

# JOAN MITCHELL FOUNDATION



Joan Mitchell in her studio in Vétheuil, France, 1983. Photo by Robert Freson, Joan Mitchell Foundation Archives. © Joan Mitchell Foundation

# CALL

CREATING A  
LIVING LEGACY

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## Estate Planning for Visual Artists

A WORKBOOK FOR ATTORNEYS & EXECUTORS

In Memory of

Joan Mitchell Foundation CALL Artists:

BETTY BLAYTON TAYLOR  
JAIME DAVIDOVICH  
ELEMORE MORGAN, JR.

CALL Partner Organization Bronx Council on the Arts CALL Artists:

HORTENSE KASSOY  
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Arts & Business Council of Greater Boston/Volunteer Lawyers for the Arts  
of Massachusetts Boston artist and benefactor:

FAY CHANDLER

# Estate Planning for Visual Artists: A Workbook for Attorneys & Executors

By Megan Low with Jim Grace

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And last, but by no means least, to our CALL community of partners, artists, legacy specialists, and apprentices who worked collaboratively with the Foundation's staff to research and assess the studio management and organizational needs of US-based visual artists and to collectively identify ways to protect, preserve, and share their life's work: we thank you, our CALL community, for your trust and belief in the Foundation's efforts to amplify the value and essential contributions of visual artists and create resources that advocate for the well-being of artists' lives and careers.

Sincerely,



Shervone Neckles-Ortiz

Artist Programs Manager, Professional Development  
Joan Mitchell Foundation

# Acknowledgments

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The Arts & Business Council of Greater Boston/Volunteer Lawyers for the Arts of Massachusetts would like to thank:

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- » The many organizations and individuals that have worked with care, determination, and impact to support the creative community and keep the issue of estate planning and legacy planning for artists alive. We are honored to continue the conversation and contribute to their valuable work.
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Sincerely,



Megan Low

Legacy Consultant and former  
Director of Legal Services  
Arts & Business Council  
of Greater Boston



Jim Grace

Executive Director  
Arts & Business Council  
of Greater Boston



## About the Contributing Organizations

### About the Joan Mitchell Foundation

The Joan Mitchell Foundation celebrates the life of abstract artist Joan Mitchell by expanding awareness of her pioneering work and fulfilling her wish to support and provide opportunities for visual artists. Through grants, residencies, and related initiatives, the Foundation advances the work of today's artists and amplifies their essential contributions to communities around the world.

As the chief steward of Joan Mitchell's legacy, the Foundation manages a collection of Mitchell's artwork and archives containing her personal papers, photographs, and ephemera. It provides loans of artworks to museums, academic institutions, and other non-profit arts spaces. Foundation staff are dedicated to assisting researchers and sharing information to further scholarship and broad appreciation for Mitchell's life and work. The Foundation is also supporting the Joan Mitchell Catalogue Raisonné, established in 2015.

Fulfilling Mitchell's mandate to "aid and assist" living artists, over the past 25 years the Foundation has evolved a range of initiatives that directly support visual artists at varying stages of their careers. The Foundation's grant programs include the annual Painters & Sculptors Grants, which provide 25 artists with unrestricted funds of \$25,000, and Emergency Grants of up to \$6,000 for disaster recovery. The New Orleans-based Joan Mitchell Center hosts residencies for national and local artists, as well as artist talks, open studio events, and other public programs that encourage dialogue and exchange with the local community. The Creating a Living Legacy (CALL) initiative provides free and essential resources to help artists of all ages organize, document, and manage their artworks and careers. Together, these programs, along with additional professional support services, actively engage with working artists as they develop and expand their practices.

### About the Arts & Business Council of Greater Boston and Volunteer Lawyers for the Arts of Massachusetts

The Arts & Business Council of Greater Boston (A&BC) is a nonprofit arts services organization offering integrated and responsive programs and services designed to support and nurture the creative ecosystem. Its flagship program, Volunteer Lawyers for the Arts of Massachusetts (VLA), has been serving the legal needs of the state's artistic community since 1989. The VLA provides pro bono referrals and direct legal services to artists and arts organizations as well as educational opportunities for artists, arts organizations, and attorneys. A&BC also assists local art and cultural institutions in finding attorneys to sit on their respective boards of directors.

