

A Visual Artist's Guide to Estate Planning

Based on a Conference Co-Sponsored by
The Marie Walsh Sharpe Art Foundation and
The Judith Rothschild Foundation

Special Note:

Note: Appendices P, R, T, & U are contained in this pdf book.

All other appendices may be downloaded from within this book by clicking on the individual items listed in the Table of Contents, and on page 155.

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Part I

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Part II

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FOREWARD

No one likes to think about death. Artists are no different in this regard. Many of us have put off making a will. But we have to think about the acres of objects, made by our own hands, which will be our legacy. As Cynthia Carlson said, “If you don’t make a plan, someone else will do it for you.”

Although an artist’s estate may contain assets other than art, it is the art that concerns many of us most. Planning for the care, storage, possible sale, or other disposition of our work after we die is a large part of an artist’s estate planning.

On April 4 and 5, 1997, artists, lawyers, accountants, dealers, and others in the arts met at Philip Pearlstein’s loft in Manhattan. The conference was a culmination of discussions which began in 1990.

A Visual Artist’s Guide to Estate Planning is the record of our conference. We intend this book to help you ask the right questions and seek the appropriate advisors, whether you are a poor, neither rich nor poor, or rich artist. We hope that reading about the experiences of other artists will help you clarify your thoughts. Part II contains additional information prepared under the auspices of the Association of the Bar of the City of New York Committee on Art Law on estate planning and administration matters.

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In the past few years the entire structure of support for the arts and for artists has gone through dramatic changes. With the diminishing involvement of the public sector at all levels, artists have increasingly had to rely on the relatively small number of private sponsors willing to step into the breach. Rare among such entities, The Marie Walsh Sharpe Art Foundation was organized around the principle that artists know best what artists require to pursue their creative direction, and understand best how those requirements may change over time.

The result has been a close, amicable, and fruitful collaboration between the officers of the Foundation and an Artists Advisory Committee composed of practicing artists and colleagues closely involved with the contemporary arts scene. At every stage this board has set the course not only with the aim of initiating specific programs, but with the hope of stimulating discussion within the larger community of funders about how to proceed in meeting the ever more complex demands facing artists in this country. To that end, The Marie Walsh Sharpe Art Foundation has engaged in ongoing dialogue with numerous groups in the field as well as with artists and experts eager to cooperate in addressing these issues.

This is our second publication. The first Roundtable Discussion on the Needs of Visual Artists was the record of a conference of thirty artists, called by The Marie Walsh Sharpe Art Foundation in November of 1988.

The Artists Advisory Committee, appointed by the Foundation after the 1988 conference, initiated and developed The Space Program and the Hotline. The Space Program awards free studios in New York City to artists and the Hotline answers questions on a host of topics which concern visual artists. A consortium of art foundations now funds the Hotline.

Joyce E. Robinson and Charles J. Hemmingsen, the principal officers of the Foundation, administer all the programs with the assistance of Kim Taylor and Nan Tirado. The Foundation is based in Colorado Springs, Colorado.

We wish to thank Harvey S. Shipley Miller, John James Oddy, and The Judith Rothschild Foundation for their generous contribution to the Estate Planning for Visual Artists project.

We would also like to thank Barbara Hoffman, Chair, and The Committee on Art Law of the Association of the Bar of the City of New York, for their contributions of effort, time, and expertise in developing Part II of this publication.

Please pass this along to another artist. Let us know if and how this publication has helped you.

Cynthia Carlson

Chuck Close

Janet Fish

Philip Pearlstein

Irving Sandler

Harriet Shorr

Robert Storr



*Left to Right
Chuck Close, Irving Sandler, Robert Storr,
Facilitators of the Visual Artists Estate Planning Conference*

INTRODUCTION

Dead artists leave two bodies, their own, and a body of work.

—Harriet Shorr, Artist

An elderly artist, named Turku Trajan, spent winters working as a short-order cook and sold his paintings on cardboard at the summer art fair in Greenwich Village. . . .

My friends and I walked into an enormous loft, jammed to the ceiling with towering heroic figures and angels with wings. They were visionary, not academic; eccentric but beautiful. A narrow pathway led to a small room where the artist was working on a smaller figure. Several years later he died, without heirs, as far as I know. The dealer, Virginia Zabriskie, acquired the estate in 1964, but in the thirty-three years since, has not been able to sell a piece or even give one away.

Variations of this story are playing out constantly across the country, with or without families participating. This country has produced thousands of serious artists, many of whom have occasionally exhibited and sold some works, but despite seriousness and talent, never became prominent. The art departments of our colleges are staffed by many such artists.

What becomes of the art they have produced when they die? It is easy to say an artist's heirs will just sell some work to pay estate taxes, but it cannot be overlooked that the reason there is so much work on hand is that the artist's works have not found a market to begin with. Logic never enters into the making of art in our society.

—Philip Pearlstein, Artist

Death in the art world is going to be a huge industry very soon. This goes well beyond major artists with highly successful careers and highly marketable works. Every block in SoHo and Tribeca has more artists living in it than lived in this entire city in the fifties. There is a vast inventory of material to be dealt with.

—Alan Schwartzman, Writer

On April 4 and 5, 1997, The Marie Walsh Sharpe Art Foundation and The Judith Rothschild Foundation convened a conference to discuss practical

and legal issues related to artists' estates in planning and in the administration of the estate after the artist's death. The idea for the gathering originated with artists on the Artists Advisory Committee of The Marie Walsh Sharpe Art Foundation: Cynthia Carlson, Chuck Close, Janet Fish, Philip Pearlstein, Harriet Shorr, and Robert Storr, and Irving Sandler, chair. At a previous roundtable on the needs of visual artists, the Artists Advisory Committee identified the topic of estate planning as significant enough for a roundtable of its own. As Irving Sandler said, "sensitive to the needs of the art community, we recognized the growing concern that artists had with estate planning—the bewilderment, the frustration. We hoped that we could help in this matter." Sandler approached The Judith Rothschild Foundation which, because of its related mission, formed a partnership with The Marie Walsh Sharpe Art Foundation to support the project. Artists, accountants, archivists, attorneys, curators, dealers, writers, and representatives from foundations, government, museums, and other nonprofit organizations were invited to meet to discuss the particular problems faced by visual artists in planning their estates, and the financial burdens placed on an estate by a body of art work. Sandler stated that "the purpose of the roundtable was to walk an artist through the problems of estate planning."

For some time prior to the conference, the Committee on Art Law of the Association of the Bar of the City of New York had been planning the publication of a book for visual artists to address their special estate planning and administration needs, and welcomed involving its members in the conference. One result of the collaboration between The Marie Walsh Sharpe Art Foundation, The Judith Rothschild Foundation, and the Association of the Bar of the City of New York Committee on Art Law is this publication. This publication has two main parts, as well as a glossary, an appendix of forms, and a list of resources. Using a question-and-answer format, Part I introduces general estate planning concepts and offers a practical and general legal discussion of the issues raised at the conference. Part II consists of a more in-depth discussion of policy, ethics, and law on selected estate planning and administration issues for visual artists, authored primarily by members of the subcommittee of Artists and Taxes of the Committee on Art Law of the Association of the Bar of the City of New York.

No two artists' estates are alike, and no two estate plans will be the same. But, whether they know it or not, all artists have an estate plan: if you die without a will, state law determines your estate plan for you. This publication is a guide to the process of estate planning and administration. While this publication covers all facets of estate planning and the important highlights of estate administration, it is not a substitute for competent legal advice. In it, you will find suggestions on how to select a legal advisor and other members of your estate planning and administration team.

Not only the seriously ill or the financially successful artist should consider an estate plan. Even if you have few assets, a carefully planned estate can help insure that your work and ideas will continue to be presented as you wish. If you leave no instructions about what to do with your work, it might not receive the recognition it would otherwise. Moreover, it might place a huge time and financial burden on surviving family and friends. Estate planning involves more than simply writing a will. For a visual artist, the process of estate planning—setting priorities, making an inventory, choosing an attorney, choosing an executor, choosing an accountant, and articulating plans for the disposition of your art work—can help insure the continued life of your work and ideas.



*Left to Right
Harriet Shorr, Cynthia Carlson, Kate Horsfield*

SETTING PRIORITIES

As artists who have a certain amount of recognition but not a great deal, I think we have a different perspective. It seems to us that there are two things to be concerned about: the well-being of the person to whom you give the property, and the well-being of the property itself. We need to think through these kinds of claims and find some way to make them harmonize.

—Betty Woodman, Artist

Three things are important. First, having clarity of purpose: you have to know who you are giving your work to and what their intent will be. No person that you leave in control will have the same agenda as you do. You are starting a process that is out of your control. Second, the choice of who to leave works to. Finally, intellectual property: what artists really have is a spirit and a philosophy—intangible things put in the material fact of the objects they make. There are laws and decisions to protect that. The use of copyright and reproductions is one example, and should be stated. If you put images of works on a CD-ROM, you should think about what will be done with that. Will it show up in thirty years in a Nike commercial?

—Peter Stevens, Artist

Why do I need a will?

My partner of fourteen years died suddenly at the age of thirty-nine. She died without a will, but she had very definite ideas about what she wanted to happen to her work. When she died, her estate was settled in Illinois. In that state, if there is no will, the estate is divided among the primary family members. One-third went to each of her parents, and to her brother. She had always had a very problematic relationship with her brother and his acquisition of one third of her estate was extremely painful for all of us who knew how passionate she was about everything, and how much she would have disliked her brother's inheritance of her possessions.

—Kate Horsfield, Video Data Bank

A will is a legal declaration by which you dispose of your property. It takes effect on death and disposes only of the property you own at the



*Left to Right
Nancy Fried, Philip Pearlstein*

time of death. If you die without a valid will, you are said to have died “intestate,” and the laws of the state where you lived govern the distribution of your property. Generally speaking, property goes to relatives: first, spouse and children; then parents and siblings; then other relatives. (Gay and lesbian partners have no automatic rights to inherit property if you die without a written will.) Even if these state-designated heirs want to care for your work and your reputation, they may have little understanding of your career or how the art world operates. If you die without a will, you also lose the ability to choose who will administer your estate.

Therefore, if you have specific wishes for the disposition of your art or other property, you need to make a will. Since each state has its own conditions for properly executing a will, legal advice from an attorney is strongly recommended. An attorney can also help you focus your priorities and establish an estate plan that meets your goals, whether to provide bequests for friends and family, to avoid estate tax liability, or to establish a charitable foundation to promote your ideas and values. Before visiting an attorney, however, it is important to think about your goals for your estate.

What should be done with my art work?

When I die, my studio will have to be emptied of all my paintings and toys. At least I won't have to do the work. But once the stuff is in the moving van, where will it go? After all these years of painting, have I simply created a terrible burden for my wife and children? They will have to give directions to the driver of that van. It almost seems that the easiest solution would be for them to take a few souvenirs and have the rest driven to the town dump.

—Philip Pearlstein, Artist

I represent a man whose brother was an artist. He asked me to help circulate his brother's work, which is stored in a garage. He suffers great pain because he knows that when he dies there will be no one to take care of his brother's work. He would have been pleased to have had his brother's permission to destroy some of it.

—David Brown, Attorney



*Left to Right
David Brown, Janet Fish, Beverly Wolff, Stephen Weil*

Storage, conservation, and cataloging needs create special problems for the visual artist's estate. It is important to separate artistic property from other physical possessions.

—Barbara Hoffman, Attorney

The David Smith estate decided not to make duplicates of the sculptures. Other estates have made other decisions when artists leave no instructions. A sculpture executed by the heirs according to the instructions of the artist is considered an authentic sculpture. Something made by the heirs on their own is not necessarily accorded the same value. Leave detailed instructions.

—Andre Emmerich, Dealer

Copyright needs to be specified carefully in your will. Artists' heirs abuse this a lot. Their works of art wind up on coffee mugs or jigsaw puzzles. It is important to anticipate what kinds of usage you want for your art.

—Beverly Wolff, Attorney

How do you want your work to be preserved and presented? Is continued exhibition of your work a top priority? Do you want your work to be distributed to your family and friends? Do you want to donate your work to a public, nonprofit organization, such as a museum, art center, university gallery, library, historical society, hospital, or school?

Do you want your work sold or reproduced to provide income? If you are a sculptor, do you want to authorize further editions of reproductions to be manufactured after your death? At what scale? If you are a photographer, do you want to authorize reprints from your negatives? On a greeting card? For digital distribution? If you are a performance artist, do you want the videos of your performances to be shown? Do you want works on consignment to galleries or on loan to museums to remain there after your death? If your work can produce income, should the focus be on short-term or long-term gains?

Where should your art be stored? Do you want it to be collected and maintained in one place? What financial resources will be available to pay for storage or other expenses of caring for the artwork? Can you afford a life insurance policy to pay for storage of your art after your death? (See Part II, page 71 for more information on insurance.)



*Left to Right
Allan Schwartzman, Betty Woodman, Cesar Trasobares, Scott Hoot*

You must decide what you want done with your artwork, and the intangible intellectual property rights to those works, which can be transferred separately. An important asset of your artistic estate may be the potential of these intellectual property rights, particularly the copyright interests, in your work. Should your estate manage your copyrights, or should they be transferred with the work? Disposition of and control of copyrights raises issues of tax, artistic control, and valuation. (See Part II, page 96 for more information on copyright.) If you do not specify what you want done, those who inherit your work will make those decisions for you.

Who should benefit from my estate?

The family tends to treat the work with the same attitude they had toward the work when the artist was alive, which isn't always friendly.

—Janet Fish, Artist

Most artists have not thought about their estates at all. It is amazing to devote your whole life to a body of work and then just assume it will find its way into institutions and the hands of those people whom you would choose.

—Cesar Trasobares, *Estate Project for Artists with AIDS*

One purpose of the estate plan is to take care of the heirs. The artist has to make some decisions. When an artist does a will, Who gets what? Who will own the body of work?

—Gilbert S. Edelson, Attorney

Do you want to leave your work to a spouse, partner, or children? Do they want the responsibility of taking care of your art works? Talk to the people or organizations you want to benefit from your estate. Do not surprise them—make sure they know what you would like done. For example, unnegotiated gifts to museums or other institutions could be refused, leaving the work in limbo.



Adrian Piper

What is important to save?

I am an only child and the only executor of my mother's estate. Going through her estate, I discovered that she had saved everything I had ever done, written, drawn, or played with. So I have a complete record! I have also had to deal with her estate more generally, and have discovered it is difficult, because almost everything has sentimental value. I found it extremely difficult to throw anything away. My problem is that I only have a few more decades on the planet, and there's a lot I want to do. I don't have time to spend the rest of my life dealing with work I've already done.

—Adrian Piper, Artist

Don't throw it out. Artists should save letters, catalogs, photos, invitations, and personal writings—anything that will help others understand the texture of the art. Imagine what would be relevant to someone in the future who wants to write a catalog or biography.

—Avis Berman, Art historian

Keep records of business relationships, and a folder of contracts.

—David Brown, Attorney

In your studio, what is art and what isn't? By what works do you want to be represented? Who should have access to what materials? In most cases, competing benefits must be weighed; there will be trade-offs. Is placement more or less important than income? Is it more important to preserve art objects and other contributions to the field, such as videotapes or correspondence, or to minimize the volume of material that will have to be dealt with after your death?

Photographs, journals, gallery announcements, critical reviews, or works in progress can give scholars and art historians materials they need to evaluate your career, but the family or friends who come to close up your studio could have a difficult time throwing anything away. Organizing your materials will make it easier for them to carry out your wishes for your work. If you are concerned about privacy, you can restrict access to certain materials—for example, you may choose to restrict access to a diary while the people mentioned in it are still alive. Art historians, scholars, and curators, however, urge artists to be generous in granting access and to not censor materials.



*Left to Right
Betty Cunningham, Richard Shebairo, Roger Anthony*

CREATING AN ART INVENTORY

Artists, while they are alive, should make some kind of inventory or listing of what's what, so this doesn't leave painful decisions for people who care about the work for more than commercial reasons and want to see it keep its integrity.

—Cynthia Carlson, Artist

Worry about inventory before worrying about storage. That way, the heirs will know what needs they will have for storage. The most effective approach for making an initial inventory is simply to start at one location (building, floor, room, closet) and list every item before moving on to the next.

—Roger Anthony, *The DeKooning Conservatorship*

Generally, working is considered life-affirming. Doing an inventory is not.

—Scott Hoot, *Volunteer Lawyers for the Arts, Artist Legacy Project*

I have begun a complete inventory of my own work. I hired a graduate student in philosophy. Philosophy graduate students are very good on computers, they are scrupulous, they are careful and analytical, good with detail. And they are smart. This student is working on FoxPro, which is an inventory system for the Macintosh. I pay him \$10 an hour. He is cataloging everything I have ever done. When he completes this process, he will match up each item on the inventory with slide reproductions, transparencies, photographs, to see if there is anything that remains undocumented. I like the idea of putting things on CD-ROM.

—Adrian Piper, Artist

It is a matter of information, because you cannot save every little object. The idea of putting things on disk—some organization should start thinking about it. It's an interesting way to preserve this kind of information, because then you can cross—reference it and you don't have the burden of all the objects.

—Joan Jonas, Artist

Preparing an inventory is onerous, but it is not just for the IRS. It also helps living artists keep track of their work.

—Avis Berman, *Art Historian*

After thinking about your priorities, the time comes to create an inventory—a record of the existence of your work. Doing so not only will help someone mounting an exhibition to assemble pieces of your work, but also will help scholars and art historians understand the development of your career.

What should an inventory of art include?

An art inventory should list all your works of art, noting the location (in the studio, on exhibition, on loan, on consignment, in private collections), with the dimensions, date, title, medium, or other descriptive information. You will also want to specify which works are finished, which are works-in-progress, and which are preparatory studies or were never intended for public viewing or sale. Even if your work has not enjoyed commercial success, a complete inventory of your work will help determine the monetary value of your artistic estate.

The inventory should include information on installation and maintenance, ownership, and exhibition records, your writings (diaries, journals, instructions on installations, articles), writing by others about you (monographs, catalogs, articles), videotapes or CD-ROMs of your work, and intangible assets such as copyrights, trademarks, and other intellectual property. It is useful to keep a record of all your contracts and any special business relationships as well. (See Appendix A for sample inventory worksheets.)

CHOOSING AN ATTORNEY

You can go to a lawyer who belongs to a prestigious law firm and has a lot of experience in estate planning, but who doesn't know how the art world works. There is a limit to the advice this person can give you.

—Hermine Ford, Artist

More than worrying about whether a lawyer specializes in art, ask if there is respect and passion for preservation of those values that the artist wants to maintain.

—Peter Stevens, Artist

You want someone who is knowledgeable, who specializes in estate planning, who is knowledgeable about you. You must trust them. Artists who cannot afford a lawyer can consult Volunteer Lawyers for the Arts.

—Gilbert S. Edelson, Attorney

The artist had been represented by an attorney who was reputable and respected in the art world, who also represented the artist's gallery. When there were questions about what works were inventoried and what works were not, the attorney advised us that it was appropriate for him to be representing both the artist and the gallery. This became problematic when disputes arose.

—Alan Schwartzman, Writer

Ultimately, the lawyer does what you want. You need a well-thought-out plan. The lawyer will explain the problems with it.

—Richard Shebairo, C.P.A., P.C.

Estate planning involves much more than drafting a will and good estate planning for artists requires a variety of skills. Ideally, the attorney who draws up your will and helps plan your estate is someone you trust, who is familiar with your work, who is knowledgeable about the art world as well as the law of trusts and estates. This particular combination of skills and experience may not be easy to find; you must decide which qualities are most important for your situation. An arts lawyer by definition is



*Left to Right
Philip Pearlstein, Gil Edelson, Charles Bergman*

engaged in the practice of overlapping legal disciplines—copyright, trusts and estates, commercial transactions. Therefore, the approach and recommendations of an arts lawyer may be different from those of a trusts and estates lawyer.

How do I find a lawyer who has experience in dealing with artists' estates and estate planning for artists?

Ask fellow artists, your accountant, or your dealer, if you have one, for recommendations. If you do not currently have a lawyer, interview several attorneys before choosing one. Be sure to discuss price and find out what services will be provided for the price. Make sure the attorney has the expertise you require and that you feel confident with his or her answers. If the attorney is willing to accept art for payment, establish the value of the attorney's services prior to any exchange of art.

In addition to being satisfied with the attorney's competence as an estate planner, you must find the fee arrangements acceptable. The question of fees should be raised at the earliest possible moment; for instance, in the telephone call making the initial appointment. Will that first visit result in a fee even if the attorney is not the one you use for the estate plan? Will the fee be based only on time spent, or is there a maximum? If the fee is a fixed amount, how many drafts or rewrites are possible? What eventualities will change the fee estimate or fixed amount? What disbursements will be charged to the artist?

In addition to the estate planning fee now, you should find out on what fee basis the attorney or law firm will do the legal work needed to administer the estate. There is no requirement that the executor employ the lawyer who drafted the will. Therefore an agreement to reduce the estate planning fees in exchange for being the estate's attorney restricts the executor's discretion and may lead to a difficult working relationship between them.

What should I talk about with an attorney?

There is no single answer, no uniform estate plan for any artist. There is a menu of things that can be done. It depends on individual circumstances. Test an idea. Will it work? What is the downside?

—Gilbert S. Edelson, Attorney

Don't be afraid to ask, How much is the estate plan going to cost me?

—Erik Stapper, Attorney

In the process of designing an estate plan, a great deal of factual information must be gathered and communicated to your attorney. In addition to creating the inventory of your art and archival material, you will need to collect and organize family information; financial information, including an inventory of assets; and your “dispositive wishes” (where you want your assets to go). Complete, accurate financial information is required in order to create an effective plan for any estate taxes and the administration of your estate. Assets can be tangible or intangible. Tangible assets include, for example, cash, bank accounts, furniture, book and magazine collections, real estate (building, land), securities (stocks, bonds, other investments), or life insurance. Intangible assets include copyright, trademark, and other intellectual property.

Estate planning requires collaboration. You must feel comfortable with your attorney, whomever you choose. Once you have made your choice, make your attorney aware of your concerns—are you most interested in providing income for your family, avoiding estate taxes, or making sure your work remains in the public eye? Do you want a charitable trust or a private foundation created? What disposition will be made of your artwork? (See Part II, pages 61–67, 87–95 for more information on trusts and foundations.)

Do not hesitate to ask questions about the benefits and drawbacks of what you want, or to suggest that your attorney seek advice on issues particular to artists' estates, such as copyright and valuation of art works, if he or she is not familiar with the art world or more sophisticated tax planning techniques. You may also want to talk to your attorney

about a health care proxy and a durable power of attorney. (See Appendices I–O for sample forms.)

Your attorney will provide legal advice, but he or she will be carrying out your decisions, so you need to be clear about what you want and to communicate your wishes effectively.

CHOOSING AN EXECUTOR

Should I name my gallery as my executor? How do I know if these people will be there in five or twenty years, and how do I know if I will still be with them?

—Nancy Fried, Artist

I am a painter; my mother was a painter; my husband is a painter; and my daughter is a painter. I don't know what kind of burden we are leaving to the next generation. When my mother died, we had no idea what we were getting into. She had asked an aunt of mine to be the executor. My aunt was ready to put all her work out onto the street to save \$125 a month in rent for an apartment on the Upper West Side.

—Emily Mason, Artist

Choose someone with the most amount of expertise and the least amount of vested self-interest.

—Peter Stevens, Artist

Pick an executor you trust, and trust them to get advice. There should be no surprises. Talk to them in advance. Trust them, because things change. You have to give your executor a certain amount of discretion, based on your stated intent.

—Gilbert S. Edelson, Attorney

Control becomes an emotional issue when partners, spouses, and family members are the only ones in charge.

—Bill Jensen, Artist



*Left to Right
Harvey S. Shipley Miller, Barbara Hoffman, Elizabeth Catlett, Fred Lazarus*

Knowledge of financial matters is not necessarily the most important qualification of an executor. Personal integrity, devotion to duty, and competence must be paramount.

Don't ignore the psychological impact of failing to choose a loved family member as an executor. Competent professionals can always be hired by the executor.

—Barbara Hoffman, Attorney

Although the duties, responsibilities, and even title of the person who administers an estate vary depending on state law, this publication uses the term executor to refer generically to such a person. The fundamental duty of the executor is loyalty to the beneficiaries of the estate. Above all, make your executor and any advisors aware of your priorities, choose people who are knowledgeable about the art world and sympathetic to your work, and encourage them to seek advice from other experts whenever necessary.

What does an executor do?

If there are assets to be sold, the executor has to sell them. If your estate is owed money, the executor must collect it. The executor may have to pay funeral expenses, other bills, and income or estate taxes, to inventory the art (if you have not done so), or to file insurance claims. The executor follows the instructions in your will and distributes the property in accordance with your wishes. The executor also chooses an attorney (who may or may not be the same person who wrote your will) to handle legal issues, and an appraiser to appraise your art work.

The final task of an executor is the accounting, the procedure by which the executor turns the assets over to the beneficiaries. The executor must be able to show that the estate tax returns were accurate and fair; the heirs may sue the executor for liability. An executor's job usually lasts three to four years, but may last considerably longer if there are assets to dispose of or manage, such as copyright interests. (See Part II, page 81 for the Executor's or Administrator's Checklist.)



*Left to Right
Stephen Weil, André Emmerich*

Who can be an executor?

An executor should be someone who is going to protect the things you are most interested in.

—Betty Cuninghame, Dealer

From an artist's point of view, dealers are not disinterested. Many artists' estates and families have had poor experiences using a dealer as executor.

—Harriet Shorr, Artist

Make sure that the person you ask to serve knows what they are getting into, how much work is involved in administering an estate.

—Cynthia Carlson, Artist

We have separated the role of the executor and the role of the ultimate beneficiary or trustee—often they are filled by the same person.

—Fred Lazarus, President, Maryland College of Art

Executors have to be careful, especially if there is contention with the heirs. It can be avoided with the proper will.

—Stephen E. Weil, Attorney

You can appoint anyone as your executor. Ideally, the executor should be trustworthy, knowledgeable about the art world, and committed to maintaining or enhancing your reputation as an artist. Since the executor must manage your estate, you may want to look for someone who is well organized, or it may be more important to you that the executor is someone who is passionate about your art. Make sure the person understands the amount of work required. If your executor does not have much experience in dealing with the art world, you can select a group of advisors to help your executor—people with expertise who might not have time to be executors themselves. However, it is the executor who has final authority and, unless written in the will, the group of advisors has no “official status.”

It is extremely important to name a competent successor to the original executor, especially if the original executor is someone close to your age

or in poor health. This can have a significant effect on whether or not your wishes are carried out. (See Part II, page 81 for more information on executors.)

Whomever you choose as your executor, consider any possible drawbacks or conflicts of interest. An executor should be someone who will act in the best interests of your estate, not someone who might administer your estate for his or her own benefit. Your executor will be making decisions that require balancing the competing demands of emotion and money, speed of sale and maximum price. Any choice has both advantages and drawbacks.

Attorney as executor. Since an estate can be planned to maximize or minimize an executor's commission, the choice of the attorney who planned the estate to also administer the estate could create a conflict of interest. In addition, the administration of an estate by the executor can be managed to either maximize or minimize associated legal fees. When acting in both capacities, some attorneys are willing to waive the executor's commission if they also serve as the lawyer for the estate.

Accountant as executor. Accountants may have the tax and financial experience, and level of professional integrity to fill the role of executor. Keep this in mind as the relationship with your accountant develops. Expose them to the broad picture, both family and financial. Evaluate whether they have the depth of character and sensitivity to your particular situation to carry out the intent, as well as the instructions, of your will: for your artwork, and for your heirs.

Dealer as executor. Some dealers are reluctant to serve as executors as there is the potential for a conflict of interest between their role as dealer and as executor. Since an artistic estate could be managed in such a way as to maximize the commissions a dealer would receive from work sold, a dealer named as executor may want each decision reviewed by a court, which could lead to delays. Many dealers prefer to act in an advisory capacity to the executor.

Spouse, family member, or friend as executor. Often the executor is a surviving partner, spouse, child, or other relative or friend.

Sometimes artists do not want to burden their families; they just want them to benefit from the estate. Talk to your beneficiaries; some may want the responsibility of placing your art works according to your wishes, some may not (especially if they are artists as well and must contend with their own art works). It is also important to consider the possible personal and emotional effect on family relationships if, in the interest of efficiency, only one family member is named as executor and the surviving spouse is relegated to the role of beneficiary.

Multiple executors. It may be more efficient to name one executor, but it is possible to name co-executors or to divide your estate into different areas. You could name one executor for your art and another for papers of historical and cultural value, for example. Or, you could designate artistic or literary advisors to assist your executor. In any of these scenarios, personal relations and dynamics should be taken into account. Keep in mind, executors are paid from the estate, unless they are willing to waive their fees. (See Part II, page 116 for more information on conflicts of interest.)

What do I tell my executor?

In the Warhol estate, snapshots that he never intended to be seen as separate works of art were elevated to that status by the executor. The artist must distinguish what is finished, signed, and completed work versus what is not intended for market.

—Stephen E. Weil, Attorney

Talk to your executor about your priorities. Make sure he or she knows your wishes for your work. You may want to write a letter specifying your intentions and preferences, even though in many states such a letter does not legally bind the executor. If you have named advisors for art-related matters, you can suggest what authority the advisors have and when you would like the executor to follow their advice, although, again, such instructions are not necessarily legally binding.



*Left to Right
William Feltzin, Betty Cunningham, David Schaengold, Elizabeth Catlett,
Richard Shebairo, Betty Woodman (back), Harriet Shorr (back)*

CHOOSING AN ACCOUNTANT

Estate planning is a process. I think it is a good idea for couples to come in together. It should be a joint effort. At some point, the professionals should be introduced to other family members.

—David Schaengold, C.P.A.

Choose an accountant by giving yourself choices. Ask friends, colleagues, and others for referrals. Make appointments to meet each one—most accountants will not charge for such an interview. Include your spouse in this process.

Find out whether they are competent in income tax planning for artists and estate tax planning. The two plans may need to be integrated, and an accountant with only an income tax focus could hamper your estate planning options.

Look for someone with whom you are comfortable and can relate; someone with the potential for a long-term relationship that can develop beyond income tax planning. Accountants often become a client's closest financial advisor. Use your own judgment through the interview process so that you can make an informed choice.

COSTS TO THE ESTATE

While I feel burdened now with the estates of two of my deceased ancestors, and the imminent estate of a third who is quite elderly, I also have great concerns for my son, who is going to inherit five artists' estates. In dealing with my father's estate, my sister and I were fortunate. The largest problems were storage and insurance. The hope is that the estate can support that expense. You are lucky if it does. And this is before you even begin to think of archiving or inventory, which is expensive to do.

—Hermine Ford, Artist

What do you do with the work of an artist who is not respected, whose production was primarily personal, for whom there is no consensus of opinion of

significance, where there is no money to preserve the work, where there is no group of supporters who want to perpetuate the work? How do you deal with storage? How do you deal with this volume of material?

—Alan Schwartzman, *Writer*

The reality is, it is almost prohibitively expensive to store art. How do you preserve the work if the money is not there?

—Stephen E. Weil, *Attorney*

Your estate plan should take into consideration all the costs involved with your estate. In addition to the costs associated with settling any estate—such as funeral expenses, payment of outstanding bills, and estate taxes, if any are due—an artist's estate faces additional costs for the storage, insurance, and appraisal of art works. Your executor, attorney, and accountant are entitled to compensation for their work on your estate, as are any advisors you may select to help with art-related issues.

Often, an estate rich in art works is cash poor. If you anticipate that your estate will not have enough cash to cover the costs of settling your estate, you might consider a simple insurance policy. For example, at age 40, it is possible for a male non-smoker to obtain a \$25,000 insurance policy with annual premiums level for fifteen years of \$50 every three months. The premium for women is a little less. This kind of insurance can be obtained through many savings and other banks.

If you want to avoid having the proceeds of such an insurance policy subject to tax, it is possible to set up an insurance trust to buy and own the policy. A friend or relative can serve as trustee. You donate enough money for the trustee to buy a policy and make an annual gift to the trust to cover the premium. The trust pays the premium. The policy is not included in your estate because it is owned by the trust. (Ask an accountant or attorney for advice in setting up such a trust.)

Should you feel that your likely taxable estate does not warrant the formation of an insurance trust at this stage, give consideration to a policy

payable to your estate (which may ultimately be a bad tax result). But do get a policy if there is no other ready cash source and give consideration to assigning it to an insurance trust as soon as you can.

How is an executor's fee determined?

The executor's fee is usually governed by state law and based on a percentage of the estate's value after specific legacies are distributed. If you leave your art as part of your residual estate (not in a specific legacy), it becomes part of the basis on which your executor will be compensated. In some cases, you may be able specify the amount of the executor's fee in your will.

How much will storage cost?

The answer to this question depends on the number, size, and material of your works, your financial situation, your location, and your priorities. Ten large-scale sculptures, 100 videos, or 1,000 watercolor paintings require very different storage decisions. No matter what the medium, it is a tremendous help to your executor if you can set aside enough money to store your art for a reasonable period of time; even if you have created a detailed inventory and made plans to distribute the work, it will take time to carry out your instructions. If your work generates reliable income, some of that money can be used to pay for storage. It is important to evaluate your storage needs on a regular basis.

If your work does not generate much income, and you want to make sure it is seen after your death, you can accomplish that goal and reduce storage costs by giving work to institutions, organizations, friends, or family while you are alive. Gifts to children are valued at fair market value, but current tax laws do not allow artists to deduct more than the cost of materials when they donate work to tax-deductible organizations. (See Part II for more information on tax, gift, and valuation issues.)



*Left to Right
Erik Stapper, Peter Stevens, Hermine Ford, John Silberman*

Do I need to have my work appraised?

Yes. All existing works of art in your estate will have to be appraised, in order to determine the value of your estate for any required estate tax returns. Your executor selects the appraiser. (See Part II, page 72 for more information on valuation and page 75 for information on the appraisal.)

MAINTAINING A REPUTATION

Art is one of the few professions where you can go to the grave with no one interested in your work, but as long as the work exists, there is the opportunity for reassessment. How does an artist keep his or her work visible?

—Chuck Close, Artist

I am trying very hard to let go of my need to control what happens to my work and my reputation after I die. I hope to be able to turn the backlog into landfill long before that. I have seen the way my own reputation has developed over the last thirty years, and what seems to be true for me personally is that I sell one or two pieces a year and get a great deal more press attention than would be suggested by how much I sell. I have concluded that my main responsibility to the future, so far as I have any, is to make sure there are representations of my work available for art critics, art historians, academics, and needy Ph.D. students. Once I have done that, my job is done.

—Adrian Piper, Artist

It will work itself out. If the artists take the responsibility to do the best they can to document their career and philosophy, that's all they can do. The individuals or institutions entrusted with this documentation should be chosen based on specific goals, such as: preservation, publication, access for research, exhibition, or other concerns. Knowing what you want helps insure the best outcome.

—Peter Stevens, Artist

Like everything else in the world, it all has to do with love and money. I have been thinking about setting up some kind of committee to help my children. I don't want them to be burdened with anything to do with this physical body of work. We all need committed, passionate friends to appoint to such a committee. Someone has to love the work, even if there isn't enough money to support the efforts of preserving the work and the artist's reputation—those are the people the artist needs to think about appointing to an advisory group. You can arrange to compensate them with art or money, and set a time limit for them to try to accomplish some of your wishes. And let them know what your wishes are.

—Harriet Shorr, Artist

I am impressed by the contribution the market makes to the preservation of art, which is to endow it with value. To preserve art is expensive. A society can preserve only a small part of its heritage. How do you maintain the value of art when the artist is gone?

Andre Emmerich, Dealer

We have to consider artists who are not in the mainstream, African-American artists and Latin artists. These are people who produce a lot and exhibit. What will happen to their art?

—Elizabeth Catlett, Artist

Most artists below the rank of superstar do not have the money to set up a foundation that would pay warehousing fees and personnel to care for the continuing life and career of the art. Our national, state, and city governments do pay to warehouse their own records, but aside from the selective warehousing (mostly of paper documents) by the Archives of American Art, there is no government warehousing of art from artists' estates. But perhaps with the current possibilities offered by electronic imaging, at least a representative selection of images created by visual artists could be stored and should be started, by a government agency, with provision made to keep these records accessible.

—Philip Pearlstein, Artist

How can I help make sure my work continues to be seen?

If you exhibit and sell your work during your lifetime, your work may continue to be exhibited and sold after your death, if there are people who are willing to manage your artistic estate. If preservation is more important to you than income, it might be possible for your work to be displayed and cared for in local art centers, cultural centers, historical societies, public schools, colleges, universities, or libraries. Hospitals, hospices, residence facilities, and homes for the aged are often receptive to gifts of art as well. If you think your work would be appropriate for a particular location, find out if the organization is interested in having and caring for your work. Art in Perpetuity is an organization that is trying to place the work of unrecognized artists. (See Appendix R for more information, and Appendix S for Resource Directory.)

Can I give my work to a museum?

Some art can be offered as gifts to museums, but the museum has to be willing to accept the art and be able to take care of it; most small museums have storerooms that are not much better than the family's own basement and have no conservation department. And works of art do fall apart.

—Philip Pearlstein, Artist

One artist was a designer of ceramic plateware. After her death, an international museum wanted her work. We encountered many problems: We had to get out of her loft quickly, since there was no money to pay rent. We gave the work to a single museum, when we should have split it up. I made settlements on royalties I would not have made under other circumstances.

—David Brown, Attorney



*Left to Right
Robert Storr, Emily Mason, Betty Cunningham,*

Think of a museum's basement as the library stacks; what is upstairs on display is the equivalent to the reference shelves. In most museums there is a lot of rotation out of the basement to the upstairs or to other museums for special exhibitions. It is better to be in a museum's basement than in a warehouse on Long Island.

—Robert Storr, Artist and Curator

The focus of most art museums is a particular portion of art history or a type of art-making. Some collect aggressively and broadly, others slowly and more narrowly, and a number of “Institutes” and “Museums” of contemporary art devote themselves primarily, if not exclusively, to exhibiting rather than collecting art. A handful of those that do collect have a policy to de-acquisition their holdings after a certain amount of time has passed, in order to stay contemporary.

It is natural to look to a museum as the possible purchaser of work or the recipient of gifts from your estate, or as the possible host of a posthumous retrospective. However, unnecessary tensions and disappointments can result from approaching the wrong institution altogether, or the right institution at the wrong time. It is important to be thorough in planning any approach to a museum, to be patient but not docile in dealing with them, and to be reasonable in your long-term expectations. And remember, the exhibitions programs, acquisitions budgets, and storage facilities of most museums are limited relative to the number of artists that potentially merit attention.

You may want to avoid making friends, family, or executors negotiate with museums, and the possible damage to your reputation that could result from posthumous rejection by an institution. If so, you should make contact with museums and curators before your death, to make certain that gifts mentioned in a will, or gifts made by heirs according to your instructions, are in fact welcome.

The best first step is to research the full range of museums in your area—city, state, private, university, and college—as well as historical societies, ethnic or socially defined museums, study centers or associations, natural history museums, etc. Next, identify the curators active in

those institutions who might be interested in your work. Study their past exhibitions, writings, and involvement in the arts community to find out where their interests lie. Most responsible curators are open to discussing art that is outside their personal taste, but within the scope of their museum, but you want to find a curator who will be an enthusiastic advocate for your work. If you work in more than one medium, it may make sense to talk to curators in each medium.

Remember, in most museums the decision to make a purchase or to accept a gift or to mount an exhibition comes gradually, through internal negotiation and bureaucratic procedure; a quick answer is unlikely, and pressing for one may doom your efforts.

If the answer to your proposal for an acquisition, gift, or exhibition is “No,” make sure to ask if other opportunities exist in the more distant future, and if the curator can recommend alternative institutions to approach. Sometimes, the “No” means “not now” rather than “never.” Other times, it means “not here” rather than “nowhere.” For those who are unfamiliar with the art world and art world manners, it is easy to take offense or draw mistaken conclusions from an initial rejection, but most art professionals will do their best to steer people in more promising directions if they are asked in a forthright way. If the initial answer to your proposal is “Yes,” be prepared to be flexible about details.

Gifts. Most museums are reluctant to accept donations of work that has restrictions on where, how, and how often they can display the work. The more restrictions you or your heirs impose, the less likely a museum is to accept even a first-rate work. If you want to negotiate a restriction on whether the institution can de-acquisition the work, remember that a museum may eventually want to sell a donated work in order to acquire a superior one by the artist that appears on the market. Given the costs of installation, conservation, and storage, it is extremely unlikely that a museum would accept a work it did not honestly intend to keep.

Acquisitions. Most museum purchases are decided upon by committees composed of patrons to whom curators present options. Very few museums pay full market value for the works they buy. Thus, museum purchases rarely help establish high prices for the work offered. Partial gifts (with tax benefits) coupled with partial purchase is a standard arrangement, as is the gift of a work or works coupled with the purchase of another work or group of works.

Exhibitions. Any serious presentation of an artist's work takes careful research, time-consuming organization, and, quite frequently, extensive conservation of the work. This means that most curators and museums are already committed to shows several years into the future. Memorial exhibitions closely following an artist's death are the exception rather than the rule, and an agreement to mount a posthumous museum show of whatever size seldom ensures quick, widespread, or lasting public attention for an artist's work. In fact, your reputation may be better served by a "settling" period than by immediate promotional activity. Make sure that those who manage your artistic estate are willing to heed advice about what work to hold back from exposure until a museum show occurs. Be aware that restraint in exercising copyright privileges may be a factor in a museum's decision to mount an exhibition: if the use of images for catalogs, posters, post cards, etc., is overly restricted, it may be difficult for a museum to undertake the project.

In general, it is best for your long-term reputation to place your work in as many appropriate museums and other institutions as possible, whether by purchase or donation. In some cases, however, it may be appropriate for particular bodies of work within your overall production to be concentrated in one place. If you plan to make a tax-deductible donation of your work during your lifetime, remember that you are allowed to deduct only the cost of materials, not the fair market value of the work.



*Left to Right
David Brown, John Oddy, Janet Fish, Harriet Shorr*

What should I do with my papers?

Any full scholarly or critical understanding of an artist must begin with a complete record of his or her work. Although the basis of that record is an inventory or catalog of the works themselves, your development is also traced through other types of documentation. Accordingly, such documentation should be preserved, not only to maintain your reputation, but to help establish authenticity and expose forgeries.

You should save letters, catalogs, photographs, invitations, diaries and other personal writings, sales records and other related financial transactions, texts of speeches, press clippings, and anything else that will help others understand the historical and social texture of your creative life. These papers can be stored simply in file cabinets or sturdy cardboard boxes. If you have at least fifteen years' worth of papers in your studio, it is likely that you do not need the earlier material anymore, and you should think about offering it to a public library or archive, with the understanding that future deposits will occur in time. If you feel that you cannot part with your papers, you should designate in your will that you want them to be given to a public institution and then name someone to be in charge of this task. This person should be someone whose interest is to make sure that information is protected, not censored, and, ideally, is cognizant of art-historical practices. Potentially embarrassing materials that will hurt the living should not be destroyed; rather, they should be restricted for an appropriate number of years. You should appoint someone you trust to award access to documentary material judiciously, but do not try to over-control the future. If you attach too many conditions or restrictions to your papers, scholars and critics will be unable to use them, and your place in the world as an artist will be perceived incorrectly or incompletely.

The largest and most practical repository for artists' papers is a national one. The Archives of American Art, which is part of the Smithsonian Institution, has branches in Boston, Ft. Worth, Los Angeles, New York City, San Francisco, and Washington, D.C., but it collects materials from artists in all areas of the country. Papers are eventually microfilmed, and



*Left to Right
Frank Hodsoll, Bill Jensen, David Brown*

the films are available for viewing without charge not only in the branches mentioned above, but throughout the country via interlibrary loan.

Among the other well-known institutions open to receiving artists' papers are the Library of Congress, the New York Public Library, the Beinecke Library (Yale University), Princeton University Library, Boston University, the University of Chicago, the Delaware Art Museum, Syracuse University, the Harry Ransom Humanities Research Center (University of Texas at Austin), and the J. Paul Getty Trust. However, many local museums, libraries, historical societies, and universities are often eager for artists' papers, too. Indeed, you might be able to wrangle a catalog or an exhibition from a library or university in your area in exchange for donating your papers to it. Above all, remember that unless you are a very famous or esteemed artist, if you don't leave your papers to a public library or archive where a curious researcher may find them and decide to publish about you, you hasten your chances of being forgotten.

Lastly, in cases where an artist or an artist's heirs or executors have successfully placed a work with a museum, it is best to give all papers relevant to that particular work—exhibition documentation, reviews, notes on materials used, notes on generative ideas, related correspondence, or copies of such papers—to the museum receiving the work.

TAX ISSUES

I posed this question to the IRS: Suppose you want to try your hand at making small sculptures, although that is not what you are known for and there is a very small market for them. Over many years you make thousands of small sculptures. What happens to them when you die? The response from the IRS was, "If you do not want to pay taxes on them, destroy them before you die."

—John Silberman, Attorney

Everything you own becomes part of your estate. What happens to those things depends on what you decide in writing during your life.

—Frank Hodson, County Commissioner;
former chair, National Endowment for the Arts

Current U.S. tax law is burdensome to visual artists on two counts. First, living artists are not allowed to use the fair market value of their work to figure the tax-deductible contribution to a tax-exempt organization, such as a museum or historical society. Living artists are allowed to deduct only the cost of materials. Upon death, however, all their unsold works must be assigned a fair market value for the estate tax return. In some cases, the value assigned to the art can determine whether or not estate taxes are due.

Will my estate have to pay estate taxes?

Federal estate tax returns will have to be filed if your total estate (all property, including art, materials, tools, real estate, insurance proceeds, or other assets) is valued at \$600,000 or more (the reporting level gradually increases, beginning in 1998, to reach \$1,000,000 in 2006). Whether or not Federal estate tax must be paid on the amount in excess of \$600,000 will depend on deductions for debts and expenses, or marital and charitable legacies. There is no Federal estate tax on the transfer of an estate to a surviving spouse who is a U.S. citizen or to a charity regardless of nationality. The surviving spouse also has a \$600,000 exemption so that with proper planning, \$1,200,000 can be left tax free by a married couple. States vary in the financial requirements for state estate taxes. (See Part II, page 128 for more information on recent changes in the tax laws.)

How will my estate be valued?

The value of your estate is determined by the fair market value of all your assets at the time of your death, including your art work and any work by other artists that you have acquired during your lifetime. (See Part II, page 72 for more information on valuation.)

How will my works of art be valued?

Whether you sold ten things in your career or thousands, the IRS will be a

factor. The IRS doesn't know what the work is worth as long as you are alive. We try to give it away and they say, "We can't establish a value on this stuff, so you get to take only the cost of the materials that went into the execution of it." When you die, all of a sudden they seem to know exactly what the stuff is worth. They assess your heirs at full market value—not the 50 percent market value that you might be able to get for it, never mind the problems of dumping huge amounts of it on the market at one time. Because I have, on occasion, sold a photograph for an obscenely large amount of money, that doesn't mean that the eight or nine hundred photographs I have in my basement could ever be sold in a hundred lifetimes. Should I just destroy all this work? How can I convince anybody that this work is not major work but may be of some kind of historic value?

—Chuck Close, Artist

The appraisal of art is an inexact and sometimes contested process.

Since your works of art will be appraised at fair market value at the time of your death, you want to make sure that the value given your work in this hypothetical sale is not inflated. If the art has a claimed value of \$3,000 or more, an expert appraisal, under oath, must be filed with the estate tax return. In court cases where the IRS has challenged estate appraisals, the court has examined auction records as well as sales by dealers. (See Part II, page 75 for more information.) Your executor will select an appraiser to determine the fair market value of your art work. Your dealer, if you have one, should act as or work with the appraiser, since the dealer can categorize works as salable or unsalable and help assign a value to each. The appraisal should be reviewed by the lawyer working on the estate as well.

For artists with successful commercial careers or with intermittent careers, there is a danger of an inflated appraisal of unsalable works, based on previous sales. In the 1960s, the concept of “blockage” was introduced in a tax court trial over the estate of artist David Smith. The

blockage discount is based on the assumption that if a large number of works by one artist goes on the market at one time, prices for individual works will drop. Alternately, blockage takes into account the possibility of a single buyer purchasing an artist's works for later resale. While the concept of blockage may at times be applied to reduce the value of art, the IRS has occasionally shown a preference to valuation by one-at-a-time retail sales.

If the number and value of your art works comprise a significant portion of your estate, there are various ways you can decrease the potential tax burden incurred by your body of work.

How can I minimize any estate taxes on my artwork?

There was a tax controversy involving Jacquelyn Susann, who instructed her executor to destroy her diaries. The executor did, but the IRS still assessed a value on them, quite a high one. The IRS prevailed because the diaries existed at the time of her death.

—David Schaengold, C.P.A.

We started off concerned about our son, Charlie, for three reasons: first, that the taxes on the art would consume much or all of the liquid assets that he might inherit. Second, that he might be pressured into hasty and unreflective sales to meet that tax obligation. Third, that he might not be able to effectively manage three estates. Our solution has two parts: one, a nonprofit charitable foundation; and two, wills that are quite specific about how art may be given to the foundation. In general terms, our son and heir may choose up to a certain percentage of the three artistic estates. The remaining parts will be given to the foundation. The foundation, combined with wills, ensures that a specific portion of our artistic estate will be treated as a cultural issue and not a financial matter. The foundation must give away what income it realizes.

—Betty Woodman, Artist

We started a foundation with \$60,000. We give small grants annually, but we can leverage certain ideas. It doesn't take a lot of money to encourage people to write critical articles that benefit the field.

—Kate Horsfield, Artist

If a board of directors is set up, it should be a widely dispersed board of directors, not just people who are intimately involved, because emotions get tangled up in issues of control. It is not about the work, it is about control.

—Bill Jensen, Artist

I decided to set up a revocable trust and asked some people if they would be willing to be trustees. I tried to pick people who were younger than I am.

—Janet Fish, Artist

The clarity of purpose of a foundation is essential. It is important to pick an executor and subsequently trustees who will carry out that mission and be steadfast.

—Charles Bergman, *The Pollock-Krasner Foundation*

For married artists who wish for their estate to go to their surviving spouse, estate taxes will not be an immediate problem, since there is no estate tax on property passing to a surviving spouse who is a U.S. citizen. For others (unmarried artists, artists in gay or lesbian partnerships, or artists with a surviving spouse who is an alien or does not want the responsibility of caring for the work), this is not an option. There are other ways to reduce estate taxes by removing art from your estate. The following descriptions do not constitute an exhaustive list of tax-planning measures; they are offered as examples. (See Part II, page 61 for more information on strategies to minimize estate taxes.)

Gifts. You can make gifts of your work to institutions, your children, or other people. Under current tax law you can take a charitable deduction on your income taxes for a gift to a nonprofit organization, but only for the amount of the materials used to create the work; you cannot deduct the fair market value of the work. You can make a gift of art pieces having a fair market value of up to \$10,000 a year per



*Left to Right
Nancy Fried, Avis Berman, Kate Horsfield, Joan Jonas Cynthia Carlson Janet Fish,
Emily Mason (back), Allan Schwartzman (back)*

person (\$20,000 if the gift is from you and your spouse), to as many people as you wish, without incurring the Federal gift tax (after 1998 the annual amount is indexed for inflation). In addition, if a work is valued at \$30,000, you can make the gift over a three-year period, at \$10,000 each year. You will need to document the transfer of the work and its valuation.

The status of the artwork, which is received as a gift from the artist, is treated as “ordinary income property” for the person who receives the gift. However, if that person gives the property to a museum, the value of the donation is still the value of the materials.

Creating a Trust. A trust divides the management of assets and the benefit derived from those assets. For example, to be entitled to a marital deduction for transfers to an alien spouse, a trust must be used to guarantee payment of the U.S. estate tax on the death of the survivor. Also, if you want to leave your estate to children who are not capable of or not interested in managing your artistic legacy, a trust can direct income to those beneficiaries, with trustees managing the assets. It is important to remember that control of the art will rest with the trustees. Putting art into a trust can reduce estate taxes, but the trust will provide income to the beneficiaries only if the art is able to generate income through, for example, sales or reproductions. (The trust set up to hold a simple term life insurance policy to provide money for storage, described in *Costs to the Estate*, similarly removes an asset—an insurance policy—from your estate.)

Trusts can have either charitable or noncharitable purposes, and consequently may or may not qualify for tax-exempt status. Noncharitable trusts, as contrasted to charitable trusts, must pay income tax on income from the sale of art, and can distribute income to noncharitable beneficiaries.

Creating a Foundation. A foundation is a nonprofit corporation or trust governed by a board of trustees which may qualify for Federal tax-exempt status and may qualify to receive tax-deductible donations. Though lawyers often discourage the creation of a foundation with under one million dollars in assets, the amount of money

needed to set up a foundation depends on what you want the foundation to do. The value and income-generating potential of the assets held by a foundation will determine the number and size of the grants it can award. A foundation can be set up fairly easily, and may be in a better position to ensure the continued preservation and exhibition of your work than individual beneficiaries. As with a non-charitable trust, the control and management of the assets is in the hands of the trustees.

Assets transferred by a will to a nonprofit foundation are exempt from estate taxes and from income taxes when sold. Such foundations are chartered to benefit the public good and must have a charitable purpose. No foundation's profit may benefit individuals, and they are not a tax shelter for personal business. They are subject to the supervision of the attorneys general of the various states, but not all have an active staff similar to the Charities Bureau of the New York Attorney General. If you want to contribute to the continuation of certain ideas or activities, which benefit the public instead of specific beneficiaries, you can set up a nonprofit foundation. (See Part II, page 87 for more information.)

