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TOP TEN ESTATE PLANNING TIPS FOR THE ARTIST (AND COLLECTOR)

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Estate planning generally involves three basic elements:

- Determining how assets will be distributed at death.
- Minimizing taxes due in connection with death, such as federal and state estate taxes and/or inheritance taxes.
- Planning for disability, incapacity or serious illness.

Artists and collectors face additional issues in estate planning arising from the unique nature of their creative assets, which may be illiquid and difficult to value as part of an estate. An estate plan for an artist or art collector must ensure that the art is properly valued, maintained, distributed, and/or sold in the best interest of the estate and/or beneficiaries. Following are ten “top” tips in creating an estate plan for the artist (or collector), taking into account many of the unique issues faced by artists and collectors in connection with estate planning:

10. Maintain Careful Records. Not only should the artist or collector maintain records as to the cost and value of artwork, but an artist should also be sure to sign and date his/her own work to avoid depreciation for unsigned works (which are typically less desirable in the marketplace).

9. Address 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 value certain estate assets, such as artwork. Appraisal before death, and other techniques, may be used to accurately value assets such as artwork before death.

8. Ensure Estate Liquidity to Pay Taxes and Administration Expenses. A common estate planning problem arises when there is substantial value in non-liquid assets, such as artwork, and a lack of liquidity to pay estate taxes and/or expenses of administration. Failure to properly plan for the taxes due at death may result in artwork being sold at a discount to facilitate a quick sale. Numerous tools are available to facilitate liquidity; consider, for example, an irrevocable life insurance trust to provide liquidity.

7. Pay Attention to Transfers of Intellectual Property Rights. Not only is intellectual property (such as copyright in an artist's work or an artist's right of publicity) difficult to value, but (beware!) intellectual property rights may or may not be transferred in connection with the physical transfer of property. Note also that copyright protection may extend beyond the life of an author, and 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 the state in which a person dies). These intangible rights may have significant value in the case of a celebrity or well-known artist. Consider 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.

6. Beware of Incomplete Gifts. Although gifts before death 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. One trap for the unwary (in addition to the annual exclusion limitations) is the concept 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.

5. Consider Charitable Giving. Gifts to charity upon death may reduce the taxable value of your estate, since the value of these gifts is not includible in the 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.

Note that an artist may not be able to take a deduction for the value of art he/she has created – where an artist donates his or her own work, the income tax deduction is generally limited to the costs of materials. But, this limitation applies only to income tax deductions. An artist who makes a bequest of his or her own work by Will may generally 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.

4. Be Clear as to Specific Bequests. When describing particular works of art for bequest to individuals, charities or other persons upon death in a Will, be specific as to which particular pieces of art are to go to each person, as this may affect the total value of your estate. 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.

3. Carefully Consider the Appointment of a Personal Representative, Trustee or Executor. Appoint a personal representative, trustee or executor who is familiar with handling art or other intellectual property, and preferably someone familiar with the art business and the artist's unique work. Consider appointing a family member together with an individual who has expertise in the art business, as a family member unfamiliar with the art industry may undervalue the works, be influenced by emotion, confuse art that should be sold versus art that the estate should hold, or sell art to bulk dealers at a discount.

2. Make Contract Arrangements Regarding Estate Assets in Advance. In connection with your estate planning, consider entering into an agreement with a reputable gallery to market and sell your works after your death in cooperation with your estate. Determine pricing, commissions, storage and maintenance issues before the emotions and hurry of estate administration.

1. Make a Plan. Often, the most difficult (yet among the most important!) is the first step in simply making a plan. Be aware of the issues surrounding estate planning for artists, and consult a professional familiar with estate planning issues for the artist and/or collector to assist you in crafting an estate plan that will allow you to protect and distribute your creative works and other estate assets according to your wishes, while maximizing estate tax savings and easing the burden of estate administration.