

The Art of Planning for the Collector: A Guide to Estate Planning Considerations for Art Collectors

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**NEW YORK STATE BAR ASSOCIATION
TRUSTS & ESTATES LAW SECTION
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ARTFUL CONSIDERATIONS

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I. STATUS OF THE ART MARKET

- a. Estate planning perspective.
 - i. Valuation issues.
 - ii. Family considerations.
 - 1. Use and allocation.
 - 2. Record keeping (provenance and authenticity)
 - 3. Investment considerations (art as an alternative “investment class”)
 - 4. Maintenance and security
 - 5. Ownership structure (outright v. trust v. entity)
 - 6. Charitable considerations
- b. Tax planning perspective (based on the Art Advisory Panel of the Commissioner of the Internal Revenue (the “Art Panel”) – The Annual Summary Report for the Fiscal Year 2016.
 - i. When a tax return is audited and the return includes an appraisal of a single work of art or cultural property valued at \$50,000 or more, the agent or appeals officer may refer the case to the Art Panel.

- ii. The Art Panel is composed of up to 25 members who serve without compensation. They are renowned art experts including dealers, advisors and curators.
- iii. The Art Panel met twice and reviewed 555 items on 63 taxpayer cases.
- iv. The average claimed value for an item reviewed by the Art Panel was \$906,550.
- v. In 2016, the Art Panel recommended accepting value of 222 items or 40% of the items. By comparison, in 2015, the Art Panel recommended accepting 35% of the items.
- vi. In 2016, the Art Panel adjusted 333 items or 60% of the appraisals it reviewed. By comparison, in 2015, the Art Panel adjusted 65% of the appraisals it reviewed.
- vii. Of the items adjusted, 202 (or 36%) of the items were increased and 131 (or 24%) of the items were decreased.
- viii. While generally two meetings are conducted per fiscal year, a dedicated meeting to review decorative arts has not occurred since 2013.
- ix. So from a tax perspective, a narrow band of estates may be affected by an adjustment to the valuation of art work for estate and gift tax purposes, but for those estate where this may present

an issue, it is important to carefully consider planning with the artwork and its valuation.

II. DUE DILIGENCE

a. While many clients may not be focused on due diligence, it is a significant estate planning and estate administration issue to carefully consider. It is important to treat an art portfolio like other valuable assets and consider issues such as title, condition, provenance and authenticity of the art work. In estate tax context, importance on getting this right is enhanced by tax overlay.

- i. The estate tax may be determined based upon one value and then sold later at lower (or zero) value (for instance in the case of a forgery).
- ii. There may also be valuation issues to consider with provenance and authenticity. For instance, in Private Letter Ruling 9152005, the IRS determined that items determined to have been stolen and possessed by the decedent at the time of his death were includible in his gross estate, but no deduction was allowed under Section 2053(a)(3) for claims against the decedent by the rightful owners.¹

III. TITLE/DOCUMENTATION

a. **Authentication.** Failing to properly determine the authenticity of artwork that is later determined to be a forgery or fake could result in the complete

¹ Private Letter Ruling 9152005 (August 30, 1991).

loss of value for the family and potentially produce adverse tax consequences.

b. Document Provenance.

- i. **Family Office/Professionals:** For family office/professional advisors, consider cataloging or at the minimum keeping an inventory the artwork. Any and all documents evidencing provenance should be kept secure.
- ii. **Other Advisors:** If there is no family office, consider coordinating with other family advisors (lawyers, accountants, etc.) to secure title and other documentation.

IV. WHEN BUYING ART - SALES AND USE TAX

- a. Consider what, if any, planning may be done to ameliorate sales and use taxes.
- b. When planning in this area, it is important to bear in mind that many states aggressively enforce their sales and use tax statutes so careful planning is necessary. For example, the New York Attorney General has stated a commitment to “rooting out tax abuses wherever we find them, especially in the art world, where the difference can be hundreds of thousands – if not millions – of dollars in lost tax revenue.”²

i. Gagosian Gallery Settlement

² Rebecca Spalding, et al., *Art Buyers Face Scrutiny as New York Kicks Off Tax Probe*, Bloomberg.com, May 3, 2016, available at <https://www.bloomberg.com/news/articles/2016-05-03/aby-rosen-to-pay-7-million-for-failing-to-pay-art-taxes>.