IN A MORE PERFECT WORLD: CHANGING PUBLIC POLICY

Current tax law in the United States works against the preservation of the cultural heritage of this country. A successful living artist is allowed to deduct only the cost of materials when donating art to a nonprofit organization such as a museum, school, or community center, denying the artist any tax benefit for the preservation of the work in the public interest. For artists whose work has not found a market, however, the problem is that the work is likely to be dispersed, lost, or destroyed. "They die, and the stuff sits in a garage or basement until it rots away. There has to be some way to do better than that, some kind of documentation. Even a disk of images preserved somewhere would be something," commented artist **Philip Pearlstein**. A disk of information could at least facilitate historic and aesthetic research.

Betty Cuningham, associate director of the Hirschl & Adler Modern, liked the idea of a national archive that would allow access to artists' materials, permitting art historians to reevaluate an artist's career. Other imagined strategies for the preservation of the visual art production of this country included a suggestion by **Beverly Wolff**, Esq., general counsel of The Museum of Modern Art, for a short-term depository, offering storage for the time needed to dispose of an artist's estate. Communities across the country could be linked to a system of archives through the library system, asserted artist **Joan Jonas**. Colleges and universities could be responsible for archiving the work of their own art faculty. According to **Charles Bergman**, executive vice president of The Pollock-Krasner Foundation, it might be possible to establish a network of community foundations for the preservation of work. **Fred Lazarus**, president of the Maryland Institute College of Art, speculated about the possibility of an institutional trusteeship or a nonprofit agency that would function much as a bank serves as an estate trustee, but with specialized knowledge about managing artists' estates. Such an entity could be designated to provide such services as inventory, storage, or promotion for a foundation or for individual heirs on a fee basis. The Estate Project for Artists with AIDS is in its second year of giving grants to institutions and organizations to test various methods of dealing with artists' estates, reported coordinator **Cesar Trasobares**. For example, the New York Public Library received a grant to rescue entire archives, including artists' work, journals, notes, and books. Grants have also been given to the New York Library for the Performing Arts, Dance Notation Bureau, and Volunteer Lawyers for the Arts. **Irving Sandler** summarized the conversation by saying that in the interest of preserving the sketches, studies, trial proofs, installation bits, and unsuccessful or incompletely realized works of art for future art historical study, a tax category should be established for such works designated by the artist(s) or their heirs to be outside the commercial realm and therefore, untaxable. (Such laws do exist in Europe.)

In debating the likelihood of changing present tax law, which restricts an artist's charitable donation of work to the cost of the materials, to instead allow a charitable deduction of the fair market value of the work,

artists **Harriet Shorr** and **Chuck Close**, and **Barbara Hoffman, Esq.**, all suggested framing the debate in terms of public policy, rather than finances. “American institutions are being deprived of works of art because it is not financially desirable for artists to give gifts,” **Hoffman** pointed out. Commissioner of Ouray County, Colorado, and former National Endowment for the Arts chairman **Frank Hodsoll** explained that the IRS argument is that fair market value is calculated as the cost of the materials plus the value added by the artist’s manipulation of the materials. When an artist donates an object to a museum, he or she has not paid income tax on the added value, and consequently should not be able to deduct that value. He does not believe the IRS would ever allow artists to deduct the fair market value of their donated work for income tax purposes. **Robert Storr**, artist and curator at The Museum of Modern Art, argued that “if the issue is presented solely in terms of possible economic benefit to the individual, you will spend forever in a maze of legalism.” Rather, he maintained, the argument should focus on the fact that the United States is losing irreplaceable parts of its cultural heritage by making it difficult for artists to donate works to American museums. While some critics of tax policy see the benefits of museum donations favoring affluent collectors—and, potentially, affluent artists, should the law be changed and fair market value—based deductions be extended to them—the biggest loser is the general public, present and future, whose access to the masterworks produced in their own country is being forever compromised by short-term, and comparatively small budgetary advantages to the Treasury. **Lazarus** suggested convening an artist committee and a museum committee to work on this issue.

Another proposal was that the IRS should accept art as payment for estate taxes. Artist **Elizabeth Catlett** noted that the Mexican government accepts art in payment for taxes. The IRS could then give the work to museums or libraries, agreed artist **Bill Jensen**. “Whenever you make a change in the tax law that saves tax,” warned **Erik Stapper** (**Stapper & Van Doren**), “you have to make up for it in some other place. Revenue loss has to be offset by revenue gain.” But **Richard Shebairo, C.P.A., P.C.**, encouraged artists “to unite to make their voices heard,” and believes that getting the IRS to accept art as payment for estates taxes is an idea

worth pursuing. Noting that gay and lesbian artists are denied the marital exemption of \$1.2 million on their estates, Hodsoll suggested investigating other ways to achieve a deduction, perhaps through a partnership structure.

The problem with taxes, said **Trasobares**, is indicative of a larger problem: how art and artists are viewed in American society. “I think you have to consider artists who are not in the mainstream. African-American and Latin artists. What will happen to their art? They have never been fully recognized as part of the U.S. art world,” observed **Catlett**. Artist **Adrian Piper** felt artists should be “realistic about how much public policy can help. It has to be thought of as the individual artist’s problem.” **Storr**, while granting that “short-term solutions will fall on individuals,” believes that there is long-term hope for changing policy. **Jonas**, too, commented that education at the grass roots can change policy; the problem, she said, is that artists have not been organized in making their arguments.

David Schaengold, C.P.A. (David Tarlow & Co. P.C.), explained that the estate tax is not legally defined as a tax on property or inheritance, but on the privilege of an individual to transfer his or her estate. Should an artist’s body of work be defined as personal property or as an interest in a business? An estate transferring a business interest is allowed to pay the estate tax in installments over a fifteen-year period. Schaengold argued that an artist is in the business of creating art, and his or her art works should be valued as an interest in a business, not as personal property—that is, the art works are created for the production of income in the course of the artist’s occupation. “When an artist dies, the interest in the business should be valued,” he said. “If that were the case, the tax would be much lower because the value would be based on what the artist was earning during his or her lifetime—historical earnings, not future earnings.” Currently, works of art in an artist’s estate are valued no differently than works of art in a collector’s estate; both are valued as personal property.

Many participants were intrigued with Schaengold’s suggestion, although several added that such an approach would probably require

litigation. Nonetheless, Schaengold stressed that “this requires no change in law—an artist is already treated as being in business for income tax purposes. Wouldn’t the courts want to treat artists the same way when they die as they were treated while they were alive?” Hoffman was supportive of the idea, but cautioned about the need for consistency in interpretation and advocacy. For example, what effect does taking the artist in a business position for estate tax purposes have on other provisions of the tax code as applied to artists?

Hodsoll pointed out that it might be more cost-effective to lobby for legislation to clarify an artist’s position as having an interest in a business. In the area of estate tax reform, artists’ chances for success would be improved by joining with others involved in similar efforts, such as the National Federation of Independent Business and the Farm Bureau, and by marshaling the support of arts service, funding, and lobbying organizations, including the National Association of Artists’ Organizations, Grantmakers in the Arts, and Americans for the Arts.

A Visual Artist's Guide to Estate Planning

Part II



INTRODUCTION TO PART II

“Ars longa, vita brevis”

In the past twenty years, art law has emerged as a distinct area of the law covering works of fine art and those who create, purchase and sell them. The contours of the law are difficult to define, since art law always begins with the application of some other type of law—copyright law, tax law and estate and trust law—to the artist. For this reason, the collaboration of the Committee on Art Law of the Association of the Bar of the City of New York and The Marie Walsh Sharpe Art Foundation on this book is particularly beneficial.

Visual art clients, like any other clients, do not want to think about dying. Yet, for the visual artist whose entire career has been devoted to his or her art and its integrity without thought of commercial success and, even more often, without the financial rewards which accompany such success, dying without a will or other legal arrangement executed by the artist during his or her life, can result in the most personal of future decisions being made by the state. For individuals with modest wealth and uncomplicated business relationships, this standard estate plan¹ may be satisfactory, but for most others, particularly the visual artist whose principal estate asset may be art created by him or her, the “standard estate plan” is unsatisfactory.

To write a formally valid simple form will is not difficult; however, when you go to a lawyer to plan your estate and to write your will, you are really setting in motion a much more complex process. Estate planning is the application of the attorney's expertise to the artist client's informed objectives. Generally there is more than one way to meet a client's objectives. The challenge is to recharacterize the estate planning process from one which is preoccupied with dying to one which empowers the visual artist to take steps now that can impact future public recognition of the artist and the appreciation of the artist's work.

¹ See J .H. Merryman and A. Elsen, *Law, Ethics and the Visual Arts*, Vol. 2, p. 445 (1987).

Thus, estate planning for the visual artist often requires special considerations in addition to providing for family and friends and avoiding unnecessary tax, probate, and administration expenses. These concerns derive from the way the visual artist earns income and the nature of the assets included in the artist's estate: The choice of executors; creation and operation of artist foundations; preserving and placing the artist's work; management of copyright and other intellectual property; sufficient liquidity to pay debts and administration expenses; valuation of the estate for estate tax purposes, are some of the special concerns of visual artists expressed in Part I.

Various strategies are available to the artist to address these concerns. One estate planning technique available to the artist is to make gifts of works during his or her lifetime. Such a gift will preclude further appreciation in the work from being included in the artist's gross estate, and if the gift falls within certain statutory limitations, it may not be subject to taxation at all. The artist may also be able to set up a family partnership or foundation. Finally, if the artist has the ability to forego profits from the sale of the artist's works during his or her lifetime, the artist's estate or beneficiaries can sell the property at potentially significant tax savings after his or her death. Carefully planning for disposition and preservation of the artwork and exploitation of the artist's intellectual property can produce income for the estate and beneficiaries or sustain a private foundation created to promote the artist's work and ideas.

In Part II we provide a more in-depth legal analysis of these techniques and an overview of strategies relating to estate planning and the administration of the artist's estate. Many of the legal issues are intricate and complex and an exhaustive legal review and analysis is beyond the scope of this book. Part II addresses estate planning and administration for the visual artist with a discussion of six broad topics: (i) Overview of Tax and Estate Planning (Baltz and Fraiman), (ii) Checklist for Artists' Gifts of Artwork (Wolff), (iii) Valuation (Baltz) and Appraisal (Wolf), (iv) Artists' Foundations (Baltz, Bjorklund), (v) Copyright and Other Intellectual Property Issues (Hoffman), and (vi) Conflict of Interest (Stapper). Following this, is a discussion of the 1997 Federal and New York State tax

law changes as they affect the visual artist (Stapper). A glossary is included to assist the artist in understanding terms with which he or she may be unfamiliar. Additional forms, including a power of attorney, health care proxy, copyright, and other resource materials are provided.

We have tried in the discussion of the selected topics and the comments which follow them to show that there is no single right strategy to meet the artist client's objectives: the importance placed by individual artists on the concerns set forth above varies, as does the size of the estate and the family situation. Moreover, the complexity of the income, gift and estate tax laws, combined with the intricacies of copyright law and artistic and intellectual property management offer the possibility of multiple solutions.²

For example, perhaps the most critical decision in estate planning for the artist is the choice of an executor, trustee, and successor executors and trustees or director of the artist's foundation. These individuals or institutions will be charged with all critical decisions which affect the artist's work, and thus, ultimately, the artistic merit and legacy of the artist. Whether to select family, friends, or professional advisors, or an institution as executor or trustee or to select co-executors or multiple trustees or directors is based on the artist's situation and needs. Each of the fiduciaries selected owes a duty of undivided loyalty to the estate and the beneficiary; yet, for a trusted advisor or art dealer, apparent conflict of interest (not the prohibition against actual self-dealing) can be waived. There is no one correct choice; however, the wrong choice may harm the artist's work and reputation and lead to costly legal battles.

Anecdotal information (The Dorothy Dehner Foundation) following the topic of Artists' Foundations has been included to illustrate that despite the conventional wisdom that only relatively wealthy artists with assets in excess of two million dollars can contemplate a foundation, it is possible to create a private foundation, a private operating foundation or a charity where "sweat equity" combined with careful management of artistic and

² In writing this book, examples and forms are based on the New York law of trusts and estates; nevertheless, the issues, if not the identical solutions, should be similar in other states of the United States.

intellectual property assets may compensate, in part, for an absence of cash. Foundations may meet a variety of personal and financial objectives of artists under certain circumstances and the cost and ease of creating and maintaining such foundations has been simplified, despite the contrary impression created by the legal disputes and attendant publicity involved in the Estates of Rothko, Warhol, Cornell, and Mapplethorpe.

The information contained in this book is not a substitute for competent legal advice. Because we have deliberately kept our discussion simple, areas which are extraordinarily complex may appear deceptively easier to understand than they actually are. We recommend that every artist consult with an attorney with regard to his or her estate plan and provide the checklists and clauses following each chapter as a basis for engaging the dialogue.³ We hope that Part II will encourage and make it easier for all artists to deal with the questions that are presented, regardless of the size of their estates and their art form, although the target audience for this publication is primarily the visual artist—emerging or mid-career. We hope that this book is also useful to attorneys working with artists by making them more aware of artists' specific concerns and providing them with the basic information to address those concerns.

I should personally like to thank the members of the Committee on Art Law who contributed as authors to this book and acted as the Publication Review Committee, and the other members of the Committee and Association who contributed to and commented on it. Above all, I would like to thank the Artist Advisory Committee of The Marie Walsh Sharpe Art Foundation, The Judith Rothschild Foundation and Joyce E. Robinson, without whom this book might have remained an inchoate idea.

Barbara Hoffman,
Chair, Committee on Art Law
Association of the Bar of the City of New York

³ Caveat. Tax laws change. The information provided here is current for May, 1998. Income, gift and estate tax considerations change over time. For example, several years ago, the artist corporation was a technique adapted for both income and estate tax considerations. Today changes in the tax laws, as well as tax court rulings discourage this strategy except in those cases where the artist seeks to obtain the protection from personal liability offered by the corporate form of organization.

OVERVIEW OF TAX AND ESTATE PLANNING

Christina M. Baltz, Esq., and Genevieve L. Fraiman, Esq.

Testamentary and Other Transfers Taking Effect at Death

An artist should make a last will if he or she wishes to determine who will be entitled to the assets of his or her estate, whether outright or in trust, and who as executor and/or trustee will control its administration.

In the absence of a will, under New York's statutory scheme⁴, an artist's assets will be distributed on death to the following "distributees": (a) the first \$50,000 and one-half of the residue to the spouse, and one-half of the residue to the issue by representation; (b) if there are no issue, the whole to the spouse; (c) if there is no spouse, the whole to the issue by representation; (d) if there are neither spouse nor issue, to the parent or parents; (e) in the absence of spouse, issue, and parents, one-half to the maternal grandparents or if neither survives to their children and grandchildren by representation, and one-half to paternal grandparents or if neither survives to their children and grandchildren by representation; and (f) if the nearest relatives are great-grandchildren, one-half to the maternal great-grandchildren per capita and one-half to the paternal great-grandchildren per capita. In categories (e) and (f), if there are no relatives on one side, the whole will pass to the relatives on the other side. Adopted persons, relatives of the half blood and certain non-marital children are treated as if they were relatives of the whole blood.

In an intestate administration (where there is no will), the Surrogate will grant letters of administration to one or more relatives in the following order: (a) the surviving spouse; (b) children; (c) grandchildren; (d) father or mother; (e) brothers or sisters; (f) distributees who are issue of grandparents. When letters are not granted under these provisions, the public administrator of the county is usually appointed to administer the estate.⁵

⁴ Sections 4-1.1 and 4-1.2 of the New York Estates, Powers and Trusts Law

⁵ Section 1001 of the New York Surrogate's Court Procedure Act

By avoiding intestacy, a will enables the artist to determine exactly who will receive the estate assets, and under what terms and conditions. Will the spouse receive the entire estate, to the exclusion of the children? Will the children's share be held in trust, and subject to the discretion of the trustee? Will one child be excluded or receive less than his or her siblings? Friends or charities can receive gifts under the will, outright or in trust, to the exclusion of the distributees, other than a surviving spouse who has a statutory right to elect against the will and take his or her elective share.⁶ The will could make gifts of specific works of art, a house, a cooperative apartment or condominium, or specified amounts of cash or shares of the estate property to designated individuals or charities. The artist could create a foundation or a charitable remainder trust. The will can determine how estate and other death taxes will be paid. The will can structure the estate in such a way as to promote the artist's works of art.

A will allows the artist to appoint the individuals who, or the bank or trust company which, as executor and/or trustee, will administer the estate and carry out the terms of the will. Selection of an executor, in whose honesty, integrity and judgment, the artist has confidence, is of the utmost importance. If the artist believes that the dealer who has promoted his (or her) art or a fellow artist is best qualified to administer the estate despite a possible conflict of interest, the will could excuse such conflict. The will can grant the fiduciaries broad powers of administration, or can limit the powers of a fiduciary given specific authority only with respect to works of art and copyright matters.

The importance of having a will has been emphasized—and rightfully so since generally the will principally controls the disposition of a person's assets at his or her death—however, not all assets pass by the terms of a person's will. For example, unless an insurance policy names the insured person's estate as the beneficiary of the policy, the proceeds of the policy

⁶ Section 5-1.1A of the New York Estates, Powers and Trusts Law.

will pass at the insured person's death to the person(s) designated as beneficiary of the policy. The same is true of pensions, IRAs and Keogh plans, which also pass pursuant to beneficiary designations, rather than by the terms of a person's will. A person's interest in certain property (such as real property or bank accounts) that is held jointly with another person as "joint tenants with right of survivorship" or as "tenants by the entirety" will pass at one tenant's death to the other tenant; the deceased tenant's will has no effect on this property.

Lifetime Transfers

Lifetime gifts (charitable and non-charitable) can be an important part of managing and disposing of an artist's assets. Art (or other assets) gifted by an artist during life will not be subject to estate tax at the artist's death.

Outright gifts to family members and friends. There is an unlimited marital deduction for outright gifts to a U.S. citizen spouse or gifts in certain prescribed forms (e.g., a trust for a U.S. citizen spouse who is given a general power of appointment, a joint tenancy or tenancy by the entireties, a QTIP trust, a joint and survivor annuity, or a charitable remainder trust if the spouse is the only non-charitable beneficiary). While there is no marital deduction for gifts to a non-U.S. citizen spouse, annual exclusion gifts of \$100,000 may be made to the non-citizen spouse. Gifts to persons other than the donor's spouse are potentially subject to gift tax. However, a person may give a gift of up to \$10,000 (or property, including the artist's own artwork with a fair market value of up to \$10,000) or, in the case of a married couple, \$20,000, to any number of people free of gift tax.⁷ These gifts are often referred to as "annual exclusion gifts" since the \$10,000/\$20,000 gifted is the amount (per donee) which may be excluded each year in determining a person's gifts subject to gift tax.⁸ The annual exclusion may only be used during a person's life; there is no comparable

⁷ If the fair market value of the work is greater than \$10,000, the artist can give a fractional interest in the work each year.

⁸ Beginning in 1997, the annual exclusion amount was indexed for inflation. It will increase in increments of \$1,000 every two to four years (approximately) if the inflation rate remains at relatively low levels.

exclusion from estate taxes for gifts made at a person's death. In addition to the annual gift tax exclusion, the unified credit against Federal estate and gift taxes (discussed below under "Taxes") allows each person to gift \$625,000 (gradually increasing to \$1,000,000 in 2006) free of Federal gift tax. (If the unified credit is not used to make lifetime gifts, it will be applied against Federal estate taxes.)

For income tax purposes, the donee of a gift retains the donor's basis: i.e., the cost of the materials. In the case of an inheritance, an heir's cost basis will be the fair market value for estate tax purposes. An exchange of artwork between two artists will be treated as a sale, so that both realize taxable ordinary income.

Outright gifts to charitable organizations. Under current law an artist gets an income tax charitable deduction for a gift of his or her art to a charitable organization equal only to his or her cost basis (i.e., the cost of the materials) in the art.⁹ (A collector, by contrast, is entitled to an income tax charitable deduction equal to the fair market value of the art at the time of the gift, assuming the gifted art will be put to a use by the donee organization that is related to its charitable purpose.) If an artist receives as a gift work from another artist, credited by that artist, the

⁹ Editor's comment. Prior to 1969, an artist was allowed to deduct the fair market value of a gift of his or her art to a museum. Several bills have been proposed in Congress to alter the effects of the 1969 changes to the income tax laws; none has been able to garner the support necessary for passage. The proposals have ranged from restoring the artist to the position she held before the passage of the Act, that is to be treated in the same way as a collector, or to providing a credit against the donating artist's income tax. Even though every proposal contained provisions to eliminate abuses, each has died in committee. The most recent bill was introduced in July of 1985, and proposed income tax changes which would provide living artists with a fair market value charitable contribution deduction for the donation of their works to cultural institutions. Specific stipulations had been included to prevent deductions for quickly produced works of art. The donated item had to be directly related to the primary purpose of the accepting institution, and no deduction might be taken by an official of the Federal government if the work was produced during his term in office. The language of the Act states that "[s]ubsection (e) of section 170 of the Internal Revenue Code of 1954...is amended by adding . . . that in the case of a qualified artistic charitable contribution the amount of such contribution shall be the fair market value of the property contributed." H.R. 3087, 99th Cong., 1st Sess. @ 2 (1985).

recipient will have a cost basis in the acquired work equal to the other artist's cost basis in the work and, if the recipient makes a charitable gift of the other artist's work, his or her income tax charitable deduction will be limited to that tax cost basis, rather than the fair market value of the artwork. Although a charitable income tax deduction limited to cost basis does not offer much of an income tax savings incentive for making a gift of art, there are of course other reasons for an artist to make a gift of his or her art, such as benefitting the charitable donee and building a relationship with a charitable donee that benefits the artist's reputation through exhibition of the work and/or that creates a possible repository for the artist's work after death.

Gifts in trust for family members or friends. A gift of art may be made to an irrevocable trust established by the artist for the benefit of family members or other loved ones. A gift made to such a trust in excess of the annual exclusion and unified credit amounts discussed above will be subject to gift tax, but the gifted property will be removed from the artist's estate and therefore will not be subject to estate taxes at the artist's death. From a gift/estate tax standpoint, it is advantageous to make such a gift before an artist's reputation is established and his or her art has not yet achieved a high market value. The art would be held, maintained, and managed by the trustee(s) and eventually (preferably after the art has appreciated) sold or distributed to the beneficiaries. Money or other liquid assets would also need to be gifted to the trust to cover the trust's administrative costs and the costs of maintaining the art before disposition.

Gifts to "split-interest" trusts benefitting both charity and family members or friends. Split-interest trusts may either be "charitable lead trusts" or "charitable remainder trusts". In the case of a charitable lead trust, one or more charitable beneficiaries gets a "lead" interest in the trust (which must be in the form of an annual payment from the trust equal to a fixed percentage of the value of the property in the trust, valued upon contribution to the trust in the case of an "annuity" trust or valued annually in the case of a "unitrust") for a term of years and, after that term of years, the donor's loved ones, as the remainder beneficiaries, get the remaining trust assets. In the case of a charitable remainder trust, the donor and/or his or her loved ones get the lead annuity or

uni- trust interest in the trust for a term of years (not to exceed twenty years) or for life and, at the end of the term, the charitable beneficiary or beneficiaries get the remaining trust assets. Split-interest trusts afford gift tax and income tax savings where highly appreciating assets (and, in the case of charitable lead trusts, generally income-producing assets) are transferred to the trust. If an artist's work is not marketable and likely to appreciate significantly, a split-interest trust funded with art is not a good disposition of the art. In addition, the charitable income tax deduction advantages to these structures are not available to artists who contribute their own artwork to a split-interest trust because the income tax deduction is limited to the artist's cost basis (as described above).

Revocable trusts for the artist's lifetime benefit and ultimate benefit of others: a will substitute. An artist can contribute his or her art (and other assets) to a revocable trust of which the artist is the beneficiary during his or her lifetime. The artist will generally be the trustee of the trust until his or her death (or incapacity if the artist should become incompetent). Since the trust is initially solely for the artist's own benefit, there is no gift tax due upon the transfer of assets to the trust. As a revocable trust, the terms of the trust may be amended and/or the trust may be revoked by the artist at any time. During the artist's lifetime, the revocable trust allows for centralized management of the artist's artwork (and other assets) and also a plan of management and disposition of the trust assets in the event that the artist becomes incompetent (at which point the second or successor trustee would take control and carry out the terms of the trust). After the artist dies, the revocable trust essentially functions as a will substitute—the trustee disposes of the artist's assets (held in the trust) in accordance with the terms of the trust, and dispositions of trust assets other than to the artist's spouse or charity are subject to estate tax. Although a revocable trust functions as a will substitute, an artist who establishes a revocable trust should nevertheless still have a will that bequeaths any property held by the artist at his or her death to the trustee(s) of the revocable trust. Inevitably there will be some property that did not get transferred to the revocable trust and, without a will, that property will be disposed of under the laws of intestacy, rather than in accordance with the artist's wishes.

Other Estate Planning-Related Documents

Although they are not the subject of this publication, there are certain other estate planning-related documents that an artist should consider executing when executing his or her will or revocable trust. By executing a power of attorney, an artist can appoint one or more persons to act as his or her attorney(s)-in-fact to manage the artist's business and personal financial affairs in the event of the artist's incapacity. (If desired, an attorney-in-fact can also act for a person while the person is competent.) By executing a health care proxy, an artist can appoint one or more persons to act as his or her health care agent to make medical and health care decisions on the artist's behalf in the event of the artist's incapacity. If desired, an artist may also execute a "living will" by which the artist expresses his or her wishes concerning life support and other medical issues. The living will can be helpful in guiding the artist's health care agent. The formal and substantive requirements of powers of attorney, health care proxies, and living wills are governed by state law and therefore vary to some degree from state to state.

Administration of the Artist's Estate

Administering an estate involves carrying out the terms of the will—that is, wrapping up the artist's financial affairs and managing and disposing of the artist's assets. In basic terms, the executor gathers the artist's assets; pays the artist's debts and estate administration expenses from estate assets; has the artist's assets appraised; pays out the legacies (gifts) to the beneficiaries named in the artist's will; prepares and files Federal and state estate tax returns and (if due) pays Federal and state estate taxes from estate assets; prepares and files the artist's final Federal and state income tax returns and the estate's Federal and state income tax returns and pays any income taxes due from estate assets; distributes the balance of the estate assets to the "residuary" beneficiary of the estate; and prepares an accounting of his or her activities as executor which the residuary beneficiary reviews; and, once the accounting is approved (which absolves the executor from any liability for his or

her activities as executor), closes the estate. An executor's checklist of activities follows this discussion.

Taxes¹⁰

Federal and state (if applicable) estate taxes are calculated as a percentage of the value of an artist's taxable estate. An artist's taxable estate is the fair market value of all property interests he holds at his date of death, less (i) certain estate administration expenses, indebtedness and taxes paid by his estate; and (ii) the value of bequests made to the artist's surviving U.S. citizen spouse; and (iii) the value of bequests made to charitable organizations. The marital deduction for a U.S. citizen spouse is unlimited if the transfer to the spouse under the will or by intestacy is outright or in a prescribed form identical to those allowed for the gift tax marital deduction (e.g., a trust for the spouse who is given a general power of appointment, life insurance or annuity payments with general power of appointment, a QTIP trust, or a charitable remainder trust if the spouse is the only beneficiary other than the charity. There is also an unlimited marital deduction for property passing to a non U.S. citizen spouse provided the property is held in the form of a QDOT that is subjected to estate tax on principal distributions and on the death of the spouse at the marginal estate tax rates of the first deceased spouse.

An artist's estate will be subject to Federal estate taxes if the artist has utilized his unified credit against estate and gift taxes to make lifetime gifts or, if the unified credit has not been used, if the value of the artist's taxable estate exceeds \$625,000 (gradually increasing to reach \$1,000,000 in 2006). Under current law, the estate of an artist domiciled

¹⁰ This discussion applies to estates of artists who at the time of death are U.S. citizens or residents and whose spouses (if any) are U.S. citizens or residents. Different rules apply in the case of nonresident aliens or if a surviving spouse is not a U.S. citizen.

in New York will also be subject to New York estate taxes if the value of his New York taxable estate exceeds \$115,000.¹¹ Effective October 1, 1998, the New York estate tax will be imposed on taxable estates exceeding \$300,000, and effective February 1, 2000, an estate will pay no New York estate tax in addition to the Federal tax it pays (New York State will instead receive a portion of the estate taxes otherwise paid to the Internal Revenue Service).

Federal and New York estate taxes are imposed at graduated rates, depending on the value of the taxable estate. The Federal rates range from 18% (imposed on the first \$10,000) to 55% (imposed on taxable estates in excess of \$3,000,000). New York estate tax rates—in effect until February 1, 2000—range from 2% (imposed on the first \$50,000) to 21% (imposed on taxable estates in excess of \$10,100,000).

The Federal estate tax return must be filed within nine months of the artist's date of death, unless an extension is granted, and estate taxes generally must be paid at that time. A deposit on the New York estate tax is due within six months of the artist's date of death and the balance is due with the filed return within nine months of the date of death unless an extension is granted.¹²

Thus, valuation of an artist's assets is determinative of the estate taxes payable on the artist's estate (if taxable). If the artist's estate is taxable, there will need to be sufficient liquidity (i.e., cash or marketable assets) to raise the cash necessary to pay estate taxes within nine months of the artist's death.

¹¹ For purposes of determining the New York taxable estate, a deduction of up to \$250,000 is allowed for a principal residence that is left to someone other than a spouse or a charitable organization. A nonresident artist who has work in an exhibition or stored in New York State at the time of death may also be subject to New York State estate tax on those works of art.

¹² However, if the value of an artist's artwork exceeds 35% of his adjusted gross estate (i.e., his gross estate less deductions for estate administration expenses, debts and certain taxes) and his artistic enterprise can qualify as a closely held business for purposes of the Internal Revenue Code provision allowing for installment payments of estate taxes, then his estate can defer payment of estate taxes (but not interest) for up to five years and can pay estate taxes in up to ten annual installments, with interest imposed at reduced rates.

COMMENTARY ON TAX AND ESTATE PLANNING¹³

The Artist's Spouse/Partner

Gil Edelson, Esq.

In many cases, the artist's spouse or significant other will be the principal or sole heir. In the case of a spouse, this makes sense both from the personal and the estate tax point of view, since there is no estate tax payable on works left to the spouse.

It is also not uncommon for the spouse or partner to be named as the executor. This is useful because the spouse/partner will probably want to waive an executor's fee. Executors' fees are calculated as a percentage of the total value of the estate; a waiver of the fee saves money, in some cases a substantial sum.

It should be kept in mind that the artist's spouse/partner frequently controls the eventual disposition of the work in the estate. Whether or not the spouse/partner is the beneficiary, he or she will obviously have much to say about what happens to the estate. For example, if the spouse/partner is the executor, he or she will select the lawyer for the estate. He or she is also likely to select the dealer through whom work will be sold. The spouse/partner will have the artist's records and may be asked for information or provenance. The spouse/partner could be asked to authenticate or to assist in authentication. He or she may also be critical in supplying information for scholarly publications, articles, and a catalogue raisonné. The spouse or partner will also control the copyrights in the artist's works.

For the foregoing reasons, the artist may wish to leave detailed instructions to his or her spouse/partner, although they are not binding.

In addition, it is important for the spouse or partner to plan his or her estate since that estate may consist largely of the artist's works.

¹³ This discussion applies to estates of artists who at the time of death are U.S. citizens or residents and whose spouses (if any) are U.S. citizens or residents. Different rules apply in the case of nonresident aliens or if a surviving spouse is not a U.S. citizen.

Liquidity for the Small Estate

David Brown, Esq.

To assure sufficient funds for gathering and preservation of work, removal from premises, payment of normal debts, retention of estate counsel, etc., consideration should be given, if no other meaningful funds will be available, to low cost insurance.

Most savings banks provide low cost term life insurance. For example, the New York State Savings Bank Life Insurance cost for level term life insurance of \$50,000 for a forty-year-old non-smoker male will remain at \$332 annually for 15 years. Females generally pay a little less, and \$25,000 life insurance is roughly a little more than half that cost. Therefore, for \$50 to \$75 every three months, there will be cash available to carry out the artist's basic wishes. Other states should have similar low cost insurance available.

If the estate, including the insurance proceeds, is likely to be less than \$625,000, the artist's estate should be named the beneficiary of the policy. If adding the insurance proceeds to the artist's estate will cause the estate to exceed \$625,000, the artist might consider gifting the policy to a trusted relative or friend, or to an insurance trust, so that the insurance proceeds will not be included in the artist's taxable estate and therefore the full amount of insurance proceeds (undiminished by estate taxes) would be available to be loaned by the relative/friend to the artist's estate as needed. Thus, should the artist become commercially better known and the value of his or her estate increase significantly, counsel should be asked for other suggestions for policy ownership or beneficiaries at that time which might result in savings on an estate where taxes were a consideration.

VALUATION¹⁴

Christina M. Baltz, Esq.

The valuation of an artist's assets is determinative of more than just the estate taxes payable on taxable estates. In the case of both taxable and nontaxable estates, the value given to the assets for estate tax purposes will be the income tax cost basis of the asset in the beneficiary's hands (the basis is said to be "stepped up" to the estate tax value). That is, if the beneficiary sells a work of art bequeathed to him by the artist, he will only pay capital gains tax on the amount (if any) by which the sales price exceeds the estate tax value of the work.

In the case of bequests to spouses, where no estate tax is imposed, it is therefore desirable to have a high estate tax value ascribed to the bequeathed assets. On the other hand, if an artist with a taxable estate is leaving property to persons other than a spouse, the potential capital gains tax advantage to the beneficiary of a high stepped up basis is counterbalanced by the higher estate tax to be paid by the artist's estate with respect to generously-valued assets. For taxable estates it is therefore generally desirable to have assets valued conservatively.

The estate tax value of an asset is its "fair market value" at the date of the artist's death (or as of the alternate valuation date, usually six months later, allowed under the Internal Revenue Code, if lower). For purposes of the estate tax, fair market value is defined as "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 estate tax value is not to be determined by a forced sale price, and the sale price should be in the market in which the property would normally be sold (e.g., in the retail market versus wholesale market). The fair market value of the artwork may be established either by selling the artwork within a reasonable

¹⁴ This discussion applies to estates of artists who at the time of death are U.S. citizens or residents and whose spouses (if any) are U.S. citizens or residents. Different rules apply in the case of nonresident aliens or if a surviving spouse is not a U.S. citizen.

period after death and using the gross sales price by having the artwork appraised.

Once the fair market value is determined, certain discounts can be applied to reduce that value (or premiums can be applied to increase the value) to determine the estate tax value. A “blockage discount” can be applied in the case of a large block of property. For example, the Federal estate tax regulations provide that, in the case of shares of stock, if the executor can show that the block of stock to be valued is “so large in relation to actual sales on the existing market that it could not be liquidated in a reasonable time without depressing the market” then the price at which the block could be sold outside the usual market may be used.

Although not set forth in the Internal Revenue Code or estate tax regulations, courts have allowed blockage discounts of 35% and 50% to be applied in determining the estate tax values for two well-established artists' very large bodies of work, recognizing that the artists' work would need to be sold over a considerable period of time in order to obtain what would be fair market value prices in the normal market for the artists' work. There are, however, no clear rules as to the percentage blockage discount (if any) that may be accepted in a particular case by the Internal Revenue Service (or a court, if the artist's estate disputes the estate tax value determined by the Internal Revenue Service).

Selling expenses, including commissions, are not automatically deductible and the Will must be carefully drafted to insure that the Internal Revenue Service will permit the estate tax deduction.

If the artist can successfully characterize his (or her) work as a business, other factors applicable to determining the net value of an interest in a business (e.g., future earning capacity of the enterprise) may be taken into account which could result in a lower value than a valuation of his artwork as tangible personal property owned by him at his death. In addition, if the artist's business can meet the requirements of the recently enacted “family-owned business exclusion”, assets comprising the

family-owned business of a value of up to \$675,000¹⁵ bequeathed to a “qualified heir” can be sheltered from Federal estate tax.¹⁶

It should be noted that a Federal estate tax return is required to be filed for an artist whose gross estate (i.e., all the artist's assets, not just the taxable estate) exceeds the exclusion amount, now \$625,000 and gradually increasing to \$1,000,000 in 2006. If the return reports “household or personal effects articles having marked artistic or intrinsic value” (which are defined in the estate tax regulations to include, among other things, paintings, etchings and engravings) which have a total value in excess of \$3,000, then an appraisal prepared by an expert, under oath, must be filed with the return. In addition, any piece of art reported on the artist's estate tax return that has an appraised value at \$20,000 or more must be submitted to the Internal Revenue Service's Art Advisory Panel for reevaluation. The Art Advisory Panel meets only twice a year and does not make public its evaluations.

¹⁵ The \$675,000 family-owned business exclusion is effective in 1998 is gradually adjusted downward to \$300,000 in 2006 as the \$600,000 unified credit amount referenced above is adjusted upward to \$1,000,000, so that at all times the maximum amount sheltered from estate tax by reason of both is \$1,300,000.

¹⁶ Editor's comments. For a discussion of the valuation of an artist's enterprise as a business and qualification as a family-owned business for purposes of the estate tax exclusion, see Schaengold, D. Valuation of Artists' Estates: David Smith, Georgia O'Keeffe and Andy Warhol-Have We Missed the Forest for the Trees? 20 Tax Mgmt. Est., Gifts & Tr. J. 167, (Nov./Dec. 1995). But see 1965 IRS G.C.M. LEXIS, 176; G.C.M. 3402 rejecting the valuation of an artist's estate as a business in part because there is no indication in the art field of “inventory costs.” Schaengold's proposal does not require legislative change. Franklin Feldman, co-author of *Art Law: Rights and Liabilities of Creators and Collectors* (Little, Brown, 1986) is currently circulating a legislative proposal to exclude artwork from the valuation of the artist's estate at death, and replace it with an inventory. When the estate or any beneficiary of the estate sold any of the work, the seller would be required to report the sale and pay ordinary income tax at the ordinary income tax rate (files of The Marie Walsh Sharpe Art Foundation).

THE APPRAISAL

Sylvia Leonard Wolf

It is important for an artist to have an inventory, or appraisal, prepared and up-dated, during the course of the artist's lifetime for several reasons. The first is to record works created on an on-going basis, so that, in the event of a loss due to theft, fire, or water damage, a complete list can be submitted to substantiate an insurance claim. Such a list would be impossible to create from memory, after a disaster. The second reason to keep a well-prepared inventory is that it can be used to form the basis of a complete and accurate appraisal after death.

An appraisal is a statement of value, based on an analysis of the market in which an object is normally sold. Fair Market Value is the basis of appraisals made for Internal Revenue Service purposes, for estates, charitable gifts, gift tax donations, and estate planning. Estate appraisals also take into consideration a factor called blockage, which is based on the hypothetical supposition that all the works by that artist would be sold on his date of death. Fair Market Value derives from the presumed sale in the appropriate market for comparable items. This frequently, though not always, is the auction market. It could also be the dealer to dealer price.

The IRS does not accept retail gallery prices as fair market value, except in the case where that is the only venue for sales. The interpretation of the complexities of Fair Market Value has been the subject of many famous tax litigation cases of artists' estates. The estates of Andy Warhol, Robert Mapplethorpe, David Smith, Georgia O'Keeffe, Mark Rothko, and Willem de Kooning have all spent hundreds of thousands of dollars arguing in tax court, and with executors, and heirs, about the basis of valuation. At the very least, the artist, while alive, should prepare his own inventory, so that there is no dispute later as to authenticity, date, and medium of a specific work.

A properly prepared appraisal must include the following information:

- name of artist
- title of work and description of what it looks like
- medium
- size (height x width x depth)
- date
- signature and location
- condition
- bibliography, references, catalog number (if any)
- exhibition history
- photograph of the work

In addition, if the appraisal is prepared by someone other than the artist, or after his death, then it must also include:

- provenance (history of ownership)
- standing of the artist in his lifetime and at the time of the appraisal
- an analysis of his sales history
- the market at the time of the appraisal
- blockage discount

After considering all of the above, the appraiser must consider the quality of the work, within the context of the artist's oeuvre, and make a value judgement. This is the most difficult aspect of all, as it is often subjective, but at the same time, is based on an analysis of comparable sales of similar or like items. Works can be listed chronologically, if known, or by medium, and classified into A, B, C, etc. categories, based on prior sales history, and current sale potential.

CHECKLIST FOR ARTISTS' GIFTS OF ARTWORK: A MUSEUM PERSPECTIVE

Beverly M. Wolff, Esq.

Introduction

Gift giving, to nonprofit institutions and to individuals, can be an effective element of "estate planning." The following outline discusses gifts and related planning issues relevant to visual artists.

Tax Restrictions on Charitable Contributions of Artwork by Artists

The artist is limited to an income tax deduction of his/her cost basis in the work if it is donated during the artist's lifetime. The artist will receive no income tax deduction if the artist leaves the work to a charity in a testamentary disposition.

Charitable contributions of artwork may benefit an artist's reputation, especially if the artist's works are accepted by a broad base of institutions, including institutions with good reputations and a large number of visitors. The earlier the artist makes such a gift, the sooner the artist is able to benefit from that boost to his/her reputation.

Arranging for Charitable Gifts

Artists wishing to give works of art to museums and other charities, during their lifetime or through a will, should contact the institution to discuss the gift. If the artist wishes to give to a museum, the artist should contact the appropriate curatorial department. If giving to another charity, the artist should contact the development office to learn the appropriate contact person with whom to discuss the gift.

Artists should be aware that many institutions receive far more offers of gifts than they can possibly accept. Also, a direct gift from an artist of the first work in a particular collection (as opposed to a purchase) may violate certain institutions' acquisition policies.

Upon learning that an organization is interested in the gift, the artist should arrange to give the work according to the institution's procedures. If the institution declines the gift, the artist should investigate other institutions that may be interested in such a gift.

Gifts to Charities Retaining Income

Artists can assist arts institutions in acquiring their artwork in ways other than outright gifts. Artists may wish to explore selling their work to charity on an installment plan or in exchange for an annuity or making a bargain sale (which is treated as part gift and part sale to the institution).¹⁷

They can give their artwork to charitable remainder trusts that will sell the work to the charity, and the purchase price will fund a trust that will pay a yearly income to the artist and his/her spouse. After both income beneficiaries have died, the charity will receive the remainder of the trust principal. Finally, artists can sell their work to a charity on an installment plan or in exchange for an annuity. If an artist exchanges work for an annuity from a charity he/she will receive a yearly annuity payment until his/her death. The annuity amount will depend on the valuation of the work at the time of donation and actuarial predictions of the artist's life expectancy.

Bequests

Most successful gifts of artwork to arts institutions have been arranged in advance by the artist and the appropriate curator. However, if the artist does not want to make his/her testamentary disposition known, he/she should have his/her will drafted to preserve the charitable gift. This can be done by providing an alternate recipient of the gift should the initial

¹⁷ Comment. John Sare, Esq. From an income tax point of view, the annuity or bargain sale concept isn't necessarily attractive for artists, because their deduction is based on their basis. Gift annuity/bargain sale arrangements generally would be more attractive to a collector, at least for purposes of the charitable deduction.

donee decline it, and/or by granting the artist's executor the discretion to find an alternate charitable beneficiary should the initial institution decline the work.

Copyright Assignment and Licensing

An artist who does not have an heir to whom he/she would like to bequeath his/her copyright might consider transferring his/her copyright to an arts institution.¹⁸ The institution would benefit from royalty earnings on the images and would be free to use the images to benefit the institution. Museums are usually happy to receive such a gift, but do not expect the copyright to be transferred with each work of art given to it.

Museums and other charitable institutions benefit greatly when artists grant them non-exclusive licenses to works of art that they give or sell to the institution. Such a license allows an institution to use the image to promote its collection and its educational purpose without any confusion over the need to clear rights or seek permission from the artist's heirs.

Non-Charitable Gifts

An artist may give any individual gifts of cash or artwork worth less than \$10,000 in a year without incurring any gift taxes. A married artist may give up to \$20,000 in any year without incurring taxes; the gift is assumed to come from both spouses. Beginning in 1997, the annual exclusion was indexed for inflation. It will increase in increments of \$1,000 every two to four years (approximately) if the inflation rate remains at relatively low levels.

¹⁸ Transfers of copyright interests by artists involve fairly intricate deductibility rules for the purposes of the gift and estate tax charitable deduction. See, Hoffman, Copyright, p. 82.

Gifts to Spouses

Property can pass between spouses during life, and at death, without incurring any transfer taxes. There is no advantage in transferring ownership of artwork to a spouse during an artist's lifetime, because the spouse will hold the property with all the same attributes as the artist.

The tax attributes of artwork change for the better when it is left to an artist's spouse through a testamentary disposition. The spouse receives a stepped-up basis in the artwork, equal to the market value on the date of the artist's death. The spouse will be able to sell the work, subject only to capital gains taxes on the appreciation of the artwork since the date of the artist's death. An artist's surviving spouse would also be able to donate the artwork to an arts institution and take an income tax deduction of the fair market value of the work on the date of the donation.¹⁹

Inventory

It is extremely important that an artist maintain an updated inventory of all the work he (or she) owns, has sold, and has given away. The inventory should include labeled slides of the work, consignment agreements, bills of sale, and deeds of gift.

The inventory will be significant in proving that particular works of art have left the artist's estate, and therefore, estate taxes on them are not due. The inventory will also insure that the heirs receive the works they were bequeathed, and that specific works of art are given to the correct recipients.

¹⁹ So long as the art institution uses the artwork toward its exempt purpose and does not merely accept the work to sell it.

EXECUTOR'S OR ADMINISTRATOR'S CHECKLIST

Genevieve L. Fraiman, Esq.

The following checklist is not intended to be all-inclusive but to provide signposts that may assist an executor/personal representative in the administration of an estate.

Upon the death of the individual, the person named as executor under the will (or the relative or other person who intends to qualify as the administrator of the estate of a decedent who dies without a will) should:

1. Notify the family members of the death.
2. Search for the decedent's will, and possess the original will.
3. Review the terms of the will. If there are funeral instructions, promptly advise those making the arrangements. Obtain the names and addresses and relationships of the decedent's closest relatives who would be his distributees if there were no will (and the ages of any persons under 18 years of age, i.e., minors, and the names and addresses of the parent or other person with whom the minor resides). Obtain the names and addresses of all fiduciaries named in the will. Obtain the names and addresses of all devisees, legatees, and beneficiaries of trusts under the will (and the ages of any minors). Are any of the above who are adults under an incapacity?
4. Contact the decedent's attorney and retain that attorney (or another attorney) to obtain probate of the will and issuance of letters to the executor(s) and trustee(s) (or letters of administration if there is no will), to render legal advice in connection with the administration of the estate, and with respect to income, gift, estate, or generation-skipping transfer tax matters.
5. Contact the decedent's accountant who may have information regarding the decedent's financial matters. Obtain copies of the decedent's bank statements, custody account statements, all gift tax returns, and income tax returns for three full years prior to death.

6. Protect and inventory the tangible property, which may include obtaining the services of a security company and/or insuring the works of the deceased artist or his or her collection of the works of other artists. Obtain and review all of the catalogues, bills of sale, contracts, and any other records regarding the decedent's works of art. Are any out on loan? Are any being restored? Have any been sold on an installment basis? What contractual arrangements did the decedent-artist have with a gallery or dealer? Does the gallery or dealer have possession of any of the artist's works? Did the artist make any gifts of his or her works of art to family, friends or to museums or other charitable institutions during his or her lifetime? Were any of these gifts of fractional interests? Are there any outstanding promised gifts to museums or other charities of the artist's works that are enforceable at death?

Make a complete inventory of the artist's works on hand at his death. Keep records and make a list of all works of art disposed of by gift, sale, or otherwise prior to death.

Obtain independent appraisals of the decedent's works of art and other tangible personal property. Take 8x10 color photographs or 4x5 color transparencies of works of art with a value of \$20,000 or more for submission to the IRS Art Advisory Panel.

Even if the estate will not be subject to Federal or state estate taxes, the works of art should be appraised to determine the stepped-up-to-date of death value for purposes of the capital gains tax that would be due when and if such work is sold by the estate or by the legatees or distributees.

If directed or authorized by the will, consider how best to continue the promotion of the works of art of the decedent, provided there are sufficient funds for this effort. Did the decedent create a foundation during his lifetime or direct or authorize the creation of a foundation in his will?

7. Obtain appraisals of the decedent's real property, condominium or cooperative apartment, closely held business, and any other asset that will be included in his or her estate (excluding cash and marketable securities). Obtain a valuation of the decedent's marketable securities.

8. Inventory all copyright interests and contractual agreements, if any, with respect to the artist's copyrights. When was each work created (fixed in a tangible form)? When does each copyright terminate? Were any works of the artist created as an employee? Did the artist assign or gift to others any copyright interests? Are copyright interests held by a trust, partnership, company or corporation? Have rights of termination been exercised by the artist before his or her death? During what time period, may the rights of termination be exercised by the artist's spouse or descendants? Calendar and make arrangements for protection of the artist's copyright interests. Notify the copyright office of the artist's death.

9. Inventory and collect the assets (including the items described in paragraphs 6 and 8 above) that will pass under the will ("probate assets"), which may include, among other things:

- a. jewelry, household furniture and equipment, china, silver, linens, art, coins, stamps, automobiles, boats, and other tangible personal property
- b. real estate (including a condominium) owned solely by the decedent or as a tenant in common
- c. a cooperative apartment (including the shares of the landlord corporation and proprietary lease)
- d. rights under a lease, including security given to the landlord
- e. marketable securities
- f. bank accounts
- g. negotiable instruments that may include outstanding loans made by the decedent to others, and property securing such loans
- h. closely held business interests (whether held as a sole proprietorship, partnership, limited liability company or corporation)
- i. employee benefits and individual retirement accounts
- j. insurance policies payable to the decedent or to his estate

- k. assets held in a revocable trust created by the decedent that is payable to his or her estate at death
 - l. vested rights and powers of appointment of the decedent under the will or trusts created by others for the benefit of the decedent, or in the intestate estate of a pre-deceased parent or other relative.
 - m. club memberships
10. Inventory and obtain information concerning assets of the decedent that may pass outside of his or her will and may be included in the decedent's taxable estate, which may include, among other things:
- a. joint bank accounts
 - b. trust bank accounts ("Totten trusts")
 - c. jointly owned real property, condominium, or cooperative apartment, owned as a tenant by the entireties with a spouse, or owned jointly with others.
 - d. joint custody accounts holding securities
 - e. insurance payable to named beneficiaries
 - f. employee benefits or retirement accounts payable to a spouse, children, or other named beneficiaries
 - g. trusts created by others in which the decedent had an interest (which may include a qualified terminable interest (QTIP) or power of appointment marital deduction trust created by the decedent's pre-deceased spouse)
 - h. revocable trusts created by the decedent, and payable or held in trust for others upon the death of the decedent
11. Obtain information concerning all unpaid bills and other debts owed by the decedent. After the will has been admitted to probate and letters issued to the executor/personal representative, debts that are legally enforceable should be paid.
12. Cancel all credit cards and accounts with stores, notify all banks, bro-

kers, businesses, magazines, clubs and other organizations of the decedent's death.

13. Notify the post office and arrange to have mail forwarded.

14. Notify social security.

15. Notify the insurance companies and arrange to collect the proceeds of the policies on behalf of the estate or named beneficiaries, and obtain the necessary tax forms provided by the insurance companies to be submitted with the estate tax returns.

16. If the decedent is survived by a spouse and/or minor children, ascertain what tangibles, automobiles and moneys, if any, that they may be entitled to as a family allowance. If the decedent left a will, will the surviving spouse exercise his or her right of election under section 5-1.1A of the New York Estates Powers and Trusts Law to take outright a pecuniary amount equal to the greater of: (i) the decedent's estate and testamentary substitutes up to \$50,000, or (ii) one-third thereof.

17. If the decedent was living in a rented apartment, arrange to terminate the lease and to vacate the apartment.

18. Pay funeral and other administration expenses, or reserve funds for payment of the same.

19. Have the decedent's last income tax returns prepared and pay any taxes due.

20. Have prepared the Federal estate tax and any state inheritance, estate or other death tax return due. If there are assets in a foreign country, it may be necessary to have prepared and to pay foreign death and other taxes due, and to review any estate tax treaties between the United States and the foreign country. Review the tax apportionment clause of the will and any applicable Federal and/or state apportionment statutes to ascertain who will bear the burden of estate and other death taxes. Pay any such taxes payable by the estate. Obtain a closing letter from the Internal Revenue Service and state tax authorities.

21. Manage the investments of the estate. In a large estate, it may be advisable to retain the services of an investment advisor and to maintain the securities in a bank or brokerage custody account in the name of the estate.

22. Carry out the terms of the will. Distribute specifically devised or bequeathed property, pay cash legacies, establish trusts created by the will. Distributions on account of the residuary estate before the final accounting of the fiduciaries may be considered, but a substantial reserve should be retained to meet unanticipated debts, expenses, or claims. The recipients of all payments and distributions are normally asked to sign a formal receipt and refunding agreement.

23. Do the terms of the will allow the executor or trustee to continue to promote the deceased artist's works? Who would benefit by and bear the expense of such promotion? Is such promotion feasible and practical?

24. Have prepared an account of all of the acts or omissions of the executor or administrator and the same settled judicially or informally by the execution of a receipt, release, and indemnification agreement. Make final payments of all outstanding debts (if any), administration expenses (including executor's or administrator's commissions and attorneys' fees), and make final distributions pursuant to the terms of the will (or to the distributees in the absence of a will).

Section 4-1.1 of the New York Estates, Powers and Trusts Law, provides for the distribution of property of a decedent not disposed of by will, as follows:

- a. \$50,000 and one-half of the residue to the spouse and the balance to issue by representation
- b. if no issue, whole to the spouse
- c. if no spouse, whole to the issue by representation
- d. if no spouse or issue, whole to parent or parents
- e. if no spouse, issue, or parents, to issue of parents by representation
- f. if none of the above, one-half to maternal grandparents or if neither survives to their issue by representation, and one-half to paternal grandparents or if neither survives to their issue by representation.

