

ESTATE PLANNING ISSUES UNIQUE TO THE ARTIST (AND COLLECTOR)

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Estate planning, generally, is the process by which individuals determine what will happen to their property after death, and attempt to minimize taxes due related to death (i.e., federal and state estate taxes and/or inheritance taxes, as may be applicable). Estate planning also involves planning for disability, incapacity, or serious illness. Notably, not all property is disposed of according to an estate plan. Jointly-owned property typically passes directly to the co-owner, and property for which a beneficiary is designated (such as a 401(k) or other retirement account or insurance policy) passes directly to the designated beneficiaries.

In addition to considering these basic issues in constructing an estate plan, artists and collectors face additional, unique issues arising from the fact that, often, much of the value of an artist's or collector's estate lies in the value of the individual's artwork. Thought and specific direction should be given with respect to such artwork in order to ensure that the art is properly valued, cared for, distributed, and/or sold in the best interest of the estate and/or beneficiaries. The following highlights certain issues that merit particular attention in creating an estate plan for the artist or collector.

Date-of-Death Valuation Issues

State and/or federal estate tax (if applicable) is levied on the value of a decedent's assets as of the date of death. Accordingly, estate tax problems may arise (or tax-saving benefits may be lost) when it is difficult to accurately ascertain the value of estate assets, such as artwork. There is an inherent conflict between the interests of taxing authorities, who will want to tax on the highest possible value, and the taxpayers. Valuation before death, and other techniques, may be used to accurately value assets such as artwork before death. In this vein, any artist or collector should maintain detailed records artwork created or purchased, cost (if applicable) and any assignment of value prior to death.

Liquidity Required to Pay Taxes Due and Expenses of Administration

Another estate planning problem which arises where there is substantial value in non-liquid assets, such as artwork, is a lack of liquidity to pay any estate taxes when due. Failure to properly plan for the taxes due at death may result in artwork being sold at a discount due to a necessary quick sale. Numerous tools are available to facilitate liquidity depending on the circumstances; commonly, an irrevocable life insurance trust is used to provide this liquidity without the necessity of liquidating assets below market value.

Transfer of Intellectual Property

Not only is intellectual property (such as copyright or other intellectual property rights in certain artwork) difficult to value, but intellectual property rights may or may not be transferred in connection with the physical transfer of the property itself. For example, copyright protection may extend beyond the life of an author, and should be

considered in estate planning. Rights of publicity (i.e., the right to use a person's name or likeness) may also extend beyond death (depending on the law of state in which person dies), and may have significant value in the case of a celebrity or well-known artist. Also, the rights of a creator of intellectual property may be different than the rights of a transferee. Consider too the rights of others who may have an interest, or license to use, certain intellectual property belonging to the decedent, and allocation of any related stream of income after death.

Beware of Incomplete Gifts

While lifetime gifts can be used appropriately to reduce a taxable estate under certain circumstances, there are many nuances to the estate tax laws with respect to gifts prior to death. Not only may such gifts reduce the exemption, but also beware of incomplete gifts. For example, if you "gift" artwork to a friend or relative, but do not actually deliver the gift (i.e., the artwork remains in your home), the gift is not complete and the value of the art will be includible in your estate for tax purposes.

Consider Charitable Giving

You may also reduce your taxable estate by gifts to charity upon death, since the value of these gifts is not included in your taxable estate. There are many ways to structure this type of gift (in addition to charitable bequests free of trust) which may provide different strategic advantages. Depending on how the gift is structured, you may also reduce income tax liability. Be aware, however, that there may be related gift tax consequences if value of the gift exceeds the annual exclusion amount.

For example, consider donating art (created by another and owned by you) to a museum. This type of gift, either during life or at death, reduces your taxable estate. Also, in the case of a lifetime gift, you may be able to take a deduction against income taxes for a charitable gift. (Note, however, that you may not take a deduction for the value of art you have created. Where an artist donates his or her own work, the deduction is limited to the costs of materials.)

This limitation with respect to an artist's own work, however, applies only to income tax deductions. An artist who makes a bequest of his own work in a last will and testament may claim a deduction on the estate tax return for the full fair market value of the work as of the artist's date of death.

Carefully Consider the Appointment of a Personal Representative, Trustee or Executor

Where estate assets will include art or other intellectual property, care should be taken to appoint a personal representative, trustee or executor who is familiar with the handling of this type of asset, or someone familiar with the art business and, preferably, the artist's work. Consider appointing a family member together with an individual who has expertise in this area, as a family member unfamiliar with the industry handling the sale and/or distribution of art may grossly undervalue art, be influenced by sentiment, confuse art that should be sold versus art that the estate should hold, or sell art to bulk dealers at a substantial discount.

Also consider making arrangements, in advance, with a gallery or galleries to handle your estate and to market your work after your death.

Be Clear as to Specific Bequests

When describing particular works of art for bequest to individuals, charities or other persons, be specific as to which particular pieces of art are to go to each person. This may have an affect on the total value of your estate. For example, a description by location (e.g., the painting in my living room) is generally insufficient. When addressing specific bequests, consider also the opportunity to express additional instructions and/or guidance as to particular works which should not be sold or works which are particularly valuable.

Maintain Careful Records

Not only should the artist or collector maintain records as to the cost and value of artwork, but also be sure that an artist's own work is signed and dated, so as to avoid depreciation for unsigned works (which are typically less desirable in the marketplace).

In sum, when an estate involves art, or other intellectual property, it is particularly important to consult a professional familiar with the unique issues presented by these assets, and create a plan to ensure smooth handling of the estate in order to maximize value to the intended beneficiaries in accordance with your wishes, and minimize state and federal taxes due at death.