1. New York Attorney General Eric T. Schneiderman settled case against Gagosian Gallery for \$4.28 million for failing to collect New York sales tax on about \$40 million of art to New York buyers.³

ii. Abby Rosen Settlement

1. New York Attorney General Eric T. Schneiderman settled case against an art collector, Aby Rosen, for \$7 million for failing to pay New York and New York City sales and use tax on over \$80 million worth of art.⁴ Mr. Rosen claimed an exclusion from sales tax on the basis that the purchases were for resale. However, the Attorney General alleged that Mr. Rosen used the artwork for personal enjoyment and enhancement of his real estate business brand by displaying the artwork in his personal residences and in his business offices and properties.⁵

- c. Before delivery of art that is purchased, consider sales and use tax of states where the art is purchased and delivered.

³ See New York Attorney General's Office Press Release, *A.G. Schneiderman Announces \$4.28 Million Settlement with International Art Dealer Gagosian Gallery for Failure to Collect and Remit New York Sales Tax* (July 19, 2016), available at <https://ag.ny.gov/press-release/ag-schneiderman-announces-428-million-settlement-international-art-dealer-gagosian>.

⁴ See New York Attorney General's Office Press Release, *A.G. Schneiderman Announces \$7 Million Settlement with Art Collector Aby J. Rosen for Failing to Pay Sales and Use Taxes on Art Acquisitions* (May 3, 2016), available at <https://ag.ny.gov/press-release/ag-schneiderman-announces-7-million-settlement-art-collector-aby-j-rosen-failing-pay>.

⁵ *Id.*

V. COLLATERAL LOANS AND 1031 EXCHANGES

a. Loans.

- i. Third party lenders may make loans secured primarily by art. In these instances, such lenders should carefully consider methods that allow them to perfect their security interest, such as a UCC filing.⁶
- ii. Typically, loans secured by art may have no more than 50% loan to value.
- iii. This is an appealing option for asset-rich collectors with limited cash flow looking for liquidity.
- iv. Auction houses provide both short term advances as well as term loans without the expectation of immediate consignment.

Collateral can include any property that can be offered at auction.

- v. Only in limited circumstances can collectors retain possession of the collateral.

b. 1031 Exchanges – Like-Kind Exchanges⁷

- i. Generally, when selling property for a capital gain, the taxpayer will be subject to tax on the amount of the gain at the time of the sale. Section 1031 previously allowed a taxpayer to postpone the

⁶ Uniform Commercial Code-1 Financing Statement.

⁷ See IRC Section 1031.

payment of tax on the gain if the taxpayer reinvests the proceeds from the sale in a similar property.⁸

- ii. However, under the Tax Cuts and Jobs Act of 2017, Section 1031 exchanges are now limited solely to real estate.⁹ Therefore, taxpayers are no longer permitted to use Section 1031 to defer capital gains on the sale of their artwork.

VI. ESTATE PLANNING/INSURANCE/FRAUD

- a. As noted above, an important consideration is providing adequate property and casualty insurance for the artwork.
- b. Relatedly, especially for high value artwork, proper management and care of the artwork should be considered as well. Storage, preservation, and security are all issues that could become problematic if not properly considered.
- c. Collectors should be aware that retail replacement value and fair market value are not interchangeable. Retail replacement value is applicable for the purpose of insurance. If a collector is using fair market value for insurance purposes, they may run the risk of being underinsured.
- d. Given frequent shifts in certain collecting categories, it is important for collectors to regularly review their values for insurance purposes and, when applicable, for their advisors to go through the process of due diligence and authentication.

⁸ See IRC Section 1031.

⁹ Tax Cuts and Jobs Act, Public Law No. 115-97, Section 13303 (2017).