ARTISTS' FOUNDATIONS

Christina M. Baltz, Esq., and Victoria Bjorklund, Esq.

An artist's private foundation can provide a vehicle for holding and managing an artist's art and enhancing the artist's reputation by promoting the public's interest in the artist's work. A private foundation is a tax-exempt entity and contributions to a foundation are eligible for income, estate or gift tax charitable deductions.²⁰ Because of the income, estate, or gift tax deductions available for gifts of art to a private foundation, creation of a private foundation may appear to be an attractive idea to an artist.

An artist cannot contribute his or her art to a private foundation and have the foundation merely hold the art; the foundation must be operated as an educational organization, offering a benefit to the public, to continue to qualify as a tax-exempt charitable organization under the Internal Revenue Code. Private foundations are subject to a relatively complex set of rules under the Internal Revenue Code and Treasury Regulations. In addition to the general rules applicable to private (grant making) foundations, an operating foundation, such as an artist's foundation, is subject to specific requirements with respect to using the foundation's assets, and paying out substantially all of its net income, to carry out its exempt purposes, and must demonstrate to the Internal Revenue Service annually that these requirements have been met.

Because of the income, estate, or gift tax deductions available for gifts of art to a private foundation, creation of a private foundation may appear

²⁰ Lifetime gifts of an artist's artwork to a private foundation are eligible for a Federal income tax deduction for the amount of the artist's cost basis in the work (essentially the cost of the materials used to create the work), but not for the amount of the fair market value of the work. The artist is entitled to a Federal gift tax deduction for the fair market value of the gifted work. In the case of a testamentary gift (i.e., made under the artist's will) of artwork to a private foundation, an artist's estate is entitled to a Federal estate tax deduction for the fair market value (at the artist's date of death) of artwork bequeathed to a private foundation. If instead of leaving the art to a private foundation under his or her will, the artist bequeathed the art to his or her spouse and the spouse then gifted the art to a private foundation, the spouse would be entitled to take a Federal income tax deduction for the fair market value of the gifted work.

to an artist to be an attractive idea. However, unless the artist's work is saleable and can produce sufficient proceeds to sustain the operation of the private foundation, the artist or others will need to make cash contributions to fund the operations (e.g., rent, storage, insurance) of the foundation. Many artists assume that the foundation could engage in fundraising to derive support from the public. As a practical matter, however, this is an unlikely result for two reasons. First, grants are expensive and time-consuming to seek and only limited funds are available. Second, most grants are available from other private foundations and from corporations. For certain tax and policy reasons, most private foundations and corporations are much less likely to make grants to other private foundations than to public charities like schools or cultural organizations. Therefore, sales, admission fees, and licensing arrangements would be more likely sources of revenue, along with endowment income.

A common question is how much in cash or art assets is required to create a private foundation. As a legal matter, no minimum amount is required. As a practical matter, however, a private operating foundation may not be justified if the cash and assets are valued at less than \$2 million. That is because private operating foundations can have high costs including rent, storage, insurance, and maintenance costs required for an art collection. In contrast, a private grantmaking foundation can be run for much less money, especially if its directors are willing to volunteer their time and talents. If services are not donated, accounting and filing fees may annually cost \$5,000 or more. In either case, an artist should create a proposed budget in order to determine whether a private grantmaking or operating foundation makes sense given the artist's cash and art assets.

If the artist is not in a position to contribute the necessary funding and the proposed private foundation would be unlikely to be self-sustaining through sales of the art or fundraising, the artist should consider alternatives to establishing a private foundation such as the Archives of American Art (The Archives of American Art does not generally collect original works of art, but accepts sketch books, drawings, correspondence, diaries and oral histories) or a donor advised art fund for disposition of art (or its proceeds) to charity. Libraries of all sizes across the

country represent a valuable resource for artists in placing their artwork and archival materials as do university libraries and art galleries. Regional and university museums may also prove to be an alternative to the artist's foundation.

An application to the Internal Revenue Service for recognition of tax-exempt status (called a Form 1023), in which the foundation must demonstrate how it is an educational organization benefitting the public and otherwise meets the requirements for tax exemption, must be filed with the Internal Revenue Service in order to obtain tax-exempt status. An artist does not need to wait to apply and receive confirmation of the foundation's tax-exempt status before making contributions to the foundation; if granted by the Internal Revenue Service, the foundation's exempt status will relate back to the date of its creation. Once established, the foundation will be required to file annual reports of its assets and expenditures (on Form 990PF) with the Internal Revenue Service.

In addition to complying with the rules and regulations and reporting requirements under the Internal Revenue Code, an artist's foundation may be required to register with the State Attorney General's office or other state agency charged with oversight of charitable organizations or fundraising activity within the state and also may be required to file annual reports with that state agency.

Assuming that the foregoing financial and regulatory hurdles to establishing the foundation can be met and the artist decides to form the foundation, he or she will need to decide whether to establish the foundation in trust or corporate form. A private foundation in trust form is established by a trust agreement between the artist, as settlor of the trust, and the trustee(s). Assets are transferred to the trustees to hold in trust and be administered or managed to carry out the foundation's exempt purposes in accordance with the terms of the trust agreement. The trust agreement generally may not be amended, but can be drawn broadly enough to give the trustees flexibility in operating the foundation. Other than the Internal Revenue Service and state filings described above, a private foundation in the form of a trust is not required to make regular

filings with any governmental agency and the trustees are not required to appoint and formally authorize delegates to carry out the operations of the foundation.

A private foundation in corporate form is established by filing a certificate of incorporation with the Secretary of State of the state of incorporation and holding an organizational meeting at which the corporation's by-laws are adopted and the members (the non-profit corporation equivalent of shareholders) are named. In the case of an artist's foundation, the members would be the artist and any other person he or she wanted to share in the ultimate control of the foundation. After the organizational meeting, the members would hold their first meeting at which they elect the directors who are to manage the foundation, and the directors would then hold their first meeting at which they elect the officers who are to carry out the day-to-day operations of the foundation and formally authorize the officers to undertake certain activities necessary to carry out the foundation's exempt functions. Elections of directors and officers must take place annually thereafter. Under the corporation laws of most states, elections of officers and directors and board authorization of the officers' activities may be accomplished by unanimous written consent of the members or directors in lieu of holding meetings. The certificate of incorporation and by-laws may be amended by the members at any time (provided that the amended certificate of incorporation is filed with the Secretary of State). Annual filings and corporate franchise taxes may be required to be paid to the Secretary of State.

In general, the corporate form limits liability. It is more familiar to banks and businesses, while the trust may be less formal to operate. The directors of a corporation are generally judged under the business-judgment rule while trustees of a trust are held to higher fiduciary standards. The artist's legal advisor can explain in greater detail the differences between a corporation and a trust.

THE DOROTHY DEHNER FOUNDATION FOR THE VISUAL ARTS

In her will, Dorothy Dehner stipulated that all artworks of her own creation and 10% of her residuary estate should be given to a charitable non-profit foundation or organization. She requested that the Dorothy Dehner Foundation for the Visual Arts be formed, and named Joan Marter, art historian who had written a catalog and organized an exhibition of Dehner's as a director (before her death in 1994, Dehner had spoken to Marter about the ultimate disposition of her work, and Marter assured her of my willingness to serve as an "adviser").

The Foundation was organized in 1995, to support education in the visual arts with approximately one hundred ten thousand dollars and Dehner's artwork. Dehner's works have been donated to university art galleries and museums. Occasionally the Foundation has also supported an art historical publication which relates to Dehner and her contemporaries. Three directors or officers were named in Dehner's will, and additional directors have been selected by a vote of the original directors. Currently five directors serve, and were chosen because of their relationship to the artist and their positions as qualified advisers. All directors, including art historians, an artist, and a museum director, knew Dorothy Dehner personally. The Foundation's operating budget of forty thousand dollars annually is drawn from the funds transferred from the residuary estate, and the proceeds from sales of Dehner's works through commercial galleries. Monthly expenses include rental on storage facilities. Other charges are for conservation of works, purchase of photographs, and framing expenses as works are prepared for exhibition. The Foundation also gives grants totaling five thousand dollars annually.

Marter, who serves as the President of the Foundation, organized an exhibition entitled "Women in Abstract Expression" which included Dehner and arranged for the writing of a *catalogue raisonné* of Dehner's sculpture by a Yale University art historian. Marter has not received any pay for her services to the Foundation. Marter was also named as a successor executor and became executor on the resignation of the executor.

MAPPLETHORPE²¹

The director of the Mapplethorpe Foundation says that approximately two years before his death, Mapplethorpe and his lawyers established the general guidelines for the foundation, including areas he did not want to fund. Because he had assembled a trusted group of lawyers and friends, Mapplethorpe did not deal with the specifics beyond this level.

Mapplethorpe's dealer remains involved in most decisions concerning the sale and exhibition of work. The foundation director oversees all aspects of storing and preserving the archives, the bulk of which consists of unsigned black and white photographs stored in archival boxes at the foundation. Negatives have been put in notebooks which are kept in bank vaults located in a basement storage room in the foundation's office building. The framed work, as well as any unframed work signed by the artist, has been put in other art storage facilities. An in-depth inventory has been done to assess the condition of each work. There are three full-time staff members and three part-time employees, and the foundation sees no need for additional staffing.

It is unfortunate that this kind of well-run organization is not feasible for artists without assets of at least \$2–3 million. Tina Summerlin, the foundation's director, recommends the following for dealing with the large number of less financially successful artists:

I would set up a volunteer advisory group of dealers, art consultants, auction experts and museum curators to look over a choice group of work from each artist involved, and then establish a specific level for each artist on a given scale of some sort, based on each artist's history. I would then work on a system of selling or dispersing work, trying to find as many diverse outlets as possible for each level of artist.

²¹ Alliance for the Arts, *The Report of the Estate Project for Artists with Aids* (1992) p. 30.

THE POLLOCK-KRASNER FOUNDATION

Ronald D. Spencer, Esq., Legal Counsel to the Foundation

The Pollock-Krasner Foundation was created in 1985 by the Trustees of Lee Krasner, the widow of Jackson Pollock, pursuant to the instructions contained in her will. The purpose of the Foundation, as set forth in the will, is to furnish financial assistance to artists deemed by the Board of Directors to be “needy and worthy.” Krasner’s two Trustees, Gerald Dickler, a prominent art lawyer and longtime friend, and Eugene V. Thaw, a distinguished art expert, private art dealer and co-author of the four-volume *catalogue raisonné* of Pollock’s work, were appointed by her will as the Directors of the Foundation.

The Foundation was established as a Delaware not-for-profit corporation and its office is located at 863 Park Avenue in New York City. The Certificate of Incorporation of the Foundation gives Eugene V. Thaw the sole authority for “marshalling, preserving, sale, loan, turning to account and distribution” of all art owned by the Foundation. Gerald Dickler was given sole authority for the administration of all other Foundation matters, including programs, staffing, and investments.

Under her will, Lee Krasner gifted the bulk of her estate, consisting of financial assets and art created by her and her husband, to the Foundation. Since the Foundation’s creation the Foundation has sold much of this art, utilizing the sales proceeds to fund its grants to artists. In its twelve years of operation, the Foundation has made grants of almost twenty million dollars to more than 1,500 artists in sixty-three countries.

The staff of the Foundation reviews applications and conducts financial investigations to determine the financial circumstances of the applicants. An anonymous and distinguished Committee of Selection meets regularly to review the slides presented by artist applicants to determine artistic merit.

The success of the Foundation is due in large part to its simplicity of purpose—providing grants to individual working visual artists of established ability who demonstrate financial need. Its success is also a function

of its simplicity of governance and management—two Directors, each expert in their respective fields, art and law, advised by a Committee of Selection and aided by a small and efficient staff overseen by an Executive Vice President, Charles C. Bergman, an expert in the administration of foundations.

THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC.

Peter McN. Gates, Esq., Counsel to the Warhol Foundation

Andy Warhol died on February 22, 1987. His will left substantially all of his estate to a charitable foundation to be formed by his executor having as its purpose “the advancement of the visual arts.” The Andy Warhol Foundation for the Visual Arts, Inc., was established on May 1, 1987. Pursuant to the will, the initial directors of the Foundation were Andy Warhol’s brother and two of the artist’s closest associates. The Board is now a fully independent body which includes museum professionals and others active in the art world, as well as businessmen and financial professionals. Archibald Gillies has been President of the Foundation since 1990.

Andy Warhol left an extraordinary estate. In addition to many other assets (including “collectibles” which sold at Sotheby’s for over \$25 million) his estate included over 100,000 of his own paintings, drawings, prints, and photographs, over 100 films he created, 4,000 hours of video footage, and hundreds of boxes of stored archival material. All of these assets had to be analyzed, inventoried, preserved, stored, insured, and appraised, an immensely complex, time-consuming, and costly project, which continues to this day. A major task has been, and continues to be, the conversion of the Foundation’s Warhol art to cash as rapidly as the marketplace permits. In effect, the Foundation has had to operate a major art business. This activity will continue for many more years.

The Estate and the Foundation have also had to devote substantial time and resources to defending, successfully, against unfounded claims and lawsuits, including a claim by the attorney hired by the Estate for legal fees of \$16 million (the final award was a fraction of the claim).

While dealing with these problems, the Foundation has actively pursued its purpose of advancing the visual arts. It joined in creating the Andy Warhol Museum in Pittsburgh, donating over 3,000 of the finest works in the collection, and the film and video collection, and providing cash support, has placed over 100 major works in 24 museums through a program of deeply discounted sales, and has made over 800 cash grants totaling more than \$24 million.

COPYRIGHT AND OTHER INTELLECTUAL PROPERTY ISSUES IN ESTATE PLANNING AND ADMINISTRATION FOR THE VISUAL ARTIST

Barbara Hoffman, Esq.²²

One of the most valuable assets of the visual artist and his or her estate—second only to the artist's artistic property—may be the right to control and manage the exploitation of the rights which are incorporated under the rubric of “intellectual property.” For the visual artist, the most important intellectual property right is copyright.²³

Control of the reproduction of their copyrighted images has long been a concern of photographers and their estates.²⁴ The traditional art reproduction market for the creator of original works of fine art was posters, postcards, the occasional T-shirt and art books. Recently, the growth of the multimedia industry, with its voracious appetite for the visual image, the licensing of works of fine art in film and television and the explosion of art image merchandising—Picasso watches and towels, Calder umbrellas, puzzles of well-known images, for example, Ringgold's Tar beach, Norman Rockwell suspenders²⁵—increases the importance of careful management of copyright by the visual artist during his or her lifetime and in the planning of his or her estate for both economic and artist rights/reputational reasons.

²² ©Barbara Hoffman 1998

²³ Trademark law offers less protection to the visual artist who creates unique works of authorship, because of the standard for infringement—consumer confusion—and the need in some cases to prove secondary meaning. For example, Andy Warhol's estate could not prevail on a trademark infringement claim against the publisher of a calendar that reproduced Warhol's works when Warhol had sold works without retaining copyrights and the calendar disclaimed endorsement by the Warhol estate. Artists who sell work in volume as in the form of posters or calendars are more likely to receive trademark protection.

²⁴ For example, the Estate of Dianne Arbus is well known for its review and control over the content of text which accompanies a license to use an image of her work. Generally in the visual arts, art historians are all too familiar with the concept of the “widow censor.”

²⁵ The Norman Rockwell Museum in Massachusetts proposes 1,200 different items, from mugs to trouser suspenders—incorporating images in whole or in part from Rockwell's prints and paintings.

This chapter explores the basic considerations that should be taken into account with respect to the creation, exploitation and preservation of artistic and intellectual property with special concern to copyright issues in the planning and administration of the visual artist's estate. Also included are sample clauses to incorporate in estate planning documents dealing with the disposition and control of artistic and intellectual property.

Copyright Basics²⁶

“The source of Congress’ power to enact copyright laws is Article I, cl. 8, of the Constitution. According to this provision, ‘Congress shall have Power...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors...the exclusive Right to their respective Writings.’”

To be protected under current U.S. copyright law, a work “must be an original work of authorship fixed in a tangible medium of expression.”²⁷ The Copyright Act imposes no requirement of aesthetic merit as a condition of protection. However, a work must have “at least some minimal degree of creativity.” Works of visual art—a painting, a photograph, a sculpture—are protected by copyright. Thus, the simple act of creating an original work in a “fixed” medium including the electronic, gives the author copyright in the work. Under Section 106 of the Copyright Act of 1976 (the “Act”), the copyright owner has the exclusive right to (1) reproduce the work in copies or phonorecords, (2) prepare derivative works based on the copyrighted work (which includes the right to recast, transform or modify), (3) distribute copies by sale or other ownership transfer, or to rent, lease, or lend copies, (4) perform the work publicly, (5) display the work publicly. For certain one-of-a-kind visual works of art

²⁶ More detailed copyright information as well as a copyright registration form VA is found in the Appendix.

²⁷ The current U.S. law known as the Copyright Act of 1976 became effective on January 1, 1978. All works of art created before that date are governed by the Copyright Act of 1909.

and numbered limited signed editions of two hundred copies, authors (artists) have the right to claim authorship (attribution) and prevent the use of their names in conjunction with certain modifications of the works and the right to prevent alteration of their work (integrity). (Section 106A.) The latter two rights—known as *droit moral* or moral rights sourced, in the protection of the author's personality, receive limited protection in the U.S. scheme of copyright based on the author's economic rights. France, Germany, Italy, and Japan are strong moral rights countries. For example, under French law, after the death of an artist, an heir or designee by will is given authority to assert the artist's "moral rights," including the right to authenticate which works are done by the artist. The holder of the moral right may act to prevent a reproduction of particularly poor quality which distorts the work; or a reproduction of good quality which is marketed in a context injurious to the nature of the work or the artist's personality.

Ownership of the bundle of intangible rights comprising copyright is separate and distinct from ownership in the work of art. Under current law, absent a writing expressly conveying copyright, the sale, gift, or transfer of the original work of art does not transfer the copyright in the work of art. Under the 1976 Act, copyright interests can be transferred *inter vivos* or at death and in whole or in part.²⁸ For example, a copyright owner can transfer all the rights or one or more of the exclusive rights or a full or undivided interest, or a divided interest in the copyright. A copyright owner may divide copyright in the work in a number of ways: by the type of use and/or media, by an exclusive license or non-exclusive license, by territory or duration, to name only a few possibilities.

²⁸ Under the 1976 Act, as a result of poor drafting, it is arguable that *inter vivos* transfers of copyright are treated differently from testamentary dispositions. Under section 201(d), the latter subject is state law will and trust formalities. Section 201(d)(2) suggests that testamentary transfers are restricted to indivisibility. Paul Goldstein, *Copyright*, 2 ed., Little Brown, 1996, §4.4.2., p. 4:56.

At least since the passage of the current law, it is no longer customary for a museum when purchasing an original work of art from an artist to require an artist to convey copyright to the work of art as a condition of the purchase.²⁹ Most museums request the artist convey to the museum a non-exclusive license to use the artwork for standard museum practices. A non-exclusive license is not a transfer of copyright ownership, but a transfer of a contract right; thus, the museum can not bring a copyright infringement action. A form used by The Museum of Modern Art is enclosed at the end of this section. Both non-exclusive and exclusive licenses are usually negotiated to reflect the artistic, economic, income, gift and estate tax interests of the artist and the museum.

The 1976 Copyright Act vests initial ownership of copyright in the creator of the work unless it is a work for hire. The 1909 Copyright Act prescribed a term of copyright measured by twenty-eight years from the date of the work's first publication; the copyright term could be renewed once for a second twenty-eight year term. Ownership of works created under the 1909 Act will be determined under the 1909 Act rather than the 1976 Act. The 1976 Copyright Act provides as a general rule that the term of copyright in a work created on or after January 1, 1978, begins with the work's creation and ends fifty years after the death of the work's author. The 1976 Act also extends the duration of any copyright that has in its renewal term or was registered for renewal between December 31, 1976 and December 31, 1977 to a term measured by seventy-five years from the date the copyright was originally secured.

²⁹ Under section 201(d)(1) of the Copyright Act, the author of a work may, as the initial owner of the copyright, transfer copyright by transferring in writing all rights in the work. "All rights, in or to the copyright in the work." Caveat: It is not clear that the testamentary phrase "I give and bequeath all right, title and interest in my Self Portrait" without mention of copyright transfers the copyright. Testamentary as well as intervivos transfers of copyright should explicitly state that copyright is being conveyed. The holder of an exclusive license is treated like any other owner of a copyright interest, and may bring infringement actions.

Artistic Property, Copyright and the Artist's Estate Plan

Copyright and other intellectual property rights should be specifically discussed and addressed in any visual artist's estate plan. Although there is no one correct solution, unified management of both artistic and intellectual property may in certain situations be a desirable course of action.

If an artist dies intestate or if both artistic property and copyright pass as part of the artist's residuary estate to more than one beneficiary, there may be difficulty in agreeing on a single course of action for the artist's work; particularly if there is discord among the beneficiaries. This is similarly true for copyright, where if copyright passed to multiple beneficiaries under the artist's will, or by the laws of intestacy, the beneficiaries would each own the copyright as joint owners either as tenants in common, joint tenants, or community property depending upon applicable state law.³⁰

Copyright Law and Its Intersection with the Income, Gift, and Estate Tax³¹

Sections 170(f), 2055(e)(2), and 2522(c)(2) of the present code disallow a charitable deduction for income, estate, or gift tax purposes, respectively, where the donor transfers an interest in property to a charity (e.g., a remainder) while also either retaining an interest in that property (e.g., an income interest) or transferring an interest in that property to a non-charity for less than full and adequate consideration subject to certain limited exceptions.³²

³⁰ A discussion of the rules of copyright joint ownership is beyond the scope of this paper. Generally both the rights and liabilities of "co-owners" under both the 1909 and 1976 Act parallel that of real property tenants in common. The rules, however, may be varied by contract.

³¹ This is an extremely complex and intricate area. A full discussion of the income, gift, and estate tax consequences of transactions in artistic and intellectual property, including the different consequences of gift, sale, license, and non-exclusive licenses is beyond the scope of this article, but should not be overlooked by the estate planner or administrator of the estate.

The restrictions on deductibility of split interest transfers to charity were added by the Tax Reform Act of 1969 to insure that there was a reasonable correlation between the amount of the charitable deduction and the value of the property received by charity. The rules provided by the Congress to accomplish this result disallowed the charitable deduction if interests in the same property were transferred for both charitable and non-charitable purposes unless the charitable interest was in certain specified forms.

In 1981, as a result of the passage of the Copyright Act of 1976, and the changes in the copyright law which treat the tangible object (i.e., the original artwork) and the intangible copyright as separate items of property, Congress amended the gift and estate tax laws. The Joint Committee Report stated “these two items of property typically are not transferred together. Moreover, the use or exploitation of the artwork or copyright generally does not affect the value of the other property. As a result, it will be possible to determine the value of the tangible object (i.e., the original artwork) apart from its related copyright interest by reference to values of similar objects which are sold without their copyright interest. Accordingly, the value of the artwork which is used to determine the amount of the charitable deduction should provide a high degree of correlation with the value of property received by charity. See 17 U.S.C. @ 102.”

The Congress concluded, therefore, that the disallowance rule for transfers of split interests in property should not apply to a work of art and the related copyright in cases where the work of art but not the copyright is transferred to charity and where there are restrictions to insure that the public will benefit from the transfer. However, the Congress believed that this rule should apply only for estate and gift tax purposes and not for income tax purposes.

³² Exceptions to this general rule are provided for: (1) remainder interests in charitable remainder annuity trusts, charitable remainder unitrusts, pooled income funds, farms, and personal residences; (2) present interests in the form of guaranteed annuity or a fixed percentage of the annual value of the property; (3) an undivided portion of the donor's entire interest in the property; and (4) a qualified conservation easement.

The Joint Committee Report then stated:

“Thus, the provisions of the Act allow gifts and bequests of works of art for the benefit of the general public without imposition of tax, but do not provide the unnecessary tax incentive that could occur if the provision were extended to the income tax.”

Thus, currently, if a donor or decedent makes a qualified contribution of a copyrightable work of art to a qualified organization, the work of art and its copyright are treated as separate properties for purposes of the estate and gift tax charitable deductions. Thus, a charitable deduction generally is allowable for the transfer to charity of a work of art, whether or not the copyright itself is simultaneously transferred to the charitable organization if the use of the work of art by the charitable organization is related to the purpose and function constituting its basis for exemption. If the artist bequeaths a sculpture to the museum without conveying the copyright on condition that the work be exhibited as part of its permanent collection, he or she receives the deduction.³³ If the artist instead bequeaths the artwork without the copyright to the Buddhist Center Hospital, the artist will not get the deduction, unless the artist can establish a related use.

Under the income tax regulations, an artwork and its copyright are not treated as two distinct properties, as they are under Federal copyright law, and for estate and gift tax purposes. Thus, the gift of an artwork without its copyright to a museum does not qualify for a charitable deduction. The failure to qualify for a charitable deduction results from treatment of contributions of artwork without the copyright as gifts of a partial interest. Generally, unless a contribution falls within one of the limited statutory exceptions to the partial interest rules, only gifts of complete interests will entitle the donor to a deduction under Section 170. For example, a deduction is not allowable for the value of an immediate and perpetual gift not in trust of an interest in original historic

³³ Most museums do not like to accept restricted gifts. General museum practices are at variance, therefore, with the restrictions for deductibility imposed by the Federal gift and estate tax laws.

□ motion picture films to a charitable organization where the donor retains the exclusive right to make reproductions of such films and to exploit such reproductions commercially. Regs. Sections 20.2055-2(e)(1)(ii), 25.2522(c)-3(c)(1)(ii); Sections 2055(e)(4), 2522(c)(3). Compare Regs. Section 1.170A-7(b)(1)(i) which addresses the partial interest rules.

Regulation β 20.2055-2(e)(2) provides two examples:

Example (1). A, an artist, died in 1983. A work of art created by A and the copyright interest in that work of art were included in A's estate. Under the terms of A's will, the work of art is transferred to X's charity, the only charitable beneficiary under A's will. X has no suitable use for the work of art and sells it. It is determined under the rules of β 1.170A-4(b)(3) that the property is put to an unrelated use by X charity. Therefore, the rule of paragraph (e)(1)(ii)(a), which treats works of art and their copyrights as separate properties, does not apply because the transfer of the work of art to X is not a qualified contribution. To determine whether paragraph (e)(1)(i) of this section applies to disallow a deduction under section 2055, it must be determined which interests are treated as passing to X under local law.

(i) If under local law A's will is treated as fully transferring both the work of art and the copyright interest to X, then paragraph (e)(1)(i) of this section does not apply to disallow a deduction under section 2055 for the value of the work of art and the copyright interest.

(ii) If under local law A's will is treated as transferring only the work of art to X, and the copyright interest is treated as part of the residue of the estate, no deduction is allowable under section 2055 to A's estate for the value of the work of art because the transfer of the work of art is not a qualified contribution and paragraph (e)(1)(i) of this section applies to disallow the deduction.

Example (2). B, a collector of art, purchased a work of art from an artist who retained the copyright interest. B died in 1983. Under the terms of B's will the work of art is given to Y charity. Since B did not

own the copyright interest, paragraph (e)(1)(i) of this section does not apply to disallow a deduction under section 2055 for the value of the work of art, regardless of whether or not the contribution is a qualified contribution under paragraph (e)(1)(ii) (c) of this section.

From a purely tax point of view, the artist is faced with the unenviable position should he or she decide to make a lifetime gift of a work of art to a museum—of being denied an income tax deduction unless the artist donates the copyright in the work of art along with the work of art—and then his or her deduction will only be equal to the cost of materials.

Will Bumping

Estate law and copyright law collide in another area—what has been called “will bumping.” The controlling statute is section 17 U.S.C. 304(a) of the Copyright Law which establishes priorities with regard to the right to renew the copyright and thus ownership of the copyright during the renewal term. To the extent that an artist’s assets include copyright interests, including renewal interests, the artist’s testamentary freedom may be restricted. The problem only exists for works of art created between 1970 and 1978. A full discussion of the potential for conflict and strategy or steps an intellectual property lawyer or estate planner can take to deal with it are discussed fully in an excellent article: Francis M. Nevis, Jr., “The Magic Kingdom of Will Bumping,” 35 *Journal of the Copyright Society of the U.S.A.*, 2, 77, 110 (1988). While works created after January 1, 1978 will not include a renewal term and are not subject to will bumping, certain restrictions on the artist’s freedom of transfer are created by Section 203 which gives authors and their statutory successors the nonwaivable right to terminate copyright grants after the lapse of a prescribed period. Section 203 does not apply, however, to testamentary grants.

Valuation of Copyright and Other Intellectual Property for Estate Tax Purposes

Copyright and other intellectual property interests are included in the gross estate of an artist. Although as with the tangible property, these intangible rights are difficult to measure, in some cases, they may be a significant wealth transfer to the estate, with a resulting tax liability. Cost, selling price, sales of comparable properties, cost of reproduction and expert opinion may all be relevant in valuation. A court has recognized that an artist/testator may decrease the value of intellectual property in his or her estate by devising an estate plan to transform those assets prior to distribution. Caveat: The restrictions must be imposed by the artist testator, not the beneficiaries who receive the property.³⁴

Collecting Societies

Collecting societies administer the copyrights and intellectual property rights of visual artists and photographers in much the same way as ASCAP and BMI. Two visual artists societies are VAGA, located at 350 Fifth Avenue, Suite 2820, New York, NY 10118, (212) 736-6666 and Artists Rights Society, 536 Broadway, 5th Floor, New York, NY 10012, (212) 420-9160. These societies also represent the interests of European collecting societies in the U.S. The current use of collecting societies in the fine arts is less widespread than in the photography or music industry. Many visual artists currently elect to monitor and manage their own intellectual property. For example, the Picasso estate, which was formerly with A.R.S., now manages its own intellectual property. In the photography field there has been formed a subsidiary of the ASMP for the purpose of

³⁴ In dictum, the court explained that the estate tax is a “tax on the privilege of passing on property, not a tax on the privilege of receiving property.” Therefore, as the court stated:

The valuation should...take into account transformations brought about by those aspects of the estate plan which go into effect logically prior to the distribution of property in the gross estate to the beneficiaries. Thus, for example, if a public figure ordered his executor to shred and burn his papers, and then to turn the ashes over to a newspaper, the value to be counted would be the value of the ashes, rather than the papers.

facilitating the electronic licensing of rights and photographs. The basic purpose is to have 5,000 of the world's best photographers with millions of images accessible through a single transaction through this subsidiary.

Some Thoughts on a Checklist for Copyright and Intellectual Property Management in Estate Planning and Administration

1. Inventory copyright interests and other intellectual property assets; record all assignments, exclusive licenses, non-exclusive licenses.
2. Create art image and likeness usage checklist for prospective licensees/usages.
3. Plan for unified management of artistic and intellectual property and identify future owners of artistic property, secondary materials like journals, photographs, letters and copyright interests in both categories.
4. Consider various options for copyright licensing management.
5. Consider moral rights (statutory and contract).
6. Create documents for foundation, trust, basic licensing forms, artist/gallery consignment agreements.
7. Seek out and enter into agreements with art critics, art historians or galleries for preparation of *catalogue raisonné* of all or part of a body of work.
8. Provide testamentary instructions and guidance concerning copyright exploitation of works of art in the estate.
9. Consider limiting value in the estate plan by imposing restrictions on the use of intellectual property.

WILL CLAUSES FOR THE VISUAL ARTIST, WITH SPECIFIC EMPHASIS ON CENTRALIZED MANAGEMENT OF ARTISTIC PROPERTY AND COPYRIGHT INTERESTS³⁵

Barbara Hoffman, Esq.

Caveat: The following will clauses are illustrative only and should not be used without an understanding of the relationship of a clause to the overall estate plan.

Clause Devising Personal Property of the Artist to his or her own Charitable Foundation.

An artist may wish to contribute secondary materials to his or her private foundation or an art trust. The foundation or trust can be created by the artist prior to death or by testamentary directive. Note that separate documents, apart from the will, are necessary to create a not for profit foundation or trust which are governed by state law. The exempt status of the organization is governed by Federal law.

_____ I give, devise and bequeath my tangible personal property other than works of art, as follows:

A.To the Foundation:

- 1. All of my business and personal papers, including, without limitation, letters written to or by me, dairies, journals, memos and all other writings of every nature and description, together with all copyrights thereon and the rights of publication thereto.**
- 2. All photographs, polaroids, video tapes, films, video and audio cassettes made by me or dealing with me and/or my work.**

³⁵ © Barbara Hoffman 1998

3. All catalogues, books, magazines and other writings dealing with me and/or my work or made by me, together with all of those items of memorabilia, clothing, furniture and objects which were painted on or decorated by me and which my Executors deem, in their sole and absolute discretion, to be of significant value or interest.

Residuary Clause giving art and copyright interests to Artist's foundation with clauses creating the Foundation³⁶

_____ I give, devise and bequeath all of the rest, residue and remainder of my estate, of whatsoever kind and nature, whether real or personal and wheresoever situated, which I may own or to which I may be entitled at the time of my death, including, without limitation, works of art created or owned by me and not otherwise bequeathed pursuant to any other provisions of this Will, together with any copyrights relating thereto, any other rights of any kind, including but not limited to trademarks and rights of publicity, lapsed legacies and all property over which I may have any power of appointment, to the Foundation, a non-profit, charitable and educational foundation created or which shall be created under the laws of the State of New York, provided that such organization or institution shall be an organization described in both Section 170(c) and 2055(a) of the Internal Revenue Code of 1986, as amended, or any corresponding section of any tax law in the United States from time to time in effect. The initial Board of Directors of the Foundation shall consist of _____, _____, _____ and _____. I further direct that _____ shall also serve as Executive Director of the Foundation, at a fair and appropriate salary, to supervise the work and purposes of the Foundation.

³⁶ See chapter on Artists' Foundations and the importance of funding the Foundation or Trust.

The purposes of the Foundation shall include, but shall not be limited to, the following objects and purposes:

(1) To distribute property and grants to institutions, such as museums or schools which will exhibit and/or make artworks created by me available for viewing and study by art historical scholars and/or by the general public;

(2) To perpetuate the understanding of works created by me, through publication of reproductions of my writings, drawings, paintings or other works in the form of books, films, or video tapes, as the Foundation sees fit.

I hereby direct that my Foundation distribute a portion of any earned income which it generates to the following charitable organizations: . . . The Foundation shall have complete discretion to decide if, when and how often any distributions may be made. The Foundation shall further reserve the right to ensure that the use of any funds is being properly handled and may request proof of such usage.

I enjoin the Board of Directors of the Foundation to remain true to the ideals and charitable intentions that I have followed and which I have shared with them.³⁷

Clause Devising Artist's Personal Property to Charitable Institution, other than Artist's Foundation.

Caution: It is critical that an artist testator specify that the bequest to a charitable organization is to be put to a designated charitable purpose if the copyright work is not conveyed with the artwork.

³⁷ More specific language and guidance might be appropriate to guide the Board of Directors.

_____ I give all photographs, prints, negatives and other photographic material owned by me at my death, not otherwise specifically bequeathed herein, to such charitable organizations or institutions as shall be selected by my Executor provided that each such organization or institution shall be an organization described in both Section 170(c) and 2055(a) of the Internal Revenue Code of 1954, as amended (or any corresponding section of any tax laws of the United States from time to time in effect) and provided that such charitable institutions are willing to comply with the conditions and restrictions which my executor may impose including the manner and frequency of exhibition of these materials and their availability for study and research.³⁸

Clause Terminating Gallery and Centralizing Management of Artistic and Intellectual Property

_____ A.I direct my Executors to gather together and inventory all of the works of art created and/or owned by me at the time of my death. To the extent possible and where not barred by contracts and/or agreements then in effect, they shall take back for the benefit of my estate all such works out on consignment to art dealers or galleries or on loan to museums, organizations and individuals and all maquettes and models that may be stored or held at fabricators, publishers and galleries.

This direction is intended to include all works of art created by me which were on consignment for sale or otherwise in the hands of various art dealers and galleries, including my primary art dealer and including all works which have not then been sold or, if sold, have not yet been paid for and payment is past due.

³⁸ The Artist, while alive, should attempt to identify the museum or university who will receive his or her personal papers and other property. Many museums will not accept bequests of personal papers. An alternative should always be provided.

B.I direct my Executors and/or the Board of Directors of my Foundation to carry out any licensing and grant of reproduction rights of my artwork as they, in their sole discretion, may determine. It is my hope, however, that they will do so as they believe I would have done and in a way that will retain the original impact and integrity of the imagery.

Clause Providing that Executor Consult with Professional Advisor

If the testator wishes to appoint an executor or trustee who is not experienced in dealing with art or intellectual property as an asset, one option would be for the testator to provide in the will that the executor or trustee should consult with a professional dealer or agent when managing such assets. An example of language providing for this arrangement follows:

I direct my Executor [or Trustee] to consult with _____ prior to exercising any powers granted to my Executor [or Trustee] with respect to [describe the artistic property subject to this clause]. My Executor [or Trustee] shall not be liable to any person if my Executor [or Trustee] acts in reliance upon or in accordance with the advice of _____ in connection with the management of [describe artistic property].

Another option is to appoint the professional who is familiar with the art market, art and copyright, and intellectual property matters as an executor, co-executor or trustee and/or successor executor or trustee. In such case it is necessary to recognize and explicitly name conflict of interest concerns.

Clause Waiving Conflict of Interest

I have appointed as fiduciaries persons with whom I presently have business associations. _____, my designated executor and trustee, has served me as my attorney for more than ten (10) years and has served with great distinction. She is far more familiar than any other individual with my business activities and with my wishes with respect to the disposition of works of art which I have created as well as with respect to works created by others which I have collected. She is a specialist in the law of intellectual and artistic properties as well and a close and trusted personal friend.

I recognize that, in their fiduciary capacities, my fiduciaries may transact business with entities in which they have a personal interest. I have complete confidence in the integrity of the fiduciaries I have designated in this will and authorize them as fiduciaries to transact any business they deem appropriate with themselves and/or with any business entity with which they may be associated, notwithstanding any actual or potential conflicts of interest which might arise. In the event that any person acting as a fiduciary hereunder shall enter into any transaction in which there are or could be actual or potential conflicts of interest, she shall not be required to seek court approval and shall be under no greater duty of care and no greater constraint in any respect than she would have been if she had engaged in a similar transaction at arm's length with any unrelated party.

Clause Giving Trustee Power to Manage Copyright Property

Normally, the documents creating the inter vivos or testamentary trust enumerate the powers to be given to the trustee. If a copyright is to be included in a trust, the following language may be included in the list of powers given to the testamentary trustee:

To copyright or renew any copyright of any copyrightable work; to exploit in such manner as the Trustee shall determine, in the sole discretion of the Trustee, any such copyright and to authorize the use of such part or all of any copyrightable work, or any rights arising by any reason of any copyright, in such manner as the Trustee, in the Trustee's sole discretion, shall determine.

DEED OF PARTIAL GIFT TO THE NATIONAL GALLERY OF ART

On this the _____ day of _____, 199__, I, _____, hereby give to the Trustees of the National Gallery of Art ("the Gallery") absolute and unconditional ownership of an undivided _____ percent of my right, title and interest in an original sculpture created by me ("the work") together with all copyright and associated rights which I have therein. The Gallery shall be entitled to possession of the work for a total of _____ days out of each calendar year. The undersigned shall be entitled to possession of the work for the balance of each calendar year.

I wish that the work be identified in the permanent records of the Gallery, and when on exhibition, as a partial and promised gift of _____.

I hereby promise to give the balance of my remaining _____ percent right, title and interest in the work to the Gallery not later than by bequest in my last will and testament. Until then, while the work is in my possession, I will make adequate provision for its care and security and will keep the Gallery apprised of its location. The Gallery will have the right to inspect the work periodically, at mutually agreeable times, to check on its condition.

It is my understanding that the Gallery's insurance will cover the fraction of the work owned by the Gallery while the work is in my possession and will cover the entire value of the work while the work is at the Gallery and in transit to and from the Gallery.

Before agreeing to lend the work or authorize its reproduction, I agree to notify the Gallery of my intentions and to obtain its concurrence as co-owner of the work.

DATE: _____ DONOR: _____

Address of Donor:

Telephone:

I certify that a deed of gift and the subject thereof were physically present in the National Gallery of Art prior to the meeting of the Trustees of the National Gallery of Art on _____ at which meeting the Trustees accepted the gift as described above.

Secretary

NON-EXCLUSIVE LICENSE³⁹

I, _____, the undersigned, being the owner of the copyright in and to _____ (describe the artwork),⁴⁰ created by me, and desiring to further the purposes of The Museum of Modern Art, New York, do hereby, by way of gift, authorize The Museum of Modern Art to reproduce copies of said work, to distribute reproductions of said work to the public, to transmit⁴¹ or otherwise communicate a display of said work to a place open to the public or to the public by means of any device or process (examples include but are not limited to slides, film and television), whether the members of the public capable of receiving the display receive it in the same place or in separate places and at the same time or at different times, and to authorize others to do the same, **BUT ONLY ON CONDITION THAT all copies of said work bear a copyright notice as prescribed by the Copyright Law of the United States.**

This non-exclusive license, which does not transfer ownership of my copyright to the Museum of Modern Art, shall endure for the entire term of the copyright in and to said work and shall survive all assignments of copyright.

Date

Signature of Artist

³⁹ The income, gift, and estate tax implications of this license are beyond the scope of this chapter.

⁴⁰ Different restrictions may be appropriate to negotiate for different media.

⁴¹ New licenses are currently being developed for licensing of artwork by the artist creator in the new media and by museums in connection with the licensing of their existing collections.

CONFLICT OF INTEREST ISSUES IN ESTATE PLANNING FOR VISUAL ARTISTS

Erik J. Stapper, Esq.

In considering the appointment of a fiduciary, whether executor or trustee, and the selection of a qualified attorney, the artist must be cognizant of the many opportunities for conflicts of interest. The most obvious conflict situation for an artist arises when the artist selects his or her dealer or publisher as one of the fiduciaries. The tension between earning commissions on the sale of artwork and planning for the long-term welfare of either the artist's survivors or the body of work left behind has led to litigation. Perhaps the most well-known example of self dealing and breach of fiduciary obligation is *Matter of Rothko*. "A fiduciary faced by a problem of conflict of interest should not use his dual position to deal for his own self-interest." The executors of Rothko's estate which included a director of the Marlborough gallery and an artist represented by the gallery agreed to sell paintings to Marlborough Gallery with a fifty-percent commission, unless the paintings were sold to or through other dealers, in which case the commission was to be forty percent. Several of the contract terms were questionable, including the inflated commission (paintings sold during Rothko's lifetime through Marlborough had earned only a ten-percent commission), interest-free installment payments over a twelve-year period, and the sale of so many paintings within a short period of time. Thus, the appointment of the dealer as the executor may have the unintended effect of preventing the person most familiar with marketing the artist's work from continuing to do so.

There are, however, many less obvious cases of conflict which can be easily overlooked. The following scenarios and the attached checklist are not meant to be all-inclusive. They are, however, intended to serve as reminders to the artist who begins to think about an estate plan that one or more individuals or institutions must take over when the artist's death or incapacity terminates a career and that those persons may have a conflict of interest in carrying out their fiduciary duties. A conflict can be waived after it has been fully disclosed. Moreover, if the scenarios or multiplicity of cautions here appear overwhelming, the artist must keep

in mind the costs and burdens on survivors, whoever they may be, if there is no estate plan (his or her estate goes to the family members specified by law).

1. Selection of spouse, non-marital partner or close friend

If the proposed fiduciary, whether spouse, non-marital partner or close friend, is also an artist, the appointment may have the effect of forcing that appointee to choose between pursuing his or her own artistic career and preserving and advancing the work of the deceased artist. Conversely, if the devoted spouse or acolyte is not an artist, the testator must consider whether there will be a significant financial burden placed on the fiduciary for which the estate's after-tax assets may not be sufficient. Consider for a moment the cost of storing, insuring or otherwise maintaining the body of artwork left behind. This burden will be very different, of course, if the artist is a miniaturist or a creator of giant sculptures.

2. Selection of other family members

The selection of one person as fiduciary may be more efficient than the naming of several persons because no time is lost to reach agreement between co-fiduciaries. In large or complicated estates, co-fiduciaries may be desired, particularly where each can perform well on her expertise in separate or specific tasks. To do so may create hurt feelings between the artist's surviving children or siblings. An even more difficult situation is created if there is a surviving spouse or non-marital partner who is not the parent of the child selected as fiduciary. This tension becomes extremely high when the child is forced to select assets that will make up the marital deduction property for a step-parent. For instance, who gets the artwork or other non-income producing assets and who receives the cash and securities? What will the survivor live on?

Even without remarriage family relations change as the result of intervening deaths. A fiduciary who could work well with the artist's surviving

siblings may not be effective when that sibling predeceases the artist so that the fiduciary must now deal with nieces and nephews or their spouses or their children.

3. Selection of attorney to prepare estate plan

In addition to being satisfied with the attorney's competence as an estate planner, the artist must find the fee arrangements acceptable.⁴² The question of fees should be raised at the earliest possible moment, for instance, in the telephone call making the initial appointment. Will that first visit result in a fee even if the attorney is not the one the artist uses for the estate plan? Will the fee be based only on time spent or is there a maximum? Is there a minimum? If the fee is a fixed amount how many drafts or rewrites are possible? What eventualities will change the fee estimate or fixed amount? What disbursements will be charged to the artist?

In addition to the estate planning fee now, the artist must find out on what fee basis the attorney or law firm will attend to the legal work needed to administer the estate. THERE IS NO REQUIREMENT THAT THE FIDUCIARY EMPLOY THE LAWYER WHO DRAFTED THE WILL. Therefore an agreement to reduce estate planning fees in exchange for being the estate's attorney restricts the executor's discretion and may lead to a difficult working relationship between them.

If a bank is appointed executor,⁴³ it is not unusual for the bank to use the drafter of the will as the estate attorney. If there are two executors each coexecutor can hire his or her own attorney, but the total fees cannot exceed the fee that would have been payable to one attorney. In the

⁴² The New York State Administrative Board of the Courts has approved a Statement of Client's Rights that must be posted conspicuously in lawyers' offices throughout New York beginning in 1998. [See Appendix A]

⁴³ It is every New York bank's practice to use the drafter of the will as the estate's attorney unless there are very unusual circumstances (making an error in the will is not such a circumstance).

two attorney case the lawyers must divide the work in a manner acceptable to both executors. For instance, one firm prepares the probate papers and collects or identifies the assets and the other firm prepares the estate tax returns and the estate's fiduciary income tax returns.

Will the bank in gratitude for receiving the will appointment agree to a higher legal fee than otherwise? Therefore the artist should discuss the question of billing for estate work with the attorney at the time the estate plan is made even though it is impossible to fix the post-mortem fee in advance. The purpose of the question is to find out on what basis the fee will be determined, for instance, a percentage of the estate, and if so, how is the estate valued for this purpose (probate estate v. Federal gross estate). If the fee is to be based on time charges the artist should ask for written confirmation of the current hourly rates so that the executor can verify that any subsequent increases merely cover inflation or other factors as well.

If a fixed fee is offered the artist must again find out what legal services are included in the fee and which items will be extra, for instance, the artist's final income tax returns. A fee that is based on a percentage of the estate's value creates a conflict between the beneficiaries' wish to keep a valuation low for estate tax purposes and the attorney seeing a fee increase from a higher valuation. This in turn raises a question about how an appraiser is selected since the appraiser's work product can increase legal fees.

4. Selection of attorney as fiduciary

At one time it was not unusual for some attorneys to advise their clients that only an attorney could be an executor (in some instances the advice was for two attorneys). This unethical practice is now contrary to a specific provision added in 1995 to the New York State Surrogate's Court Procedure Act. This new provision, Section 2307-a, requires a New York attorney to disclose to all estate planning clients that, subject to limited statutory exceptions, any person, including an attorney, is eligible to

serve as executor. Moreover, the attorney must disclose that any person, including an attorney, is entitled to receive a statutory commission. The disclosure must include an explanation that the statutory fee is payable in the absence of an agreement to the contrary. Finally, the attorney must disclose to the client that the attorney who is named as executor will also be entitled, or an affiliated attorney will be entitled, to receive just and reasonable compensation for legal services. This is usually referred to as “double dipping”.

Most importantly, the client must confirm the attorney’s disclosure in a signed writing. In the absence of the required written acknowledgment, the attorney’s commission as executor is limited to one-half the statutory amount.

To some extent the statutory disclosure is not sufficient because it does not require a disclosure of how the statutory commission is calculated in New York State.⁴⁴ The commission is based on the executor receiving and paying out all sums of money, including income earned during administration and on the commission paid out. Property that the executor never receives is not included in the computation even if part of the taxable estate. Examples include retirement benefits, life insurance, or joint accounts that go to named persons and not to the estate (in New York an “in trust for” designation avoids inclusion of a bank account in the “probate” estate as a result of a decision in Matter of Totten leading to these accounts usually being referred to as Totten Trusts). A joint account can become part of the probate estate if it can be established that the joint account was used for the convenience of the decedent and not as a “testamentary substitute.”

⁴⁴ The statutory amount now in effect is calculated as follows on commissionable assets:

5% of the first	\$ 100,000
4% of the next	200,000
3% of the next	700,000
2 1/2% of the next	4,000,000
2% of the excess over	5,000,000

Also not included in the commission calculation base is property specifically identified, or a fixed amount, that is given in the will to a named person, a “specific legacy,” and not as part of the balance of the estate referred to as the “residuary estate.” Real estate is not included in the calculation even if it is part of the residuary estate, unless the executor is required to take action regarding the property, such as removal of title problems (a “cloud on title”), evicting tenants or partitioning the property among several beneficiaries of the residuary estate.

Another problem in calculating commissions comes up when the artist is the beneficiary of a trust established by a predeceased spouse, parent, or grandparent and the artist can designate who is to receive the trust assets at the artist’s death, a “power of appointment.” Frequently such powers can be used to pay estate taxes. If the power merely directs payment of the tax to the government, that amount does not become part of the calculation base. If it is directed to be paid to the executor for the purpose of having the executor pay the estate tax, then the amount so received and paid out may be included in the calculation.

5. Selection of other professional advisers

The problem of selecting an appraiser who is independent of the attorney has already been mentioned. Conflicts can also arise between beneficiaries where gifts of artwork are equalized or supplemented by cash legacies. Similarly, if the will provides for an allocation of estate taxes, a conflict can be created among beneficiaries.

CONFLICT OF INTEREST CHECKLIST

Erik J. Stapper, Esq.

Conflicts to Be Considered in Making an Estate Plan

Selection of fiduciaries:

1. Naming of attorney and disclosure requirements. Is the New York mandated disclosure sufficient? Is it enough to state that fee is fixed by statute and is the same for whoever serves as fiduciary? No, Section 2307 of the Surrogate's Procedure Act specifically states that the statutory fees apply "absent an agreement to the contrary."
 - a. Coexecutors.
 - b. Statutory fee (e.) amount specified in will.
 - c. Calculation of commissions and exclusions from base, for instance, real estate and specific legacies unless work is required.
 - d. Power to retain experts and the source of their fees. Do they reduce commissions or are they an additional charge?
 - e. How to pay for the estate plan. Is the will appointment intended to compensate the planner for the planning and other legal services?
2. Naming of unrelated professional such as bank, accountant, financial advisor, business associates (curator).
 - a. Since the designated fiduciary must eventually approve the legal fees for administration of the estate, is there a relationship between estate planner and designated fiduciary that may lead to approval of unwarranted fees?

b. Planner's estate plan may have the effect of minimizing or maximizing the executor's commission through use or non-use of specific legacies, a decision that can affect fiduciary's attitude toward legal fee to be approved.

3. Naming of family member.

a. Effect on family relations when only one sibling is named to gain efficiency.

b. Inefficiency of administration when naming multiple executors.

c. Relationship between surviving spouse and stepchild fiduciary especially when funding marital deduction.

d. Relationship between fiduciary and heirs of predeceased sibling.

e. Relationship between heirs and fiduciary who is sibling of the deceased.

f. Discretionary selection by fiduciary of tangible personal property to satisfy specific legacy.

g. Problems are magnified for estate of visual artist who leaves behind a collection of artwork because of valuation problems and sentimental attachments; order of selection.

h. Listing of these problems may discourage decision making.

i. Non-traditional family.

Some Potential Conflicts in Administering the Estate

1. Selection of counsel and fixing of legal fees.
 - a. Does not have to be the drafter of the will.
 - b. Percentage of estate
 - i. Probate estate
 - ii. Federal gross estate
 - iii. Valuation
 - c. Time charges and disclosure of hourly rates.
 - d. Fixed fee.
 - e. Description of services that are included in a fee agreement and what is additional.
2. Selection of appraiser
 - a. International auction house v. independent appraiser.
 - b. Fee for appraisal.
 - c. Limitations on appraisal, including disclosure of intended uses.
 - d. The Art Advisory Panel of the Commissioner of Internal Revenue.
 - e. Revenue Procedure 96-15, 1996-1 Cum. Bull. 627 for advance valuations that apply for income, estate, and gift tax purposes.
 - f. Conflict of interest between executor and counsel toward beneficiaries and appraisal decision.

- g. Conflict of interest between fiduciaries and counsel and appraisal decisions.
 - h. Conflict of interest between beneficiaries where cash is bequeathed to equalize property bequests or where income tax basis becomes an issue.
 - i. Change positions when second death occurs during proceeding.
3. Tax allocation clauses for non-charitable legacies and conflict between beneficiaries as to values.