VII. ESTATE PLANNING/PRIVATE PLACEMENT

- a. For many art collectors and families, there is a tension between planning and access/control or enjoyment of the collection.
- b. There are a number of options available for the collector to potentially relieve some of the tension between estate planning and the access/control issues.
- c. **Limited Liability Company (“LLC”).**¹⁰ An LLC structure offers several benefits for holding an art collection. For instance, an LLC structure provides central management of the art and decision-making.¹¹ The LLC structure can also facilitate multiple beneficiaries to enjoy the same artworks (for instance on an alternating basis).
 - i. The manager of the LLC would provide management services such as providing for insurance coverage, proper storage and transportation, and facilitating equitable possession of the artwork among the LLC members.
 - ii. Another benefit of the family LLC to hold the art collection is that the sale of a particular piece can benefit the whole family (the members of the LLC), as opposed to benefiting one family member who owns that artwork to the exclusion of others.

¹⁰ For a further discussion on using entities for planning with artwork, please see Darren M. Wallace and Alexis Gettier, *Using Family Entities for Planning with Artwork*, TRUSTS & ESTATES (June 2016).

¹¹ Darren M. Wallace and Alexis Gettier, *Using Family Entities for Planning with Artwork*, TRUSTS & ESTATES (June 2016).

- iii. Once the family LLC is created and funded with the collection, the parents may then make gifts of a portion of their membership interest. This may be done without incurring a gift tax if utilizing the annual exclusion amount, currently \$15,000, or using some or all of the donor's applicable lifetime exemption. Notably, appraising one's collection in order to properly value these types of gifts may be cumbersome and costly.
- iv. One drawback of the family LLC structure is that the collector is now sharing the enjoyment and use of the collection with the other members of the LLC. The collector no longer has the sole beneficial enjoyment that they would have if they were the sole, outright owner.
- v. **Estate Tax Consideration.** The family LLC should be done with care to avoid any Section 2036 issues at the death of the senior family members.¹² To the extent that the collector wishes to retain possession of one or more of the artworks in the collection transferred to the family LLC, the collector should pay fair market rent to the entity, distributable to the members of the LLC in proportion to their interest. A key for this consideration is to properly establish fair market rent.

¹² See *Estate of Scull v. Comm'r, T.C. Memo.* 1994-211.

vi. An individual may be able to apply a fractional discount to the value of their interest in a family LLC due to marketability restrictions and lack of control; however, such discounts are less likely to be viewed favorably by the IRS. The IRS appears to take the view that there is no actual market for such a fractional interest and appears to be unwilling to approve a discount for the value of a fractional interest in such a family entity.¹³

1. *Estate of Elkins*: One case suggests that such discounts may be available.¹⁴ The decedent in this case owned fractional interests in various artworks with his children. All the works were subject to a Cotenant's Agreement. The Tax Court disagreed with the IRS that no valuation discount should be applied. The Tax Court, however, did not agree with the estate's assessment of how much of a discount should be allowed, taking the view that only a 10% discount may be applied.
2. The IRS has not acquiesced on this issue, so planners should be wary of IRS scrutiny that may result in a higher tax burden if the artwork's value is finally determined to be more than initially reported.

¹³ Section 2036(a)(1) and (3); Steven M. Fast, et al., *Context Matters: Rules for Reducing Taxable Value*, 120 Yale L.J. Online 141 (2010), available at <http://yalelawjournal.org/forum/context-matters-rules-for-reducing-taxable-value>.

¹⁴ *Estate of Elkins v. Comm'r*, 767 F.3d 443 (5th Cir. 2014).

- d. **Charitable Gifts.**¹⁵ Many collectors have an passionate and deeply personal connection with their artwork. Their sentiment for the art is so deep that they may prefer to donate their collection for public enjoyment rather than pass it on to family members who may not share the same affinity for the art.
- e. **Inter vivos v. Testamentary Bequest.** The simplest way to donate artwork to charity is by a bequest at death. The bequest at death will provide for a full estate tax deduction equal to the fair market value of the artwork on the date of death. An inter vivos transfer will produce a gift tax deduction and an income tax deduction that can offset ordinary income for the fair market value of the artwork, generally up to 30% of the donor's gross income for the year.¹⁶
- i. The availability of the charitable deduction is limited by the "related use test." Basically, this test requires that the contribution is made to an organization where the use of the art is related to its mission, such as a museum.¹⁷ If the artwork is contributed to an organization such as a church or a school with an expectation (or reasonable anticipation) that the organization will sell the artwork and use the proceeds in furtherance of its mission, the donor's

¹⁵ For further discussion into charitable donations of artwork, please see Darren M. Wallace and Alexis Gettier, *The Charitably Inclined Collector*, TRUSTS & ESTATES (August 2016).

¹⁶ Section 170(b)(1).

¹⁷ Treas. Reg. § 1.170A-4(b)(2), (3).

income tax deduction will be limited to the donor's basis in the artwork, instead of the fair market value (likely higher).¹⁸

f. Public Museum¹⁹

- i. Contributions to public museums generally qualify for the charitable tax deduction.
- ii. Most institutions prefer to accept unrestricted gifts; however, in limited circumstances, the institutions may be amenable to allowing the collector to specify certain requests for the display of the donated works. For example, a somewhat common request is that the collection should be displayed in a wing named after the donor or that the collection be kept together for a finite period of time.
- iii. The overhead costs associated with maintaining a significant collection can be high, which may cause the institution or museum to consider break up the collection. One way to ensure that the collection stays together is to establish an endowment at the public museum to cover the associated costs of maintaining the collection for a term of years or indefinitely. An income tax deduction is available for the property/funds contributed to establish an endowment.

¹⁸ Section 170(e)(1)(B)(i).

¹⁹ See Darren M. Wallace and Alexis Gettier, *The Charitably Inclined Collector*, TRUSTS & ESTATES (August 2016).

- iv. A gifting agreement should be negotiated at the time of the contribution in order to set appropriate expectations.

g. Private Museum²⁰

- i. Public museums may be selective about the artwork and collections they accept. The public museum may not specialize in the genre of the artwork to be donated or the museum may be inundated with artworks by the same artist or genre. Recently, the establishment of private museums by collectors has gained popularity.
- ii. Private museums may be run by a private operating foundation controlled by the donor. The museum may even be located near to the donor's residence, but a donor should proceed with caution before doing so.

- 1. For the private operating foundation to qualify as an operating foundation, it must meet two requirements:

- a. First, the foundation must make "qualifying distributions" directly in pursuit of its purpose equal to the lesser of (i) its adjusted net income or (ii) its minimum investment return.²¹ Qualifying distributions are any amounts reasonably paid by

²⁰ See Darren M. Wallace and Alexis Gettier, *The Charitably Inclined Collector*, TRUSTS & ESTATES (August 2016).

²¹ Section 4942(j)(3)(A).

the foundation to accomplish its purpose, so long as that purpose is charitable.²² In the case of a private museum, the charitable purpose is educational.

b. Second, substantially more than half of the foundation's assets must be devoted to the foundation's primary activity (i.e., the operation of the museum).²³ Generally, the most valuable assets of such a foundation almost certainly consist of the collection, the display of which is a use in furtherance of the foundation's charitable purpose. Of course, the foundation must report its activities, income and disbursements annually on the foundation's informational tax return, Form 990-PF.

iii. A charitable income tax deduction is available for the fair market value of any assets contributed to the private museum, for contributions to cover the museum's expenses, and for the purchase of additional works of art. The museum's expenses that can be deducted include the costs of conserving and insuring the artworks as well as the costs of storage and display space.

²² Section 4942(g)(1); Section 170(c)(2)(B).

²³ Section 4942(j)(3)(B)(i).