CONFLICT OF INTEREST DISCLOSURE FORM

The following are the statutory models of the testator's written acknowledgment of an attorney's disclosure of who can serve as executor:

(a) When set forth in writing executed prior to or concurrently with a will:

Prior to signing my will, I was informed that:

(i) subject to limited statutory exceptions, any person, including an attorney, is eligible to serve as my executor;

(ii) absent an agreement to the contrary, any person, including an attorney, who serves as an executor for me is entitled to receive statutory commissions for executorial services rendered to my estate;

(iii) if such attorney serves as my executor, and he or she or another attorney affiliated with such attorney renders legal services in connection with the executor's official duties, he or she is entitled to receive just and reasonable compensation for those legal services, in addition to the commissions to which an executor is entitled.

(Witness)

Dated:

(Testator)

Dated:

(b) When set forth in a writing executed subsequently to the will:

I, _____, have designated my attorney,
[a][an][executor][alternative executor][coexecutor] (delete what
is inapplicable) in my will dated _____

Prior to signing my will, I was informed that:

- (i) subject to limited statutory exceptions, any person, including an attorney, is eligible to serve as my executor;
- (ii) absent an agreement to the contrary, any person, including an attorney, who serves as an executor for me is entitled to receive statutory commissions for executorial services rendered to my estate;
- (iii) if such attorney serves as my executor, and he or she or another attorney affiliated with such attorney renders legal services in connection with the executor's official duties, he or she is entitled to receive just and reasonable compensation for those legal services, in addition to the commissions to which an executor is entitled.

(Witness)

Dated:

(Testator)

Dated:

1997 CHANGES IN ESTATE AND GIFT TAX LAWS AND THE VISUAL ARTIST

Erik J. Stapper, Esq.

1997 was a year in which the estate and gift tax provisions of both the Internal Revenue Code and the New York State Tax Law were changed. The New York State change is in fact a repeal and will be reviewed first because it also provides an insight into the operation of the Federal law.

New York State Estate Tax Law

In calculating the Federal estate tax the Internal Revenue Code allows a credit for a specified amount of state estate tax. Therefore many States and the District of Columbia adopted an estate tax that is exactly equal to the amount of the Federal credit. By doing so these jurisdictions did not increase the total estate tax burden because in the absence of the state tax the Federal tax would be greater by the same amount. Therefore this type of estate tax is usually referred to as a “sop tax” because it sops up the Federal credit and taxes nothing more. Moreover, when there is no Federal tax due because the estate does not exceed the federally exempted amount there is no state estate tax and no state return filing requirement.

New York, however, imposes its own separate gift and estate taxes beginning at \$115,000. The New York estate tax rates exceed the allowable Federal estate tax credit at all levels (the maximum New York state tax rate is 21 percent and the maximum Federal credit rate is 16 percent). More significantly, there is no Federal credit for gift taxes paid to a state so that there is no relief from the New York gift tax other than to move to a sop tax state, such as Florida.

New York has now enacted a sop tax for estates of decedents dying on or after February 1, 2000. The New York gift tax is repealed for gifts made on or after January 1, 2000. Until then the New York gift and estate taxes will remain in effect except that the exemption will increase from \$115,000 to

\$300,000 for decedent's dying on or after October 1, 1998 and for gifts made on or after January 1, 1999. The non-parallel transition treatment by New York of its gift and estate taxes is a trap for the unwary. The simplest plan is to defer making gifts of \$300,000 to 1999 and all larger gifts until the year 2000.

Internal Revenue Code

The most frequently discussed change and the question that all artists will ask is whether their estates will qualify for the family-owned business exclusion of new Section 2033A as added to the Internal Revenue Code by the Taxpayer Relief Act of 1997 (signed into law on August 5, 1997 making it the "date of enactment"). The provision is effective for estates of decedent's dying after December 31, 1997. It is a complex provision and before dealing with it, other important changes should be considered first even though they may be of more general applications.

Revaluation of gifts

Section 2001(f) has been added to prevent the Internal Revenue Service from revaluing for estate tax purposes lifetime gifts for which the limitations period has passed. The effect of such a revaluation had been to redetermine the applicable estate tax bracket and available unified credit.⁴⁵ The revaluation problem was of particular concern for gifts of works of art or interests in family businesses. The change is effective for gifts made after the date of enactment (8/5/97).

⁴⁵ The revaluation did not result in an additional gift tax liability because the return years were closed. The revaluation had the effect, for example, of using up more of the \$600,000 exemption or pushing the estate into a higher estate tax bracket. This change can be correctly described as a taxpayer relief provision.

Gift tax exclusion

The annual \$10,000 gift tax exclusion has been indexed for inflation effective for gifts made after December 31, 1998, based on the 1997 calendar year.

Increase in estate tax exemption

The much heralded increase of the estate tax exemption to \$1,000,000 has been accomplished technically by adding to the Code the term “the applicable credit.” It is defined to be the amount of the tentative tax computed on the “applicable exclusion amount”.

The 1997 changes did not index the \$1,000,000 exemption for inflation in years after 2006. It also did not change the unified estate and gift tax rate. At \$1,000,000 that rate is 41 percent. It reaches the maximum rate of 55 percent at \$3,000,000.

Estate tax deferral for business assets

Existing law allowed in effect for a complete five year deferral for the payment of estate taxes and a partial deferral for 14 years by having no payments, other than interest, for the first four years and then installments of principal and interest over the next ten years to the extent the tax is attributable to a closely held business. The value of that business must exceed 35 percent of the adjusted gross estate.⁴⁶ Moreover, Section 6601(j) provides that the tax attributable to \$400,000 of that value qualifies for a special 4 percent interest rate. In addition, the entire amount of interest, including the 4 percent amount, paid on the deferral is deductible in recalculating the estate tax initially determined to be due.

The deferral provisions have been revised to eliminate both the estate and income tax deduction for the interest. In exchange for the loss of the deduction of the interest payment, the 4 percent rate has been reduced

⁴⁶ There has been no change in the eligibility requirements for the installment election.

to 2 percent and the amount of tax that qualifies for the 2 percent rate (“the 2 percent portion”) is the tax attributable to \$1,000,000 (an amount indexed for inflation after 1997) of closely held business assets regardless of the excluded amount.⁴⁷ More importantly, the tax attributable to the business assets that is in excess of the 2 percent portion will bear interest at an amount equal to 45 percent of the applicable interest rate. These changes are effective for estates of decedents dying after December 31, 1997. A special election is provided for existing installment agreements.

Judicial review of installment payment eligibility

If the Service determines that an estate is not eligible⁴⁸ for installment payments, that adverse decision can now be brought before the Tax Court in a declaratory judgment action. The change is effective for estates of decedents dying after the date of enactment (August 5, 1997). Previously there was no judicial relief because the Tax Court only had jurisdiction over “amounts” in controversy.

Exclusion for family-owned business

After December 31, 1997 a new section will exclude from an estate the “adjusted value of the qualified family-owned business interest of the decedent.” The excluded amount cannot exceed \$1,300,000 less the applicable exclusion amount. Thus by 2006 the amount of the exclusion will only be \$300,000. For 1998 it is \$675,000 (\$1,300,000 less \$625,000).

⁴⁷ Before this change the amount of tax attributable to \$1,000,000 of such business assets had to be calculated by taking into account the \$600,000 exemption. Consequently, the old law applied only to \$400,000 of small business assets.

⁴⁸ Continuing eligibility for installment treatment that had been initially allowed but is being denied in a later year is also covered by the declaratory judgment provision.

In considering whether to elect the new family-owned business exclusion the executor and the family must be conscious of the possibility that when artwork is sold as part of an ongoing family business profitable sales, measured by reference to date of death values, may produce ordinary income which may then also be subject to the self-employment tax. If the election is not made, the profit may qualify for capital gain treatment. In this connection it is important to note that gain on the sale of “collectibles” remains subject to the 28 percent capital gains tax (or 15 percent if that is the applicable bracket). The term “collectible” means “any work of art” regardless of how acquired or who created it.

GLOSSARY

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Accounting. The preparation of financial statements that will give the court, the beneficiaries, and everyone involved in the estate a clear picture of the property in the estate available for distribution, and a history of the transactions dating back to the time the executor first took control of the property. An accounting may be formal or informal. The beneficiaries review the accounting and their approval of the accounting releases the executor for liability arising from his or her activities as executor.

Administration. The management of the estate of a deceased person. It includes collecting the assets, paying the debts and taxes, and making distribution to the persons entitled to the decedent's property.

Administrator (m); Administratrix (f). The person appointed by the court to manage an estate if the decedent had no valid will or if the will did not provide for an executor or executrix.

Advance valuation of art. A revenue procedure that allows a taxpayer to obtain from the Internal Revenue Service a Statement of Value for certain art contributed to a qualified charitable organization. Under the revenue procedure, a taxpayer's request for a Statement of Value from the Service must be made before the taxpayer files the Federal income tax return on which such a contribution is first claimed as a deduction under Section 170 of the Internal Revenue Code. The revenue procedure requires the taxpayer requesting a Statement of Value to pay a user fee. A taxpayer may rely upon the Statement of Value in completing his or her tax return (i.e., it is binding and the IRS may not dispute the claimed value).

Alternate value date. For Federal estate tax purposes, the value of the gross estate six months after the date of death, unless property is distributed, sold, exchanged, or otherwise disposed of within six months. In that case, the value of such property is determined as of the date of disposition.

Annual exclusion. Gifts made in a given calendar year are taxable minus the allowable exclusions and exemptions. The Federal gift tax exclusions are (i) the annual exclusion and (ii) amounts paid on behalf of another person for certain educational expenses and for medical care. The annual exclusion permits \$10,000 in gifts to each separate recipient each year or \$20,000 if a husband and wife elect to split the gift.

Art Advisory Panel. The Internal Revenue Service in 1968 created a panel consisting of nationally prominent art dealers, art professors, art museum directors and art advisors to assist in the valuation of appraisals of artwork or cultural property with a claimed value for tax purposes of twenty thousand dollars or more. The Panel meets in Washington, D.C. usually once or twice a year at closed meetings in each speciality area. The determinations of the Art Advisory Panel, in practice, become the position of the Internal Revenue Service.

Assets. In probate law, the property—real, personal, tangible, intangible, legal and equitable—of a decedent available for the payment of debts and legacies.

Audit. Tax audits by Federal and state authorities are adversarial, with the government attempting to raise the largest tax possible and the taxpayer trying to pay the least allowed by law.

Beneficiary. The person who inherits a share or part of the decedent's estate; one who receives a beneficial interest under a trust, insurance policy, or retirement plan.

Bequest. A gift of personal property by will, as distinguished from a gift of real property. A specific bequest is a gift of specified property. "I give to my studio assistant Leonardo, an original artwork entitled 'Self Portrait,' 1996." A general bequest is one that may be satisfied from the general assets of the estate. "I give \$100 to my studio assistant, Francois Picasso." If the specific bequest was sold before the decedent died, the gift will fail.

Blockage discount. Valuing artwork in an artist's or collector's estate is a central issue of estate planning. *Estate of David Smith* is a landmark case which established the application of the principle of a blockage discount to works of art, previously developed in stock evaluation cases. In *Smith*, the court allowed a blockage discount involving the works of David Smith, recognizing the "impact of simultaneous availability of an extremely large number of items of the same general category." Cases involving the *Estate of Georgia O' Keeffe*, *The Estate of Andy Warhol* and *The Estate of Robert Mapplethorpe* have further developed the concept. Blockage is not only a relevant concept in determining the value of an artist's estate for Federal estate tax purposes. The concept is also applied in determining the executor's fees, distribution and the beneficiaries, basis in the property for the purposes of determining gain or loss on subsequent sale.

Buy/sell agreement. Also called a business agreement. An arrangement for the disposition of a business interest in the event of the owner's death, disability, or retirement or on the owner's withdrawal from the business at some earlier time. Business purchase agreements take various forms: (1) an agreement between the business itself and the individual owners (a stock redemption agreement); (2) an agreement between the individual owners (cross/purchase agreement); and (3) an agreement between the individual owners and a key person, family member, or outside individual (a third-party business-buyout agreement).

Capital gain property. Any property the sale of which at its fair market value at the time of the contribution would have resulted in long-term capital gain. The property is a capital gain property if it has appreciated in value and, beginning January 1, 1998, if it has been held by the donor for more than one year, unless owned by the artist who created it. [Section 1221(3).]

Charitable organization. A trust or non-profit organization exempt from Federal income tax under IRC § 501(c)(3) is popularly referred to as a charitable organization. Charitable organizations are characterized as either public or private. Public charities generally receive part of their support from the general public. They include churches, schools, hos-

pitals, museums, and other publicly supported organizations. Private operating foundations, certain organizations operated in connection with another public organization, and those private foundations that distribute all their receipts each year may be deemed public charities for certain purposes, including the Federal tax treatment of charitable contributions. Private charities include all other exempt organizations, and include the usual kind of private foundations. It is important to verify the status of the charitable organization as either a public or a private charity when making charitable contributions as the public or private status determines the charitable deduction limitation applied to the contribution.

Charitable remainder annuity trust. A trust that permits payment of a fixed amount annually to a noncharitable beneficiary, with the remainder going to charity.

Charitable remainder trust. An irrevocable trust that pays income to one or more noncharitable beneficiaries for a period of years or for life, then pays the remainder over to a designated charity. In order to qualify for the charitable income, gift, or estate tax deductions the trust must take the form of an annuity trust or a unitrust.

Charitable remainder unitrust. A trust designed to permit payment of a variable annuity (i.e., a fixed percentage of the trust's assets as revalued year by year) to a noncharitable beneficiary, with the remainder going to charity.

Code: The Internal Revenue Code. The Code includes Federal income, estate, and gift taxation provisions.

Codicil. A supplement to an existing will to effect some revision, change, or modification. A codicil must meet the same requirements regarding execution and validity as a will.

Common disaster. An accident that results in the simultaneous death of both the decedent and the intended beneficiary.

Community property. Property acquired during marriage in which both husband and wife have an undivided one-half interest, therefore, not

more than half of the assets of the community can be disposed of by the will of either spouse. There are currently eight community-property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

Contingent interest. A future interest in real or personal property that depends on the fulfillment of a stated condition that may never come into existence. “I give and bequeath my studio at Arles to my brother Theo, if he becomes a painter.”

Contingent remainder. A future interest in property dependent on the fulfillment of a stated condition before the termination of a prior estate. For example, Pablo Picasso leaves property to a bank in trust to pay the income to Françoise during her lifetime. After her death, the trustee is to transfer the property to the decedent’s son, Paolo, if the son is then living; otherwise, it goes to his daughter, Paloma. Paolo has a contingent remainder interest—contingent upon his outliving his mother. Paloma has a contingent remainder interest, which she will receive only if the son does not outlive the mother.

Copyright. A bundle of intangible property rights created by law which include the right to control the reproduction, distribution, public performance and display, and to prepare derivative works based on the work. To be protected under current U.S. copyright law, a work “must be an original work of authorship fixed in a tangible medium of expression.” Works of visual art—a painting, a photograph, a sculpture—are protected by copyright.

Corpus. The principal, as distinguished from the income. When we speak of the corpus of a trust, we are talking about the assets in the trust (versus the income generated by those assets).

Decedent. The person who died (whether man or woman).

Descent. The passing of real estate to the heirs of one who dies without a will.

Devise. A gift of real estate under a will, as distinguished from a gift of personal property.

Disclaimer. A renunciation or refusal by a beneficiary of his or her right to accept an obligation or interest in property. Disclaimers are used effectively as a postmortem estate planning tool.

Distribution. The passing of personal property to the heirs of one who dies without a will. Also, the formal act of the executor in disposing of the estate's assets to the designated beneficiaries.

Domicile. An individual's permanent home. The place to which, regardless of where he or she is living, an individual intends to return. Domicile is an important concept in estate (and income tax) planning. The validity of a will is determined by the testator's domicile at death. The decedent's domicile at death determines the state that will tax the estate other than real property and certain tangible property located outside the state. Objective criteria such as voting history, income tax payments, memberships, and licenses when combined with statements and declarations of the client's intent, determine domicile. Artists with multiple studios and residences in the U.S. and abroad should consider the estate and other tax consequences of domicile.

Donee. A person or entity who receives a gift.

Donor. A person or entity who makes a gift.

Escheat. In the absence of lawful heirs, and subject to the claims of creditors, the property of a person dying intestate is said to escheat—that is, to “return” to the state.

Estate tax. A tax imposed on the right of a person to transfer property at death. The tax is imposed not only by the Federal government but also by various states. “For the purposes of the [estate] tax imposed by the Code, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests . . . to or for the use of any...charitable [purposes].” [2055(a)(2).]

Executor (m); Executrix (f). The person named by the deceased in his or her will to manage the decedent's affairs; the personal representative of the decedent who stands in the shoes of the decedent, collects the assets of the estate, pays the debts and taxes, and makes the distribution of the remaining property to the beneficiaries or heirs.

Fair market value. The value at which estate property is included in the gross estate for Federal estate tax purposes; the price at which property would change hands between a willing buyer and a willing seller, neither being under compulsion to buy or sell and both having knowledge of the relevant facts. The Treasury regulations define fair market value for artworks sold at public auction, as the auction price plus buyer's commission [TAM9235005]. Currently, selling expenses, including commissions, are not deducted from fair market value for estate tax purposes unless required to meet estate obligations and expenses.

Family Limited Partnership. A Family Limited Partnership ("FLP") is created under state law by an FLP Agreement. Generally, when a donor makes a gift, the donor must give up all future control over the gifted property. In an FLP the donor contributes property to the FLP in exchange for general and limited partnerships interests. By retaining the General Partnership interests and making gifts of the Limited Partnership interests, the donor, in effect, retains control over the gifted property. Artwork may be an appropriate asset to transfer because of its appreciation potential.

Fiduciary. One who occupies a position of trust. Executors, administrators, trustees, guardians, attorneys, and accountants, all stand in a fiduciary relationship to persons whose affairs they are handling. As such, they must avoid all conflicts of interest and owe a duty of loyalty to the estate. An executor of an artist's estate who was an artist, under contract with galleries to which paintings in the estate were sold or consigned has a conflict of interest resulting from the advantage he might gain in the purchase and sale of his own paintings. Similarly, an executor of an artist's estate who was a director and officer of one or two related art galleries to which paintings in the estate were sold or consigned has a conflict of interest through inducements to favor the galleries' interests,

including the aggrandizement of his status and financial advantage through sales of his family's private art collection.

Generation-skipping transfer tax (GSTT). A flat-rate tax imposed in addition to the Federal gift or estate tax, and at the highest current estate or gift tax rate, on transfers to "skip persons" (essentially transfers to grandchildren). The GST tax may be imposed on direct skips (such as when a grandparent writes a check to a grandchild) or where property passes from one generation to another in less obvious ways by trust or otherwise. There is a \$10,000 per donee (or \$20,000 if the gift is made by husband and wife) annual exclusion from GST tax similar to the annual exclusion from Federal gift tax.

Gift. A gratuitous transfer of property. To be considered a gift, the transfer is complete when it leaves the person who makes the gift and the person (donor) retains no power to change the disposition of the property either for her own or another's benefit. The elements of a gift under New York law are: donative intent, delivery and acceptance.

Gift tax. A tax imposed on the lifetime gratuitous transfer of property. In addition to the Federal gift tax, some states also impose a tax on transfers during lifetime.

Gift-tax exclusion. For Federal gift-tax purposes, anyone, married or single, can give up to \$10,000 in cash or other property each year to any number of persons (whether or not they are related to the donor) with no gift-tax liability. The exclusion is doubled to \$20,000 in the case of a married donor whose spouse consents to split the gift. (Note: also referred to as the annual exclusion.)

Grantor. A person who creates a trust; also called a settlor, creator, donor, or trustor.

Gross estate. The value of all property owned by the decedent or in which the decedent had an interest at the time of death. Generally, assets are included in the gross estate at their fair market value at the date of death but the executor may elect an alternative valuation date.

Guardian. There are two classes of guardians: (1) A guardian of the person is appointed by the surviving spouse in his or her will to take care of the personal affairs of the couple's minor children. Since each parent is the natural guardian of the minor children, only the surviving parent can name the guardian of the person. (2) A guardian of the property of a minor or incompetent is a person or institution appointed or named to represent the interests of a minor child or incompetent adult. A guardian of the property can be named in a will or be appointed by a court.

Guardian ad litem. A lawyer or other qualified individual appointed by the court to represent the interests of minors or incompetents in a particular matter before the court.

Health Care Proxy: An individual may execute a health care proxy in which he/she sets forth his/her decisions with respect to receiving or refusing medical care and interventions and names the proxy who is to communicate those decisions at the relevant time. In addition, the health care proxy can name an agent authorized to make medical-related decisions on behalf of the principal. The document can be a combination—e.g., first, instructing the agent to communicate the written decisions of the principal and, second, instructing the agent to make decisions in the patient's best interests where instructions relevant to a particular issue are not contained in the document. By no means is a proxy that merely names a person to make all decisions for the principal a good substitute for carefully drafting a personal health care decisions declaration ("living will") tailored to the principal's wishes, needs, and quality of life standards.

Heir. A person designated by law to succeed to the estate of a person who dies intestate (without a will).

Holographic will. A will entirely in the handwriting of the testator. In many states, such a will is not recognized unless it is published, declared, and witnessed as required by statute for other written wills.

Incompetent. An individual who legally has been found incapable of managing his or her own affairs.

Inheritance tax. A tax levied on the rights of the heirs to receive property from a deceased person, measured by the share passing to each beneficiary (sometimes called a succession tax). The Federal death tax is an estate (as opposed to an inheritance) tax. Some states have estate taxes but most have inheritance taxes.

Insurance trust. A trust composed partly or wholly of life insurance policy contracts. An insurance trust is generally established to purchase (or receive as a gift) one or more life insurance policies so that the trust, rather than the insured person, is the owner of the policy. Since the insured person is not the owner, when he or she dies, the value of the policy will not be included in his or her taxable estate. The trust will also be named as the beneficiary of the policies. The trustee can use the policy proceeds to purchase illiquid assets from the insured person's estate, thereby providing liquidity to the estate. If preferred, the trustee could also be authorized to make loans to the estate.

Intangible property. Property that does not have physical substance. The item itself is only the evidence of value (for example, a certificate of stock or bond, an insurance policy, copyright and other intellectual property rights).

Inter vivos trust. A trust created during the grantor's lifetime and operative during lifetime, as opposed to a trust under a will, called a testamentary trust, which does not go into effect until after the grantor dies.

Intestacy laws. Individual state laws that provide for distribution of property of a person who has died without leaving a valid will. Intestate—without a will. A person who dies without a valid will dies intestate.

Inventory. When used as a legal term refers to a schedule of all the assets of an estate, to be prepared by the personal representative (executor). Inventory is also used to refer specifically to creating a record of the artistic output of the artist. A complete inventory and documentation of the artist's work is called a *catalogue raisonné*.

Irrevocable trust. A trust that cannot be revoked or terminated by the grantor. To qualify the trust as irrevocable for tax purposes, the grantor

cannot retain any right to alter, amend, revoke, or terminate. The trust can be revoked or terminated by the grantor only with the consent of someone who has an adverse interest in the trust.

Issue. All persons descending from a common ancestor.

Joint tenancy. A common ownership of property by two persons in such a way that, on the death of either, the property goes to the survivor. Under the law of some states, if the persons are husband and wife, then the property is said to be held by the entirety. This is contrasted to tenancy in common, in which each owner has an undivided interest that upon the death of one is passed by probate or intestacy.

Lapse. The failure of a testamentary bequest due to the death of the recipient during the life of the person who made the will.

Legacy. Technically, a gift of personal property by will, but in practice including any disposition by will.

Legatee. A person to whom a legacy is bequeathed under a will.

Life estate. The title of the interest owned by a life tenant; a person whose interest in property terminates at his or her death. “I give my loft to my companion Dario for his life, then to the _____.”

Life insurance. An insurance policy payable on the death of the insured person. If an artist wishes to avoid the sale of all work from the artist's estate to pay debts and administrative expenses, the artist may wish to consider life insurance so that the proceeds from the life insurance policy may be used to pay obligations. The designated beneficiary may be the artist's estate or the trustee named in the artist's will if a testamentary trust is created. While providing for liquidity, there may be adverse estate tax consequences to this strategy.

Literary executor. A term sometimes used in the will of an author to authorize a person to assemble unpublished works of the deceased and to try to have published those works the literary executor thinks appropriate, discarding the remainder. In New York, there is no statutory provi-

sion for a literary or an art executor. It is possible to designate different executors for different purposes including art and finances.

Living will. A written expression of an individual's desire that no extraordinary means be employed to prolong his or her life. Living wills are legal in some states. In other states, although the living will itself has no legal effect, it can help physicians by making them aware of a patient's wishes.

Marital deduction. For Federal estate tax purposes, the portion of a decedent's estate that may be passed to the surviving spouse without its becoming subject to the Federal estate tax levied against the decedent's estate. Under present Federal estate-tax law, the marital deduction is unlimited, provided that the property passes to the surviving spouse in a qualified manner.

Minor. A person who is under the legal age of majority, which can vary from age 18 to 21, depending on the state law.

Mutual wills. The separate wills of two or more persons, with reciprocal provisions in each will in favor of the other person(s).

Nonliquid assets. Assets that are not readily convertible into cash for at least nine months without a serious loss (such as art, real estate, property, contract rights, and business interests).

Nonprobate property or assets. Property that passes outside the administration of the estate other than by will or intestacy laws. Their distribution is controlled by contract or by operation of law. Examples include jointly held property, pension, benefits and life insurance proceeds paid to a named beneficiary, or property in an inter vivos trust. Nonprobate assets are still included in the gross estate for estate tax purposes.

Nuncupative will. An oral will, declared by the testator in his or her last illness before a sufficient number of witnesses, and afterward reduced to writing.

Ordinary income property. Ordinary income property is treated differently from capital gain property for Federal income tax purposes. Property is

ordinary income property if it was created by the donor; it was received by the donor as a gift from the creator; it is held in inventory by a dealer; it would produce short-term capital gain if sold, that is, it is owned for one year or less before being contributed; or it would produce a capital loss if sold. All works of art created by the artist will be ordinary income property, since that property, by the definition contained in the Code, cannot be a capital asset. Artist Jackson Krasner gives his admirer, Lisa Guggenheim, an original painting. The painting retains its character as ordinary income property.

Per capita. Equally to each individual. In distribution per capita, the takers share equally without a right of representation. For example, each of five sons would take one-fifth of the estate. In most states, if descendants are related in equal degree to the decedent, they take per capita; if descendants are of unequal degree (such as four sons and a child of a deceased son), a per stirpes distribution is made.

Per stirpes. “By stock.” A distribution per stirpes occurs when issue succeed to the shares of their lineal ascendants by representation. For example, if a person dies survived by three children and by two children of a deceased child (the decedent’s grandchildren), distribution is per stirpes. The two grandchildren succeed to their deceased parent’s share, so that one-quarter of the estate goes to each of the surviving children, and one-eighth to each of the two grandchildren.

Pourover. The transfer of property from an estate or trust to another estate or trust upon the occurrence of an event specified in the instrument. For example, a will can provide that certain property be paid (poured over) to an existing trust. This is called a pourover will.

Power of appointment. A right given to a person to dispose of property that he or she does not fully own. There are two types of powers of appointment. A general power of appointment is a power over the distribution of property exercisable in favor of any person the donee of the power may select—including himself, his estate, his creditors, or the creditors of his estate. A limited power of appointment is sometimes called a special power. An example of a limited power is giving the recipi-

ent of a power the right to distribute the property at her death to any of her sister's children that she designates. Powers of appointment can be created to be exercisable during the power holder's life or can be testamentary powers exercisable by the power holder's will.

Power of attorney. A written document that enables an individual, or "principal," to designate another person or persons as his or her "attorney in fact"—that is, to act on the principal's behalf. The scope of the power can be severely limited or quite broad. (A "durable power" is one that survives the mental or physical incapacity of the creator of the power.)

Present interest. A present right to use or enjoy property or an interest which is presently ascertainable but may vest in the future. Only a gift of an ascertainable present interest is eligible for a charitable deduction. "I give my 'Self Portrait 1992' to my daughter for ten years, then to the M museum." The M museum has a present interest.

Pretermitted heir. A child or other descendant omitted from a testator's will. When a testator fails to make provisions for a child, either living at execution of the will or born thereafter, statutes often provide that such child, or the issue of a deceased child, take an intestate share of the testator's estate.

Principal. The property comprising the estate or fund that has been set aside in trust, or from which income has been expected to accrue. The trust principal is also known as the trust corpus or res.

Probate. The process of proving the validity of the will and executing its provisions under the guidance of the appropriate public official. The title of the official varies from state to state. Wills are probated in the Register of Wills office and in the Probate or Surrogate's Court. When a person dies, the will must be filed before the proper officer; this is called filing or offering the will for probate. When it has been filed and accepted, it is said to be admitted to probate. The process of probating the will involves recognition by the court of the executor named in the will (or appointment of an administrator if none has been named).

Probate property. Property that can be passed under the terms of the will or (if no will) under the intestacy laws of the state.

Prudent man rule (or Prudent investor law). The theory according to which the duty of an executor is to invest in such assets as an ordinary, prudent man of intelligence and integrity would purchase in the exercise of reasonable care, judgment, and diligence under the circumstances existing at the time of purchase.

Qualified appraisal. An appraisal prepared by a qualified appraiser not earlier than sixty days before the date of the contribution of the appraised property. The appraisal must be signed and dated by a qualified appraiser who charges an appraisal fee that is not based on a percentage of value and that contains certain required information set forth in Treas. Reg. Section 1.170A-13(b)(2)(ii).

1. A description of the property in sufficient detail for a person who is not generally familiar with the type of property to determine that the property appraised is the property that was (or will be) contributed.
2. The physical condition of any tangible property.
3. The date (or expected date) of contribution.
4. The terms of any agreement or understanding entered into (or expected to be entered into) by or on behalf of the donor that relates to the use, sale, or other disposition of the donated property.
5. The name, address, and taxpayer identification number of the qualified appraiser and, if the appraiser is a partner, an employee, or an independent contractor engaged by a person other than the donor, the name, address, and taxpayer identification number of the partnership or the person who employs or engages the appraiser.
6. The qualifications of the qualified appraiser who signs the appraisal, including the appraiser's background, experience, education, and any membership in professional appraisal associations.
7. A statement that the appraisal was prepared for income tax purposes.

8. The date (or dates) on which the property was valued.
9. The appraised FMV on the date (or expected date) of contribution.
10. The method of valuation used to determine FMV, such as the income approach, the comparable sales or market data approach, or the replacement cost less depreciation approach, and
11. The specific basis for the valuation, such as any specific comparable sales transaction.

Qualified Appraiser. A person who holds himself or herself out to the public as an appraiser who is an expert as to the particular type of property being appraised; who understands that, if he or she makes a false or fraudulent overstatement of value, he or she may be subject to a civil penalty under Section 6701; and who is completely independent of the donor. To be independent of the donor, the qualified appraiser cannot be the donor or the donee, a party to the transaction in which the donor acquired the property, a person employed by any of the foregoing, or a person related (within the meaning of Section 267(b)) to any of the foregoing.

Receipt and release. Informal method of settling estates. The executor gives the beneficiaries an informal accounting and obtains a “receipt” from the beneficiaries for their share of the estate and a “release” discharging the executor from any further liability.

Remainderman. The person(s) or entity(ies) entitled to receive property (usually in trust) after the termination of the prior holder's interest. For example, a mother might set up a trust that pays her income for life, but at her death the principal in the trust would pass to her son (the remainderman).

Renunciation. Also called a disclaimer. An unqualified refusal to accept property or an interest in property. It is the abandonment of a right without the direct transfer to someone else of the interest subject to that right. The renounced or disclaimed property passes as though the person renouncing/disclaiming the property has died before the property was transferred to him or her.

Residuary estate. The remaining part of the decedent's estate after payment of debts and bequests. Wills usually contain a clause disposing of the residue of the estate that the decedent has not otherwise bequeathed or devised.

Reversionary interest. A right to future enjoyment by the transferor of property that is now in the possession or enjoyment of another party. For example, a father creates a trust under which his son is going to enjoy the income for life, with the principal of the trust to be paid over to the daughter at the son's death or, if the daughter does not survive the son, the remainder will revert to the father. The father's interest is the reversionary interest.

Revocable trust. A trust that can be changed or terminated during the grantor's lifetime and under which the property in the trust can be recovered. West Coast lawyers think it's the hottest thing going. East Coast lawyers tend to be slightly less enthusiastic, as one prominent trust and estate's practitioner commented, "One of the great myths is that the revocable trust completely avoids probate. 99.9 per cent of the time it does not. It is particularly difficult to transfer all your artwork to a trust."

State Death Tax Equal to Federal Credit (SOP Tax). A death tax imposed by a state equal to the amount of the Federal estate tax credited for state death taxes paid.

Tenant in common. Tenants who hold an undivided interest in the same property without right of survivorship. Each tenant has the right to bequeath, sell, or give her undivided share. For example, if an artist gifts an undivided one-half interest in a sculpture created by her to the Hirschorn Museum, the artist and Hirschorn are tenants in common. "I hereby grant to the Hirschorn Museum an undivided one-half interest in my sculpture. The museum shall have the right to possession and control for six months a year."

Trust. An express trust of property created by a will, deed, or other instrument, whereby there is imposed upon a trustee the duty to administer property for the benefit of a named or other described individual.

The trustee is the legal owner of the trust property and the beneficiary is the beneficial owner. The document which creates the trust must define what property is to be transferred to the trust, i.e., how and to what extent the trust is to be funded. “I give, devise, and bequeath to the Norman Rockwell Art Collection Trust established under a Trust agreement dated October 25, 1973, by and between myself as Settlor and . . . Thomas Rockwell as Trustee, the building which I have used as my studio together with the contents thereof at the time of my death, including but not limited to any works of art done by me or others, to be held and administered in accordance with the terms and conditions, thereof.”

Trustee. The person holding legal title to a trust for the benefit of a beneficiary. As legal owner, the trustee controls the management, disposition, etc., of the trust property.

Vested interest. A present right or title to a thing which carries with it an existing right of alienation (sale or gift or devise) even though the right to possession or enjoyment may be postponed to some uncertain time in the future. Distinguished from a future interest which may never materialize or ripen into title. It is the right to entitlement or possession that distinguishes a vested present interest from a future interest. Freda Kahlo by deed of gift transfers to the Diego Rivera Museum an undivided quarter interest in “Self Portrait.” One year later she transfers by deed of gift, a three-quarters interest in “Self Portrait” to take effect on her death to the National Museum of Women’s Art. The National Museum has a vested present interest in the painting. Only a present vested interest to a charity is eligible for a charitable deduction.

Will. The legal expression or declaration of a person’s mind or wishes as to the disposition of her or his property to be performed or take effect at death. Formal requirements vary by states, but usually, at a minimum, a will must be in writing made with testamentary intent and mental capacity, and signed by the testator. Requirements for witnesses vary according to states. New York’s Estate, Powers and Trust Law does not refer to a prescribed format for a will but does prescribe formalities for execution and witnessing of the will. When Georgia O’Keeffe, died in 1986 at age 98, the principal beneficiary of her will was Juan Hamilton, who was 58

years her junior. An aspiring but nearly destitute artist, Hamilton had knocked on O’Keeffe’s door one morning in August of 1973 seeking work. He never left. O’Keeffe initially employed Hamilton as her secretary, but he ultimately became her assistant, agent, business manager, companion, and caretaker. After O’Keeffe’s death, her 92-year-old sister and a niece challenged the validity of O’Keeffe’s will, claiming Hamilton exercised undue influence over her.



A Visual Artist's Guide to Estate Planning

Appendices



NOTE: The following appendices may be downloaded by clicking on the title you want, or go online to:

http://www.visualartistsguide.com/estateplnbook/download_page.htm

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Statement of Client's Rights

APPENDIX P: **STATEMENT OF CLIENT'S RIGHTS**

The following statement has been approved by the New York State Administrative Board of the Courts to be posted conspicuously in lawyers' offices in New York State beginning January 1, 1998.

Statement of Client's Rights

1. You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and personnel in your lawyer's office.
2. You are entitled to an attorney capable of handling your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters, and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge).
3. You are entitled to your lawyer's independent professional judgment and undivided loyalty uncompromised by conflicts of interest.
4. You are entitled to be charged a reasonable fee and to have your lawyer explain at the outset how the fee will be computed and the manner and frequency of billing. You are entitled to request and receive a written itemized bill from your attorney at reasonable intervals. You may refuse to enter into any fee arrangement that you find unsatisfactory.
5. You are entitled to have your questions and concerns addressed in a prompt manner and to have your telephone calls returned promptly.
6. You are entitled to be kept informed as to the status of your matter and to request and receive copies of papers. You are entitled to sufficient

information to allow you to participate meaningfully in the development of your matter.

7. You are entitled to have your legitimate objectives respected by your attorney, including whether or not to settle your matter (court approval of a settlement is required in some matters).
8. You have the right to privacy in dealings with your lawyer and to have your secrets and confidences preserved to the extent permitted by law.
9. You are entitled to have your attorney conduct himself or herself ethically in accordance with the Code of Professional Responsibility.
10. You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, age, national origin, or disability.

APPENDIX R:

The Estate Project for Artists with AIDS

APPENDIX R:

THE ESTATE PROJECT FOR ARTISTS WITH AIDS

Patrick Moore, Director

Project Background

In 1991, the Alliance for the Arts initiated the Estate Project for Artists with AIDS as a research project to develop useful advice for artists on estate planning and strategic direction for the arts community in the face of the enormous cultural losses created by AIDS. Artists with HIV/AIDS faced particularly complex issues, especially those who were gay or lesbian. Future Safe was intended to explain, in easily understood terms, the basic issues of estate planning for artists. Future Safe's basic premise is that the artist must become motivated to help himself and then turn to legal counsel once certain decisions had been made.

The Estate Project worked closely, and supported financially, a range of programs in New York to provide a network of services. Of particular interest is Volunteer Lawyers for the Arts (VLA). VLA's Artist Legacy Project used Future Safe and other specially developed materials to counsel artists and make legal provisions for them, including wills.

The Estate Project has also supported the work of Visual AIDS and developed several collaborative projects with the organization. Visual AIDS is most well known for developing the Red Ribbon. However, the organization now provides a range of services to artists living with HIV disease through its Archive Project. The Archive Project documents the work of artists living with HIV and unable to arrange for the often expensive process of professional documentation. These slides form much of the content in the Estate Project's Virtual Collection, described below.

By 1993, the Estate Project's work had been featured on the front page of the New York Times and the project was actively pursuing a national program of archival projects. At this point, the project is fully operational in New York, Los Angeles, and Miami with active working relationships with institutions ranging from the New York Public Library to the Getty Information Institute and the Solomon R. Guggenheim Museum.

The Estate Project currently has three main, national programs in addition to its publications:

The Virtual Collection is a digital archive of work by visual artists with AIDS that has been developed in conjunction with the Getty Information Institute. The Virtual Collection brings together a huge collection of images created by artists with AIDS and, by using sophisticated technology, makes it possible for curators and historians to access this material without sorting through thousands of fragile slides. The Virtual Collection will be accessible through leading libraries and museums, as well as the Internet. The Estate Project's redesigned website located at <http://www.artistswithaids.org> will feature both the Virtual Collection and on-line versions of Future Safe and other publications.

An even larger effort is the Estate Project's initiative to catalog and preserve the majority of AIDS activist video made in America. We believe these fragile records will form an invaluable resource in later studying and presenting this moment in history. A core group of important tapes has already been preserved and housed at the New York Public Library. We intend to nationalize this effort and preserve 1,000 hours of tape.

Finally, on September 30, 1997, the Estate Project's first film preservation effort had its world premiere at the New York Film Festival. This first film, *Whiplash* by the well-respected experimental filmmaker Warren Sonbert, has been used as a pilot project to develop standards of preservation. The Estate Project's film preservation project has been undertaken in partnership with the Academy of Motion Picture Arts & Sciences and the Guggenheim Museum. The Estate Project has also begun work on the estate of Jack Smith.

The Estate Project views the art works created by artists with HIV/AIDS crisis as vital historical records of a time of crisis. Comprehensive records such as these, stored in top-level archives, will be a treasure trove for historians hundreds of years from now. We believe much can be learned by the process of completing these projects and teaching other communities what we have learned.

An Anecdote

There has always been much made of the fact that most of the artists involved in the Estate Project's work have not achieved commercial success, as if that relegated them to a status where they were not worthy of basic services such as documentation and wills. It is interesting to look at two mid-career artists whose work has been somewhat hampered by the fact that proper estate planning was not done before their deaths.

Jimmy de Sana and Mark Morrisroe were both well-regarded photographers, producing challenging work that was recognized in the commercial world. It might be assumed that their work would thrive posthumously, nurtured by art world friends and a committed, intelligent dealer (Pat Hearn).

However, both de Sana and Morrisroe left a mass of uncatalogued negatives and source material. Not only were these materials an unworkable burden for Hearn and others entrusted with the arts, they were in a fundamental way only truly understandable to the artists themselves. While informed archivists might conjecture which images were to be printed and in what way, only the artists could have made their wishes known accurately.

Finally, several years later, Hearn has been awarded a grant from the Robert D. Farber Foundation to support the extensive work needed to fully catalog the estates. Although there is much interest in the work of both artists, including museum shows, only now will the work begin to be fully utilized.

Numerous examples of this type exist, ranging the gamut from famous artists such as Keith Haring to unknown artists who have never been shown. The leveling factor in all cases is that only informed decisions by the artists, while they are still well, make for an effective plan.

Conclusion

AIDS has had the effect of bringing to the fore issues that have long been unresolved in American culture. Much as AIDS has focused attention on the fact that our country's health care system is fundamentally flawed, it has also pointed out that our cultural legacy is rather fragile. It is the Estate Project's view that there is an incentive for both the individual and the arts community to value the process of making plans to safeguard the cultural records that will later illustrate this time of crisis.

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A VISUAL ARTIST'S GUIDE TO ESTATE PLANNING

The 2008 Supplement Update

Sponsored by
The Marie Walsh Sharpe Art Foundation and
The Judith Rothschild Foundation

Edited by Barbara T. Hoffman

A Visual Artist's Guide to Estate Planning

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Special Note:

Appendices may be downloaded from the *Supplement* and *A Visual Artist's Guide to Estate Planning* by clicking on the "download pdf now" option listed in Appendices in the table of contents.

A Visual Artist's Guide, the *Supplement*, and Appendices may also be downloaded from the website. Go to:

<http://www.sharpeartfdn.org>

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A Visual Artist's Guide to Estate Planning

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To facilitate the networking and exchange of information, The Marie Walsh Sharpe Art Foundation is interested in receiving your comments on the publication and any experiences related to this topic.

Send your comments and contact information to The Visual Artist Legacy Project ("ALP")™ at sharpeartfdn@qwest.net.

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PREFACE

Joyce E. Robinson
Vice President/Executive Director
The Marie Walsh Sharpe Art Foundation

It was the long-held dream of Marie Walsh Sharpe to support the visual arts by providing financial assistance to the gifted in the field. In June 1984, as the culmination of that dream, Mrs. Sharpe established The Marie Walsh Sharpe Art Foundation, charging it with providing assistance to individual visual artists of demonstrated talent and with providing seminars and workshops for gifted high school students. Mrs. Sharpe died on September 21, 1985. Her will stipulated that a substantial part of her estate be used to fund the Foundation.

To develop programs for the Foundation's Individual Artists Program, the Foundation turned to artists, who themselves turned to artists again. It was Chuck Close who initiated the idea of involving artists in the process of gathering information about the most important needs of the visual arts community. Further encouraged by Philip Pearlstein and Irving Sandler, the Foundation embraced the concept. With this purpose in mind, on November 16, 1988, the Foundation convened a meeting of twenty-six visual artists at Philip Pearlstein's New York studio, hosted by Chuck Close and Philip Pearlstein and facilitated by Irving Sandler. The publication *Roundtable Discussion on the Needs of Visual Artists* is a report of the session. A small group of artists from that meeting later met to prioritize the report's recommendations in developing programs; Cynthia Carlson, Chuck Close, Janet Fish, Philip Pearlstein, Irving Sandler, Harriet Shorr, and Robert Storr were selected from the original group to form the Foundation's Artists Advisory Committee.

The first program developed by the Committee was the Visual Artists Information Hotline, which was established in cooperation with the American Council for the Arts and began on October 1, 1990. The Hotline

is primarily a referral service, providing visual artists with information on a wide variety of programs and services available to them. During five years of operation at the Council, the Hotline responded to over 20,000 calls from artists. In March of 1996, the operation of the Hotline was transferred to the New York Foundation for the Arts, where it still continues, funded by a consortium of members, supporters, artists, and friends organized by the Sharpe Foundation's executive director. The Visual Artists Information Hotline Number is 1-800-232-2789. Now called NYFA Source, the website address is <http://www.nyfa.org>.

On April 4–5, 1997, The Marie Walsh Sharpe Art Foundation and The Judith Rothschild Foundation sponsored a Visual Artists Estate Planning Conference in New York, planned by the Artists Advisory Committee and facilitated by Chuck Close, Irving Sandler, and Robert Storr. The conference was attended by artists, accountants, archivists, art dealers, curators, lawyers, writers, and representatives from foundations, government, museums, and other nonprofit organizations, who discussed practical and legal issues related to both the planning and the administration of artists' estates. The result was *A Visual Artist's Guide to Estate Planning*, published in 1998, a comprehensive handbook designed to help artists plan their estates. Part I introduces general estate planning concepts and offers practical advice and a discussion of legal issues raised by artists at the conference. Part II consists of an in-depth discussion of policy and law on selected issues of estate planning and administration for visual artists. The Committee on Art Law of the Association of the Bar of the City of New York, chaired by Barbara T. Hoffman, Esq., wrote Part II.

With the passage of time and the fact that print copies of *A Visual Artist's Guide to Estate Planning* were no longer available, the Artists Advisory Committee recommended that the Foundation publish a supplement and update to the first edition. We turned to art lawyer Barbara T. Hoffman to assist us in developing the supplement and update, a task which she has taken on with passion and dedication. The current issues and the state of the art of the complicated issues confronting the artists and their advisors in planning the artists' estate and foundation are brilliantly put into focus by the contributors to the *2008 Supplement Update*, conceptualized, edited, and organized by Barbara T. Hoffman.

With the *2008 Supplement Update*, *A Visual Artist's Guide to Estate Planning* should continue to be a useful guide and essential tool for all those who create visual images, their advisors, including lawyers, accountants, museums, and galleries and those concerned with the post mortem preservation of the artist's legacy and reputation.

The Foundation's intention in publishing the update is the same as in publishing the first edition: "We intend this book to help you ask the right questions and seek the appropriate advisors. The book is intended to assist all visual artists regardless of their level of financial success in the current art world."

I want to personally thank and express the deep appreciation of The Marie Walsh Sharpe Art Foundation to Barbara Hoffman, and to the Advisory Board—Phong Bui, Cynthia Carlson, Matthew Deleget, Tara Donovan, Janet Fish, Philip Pearlstein, Irving Sandler, Harriet Shorr, Robert Storr and Chuck Close, Emeritus—for the time and invaluable contributions they have made without monetary compensation in support of this supplement and the work of The Marie Walsh Sharpe Art Foundation.

INTRODUCTION TO *THE 2008 SUPPLEMENT UPDATE TO*

A VISUAL ARTIST'S GUIDE TO ESTATE PLANNING

Barbara T. Hoffman, Esq.

It has been ten years since The Marie Walsh Sharpe Art Foundation, The Judith Rothschild Foundation, and the Association of the Bar of the City of New York collaborated to produce *A Visual Artist's Guide to Estate Planning*. The 5,000 print copies have long since sold out and the book has earned a merited reputation as an essential reference for the visual artist and his or her advisor, whether the artist is motivated by financial concerns, preserving an artistic legacy, or both.

The 2008 Supplement Update is to be used in tandem with *A Visual Artist's Guide to Estate Planning*. *A Visual Artist's Guide to Estate Planning* has two parts and appendices. Part I introduces general estate planning concepts and offers practical advice and a general legal discussion of issues raised by artists and their advisors at an estate planning conference in 1997. The questions posed, the wide-ranging discussion, and the anecdotal information in Part I is as timely today as it was ten years ago. To the extent that changes in policy or legislation have an impact on the discussion, they are reflected in the discussion in the *Supplement* or the materials in the Appendices.

AN UPDATE OF LEGISLATIVE DEVELOPMENTS IN TAX AND COPYRIGHT

Part II of *A Visual Artist's Guide to Estate Planning* consists of an in-depth discussion of policy and law on selected issues of estate planning and administration for the visual artist. Significant developments in the last decade have influenced the discussion and required revision to or supplement of a number of chapters. With the exception of the chapter on tax and the chapter on foundations, which have been entirely rewritten, Part II is intended to be read with the *Supplement*.

Recent tax legislation at the federal level, in particular, The Economic Growth and Tax Relief Reconciliation Act (“2001 Tax Act”) and The Pension Protection Act of 2006 (“2006 Tax Act”), have important planning implications for artists and their advisors. The 2006 Tax Act has several significant changes that impact charitable contributions, including provisions affecting (i) fractional interest gifts in donated property, (ii) the related use rule, and (iii) appraisal reforms with respect to noncash charitable contributions, imposing strict penalties on both appraisers and recipients (donees) for failure to comply with the reforms. The 2001 Tax Act and the 2006 Tax Act are discussed in the “Update to Overview of Tax and Estate Planning,” whilst the appraisal reforms and other developments with respect to valuation are discussed in “Valuation and Appraisal: Current Issues,” which supplements *A Visual Artist's Guide* chapters on “Valuation and Appraisal.” Extensive appendices are provided that reflect these changes and include relevant Internal Revenue Service circulars (“IRS”).

“Copyright and Other Intellectual Property Issues in Estate Planning and Administration for the Visual Artist” is supplemented by “Protecting the Intangible Assets of a Visual Artist’s Work: Estate Planning and Management of Copyrights to Create Value and Preserve a Legacy.” The chapter discusses the two significant changes in the Copyright Act that have occurred since 1998. In 1998, Congress passed The Digital Millennium Copyright Act to implement two treaties of the World Intellectual Property Organization (“WIPO”). Appendix B-1 provides a summary by the United States Copyright Office of The Digital Millennium Copyright Act. Perhaps of more importance to the planning and administration of artists’ estates and foundations is the discussion with respect to the Copyright Term Extension Act of 1998 (“CTEA” or Act), Pub.L.No. 105-298, 112 Stat.2827 and the policy implications of that discussion. More recently, legislation with respect to “orphan works” has been introduced, and its importance for those entrusted with protecting an artist’s intellectual property should not be overlooked. This chapter also discusses the increasing value in the exploitation of images in the digital world, with an emphasis on emerging business models and issues.

AN EXPANDED TREATMENT OF THE ARTIST FOUNDATION AND ARCHIVE

Chapter 4, “Artists’ Foundations,” has been entirely rewritten to reflect both the enormous growth and popularity in the artist foundation as an estate planning vehicle and the significant legal changes that have occurred with respect to advising the artist foundation. Because this is an evolving and complex area in which knowledge is acquired incrementally through shared experience, The Marie Walsh Sharpe Art Foundation sent a survey to thirty-five artist foundations, of which fourteen responded. The surveys are discussed in chapter 5, “Artists’ Foundations and Museums: Reflections on the Survey and Other Musings.” *A Visual Artist’s Guide to Estate Planning* discussed the Andy Warhol Foundation, the Pollock-Krasner Foundation, the Robert Mapplethorpe Foundation, and the Dorothy Dehner Foundation as different models of the artist foundation. To this discussion, we add as additional models, the Roy Lichtenstein Foundation, and Judd Foundation, private foundations, and the Anyone Can Fly Foundation, a public charity.

Harriet Shorr, artist, remarked, in the first edition, “Dead artists leave two bodies: their own, and a body of work.” In fact, artists and writers leave a third body—their archives. Rachel Dondio, writing in the *New York Times*, March 25, 2007, observed, “When writers die, their work lives on—and their papers go to Texas. Or Yale, Harvard, Emory, the New York Public Library, the British Library and other scholarly institutions that collect authors’ manuscripts and correspondence. How such papers change hands and find monetary value—is the result of a peculiar alchemy between market forces and literary reputations. Like the art and real estate markets, the archive market has gone through the roof.”

Because of this expanding market and because of the increasing importance for financial, educational, and reputational interest of the artist’s archive in the estate plan, we have expanded the discussion of the artist’s archive in the *Supplement*. Special emphasis is placed on the accumulative meaning of visual archives, the various functions of visual archives, and the selling of such archives to appropriate repositories.

CHANGING PUBLIC POLICY AND THE IMPORTANCE OF ADVOCACY

In a section titled “In a More Perfect World: Changing Public Policy” of *A Visual Artist's Guide to Estate Planning*, participants at the visual artist estate conference noted “that current tax laws in the United States work against the preservation of cultural heritage in this country.”

Participants proffered a number of alternatives both legislative and practical to improve the situation. Sadly, ten years later, to my knowledge, none of the recommendations have been implemented, and if anything, the situation is worse.

One of the proposed legislative initiatives dealt with changing the current tax law, which restricts an artist's income tax charitable donation of the work to the artist's basis (cost of the materials), rather than the fair market value of the work. Although such legislation to permit artists and writers to obtain a fair market deduction and achieve parity with collectors has been repeatedly introduced, it has not been enacted as law. Legislation passed the Senate and House in different forms in 2001. A reconciliation bill was derailed by 9/11. In 2003, the U.S. Senate passed, by a vote of 95-5, the Artist-Museum Partnership Act, but the legislation did not pass the House. Again in 2005, a bill passed the Senate as an amendment to a broader \$59.6 billion tax relief bill. Under the bill, artists could donate their work during their lifetimes at full fair market value provided it was properly appraised and donated at least eight months after it was created. The House tax relief bill did not include the provision. The most recent version of the legislation as well as a background report by the American Association of Art Museum Directors originally prepared with the assistance of the Committee on Art Law is included in the Appendices (C 1-3).

A glimmer of hope has appeared at the state level and should encourage artists to engage in advocacy at the state level as well as the federal level. Oregon code (ORS316.838) allows “a subtraction to artists who contribute their own works of art to a recognized charitable organization or governmental unit.” The art object must qualify for the deduction allowed by IRC Section 170. Unlike the federal tax law, the charitable

organization is not required to use the art for some purpose or function that qualifies it for its federal tax exemption. The legislation thus addresses two hurdles faced by artists who make charitable contributions—the limitation on the value of the contribution and the related use rule, which permits the artist to receive a gift and estate tax deduction and retain the copyright in the work of art, only if the work of art is donated to a charity for a related use.

In July, 1998, the Association of the Bar of the City of New York issued a report and recommendation titled “Qualified Contributions of Works of Art and Their Copyrights Treated as Separate Properties in Certain Cases.” The report addresses certain problems in the relationship between the U.S. copyright law and federal tax law, which also deter artists’ charitable deductions. The report is a call to action today as it was in 1998.

It is more than time for Congress to implement the proposed tax reform legislation to encourage donations of art, manuscripts, and other items created by the taxpayer to our cultural institutions.

Also included in the Appendices is a current legislative initiative to amend the copyright law to address the issues raised by “Orphan Works”—copyrighted works whose owners may be impossible to locate or identify. Concerns have been raised that the uncertainty surrounding ownership of such works might needlessly discourage subsequent creators and users from incorporating such works in new creative efforts or from making such works available to the public. Associations representing photographers and other visual artists argue that producers of visual imagery are disproportionately impacted by the proposed legislation and have argued against the breadth of remedies advocated by museums and libraries. Legislation introduced in the last Congress, which will no doubt surface again, is included in the Appendices along with two different views on the subject.

It is important in view of the foregoing for the artist and his or her advisors to be involved in advocacy at the state and federal levels. The links to several important organizations whose websites should be consulted for advocacy updates are provided for the convenience of the reader.

American Association of Museums <http://www.aam-us.org/>
Americans for the Arts <http://www.artsusa.org>
Association of Art Museum Directors <http://www.aamd.org/>
Association of State Art Agencies <http://www.nasaa-arts.org/>
College Art Association <http://www.collegeart.org/>

A WORK IN PROGRESS

The 2008 Supplement Update is intended primarily for visual artists, their lawyers, and other advisors. Thus, for the most part, the discussion in the *Supplement* is of concepts and strategies rather than detailed technical information to which lawyers or accountants already have access. More technical information is provided in the Appendices, with particular reference to tax materials.

In many respects, artists share the same estate planning concerns as other members of society. Basic estate planning techniques cannot be ignored. Visual artists and collectors of works of visual art, however, have additional concerns, albeit different, arising from creation and ownership of works of art. Both *A Visual Artist's Guide* and the *Supplement* intend to flag the issues and make the artist and his or her advisor aware of the specific concerns faced by the artist, both as creator and collector of works of visual art.

Artists, collectors, and their advisors need to be aware of the consequences of not planning, or rather, as is the case, having state law determine distribution of their property. Statistics indicate that 70 percent of the population dies without a will. Do not be part of the percentage. Substantial financial and reputational benefits accrue to the artist who carefully plans for the disposition of assets, particularly his or her art assets, including copyright and archives.

A Visual Artist's Guide to Estate Planning and *Supplement* is a work in progress for a subject not always demarcated by bright line rules. Estate planning is personal and fact specific. No one size fits all. Several of the issues are complicated, and this *Supplement* is not a substitute for competent legal advice.

Because there are no easy answers to many of the questions posed, we believe that there is a benefit to sharing techniques and strategies. We hope that you share the information with your fellow artists and their advisors.

Send your comments and contact information to The Visual Artist Legacy Project™ (“ALP”) at sharpeartfdn@qwest.net.

PART 1: CHAPTER UPDATES TO THE FIRST EDITION

CHAPTER 1: UPDATE TO OVERVIEW OF TAX AND ESTATE PLANNING

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FEDERAL TAX UPDATE: THE ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT (“2001 TAX ACT”)

Since the publication in 1998 of *A Visual Artist's Guide to Estate Planning*, there have been a number of significant changes governing the federal estate tax, gift tax, and generation skipping transfer tax (GST tax) under the Economic Growth and Tax Relief Reconciliation Act (“2001 Tax Act”) that are described below. In light of the complex provisions of the Internal Revenue Code as modified by the 2001 Tax Act, an artist would be well advised to consult an attorney to assist in the development and implementation of an estate and tax plan.

The 2001 Tax Act purports to repeal the estate tax and the generation skipping transfer tax (GST tax) for the estate of decedents dying during calendar year 2010. But the provisions eliminating the estate and GST

taxes do not apply to decedents dying, gifts made, or generation skipping transfers after December 31, 2010.

For decedents dying after December 31, 2001 and before January 1, 2010, the 2001 Tax Act:

(1) gradually reduces the maximum unified gift, estate, and GST tax rate from 50 percent to 45 percent for decedents dying in 2007, 2008, and 2009;

(2) increases the exclusion amount that can pass free of the estate tax and GST tax in the following years:

2002 and 2003	\$1,000,000
2004 and 2005	1,500,000
2006, 2007, and 2008	2,000,000
2009	3,500,000

[The federal estate tax and GST tax are repealed for persons dying during calendar year 2010.]

(3) reduced the maximum state death tax credit allowed in computing the federal estate tax by 25 percent, 50 percent, and 75 percent for decedents dying in 2002, 2003, and 2004 respectively; and in 2005 converted the credit for state death taxes into a deduction from the gross estate.

(4) did not repeal the federal gift tax, the gift tax exclusion remaining at \$1,000,000. However, annual exclusion gifts of \$10,000 indexed for inflation (now \$12,000) and gifts in any amount for tuition paid directly to an educational organization, and gifts paid directly to a provider for medical care or health insurance on behalf of an individual are not treated as transfers for purposes of the gift tax. Gifts made after 2009 will be subject to a rate schedule ranging from 18 percent to 35 percent.

(5) after repeal of the estate tax, property acquired from a decedent will be treated as though transferred by gift. However, the basis of selected assets for income tax purposes may be increased to \$1,300,000, and the basis of property left outright to a spouse or in a qualified terminable interest trust may be increased to \$3,000,000 (but not above fair market value).

[CAVEAT: However, under the sunset provision of the 2001 Tax Act, if Congress does not act, the above-described amendments will not apply in the case of decedents dying after December 31, 2010; and the federal estate tax, gift tax, and GST tax will revert to the tax system in effect prior to the enactment of the 2001 Tax Act.]

One important benefit of the 2001 Tax Act is the increase in the exclusion amount for purposes of the federal estate and generation skipping taxes to \$2,000,000 in the case of a decedent dying in 2006–2008 or \$3,500,000 in the case of a decedent dying in 2009. In the case of a married couple, the attorney may advise use of a “credit shelter” or “by-pass trust” in order to enable a husband and wife to each utilize his or her exclusion amount to pass a total of \$4,000,000 (if dying in 2006–2008) or \$7,000,000 (if dying in 2009) to their children free of federal estate and GST taxes. For example, a by-pass trust under the will of the first dying spouse (Spouse 1) would provide that his exclusion amount that can pass free of the federal estate tax would be held in a discretionary trust for the benefit of his surviving spouse (Spouse 2) and children. The trustee would be given the discretion to pay all of the income and so much of the principal as the trustee determines to Spouse 2, or alternatively, to pay over the income and principal of the trust among a class consisting of Spouse 2 and the children. On the death of Spouse 2, the trust remainder would pass outright to the children or, alternatively, continue in a generation skipping trust for the descendants. Since Spouse 2 will have no interest or power over the remainder, the assets held in the by-pass trust will not be taxed in her estate. In a typical estate plan for a husband and wife, Spouse 1 would create a by-pass trust funded with assets equal to his exclusion amount, and would bequeath the balance of his estate in excess of the exclusion amount outright to Spouse 2 or in a QTIP trust that would qualify for the marital deduction. Thus, no federal estate taxes would be imposed on the estate of Spouse 1. On the death of Spouse 2, the by-pass trust funded with Spouse 1’s exclusion amount will pass free of estate tax to the children, and Spouse 2 will have the benefit of her own exclusion amount to apply to her taxable estate (that would include the assets she owned outright or in a QTIP trust.) Under this scenario, depending on whether each spouse had a

\$2,000,000 or \$3,500,000 exclusion amount, the children could receive up to \$4,000,000 or \$7,000,000 free of federal estate taxes.

If, on the other hand, Spouse 1 does not create a by-pass trust and leaves his entire estate outright to Spouse 2, he will fail to use his \$2,000,000 or \$3,500,000 exclusion amount. On Spouse 2's death, although her estate will include the assets she inherited from Spouse 1 as well as her own assets, she will have the use only of her own exclusion amount, and depending on the year of her death, the children would receive only \$2,000,000 or \$3,500,000 free of federal estate taxes.

FEDERAL TAX UPDATE: THE PENSION PROTECTION ACT OF 2006 ("2006 TAX ACT")

Fractional Gifts

Under the Pension Protection Act of 2006 ("2006 Tax Act"), fractional gifts of tangible personal property (e.g., art) to a public charity, made after August 17, 2006, are subject to stringent rules regarding timing limitations and use limitations. Under section 170(o)(3)(A)(i),¹ the donor must complete the donation of his entire interest in the work of art before the earlier of (1) ten years from the initial fractional contribution or (2) the donor's death. If the donee charity is no longer in existence, the collector's remaining interest may be contributed to another section 170(c) organization.

Under the new provisions, the donee charity of a fractional interest in a work of art must (1) have substantial physical possession of the work of art during the donor allowed possession period (maximum of ten years) and (2) use the work of art for an exempt use during such period and satisfy the related use rule, section 170(o)(3)(A)(ii). The Joint Committee on Taxation Report (the JCT Report) gives an example of an art museum described in section 501(c)(3) that is the donee of a fractional interest in a painting that includes the painting in an art exhibit sponsored by the museum, as satisfying the related-use requirement. However, the JCT Report contains no example as to the meaning of "substantial physical possession." The market value of the additional contribution will be deter-

1. All section references are to the Internal Revenue Code of 1986, as amended.

mined by the lesser of the fair market value of the art at the time of the initial contribution or the value at the time of the additional contribution.

Regulations will need to further clarify this meaning of “substantial physical possession.” Requiring a museum to take physical possession of an artwork during this time period, without regard for the museum’s ability to store or display that work, will impose additional costs on museums. Requiring the art to be transported back and forth subjects it to additional risk of damage or loss.

Recapture of deduction: Onerous recapture rules and penalties are imposed if the entire interest in the art is not received by the museum within that timeframe, or if the museum does not obtain possession of the art commensurate with its interest and/or does not use it for its related purpose. Under section 170(o)(3)(A), if the donor violates the ten-year timing limitation or the use limitation (the substantial possession or related-use requirement), then the donor’s charitable income and gift tax deductions for all previous contributions of interests in the work of art are recaptured plus interest. In any case in which there is a recapture of a deduction, the statute also imposes an additional tax in an amount equal to 10 percent of the amount recaptured.

This severe penalty for noncompliance will deter donors from making fractional gifts. In addition, the law is unclear about what would happen if a donor dies before the end of the ten-year period, but before the donee museum has had a chance to comply with the “substantial physical possession” requirement. Would the donor’s heirs be subject to the tax penalty? The law also is unclear whether these penalties are cumulative.

Denial of deduction: Under 170(o)(1)(A), no income tax deduction is allowed for a contribution of a fractional interest in a work of art unless immediately before such contribution all interests in the work of art are owned (1) by the taxpayer or (2) by the taxpayer and the donee organization. Under 170(o)(1)(B), the secretary is authorized to make exceptions to this rule in cases where all persons who hold an interest in the work of art make proportional contributions of undivided interests in their respective shares of such work of art to the donee organization.

The 2006 Tax Act contains similar limitations as described above for gift and estate tax purposes. (See section 2055(g) and section 2522(e).) Like the income tax provision, IRC § 2055(g)(1) limits the estate tax charitable deduction to the lesser of: (1) the fair market value at the time of the initial fractional contribution; or (2) the fair market value at the time of the additional contribution by gift or at death. In order to avoid the recapture of the income tax deduction, the transfer to the donee charity must be completed on the earlier of ten (10) years from the initial contribution or the donor's death.

Many collectors choose fractional gifts so they can (1) spread out the tax benefits of the donations over many years, and (2) retain some possession of the works during their lifetimes. Imposing a ten-year limit on the duration of a fractional gift most probably will eliminate these incentives and discourage fractional donations of artworks to museums.

Related Use of Donated Property

The 2006 Tax Act also added new Internal Revenue Code section 170(e)(7)(A) that provides if a charitable organization receives appreciated tangible personal property as a charitable contribution and disposes of the property within three years of receiving it, the donor may not derive any tax benefit beyond a deduction in the amount of the property's basis, section 170(e)(7)(C).² However, this rule will not apply if the donee provides a "certification" from the donee charity that the property was intended to be used or was put to a use related to the donee's exempt purpose, section 170(e)(7)(B).

The related use rule applies to capital gain property that is tangible personal property contributed to a public charity. The term "tangible personal property" includes paintings and art objects not produced by the donor. The related use rule requires that the use of the tangible personal property by the donee organization be related to the purpose or the function constituting the basis for the donee's exemption under section 501.

2. One of the major changes made by the Tax Reform Act of 1986 was the amendment of section 170(e)(1) so that 100 percent of the appreciation in value is lost as a charitable deduction if the related use rule is not satisfied.

STATE UPDATE: TRANSFER-ON-DEATH SECURITY REGISTRATION ACT

In 2005, the New York legislature adopted the Transfer-on-Death Security Registration Act (effective with respect to decedents dying on or after January 1, 2007) that allows the owner of securities to create an account with a broker or transfer agent in “beneficiary form” (referred to as a “TOD” or “POD” account). [See New York Estates, Powers and Trusts Law Sections 13-4.1 ff.] The securities in the TOD account are transferred on the death of the owner by the broker or transfer agent directly to the named beneficiary or beneficiaries, and accordingly will not be subject to the terms of the owner’s will. It is therefore of the utmost importance that the artist advise his or her attorney of a sizeable TOD brokerage account that would pass outside of the will and could result in a major distortion of the testamentary plan.

CHAPTER 2: THE APPRAISAL: CURRENT ISSUES

Dr. Alex Rosenberg

President, Alex Rosenberg Fine Art

THE PENSION PROTECTION ACT OF 2006 AND THE QUALIFIED APPRAISER

The Pension Protection Act of 2006 (“the 2006 Tax Law”) has added strict requirements for appraisals of noncash contributions for which an income tax charitable deduction is sought. Unlike the income tax law, estate and gift tax laws do not require a qualified appraisal by a qualified appraiser. The IRS has discretionary authority to waive all or part of the section 6662 penalty if the taxpayer establishes that there was a reasonable basis for the valuation claimed and that the claim was made in good faith.

For any contribution of exempt use property of more than \$5,000, a qualified appraisal by a qualified appraiser must accompany the return. The 2006 Tax Law defines the terms. Any appraisal must be obtained no more than sixty (60) days before the donation. (See tax appendices regarding noncash contributions.)

VALUING ESTATES: PURPOSE OF THE APPRAISAL IN RELATION TO HOW THE ASSETS WILL BE HANDLED

While the Internal Revenue Service (IRS) regulations require estate appraisals employ Fair Market Value (FMV) in determining value, and that the end result be the same as when an item is valued when being donated as a tax deductible gift, in practice we have found that there is a considerable variance in the approach taken by both the IRS and the appraiser for the taxpayer. The IRS, as a money-raising organization for the government, will tend to overvalue items in estates and undervalue them when given as gifts. These are rational positions, as each side has an opposite interest.

The appraiser must be keenly aware of this situation and be careful in determining how far he or she can deviate from an impartial value. When one considers that the IRS's position is unreasonable, considering that in determining FMV one is called upon to add the auction house's fee to the hammer price and that an estate is not a buyer but a seller that will have to pay 10 percent to sell an item, one finds there will be as much as a 25 percent difference between the IRS's calculations and the real amount to be realized from an auction sale.

Therefore, it becomes important for the appraiser to advise the attorney or accountant of the estate to dispose of as much of the estate that is unwanted prior to the date of probate. This will prevent inheritance taxes being levied on objects valued higher than the amount they will sell for.

When the IRS examines an estate appraisal, they will forego challenging the appraisal if the appraiser's value is within 15 percent of the IRS appraisal. The IRS will rarely, if ever, take the time to examine the condition of the objects being taxed and will value them in accordance with previous sales at auction. Therefore, the appraiser must examine each item and carefully describe any blemish, damage, or shortcoming of the asset as a means of lowering its taxable value. Further, the appraiser must determine if he or she has a case for employing blockage discount. The IRS will generally oppose the amount of this deduction, leaving the appraiser with the responsibility to clearly show the justification for taking a blockage discount and to be careful not to take a discount that is unwarranted.

When there is a surviving spouse, both the spouse and appraiser should be aware of the future ramifications of values given to the objects inherited free of inheritance tax by the spouse. In valuing any inherited item, the appraiser should find out which items will be given away, which will be sold, and which will be kept. As no tax is involved, it will be advantageous to the surviving spouse if those items being donated and those being sold are given as high a value as is logical. This will decrease the taxes on the estate on that portion not being inherited by the spouse. By increasing the base value of art being inherited by the spouse or others, the appraiser will help reduce the tax on the profit of the item when sold.

If the amount of the art inherited by the spouse is of considerable quantity, the IRS may allow that blockage lowers the value of the items being inherited. The sale at auction of unwanted objects before probate will supply the appraiser with values the IRS will normally accept.

The Artist's Death and Stepped-Up Basis

During an artist's lifetime, the art that the artist created is termed "ordinary income property." As such, it is not a capital asset, and the artist pays the higher income tax rate on sale, deducting from profits the artist's expenses. This explains the difference in treatment for charitable contributions of an artist and a collector.

The tax consequence of death for the artist is that in the artist's estate, the art is taxed at its fair market value. The good news is that property included in the artist's gross estate for federal estate tax purposes acquires a "step-up" in basis for income tax purposes equal to its federal estate tax value. The IRC section 1014 provides that the basis of property is the fair market value at the date of death or the alternate valuation date as appraised for purposes of the federal estate tax. The heirs acquire the art at the step-up in basis. If a work of art is occasionally sold by an artist's estate or heirs after the artist's death, the work acquires the "stepped-up basis" or fair market value used for estate tax purposes. Any profit on the sale determined by subtracting the estate fair market value from the selling price is taxed at the lower capital gains rate. However, if the artist's business is continued by his estate, his trust, or his heirs, the profit on any sale is taxed at the higher ordinary income rate.

The Janis Case and the Principle of Consistency

Janis v. Commissioner, 87 T.C. Memo 1322 (2004), is a good example of the issues discussed in this section as well as of the concept of blockage discount. Art dealer Sidney Janis died owning many works of art in the gallery that he ran as a sole proprietorship. The IRS Art Panel first determined the total value of the works of art owned at death to be \$36,000,000 based on a per item appraisal submitted by executors. The panel then allowed a \$13,600,000 discount based on the following arguments made by the taxpayer:

- (1) there were numerous works by individual artists;
- (2) some of the art would be sold in the dealer market as opposed to the retail market;
- (3) the executor's inability to sell the gallery in the retail market for the sum of the value of the individual works of art;
- (4) the fact that a buyer of the gallery would not pay the full resale price of the underlying assets in a bulk sale; and
- (5) any buyer would consider the cost of maintaining the business for a reasonable period of time.

After accepting the taxpayer's arguments that reduced the value of the artworks by \$13,600,000 the IRS Art Panel agreed to further apply a blockage discount. The panel first acknowledged that the blockage concept generally applies to a large number of works by one artist, usually in an artist's estate. It then went on to apply some of the general blockage discount principles to the gallery's inventory as follows:

A number of factors have been considered in determining whether a blockage discount is appropriate and to what extent it should be applied to the subject properties. Consideration was given to the prominence of the artists; the types of works in the estate; the distribution of the items (for example, the number and types, and their quality and saleability); the number of similar items available in the marketplace; the market's response to such works around the valuation date; the number of sales and the prices at which sales were made during the period immediately preceding and following death; the annual sales of the gallery; length of time necessary to dispose of the items; the works that are saleable within a relatively short period of time; the works that can only be marketed over a long period; the demonstrated earning capacity of the business; the tangible and intangible assets, including goodwill and the reputation of the gallery and provenance.

In addition, consideration was given to the possible disbursement and handling of the gallery. One option would be the continuation of the gallery through Sidney Janis's surviving sons and the selling of the items in the course of business. Another option would be the sale of the gallery to a willing purchaser.

Attention was given to the gallery's annual gross and net receipts of the inventory since 1985. This resulted in a further 37 percent reduction of the value of the gallery's inventory or a total combined discount of approximately 60.42 percent.

When the heirs of the estate who continued to operate the gallery as a trust then partnership, some years later, sold some of the artworks, they used as their new stepped-up basis the original per item appraisal value accepted by the IRS Art Panel before the application of the 60.24 percent discount. The Tax Court rejected the heirs' argument, holding that the "appraised value" contemplated by section 1.1014-3(a) is a value that includes the blockage discount. Accordingly, the heirs' step-up in basis was limited to the discounted per artwork value.

The heirs of the estate appealed the Tax Court's decision to the Ninth Circuit (*Janis v. Commissioner*, 461 F.3d 1080, 2006), which affirmed the Tax Court's decision on the basis of the principle known as the "taxpayer's duty of consistency."

APPRAISING SITE-SPECIFIC WORKS OF ART

In appraising site-specific works, the appraisal value used will often determine if a work has any monetary value other than replacement cost for insurance purposes or as salvage. An immovable installation that cannot be reconstructed elsewhere can be insured initially for its total cost and increased in value if and when the artist's prices increase. The values for the site-specific work must increase in the same proportion as the artist's other works. No further justification is required. As salvage, the value, however, is unpredictable. Only after a piece has been sold are we able to determine its value. This is the amount that the owner received from the sale.

Fair Market Value (FMV), Market Value, and Marketable Cash Value require that for a property to have value it must be moveable, usable, and able to be possessed by a new owner. If there is no way to disassemble an installation and install it elsewhere or no way to remove the furnishings from the site without destroying them, the piece has no commercial value. The exception to this rule would occur if one were able to sell an installation to another party as part of the sale of the real estate.

An illustration of this took place about twenty years ago in a bankrupt hotel in Miami Beach, Florida. While constructing the hotel, the owners installed an extremely large-sized Henry Moore pink marble sculpture. The work was so large and heavy it had to be embedded in concrete when placed in the atrium of the hotel, prior to the atrium being completed and the roof installed.

In subsequent bankruptcy proceedings for the hotel, the value of the sculpture became an issue because the trustees wished to sell the sculpture to raise funds needed to reach a settlement with the creditors. The sculpture had originally cost, including the installation, \$5 million.

An appraiser was hired to determine the FMV of the Henry Moore sculpture. The work was quite beautiful, enhanced the entire ground floor of the public area of the hotel, and had a public relations value far greater than its original cost. Moving the sculpture, however, from its present location proved to be an impractical idea because the cost of freeing the sculpture from its concrete base and removing the roof of the atrium so that the Moore could be hoisted out was much more than the amount for which the Moore could be resold. This being the case, the appraiser concluded that the work had no FMV and only had value in its present site.

This finding pleased no one, and the appraiser was replaced by another. The second appraiser suggested that the sculpture be cut into sections that could then be removed from the hotel without damaging the building's structure. He estimated the net value of the pieces to be \$1 million after deducting the cost of disassembling the sculpture and repairing the site where it had rested. The parties accepted this value, which was actually a salvage value, because the art would no longer be in its origi-

nal form and would have lost its artistic integrity. Henry Moore himself objected to this solution, preventing it from being employed. The sculpture remained in place but its monetary value was lowered to the salvage value to benefit the creditors.

This situation and other similar examples have resulted in several well-known artists using purchasable objects in their installations. Instead of the installation being unique, it has become part of a numbered series with each example being accompanied by a blueprint that allows the work to be moved and reassembled elsewhere. By handling installations in this manner, the work can be sold, moved to a new location, and have a commercial value.

On the other hand, there is an occasion when a site-specific work may be eligible to have a fair market or replacement value. Sol LeWitt has created nonunique site-specific works by selling a kit of objects that is accompanied by a certificate of authenticity signed by him, giving the title of the work and its number in the edition. The certificate includes the instructions needed to install the work.

This work can be disassembled, sold to another person, and reinstalled at a new location. These conditions make this work of art possibly eligible for an FMV or Replacement Value appraisal. However, the question arises if an object that can be moved and reinstalled at a location other than where it was originally installed qualifies to be a site-specific work.

ARTISTIC INTEGRITY AND VALUATION

Visual artists in the United States, under section 106A of the Copyright Law (the Visual Artist's Rights Act of 1990), are given a limited right of integrity. (See Hoffman, Chapter 3.) The right of artistic integrity is an intangible right that remains with the artist even after the work of art is sold. Thus, if a purchaser purchases all right and title to a work of art, the buyer may not modify or alter the work of art in a manner that is harmful to the artist's reputation. A contrary result would prevail if a sale is characterized as a commercial transaction of a work not defined as one of the narrow categories of a work of visual art.

In a case that resulted in a negotiated settlement, the works of a prominent sculptor, represented by one of New York's top galleries, declined in value and appeal. The sculptor entered into a commercial-type arrangement under which he sold his foundry, tools, inventory, and rights for a significant amount of money plus a royalty arrangement covering future sales. Included in the agreement was a medical plan, salary, and even the number of weeks of vacation the selling artist was entitled to each year.

The new owner destroyed much of the inventory as excess and undesirable, placed the work with a number of lesser quality galleries, and in short order revived the artist's market to such an extent that the artist received about \$3 million from the proceeds of the sales and royalties. The artist then sued based on the owner having violated his artistic integrity.

The issue was to determine if the sales agreement was that of an artist and a dealer or a commercial agreement between an owner of a plant, machinery, and inventory with a dealer of equipment who was not in the art business at the time of the transaction.

The sculptor abandoned the case on the advice of counsel, as in the course of the proceeding it was determined that the transaction was a commercial one in which the artist had surrendered his rights governing artistic integrity.

As appraisers, it is important for us to make several determinations when asked to appraise an object that uses the image that an artist created for another purpose. If the reproduction is an image of a painting made into a poster that clearly is a true reproduction of the original work, our only problem is to determine if the poster was made legally and recognizes the right of the artist. But if the colors have been changed or it is being used to decorate toilet paper, for example, the artistic integrity of the artist has been violated and we may not appraise the reproductions without the permission of the artist, as we will be attributing value to an illegal or immoral product; something our ethics prevents us from doing.

This can be a very complicated issue, and if we appraise such items, we can find ourselves defending our actions. The best advice is to either not do the appraisal or, if sufficiently important to the appraiser, consult an attorney versed in these matters.

GIFTS BY ARTISTS HAVING REPURCHASED THEIR OWN WORK

The tax effects on an artist who has repurchased his own work in the open market are unclear and have never been adjudicated or been subject to an official Internal Revenue Service (IRS) ruling.

The regulation, as written and now in force, deals with artists gifting their own work. In this case, the IRS has decided that the artist can only deduct from his taxes the cost he incurred in creating the work. However, two recent occurrences, both conflicting, indicate that the IRS is not totally convinced of its own ruling, especially when the artist is the donor of one of his own works that had previously been owned by others.

In the first case, a well-known artist purchased his own work at auction many years after having painted it. Considering himself to be a holder in due course and not the original owner-donor, he decided to gift the work and take a Fair Market Value (FMV) tax deduction. His accountant refused to allow him to do this because he read the regulation in its strict interpretation. The IRS's legal department at the behest of the Art Advisory Panel ruled he could deduct what he paid for the painting at auction, but not its FMV. In addition, the IRS ruled he would have to surrender his copyright. In the face of this, the artist took no tax deduction.

In the second similar case, another well-known artist had a very different result. The artist's personal corporation bought one of his own works at auction and after holding it for more than a year, sold the work. His accountant advised him that the sale was subject to only a capital gains tax, as he was a holder in due course and no longer the original owner (painter). The IRS accepted his tax return; it never went before the Art Advisory Panel for an opinion.

From these two experiences, it would appear that the Art Panel's opinion is in conflict with the general IRS policy, since the difference between these two similar sales is that in one case the donation was made personally and in the second case the sale was made by the artist's personal corporation. We can assume that had the second artist's transaction gone before the Art Advisory Panel, they might have ruled against his taking

a capital gains tax and would have insisted that normal taxes be paid. Had the first artist sold the painting and donated the money to a tax-free donee, he would have received a full deduction for the gift, which offset its cost and profit, instead of only being allowed to deduct the cost and being forced to cede his copyright.

For years, the art world has protested the IRS's treatment of artists' gifts of their own work; hopefully, a change in the law is in the offing.

CHAPTER 3: PROTECTING THE INTANGIBLE ASSETS OF A VISUAL ARTIST'S WORK: ESTATE PLANNING AND MANAGEMENT OF COPYRIGHTS TO CREATE VALUE AND PRESERVE A LEGACY

Barbara T. Hoffman, Esq.

The Supplement Update to the chapter "Copyright and Other Intellectual Property Issues in Estate Planning and Administration for the Visual Artist" assumes that the reader is familiar with the basic copyright concepts discussed in that chapter.

This chapter provides a more in-depth analysis on some of the practical concerns and policy issues encountered by an artist, his or her advisors, and those who are otherwise entrusted with planning and administering the artist's estate, foundation, or archive.

The rapid advance of the digital technologies and the increasing demand for visual content provide significant opportunities to artists, their foundations, and their estates, and make it even more important for planning and administration for the artist and his or her advisor to focus on intellectual property issues, primarily copyright, but also trademark and state law rights of privacy and publicity.

The Internet has the ability to make exhibitions and archival material available to a global public. Artists, artists' foundations, artists' trusts and estates and archives may hold valuable intellectual property assets, which with careful management can promote the artist's reputation, provide revenue streams, and benefit society by providing visual images for study, research, and education. Consider the private foundation set up by the will of Willem de Kooning. Its IRS Form 990-PF for the year ending June 30, 2006, listed income of \$44,579.00 from reproduction income. In the section of the 990 that describes how its revenue-raising activities are related to its exempt purpose, the foundation states, "Royalties from the licensing of reproductions and/or publications of Willem de Kooning

constitute some of the means by which the Foundation currently accomplishes its exempt purpose. Its exempt purpose is to preserve the artwork of Willem de Kooning, and provide access thereto; to create and maintain an archive of artworks and reference papers relating to Willem de Kooning and provide access to the archive to scholars for research; and to educate the public about the art of Willem de Kooning and art in general.”

The Isamu Noguchi Foundation and Garden Museum manages an extensive collection of sculptures, architectural models, stage designs, drawings, and furniture designs. Its 990 for 2005 shows reproduction income of over \$400,000. Judd Foundation (see Chapter 8) has a rights clearance program as well as an extensive licensing program for Judd furniture. In 2006, combined income from these activities based on its Form 990 was \$114,120.

For many photographers, their foundations, and estates, the exploitation of their photo archives is a primary source of revenue as well as a means of building a reputation. Licensing usage rights, reproductions of prints, and publications are core activities. Richard Avedon bequeathed to the Richard Avedon Foundation the photographic and archival materials he possessed at death as well as the copyright to his images. The Richard Avedon Foundation on its Form 990 for 2006 reported a total of \$106,571 from royalty income, book income, and usage fees (<http://www.richardavedon.com/>).¹

The “mother” of licensing foundations is The Andy Warhol Foundation for the Visual Arts. Since 2004, The Andy Warhol Foundation for the Visual Arts has seen significant growth and development in its licensing program. Licensed products designed from Warhol images have appeared in prominent publications such as *Italian Vogue*, *Interview*, and *i-D Magazine*. The foundation was nominated for International License of the Year by the Licensing Industry Merchandising Association, competing against major properties such as Harry Potter and Spider Man. The line of Andy Warhol products, including clothing, housewares, stationery, and other items, is well established and successful in Europe, and will soon move aggressively into the North American market with a new line of

1. The Robert Mapplethorpe Foundation on its Form 990 for 2006 reported income from loan fees and royalties of \$246,202 and gross income from sale of photographs of \$4,304,240.

products for the home. Annual revenues from licensing are estimated at approximately \$19 million per year.

Copyright and other intellectual property rights should be specifically discussed and addressed in any visual artist's estate plan with respect to the dual benefits of minimizing estate taxes and building a legacy. As I use the term, "visual artist" includes those who create images—photographers, painters, multi-media artists, graphic artists, computer artists, performance artists, and filmmakers. There is no one correct solution. Strategies will in part depend on the medium of expression, the importance of licensing to the medium, and whether works exist in editions, are intended to be unique, or are plans for yet unrealized works.

COPYRIGHT AND CHARITABLE CONTRIBUTIONS: A TRAP FOR THE UNWARY

Other chapters have discussed the benefits of charitable giving. Even for a visual artist currently disfavored under the federal income tax law with respect to lifetime charitable contributions of works created by him or her, the federal estate tax provides a 100 percent deduction of the fair market value of any artwork left to a qualified charitable institution.

Qualifying for this deduction, particularly for the artist, is an important part of any estate plan, not only because of its potential for building a legacy, but because it reduces estate taxes for the artist. Artists and their advisors need to be fully aware of the traps and pitfalls in IRS requirements respecting charitable deductions. The subject of the interface between the copyright law and the federal tax law is explored in my original chapter. The subject is also fully discussed in the Report and Recommendations issued by the City Bar Association when I was Chair of the Committee on Art and Law. (See Appendix C-4.)

An artist who retains copyright in the estate or bequests it to a foundation or archive and may lose the benefit of a fair market charitable deduction for the artwork unless attention is paid to the disposition of the artwork. If the artist at the time of her or his death does not own the copyright, this cautionary note does not apply.²

2. See Chapter 1, Fraiman, G. (Related Use Rule) and Chapter 4, Bjorklund, V., Esq. and Lerner, R. and Bressler, J. *Art Law* (2005).

[CAVEAT: An artist should not make a testamentary gift of an artwork without its copyright if the artwork is given to a “non-operating private foundation” or to a qualified charity for an unrelated use. In light of my recommendation for centralized management of copyright, careful planning with the artist’s advisors is necessary with respect to tax planning and copyright management. If the copyright interest is maintained by the artist’s estate or foundation, without the art, the transfer of the art must be made to a “qualified organizaion” and meet the requirements of IRS Code 2055(e)(4)(c) and 170(e)(1), otherwise 100 percent of the appreciated value of the property may be lost for failure to comply with the related use rule.]

In 2004 Congress enacted the American Jobs Creation Act of 2004. The law contains provisions to deal with what the IRS saw as abuses in deducting charitable contributions of intellectual property. The law places limits on the initial charitable contribution. Artists are not covered by this provision, which does not apply to copyright on works created by the taxpayer.

**UPDATE TO THE FORM “DEED OF PARTIAL GIFT TO THE NATIONAL GALLERY”
P. 113 OF THE CHAPTER**

This form must be modified to reflect the restrictions imposed on fractional interest gifts by the Pension Reform Act of 2006 discussed in the update to the Chapter “Tax and Estate Planning.”

**SUPPLEMENT TO “SOME THOUGHTS ON A CHECKLIST FOR COPYRIGHT
AND INTELLECTUAL PROPERTY MANAGEMENT IN ESTATE PLANNING AND
ADMINISTRATION”**

I have reprinted from the original chapter the checklist for the convenience of the reader.

1. Inventory copyright interests and other intellectual property assets; record all assignments, exclusive licenses, nonexclusive licenses.
2. Create art image and likeness usage checklist for prospective licensees/usages.

3. Plan for unified management of artistic and intellectual property and identify future owners of artistic property, secondary materials like journals, photographs, letters, and copyright interests in both categories.
4. Consider various options for copyright licensing management.
5. Consider moral rights (statutory and contract).
6. Create documents for foundation, trust, basic licensing forms, artist/gallery consignment agreements.
7. Seek out and enter into agreements with art critics, art historians, or galleries for preparation of catalogue raisonné of all or part of a body of work.
8. Provide testamentary instructions and guidance concerning copyright exploitation of works of art in the estate.
9. Consider limiting value in the estate plan by imposing restrictions on reproduction rights, such as creating limited editions, etc.

In these next sections, I will supplement the discussion of points one, four, and five of the checklist.

Creating an Inventory of Copyright and Other Intellectual Property Assets

Often, in advising estates, foundations, archives, and museums, one of the more difficult issues, particularly for works created prior to the effective date of the 1976 Copyright Act, January 1, 1978, is determining the copyright status of works in the collection.³ Because of the technicalities now eliminated in the Copyright Act of 1976, many works of art under the

3. Until 1978, the term of federal copyright was 28 years from the date of publication. To maintain copyright protection during the second, or renewal, term a copyright owner had to file a renewal application during the 28th year of the initial term. Failure to comply in a timely manner with those strict requirements meant the work fell into the public domain. That changed with the passage of the 1976 Copyright Act, which provided that federal copyright protection of works created by "identified natural persons" would run from the

Copyright Act of 1909 inadvertently fell into the public domain for “publication” without copyright notice, or for failure to renew in a timely fashion. The public domain is an expansive concept that includes facts and ideas. A significant part of the public domain consists of works that once were protected by copyright but have lost that protection by forfeiture, abandonment, or expiration of their term.

Normally, an artist’s foundation or estate will own the copyright in works created after 1978, unless the work was created as a “work for hire”⁴ or the artist assigned the copyright in writing or published the work without notice prior to March, 1989, and failed to correct the omission as permitted by the 1976 Copyright Act. Nevertheless, the foundation, estate, or archive must use due diligence to establish the copyright status of works. Particularly, photographic collections may have multiple layers of authorship (i.e., the “author” of the photograph and the “author” of the original work). In addition, certain works of art may implicate rights of privacy and publicity of a depicted subject.

In 1998, the Sonny Bono Copyright Term Extension Act (CTEA) retroactively extended the duration of copyright from “the life of the author plus 50 years,” in the 1976 Copyright Act, to “the life of the author plus 70 years,” in the case of individual works, and from 75 years to 95 years in the case of works of corporate authorship and/or those first published before Jan. 1, 1978. This extension was challenged by Eric Eldred, a New Hampshire-based Web publisher who puts public domain books on the Internet. In *Eldred v. Ashcroft*, he argued that the Internet and digital

work’s creation—rather than its publication—and that such protection would last until 50 years after the author’s death. At first, Congress retained the renewal feature for works copyrighted and still in their initial term before Jan. 1, 1978, but in 1992 it eliminated the mandatory renewal registration requirement, automatically extending the second term for works copyrighted between Jan. 1, 1964 and Dec. 31, 1978.

4. Sec. 101 of the 1976 Copyright Act defines two types of “work for hire”: (1) An employer-employee relationship if the employee creates the work within the scope of employment; (2) one of several categories of commission works. To help determine who is an employer, the Supreme Court in *CCNV v. Reid* identified certain characteristics that define the relationship of employer-employee. The typical artist commission does not normally fit within any of the categories.

technology made it possible for people to create and distribute new works made from older ones, if only copyright law would permit it.

It is important, if only briefly, to understand the dynamics of this lawsuit, because the resolution of the policy issues involved are recurring, and those who are responsible for the management and administration of artist's estates and foundations should participate in the ongoing dialogue. As with so many copyright battles, the interest of the author (the creator) had been overshadowed by fears of corporate interests collapsing the public domain. The CTEA was called the "Mickey Mouse Law" by opponents, since these Disney characters arguably would have entered the public domain circa 2002. However, artists, their estates, and museums that own copyright benefit by longer protection for their works and the ability to license works in their collection.

In its 7-2 *Eldred* decision, the Supreme Court addressed the appropriate balance between copyright and the Free Speech Clause of the First Amendment and struck the balance in favor of Congress's power to enlarge the term of copyright. The Court determined that CTEA was constitutional and that the extension of existing copyrights did not exceed Congress's power under the Intellectual Property Clause of the Constitution.

Artists and their advisors often ask whether in order to receive copyright protection, it is necessary to register with the U.S. Copyright Office. Under the 1976 Copyright Act, the "author" of a work in a "tangible medium of expression" is the copyright owner. Registration is not a condition of copyright protection.

Even though registration is not a requirement for protection, the 1976 Copyright Act provides several inducements or advantages to encourage copyright owners to register. Among these advantages are the following:

- Registration establishes a public record of the copyright claim.
- Before an infringement suit may be filed in court, registration is necessary for works of U.S. origin.

- If made before or within five years of publication, registration will establish prima facie evidence in court of the validity of the copyright and of the facts stated in the certificate.
- If registration is made within three months after publication of the work or prior to an infringement of the work, statutory damages and attorney's fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner.
- Registration allows the owner of the copyright to record the registration with the U. S. Customs Service for protection against the importation of infringing copies.

For additional information, go to the [U.S. Customs and Border Protection](http://www.cbp.gov/xp/cgov/import) website at www.cbp.gov/xp/cgov/import. Click on "Intellectual Property Rights."

The current fee is \$45.00 for each registration. Photographers and visual artists meeting the requirements may file all the images created by the same author in one year as one group registration on Form VA.

Most artists' estates and foundations may not normally hold trademarks. Nevertheless some museums with notable buildings like the Guggenheim have trademarked Frank Lloyd's building in New York and Frank Gehry's Bilbao. The Warhol Foundation and the Andy Warhol Museum hold many trademarks. For example the Warhol Museum, One Stop Warhol Shop, Warhol.org are all service marks or trademarks of the Andy Warhol Museum. Unlike copyright law, trademark and unfair competition law allow protection of words, logos, and designs that otherwise would be in the public domain. This difference in protection is rooted in the historical development of these separate and distinct bodies of intellectual property law. Copyright law falls under the Intellectual Property Clause of the Constitution; trademark law falls under the Commerce Clause. Thus, trademark's primary purpose is to identify and distinguish the source of a good or service. A trademark is any "word, name, symbol or device adapted or used by a manufacturer or a merchant to identify his goods and distinguish them from those sold by others." To determine the degree

of trademark protection received, marks are categorized according to a common-law hierarchy of descriptiveness. The order is (1) generic marks, which are never registrable; (2) descriptive marks, which are registrable upon proof of secondary meaning; (3) suggestive marks, which are registrable; and (4) arbitrary or fanciful marks, which garner the highest trademark protection.

As a result, trademark law reverses copyright by allowing an individual or organization to select a word or design (“the mark”) to represent a product or service. If that word or design symbolizes the product or service in the public’s mind, it obtains a “secondary meaning,” and the individual or organization acquires a property right in the mark. For example, trademark rights carry important implications for characters, since characters can be used to identify the source or origin of goods or services as well as embody the creative expression of an author. A character whose name and appearance has acquired secondary meaning for trademark purposes during or after the expiration of the term of copyright has been protected by trademark law even after the character has fallen into the public domain for copyright purposes. Such protection allows the owner of trademark rights in a character to prohibit others from unauthorized trademark uses of the character. Trademark law may also serve to protect iconic photographic images if such images identify services or a product.

In theory, trademark protection has no time limit. Trademark rights continue indefinitely so long as the mark is used in commerce and, if registered, timely renewals are filed. In addition, aspects of the same work (e.g., fictional characters) may be protected by both copyright and trademark. The inquiry in an action for trademark infringement is whether there is any likelihood that an appreciable number of “ordinary prudent” purchases are likely to be misled or confused as to the source of the goods in question.

In *Dastar Corp. v. Twentieth Century Fox Film Corporation*, another 2003 case, the U.S. Supreme Court had to decide whether trademark law takes over when copyright protection ends.

The Supreme Court unanimously (Justice Breyer did not participate) reversed the lower courts' decisions and held that Section 43(a) of the Lanham Act does not prevent the unaccredited copying of an uncopyrighted work.

The Supreme Court held that the phrase "origin of goods" in the Lanham Act "refers to the producer of the tangible goods that are offered for sale," and not to the author of any idea, concept, or communication embodied in those goods. The court rejected the idea of carving out a special exception for communicative product.

Various Options for Copyright Licensing

Under Section 106 of the Copyright Law of 1976, the copyright owner has the exclusive right to (1) reproduce the work in copies or phonorecords, (2) prepare derivative works based on the copyrighted work (which includes the right to recast, transform, or modify), (3) distribute copies by sale or other ownership transfer, or to rent, lease, or lend copies, (4) perform the work publicly, and (5) display the work publicly.

Ownership of the bundle of intangible rights comprising copyright is separate and distinct from ownership in the work of art. Under current law, absent a writing expressly conveying copyright, the sale, gift, or transfer of the original work of art does not transfer the copyright in the work of art. Under the 1976 Act, copyright interests can be transferred *inter vivos* or at death and in whole or in part. For example, a copyright owner can transfer all the rights or one or more of the exclusive rights or a full or undivided interest, or a divided interest in the copyright. A copyright owner may license or assign copyright in the work in a number of ways: by the type of use and/or media, by an exclusive license or nonexclusive license, by territory or duration, to name only a few possibilities.

A nonexclusive license is not a transfer of copyright ownership, but a transfer of a contract right; thus, the artist should be aware that the holder of a nonexclusive license cannot bring a copyright infringement action and the artist or his or her heirs must defend any copyright infringement. The scope, duration, and fee for a nonexclusive or an exclusive license,

like any contract, may be the subject of negotiation.

Many artists' foundations will have as part of their mission the organization of exhibitions, publications, including catalogues and books, and other activities to promote an understanding of the work of the artist and enhance his or her reputation. Each of these activities involves careful management of copyright.

Digital technology has provided the basis for a number of models for the licensing of images both for profit and not for profit. In my original chapter, I discussed the role of artists' collecting societies. Since that time, a number of new models and initiatives are underway to make images available. For example, a project funded by the Mellon Foundation, ARTstor Digital Library, is a not-for-profit organization that operates and makes available an access-restricted electronic database of digital images of art and other works, cataloguing and texts, an electronic search capacity, and other tools and software solely for noncommercial, educational, and scholarly purposes.

Artists, their archives, estates, and foundations should carefully review and negotiate any such agreements. The mission of the artist or his or her foundation must be carefully analyzed to make sure that any licensing program is consistent with the said mission. Particularly if licensing revenue is an important component of estate or foundation income or if control of the artwork via access rather than copyright is important, the foundation or estate should undertake licensing to electronic image data banks with caution and with carefully negotiated conditions.

[CAVEAT: The artist and his or her advisors should be wary of any grant of a perpetual license and in any license agreement define precisely and narrowly terms such as "educational," "noncommercial," and "publicity or public relations." Such terms are terms of art and derive meaning from industry practice and context.]

What Is "Fair Use"?

I would be remiss if no word was mentioned of the doctrine of "fair use." Every person charged with the administration and management of an

artist's foundation or estate should have some knowledge of "fair use." The doctrine may inform the development of licensing schedules and fees. In this era of appropriation art, it should also help the administrator to defend against charges of wrongful appropriation.

The fair use doctrine "permits other people to use copyrighted material without the owner's consent in a reasonable manner for certain purposes." Recognized at common law, the doctrine is now codified in section 107 of the 1976 Copyright Act, 17 U.S.C. @ 107 (1994). Section 107 provides an illustrative list of the purposes for which the doctrine may be invoked, including "comment" and "criticism," id., as well as a now familiar list of factors that courts should consider in determining whether a use is "fair." These factors are (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the work used, and (4) the effect of the use on the market for the original. The Supreme Court case of *Campbell v Acuff-Rose Music, Inc.* 114 S. Ct. 1164 (1994) clarified the fair use defense in general and its particular application to parodies. As a general matter, the Court emphasized that the fair use determination "calls for case-by-case analysis," and "is not to be simplified with bright-line rules." The Court made clear that all four of the statutory factors "are to be explored, and the results weighed together."

Campbell also significantly illuminated the proper application of the first fair use factor, the purpose and character of the use. The focus of this inquiry, the Court explained, should be on whether the copying work "merely 'supersedes the objects' of the original . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." The Court considered this standard appropriately captured by Judge Leval's helpful adjective "transformative" (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 [1990]).

The Court's emphasis on an aggregate weighing of all four fair use factors represented a modification of the Court's earlier view that the fourth factor, effect on the potential market for, or value of, the original, was "the single most important element of fair use," a characterization conspicuously absent from the Campbell opinion. Rather than accord the

fourth factor primacy, the Court explicitly noted that “the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.”⁵

Those who manage and administer an artist's copyrights should consider and develop a rights and reproduction policy. Certain estates, like the Diane Arbus estate, are known for the “widow or daughter censor.” If scholars cannot have access to or use photographs of an artist's work because of excessive usage fee or because of censorship of their writings, scholars and art writers will no longer write about the artist or use images of his or her work. A world devoid of images because of an overly restrictive licensing or review policy may, in the end, harm the reputation and legacy of the artist.

Artist's Moral Rights

Under French law, every creator has a personal, perpetual, and inalienable right to respect for the artistic integrity of the creative work. The *droit moral* is generally considered to have five components: (1) the right of paternity: a work must be attributed to its creator and to no one else; (2) the right of creation: no one except the creator may determine whether or when the work is put before the public; (3) the right of integrity: no one except the creator can change the work; (4) the right to protection from excessive criticism; and (5) the right to withdraw the work from the public. Legal protection of an artist's so-called “moral or personality right” was controversial in the United States because U.S. copyright law focused primarily on the protection of economic rights and interests. Prior to 1990, artists relied on theories of contract law, defamation, or trademark as a “moral rights equivalent.” In 1990, after years of debate, Congress enacted the Visual Artists Rights Act (VARA) as section 106A of the Copyright Act, a limited form of “moral rights” protection.

VARA vests in the artist a right of attribution and a right of respect and integrity. VARA provides that the author of a “work of visual art” shall have the right to claim authorship of that work, and shall have the right

5. A more extensive discussion of fair use is beyond the scope of this chapter, but see www.hoffmanlawfirm.org.

to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and to prevent any destruction of a work of recognized stature.

An artist who wishes to state a claim under VARA must first establish that VARA applies because the work meets the statutory definition of a work of visual art. A “work of visual art” is defined by VARA in terms both positive and negative. VARA affords “protection only to authors of works of visual art—a narrow class of art defined to include paintings, drawings, prints, sculptures, or photographs produced for exhibition purposes, existing in a single copy or limited edition of 200 copies or fewer.” VARA attaches at the moment of creation. The artist is protected because her creation infuses her spirit in the work; the personality as well as the integrity of the work should be protected.

Works of recognized stature, within the meaning of VARA, are those works of artistic merit that have been “recognized” by members of the artistic community and/or the general public, prior to or at the time of the lawsuit. To achieve VARA protection, an artist must show not only that the work has artistic merit, but also that it has been recognized as having such merit. The stature of a work of art is generally established through expert testimony.

As noted, VARA-type rights are more expansive in other countries, including the scope, applicability to works for hire (i.e., works made for an employer), duration, and lack of waiver. With respect to duration, France, the most expansive moral rights jurisdiction, regards moral rights as “perpetual, inalienable, non-seizable and universal.”

Some other countries, such as Mexico and Nigeria, follow the French tradition and similarly provide that moral rights are perpetual. Other nations, such as the United Kingdom, treat moral rights the same as copyrights, protecting them only for a specified term of years after the artist’s death. In most instances, that means protection for the lifetime of the author plus fifty years or seventy years.

Although VARA was enacted as part of the Copyright Act, the duration of VARA rights is limited to the life of the artist. However, there are limited instances when VARA protections may last beyond the life of the artist.

For example, one provision of VARA allows moral rights to continue after the death of the artist if the work in question was created before the enactment of VARA and the artist still retains title to the work. Another section of VARA allows the surviving artist of a joint work to retain moral rights after the co-artist's death. These postmortem rights are exceptions to VARA's scheme to terminate moral rights at the death of the artist.

The implications of postmortem moral rights after the passage of VARA becomes even more complex when viewed in light of VARA's preemption provision. This provision is intended to ensure that the federal legislation overrides "equivalent" state moral rights during the life of the artist. Many state statutes allow moral rights to continue after the artist's death. Several state statutes also extend the scope of protection beyond the narrow category of works of "visual art" protected by VARA. For example, the New York Artist's Authorship Rights Act protects reproductions, while the Massachusetts statute protect films.

Rights equivalent to VARA may and should be protected by contract, particularly after the artist's death. Any licensing of images by the artist or his or her foundation, estate, or advisors on his or her behalf should include provisions for credit and a prohibition against cropping, altering, or any other action harmful to the reputation of the artist.

The original chapter discussed the importance of nominating an "art executor" or "art trustee" in will and trust documents with power to exercise rights with respect to attribution, integrity, and protecting reputational interest. Digital technology has cause even more difficult issues for artists, particularly photographers, with the ease of manipulation of the image. Questions as to editions, what is an original, who owns copyright, what is entitled to an estate stamp must be addressed by the artist, his "art executor," and advisors.

VARA rights may only be waived explicitly in writing. An artist should avoid waiving VARA rights or at least narrowly draft any waiver provision. Although VARA rights may be protected by contract, in the event of a breach of contract, the artist may only obtain damages, whilst the successful VARA plaintiff is entitled to copyright remedies including statutory damages and attorney's fees.

PART 2: ARTIST FOUNDATIONS

CHAPTER 4: ARTISTS' FOUNDATIONS

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An artist's private foundation may have many purposes, including research, documentation, and the protection and sharing of the artist's legacy. The foundation may also be an educational and lending resource of the artist's work. Creating a private foundation may appear to be an attractive idea to an artist because a private foundation is a tax-exempt entity and contributions, including gifts of art, are eligible for income, estate, and gift tax charitable deductions. A private foundation is also advantageous because the artist may lend his or her own vision to the activities and purposes of the foundation.