- iv. Contributions to private operating foundations are deductible up to 60% of the taxpayer's gross income for the year.²⁴ Further, contributions to a private museum to purchase new works of art can provide a sales tax benefit since the purchase by the private museum of new artwork is exempt from state and local sales tax.
- v. As noted above, the purpose of the private museum must be educational. Merely displaying the artwork in the collector's personal residence and occasionally inviting school children over to view the artwork will not be considered enough to serve the educational purpose.
- vi. Public access is an important element of a private museum, furthering its educational purpose. Factors to consider for public access include: advertisement, holding regular hours (or even potentially by appointment only), lending out works of art, giving grants, making the collection available for research, and engaging in public educational programs. While holding visiting hours is an important element for public access, that alone will not be enough. There must also be sufficient advertisements encouraging visitors.
- vii. Museums that are located in close proximity to the donor's residence or office may draw IRS scrutiny. The IRS may argue that the museum's close proximity indicates that the primary

²⁴ 26 U.S.C. Section 170(b)(1)(A)(vii); 26 U.S.C. Section 170(b)(1)(F)(i).

benefit of the collection is intended for the donor and not for the public. Similarly, the close proximity to the donor's home or office suggests a higher likelihood that the painting could be used primarily for donor's personal benefit, such as in the donor's home or office. The proximity of a private museum to the donor is not a bright line rule and there are private museums that are located near the collector's home, however, they retain their exempt status by complying with the public benefit requirement in other ways.

- viii. Similarly, the IRS may scrutinize private museums that are secluded or difficult to find, especially if they do not advertise their location, hours or events.
- ix. There is little guidance as to what amount of public benefit is sufficient, so it is important to advise clients to be practical and generous in the public benefits of their private museums.

VIII. SALE AT AUCTION V. PRIVATE SALE

- a. Inter vivos v. testamentary sale
- b. Advances
- c. Commissions
- d. Sales and use tax issues
- e. Estate tax versus income tax
- f. Condition/provenance issues
- g. Marketing plan and placement issues

h. Other considerations

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Global Art Market Updates



Jean-Michel Basquiat
Untitled
Acrylic, spray paint and oilstick on canvas
72 1/8 by 68 1/8 in.

Christie's, New York, May 8, 1984
Sold for \$19,000

Sotheby's, New York, May 18, 2017
Sold for \$110.5M



Pablo Picasso
Femme au Beret et a La Robe
Quadillee, Marie-Therese Walter
Oil on canvas
21 5/8 by 18 1/8 in.

Sotheby's, London, Feb. 28, 2018

Estimate Upon Request
Sold for \$49.8M



Pink Star Diamond
Fancy Vivid Pink
59.60 carat, internally flawless

Sotheby's, Hong Kong, April 3, 2017

Sold for \$71.2M

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Global Art Market Updates



*Property from
the Collection of Lolo Sarnoff*

An Important Imperial Jade Seal
Qing Dynasty, Qianlong Period

Sold for \$4.45M
Estimate: \$1 – 1.5M
New York, March 17, 2015



*Wines from
the Cellar of William I. Koch*

Sold for \$29.1M
Estimate: \$10 – 15M

20,000 bottles/2,700 lots
New York, May 19 - 21, 2016



Bowie/Collector

Achille and Pier Giacomo Castiglioni,
Radio-Phonograph, Model No RR126

Sold for \$323,049
Estimate: \$1,006 - 1,508
London, November 11, 2016

IRS Art Advisory Panel – Fiscal Year 2016



- Meetings annual: 2 (both Fine Arts)
- Panel Members: 17 (gallerists, curators, advisors)
- Aggregate taxpayer valuation: \$503,135,185 (63 cases)
- Net adjustments \$102,406,967 (17% increase)
- Items reviewed: 555
- Average claimed value: \$906,550
- Accepted: 222 items (40%)
- Adjusted: 333 items (60%)

When to Value Art

Situation	Purpose	Value
If the art is transferred during life to a charitable donee	Income tax (charitable contribution)	Fair market value
If the art is transferred during life to an individual	Gift tax	Fair market value
If the art is owned at death	Estate tax	Fair market value
If determining premium for liability coverage	Property insurance	Retail replacement value

How to Value Art

A qualified appraiser:

- Appraisal designation from a recognized professional appraiser organization (USPAP)
- Regularly performs appraisals for pay
- Education and experience in valuing the type of property being appraised