GRANTMAKING VS. OPERATING FOUNDATIONS

Prior to deciding whether to create a foundation, the artist should be aware of some general information about private foundations. An art-

ist cannot contribute his or her art to a private foundation and have the foundation merely hold the art; the foundation must be operated as an educational organization, offering a benefit to the public, to qualify as a tax-exempt charitable organization under the Internal Revenue Code (the “Code”). The artist must choose to create either a grantmaking foundation or an operating foundation. Most foundations are considered “grantmaking foundations,” which operate by annually granting an amount equal to at least 5 percent of the foundation’s noncharitable use assets to other charities. Thus, for example, the Andy Warhol Foundation annually makes grants to museums and other public charities. A special subset of private foundations are classified by the Internal Revenue Service (the “IRS”) as “operating foundations.” Instead of making grants, an operating foundation uses its assets in its day-to-day operations. An example is the Menil Foundation, which uses its assets to operate the Menil Collection.

Private foundations, both grantmaking and operating, are subject to a relatively complex set of rules under the Code and Treasury Regulations, including a 2 percent annual excise tax on the foundation’s net investment income. In addition to the general rules applicable to all private foundations, an operating foundation is subject to specific requirements with respect to using the foundation’s assets, and annually paying out substantially all of its net income, to carry out its exempt purposes. A private operating foundation must demonstrate annually to the IRS that these requirements have been met.

The income, estate, or gift tax deductions available for gifts of art to a private foundation may make the creation of a foundation an attractive idea. However, the artist must provide the foundation with sufficient income to sustain its operations. Income can be generated through investment of an initial cash contribution or through a donation of saleable art. Operational costs of the foundation will include rent, salaries, storage, and insurance. The foundation will also have to pay legal and accounting fees. Many artists assume that the foundation could engage in fundraising to derive support from the public. As a practical matter, however, this is an unlikely result for two reasons. First, grants are expensive and time-consuming to seek and only limited funds are avail-

able.¹ Second, most grants are available from other private foundations and from corporations. For certain tax and policy reasons, most private foundations and corporations are much less likely to make grants to private foundations than to public charities like schools or cultural organizations. Therefore, sales, admission fees, and licensing arrangements would be more likely sources of revenue for an artist's foundation, along with endowment income from stocks and other investments.

A common question is how much cash or art is required to create a private foundation. As a legal matter there is no monetary threshold to create such a foundation. As a practical matter, however, a private foundation may not be justified if the cash and assets to be donated are valued at less than \$2 million. That is because private foundations can have high operating costs, including salaries, rent, storage, insurance, and maintenance costs. If services are not donated, mandatory tax, accounting, and filing fees may annually cost the foundation between \$5,000 and \$20,000 or more. In every case, an artist should create a proposed budget in order to determine whether a private grantmaking or operating foundation makes sense given the artist's cash and art assets.

If the artist is not in a position to contribute the necessary funding and the proposed private foundation would be unlikely to be self-sustaining through sales of the art or fundraising, the artist should consider alternatives to establishing a private foundation. Libraries, universities, museums, and art galleries represent a valuable resource for artists in placing their artwork and archival materials. Other alternatives are the Archives of American Art² or a donor advised fund³ for disposition of art (or its proceeds) to charity. An artist should always confer with a potential recipient before donating or bequeathing his or her work to charity.

1. The foundation would be required to register before soliciting and annually report if it is raising funds in any of the thirty-nine states that requires registration.

2. The Archives of American Art does not generally collect original works of art, but accepts sketchbooks, drawings, correspondence, diaries, and oral histories from artists.

3. Some donor advised funds do not accept donations of art assets.

DEDUCTIONS FOR THE GIFT

An artist making a gift of his or her artwork during the artist's lifetime to a private foundation is entitled to claim a federal income tax deduction in the amount of the artist's cost basis in the work (essentially the cost of the materials used to create the work), but not in the amount of the fair market value of the work.⁴ In contrast, the artist is entitled to claim a federal gift tax deduction in the amount of the fair market value of the donated work.⁵ In relation to the artist a piece of art is considered ordinary income property because it is self-created property.⁶

A collector unrelated to the artist who purchases art from the artist and then donates the art to a private operating foundation will be able to claim a federal income tax deduction for the fair market value at the date of the gift.⁷ In relation to the collector the art is considered capital gain property as long as it is purchased for investment and not inventory purposes. In order to qualify for a fair market value deduction, the donation must meet the "related-use" test, which requires proof that the art will be used in a way that is related to the exempt purposes of the recipient organization.⁸

4. IRC § 170(e)(1)(A).

5. IRC § 2522(a).

6. IRC § 1221(a)(3)(a). Treas. Reg. § 1.170A-4(b)(1).

7. Recently the Pension Protection Act of 2006 modified the law with respect to contribution of fractional interests in tangible personal property, which would include contributions of fractional interests in works of art. If a donor makes a charitable contribution of a fractional interest in tangible personal property, the donor must subsequently contribute his or her entire interest in the property within ten years of the initial contribution (or by his or her death, whichever is earlier). If the donor fails to do so, the tax benefit the donor received will be recaptured. Furthermore, the recipient charitable organization must have "significant physical possession" of the property. When the remaining interest in the property is donated, the value of the donor's charitable contribution deduction will be based on the lesser of fair market value at the time of the initial donation or fair market value at the time of the donation of the remaining interest.

8. IRC § 170(e)(1)(B)(i)(I). Treas. Reg. § 1.170A-4(b)(3)(i). A sale of art is not a related use. Thus, art donated to and sold at a charity auction is not being put to a "related use" with the result that the fair market value deduction is not allowed. Display of art in a museum is

Example 1: A is an artist who creates oil paintings. It costs A \$200 in supplies (paint, brushes, and a canvas) to create the painting. One of A's paintings typically sells for \$5,000 at a gallery in Gotham City. A has created a private foundation with members of her family, and A donates one of her paintings to the foundation she has created. A is only entitled to claim a deduction of \$200, her costs basis in the painting, because she is the creator of the painting. If A chose to give the painting to Gotham City Museum, a public charity, instead of giving it to her private foundation, she would still only be entitled to claim a deduction of \$200 because she is the creator of the painting.

Example 2: C is a collector who has purchased one of A's paintings. C recently purchased the painting for \$5,000 at a gallery, and he has obtained an appraisal by a qualified appraiser stating that the fair market value of the painting is \$5,000. C donates the painting to Gotham City Museum, a public charity. C is entitled to claim an income-tax deduction of \$5,000.

Example 3: The facts are the same as in Example 2 except that C decides not to donate the painting and instead to hang it on the wall of his apartment. Three years later C decides to donate the painting to the museum, which agrees to hang the painting as part of an exhibit, a related use. According to a qualified appraisal the painting is now worth \$8,000. C is now entitled to claim a deduction of \$8,000, the fair market value of the painting at the time of the donation.

In the case of a testamentary gift (that is, a gift made under the artist's will) of artwork to a private foundation, an artist's estate is entitled to claim a federal estate tax deduction for the fair market value (determined as of the artist's date of death) of the bequeathed artwork.⁹ Thus, the tax law favors gifts by artists at their deaths over gifts by artists during their

a classic related use. The Pension Protection Act of 2006 amended the law to provide that if the organization sells the property within three years of the donation the tax benefit that the donor received will be recaptured, and the donor will only be able to claim a deduction equal to his basis in the property.

9. IRC § 2055(a).

lifetimes. It is this tax policy that has driven the creation of so many testamentary foundations during the past twenty years.

Example 4: The facts are the same as in Example 1 except that A dies and under her will bequeaths all of her self-created paintings to the private foundation she started with members of her family. Her estate is entitled to claim an estate tax deduction for the fair market value of the artwork. However, A's estate consists of many paintings by the artist. Therefore, the qualified appraiser aggregates the unit values of A's bequeathed works and applies a blockage discount. A blockage discount would lower the fair market value of the bequeathed artwork due to the downward effect on the market of having a large number of A's works available for hypothetical sale at the same time.¹⁰

STEPS FOR CREATING A FOUNDATION

If the artist chooses to create a foundation (whether operating or grant-making) there are certain steps that must be followed. Assuming that the foregoing financial and regulatory hurdles to establishing the foundation can be met and the artist decides to form the foundation, he or she will need to decide whether to establish the foundation in trust or corporate form. A private foundation in trust form is established by a trust agreement between the artist, as settlor of the trust, and the trustee(s). Assets are transferred to the trustees to hold in trust and be administered or managed to carry out the foundation's exempt purposes in accordance with the terms of the trust agreement. The trust agreement generally may not be amended, but can be drawn broadly enough to give the trustees flexibility in operating the foundation.

A private foundation in corporate form is established by filing a certificate of incorporation with the Secretary of State of the state of incor-

10. For more on tax and estate planning for artists see Ralph E. Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers, and Artists* (3rd ed. 2005). For cases that discuss blockage discount see *Estate of Georgia T. O'Keeffe v. Comm'r*, 63 T.C.M (CCH) 2699 (1992), In re Determination of Legal Fees Payable by the Estate of Andy Warhol, deceased, N.Y.L.J., Apr. 18, 1994, In re Warhol Estate, No. 824/87, unpublished opinion, N.Y. Surrogate's Court, Apr. 14, 1994.

poration and holding an organizational meeting in person or by written consent at which the corporation's directors are appointed and by-laws are adopted. A corporation may or may not have members. If it does, the artist may appoint the initial members of the corporation who will elect the directors. The directors manage the foundation and elect the officers who carry out the day-to-day operations of the foundation.

In general, the corporate form limits liability. It is more familiar to banks and businesses, while the trust may be less formal to operate. The directors of a corporation are generally judged under the business-judgment rule, while trustees of a trust are held to higher fiduciary standards. The artist's legal advisor can explain in greater detail the differences between a corporation and a trust.

No matter how it is organized, the foundation must apply to the IRS for recognition of tax-exempt status (on IRS Form 1023), and must demonstrate that it is an educational organization benefiting the public (rather than the artist) and otherwise meets the requirements for tax exemption. In addition, counsel for the foundation will need to show the IRS on Form 1023 how the foundation will operate if the foundation is to be classified as a "private operating foundation."¹¹ Many foundations do not seek classification as an "operating foundation" until the foundation is established and can give proof of its operations.¹² However, a foundation may seek operating classification at its start if the request is based on a good faith determination that it will satisfy the requirements.¹³

An artist may want to receive confirmation of the foundation's tax-exempt status before making contributions to the foundation; however, if recognized by the IRS, the foundation's exempt status will generally relate back to the date of its creation if the IRS does not require any material changes in the foundation's governing documents. Therefore, if the artist and counsel are confident that no material changes will be required

11. Treas. Reg. § 53.4942(b)-3(a).

12. Treas. Reg. § 53.4942(b)-3(b)(1).

13. Treas. Reg. § 53.4942(b)-3(b)(2).

by the IRS, the artist and others can begin making donations as soon as the foundation is organized. Once established, the foundation will be required to file annual reports of its assets and expenditures (on IRS Form 990-PF) with the IRS.

In addition to complying with the rules, regulations, and reporting requirements under the Code, an artist's foundation may be required to register with the State Attorney General's office or other state agency charged with oversight of charitable organizations or fundraising activity within the state and also may be required to file annual reports with that state agency. In New York State, a museum maintaining a collection is required to be chartered by the Board of Regents.¹⁴ Any charitable organization that holds art may qualify as a museum, including a private foundation that holds art assets.¹⁵

SELF-DEALING

Once the foundation has been created, the artist should be aware of the penalties on self-dealing. An act of self-dealing between a disqualified person and a private foundation may expose the disqualified person and possibly the foundation's managers to excise taxes. Section 4941 of the Code imposes a tax on disqualified persons who participate in an act of self-dealing with a private foundation. Acts of self-dealing include selling, exchanging, or leasing property, lending money, furnishing goods, services or facilities, paying compensation, and transferring or using the private foundation's assets for the benefit of a disqualified person. Even if a sale, loan, or other act is beneficial to the foundation it will still be considered an act of self-dealing subject to penalty taxes. A disqualified person is defined in the Code to include major donors, trustees, and officers of the private foundation, members of their families, and entities in which these persons have more than a 35 percent interest.¹⁶ Therefore an artist who

14. N.Y. Education Law §§ 216 and 256(1).

15. Rules of the Board of Regents § 3.27.

16. IRC § 4946. A corporation will be considered a disqualified person if disqualified persons own more than 35 percent of the voting stock. A private foundation will be considered

creates a private foundation and makes a large donation to that foundation or is a director of the foundation will be considered a disqualified person. In addition, entities in which the artist has more than a 35 percent interest may be disqualified persons. An artist who chooses to start a private foundation should be aware of the self-dealing rules and should seek counsel's advice when entering into any interaction with the private foundation.

Not all acts of the private foundation affecting the disqualified person will be considered self-dealing. A disqualified person may receive an "incidental and tenuous" benefit from a foundation.¹⁷ In the facts of an IRS private letter ruling a collector donated one of his two collections to a private foundation he had founded. The collector retained possession of the other collection. The foundation intended to keep the collection on continuous public display. In this case the IRS privately ruled that the indirect benefit the collector received from a private foundation exhibiting the collection he had donated was an incidental or tenuous benefit and therefore was not self-dealing.¹⁸ The IRS has not issued a ruling explaining how an artist would be treated under similar facts. A private letter ruling is not precedential authority and is only binding on the taxpayer who requested the ruling. However, these rulings do provide an indication of the IRS' views on a particular situation.

An artist who makes a substantial contribution of art to a private foundation will be considered a disqualified person. In a revenue ruling, the IRS advised that the placement of paintings owned by a private foundation in the private residence of a disqualified person was self-dealing even though the paintings were occasionally made available for viewing by the public.¹⁹ An artist may also run into trouble if the foundation is operated for a pri-

a disqualified person if disqualified persons own more than 35 percent of the profit interests. A trust or estate will be considered a disqualified person if disqualified persons hold more than 35 percent of the beneficial interest.

17. Treas. Reg. §53.4941(d)-2(f)(2).

18. IRS Priv. Ltr. Rul. 9011053 (Dec. 22, 1989).

19. Rev. Rul. 74-600 (Jan. 1, 1974). A revenue ruling has precedential value for all taxpayers.

vate purpose, such as the promotion of the work of a disqualified person. For example, paying or reimbursing expenses to or for a disqualified person is generally self-dealing.²⁰ The IRS has privately ruled that self-dealing occurred where a foundation participated in various exhibitions that primarily exhibited works of the artist that were still owned by the artist, and the foundation incurred expenses (transportation, display, and storage) on behalf of the artist.²¹ Once beyond analysis of payments, it can be harder to determine whether an expenditure will confer a “more-than-incidental” benefit and, therefore, be an act of self-dealing for which the artist or her family could be liable for penalties. In order to determine whether a particular payment is incidental or whether it rises to the level of self-dealing, an artist may confer with his or her tax advisor for advice. Where stakes are large and the answer unclear, the artist may ask her tax advisor to request a private letter ruling from the IRS. Unfortunately, a letter ruling can cost more than \$15,000 and take one to two years to obtain.

The examples above address foundations that hold or exhibit artwork. Self-dealing is also an issue for private grantmaking foundations. The IRS has privately ruled that self-dealing occurred where a private foundation granted funds to a charity, and the funds were then used by the charity to buy artwork from individuals who were disqualified persons as to the private foundation.²² One disqualified person was on the charity’s acquisition committee and did not make an adequate disclosure to the charity of her conflict of interest. Although the charity made the purchase and not the private foundation, the sales of art by the disqualified persons were considered an act of self-dealing.

There is also an exception to the self-dealing rules that allows a private foundation to pay compensation to (and pay or reimburse expenses of) a disqualified person for personal services that are reasonable and necessary to carrying out the exempt purposes of the foundation, so long as

20. IRC §4941.

21. IRS Priv. Ltr. Rul. 9408006 (Dec. 4, 1992).

22. IRS Priv. Ltr. Rul. 8310002 (Dec. 17, 1982).

23. IRC §4941(d)(2)(E).

the payments are not excessive.²³ A private foundation should consult with counsel before paying compensation to any disqualified person.

If an act is considered self-dealing it will need to be corrected²⁴ and an excise tax may be imposed. Artists who fit the definition of disqualified persons should take extra care to make sure none of their activities and none of their foundations payments would constitute self-dealing.

24. The terms “correction” and “correct” mean, with respect to any act of self-dealing, undoing the transaction to the extent possible, but in any case placing the private foundation in a financial position not worse than that in which it would be if the disqualified person were dealing under the highest fiduciary standards. IRC §4941(e)(3).

CHAPTER 5: REFLECTIONS ON THE SURVEY AND OTHER MUSINGS ON THE MANAGEMENT OF ARTIST'S FOUNDATIONS AND MUSEUMS

Barbara T. Hoffman, Esq.

The arts live continuously. They outlive governments and creeds and societies, even the very civilizations that produce them.... They are what we find again when the ruins are cleared away.

Katherine Anne Porter

Introduction

This chapter discusses and summarizes the results of an informal survey (the "Survey") conducted by me for The Marie Walsh Sharpe Art Foundation of artists' foundations and the lessons to be derived from the Survey. The written survey was initially distributed to thirty-six artist foundations affiliated with the Council on Artist Foundations, of which fourteen responded. In order to supplement the Survey, I reviewed an additional twenty-five or so artists' foundations on [Guidestar](#), a database which gives access to the IRS Form 990 tax return required of exempt organizations ("Form 990"), and interviewed the executive directors of several other artists' foundations. The anecdotal results discussed in this chapter are a compilation of the above data and of the collective knowledge gleaned by myself and colleagues practicing in this area.

As a complement to Chapter 4, a second part of the chapter discusses state corporate law issues, including formation, governance, and director liability. The chapter concludes with an overview of legal issues faced by foundations and trusts in the conduct of business, including the special concerns involved in authentication of works of art and the preparation of a catalogue raisonné.

The Survey

A copy of the Survey is attached as Appendix D-1. It asks questions which, in many respects, reflect the questions often asked by an artist contemplating the preservation of his or her legacy and considering how and whether an estate plan should incorporate a non-charitable trust, a charitable trust or not-for-profit corporation, and if so, whether it should be created while the artist is alive or by will, to take effect on the death of the artist. Clients often ask whether a charitable trust is appropriate, and if so, how many trustees or directors should be selected, and how much money is required to fund the foundation, or trust. Because our Survey was sent to the Council on Artist Foundations, and we used the Guidestar database, the foundations analyzed were all 501(c)(3) exempt organizations. Whether an artist creates a charitable organization as the exclusive estate planning vehicle or whether the artist creates a charitable foundation or a non-charitable entity as part of an overall estate plan, in large part, will depend on the articulation of the mission, distribution of proceeds and whether the primary intent is to provide revenues to support the exempt purposes of a charitable or educational entity, or whether the purpose is to provide revenue streams to support the family and others.

For example, the Nickolas Muray Photo Archive is incorporated in Utah as a limited liability company. Its mission and activities may not differ significantly from some of its tax-exempt counterparts, such as the [Richard Avedon Foundation](#) or the [Laszlo Mohly-Nagy Foundation](#). Both the for-profit and the not-for-profit hold the “reputation of the artist in trust.” Nickolas Muray (1892–1965) was a Hungarian photographer who, in 1913, immigrated to New York City where he became internationally known as a portrait photographer. His circle of friends in the art culture in Mexico in the 1930s included Miguel Covarrubias, Rufino Tomayo, Diego Rivera, and, especially, Frida Kahlo, with whom he exchanged love letters in 1939. Between 1920 and 1940, Nickolas Muray made over 10,000 portraits of celebrities, including Babe Ruth and Greta Garbo. However, it is in part because of the phenomenal rise in popularity of Frida Kahlo that interest in Muray’s photographs, particularly the photos of Frida, has also

grown. On Muray's death in 1965, the Nickolas Muray family gifted his negatives to George Eastman House but retained all other rights in and to the images. More than thirty years later, the Estate of Nickolas Muray formed the LLC. Ms. Muray, the daughter of Nickolas Muray, is the director of the archive and is educating the public through the sale of his photographs, the licensing of his images, and the arranging for the writing of catalogues and books to preserve her father's legacy. As noted, these activities are similar to those undertaken by some tax-exempt entities described in the next section. The significant difference is in the distribution of revenues from these activities, which in the case of the Nickolas Muray Archives, are distributed to Mr. Muray's son and daughter.

The Type of Entity, Its Mission, and Whether the Organization was Created by Will to Take Effect on the Artist's Death

As noted, the Survey was skewed in favor of charitable organizations. In addition, in many cases, no access was had to the artist's overall estate plan and no conclusions, except where specifically noted, should be drawn. All of the foundations considered were exempt 501(c)(3) organizations—some were organized as trusts under state law, others as not-for-profit organizations.¹

The vast majority of trusts and not-for-profits devoted to artists are pri-

1. Because New York State has an extraordinarily expansive view of those organizations which must be chartered, it is not surprising that foundations like the Lichtenstein Foundation, the DeKooning Foundation and the Richard Avedon Foundation have incorporated in Delaware. Particularly since 2004, New York's Department of Education/Regents Chartering Division has construed broadly its authority to regulate not-for-profit corporations and to subject them to cumbersome regulations and requirements. Previously, not-for-profit corporations were routinely approved for incorporation with minimal review by the Department of Education under the authority of the New York Secretary of State. Absent special considerations or activities like operating a museum or maintaining a collection open to the public, the artist or his/her advisor is advised to incorporate in a state with a less stringent regulatory framework, such as Delaware, and file the required registration for doing business in New York as a foreign corporation. Trusts are formed by trust documents signed by the creator of the trust or by will. The creator of the trust does not file the documents with the state. (See pages 60–68 of *A Visual Artist's Guide to Estate Planning* and Chapters 1 and 4 of this *Supplement* for a discussion of the difference between a trust and a corporation.)

vate foundations rather than public charities. A private foundation is a charitable entity primarily funded from one source (individual, family). As a general rule, “public charities” normally derive one-third of their income from public support measured in terms of gifts or grants.

In our limited Survey, only the Anyone Can Fly Foundation (www.anyonecanflyfoundation.org), the Aperture Foundation (www.aperture.org), the Noguchi Foundation, the Romare Bearden Foundation and Through the Flower are publicly supported charities which actively seek funds from public support, although Judd Foundation and others have successfully obtained grants targeted to their mission and used such grants to evolve to another level of development.

Private foundations are further divided into two categories: private operating foundations and private non-operating foundations. Private non-operating foundations are those that conduct their charitable programs through grant making to other qualified foundations. The [Larry Rivers Foundation, Inc.](#), a private non-operating foundation, has as its purpose the advancement of the visual arts and education of the public about the visual arts and in particular the work of the late artist Larry Rivers. It accomplishes these purposes by making grants to public charities that support the visual arts, holding exhibitions of works of art, placing works of art created by Larry Rivers in museums, universities, and other public art collections, and creating a catalogue raisonné of the works of art created by Larry Rivers. The items sold by the foundation further its exempt purposes by placing the works of art by Larry Rivers in the public realm and allowing the foundation to fulfill its charitable mandate in accordance with its purposes.

When Andy Warhol died unexpectedly on February 22, 1987, at 58, he left a vast inventory of art. His will specified that most of his estate would go to create a foundation dedicated to “the advancement of the visual arts.” His executors created a non-operating private foundation. During the tenure of its President, Archibald L. Gillies, from 1989–2001, the foundation converted its asset base from one based primarily in the art bequeathed to it by Warhol’s estate to one with over \$131 million in cash and investments, even as it distributed over \$41 million in 1190 cash grants. During

this time, the foundation also helped establish the Andy Warhol Museum in Pittsburgh, to which it donated more than 3900 works of art, including paintings, drawings, photographs, prints, sculptures, film and video work, as well as all Warhol archival material it had inherited from the estate. It also funded the preservation of all Warhol's film and video work by the Museum of Modern Art; helped establish Creative Capital, a foundation dedicated to supporting individual artists; and launched the Warhol Initiative, a multi-million dollar capacity-building effort directed at smaller visual arts organizations. Throughout Gillies' term, the foundation was an outspoken champion of freedom of artistic expression, and supported the legal defenses of the NEA Four and the Brooklyn Museum of Art in their battles against government censorship.

The [Barnett Newman Foundation](#), the [Adolph and Esther Gottlieb Foundation](#), the Robert Mapplethorpe Foundation, [Reuben Kadish Art Foundation](#), and the George Rickey Foundation are all private non-operating foundations.

Private operating foundations are characterized by a more active programmatic agenda than the solely grantmaking activities of the non-operating foundation. The vast majority of artists' foundations in general and in the Survey were formed as 501(c)(3) private operating foundations under the will of the artist.²

The first question in the Survey was unintentionally ambiguous. "Is the Foundation one that was set up during the lifetime of the artist" was intended to ask whether the foundation was operated by the artist during his lifetime; however, some respondents interpreted a foundation created by the artist in his will as a "yes" answer to this question. In fact, most foundations which came into being on the artist's death were created while the artist was alive in the sense that the artist provided for the foundation in his or her will.

The [Joan Mitchell Foundation](#), the [Roy Lichtenstein Foundation](#), the

2. Federal income tax charitable deduction rules favor gifts to public charities as opposed to private foundations (IRC Sec. 170). The IRS has complicated rules to govern the operation of private foundations and equally complicated rules to govern the amount allowed for charitable deductions to various charitable entities.

DeKooning Foundation, Judd Foundation, the Calder Foundation, the Larry Rivers Foundation, the Nancy Graves Foundation, the Judith Rothschild Foundation, the Romare Bearden Foundation, the Saul Steinberg Foundation, the Josef and Anne Albers Foundation, the Barnett Newman Foundation, among others all came into existence on the death of the artist.

A number of exempt organizations have been founded by artists during their lifetime. Before his death of AIDS at the age of thirty-two, Keith Haring established a foundation in his name to maintain and enhance his legacy of giving to children and AIDS organizations. The [Keith Haring Foundation](#) was established in 1989 to assist AIDS-related and children's charities and maintains the largest resource of archives on Keith Haring. The foundation is also committed to expanding and sustaining public awareness of Keith Haring and his artwork. The foundation also authenticates works attributed to Keith Haring.

Simultaneously, after discovering in 1986 that he had been diagnosed with AIDS, Robert Mapplethorpe was determined to build a lasting artistic legacy. He accelerated his creative efforts, broadened the sweep of his photographic inquiry, accepted increasingly challenging commissions, and, despite his illness, continued to create provocative images up until his death in 1989.

The Robert Mapplethorpe Foundation, Inc. was founded on May 27, 1988, some ten months before the artist's death. Robert Mapplethorpe funded the foundation with substantial contributions of his work, selected four trustees to serve with him on its board, and was appointed its first president. He also established the Foundation's initial philanthropic mandate, targeting the area of his greatest concern: the recognition of photography as an art form of the same importance as painting and sculpture. He directed that the net revenues proceeds from the sale of his works be used to benefit those museums and other artistic institutions that had shown particular interest in establishing photography departments or expanding their existing one. During the last weeks of his life he supplemented the Foundation's mandate with a second mission to support medical research in the HIV/AIDS area.³

3. See *A Visual Artist's Guide to Estate Planning*, page 98, for earlier discussion of the Mapplethorpe Foundation.

In keeping with Mapplethorpe's wishes, The Robert Mapplethorpe Foundation has spent millions of dollars to fund medical research in the fight against AIDS and HIV infection. In the field of the photographic arts, the Foundation has funded numerous publications on photography, supported exhibitions at various art institutions, and provided grants—in the form of funding or gifts of original Mapplethorpe works—to qualified art institutions, ranging from the world's major art museums to small university galleries. In addition to its charitable work, the foundation works to maintain Mapplethorpe's artistic legacy by organizing and/or lending to Mapplethorpe exhibitions around the world, preserving his archive of vintage editioned prints, strictly maintaining the editions he established during his lifetime, and placing his work in important museum collections around the world.

The Anyone Can Fly Foundation has been created by the artist Faith Ringgold as a private operating foundation to expand the art establishment's canon to include artists of the African Diaspora.⁴

Robert Rauschenberg created his foundation in the 1980s as a private operating foundation. The foundation has assets currently of \$12 million. The foundation lists as its direct charitable activities on Form 990:

- 1) Continuation of a program to give instruction to teachers of learning disabled. Host annual workshop to provide guidance on the use of art as an educational enhancement;
- 2) Curatorial archival and other expenses incurred in connection with the anticipation of the receipt of artwork and collaboration of its uses with the Guggenheim Museums; and
- 3) Arts for abuse counseling treatment centers help raise awareness of spousal abuse and the need for remedial support and temporary housing.

The [Isamu Noguchi Foundation and Garden Museum](#) was set up in 1986 by the sculptor Isamu Noguchi and funded with an initial endowment of \$2 million, through the sale of artworks and revenues from the sale of his popular Akari lamp. Since Noguchi's death, the organization has evolved into a public 501(c)(3) charity dedicated to maintaining and promoting

4. See Chapter 7 of this *Supplement*.

the artistic legacy of Noguchi. The foundation raises funds from the public and states, “We are a public foundation and museum which is why we raise public money and rechartered as such under New York State law in 2004.” Jenny Dixon, the museum’s director, responded in the Survey, “The primary activity of the foundation is the operation of a museum—the maintenance, conservation of the core collection and mounting temporary exhibitions accompanied by publications; developing and maintaining an archive of the artist’s work and development of a catalogue raisonné. The foundation sells art—only works that were left by the artist to sell in order to support the foundation, not any of the work that is part of the core museum collection. These works that are for sale are called ‘residual assets.’”

The Aperture Foundation, the nonprofit organization devoted to photography that publishes *Aperture Magazine* and Aperture books, was founded by nine photographers, including Dorothea Lange and Ansel Adams, with the mission to advance photography through the publication of *Aperture Magazine*, books, traveling exhibitions and educational programs. Aperture was gifted the Paul Strand Archive by the Paul Strand Foundation and Paul Strand’s wife, each of whom had originally inherited a part of the archive on Strand’s death. The Paul Strand Archive is now integrated into Aperture, and any revenue generated from its exploitation serve Aperture’s exempt purposes.

Judy Chicago founded [Through the Flower](#), a tax-exempt public charity, in 1978. *The Dinner Party*, *Birth Project*, and the *Holocaust Project*, monumental collaborative works which explored her deepening feminist vision, were sponsored, documented, exhibited, and preserved by Through the Flower. When *The Dinner Party* opened at the San Francisco Museum of Modern Art in 1979, Through the Flower offered programs and information documenting women’s unsung roles in history. It managed subsequent exhibitions, mostly initiated by community groups, in fourteen cities: seven in the United States, three in Canada, two in the United Kingdom, and one in Germany and Australia. The art was stored and cared for by Through the Flower until it was acquired and donated by Dr. Elizabeth A. Sackler to The Brooklyn Museum. A

Getty Conservation grant was awarded to Through the Flower in preparation for permanent housing.

The Birth Project engaged Chicago with 150 needle-workers around the U.S. and in Canada and New Zealand. Through the Flower organized the execution of 85 works in various needle and textile techniques and planned and implemented a varied and successful multi-year exhibition tour to 100 venues. It also cared for the art until most of it was placed by gift in other nonprofit institutions. Through the Flower was also the fiscal umbrella for the research and preparatory work of the *Holocaust Project*.

László Moholy-Nagy, the Hungarian constructivist painter, photographer, Bauhaus professor, and one of the most gifted and versatile of the artists of the twentieth century, died in 1946. Like the Nickolas Muray Photo Archive, the [Moholy-Nagy Foundation](#) was created many years after the artist's death. Almost sixty years later, his daughter, in 2003, founded The Moholy-Nagy Foundation, Inc. with \$100,000 as a private family operating foundation under Section 501(c)(3). It was formed in response to the continuing interest in the life and works of László Moholy-Nagy, and in response to the growing number of fakes attributed to him on the market. The primary goals of the foundation are to produce a complete catalogue raisonné of Moholy-Nagy's art and photography, record and conserve works in the foundation's collection, augment and catalogue the foundation's archive and library and make them available to interested researchers, provide an interface between scholars and the public through the website, exhibitions, and other events, and provide authentication of works attributed to Moholy-Nagy. In my opinion, the foundation offers an excellent model of how a small amount of capital can effectively combine with twenty-first-century technology to preserve and enhance an artist's reputation and legacy. The newly designed website, which cost approximately \$15,000 to establish, effectively links to other archives and repositories of the artist's work, such as George Eastman House, which purchased a collection of Moholy-Nagy photographs and is an important resource for research on the artist and recent news about him.⁵

5. The internet is a valuable tool for artist's trusts and foundation and can assist in many of its programs, including research, education, and the preparation of a catalogue

A trust or not-for-profit must be funded. Most artists' foundations initially are funded with bequests of money from the estate, works of art by the artist, works owned by the artist of other artists, pension funds, and real estate. For the most part, the initial value of the endowment of these testamentary foundations was \$500,000 to \$2 million. Not surprisingly, most foundations responding to the Survey created by the artist's will indicated that art sales were an important source of funds. The increasing prices for contemporary artists like Judd, Lichtenstein, and Mapplethorpe have resulted in large endowments. Consider, for example, Judd Foundation's sale of Judd works at Christie's in 2006, which gained more than \$22 million for the foundation. Artist foundations' operating budgets, as reported on the Form 990, indicated a wide range from approximately \$15,000 to \$3 million and above. Artists and their advisors should review several Forms 990 to identify the line items of a budget for the proposed artist's foundation and the range of projected costs.

Not surprisingly, many artist foundations include amongst their activities providing grants for the support of artists. In addition to those previously noted, and by way of illustration, the Joan Mitchell Foundation supports artists through grants, as does the Judith Rothschild Foundation. Both foundations focus on assistance to under-recognized artists and in the case of Judith Rothschild Foundation to the estates or foundations of deceased artists. (See Appendix D-2, "Guidelines of Judith Rothschild Foundation for Grants.") The Joan Mitchell Foundation's total budget program in 2006 was approximately two million five-hundred thousand dollars (\$2.5 million).

Board of Directors and Trustees

Most of the foundations surveyed had a board of directors or trustees selected by the artist in his or her will. Some trustees or directors were selected by the executor. Generally, a trust created by the artist's will has one to three trustees. According to the Survey and our further review, most nonprofits have four to seven directors or trustees who are a mix of family members, friends, and professional advisors, principally lawyers

raisonné. See The Catalogue Raisonné Scholars Association, CRA Forum (Spring 2007) websites and the [Catalogue Raisonné](#).

and accountants. The Joan Mitchell Foundation's board is mainly composed of working artists who understand the challenges for artists of supporting themselves through art making. In most instances, the original directors or trustees selected by the artist in his will are still serving in that capacity. In many instances, additional directors have been added as the foundation and activities grow in maturity.

The Internal Revenue Service recommends "that governing boards should be composed of persons who are informed and active in overseeing a charity's operations and finances." (See IRS Good Governance Practices for the 501(c)(3), Appendix A-9.) Most of the organizations reviewed seem to reflect the IRS recommendation with respect to both selection of board members and trustees as well as with respect to numbers. "Organizations with very small or very large governing boards may be problematic: small boards generally do not represent a public interest and large boards may be less attentive to oversight duties." (See Appendix A-9.)

Words of Advice

In response to the question "what advice would you give to other artists," answers included:

"Make sure trustees are knowledgeable about the artist's work, the art world, and the worlds of criticism, scholarship and museums. Create a detailed database, with images, of all works still owned by the artist and, if possible, those already sold. An extant database at the time of the artist's death will save the estate an enormous amount of money since the lawyers will have to be involved in the work."

"Speak with an attorney, an accountant and others who have experience and expertise setting up an artist's foundation."

"Before setting up a foundation, inventory art works, organize documents and all other archival materials as much as possible, and contact experts in the field that will enthusiastically support your work and start dialoguing with them before giving them a role in the foundation."

“Plan to spend a lot of time negotiating with IRS red tape, and cultivate great patience.”

GOVERNANCE OF THE EXEMPT ORGANIZATION

Most artist foundations are organized under state law as either a charitable trust or a not-for-profit corporation. Directors/trustees are charged with the management of the not-for-profit or trust in the conduct of its activities in furtherance of its exempt purposes.

A Director's Fiduciary Duty

Directors and trustees are said to be “fiduciaries,” that is, to be in a special relationship of trust and confidence. The fiduciary principle imposes on a director of a nonprofit organization a duty of loyalty and a duty of care. A director's duty of loyalty includes loyalty to the trust or foundation's mission and purpose and avoidance of conflict of interest and self-dealing. A director's fiduciary duty of care often works in tandem with the duty of loyalty to impose upon the director a duty to abide by the laws, ethical codes, and internal rules and regulations that govern the exempt organization. “The first responsibility of any nonprofit board is to comply with all laws, treaties and international regulations,” says Edward H. Able Jr., President and CEO of the American Association of Museums (AAM) in Washington, D.C. “Board members need to be certain that procedures are in place for whatever oversight is necessary to assure that the organization is acting in compliance with the laws.... such directors and trustees have a fiduciary duty of care and loyalty to the institution and the public.” Duty of loyalty and duty of care issues also arise from federal tax status in so far as the exempt status of the organization prohibits “private inurement,” excess benefit transactions, acts of self-dealing or private benefit to directors and trustees of such organizations. The IRS can impose prohibitive excise taxes for self-dealing under the Code.⁶

6. Under the IRC, directors and trustees of private foundations are held to more stringent standards and regulations with respect to loyalty and care than directors of public charities are held to the “business judgment” and state conflict of interest standard.

Under the laws of most states, a trustee of a trust and executor are also fiduciaries and owe a duty of loyalty and care to the trust or estate. Both nonprofit directors and trustees were held originally to the highest standard of care.⁷

Following the decision of a District of Columbia federal court in *Stern v. Lucy Webb* in 1973, courts “tend to measure a not-for-profit director’s duty of care by the more lenient,” “business judgment rule” applicable to directors of for-profit corporations. Courts have participated in this “hands-off” business judgment approach to the directors or trustees of nonprofit corporations, stating that “if the trustees act within the bounds of reasonable judgment in the exercise of the discretion conferred upon them, the court will not interfere.”

There has been a renewed and heightened emphasis on duty of loyalty issues particularly resulting from conflict of interest situations. The typical conflict of interest arises when a trustee or director is on both sides of a transaction. In addition to the normal transactions involving conflict of interest with respect to corporate boards and nonprofits, a unique set of conflicts applies in the case of the trustee or director of a foundation or museum if that trustee or director is a family member or collector with a large collection of works created by the artist on whose foundation board she/he sits or a dealer in the artist’s works. For example, if a trustee acquires a work of art based on knowledge obtained at a board meeting instead of permitting the museum to acquire such object or if the museum displays an object loaned by a trustee or if the trustee borrows a work owned by the museum and displays it in the trustee’s collection, self-dealing and conflict of interest arises. The potential for conflicts also exists for a living artist and his or her foundation.

7. Justice Cardozo articulated the classic fiduciary obligations of a trustee more than eighty years ago in the New York case of *Meinhard v. Salmon* when he stated, “Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound to fiduciary ties. A trustee is held to something stricter than morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard behavior.”

Shared space and staff, authentication of works in which the authenticator has an interest, acquisition of works from the family of the artist, and the preparation of a catalogue raisonné may pose potential conflicts and “private benefit.”

Best Practice. Discuss and adopt bylaws to avoid conflict of interest and adopt a policy addressing conflicts of interest among directors that includes disclosure, recusal and memorialization in the written board minutes of any action and disclosure. A director or trustee should not participate in discussions of any business dealing in which the director or trustee or an immediate family member has a financial interest or fails to disclose such interest.

One of the results of the revelations of corporate scandals such as Enron and WorldCom in 2001 led to the enactment of a new federal law, the Sarbanes-Oxley Act of 2002, that requires greater compliance with accounting rules and greater transparency. The consensus of the legal community is that the statute does not apply to nonprofit organizations, but that in light of Sarbanes-Oxley, regulators and the public are going to be taking a closer look at how nonprofit boards of directors manage the affairs of the corporation. In fact, the Internal Revenue Service is already drafting new regulations impacting nonprofit accounting and reporting.

In 2005, the ABA Coordinating Committee on Nonprofit Governance published a “Guide to Nonprofit Corporate Governance in the Wake of Sarbanes-Oxley.” The Guide recommends that a nonprofit organization “should adopt and implement ethics and business conduct codes applicable to directors, senior management, agents and employees that reflect the commitment to operating in the best interests of the organization and in compliance with applicable law, ethics business standards and the organization’s governing documents.” The Guide observes in relevant part that such codes should include “definitions of procedures for handling conflict of interest.” The Guide continues: “Conflict codes should cover self-dealing transactions as well as prohibitions against personal use of corporate assets....”

Steve Gunderson, President of the Council of Foundations, which represents more than 2,000 grantmaking foundations, recently stated, “Foundations are clearly in an era of public scrutiny because we are

growing in size and service, and in public awareness.” In December, the Council placed the Getty Trust on probation for allegedly allowing Mr. Munitz, the Getty’s President, and Marion True, curator, “use of foundation assets for personal benefit and potential self-dealing, as questions about its spending became public and the trust did not cooperate fully with an inquiry begun by the Council. The Council, which can censure or eject members, said it was looking into whether trust officials had used the trust’s money for personal benefit; into a land deal between the trust and Eli Broad, a billionaire financier who is a friend of Mr. Munitz, the Getty Trust’s President, and into whether there was “inappropriate compensation” for the foundation’s C.E.O. and potential self-dealing.⁸

Form 990 and Its Opportunities

The Form 990 is the information return that most 501(c)(3) charities file annually with the IRS. (Organizations with revenues of less than \$25,000 and religious organizations are exempt.) Although audits provide more comprehensive financial information, few not-for-profit organizations conduct or are required to conduct audits. Consequently, the Form 990 is the primary source of information about the nonprofit sector.

As of June 8, 1999, the new IRS regulations provide greater access to the public to Form 990. In the past, a nonprofit only had to disclose its Form 990 if a request was made in person at the nonprofit’s offices, and was not even required to make a copy. The new regulations require that a 501(c)(3) organization make copies of its three most recent Forms 990 for anyone who requests them, whether in person or by mail, fax, or e-mail.

The Internet is making the Form 990 more widely available than ever before. Since July 1998, Forms 990 received by the IRS have been scanned and are available at Guidestar.

The Form 990 is a primary source for data. As previously mentioned,

8. For an expanded discussion of ethics in the art world, see *Ethics and the Visual Arts*, eds. Elaine A. King and Gail Levin (Allworth Press, September 2006), Chapter 19, Hoffman, “Law, Ethics and the Visual Arts: The Many Facets of Conflict of Interest.”

9. For example, the 990 reveals how much executive directors and staff in comparable organizations are being paid and what their lawyers charge.

other foundations' budgets are an excellent aid in fiscal planning. The 990 also is a source of industry "gossip."⁹

Best Practice. Filing a complete and accurate Form 990 with the IRS and state charity officials is the law. However, artists' foundations and trusts should see the 990 not as a burdensome obligation but rather as a public relations opportunity. Forms 990 also help the organization to comply with the enhanced accountability and transparency required of nonprofits. A recent survey indicated that two out of three grant-makers also used the 990 in assisting them in making their final awards.

OVERVIEW OF LEGAL ISSUES

A complete discussion of the legal issues involved with the management of an artist's trust or foundation is beyond the scope of this chapter. For governance and corporate issues, the reader is counseled to review the IRS Draft-Good Governance Practices for 501(c)(3) Organizations. (See Appendix A-9.)

With respect to day-to-day activities in furtherance of its mission, the foundation, estate, or trust should enter into written contracts whether the transaction is a loan of art to an exhibition, the organization of an exhibition, sale, or licensing of art, or any other of the numerous activities previously discussed herein. Both good practice and the IRS require the trust, estate and/or foundation to adopt grant guidelines and procedures, if grants are to be awarded.

The Risks of Legal Liability for Attribution of Works of Art

Authentication and the preparation of a catalogue raisonné by the foundation or trust pose special risks which merit discussion here. In Chapter 3, the concept of "droit moral" or "moral rights" was briefly discussed. In civil law countries like France, an heir or designee by will is given authority to assert the artist's "moral rights," including the right to authenticate which works are done by that artist. In the United States, moral rights do not include the right of attribution by persons other than the artist. *Greenwood v. Koven*, a 1993 New York case, although decided on other grounds raises interesting issues concerning the moral right under French law and U.S. law as it respects authentication.

Jane Koven owned a pastel purportedly created by Georges Braque, a prominent twentieth-century French painter. On May 16, 1990, Christie, Manson & Woods International, Inc. sold the Braque pastel by auction for \$600,000 to Barbaralee Diamonstein. Christie's remitted the sale proceeds to Koven. Diamonstein raised questions about the pastel's authenticity shortly after the sale. On January 10, 1991, Christie's, purportedly concerned about the authenticity of the pastel and the potential liability those concerns portended, rescinded the sale, returned the purchase price to Diamonstein, and sought return of the sale proceeds from Koven.

Koven refused to remit the sale proceeds, believing that Christie's acted improperly in rescinding the sale, since prior to the sale Christie's own experts had conclusively determined the artwork was a Braque.

Diamonstein demanded authentication by an outside scholar, and Christie's contacted Claude Laurens who held the *droit moral* for Braque. Christie's contacted Laurens through his son Quentin, and in November, 1990, Christie's had the pastel flown to France where it could be examined by Quentin Laurens, who had been given the moral right. Quentin informed Christie's that he did not believe the pastel to be the work of Braque, and that a certificate of authenticity would not be issued.

In dismissing Ms. Koven's case, the Court stated:

I think it appropriate to say something about the import of this opinion, given that counsel for Christie's and Koven have each presented a parade of horrors likely to result from a decision adverse to their clients. Koven's attorney, in particular, has stated that this opinion will have tremendous implications for the glamorous world of art collection and dealing, that it will be an important statement about the complex relationship between buyers, sellers, and auction houses, and that it will determine the proper role to be played by different types of experts in arbitrating the authenticity battles of artworld titans.

These predictions notwithstanding, it should be apparent that this decision is mostly about the relatively unglamorous world

of contract law. The Consignment Agreement in this case clearly addressed the dispute between the parties. Though Koven is understandably dissatisfied with the rescission of the sale, Koven read and understood the Consignment Agreement and is bound by its terms.

For the work of some artists, special authentication boards or committees have been established to answer inquiries of authenticity, many by the artists' foundations. Those seeking authentication typically provide a board or committee of experts with the work itself or photographs coupled with information such as the work's size, medium, any publications or exhibitions the work has been included in, and any information or documentation relevant to the work's provenance.

To protect themselves, authentication boards and committees of experts often require applicants to "hold them harmless and indemnify them against any resulting claims." Applicants must also acknowledge that the board's decision is an "opinion," not a "warranty or guarantee."¹⁰ The committee may also contract for certain rights, such as the right to publish its opinion with an image of the work, to "permanently mark" the work issue "to reflect its opinion," to alter its opinion in the future if new information comes to light, or to not issue an opinion at all.

The Pollock-Krasner Authentication Board, Inc. was established in 1990 to provide authentication services, free of charge, for works of art purportedly created by either Jackson Pollock, or his wife Lee Krasner. After the Pollock-Krasner Authentication Board had been sued several times by individuals whose works were deemed forgeries by the board on legal theories ranging from negligence, slander of title to anti-trust, the authentication board stopped authentication for several years. Recently, however, the discovery by Alex Matter of a large number of "Pollocks"

10. This distinction arises from constitutional jurisprudence which originally distinguished assertions of fact from opinion to create the breathing space required by the First Amendment. That safe harbor was eliminated by the 1990 Supreme Court case of *Milkovich v. Lorain Journal Company*. The Court stated that as far as the First Amendment is concerned, even "opinions" can give rise to defamation actions if the opinion includes "a provably false connotation."

which belonged to his parents, Herbert and Mercedes Matter, and their authentication by a former board member and author of a well-received 1989 Pollock biography, Dr. Ellen Landau, has caused the foundation, which considers the works fake, to reconsider authentication. Former members of the authentication committee, including Eugene Thaw and catalogue raisonné scholar Francis O'Conner, agree the works are fakes. None of the previous suits against the authentication committees were successful. As the Court stated in the last litigation where the authentication board was sued for failure to authenticate a Pollock, signed on the back by "Pollack."

The defendants have submitted overwhelming proof that every single one of the plaintiff's claims in this case are not only without any merit whatsoever, but constitutes a laughable and clumsy attempt at fraud. In the absence of a contravening public policy, exculpatory provisions in a contract purporting to insulate one of the parties from liability resulting from that party's own negligence, although disfavored by the law and closely scrutinized by the courts, generally are enforced, subject however to various qualifications. Where the language of the exculpatory agreement expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence, the agreement will be enforced. The court held for the Pollock-Krasner Authentication Board.

Best Practice. Prior to any authentication by a foundation or board, the person seeking to authenticate the artwork should sign a written agreement which in substance and effect states: "I agree to hold the Authentication Board and its directors and officers in their representative and individual capacities harmless from any liability towards me or others because of its rendition of an opinion (or its refusal to render any opinion)." The agreement should provide also that nothing the Authentication Board "says should be considered a factual statement nor a representation or warranty with respect to the authenticity, provenance, or condition of artwork submitted." The agreement should also provide a broad arbitration clause.

There is little reason to fear that an expert committee involved in authentication will ultimately be held liable for its opinions if it follows best practices and avoids certain recurring situations which may give rise to claims for negligence, defamation, or product disparagement.¹¹ My own experience is that many experts have misconceptions of the laws and exaggerated fears not necessarily based on facts.

The Catalogue Raisonné

A catalogue raisonné is an authoritative index of an artist's work, covering either the artist's full oeuvre or a specific category of his other works. It is an invaluable reference, often containing detailed descriptions, history, and provenance for each work. Primarily, however, it is a list of all known works attributed to the artist. Therefore, when the authors of a catalogue raisonné omit a work, they cast serious doubt on its authenticity and profoundly affect the work's marketability. As the attorney for a leading art dealer put it, "If a work isn't going to be included in the catalogue, from a commercial view it's the death of your painting." For this reason, a catalogue raisonné committee may have exposure to similar legal claims for omission of works from a catalogue raisonné: negligence, defamation, disparagement, fraud, anti-trust, and negligent misrepresentation, if the expert is a fiduciary. As noted previously, a carefully drafted contract prior to consideration of the work and insurance will serve to protect the expert in the unlikely event of lawsuit except in the event of gross negligence or fraud.

The Catalogue Raisonné Scholars Association was founded in 1994 to serve the interests of authors of catalogues raisonnés of works of art. Members are typically engaged in the study of a single artist's body of work to establish a reliable list of authentic works, their chronology, and history (usually including provenance, bibliographic, and exhibition histories). The membership also includes those who are not actively engaged

11. See Levy, S.M., "Liability of the Art Expert for Professional Malpractice" in 1991 University of Wisconsin Law, Rev. P. 509. See also, Spencer, R.D., *The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts* (Oxford Univ. Press, 2004). See also Hoffman, B., College Art Association Annual Meeting, Catalogue Raisonné Scholars Association, February 1995, "Issues of Liability and Copyright for the Catalogue Raisonné Scholar."

in such a project but who have a keen interest in this type of work, such as patrons, collectors, art dealers, attorneys, and software designers. The organization publishes a newsletter, the CRSA Forum, and maintains a list serve for discussion of relevant issues. As an affiliated society of the College Art Association, the CRSA holds its annual meeting and program at the CAA Annual Conference. It holds interim panels in New York on an occasional basis and has begun collaborating with the New York University School of Continuing and Professional Studies to mount an annual symposium.

Best Practice. Foundations and estates involved in preparing a catalogue raisonné are advised to participate in the Catalogue Raisonné Scholars Association or other professional associations. I have always thought it a good idea for the College Art Association to provide a resource bank of scholars interested in working with a particular artist's estate or foundation and serve as a network to connect artists, their estates, and foundations to interested scholars.

Sale of Artworks by the Foundation or Estate

Most artists' foundations and estates sell art. Difficult questions arise for an executor and trustee regarding sales of works of art: whether to retain the artist's dealer if the artist had a dealer prior to death, whether to engage a new dealer, when and whether to sell works of art, and whether to sell through a dealer or at auction, are questions which should be discussed by the board of directors, the executor, or the art executor.

Professional advice should be sought on the basic artist-dealer consignment agreement and careful attention paid to the scope of the dealers' agency—exclusive versus nonexclusive, territory and medium, and the term, as well as basis for early termination.

Foundations may prefer to sell at auction. If the foundation has multiple works to sell and/or sells often, relationships with several auction houses should be developed. Different auction houses serve different geographic areas and have expertise with different collections. As in the sale of an artist's personal archive, the quality of the artwork and the notoriety of the

artist will determine value. Auction houses may provide useful advice on whether to sell, appropriate values, reserves, and guarantees. The executor or board of directors should solicit proposals from more than one auction house. The basic auction contract of Sotheby's and Christie's, the two major auction houses, can be found online. While certain provisions of the standard agreement are not negotiable, certain provisions—reserves, guarantees, commissions, insurance, and costs—may be negotiable and the executor or board of directors should seek advice if not familiar with such contracts to comply with the fiduciary duty of care imposed upon them.

URLs Referenced in this Chapter

Guidestar <http://www.guidestar.org>

Richard Avedon Foundation <http://www.richardavedon.com>

Laszlo Mohly-Nagy Foundation <http://www.moholy-nagy.org>

The Larry Rivers Foundation, Inc. <http://www.larryriversfoundation.org>

The Barnett Newman Foundation <http://www.barnettnewman.org>

Adolph and Esther Gottlieb Foundation <http://www.gottliebfoundation.org>

Reuben Kadish Art Foundation <http://www.reubenkadish.org>

The Joan Mitchell Foundation <http://www.joanmitchellfoundation.org>

Roy Lichtenstein Foundation <http://www.lichtensteinfoundation.org>

DeKooning Foundation <http://www.dekooning.org>

Judd Foundation <http://www.juddfoundation.org>

Calder Foundation <http://www.calder.org>

Nancy Graves Foundation <http://www.nancygravesfoundation.org>

Judith Rothschild Foundation <http://www.judithrothschildfdn.org>

Romare Bearden Foundation <http://www.beardenfoundation.org>

Saul Steinberg Foundation <http://www.saulsteinbergfoundation.org>

Josef and Anne Albers Foundation <http://www.albersfoundation.org>

Barnett Newman Foundation <http://www.barnettnewman.org>

Keith Haring Foundation <http://www.haring.com>

Isamu Noguchi Foundation and Garden Museum <http://www.noguchi.org>

Through the Flower <http://www.throughtheflower.org>

Catalogue Raisonné <http://www.catalogueraisonne.org>

CHAPTER 6: THE ROY LICHTENSTEIN FOUNDATION¹

Jack Cowart

I am nominally copying, but I am restating the copied thing in other terms. In doing that, the original acquires a totally different texture. It isn't thick or thin brushstrokes, it's dots and flat colors and unyielding lines. It seems to be anti-art, but I don't think of it that way.

— Roy Lichtenstein (1983)²

Roy Lichtenstein was born to middle-class parents, Milton, a real estate broker, and Beatrice (née Werner) Lichtenstein, on October 27, 1923, in New York City. He and his sister grew up on the Upper West Side. He studied with American scene painter Reginald Marsh at the Art Students League in 1939, then at Ohio State University from 1940 to 1943. In 1943, he entered the United States Army, serving in Europe as a cartographic draftsman until 1946. He returned to Ohio State, and after obtaining a B.F.A. degree that June and an M.F.A. in 1949, he taught there until 1951. In 1949 he married Isabel Wilson, assistant in the nonprofit 10-30 Gallery in Cleveland. Their sons, David and Mitchell, were born in 1954 and 1956. Between 1951 and 1957, Lichtenstein worked intermittently as an engineering draftsman in Cleveland and at other designing jobs while continuing to paint. His final period of teaching was at New York State College, Oswego, from 1957 to 1960 (where his work was abstract expres-

1. This chapter is reprinted with the permission of Rutgers University Press, Salvesen, Magda and Cousineau, Diane, eds. *Artists' Estates: Reputations in Trust*, chapter 9, pp. 336–351. Copyright © 2005 Magda Salvesen.

2. Statement made in February 1983, quoted in *Roy Lichtenstein*, by Lawrence Alloway (New York: Abbeville Press, 1983), p.106.

sionist), and at Douglass College, Rutgers University, New Jersey, from 1960 to 1964. His first paintings of comic strip characters and speech balloons appeared in 1961. With their exhibition at Leo Castelli the following year, he was launched as the leader of the new pop style and moved into New York City in 1963. He was divorced in 1965 from Isabel, who received custody of the children, and married Dorothy Herzka in 1968. In 1971, they moved to Southampton, New York, but after 1982 they maintained the option of living and working in the city.

A lifelong interest in the machine quality of printing, whether in newspaper and magazine advertisements or in art magazines and books, as well as the art deco style, provided a wealth of material for Lichtenstein. Usually working in series, he began in the mid-1960s—with deadpan humor and using emphatic forms and colors—to make pop versions of twentieth-century styles, working his way through cubism, futurism, surrealism, and so on. Beginning in the early 1980s he created witty sculpture cutouts, subsequently fabricated on a large scale for public plazas or sculpture gardens. He died of pneumonia on September 29, 1997, at the age of seventy-three....

The double-storied, skylit, sixty-by-eighty-foot former studio of Roy Lichtenstein in the West Village of Manhattan now houses the foundation that his widow formed in his name. Its new function is reflected in the office compartments and the bank of filing cabinets that take up two sides of the room. But, as I saw when I went to visit Jack Cowart, the foundation's director, the presence of Lichtenstein was still strongly felt: his painting wall has been left intact, and his paintings and sculpture—on their way to or from the warehouse—could be seen in the main area of the studio, while his prints hung in the room upstairs where we talked.

...

You were in the museum world for many years. What enticed you to move from Washington to New York and become the executive director of the Roy Lichtenstein Foundation?

After I finished the Matisse paper cutouts show of 1977, I decided that I wanted to work with a living artist. I hit upon Roy Lichtenstein. He hadn't

had a lot of exhibitions since the retrospective at the Guggenheim in 1969, so I pitched him the idea of doing an exhibition of recent work and then touring it around the world. I was based at the Saint Louis Art Museum at that point, but I spent a lot of time staying with Roy in Southampton on Long Island. He and Dorothy were very generous, and we got to know each other. I had an art historical, curatorial way of thinking—quite different from Roy's—but he put up with me. We were periodically together in the early 1980s when the exhibition *Roy Lichtenstein 1970–1980* traveled, and we stayed in contact.

When I was called by the National Gallery in 1983 to take over the twentieth-century department, he was the first artist I invited to create an artist's room. Every five years or so, I would dream up another way for us to do something. Or if Roy needed an essay for an exhibition catalogue, I would sometimes get a call. Being involved with the Meyerhoffs as they formed their collection for the National Gallery put me in continued contact with Roy, and the Gemini print exhibition at the National Gallery in 1984 was another big project that involved his work.

I certainly wasn't aware that he was deathly ill in the summer of 1997—by then I was deputy director and chief curator at the Corcoran Gallery of Art—so it came as a big shock to me when Roy died so quickly. It also came as a relative shock when Dorothy revealed that there was a plan for a foundation and asked me to participate. It was intriguing, but I didn't want to move from Washington, especially since my wife's career is there and we had deep community roots. Dorothy said, "Oh, you don't have to. We'll be very flexible about it. I can't think of anyone better." I probably could, but I didn't want someone else to get the job!

So I live in this guesthouse beside Roy's former studio when I am in New York, and then, from Virginia, I can annoy the staff by e-mail, fax, and phone. Maintaining constant communication is a major part of our operation, especially with Mrs. Lichtenstein, who travels a good deal.³

3. Dorothy (née Herzka) Lichtenstein was born on October 26, 1939, in New York City. After obtaining her B.A. from Beaver College (now Arcadia University), Pennsylvania, in 1960, she worked at the Paul Bianchini Gallery in New York from 1963 to 1969, meeting

Our job is to give her the freedom she deserves. She is less resident in Manhattan than previously, staying on the eastern end of Long Island during the summer and in Florida during the winter. She travels a good deal, but we try to stay in touch as best we can.

The Barnett Newman Foundation is a small, functional office space in midtown, rented after Annalee Newman died, whereas you work in Lichtenstein's studio and are surrounded by his work.

Certainly it is a great privilege. It is a constant delight to be able to hang things up for ourselves and then learn from them. Then, because I live here with his art, I can actually watch television and look at a Lichtenstein sculpture at the same time—and begin to think about what was in Roy's mind. We want to maintain the studios in a way that will allow curators and others who want to think about Roy's work to breathe a little bit of that air and to understand the scale of things, the light, and the setting. At the same time I'm not trying to create a mausoleum. I think he does still inhabit these spaces in some way. The paint marks and the studio materials are still there. But this New York space wasn't his only studio. From 1988 to 1997 was a good run. If he had lived here forever, that would have created a very heavy burden, I think, similar to that of maintaining the Brancusi studio.⁴

The Southampton studio that Roy was in from 1970 onwards would be a harder place to disengage from. The National Trust for Historic Preservation and the Henry Luce Foundation have funded a project looking into the problems and requirements for preserving artists' studios. I'm watching from the side.

So besides the possibility of visiting Georgia O'Keeffe's studio in New Mexico in the future, one might also be able to visit the Lichtenstein studio, the de Kooning studio, and so on?

Roy Lichtenstein in 1964. They married in 1968. Her book, *Pop Art One*, was published in 1965. She became an Officier de l'Ordre des Arts et des Lettres in 2000.

4. The sculptor Constantin Brancusi (1876–1957) bequeathed the whole of his studio and its contents to the French government. It has been reconstructed outside the Pompidou Center in Paris.

Yes, and there's a whole group of living artists like Cindy Sherman, Chuck Close, and Julian Schnabel on the eastern end of Long Island. Should Roy's be managed by the Parrish Art Museum in Southampton, or should it be part of a consortium of artists' studios? Should it be independently funded by the foundation? Should it be torn down? Should it be moved? Do we let it, like Alfonso Ossorio's, get sold to a private individual? If it becomes a public facility, you have to have a parking lot, the handicap facilities, the ramps, and so on. Georgia O'Keeffe had dirt floors. What do you do with dirt floors and five hundred people? You can't. You ruin the studio by trying to save it. But people still want to make pilgrimages. Do you buy into the pilgrimage site, or do you forget it? Delacroix's studio on Place de Furstenberg in Paris is a great evocative setting, but Gustave Moreau's feels dusty and dead. Dorothy and I do kick these questions around as part of the open agenda. The house in Southampton is going to a Lichtenstein family member. Nobody wants to have a studio open to the public in their side yard, with people knocking at the door, saying, "Can we come in?" like the Pollock-Krasner House at Springs, New York.

Would you ever think in terms of setting up a Lichtenstein museum elsewhere?

No, for many reasons. Roy didn't want one. The family doesn't want one, and we're not interested. We couldn't anyway because we only have very early Lichtenstein or relatively middle to late Lichtenstein. Increasingly, Roy was able to keep back more work, but he sold almost everything that he was making in the 1960s in order to stay in business, to stay alive. You can't have a Lichtenstein museum without some of the great pop sixties masterpieces. We wouldn't want it to look like the Fernand Léger Museum in Biot, which has all the things that Léger couldn't sell, or late works, and none of the core.

Did you have any previous experience dealing with the complications of foundations?

Having lived through the Rothko Foundation situation when I was at the National Gallery, I prayed heavily that this was not some kind of bear trap. I'd also witnessed the O'Keeffe heirs suing each other until the day

they decided to settle and become a foundation. But Roy was scrupulous in his relationships and very clear. I felt that we were starting with a completely fresh charter. And, like Roy, it was joyful.

After the wide scope of the museum world, does focusing on one artist suit you?

I've been in the museum business for twenty-seven years. I must have been involved with three hundred or five hundred exhibitions, thousands of objects, two-hundred-thousand-square-feet of gallery space, fifty staff members, and endless reports. It is wonderful at this stage of my life—and having developed a certain cynicism about the museum, gallery, and collecting world—to be able to work on “one” subject. Actually, my job involves the same kind of things as museum work: publishing, research, exhibitions, management of objects. We have a mini-museum collection here. So it's very curatorial, art-historical, political, and amusing, and it's very family-related. There are four of what I call our technical side: myself, my managing director, the accountant, and the lawyer. And then there are the four Lichtenstein family members: Roy's two sons, his sister Renée Lichtenstein Tolcott, and his widow. We don't have outside members on the board. However, it's not insular or secretive. Although there is a charter that states the five basic purposes of the foundation, in typically Lichtensteinian fashion, we are quite content in our board meetings to adjust or add to them as needs demand. We're in total control—not total control, relative total control—of our own destiny. We can do what we want, responsibly, and have the luxury of setting a course under our own steam and then navigating it. When Roy did something, he did it very well. And now Dorothy Lichtenstein, too, insists on a very high level of quality, which directly relates to my nine years with the National Gallery, where we had enormous resources and very high expectations.

Could you talk a little bit about the financial structure of the organization?

The foundation clicked into existence at Roy's death, beginning as a legal entity with no assets. We're private and will only give grants if we have an income greater than our own needs. The foundation exists to facilitate exhibitions of the work of Roy Lichtenstein, to publish catalogues raisonnés,

and to encourage new scholarship. We also want to do good deeds and be a model of good management for artists' foundations. The end game is to get Roy's remaining art into major urban centers, cultural complexes, and museums.

When we had our first board meeting, we asked ourselves how long we wanted to stay in business. O'Keeffe sunsets in 2006, the Judith Rothschild Foundation in 2018. We roughed out about thirty years, or until the last person who knew Roy still cares. It depends, too, on how deep the family involvement of his sons and grandchild will be. We came up with three interlocking ten-year plans. This all relates to the financing. Dorothy gave the money from the estate to run the foundation. I'm also informal chief policy advisor to the estate. There are other direct links in that Cassandra Lozano, the part-time managing director of the foundation, is also part-time administrator of the estate, and the accounting teams and the lawyers are the same.

We began with a primary donation of art from the estate to be sold over time, if proper placement came up. Eventually, some were placed, providing around \$10 million. That created the "starter endowment," which we put into treasuries and fixed return investments. The income meets about half of our operating expenses. The rest are check-written from the estate. Recently we've fabricated some objects, and the sales will fill in some of the gaps in funding and be set aside for ongoing major projects like the catalogue raisonné.

What would improper placements be?

A lot of people bought the work for resale and profit, especially the paintings of the sixties. That was fine in the old days when Roy was making new stuff every year. But, as his position becomes more secure over the years, certainly the idea is to place all works with primary institutions, or to identify collectors who have very firm commitments to an institution so that there is a high probability, something like ninety-nine percent, that their acquisition will eventually go there. There are, though, some things in the estate that can be sold to new and upcoming collectors in an attempt to get them to appreciate the work.

With somebody like Lichtenstein whose work is already so available in museums, is there really a need to keep proving his worth?

Yes, Roy is ubiquitous. He himself, I think, was in general wonderment about his success. He was certainly a driven, professional, and ambitious artist and very sure of his own talent, but making art was his primary purpose. He believed that if the work was good, it would stay on the walls, but the question didn't keep him up late at night.

However, there's more to Roy than the comic paintings from 1962 through 1964. That was two years out of a complex artistic career that spanned forty-seven. We are very keen to reveal these other aspects of Roy's work, whether it's the American or art historical cartoon pieces of the 1950s, the *Perfect/Imperfects* and the *Brushwork* paintings from the 1980s, or the *Interiors* of the 1990s. The Louisiana Museum is now doing a retrospective, *Roy Lichtenstein: All about Art*, which we hope will not be like every other retrospective. We want to see an idea that goes beyond the known ideas. Books are still to be written that will recontextualize and reevaluate the work, going beyond the existing studies, including my own. For example, we have a German Ph.D. candidate, Karen Bandlow from the University of Heidelberg, living with us in this house for the next three months. She's researching Roy's acceptance in Asia and his use of Asiatic motifs, and she's been converted from a Chinese art historian to an American contemporary art historian in the process. She reminds us that Roy lived from 1951 to 1957 in Cleveland, which has a great Asian collection from Japan, China, and Korea, and he must have picked up something there.

We have an archive that was transferred as a gift about a year and a half ago from the estate: the papers, object records, and photographs of Roy. All the filing cabinets and their contents are now ours, as well as the library, but not the real estate property. Our databases now say that Roy produced some five thousand unique works—each of the print editions counts as one. If there are five thousand in all, I can figure what your next question is—how many works are there in the estate?

Exactly!

At this stage the foundation has fifteen objects—major paintings, sculpture, collages, and drawings—things that we wanted to make sure were not lured away by the marketplace. I don't want to give numbers, but it's fair to say that of the 1,200 paintings that Roy produced during his lifetime, the estate holds a relatively minor number. However, Roy made—and kept for future work—at least three thousand drawings: *croquis*, finished drawings, studies, work in sketchbooks, et cetera. So we have a major reference base here. Following our advice, the estate spent a lot of time getting them measured, matted, inventoried, and organized in solander boxes. We've got them plus the paintings, collages, and maquettes, all recorded digitally so we can share this information. We also have a big website with a tremendous amount of data on it. A vast number of major paintings, various major drawings, collages, prints, and other works are out in the world.

Ours is the obverse of the Warhol Foundation. When Andy died, there were thousands of objects that came immediately into the foundation. The plan was to sell them as reasonably as possible to make up an enormous endowment and give great grants for the advancement of the visual arts. Ours is not like that at all. It's also not like what I imagine the Morris Louis estate to have been at the beginning, when a lot of his work wasn't documented, with unstretched stain paintings on rolls that had never been seen. Almost everything that Roy made was shown, documented, published—except perhaps his pre-1960s works—mostly because he had annual exhibitions at Castelli from 1962 on. He didn't change galleries on a whim, but just stuck it through with Castelli. So we're working with a relatively accessible situation and are also doing two or three exhibitions a year. There are no secrets.

Roy's *Times Square Mural*, which was installed in 2002 in the subway at 42nd and Broadway, was actually finished in 1994, three years before Roy died. Are there other murals that were commissioned but not installed? And you mentioned new fabrications of sculpture?

There are one or two large-scale sculptures that he left as maquettes because the specific commission didn't go forward in the 1980s. There are designs for others, done on spec in the mid-1990s, that also were

not executed, although the ideas were sufficiently developed. They will be seen as time goes by: one will be installed on the Cantor roof garden at the Metropolitan Museum next month [May 2003]. But if there are too many post-Lichtenstein judgments to be made, we don't do it. We err on the side of caution.

We'd really like to remake the *Greene Street Mural*, which was done for the Castelli gallery on Greene Street in 1983, and then purposely destroyed because Roy wanted it to be temporary. If we do, it will not be as an art object, but as a mural-graphic experience, without value, as a recasting, on portable panels. That project may get lost, however, because we're also trying to do a book of great photos of Roy, a new chronology, oral histories, and the catalogues raisonnés. We're working on three retrospective exhibitions and a show for Brazil as well—and things always happen you don't ever anticipate.

Many estates talk a great deal about conservation costs. Is that a worry or a burden for this foundation?

So far it's not. Roy was working with very professional, stable, specifically made, materials. They have a good life span. If we need to have something conserved, we'll have it done. His pre-1960 work is more fragile, and we are overseeing the renovation of some of those owned by the estate. We also want to make sure that Roy's early work owned by others is preserved. We have yet to work out some kind of formulation for helping them, or for reacquiring the work and then fixing it up ourselves. We fully believe that museums owning the artist's work should take care of what they possess. But, if people have problems that impact their ability to show Roy's work, we'll have to consider that as a conservation program for the future. I know the Morris Louis Conservation Fund said that because Louis worked on unprimed canvas and the paintings tend to degrade visually, they would underwrite a program to facilitate their restoration by their known practitioners.

We're working on an artist's material archive at three different institutions that would allow scientists to create databases of information about Roy's materials. We haven't signed a deal and haven't made a transfer. But we will. We're dancing cheek-to-cheek with one institution. The other two are just verbal agreements that this would be a good thing to do.

By the time of his death in 1997, had Roy drifted away from the Castelli gallery?

No, Castelli was still the gallery of record. I don't think there was ever any formal contract of representation when he came into the gallery in 1962, and there wasn't an exit one. Leaving had nothing to do with Barbara [Castelli] or anybody else.⁵ In her recent interview in *Art & Auction*,⁶ she said that it would not be appropriate for her to represent the Lichtenstein estate and foundation.

Whose decision was it to move from the Castelli gallery to Mitchell-Innes & Nash?

In between moving from the Castelli gallery to the Mitchell-Innes, there were two or three years of being noplacement. But the board kept getting pressure from aspiring galleries, and we had been informally looking at all of the applicants. We decided that we had little interest in either sales or exhibitions, but wanted a gallery to organize things and shield us from getting too involved in the occasional deal or two. Dorothy and I had both known Lucy and David for a long time. We took a board vote and had them come down and make a presentation to us. We said, "Okay, we like your thinking. Draw up a contract." We needed the agency of somebody whom we could trust and who wouldn't be intrusive or directive, but would, at the same time, be consummately professional. Roy probably would have gone with some other dealer. He needed a larger space and a different relationship to contemporary artists. But Roy's not alive, he's not producing annually; it's no longer about annual shows of big work. It's about a careful management of the finite legacy.

I know the National Gallery in Washington has a very good collection of Lichtenstein prints following Roy's gift of 154 of them in 1995. Do you want to facilitate other museums in forming major holdings of Roy's work?

5. Barbara Bertozzi, Leo Castelli's third wife, already managed the gallery before her husband's death in 1999 at the age of ninety-one. The Leo Castelli Gallery, now at 59 E. 79th St., is much smaller than the former space in SoHo.

6. The interview, "Act Two," by Anthony Haden-Guest, appeared in *Art & Auction*, volume XXV, no.5 (May 2003), pp. 48-50.

I let in a word earlier about my wariness about museums. However, I admire and, in some cases, understand them all too well and realize the pressures they are under. Roy always wanted his work to be accessible to the public, and museums remain the best, if somewhat flawed, institutions by which one can have that global access. We also believe in institutions of higher learning, university galleries, and study complexes. We believe in large institutions like the Getty and small ones like semi-private museums, so we are pretty inclusive.

Dorothy and the board are much more attentive when people approach us rather than my making blind telephone calls to curators. When they come to us from this country or abroad to organize an exhibition, to add to their collection, to learn more about the artist, or to suggest a publishing project, we like to respond to them. If we find a work on the secondary market, even something that we would like to buy ourselves, we're inclined to call the museum that's approached us and say, "You were looking for a *Mirror* painting of the 1970s. Are you aware that there's a great one coming up at auction?" We'll try to realign work in the outer world before offering one of our own.

Unlike the Motherwell foundation [the Dedalus Foundation] or the Warhol—that say, "Ok, here's the appraised value of the work; we'll sell it to you for half price"—we don't own much work. The estate is set up to provide for the heirs. The foundation is second or third or fourth in line from those front-end costs and needs, and we understand that. We're not about wanting to be the richest foundation in the neighborhood, and we haven't come to the point of large donations. That could come twenty years from now if the foundation is winding down. Then a large group of drawings, or the rest of the print archive, or a collection of maquettes might be gifted to institutions where art history and connoisseurship are taught, both in this country and abroad.

In actual fact, is it necessary for you to make a great distinction between the paintings in the estate and the paintings in the foundation, since you're giving advice on both?

Officially, it's inappropriate for us to be overly involved in the affairs of the estate per se, though we do have an overarching sense of quality control, and we share the same art dealer for certain sales. Dorothy has great expertise in her own right. Over time, more will come from the estate to the foundation, but this beginning-small approach has been very good. She and the family have well exceeded their allowance to claim tax benefits—it is pure philanthropy.

Turning to Dorothy Lichtenstein—your website states that she's been involved in the arts since the 1960s. What has her particular role been within the art world?

In the early sixties, she worked with Paul Bianchini at his gallery in New York. She helped him put together the *American Supermarket* show in 1964, which gave her the chance of working with some Leo Castelli artists and getting them in on this joint project. That was how she met Roy. They got married in 1968 and, I would say, her primary noninstitutional role has been as an involved and sensitive enthusiast. She's very interested in the Trisha Brown Dance Company and other things, usually through her many personal friendships. She's open to new ideas and has a wide inquisitiveness and great intelligence. The foundation is Dorothy's foundation. She is the initiator, the president, and she is not a figurehead. I wouldn't contemplate doing anything that would run contrary to her instincts or her level of comfort.

Was she deeply involved in Roy's career previously?

Dorothy was the more gregarious partner. She is elegant, engaged, verbal, fun, funny, and she didn't take the position of an Annalee Newman type. She created her own independent sphere and was not the mouthpiece for Roy's art. She also has a fantastic memory for the details of the last thirty years. Our oral history program will have endless interviews with Dorothy for as long as she will put up with them. She was involved in so many aspects of Roy's life, and sometimes much more in the art than I might have thought. While she traveled a lot—taking these long treks to China or Africa—Roy, who hated to travel, would be home beavering away.

Were these trips sometimes to do with his work?

Not really. Dorothy is inquisitive, and so she would directly experience other cultures in ways that Roy might not. He would say, "All I need are pictures of it." Her involvement in the art world has been as a partner, as a social and softening agent on behalf of Roy. Then, because she is also close friends with so many of the Castelli artists, and those of the next generation— such as Jeff Koons, David Salle, and Julian Schnabel— she has an indirect but almost tangible presence in the art world and an enthusiasm for it. It's hard to suggest all this on a website for the foundation. She always was behind Roy, strategically, purposefully, personally. When I first met the Lichtensteins in 1977, it was Dorothy and also Olivia Motch, Roy's studio manager, who facilitated access, dovetailing all the arrangements for social interaction with Roy. Dorothy's also very good at remembering who said what to whom about the endless commissions and benefit appearances and charity things that Roy got talked into on an annual basis.

The art historian Lloyd Goodrich is said to have said something like, "Never believe the widow and never listen to the children!"

And never believe the artist or the critic or anybody else! We get through that by triangulating everything. We're now running a strictly informational, oral history program and making wonderful discoveries. Since 2002, Avis Berman has been taping the people who knew Roy substantively during his lifetime, and then *Rashomon*-like we find the truth is someplace in the middle. We have a fascinating time building up the similarities and contrasts, themes and variations from these multiple sources.

The Lichtenstein family is different from more polemical families in that they are casual about their importance. There's no family line that has to be adhered to. We reach edges of sensitivity, but we're not out there to prove a point. Roy had his own kind of internal history that he didn't share, so we can only arrive at some suspicion of it by inference. That means talking to artists whom he talked to. A lot of these are names no one will know. I can go to Bob Rauschenberg, Jim Rosenquist, and Claes Oldenburg, but Roy may not have told them the most revealing things. He told more to people like Stan Twardowicz, whom he was really buddies with, or Spike Landsman, who was interviewed at various times and

let his guard down. They were with him at times of particular growth and change. We're not intending to publish a biography of the artist or these oral histories per se, but we, as well as researchers, can use them as raw data—to be taken with all of the usual caveats—to help us solve certain problems like dating of objects and chronology, especially for the catalogues raisonnés.

Did Roy enjoy socializing in the broader sense?

I think he did like to be relatively social in a cozy way with a certain number of artists. Did he like going to the Warhol factory? I think he liked to see the scene because he knew he didn't have to participate in it and that he could withdraw from it at any time. He would be taken into these mega-experiences by Dorothy or by friends and had a kind of wry, tolerant wit and wisdom about them. "David Byrne? The Talking Heads? I really like jazz," he would say, "but it works fine. I'll use it later. I'll think about it."

How much were Roy's two sons involved in their father's world?⁷

Once Roy and Isabel separated in 1963, the boys spent a formative period living with their birth mother outside Princeton. Mitchell eventually spent a lot of time with Dorothy and Roy in Southampton. David was fairly independent in ways that had to do with surfing, music, and doing his own creative things, but he did spend some time there. To the best of my knowledge, they had a very comfortable relationship with both Dorothy and Roy. Dorothy invited them to be senior officers of the board. There was never any question of either giving up his career, but we ask them to participate as much or as little as they want. I'm sure Roy said, "Well, you know, yes, Dorothy, if you want to, why don't we invite Mitchell and David and Renée to sit on the board?"

Apparently there weren't many letters in the files. Is that because Leo Castelli took care of most things to do with his career?

7. David Hoyt Lichtenstein, a graduate of Columbia University, with a B.S. in electrical engineering, a former rock musician, recording engineer, and software developer, is currently working independently. Mitchell Wilson Lichtenstein, a graduate of Bennington College and Yale School of Drama, has acted in film, television, and theater, and is currently a screenwriter.

I have about ten letters from Roy in the whole archive. He was not a man of the written word. He would talk on the phone a certain amount, but mostly he had other people do the talking for him. The studio assistants, the studio managers in particular, certainly Leo, and the gallery would do the deals and all the paperwork. I don't have access at this stage to everything in the Castelli archives, as they are still privately owned. There is some correspondence from his old buddy artists. He would be tortured for several months trying to figure out how he could write a response. He would usually start with, "I'm sorry it's taken me so long, but writing is not my thing. I'll be lucky if I get to the bottom of the page," and he'd say, "I'll really try hard." His longest letter known to me is about three paragraphs and, if he gets to the back side of the sheet, it's "Phew, I made it!" There are family letters written in 1945 from Europe during the war to indicate that he was still alive, and to comfort his father and mother. But that's the longest string of coherent correspondence. He was much more a talk-to person when he wasn't working.

What about his various studio assistants, who have a kind of insider's knowledge they might reveal?

These issues of disclosure and nondisclosure have to do with the judgment and the sensibility of people. He was generous towards them; they will always be generous towards him. A filmmaker came in last year wanting to do a film about the man, not an art history film. We kind of gritted our teeth and said, "Go ahead and interview these people, but we don't think there's a story. Maybe you can tell us there is." Six months later he came back and said, "You know, I talked to a lot of people. I was really trying to juice them up, but they just said, "Roy was a nice guy."

That means that the emphasis will be on the work and not on the personality or the myth?

I felt it was such a privilege to be asked to come into this startup situation because I admired both the art and Roy's behavior to people. There was a level of trust very quickly between Roy and me. "Do you want to read the text that I've written?" "Not necessarily. I trust you." That's the way we work with museums now. "You don't have to pre-clear your essay

with us. If you want to show it to us, terrific. We'll correct it for factual error, but your spin is your spin. We trust you; we'll take that gamble." There's no family line and no one fixed esthetic. We're still amazed and intrigued by the new information we get from the foundation manager Cassandra Lozano, an artist herself, who worked with Roy as the studio manager for seven years.

What is the foundation's attitude towards intellectual copyright? At the 2003 College Art Association meeting, the difficulty and the expense that scholars have in obtaining reproductions for their books was discussed.⁸

The estate currently holds the copyright on Roy's work and will for the foreseeable future. It is managed by Shelley Lee, who comes in once a week on behalf of the estate. Basically, the net from that operation offsets the cost of having her come in and do quality control. She makes sure that the color is done properly, that there's no overprinting and no bleeding, that a Lichtenstein image is not going to be on a tea cozy and on at least properly made coffee cups, et cetera. The estate has also always subscribed to the major international copyright societies such as [CISAC](#) [International Confederation of Societies of Authors and Composers], and expects those copyright associations to do their proper vetting and billing and control, and every now and again a minor check arrives.

We're pretty accommodating when people come to us with specific needs. When Michael Lobel was publishing his Ph.D. dissertation in book form for a commercial operation with the Yale University Press, [*Image Duplicator: Roy Lichtenstein and the Emergence of Pop Art*], he came to us and said, "We're really having trouble with copyright fees and getting photo rights, and therefore my thesis on Roy," which we kind of admired, "when published, will be underillustrated." I said, "Have Yale write me a letter telling us the cost to handle the rights and reproduction fees, and we will offset that with a grant." Obviously, it's in our best interest to have books on Roy illustrated and in color instead of just fields of gray text.

We have our own difficulties. Because we have so many photographs of

8. "Clearing Rights and Permissions: How to, Why to, When to," sponsored by the CAA Committee in Intellectual Property and the Association of Art Editors, CAA conference, February 22, 2003.

Roy by so many professional photographers, we are constantly negotiating with them to come up with a reasonable fee. Whether it was work for hire [when the photographer doesn't own the copyright] or not is always an open question. What's the standard fee? There is none. Is it two hundred or is it one thousand dollars?

What is your position on royalties?

We often gain more in other ways. I mean, the Louisiana Museum in Denmark is giving away 32,000 of their Lichtenstein publication, so the estate will disregard any royalty share on that. If it goes to hardbound, then we might ask for a nominal fee. Roy always split royalties with the institution. He felt that the institution took the risk of publication and put the front end into it, so he wanted to advance their net gain. We don't have our own product line, and we are under no obligation to market the name to keep, for example, a grant program running.

You mentioned previously that directors of foundations meet together. Do you gather once a month?

That's far too ambitious! When I moved up here, I said, "Okay, what's the peer group?" I had worked with the Rothko and O'Keeffe foundations and realized that they all beaver away in their little cells and don't talk to each other. I didn't want to reinvent the wheel, so I built a list of artists' foundations by going to GuideStar on the Internet and by contacting people. I phoned Arch Gillies at the Warhol Foundation and suggested we get together and form a loose association, and then help other artists making plans for their foundation. About twelve or so foundations assembled here for lunch. It's a freewheeling thing and has no administration. The best scenario is that we try to meet about two times a year. At first, it was basically show-and-tell. Come to our house, we'll show you what we look like, what we do. If we have things on the agenda for discussion, fine. If not, it's social. We just went over to the Dedalus Foundation, and last summer we went on our first field trip, to the Josef and Anni Albers Foundation, outside of New Haven. Our summer trip this year is to the Archipenko Foundation in Bearsville, New York. So it's just, "Gee, it's nice to get together. And by the way, talk to me about how you filed your 990-

PF. Oh, who's your counsel for warranties if you get an attribution blowup that somebody's going to sue you about?"

Now I have a little databank of almost all known American artists' foundations, those evolving for deceased artists, and others being planned by living artists. It's open source material. If someone asks how many foundations there are in the U.S., I'll say, "Maybe forty or forty-five. I'll email you the doc." If there's a question about what you do when you find a fake, I'll say, "I don't know. I'll call Sandy Rower at the Calder Foundation. He does this all the time." It's just a loosely disorganized, spiritually sympathetic group of like- and unlike-minded foundation workers. It's not only in New York. It extends to the Chinati Foundation in Texas [set up by Donald Judd], the Midwest, and the West Coast.

We actually did take a name, the Council of Artist Foundations, because we wanted to encourage IFAR [International Foundation for Art Research] when it was organizing a conference on catalogues raisonnés, and also to give members of the group an opportunity to write letters to their Congresspeople in support of artists giving their work to museums and receiving some tax benefit during their lifetimes. There was a split within the group about lobbying or not lobbying. We ourselves had nothing to gain because our artists had already given and gotten nothing, but we could work on behalf of living artists. While not taking an official position, our emotional position is that cultural institutions should, with proper controls, work out lifetime gifts from living artists rather than leaving it to the estate. So many opportunities are lost; things are sold many times for the wrong reasons—for death taxes, et cetera. In France and Britain, it's a case of national patrimony, and they tend to release the tax burden in some way.

The group also discussed gifts of archival material to institutions. Artists and foundations sometimes find they can't get access to their own archive again without forty-eight releases and a service fee, so we're thinking of developing a group position for those institutions that wish to donate collections but want to be able to get them back when needed.

Do you spend quite a bit of your time authenticating work?

Well, Cassandra will occasionally be expected by the auction houses to help with that. We don't have a formal board that does authentications or appraisals. Informally we'll say, "Yes, it is in the Castelli registry or, yes, it is in Roy's studio records." And we're glad to help because then we know where the work is, and it helps our catalogue raisonné process. We don't expose ourselves or anyone in the foundation to the possibility of legal claims. Some foundations are quite structured and aggressive on this whole issue, and they do prevail six months of trial later. We don't think that Lichtenstein authentication issues are of such profound moment that we want to get into that. I think we can solve them all person-to-person, at a lower level.

Which foundations are more concerned with authentication?

Well, in public record, the Pollock-Krasner Foundation has been involved in landmark cases dealing with authentication issues. *Lariviere v. Pollock*⁹ is a recent case. That's good case law. Certainly the Andy Warhol Authentication Board is separate from the foundation. The Calder Foundation is very aggressive in going after known forgers of Sandy Calder's work.

It seems as though the artist's foundation has become a new entity within the art world, creating new and specialized jobs for art historians, assistants, lawyers, and accountants.

It certainly has. There's a necessity for estate planning and the management of large bulks of material when artists are dying with such enormous holdings of their own work. How does one act strategically, or just responsibly? There is the possibility also of substantial asset buildup, or the hope that maybe a nonfunctional, nonfiduciary estate can be converted to some cash at some point. And, if there isn't a market for the work at present, it can at least be properly distributed to responsible, adopting agencies. The foundations are this intermediary point. We are not all alike by any stretch of the imagination and don't intend to be. We feel

9. In *Lariviere v. E.V. Thaw, the Pollock Krasner Authentication Board, et al.*, the court held that an owner who had signed the Authentication Board's application form containing an agreement not to sue the experts for their opinion cannot then sue the board if its opinion was not what was hoped for. See *IFAR Journal*, 3, no.2 (spring 2000).

wonderfully idiosyncratic, operating within our guidelines established legally and ethically. It's wonderful to be free, but at the same time, I always try to figure out what Roy would have wanted. Largely, he would have wanted not to be troubled by a lot of our troubles. It's our duty to carry on an intensity of investigation that no other institution would be so crazy to do, to indulge our love and our excitement for the work in ways that are responsible and that keeps us going. So we're deep mining. Museums can strip mine, but we can really dig tunnels, burrowing through layers of rock on behalf of Roy, maybe figuring things out.

April 2003

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CHAPTER 7: THE ANYONE CAN FLY FOUNDATION: THE LIFE, CAREER, AND MISSION OF FAITH RINGGOLD—AFRICAN AMERICAN ARTIST, FEMINIST WRITER, AND CHILDREN'S BOOK ILLUSTRATOR, PAR EXCELLENCE

By Michele Wallace

When nations grow old, the Arts grow cold, and commerce settles on every tree.

William Blake

There's a necessity for estate planning and the management of large bulks of material when artists are dying with such enormous holdings of their own work. How does one act strategically or just responsibly? ... The [artists] foundations are this intermediary point."

Jack Cowart

Executive Director of the Roy Lichtenstein Foundation, 2003¹

Faith Ringgold is professor emeritus at the University of California, San Diego, where she taught art and art history from 1984 through 2002. She is highly praised internationally as a painter, mixed-media artist (soft sculpture, dolls, masks and quilts), performance artist, and lecturer. Ringgold is a prize-winning writer of children's books and has penned an autobiography. She is the recipient of nineteen honorary doctorates of fine arts

1. Cowart is a founder of an organization called the Council of Artist Foundations. The author understands that Dr. Cowart has played a major role in assisting in the development and professionalism of artists' foundations. Chapter 6 on the Roy Lichtenstein Foundation for this author went beyond informational, and was inspirational. Cowart has apparently created a network which is a resource for living artists and their foundations, as well as for the executive directors who must try to interpret the intentions of deceased artists' foundations.

and more than seventy-five awards and grants, including the National Endowment for the Arts Award for Sculpture (1978) and Painting (1987), La Napoule Foundation Award for Painting in France (1990), and the John Simon Guggenheim Memorial Foundation Fellowship for Painting (1987).

Ringgold's art is included in many private and public art collections, among them the Metropolitan Museum of Art and the Guggenheim Museum. She has been exhibited in museums and galleries in the United States, Europe, Asia, South America, the Middle East, and Africa. *Tar Beach*, published by Random House in 1991, is the first of fourteen children's books which Ringgold has written and illustrated. These uniquely illustrated books have won more than thirty awards, including a Caldecott Honor and the Coretta Scott King award for best illustrated children's book of 1991. Aside from her activities as writer and artist, Ringgold makes it a policy to participate on juries and organize exhibitions for young and emerging artists, thus enabling her to continue to support the talent, dedication, and creativity of generations of artists to come.

Faith Ringgold founded the Anyone Can Fly Foundation, Inc. in 1999 as a New Jersey not-for-profit corporation and a 501(c)(3) in order to address the ongoing issues of her particular legacy as an internationally famous African American woman artist. First and foremost to be confronted was the possibility of the misinterpretation of the massive body of artwork Ringgold has created over the course of her career of fifty years, given the ongoing lack of recognition of the collective contributions of African American arts and culture to the American visual arts scene. On the one hand, the problem is systemic in that the contributions of African American culture to the visual arts remain universally unrecognized in terms of art historical interpretation. On the other hand, Ringgold's legacy as a black woman artist is also at risk, once she is no longer alive, from the whims of surviving members of her family who might misinterpret her goals and wishes or, under the pressure of various financial considerations including the outstretched arms of the Internal Revenue Service, be forced to make ill-considered and hasty decisions on the future disposition of her works. Without going into detail, it has happened repeatedly in the case of the works of African American artists that the work was disposed of too

cheaply, or sometimes simply destroyed for lack of understanding of it, its value, or a clear-cut way to store or preserve the work.

It goes without saying that the visual arts require a level of care and attention in terms of preservation and maintenance, which grows increasingly expensive in a world in which space is money. Thus, from the outset, the primary mission of Ringgold's foundation was envisioned as the promotion, documentation, and preservation of the visual arts history and culture of the peoples of the African Diaspora, with a particular emphasis for the foreseeable future on the works of African American artists born during the 1930s and before. The foundation's mission as articulated in its articles of incorporation is to expand the art establishment's canon to include artists of the African Diaspora and to introduce the great masters of African American art and their art traditions to kids as well as adult audiences.

The debate continues in African American intellectual circles over whether or not it is appropriate to borrow the term Diaspora from descriptions of the Jewish Diaspora and the European Holocaust in order to summarize the various narratives of the dispersal across the Americas of peoples of African descent via the Atlantic slave trade from the sixteenth through the nineteenth centuries. In any case, we use the term Diaspora advisedly with the comprehension that subsequent scholarship may find intellectually more apt terminology to account for the rebirth of African cultures as the music, dance, religion, visual and material cultures which were developed by the former slaves of the Caribbean and the Americas.

One of the main goals of the creation of the foundation is to even those odds, to promote the recognition of a canon of African American art and African American artists, and in the process, to prepare the ground for the second stage of the foundation's work after Ringgold's death, which will be to preserve and promote the Faith Ringgold legacy and life work in art, performance, and the writing and illustrating of children's books. The relationship of the foundation's present mission to its intended mission in the second stage of its existence makes complete sense. Specifically, without the existence of a canon of African American art in the nineteenth and early twentieth centuries, it makes little sense to talk about the genius and mastery of Faith Ringgold born in 1930.

Indeed, even when the art world chooses to selectively recognize an individual black artist (for example, in the cases of Jacob Lawrence, Romare Bearden, and Jean Paul Basquiat), it is always on the pre-condition that this is someone who is unlike other African Americans, whose work distinguishes him or her from other African Americans, who is more universal or modern or humanistic or anything but black and African American, so that each success story among African American artists puts the group collectively further and further back in terms of the recognition of the collective reality of the group. One of the fascinating things about Ringgold's development is that she has built her career in such a manner that it is almost impossible to use her accomplishments for this purpose.

Which is why Ringgold could only conceive of doing the work of her foundation by first taking up as well the task of laying the groundwork for a total paradigm shift in the perception of the art world of African Americans in the visual arts collectively. How did she know this was what she needed to do? Simply because she has had to do this from the outset at every step of her journey toward becoming a black woman artist. Before each step in her individual development is taken, she must first insist upon the existence of her potential to take that step. Why? Because at every step, there were always plenty of detractors in the art world itself ready to tell her that what she was attempting to do could not in fact be done.

The Anyone Can Fly Foundation is unique and unprecedented among foundations founded by African American artists. Artists' foundations in general have only fairly recently become a significant movement in the dispensation of white American and European artists. For African American artists who have much less mainstream financial support, the artist foundation remains still largely unobtainable. Nonetheless, the Anyone Can Fly Foundation, through the efforts of Ringgold and a loyal band of supporters and contributors, is an accredited 501(c)(3) private operating foundation, which pursues its programs based upon the support and donations of voluntary contributions and labor.² Although

2. The Romare Bearden Foundation has received a preliminary and anticipates definitive ruling on its public charity status based on percentage of funds received from the public.

the Anyone Can Fly Foundation is a public charity, it has not applied for grants in the past because of the impermanent nature of grants as a continued source of funding. The foundation currently operates out of offices located at 345 West 145th Street in Harlem in a co-op apartment, which the foundation will also inherit.

Ultimately, the purpose of the foundation will revert after Ringgold's death to the more traditional function of an artist's foundation of overseeing and protecting Ringgold's specific achievements as an artist, writer, and visionary. Her entire collection of art copyrights, royalties, and unpublished works, as well as property and land, will be bequeathed to the foundation upon her death, thus providing the foundation with an ongoing source of endowment. This foundation will also at this point oversee the completion and publication of Ringgold's catalogue raisonné, on which she continues to work.

The foundation annually offers a series of scholar and educator grants designed to promote research and knowledge of the history of African American artists among audiences of both children and adults.

DESCRIPTION OF FOUNDATION PROGRAMS

The Distinguished African American Scholar (or Artist) Lifetime Achievement Award includes a monetary grant of \$2,000 to the designated recipient. Winners thus far have been in 2004 Cuesta Benberry, celebrated art historian of African American quilts; in 2005 David Driscoll, artist and Professor Emeritus of Art and Art History at the University of Maryland in College Park; in 2006 Elizabeth Catlett, sculptor and printmaker; in 2007, Samella Lewis, art historian and artist. Each Distinguished Scholar (and/or Artist) has been extensively interviewed on videotape concerning the contributions of his or her life's work and contributions to African American art history. The videotapes will appear in full on the foundation website together with a complete written transcript of the interviews. Distinguished Scholars are awarded their prizes at the annual foundation garden party given the last Sunday in June each year since 1999. In 2007, the artworks of Samella Lewis were also featured in a special exhibition during the garden party.

Future Distinguished Scholars under consideration are painter Richard Mayhew, printmaker Margaret Burroughs, quilter and sculptor Aminah Brenda Lynn Robinson, and Evangeline Juliet Montgomery.³

In addition to the annual Garden Party as a fundraiser, there is an annual art exhibition and silent auction held each year at the ACA Gallery at 529 West 20th Street, 5th Floor in mid-October. There is live music and wonderful soul food and festivities at both the Garden Party and the Silent Auction.

The foundation offers a Printmaking Scholarship to selected artists who have never made a print edition before. Half the edition of twenty-five prints becomes the property of the Anyone Can Fly Foundation for exhibition and sale. The scholarship recipients, who thus far have been Grace Matthews, Linda Freeman, and Samantha Hill, make the prints either at the Robert Blackburn Printmaking Workshop or at the Experimental Printmaking Institute with Curlee Holton at Lafayette College. The Anyone Can Fly Foundation made a \$4,000 donation to EPI in 2006 in order to support the printmaking scholarship.

The foundation also sponsors an Art with Kids grant overseen by Barbara Wallace in which teachers who apply go into the public schools to do presentations on African American artists included on the ACFF Masters List. The teachers who have thus far participated in these programs are Linda Camardo, Trish Maunder, Dawn DeCosta, Robin Miller, and Jose Ortiz. ACFF also sponsors a professional scholar's grant, in which \$2,000 is given to an art historian for producing a 3,000-word illustrated essay on one of the designated Masters of African American Art from the ACFF approved list.⁴

3. Richard Mayhew (http://www.acagalleries.com/dynamic/artist_bio.asp?ArtistID=15); Margaret Burroughs (<http://www.slam.org/images/spex/BLKHIST/burroughs.html>); Aminah Brenda Lynn Robinson (<http://www.columbusmuseum.org/view/robinson.php>); Evangeline Juliet Montgomery (http://www.udel.edu/museums/jones/archive/archive_pages/artist_pages/montgomery.html)

4. Masters of African American Art (born 1765–1920). See <http://www.anyonecanflyfoundation.org>.

Essays currently featured on the ACFF website (<http://www.anyonecanflyfoundation.org>) include: “Patterns of Change: the Work of Lois Mailou Jones” by Dr. Catherine Bernard; “A Life In Print: Robert Blackburn and American Printmaking” by Dr. Deborah Cullens-Morales; “Casting Feral Benga: A Biography of Richmond Barthe’s Signature Work” by Dr. Margaret Rose Vendryes; “A Child’s Eye: An Artist’s Mind, and a Man’s Heart: Romare Bearden” by Dr. Lisa Collins; and “The Sculptural Legacy of Selma Burke” by Dr. Lori Verderame.

Board meetings take place regularly in conjunction with the annual Garden Party and the annual silent auction and exhibition of the ACFF collection. The foundation also hosted a holiday party for its volunteers in 2006 and plans to do so again in December of 2007.

In 2008, the Anyone Can Fly Foundation will celebrate its tenth anniversary with the inauguration of an endowment to raise capital funds for an artist-in-residence (AIR) program for children six to twelve years old. To be called the Anyone Can Fly Kids Artist-in-Residence Endowment Fund, it will begin with an initial donation of \$50,000 from Ringgold with the intention of raising matching funds designed to purchase an appropriate property for housing a residency program for children in which there would be a concentration on learning about the arts and producing art for a period during which school was not in session.

The future for the Anyone Can Fly Foundation is a bright one indeed. Please join us in the celebration of our tenth anniversary.

CHAPTER 8: JUDD FOUNDATION NEW YORK/MARFA

Barbara Hunt McLanahan
Executive Director, Judd Foundation

INTRODUCTION

Following the creation of an endowment in 2006, Judd Foundation entered a new phase in its development. With the appointment of its first Executive Director in 2006, and subsequent staff expansion, the Foundation has begun to build an administrative and financial infrastructure that will enable the growth of programs that properly facilitate the fulfillment of its mission. The founding Board of Directors has been expanded from four members to the current six. The Board is undertaking strategic planning, working on a development plan that will consider board expansion, the role of family members and lifetime trustees, the status of the Foundation as a private operating foundation (as opposed to a public charity) and its impact on the foundation's fundraising potential, as well as the growth of its programs relative to staffing and infrastructure.

It should be noted that these developments are fairly standard in the lifecycle growth of a nonprofit, particularly the growth of an artist's foundation. The resolution of estate matters is often a complex and lengthy process, and the foundation's board of directors must prioritize their volunteer efforts to best serve the organization's mission. As professional staff are gradually appointed and resources become available, issues of archiving, collections management, conservation, scholarly research, and public programming can be considered, and achievable plans can be put into place. The Board—once called upon as volunteers to undertake critical work as it arises to ensure the protection of the artist's legacy in its early stages—move into a new leadership role. With professional

staff to oversee the foundation's organizational management demands, the Board is now able to function as a strategic and visionary body that directs the staff in the fulfillment of the mission, taking on a legal and fiduciary role in the long-term stewardship of the organization.

About Judd Foundation

Judd Foundation was created in 1996 by twentieth century American artist Donald Judd (1928–1994) through his last will and testament to maintain and preserve his permanently installed living and work spaces, libraries, and archives in Texas and New York. The Foundation is dedicated to promoting a wider appreciation for Judd's artistic legacy by facilitating public access to these spaces and resources and developing scholarly and educational programs. Judd Foundation is a nonprofit operating foundation with 501(c)(3) tax-exempt status and is distinct from Chinati Foundation—a public institution founded by Donald Judd in Marfa, Texas, which houses Judd's large-scale, publicly installed artworks, and which has an independent 501(c)(3) status and organizational mission. As sister organizations that share the same founder, Donald Judd, Chinati Foundation and Judd Foundation collaborate on programmatic activities that serve to further the shared aspects of their discrete missions.

EVOLUTION OF THE FOUNDATION

Though the Foundation was established in 1996 pursuant to the artist's will, the transfer of the properties and art that comprise the assets of the Foundation was not fully completed until 2002. At that time, the Board of the Foundation began a strategic planning process that culminated in the hiring of the first full-time Executive Director of Judd Foundation, Barbara Hunt McLanahan, in 2006. Ms. McLanahan brings more than twenty years of arts management to the Foundation.

ESTABLISHING AN ENDOWMENT

It was Donald Judd's expressed intention for uninstalled works owned by the Foundation to serve as a source of revenue for an endowment that would help to preserve permanently installed works and spaces in both New York and Marfa. On May 9, 2006, Judd Foundation sold thirty-six of

these select works by Donald Judd at Christie's New York for \$27,788,400 (including buyers' premium). The proceeds of the sale provided the cornerstone for the Foundation's endowment that will help to sustain Judd's legacy. However, since the Foundation shoulders the responsibility for over 126,000 square feet of museum space and numerous public programs in New York and Texas, it must seek additional support to help it carry out this important work.

As a result of the stability provided by the endowment, it is anticipated that the Foundation will soon be able to undertake the restoration of 101 Spring Street, Donald Judd's first home and studio in New York, and the artist's fifteen private living and working spaces in Marfa, Texas; provide new public programs at these locations; and develop the Donald Judd catalogue raisonné and other critical collections care projects.

PROGRAMMATIC ACTIVITIES

Too often, I believe, the meaning of a work of art is lost as a result of a thoughtless or unsuitable placement of the work for display. The installation of my own work, for example, as well as the work of others, is contemporary with its creation, and the space surrounding the work is crucial to it. Frequently as much thought has gone into the placement of a piece as into the piece itself. Accordingly, it is my hope that my works of art which I own at the time of my death as are installed at 101 Spring Street in New York City, or in Marfa, Texas, will be preserved where they are installed.

— Donald Judd, 1993

101 Spring Street Restoration, NYC

As one of the founding sites of The National Trust for Historic Preservation's program of Historic Artists' Homes and Studios, 101 Spring Street is the only remaining intact, single-use cast-iron building in SoHo. Serving as the New York residence and studio space for Judd, 101 Spring Street was an inspiration for much of the artist's work, as well as the birthplace of "the Permanent Installation," now a hallmark of contemporary art as evidenced by the recently opened DIA: Beacon Museum.

In 2001 Judd Foundation was awarded a prestigious National Trust grant to plan the restoration of this significant property. In early 2002 the Foundation retained the services of an architectural firm to create a master plan for rehabilitating 101 Spring Street to protect the building from further disintegration and to accommodate more public programming onsite. A master plan was created by the architects over the course of one year, the first phase of which was completed in 2005. The project team has now entered the second design phase of the project, which includes onsite assessments of conditions and the creation of construction drawings.

In March 2006, Judd Foundation was awarded a competitive Cultural Enhancement Grant from Lower Manhattan Development Corporation (LMDC) for \$250,000 toward the innovative fire and life safety systems designed for the building, and in December 2006 Judd Foundation was awarded \$200,000 from Save America's Treasures toward the renovation of the façade of 101 Spring Street.

Archives

As the repository for the artist's personal, artistic, and intellectual property, Judd Foundation maintains and preserves the personal papers of Donald Judd. The Judd Foundation Archive is the largest and most comprehensive archival collection existing on the art and life of Donald Judd. Housed in the offices of the Judd Foundation in Marfa, Texas, its primary purpose is to serve as a resource for scholars to promote and stimulate knowledge and understanding of Judd's art and life.

The Foundation is committed to preserving this vast intellectual property of Donald Judd, including his writings, personal correspondence, historical documents pertaining to his relationship with other artists and art institutions, as well as photographs, videos, an expansive research library, and fabrication drawings. In addition to making these invaluable resources more available to students and scholars, the Foundation has begun an assessment and cataloguing process of these materials toward the creation of an artist's catalogue raisonné.