A qualified appraisal:

- Consistent with the substance and principles set forth in USPAP
- Includes images, condition notes, date of contribution, date of appraisal, description of appraiser's background, method of valuation used, description of fee arrangement with appraiser



Sample Market - Picasso



CERAMIC

Taureau

Sold for £100,000

Est: £50,000 – 70,000
London, April 10, 2017



PRINT

Vieil Homme Songeant

Sold for \$8,125

Est: \$3,000 – 5,000
New York, Oct 23, 2017



DRAWING

Gueridon et Guitare

Sold for \$212,500

Est: \$80,000 – 12,000
New York, May 18, 2017



PAINING

Le Matador

Sold for £22.78M

Est: £14 – 18M
London, Feb 28, 2018

A Case Study: Quedlinburg Treasures (PLR 9152005)



The Impact of Restricted Materials on Estate Tax Values



Robert Rauschenberg, *Canyon*
1959
Mixed media on canvas

Estate of Ileana Sonnabend v. Commissioner

Robert Rauschenberg, <i>Canyon</i>	
Taxpayer claimed value	\$0
IRS Original Claimed Value	\$13M
IRS Revised Claimed Value (Penalties)	\$65M \$29M

Authenticity and Value



SALES AND USE TAX



Collateral Loans against Art & Collectibles

DRIVERS OF DEMAND

- Appreciating value of art resulting in higher proportion of art in HNWI's assets
- Collectors more comfortable with leverage, especially in the U.S.
- Low interest rate environment
- Globalization of the marketplace
- Growth of the contemporary art market
- Asset-rich clients with limited cash flows looking for liquidity
- Improving liquidity, transparency and infrastructure of the art market (Freeports, insurance products, etc.)

KEY CHALLENGES FOR LENDERS

- Difficult to assess valuation and authenticity risk; inevitable reliance on third parties
- Difficulties of marking-to-market
- Title may be challenging to establish
- Fraud risk associated with possession
- Lack of lien perfection for non-possessory loans outside of the U.S.
- Perceived lack of liquidity
- Largely unregulated market outside of the U.S.
- Need for income beyond lending to justify capital investment

The Impact of Damage and Loss



Picasso's <i>Le Reve</i>	
Original Purchase Price (1941)	\$7,000
Value as of October 2006	\$139M
Cost of Restoration	\$90,000
(Post-Restoration Value) (Claimed Loss)	\$85M \$54M
Final Purchase Price (2013)	\$155M

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Valuation Discounts: Fractional Interest

Estate of Elkins v. Commissioner

- 64 works of art
- Fair market value: \$35,180,650



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Public Museums



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Private Museums



The Brant Foundation
Greenwich, CT



Glenstone Museum
Potomac, MD

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Fair Market Value and Buyer's Premium/Commissions

Fair market value: the price at which the property would change hands between a hypothetical willing buyer and a hypothetical willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts (Treasury Regulation Section 25.1512 – 1)

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Buyer's premium rate payable on the hammer price up to and including \$300,000	25%
Buyer's premium rate payable on the hammer price in excess of \$300,000 up to and including \$3,000,000	20%
Buyer's premium rate payable on the portion of the hammer price in excess of \$3,000,000	12%

The Impact of Subsequent Sales on Estate Tax Values

Estate of Bernice Newberger v. Commissioner (2015)

Title/Artist	Cost basis	Estate Tax Value (7/29/09)	Sale Result	IRS Value
<i>Tête de Femme (Jacqueline)</i> by Pablo Picasso	\$195,000 Acquired 1/10/81	\$5M	\$12.9M 2/2/10	\$13M (\$10M)
<i>Untitled</i> by Robert Motherwell	\$8,000 Acquired 5/27/69	\$450,000 (\$800,000)	\$1.4M 11/11/10	\$1.5M
<i>Élément Bleu XV</i> by Jean Dubuffet	\$40,000 Acquired 6/10/82	\$500,000	N/A	\$750,000 (\$900,000)



QUESTIONS



Edward Ruscha, *Question Mark*, 1990