In 2004, the Foundation was awarded \$10,000 from the National Endowment for the Arts (NEA) grant to continue the preservation of its

valuable archival resources. The resulting Archival Needs Assessment Report, prepared by a conservator-archivist team, will guide the Foundation in its ongoing efforts to catalogue and conserve this invaluable resource. An Archives and Research Manager was hired in 2006 to begin a preliminary study of the Archive and develop a long-term plan for its cataloguing and preservation for increased scholarly access.

Catalogue Raisonné

As the single most important scholarly publication on an artist, the publication of a catalogue raisonné is a primary long-term goal for Judd Foundation. Judd Foundation has begun work on this major undertaking, which will begin with in-depth research of its collection, and the preparation of its archives for use as primary source material for this project. Now in its initial planning stages, The Catalogue Raisonné Project will be a multi-year project.

PUBLIC AND PRIVATE TOURS—NEW YORK/MARFA

Throughout his lifetime, Judd collected works of art, furniture, and decorative art objects from various countries and time periods solely for the purpose of his personal enjoyment. While Judd commissioned works for public view at Chinati Foundation, Judd's collection in his private living and working spaces represents his personal investment in art objects and their sensitive placement in and around rehabilitated structures, including former WWI and WWII military buildings, abandoned hotels, a bank, and a grocery store. Artifacts and furniture representing local cultures and Judd's travels throughout Europe and Japan combine with works of art by Judd and his peers to create an all-encompassing art environment that uniquely expresses the individuality and the creative mind of the artist.

Judd's personal collection, now under the care of Judd Foundation, spans the entirety of his career and represents the full range of media in which he worked, comprising the largest collection of the artist's work in the world. Judd installed his work throughout his private living and working spaces, together with works of art by some of the founding artists of modern art, Judd's peers, as well as works by many of the younger art-

ists whose work Judd championed in his writings. These works are interspersed with an array of textiles and decorative objects of African, Asian, Northern European, and Central and South American origin.

Judd Foundation's collection spans two states, with 118,000 square feet of space in Marfa, Texas, and nearly 8,000 square feet in New York, New York. The Foundation's properties, as the clearest expression of the artist's vision and artistic process, hold a prominent position in the international art community, and in broader cultural circles, as unique must-see destinations.

Tours — New York

Following the restoration of 101 Spring Street, Judd Foundation programming at 101 Spring Street will focus on public access to this unique single-use artist studio in SoHo. As part of Judd Foundation's current tour program, the building receives approximately 800 visitors annually (in 2006: 21 percent students, 39 percent art patrons/collectors, and 40 percent arts professionals). Regularly scheduled tours are offered every Friday and by appointment Monday through Friday, and are led by knowledgeable tour guides who provide an art historical perspective on Judd and his philosophy on art and installation. The Foundation is currently conducting research with education professionals to develop interpretation plans to emphasize the many educational aspects of the building and its collection as a reflection of Judd's multifaceted artistic legacy.

Since the artist's death in 1994, more than twelve thousand people have toured 101 Spring Street. Upon completion of the building's restoration, which is estimated to take approximately three years, the Foundation will offer an expanded tour schedule and regular seasonal public programming in its renovated spaces. Future plans include hosting lecture series and public symposia on topics related to Donald Judd's legacy and the artists that were his contemporaries. It is estimated that visitation to 101 Spring Street will average five thousand visitors for the first three years after its renovation.

Tours — Marfa, TX

Located in the southwestern section of West Texas, two hundred miles southeast of El Paso, Marfa is situated near the Chinati mountain range

of Presidio County, the second largest county in Texas. Beginning in the early 1970s, Donald Judd gradually purchased numerous buildings in downtown Marfa, including former military structures dating to WWI and WWII, former hotels, banks, and a grocery store. Over the course of two decades, Judd renovated the structures as living and working spaces, and to house his personal art collection. The Foundation currently offers tours of La Mansana de Chinati, "The Block," a large complex of buildings in which the artist lived, as well as The Architecture Studio, Ranch Office, Cobb House, and Whyte Building. These tours follow a regular schedule (Wednesday–Sunday). It is the intent of the Foundation to open additional properties to public tours in the near future.

The Foundation co-hosts the annual Open House weekend in Marfa with the Chinati Foundation every October. This weekend features free admission and additional programming by the Foundation (video/film screenings, a public barbeque at one of the Foundation Ranch properties outside of Marfa) and public tours of all properties. More than 2,500 visitors attend these events each year.

COLLECTIONS PRESERVATION/CONSERVATION OF WORKS OF ART BY DONALD JUDD

Judd Foundation's collection comprises an invaluable cultural asset to the local, national, and international community. The Foundation considers the conservation of this collection to be of the highest priority and is committed to setting a new standard for the preservation of works of art by Donald Judd, and to increase awareness of the importance of preserving an artist's collection in its original context in his/her living and working spaces. Future conservation projects will be held to the highest conservation standards, thereby setting new standards for artists' foundations and encouraging ongoing research into contemporary materials.

With the assistance of an Advisory Committee for Conservation and Restoration (ACCR)—comprised of preeminent conservators from the U.S. and Europe who meet quarterly to discuss best practice in the handling, installation, and maintenance of works of art by Donald Judd—Judd Foundation is creating guidelines for the care and handling of works of art in modern materials for both its collection and other public and pri-

vate collections. These efforts serve to ensure the longevity of Donald Judd's artistic legacy, while serving as a model for other artists foundation to take a proactive approach in the preservation of artists' works.

ORAL HISTORY PROJECT

As one of the most influential artists and writers of art in the twentieth century, Donald Judd shared his artistic vision and process with those working around him, including his early dealers, fabricators, assistants, and many of the most prominent artists, scholars, and collectors of the time. These individuals, who each have unique perspectives into the artist's artistic philosophy, maintain equally invaluable points of view on his working method. Despite the incredible collective breadth of knowledge that these legacy holders possess, many of them have not yet shared their insights in an interview format for a documentary or publication. It is hoped that a series of sensitive and timely interviews will enable those closest to the artist to impart their understanding of Judd as only they can.

In 2006, Judd Foundation received a National Endowment for the Arts (NEA) grant of \$25,000 to begin the first phase of the Oral History Project. The Foundation is interested in capturing interviews in audio-visual format (digital) and audio-only format, as well as in transcript form. The Oral History Project will enable the Judd Foundation to serve its mission to sustain the legacy of Donald Judd by compiling heretofore undocumented views and information on his artistic practice and helping to make it more accessible to the public in various formats for scholarly research and the education of the general public.

Judd Foundation, in partnership with Marfa Public Radio, launched its initial presentation of the project, working footage of the first interviews titled "Marfa Voices," at the Open House weekend in October 2006. This footage addressed key events or aspects of Judd's artistic practice, while also touching upon a more intimate view of the artist as resident of Marfa for nearly twenty years. In addition, "Marfa Voices" gave new consideration to Judd's impact on Marfa, as well as the impact that Marfa had on Judd's own belief systems and artistic practice. In May 2007, Judd Foundation presented a panel discussion at the Museum of Modern

Art in May 2007 titled *Oral History for Artists' Legacies*. The Foundation received a record response from artists, foundations, curators, art historians, oral historians, and the general public, to the extent that the auditorium was booked to capacity, approximately 150 people. Speakers included Avis Berman (writer and historian), Lynne Cooke (Curator, Dia Art Foundation), Vincent Fremont (Andy Warhol Historian and Filmmaker), Arne Glimcher (Founder and Chairman, PaceWildenstein), Rainer Judd (Artist and Filmmaker, President of Judd Foundation), and Glenn Lowry (Director, The Museum of Modern Art). Judd Foundation's development of its oral history project through future interviews, screenings, and other public program, related to oral history is ongoing.

PUBLICATIONS

Each year an estimated 500,000 readers access Judd scholarship through the Foundation's active support of publications and rights clearance on copyrighted writings and images and assistance with articles, independent publications, and exhibition catalogues by museums and art institutions. In 2003 Judd Foundation reprinted 4,000 copies of "Architektur" ("Architecture"), which included corrections made by Judd, and in 2004 Judd Foundation worked with the original publisher, Nova Scotia Press, to re-release 5,000 copies of an anthology of writings by Donald Judd, *Complete Writings 1959–1975*, which includes corrections made by the artist after its initial release.

Judd Foundation plans to release guidelines for the care and handling of Judd artworks in various materials. This practical manual will benefit major art institutions worldwide, as well as private collectors, art handlers, and conservators, while furthering research into the conservation issues specific to Judd's work in various media. It is estimated that by January 2008 the first chapter on metals will be available to professional conservators, institutions, private collectors, and those who handle or treat Judd artworks.

EXHIBITION SUPPORT

Judd Foundation regularly supports programs that extend the reach of its educational mission such as national and international exhibitions.

Roughly 500,000 museum visitors benefit each year from exhibitions of works loaned from Judd Foundation's collection.

In 2004 Tate Modern in London organized the well-attended *Donald Judd Retrospective*, which traveled to Kunstsammlung (Dusseldorf) and Kunstmuseum Basel, attracting more than 200,000 visitors, and included works loaned by Judd Foundation and a monograph supported extensively by the Foundation. In 2005, the Foundation collaborated on the traveling exhibition *Design is not Art*, organized by the Smithsonian, Cooper-Hewitt, New York, which traveled to Atlanta's Museum of Design, as well as the Aspen Art Museum, and attracted 152,000 visitors. The Foundation currently has major works of art on long-term loan to DIA: Beacon and Chinati Foundation and actively supports several university and independent galleries in the U.S. and abroad.

INTERNSHIP PROGRAM

In 2005, Judd Foundation initiated an undergraduate internship program at 101 Spring Street, in partnership with New York University's Fine Arts department in the College of Arts and Sciences and the Gallatin School of Individualized Study. Under the advisement of Foundation staff, interns participate in planning and preparation for ongoing programs at Judd Foundation, and undertake scholarly research projects toward the development of current and future programs including oral history interviews, Open House, and an artist's catalogue raisonné. Judd Foundation has expanded its program to include graduate level students, and currently offers seven to ten internships per year, each of which runs for approximately three months.

In addition, the Foundation is in the process of developing a comprehensive internship program at Donald Judd's permanently installed spaces in Marfa, Texas.

WEBSITE

Judd Foundation hosts a comprehensive website (www.juddfoundation.org) which includes images and descriptions of Judd's studios and residences in Texas and New York, as well as critical biographical informa-

tion on the artist and his art-making and furniture design. The site also includes tour information and contact information for directing inquiries to the appropriate Foundation personnel for further assistance.

FURNITURE

The Foundation manufactures and sells functional examples of furniture fabricated using the original designs and fabricators of Donald Judd in order to further preserve and increase the public's appreciation of the artist's work. The Foundation supports exhibitions of Judd furniture and makes furniture from its collection available to Museums for exhibition.

PART 3: ARTISTS AND THEIR ARCHIVES

CHAPTER 9: INCREASING KNOWLEDGE AND UNDERSTANDING OF ART AND ITS HISTORY: DONATION AND SALE OF THE ARTIST'S, PHOTOGRAPHER'S, AND ARCHITECT'S PERSONAL ARCHIVES

Barbara T. Hoffman, Esq.

On October 19, 2007, the Smithsonian's Archives of American Art made public it had acquired the records of one of the most influential art dealers of the twentieth century, Leo Castelli. The records comprise the history of the Leo Castelli Gallery from its founding in 1957 until Mr. Castelli's death in 1999. Among the papers are art registry books, auction and sales history information, exhibition records, photographs of artists and of works of art, ephemera pertaining to Castelli's artists (e.g., clippings, reviews, invitations and announcements, letters and memorabilia), original correspondence with artists, collectors, curators, dealers, and all gallery business records.

Of particular interest are the extensive files of clippings and correspondence with the artists whose work Castelli championed and whose careers he nurtured, including Richard Artschwager, Lee Bontecou, John

Chamberlain, Dan Flavin, Jasper Johns, Ellsworth Kelly, Roy Lichtenstein, Bruce Nauman, Robert Rauschenberg, Richard Serra, and Frank Stella, among others. The archive also contains the sales records for every work of art sold by Castelli from 1957 to 1999.

Other significant highlights include photographs documenting gallery installations and works of art exhibited and sold by the gallery. The breadth and depth of these records will provide historians and scholars unparalleled insight into an era critical to the development of American art history and visual culture.

Castelli died in 1999. In 1992, amid rumors that Castelli was negotiating to sell his archives to the Getty Center for the History of Art and the Humanities in Los Angeles, the collection was said to be worth some \$2 million. As Carol Vogel reported in the *New York Times*, October 19, 2007, “‘Nothing came of the talks,’ said his widow, Barbara Bertozzi Castelli. Instead she and his two children, Jean-Christopher Castelli and Nina Castelli Sundell, decided to give the collection to the Archives of American Art.” John W. Smith, director of the Archives of American Art, stated:

The gift of this collection by Leo Castelli’s family represents a milestone in the history of the Archives of American Art. Without question, the Castelli archive is one of the richest resources for the study of art produced in the second half of the 20th century. Leo Castelli’s unparalleled eye for quality, combined with his extraordinary skill for nurturing and promoting new art and artists, secured his position as one of the most respected and influential advocates of contemporary art for more than four decades.

John W. Smith discusses the Archives of American Art and its importance to the scholarly community in Chapter 12. The Castelli Archive was, without question, a coup for the Archives, which has had some difficulty competing with the well-endowed Getty Research Institute for archives significant to modern and contemporary American art history. Professor Irving Sandler, who in Chapter 11 discusses the sale of his personal archive to the Getty Research, is a case in point.

If the Castelli donation of the Castelli Gallery archives was based on years of cultivation by the Archives and collaborative projects between Castelli and the Archives of American Art, long-term relationship is said not to be a factor of influence for Frank Gehry. Gehry has indicated he is not focusing on institutions he feels close to, like the Guggenheim Museum for which he has designed two satellite museums.

Gehry has been quoted as stating, “I don’t want to give it away—it’s an asset. It’s an asset. It’s the one thing in your life you build up and you own it. And I’ve been spending a lot of rent to preserve it.” MOMA chief curator of architecture and design Barry Bergdall said he had been approached about the Gehry archive and that the price range was in “multimillion dollars.”¹

Alison Nordström in Chapter 10 provides a superb overview of various factors for consideration by artists, architects, and photographers in the selection of institutions for the sale and donation of archives. Money, long-term relationships, compatibility with other materials in the collection, accessibility, capacity for conservation, and ability to provide access to scholars, researchers, and the public may all be factors.

What is evident is that the artist, photographer, architect, and others with archives of scholarly and research value must do their homework or work with competent advisors to do so, particularly if they view the archive as a goldmine like Gehry or Peter Eisenman, quoted as saying, “I could not afford not to sell the archive.”

A theme articulated throughout this supplement is that “no one size fits all.” It is not unusual for an artist to provide for both donations and/or sale of artwork and archive to several institutions. For example, following the provisions of his will, Saul Steinberg’s collection of his own works was divided between the Saul Steinberg Foundation and the Beinecke Rare Book and Manuscript Library at Yale University, which also received Steinberg’s archives. The Saul Steinberg Foundation holds the copyrights to Steinberg’s artworks and writings.

1. Pogrebim, R. “For Architects, Personal Archives as Gold Mines,” *New York Times*, July 23, 2007.

The value of an archive for study and research is, absent other factors, in its integrity. Thus, Steinberg divided his works, other than the archive between Yale and the Saul Steinberg Foundation. The archive in its entirety went to Yale.

My experience is that like any other transaction, the donation or sale of an archive or collection is the subject of negotiation. Like any other negotiation, the value of the collection or archive to the recipient institution both in terms of its existing collection strengths or its ability to develop new areas of research and use the archive as a magnet, will influence the artist's, photographer's, or architect's bargaining power. Some artists, photographers, and architects are gratified that their collections are of sufficient historical value that an institution is interested in dedicating space to the archive. Others will be in a position to command money and/or a creative structure surrounding the archives. There are a relatively small number of repositories in the United States that have endowments that enable six or seven figure purchases.

In all instances, competent professional advice should be sought to structure the deal which maximizes value for all parties to the transaction, and resolves sometimes complex issues involving copyright, privacy, preservation, education and access.

Examples such as the acquisitions of Hatch-Billops collection by Emory University in Atlanta, Georgia, the Diane Arbus Archive by the Metropolitan Museum in New York City, and the Black Star Archive by Ryerson University in Toronto, Canada, illustrate both the creativity and complexity involved in the sale or donations of archives.

The extraordinary Hatch-Billops Collection in New York was built over thirty-five years by artist and filmmaker Billops and theater historian Hatch, and will be known as the Camille Billops and James V. Hatch Archives at Emory University. Hatch/Billops will continue its active program of documentation and acquisition, including development of the oral history archive and publication of an annual volume of interviews, "Artist and Influence: The Journal of Black American Cultural History."

The contract for the acquisition provided for a phased transfer of materials. The materials transferred to Emory include oral history tapes, scripts of unpublished plays, posters, photographs, and many boxes of books and periodicals, all of which will be catalogued and documented by Emory. Included among the several hundred playscripts received are works by Amiri Baraka, Ed Bullins, Ossie Davis, Ruby Dee, Lorraine Hansberry, Zora Neale Hurston, Willis Richardson, Wole Soyinka, Melvin Van Peebles, Derek Walcott and Richard Wright.

At the time of the gift, the director of special collections and archives stated, “Emory received this wonderful gift not only because of the growing reputation of our collections, but also because of the commitment we were willing to make: this includes a designated space, a curator and fellowships for researchers.” Emory also intends to become a center for scholarly research in African-American arts and letters. An advisory body formed by the University to advise on the uses of the archive also includes Hatch and Billops.

In fact, an archive of this nature is significant not just on its own merits, but also because it attracts additional collections. Following the acquisition of the Hatch Billops Collection, Emory acquired the Delilah Jackson Archive of papers, photographs, and memorabilia of New York performers of all kinds, including dancers, singers, musicians and theater folk and the archives of several other noted African American and other artists and writers.

Another example of the special “archive alchemy” created by the desire of an institution to become a center in a particular area, and the magnet quality of the acquisition of an important collection is the gift to the Metropolitan Museum of Art of the Diane Arbus Archive. For years the Met has made efforts to expand its modern photography collections. In 1994 it captured the archive of Walker Evans, including some 30,000 black and white negatives, 10,000 color transparencies, motion picture film from the late 1920s to the 1970s, original manuscripts, diaries, recordings of interviews and lectures and his personal library.

In 2005, the Met mounted an exhibition of Arbus’ work including not only her portraits but photographic equipment, pages from her diaries, books from her home and studio and family pictures.

In December 2007 the Arbus estate gifted to the Met her priceless archive along with hundreds of early and unique photographs; negatives and contract prints of 7,500 rolls of film; and hundreds of glassine print sleeves that she personally annotated before her death by suicide in 1971.

At the same time, the Met purchased twenty of Arbus's most important photographs, for a roughly estimated five million dollars and promises to conserve, catalogue and organize the archive for study and research.

Black Star, the once-great photojournalism agency founded in 1935, was gifted to Ryerson University in Toronto in 2005. An anonymous donor gave the collection, along with \$7 million earmarked for its "preservation, study and exhibit." The archive contains nearly 300,000 photographs "shot by world-famous photographers and photojournalists." The list includes Robert Capa, Andreas Feininger, Germaine Krull, Philippe Halsmann, Martin Munkacsi, W. Eugene Smith, Marion Post-Wolcott, Bill Brandt, Henri Cartier-Bresson and Mario Giacomelli.

Ryerson has started building an \$8 million facility to house the exhibition with the hopes of it becoming an important cultural attraction for Toronto and one of the top facilities in the world for the study, teaching, research, and exhibition of photography.

The new gallery and research center will be home to the two graduate programs at the School of Image Arts: its master's program in photographic preservation and collections management—the world's first of its kind and jointly created by the university and photography museum George Eastman House in 2003—and its new master's program for documentary media, which is planned for fall 2007. The deal was brokered by Ryerson faculty, curator, and administrators.

A lawyer or dealer often plays a role in brokering the sale of an archive. Often, in my experience, if the archive's owner is still living, then the artist, photographer, or architect may make the initial contact often through a curator or director, patron, the archivist, or librarian. Once there is an interest, the deal moves up the hierarchy and may involve the artist and her or his lawyer in complex negotiations with university or museum counsel, president, and potential donors.

Art historians and critics, either through professional associations like the College Art Association and the [International Association of Art Critics](#), or independently have a key as yet underdeveloped role in the mining of the artist archive, the preparation of catalogue raisonné, and the development of web sites to preserve artist, photographer, and architect's legacies.

Best Practice: Develop a preliminary checklist and inventory of the archive. What is the nature of and value in the archive? A dealer's archive, a stock agency's archive, a photographer's archive, an installation or performance artist archive, a sculptor's archive and a painter's archive are all different in both subject matter and materials. Identify the institutions that may be interested in the archive because of the subject matter of the archive, the medium of expression or the archive's historical value. In many respects the same considerations may apply for the sale of a collection by a collector as will apply to the sale of an archive by an artist, architect or photographer. Significant differences may arise if the archive sale is accompanied by the sale of the copyright in the work. Normally the collector will not hold the copyright in works of art in the collection. Museums and other institutions that do not collect comprehensive archives may still be interested in acquiring selected artworks from an artist's body of work. The sale of individual aspects of the archive must be carefully considered and weighed against the value of the archive as a whole, and careful attention must be paid to copyright issues.

As digital technology conflates the library, museum and archive, establishing links between art historians, art critics, and artists, their estates and their archives, can contribute to the public's understanding of our visual culture and the contributions made by the creators of visual images to our history. I urge the [College Art Association](#), the Art Critics Association and the Marie Walsh Sharpe Artists' Legacy Project to facilitate the establishment of a match.com to preserve artists' legacies, particularly those who may not be in fashion at this time.

CHAPTER 10: ARTISTS AND ARCHIVES: MAKING THE MATCH

Alison D. Nordström, Ph.D.

Curator of Photographs

George Eastman House International Museum of Photography and Film

An archive is a collection of papers and other documents kept for their historical or cultural interest. It may contain correspondence, diaries, business records, photographs, audiovisual material, works of art, computer files, or three-dimensional objects. Allen Ginsberg's archive, which he sold to Stanford University for around a million dollars a few years before his death, included a pair of tennis shoes!

Archives come into existence in many ways and for many reasons. Some, like national, state, and municipal archives, are begun with the intention of establishing an official historical record. Many, like most newspaper and picture agency archives, began as something else, usually a tool for doing business. A third category, and the one in which most artists' archives belong, are a by-product of the activity of an individual, company, or institution. Regardless of how they begin, archives are intentional; that is, they do not become archives until they are understood and used as such.

An archive takes its shape and meaning from the ways it is used, and use is generally what dictates the way an archive is organized. An archive that is mostly correspondence will probably be organized either chronologically or by the author of the correspondence. An archive that contains a lot of photographs, sketches, or drafts of poems may be organized by subject. Some archives are organized by the types of material they contain, especially if some of them require specialized storage.

Museums that do not collect artists' comprehensive archives may still be interested in acquiring selected artworks from an artist's body of work. While this kind of acquisition is outside the scope of this paper, many of the considerations related to archives may also apply. This is especially

true for issues of documentation and organization and for beginning the conversation while the artist is alive. Artists who make photographs may be a special case. Individual prints and portfolios may be acquired by a museum, but finished prints as well as negatives, contact sheets, and work prints may accompany the usual papers, correspondence, and business records more generally held by an archive.

An archive is an ecosystem. While it may contain individual objects of great significance as well as minor ephemera, it is best understood as a single entity. Each element affects every other element, and the relationship amongst the objects in it is critical. Unlike a museum collection, which usually consists only of “important” objects in pristine condition, archives are often a unique source of context for these very things, and should be preserved as such.

There are many advantages to artists who are able to place their archives in a public institution. In rare instances, there may be compensation. There may also be some tax advantages to the artists themselves or to their heirs. There may be some assistance in organizing, transporting, and storing archive material. Loans, research requests, and the like are channeled through the institution. Most important, artists who place their work in archives enjoy a permanent legacy. Their work is protected in perpetuity, kept together for whatever future needs may arise.

The ongoing processing and care of archives is expensive and time-consuming, and no institution is in a position to accept everything that it is offered. Artists can increase the desirability of their offered gift by meeting with a prospective recipient to determine how its archives are organized and what kinds of things they are looking for. Most institutions now use some kind of digitized database to keep track of what they have, and an offer of a collection that has been systematically organized in a compatible manner will promise to save an institution an important amount of time. Similarly, collections that have been digitized before acquisition are of greater value than those that have not. Some archives material, especially visual material that could be licensed and manuscripts that could be published, will have potential to earn income for the institution that controls them. Any discussion between artists or their heirs and a potential recipi-

ent of an artist's archive should include a determination of just what is being offered, whether material only or the rights to that material.

Prospective donors should also give thought as to how and by whom their donated material may be used over time. While an unrestricted gift is usually most attractive to a receiving institution, artists may choose to limit certain aspects of their gift. Photographers, for example, may restrict the printing for exhibition of a negative never deemed good enough for printing in their lifetimes, as a writer may specify which manuscripts may be published. It is not uncommon to seal or otherwise restrict publication or research access to correspondence or other writing to some future date related to the death dates of those whom the material concerns. If an archive is seen as one that has income potential, artists may ask that a portion of that income be directed to their heirs or estates. Other common restrictions include limiting use of archive materials to educational rather than commercial purposes, specifying the language and placement of any credit line, and specifying that reproductions must meet certain standards such as no cropping, overprinting, or colorization. Artists may specify that everything donated must be kept, or, conversely that certain objects (identified or not) may be sold to benefit the institution (or the institution and the estate, or the estate)

Artists who understand the range of missions and responsibilities of collecting institutions will be best able to match themselves with appropriate homes for their lives' work. While it is appealing to assume that one's work belongs in a national institution like the Smithsonian or a major university library, often it is in smaller institutions that an artist's archive is most appreciated and best used. It is wise to consider a broad range of connections between artist and institution, which may include region, discipline, various affiliations, and area of interest. An institution with a specialized collection related to a particular place, time period, ethnic group, or medium is most likely to look favorably on the offer of a donation that expands on these strengths. Do not overlook local and regional libraries and historical societies, or organizations and universities with which the artist was or is directly associated. Clubs, unions, political groups, and publications often keep archives of their own, to which a contributor's material may be very welcome.

In considering if an institution is best suited to receive an archive, artists will want to ascertain its capacity for care, access, dissemination, and use of donated material. Ideally, these conversations begin at a time in the artists' lives when they can be fully involved in planning and decision making. While there is no substitute for a strong and trusting relationship between an artist and an individual archive worker, it is important to remember that the collection will survive any of the individuals involved in its transfer, and that clear written guidelines will ensure ongoing fulfillment of the artists' wishes. These may be a standard formal document used regularly by the receiving institution, or something as simple as a memorandum of understanding written by either party.

In summary, artists or artists' heirs who wish to deposit their material in an archive should begin by considering what their motivations are. They should decide what of the material they wish to offer and how they wish it to be used, while remembering that the fewer restrictions they place on this use, the more likely they are to find an interested recipient. The material should be as well housed and well organized as possible. Once they have determined some likely candidates, they should begin discussions early with them. Once an agreement is reached, a written document should be produced for both parties' agreement.

Artists who pay attention to the future of their work and the material that supports it are doing the right thing by their heirs and their legacies, but they also do a service to the general public. Those who determine that a public institution may play a part in this future, and who work to make it happen, should be commended.

Chapter 11: PRESERVATION OF ARCHIVAL MATERIAL

Professor Irving Sandler

For more than a half-century, it has been my practice to take notes in whatever artists' venue I happened to be. Looking back, at one point, it occurred to me that I had amassed an historically valuable archive, including notes of some six years of weekly panels at the club founded by the Abstract Expressionists in 1949, as well as hundreds of interviews and conversations with leading older avant-garde artists, among them Philip Guston, Willem de Kooning, Barnett Newman, Ad Reinhardt, and Mark Rothko, and with younger artists, Mark di Suvero, Alex Katz, Al Held, and Joan Mitchell.

As an art historian, I wanted this material saved since it could be useful to future historians. Consequently, I looked around for a library or research in which to deposit it. After investigating a number of repositories, it seemed to me that the Getty Research Center would best suit my purpose since it had committed itself to the preservation of archives like mine; because it had already received several important archives of artists and critics associated with avant-garde American art; and because it had the resources to properly document and care for this archive. I then established contact with librarians at the Getty. One of them visited me to determine the importance of my archive, and agreed to accept and purchase it. Subsequently, the Getty informed me that my archive was being actively used by critics and historians.

Most artists I know have also collected and saved their own statements and letters; catalogues and brochures of their work that are only too often lost; articles, particularly in out-of-the-way publications; and memorabilia and ephemera, that would be valuable for art historians to consult. More important for the artist, such material would also be useful in the consideration of the artist's work by future scholars in books and arti-

cles. It is important for artists to find repositories, such as the Archives of American Art, the Getty Research Center, or public libraries, colleges, and universities. Artists should do this while they are alive since they can provide information to archivists that their heirs would not have. I know of too many cases where lifelong collections of valuable material, that would have been useful in the perpetuation of an artist's work, were junked because the heirs were not instructed as to what to do with them and because of the cost of storage.

Chapter 12: THE ARCHIVES OF AMERICAN ART

John W. Smith

The Smithsonian's Archives of American Art

In a 1954 letter from then Director of the Detroit Institute of Arts Edgar P. Richardson to Lawrence Fleischman, Richardson poses a question: "Do you realize what a big thing you have done in starting the Archives [of American Art]? I know you do. But *do* you? It is enormous in its implications; enormous!" Richardson and Fleischman, a Detroit businessman and an active young collector, founded the Archives earlier that year.

The pair's initial goal for the Archives to serve as a centralized microfilm repository for manuscript collections housed in other institutions or in the hands of private individuals quickly expanded to collecting and preserving original archival material from across the country. Covering over two hundred years of American art history these primary sources include illustrated letters and diaries; manuscripts; the historical records of museums, galleries, and schools; original and rare photographs of art world figures and events; and artists' sketchbooks and preliminary drawings or studies. A long-standing Oral History Program serves as a valuable companion resource to the documentary collections. Microfilming has been replaced by an active digitization program. Researchers now have access to unprecedented and ever-increasing electronic resources on AAA's website, such as selected collections scanned in their entirety, representative images from collections, transcripts of oral histories, online exhibitions, guides, and finding aids, as well as research assistance.

In 1970 the Archives joined the Smithsonian Institution, a perfect synergy with the Institution's mandate—the increase and diffusion of knowledge. Today, the Archives includes more than 16 million items, 5,000 collections, 2,000 oral history interviews and receives up to 12 million users annually to our website. The Archives maintains a research center in New York in addition to its headquarters in Washington, D.C., where 2,500 vis-

itors are received annually. It is the world's largest and most widely used resource on the history of art in America.

WHAT DO WE COLLECT?

For more than fifty years, the Archives of American Art has provided researchers worldwide with access to the largest collection of primary source materials documenting the history of the visual arts in America. The Archives has played a defining role in fostering scholarship and illuminating the history of art for the benefit of future generations. Today, the Archives continues to fulfill its ongoing mission to collect, preserve, and make available for study documentary records of this country's rich artistic legacy.

The Archives of American Art collects primary source materials that have art historical significance. We seek historical records, routine and unusual, whose stories and meanings are rich and complex, that have inherent value as originals, and that both reflect and challenge conventional ideas about art. We collect the personal papers of individuals and the records of organizations that include letters from, or references to, prominent figures in American cultural history; a significant body of unpublished manuscript material; and documentation on major American artists or major art trends. Our collections form the foundation for research, scholarship, publications, exhibitions, public programs, and outreach.

The following kinds of papers are most useful to researchers:

- *Personal letters* from colleagues in the arts, family and friends covering a wide span of years
- *Professional correspondence* with galleries, dealers, collectors, critics, institutions, and organizations
- *Drafts or copies* of outgoing letters
- *Diaries or journals* giving a day-by-day view of ideas and activities, travels, sales, exhibitions, and options

- *Sketchbooks, loose sketches, and studies*
- *Photographs, slides, film, and videotapes*, not only of work, but of the subject's family, friends, and studio
- *Lectures, addresses, published or unpublished articles* preferably from first to last draft
- *Audiotapes*
- *Scrapbooks, clippings, exhibition catalogues, and announcements*
- *Teaching material*, including lecture notes, reports, and comments
- *Research files*
- *Financial papers*, including bills, receipts, lists, and ledgers

WHY DO WE COLLECT?

The audiences of the Archives of American Art are primarily art historians, as well as scholars in other disciplines, artists, students, curators, art dealers, and the general public. The materials we hold are the raw materials for scholarship. The Archives has grown with the field of American art history and has greatly contributed to the available knowledge about art in the United States. Independent inquiry and in-depth research simply could not occur without access to these primary source materials. In this way, the Archives preserves and provides access to this country's rich artistic legacy.

HOW DO WE COLLECT?

There are a variety of ways in which materials come to the Archives. Typically, personal papers are donated by the artists themselves or by their heirs. Artists and their families come to us through friends and colleagues who recommend the Archives as the world's foremost repository of art-related materials. For example, in the case of the Joseph Cornell papers, Cornell's sister Elizabeth Benton donated most of his personal papers in 1974. The remainder of the material was donated in 1989 and in 2004 by the Joseph and Robert Cornell Memorial Foundation via Richard

M. Ader. The personal papers of Jackson Pollock and Lee Krasner were donated to the Archives in 1983, just before Krasner's death. The remainder of her personal papers were then donated to the Archives through a bequest in 1985. Today, the Archives holds over fifteen feet of materials from the personal archives of both Pollock and Krasner, a collection that has been invaluable to the study of twentieth-century American art.

Papers also come to the Archives through documentation projects that focus on particular areas of study within the field of American art. These projects are funded through grants and gifts from various donors and institutions. For example, the Nanette L. Laitman Documentation Project for Craft and Decorative Arts in America has resulted in more than one hundred oral history interviews of craft artists at the height of their careers, and has led to the acquisition of over fifty collections of personal papers from these artists, including the papers of William P. Daley, Jack Lenor Larsen, Italo Scanga, Robert Chapman Turner, Patti Warashina, and Toshiko Takaezu.

The records of leading galleries also prove to be invaluable to scholars who use these records to research provenance, document an artist's oeuvre, or determine the gallery's role in a particular movement or school, among many other reasons. The Archives' holdings of major and minor gallery records is unprecedented and covers the collecting and creation of all major American art movements—particularly American modernism. Among the collections at the Archives are the records of Jacques Seligmann & Co., Macbeth Gallery, Downtown Gallery, Betty Parsons Gallery, Kraushaar Galleries, and the Perls Galleries. In 2006, the Archives acquired the records of the Paula Cooper Gallery, including the records she held on behalf on the artist's cooperative Park Place Gallery and Art Research, Inc.

The Archives of American Art does not purchase papers. However, as a donation to a non-profit organization, the gift of papers is tax-deductible. We depend upon the generosity of the visual arts community, their friends, and their families for donations of letters, photographs, sketches, journals, and other files that allow historians, students, and the public to understand and appreciate art and the role of the artist in America. As you plan for the disposition of your estate, you can either contact the Archives directly or add a codicil to your will.

If you are ready to donate your papers to the Archives of American Art, please call the Curator of Manuscripts, Liza Kirwin, at (202) 633-3957 or e-mail her at KIRWINL@si.edu. At the curator's discretion, a representative may come to your studio (or wherever documents are stored) to assess the collection and determine how it is to be shipped to Washington. In some cases, the curator may ask for you to send the documents directly to Washington for assessment. At that time the curator and a committee of other staff members, as well as outside advisors, will decide whether the records are in keeping with the Archives' mission. If they are, we will contact you and ask you to sign a deed of gift. This document transfers legal ownership of the material to the Archives of American Art, Smithsonian Institution.

Lastly, as you plan your estate, please consider including a monetary donation to support the arrangement, description, and preservation of your papers.

WHAT HAPPENS TO MY PAPERS ONCE I'VE DONATED THEM?

Upon the papers' arrival in our Washington or New York office, a team of professional archivists and art historians will re-box the collection into archival containers. Duplicate and out of scope materials may be returned to the donor or, in some cases, transferred to another area within the Smithsonian. (In most cases, this is the Smithsonian American Art Museum/National Portrait Gallery Library.) The remaining material (the "collection") is then described in detail and entered into our database ("accessioned"). A brief biography and all pertinent dates, proper names, and places are also included in the record. In many cases, an inventory of each box is included (created by the donor or by Archives staff). Your collection will be properly cataloged according to established national archival standards and linked to other related collections and items in our collection. A catalog record will be created and entered into the Smithsonian's searchable bibliographic database and also sent to the Research Libraries Group/OCLC national online bibliographic research database. The collection is then shelved and fully accessible to researchers as it awaits any additional processing and preservation work.

To access original documents from your collection, researchers must make an appointment with the Archives' reference staff. The researcher is then given one box at a time and allowed to study the material in our secure manuscript reading room. The Archives makes its collections fully accessible to the public in a closely monitored and documented manner. In this way, the Archives acts as a steward for the safekeeping and security of your documents.

Collections may be prioritized for further enhanced archival processing and descriptive work completed by trained professional archivists. Such work would typically include detailed organization and arrangement of the papers and folder-level inventories, ultimately resulting in an online finding aid to the papers. A finding aid provides a detailed description of the entire scope and contents of the papers, and greatly aids staff and researchers in locating items within the collection. Additional preservation work completed on the collection is designed to halt any further deterioration of the papers and generally includes re-folding the collection into acid free folders; removing staples and clips; interleaving acidic and brittle materials; and identifying critical documents for conservation work.

At any time after the materials have become part of our holdings, they may be selectively digitized at the discretion of Archives' staff. Digitization can be of an entire collection or of a single item. The Archives was recently awarded a substantial grant by the Terra Foundation for American Art to digitize a cross-section of our collection. The selection of collections for this project is based on user statistics and the potential research value as determined by Archives' staff and outside advisors. After items or collections are digitized, they are made available worldwide on our website at www.aaa.si.edu. They are then searchable through our image database and through various web-accessible search engines, and also may be used by Archives staff as part of special web-based programs, including special-focus guides and acquisition highlights that are available to the general public.

The Archives also produces exhibitions and publications and lends documents to exhibitions worldwide according to best archival and museum registrarial practices. The Archives maintains the Lawrence A. Fleischman

Gallery in the Smithsonian's Donald W. Reynolds Center for American Art and Portraiture. In 2006–2007, the exhibitions included “Artists in Their Studios,” “Exquisite Surprise: The Papers of Joseph Cornell,” and “Anatomy of a Painting: Honoré Sharrer's *Tribute to the American Working People*.” The Archives also publishes a scholarly journal based on its collections and has recently published a book of illustrated letters titled *More Than Words: Illustrated Letters from the Smithsonian's Archives of American Art* [2005].

WHY CHOOSE THE ARCHIVES OF AMERICAN ART?

The Archives of American Art recognizes that artists today have many choices to make when planning for the disposition of personal records and papers. This may include considering one's alma mater, a university library, and other research institutions as the chief repository. However, when it comes to the history of art, no other organization approaches the breadth and depth of our collections, which have the broadest American art historical context. The Archives of American Art is the only organization that functions solely as a research facility dedicated to providing access to materials of American art historical significance. While other organizations have strong reputations and impressive collections, they are often a part of a much larger library or institution. The Archives of American Art has a staff of over forty archival professionals, along with an independent board of trustees, all dedicated solely to promoting research in the field of American art.

A CAUTIONARY TALE

In 1969, Rockwell Kent lost his home in a fire. The Archives of American Art salvaged his papers, though they had been under six feet of water. Kent wrote, “We wish that the whole house, with all its now irreplaceable contents, had been sent to the Detroit Archives.” Later, he gave this ringing endorsement: “In letters to other artists I am occasionally asked for my advice as to what they should do with their records. My advice is... offer them to the Archives of American Art.”

PART 5: BIOGRAPHIES OF CONTRIBUTORS TO THE 2008 SUPPLEMENT UPDATE

Victoria Bjorklund, Esq.

Victoria Bjorklund is a partner at Simpson Thacher & Bartlett LLP where she heads the firm's Exempt Organizations Group. She advises public charities, private foundations, boards, and donors.

In 2001, Ms. Bjorklund was appointed by the Secretary of the Treasury to serve as one of six exempt-organization members on the IRS's Tax Exempt/Government Entities Advisory Committee and served as Chair for 2004–2005. In June 2005, she received the IRS Tax Exempt Division Commissioner's Award for "ground-breaking service" to the Advisory Committee.

Ms. Bjorklund was named a David Rockefeller Fellow for 1997–1998 as a rising civic leader in New York City. From 1989 through 2001, she served as a director, secretary, and still serves as pro bono legal counsel for Doctors Without Borders, the emergency medical relief organization that was awarded the 1999 Nobel Peace Prize. She is also a director of and pro bono counsel for the Robin Hood Foundation. She chaired the ABA Tax Section Committee on Exempt Organizations from 2001 through 2003 and now serves as co-chair of the Subcommittee

on International Philanthropy. Ms. Bjorklund was honored in May 2002 as ABA Tax Section “Pro Bono Lawyer of the Year” in recognition of her 9/11 work. She also accepted the “Pro Bono Firm of the Year” award from the NYS Bar Association in recognition of the firm’s 9/11 work. In 2003, she received the Commissioner’s Award, the highest honor the Commissioner of Internal Revenue can bestow, for her “timely, creative and nimble response to 9/11’s unprecedented legal challenges.” In 2005, she received the Assistant Commissioner’s Award for her contributions to the IRS Advisory Committee. In 2006, Ms. Bjorklund was appointed to the Board of Trustees, Institute for Advanced Study, Princeton.

Ms. Bjorklund speaks and writes frequently on exempt-organization subjects. She is the coauthor with Jim Fishman and Dan Kurtz of *New York Nonprofit Law and Practice* (Lexis Publications, 1997 and annual supplements).

She earned her J.D. at Columbia University School of Law, a Ph.D. in Medieval Studies from Yale University, and a B.A. *magna cum laude* from Princeton University, where she graduated in three years and was elected to *Phi Beta Kappa*. Ms. Bjorklund is a former cochair of the firm’s Pro Bono Committee and in 2006, she was appointed cochair of the Diversity Committee.

HYPERLINK “<mailto:vbjorklund@stblaw.com>”

HYPERLINK “<http://www.stblaw.com>”

Dr. Jack Cowart

Jack Cowart received his B.A. (history) in 1967 from the Virginia Military Institute, Lexington, Virginia, and his Ph.D. (art history) in 1972 from the Johns Hopkins University, Baltimore, Maryland. He was assistant curator of paintings at the Wadsworth Atheneum, Hartford, Connecticut (1972–1974); curator of nineteenth- and twentieth-century art at the Saint Louis Art Museum, St. Louis (1974–1983); head of the department and curator of twentieth-century art at the National Gallery of Art, Washington, D.C. (1983–1992); and deputy director-chief curator of the Corcoran Gallery of Art (1992–1999). His major publications include monographs and studies

on Roy Lichtenstein, Henri Matisse, Ellsworth Kelly, and Manuel Neri. In 1999 he was appointed the founding executive director and member of the board of the Roy Lichtenstein Foundation.

HYPERLINK "<http://www.lichtensteinfoundation.org>"

Genevieve Lam Fraiman, Esq.

Genevieve Lam Fraiman, Lord, Day & Lord, Barrett Smith, (1954–1994, partner 1976–1994); Cadwalader, Wickersham & Taft (senior attorney/consultant 1994–1999); chaired or served on various committees of the American Bar Association, Real Property, Probate and Trust Law Section, New York State Bar Association Trusts and Estates Section, American College of Trust and Estate Counsel; and Association of the Bar of the City of New York (now New York Bar Association); publications: *Estate Planning for Authors and Artists*, (T.M. 815, 1998 ed.); contributor *A Visual Artist's Guide to Estate Planning* (1998 ed.); "The Lifetime Disposition of Fine Art" and "You Can't Take it With You," *Probate and Property* (Nov./Dec. 1990).

HYPERLINK "<mailto:framangen@aol.com>"

Barbara T. Hoffman, Esq.

Barbara T. Hoffman, editor, is a prominent New York City arts and intellectual property lawyer with a national and international transactional and litigation practice, representing governments, visual artists, photographers, writers, collectors, and filmmakers. She has also advised for-profit organizations, including photo archives, and not-for-profit organizations, including museums and artists' foundations, on managing and protecting intellectual property assets, board development, strategic planning and governance, as well as on routine contractual matters, including exhibition loan agreements and licensing. Hoffman has served as counsel or on the board of organizations such as the Explorers Club, the College Art Association, the Art Critics Association, Williamstown Art Conservation, The International Federation of Women in Legal Careers, and PERFORMA. Hoffman collaborates with tax and estate counsel with respect to art

and intellectual property related aspects of estate planning and administration, and has successfully negotiated the sale or donation and sale of several artist archives and collections to major public institutions. Publications include *Art and Cultural Heritage: Law, Policy and Practice* (Cambridge University Press, 2006) and *Exploiting Images and Image Collections in the Media* (Kluwer Law International, and International Bar Association, 1999). She is a former chair of the City Bar Association Committee on Art Law and the former chair of the International Bar Association Committee on Art and Cultural Heritage Law.

She earned her J.D. at Columbia University School of Law (Harlan Fiske Stone Scholar), M.A., *cum laude* from Johns Hopkins SAIS, an M. Phil. from London School of Economics, and a B.A. *cum laude* from Brown University, where she studied art history and French literature. She speaks French, Spanish, and Italian.

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Barbara Hunt McLanahan

Barbara Hunt McLanahan joined Judd Foundation in January 2006, having formerly been the Executive Director of Artists Space, NY (2000–2006), Visual AIDS, NY (1997–2000), and Camerawork Gallery + Darkroom, London, UK (1992–1996). Following a BA (Hons) degree in visual and performed arts and a postgraduate diploma in gallery and museum studies at the Universities of Kent and Manchester respectively, she worked as a curator and arts administrator for over twenty years on both sides of the Atlantic. She has been an active volunteer throughout her career, sitting on the board of the African and Asian Visual Artists Archive and the Leisure Services Committee of the Royal National Institute for the Blind in the United Kingdom, as well as participating in Godzilla, a group of Asian American artists and curators, and sitting on the board of ABACA (Arts Benefit All Coalition Alternative) at Satellite Academy. She recently joined the board of the Jerome Foundation in Minneapolis. In 2006 she was named *Chevalier de l' Ordre des Artes et des Lettres* by the Republic of France.

Ms. Hunt McLanahan has been a panelist and lecturer at museums, non-profit galleries, conferences, and colleges in the U.S. and UK, particularly on career options for emerging artists and the changing opportunities facing artist-run alternative spaces.

Irving Sandler

Irving Sandler, born in New York City in 1925, holds a B.A. from Temple University (1948) and an M.A. from University of Pennsylvania (1950), where he studied American history. For a year or so after graduation, he tried his hand at painting, specifically abstract expressionism current in the 1950s, and became manager of a gallery on 10th Street, thereby meeting artists he admired. It gradually became clear that his vocation was to be that of chronicler and critic rather than artist. In 1954, Sandler began taking copious notes of conversations with artists, or among artists, during informal gatherings at the Club, the Cedar Street Tavern, or in artists' studios. In 1956, he became the director of the Tanager Gallery, program chairman for the Artists' Club, and a reviewer for *Art News* and *Art International*, establishing two roles that he would fill for the rest of his career: supporter of emergent artist groups, and advocate critic. A third role, that of professor, emerged in the 1960s. Sandler began writing books in the early seventies that synthesized his collection of interviews and reviews into broad surveys of contemporary art. His titles include *The Triumph of American Painting: A History of Abstract Expressionism* (1970), *The New York School: The Painters and Sculptors of the Fifties* (1978), *American Art of the 1960s* (1988), *Art of the Postmodern Era: From the Late 1960s to the Early 1990s* (1996), and *A Sweeper-Up After Artists: A Memoir* (1993). In addition, he has also written monographs on individual artists, such as Alex Katz and Mark Di Suvero. After teaching at New York University throughout the 1960s, Sandler earned a Ph.D. in art history in 1976 and then taught at SUNY Purchase, with occasional visiting professorships at other northeastern U.S. institutions. In 1972, he organized "Artist's Space," an alternative exhibition space for young artists. Laurie Anderson, Judy Pfaff, Barbara Kruger, Cindy Sherman, Nan Goldin, and Chuck Close are among those who got their start there. He has served on the boards of, or otherwise lent support to, many other art-

ists' organizations. He has influential positions in academic and curatorial organizations as well, such as the College Art Association and Independent Curators Incorporated, and in major foundations supporting the arts, such as the National Endowment for the Arts and the Sharpe Art Foundation. He has also served on the board of Public Art Fund, which generated public art projects such as "Sculpture in Environment," "City Walls," and "Prospect Mountain," and was involved in many other public art commissions around the country. *Avant Garde to Pluralism* (Hard Press Editions, 2006) is his most comprehensive work in over a decade.

Alison D. Nordström

Alison Nordström is curator of photographs at George Eastman House, the oldest and largest museum of photography in the United States. She was the founding director and senior curator of the Southeast Museum of Photography in Daytona Beach, Florida from 1991 to 2001, and previously held positions involving photography at the Brattleboro (Vermont) Museum & Art Center and the Peabody Museum of Ethnography, Harvard. She has worked extensively with archives and artists' estates. She has curated over one hundred exhibitions of photography, including the popular biennial series *Fresh Work*, and major surveys of landscape, portraiture, travel photographs, and journalism. She has worked extensively with historical photographs related to the construction of race and place and is the author of numerous books, catalogue essays, and chapters, articles, and reviews in academic publications. In 2006, she curated the exhibition *Paris: Photographs by Eugene Atget and Christopher Rauschenberg* for George Eastman House and the International Center for photography in New York City and the traveling exhibition *Why Look at Animals?*, a historical survey coupled with contemporary installations. Nordström holds a B.A. in English literature, an M.L.S. with museum emphasis, and a Ph.D. in cultural and visual studies.

Faith Ringgold

Faith Ringgold began her artistic career more than thirty-five years ago as a painter. Today, she is best known for her painted story quilts—art that combines painting, quilted fabric, and storytelling. She has exhibited in major museums in the USA, Europe, South America, Asia, Africa, and the Middle East. She is in the permanent collection of many museums, including the Studio Museum in Harlem, the [Solomon R. Guggenheim Museum](#), the [Metropolitan Museum of Art](#), and the [Museum of Modern Art](#). Her first book, *Tar Beach*, was a Caldecott Honor Book and winner of the Coretta Scott King Award for Illustration, among numerous other honors. She has written and illustrated eleven children's books. She has received more than seventy-five awards, fellowships, citations, and honors, including the Solomon R. Guggenheim Fellowship for painting, two National Endowment for the Arts Awards, and seventeen honorary doctorates, one of which is from her alma mater, [The City College of New York](#). She recently retired as a tenured professor of art at the [University of California in San Diego](#).

HYPERLINK "<http://www.anyonecanflyfoundation.org>"

Dr. Alex Rosenberg

Dr. Alex Rosenberg AAA/ASA, former president of the Appraisers Association of America and certified/senior appraiser in personal property/fine art has thirty years of experience as an art dealer and publisher. Dr. Rosenberg founded Transworld Art in 1968, and published over six hundred editions of original prints, portfolios, and multiples. He is currently the president of Alex Rosenberg Fine Art, which offers a selection of the finest paintings, sculpture, tapestries, prints, and multiples by internationally important artists. He is currently in the process of writing a forthcoming book, *Advanced Problems in Appraising*.

John W. Smith

John W. Smith is director of the Smithsonian's Archives of American Art, the world's largest archive devoted to collecting, preserving, and disseminating the rich documentary evidence of art in the United States.

Smith was formerly assistant director for collections, exhibitions, and research at the Andy Warhol Museum in Pittsburgh (2000–2006), where he oversaw all aspects of the permanent collection, organized exhibitions, raised money for the museum's exhibitions and collections programs, and lectured and published books on various aspects of the museum's collection.

As curator of archives and director of the Archives Research Center at the Andy Warhol Museum (1994–2000), Smith established the founding policies and guidelines of the center, raised funds to support the center's goals, and collaborated with colleges and universities to promote the center's resources. He also served as interim director of the museum from 1995 to 1996.

In addition, Smith's extensive archival experience includes serving as chief archivist at the Art Institute of Chicago (1990–1994), visiting archivist at the Royal Opera House in Covent Garden, London (1991), and as founding curator of special collections and archives at the Chicago Park District (1988–1990).

Smith's exhibitions and publications include "Strange Messenger: The Work of Patti Smith" (2002); "Andy Warhol: His Work, Ideas, and Process" (2003); "The American Supermarket" (2003); "Flowers Observed, Flowers Transformed" (2004); "Andy Warhol's Time Capsules" (2004), a collaboration with the Museum for Modern Art in Frankfurt, Germany; "Seeing Double: Encounters with Warhol" (2005); "Andy Warhol: Artist of Modern Life" (September 2005–April 2006), the first major exhibition of Warhol's work to travel to three major museums in Russia; and "Grayson Perry" (February–May 2006), the first U.S. museum exhibition of Great Britain's prestigious 2003 Turner Prize winner.

Smith received his bachelor's degree in English from Southern Illinois University in 1980.

HYPERLINK "<http://www.aaa.si.edu>"

Michele Wallace

Professor Michele Wallace, author of *Black Macho and the Myth of the Superwoman*, *Invisibility Blues: From Pop to Theory*, and *Dark Designs and Visual Culture*, is Professor of English, Women's Studies and Film Studies at the City College of New York and the City University of New York (CUNY) Graduate Center. She also completed a Ph.D. in Cinema Studies at New York University in 1999. Wallace is Faith Ringgold's first daughter.