Recognizing the great need for estate planning for working artists, the VLA has been developing trainings and tools to help artists and attorneys work together and achieve their goals. In 2006, the VLA received a grant from Fay Chandler, an artist and innovator, to launch a program educating and preparing artists to better plan for the disposition of their estates. Since that time, the VLA, through programs and workshops, has focused on educating artists about the necessity for estate planning, understanding copyright law and its implications for their estates, and practical methods for better cataloguing and preparing their works for disposition. In addition, the VLA is working to increase the panel of estate planning lawyers to whom it can refer its artists (both pro bono and for fee cases), through educational workshops on artist-specific issues that arise in estate planning, and outreach to the estate planning bar committees.

## About the JMF and A&BC Partnership

Recognizing the need for greater resources on estate planning for artists, the Joan Mitchell Foundation and the Arts & Business Council of Greater Boston have partnered to create informative and helpful workbooks for use by both visual artists and estate planning professionals.

In 2014, the partnership created and released the Estate Planning Workbook for Visual Artists. That workbook serves as a guide to understanding the components and the need for the basic elements of an estate plan, as well as addressing artist-specific concerns, issues, and opportunities relating to both their physical artwork and their intellectual property. A PDF of the workbook is available to download free of charge on both the A&BC and JMF websites.

The A&BC and JMF are collaborating for a second time to produce this complementary workbook for estate planning attorneys who are professionals in their field but may not know about or appreciate some of the particular challenges, solutions, and opportunities an artist's career and estate may pose.

The goal of this workbook is to provide a resource and framework for those working with artists, to alert them to possibilities and issues they might not have considered, and ultimately to enlarge the pool of estate planning attorneys with knowledge and experience in this area. This workbook features more in-depth sections on legal issues, such as intellectual property and estate vehicles, as well as sections designed to acquaint the attorney with art-specific issues, such as conservation, inventory, and working with art professionals. Additionally, the workbook captures a dynamic conversation amongst a diverse group of art professionals on what needs to be considered during the legacy-planning process.

# Foreword

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BY MARGARET ROSE VENDRYES, PhD

In identifying as a “mature” artist, you are called upon to accept your mortality, as well as the fact that your art will most likely outlive you. Joan Mitchell Foundation's Creating a Living Legacy (CALL) program for visual artists is essentially concerned with the fate of the artwork through directly communicating with the artist. Before this moment in an artist's career, making the work is the most important task. For some, opportunities to share the work rank second. I am not alone in talking about my paintings as if they were flesh-and-blood members of my family. But I am also among those mature artists who encounter early work with only a faint recollection that it was of their hands. Approaching artmaking, and its attendant ephemera, as a proper business, is necessary for living artists and crucial for their legacies.

The Estate Planning for Visual Artists: A Workbook for Attorneys & Executors is an appreciated accompaniment to the CALL Career Documentation Guide, which could not stress enough the importance of an inventory of the work and an archive of the artist's accomplishments. Although this guidance is useful to all artists, the focus on mature artists with immense amounts of work threatened by lack of appropriate documentation is brilliant.

As a companion to the previously published CALL Estate Planning Workbook for Visual Artists, this Workbook for Attorneys & Executors is as thorough as it is infinitely clear. The reader, who need not be an attorney, will come away with the essential information needed to assist an artist in planning their estate. The word “estate” conjures visions of great wealth—something few artists will claim in their lifetime. What these two smart CALL workbooks offer is a wake-up call to visual artists to recognize the value of what they make, but even more essential, to place importance on creating a legacy plan that can be carried out after they die. Art market recognition is essentially unnecessary to the process of archiving and caring for the work. An artist, while still active, can create directives in the form of legal documents spelling out individual wishes for the future of the work.

Much like the advice that a “legacy specialist” be identified and employed to help with the work of archiving and data collection, this publication makes it clear that professional counsel should be obtained. It is a guide written for an estate attorney representing artists, dealers, collectors, and investors.

It is not unusual for artists to also collect art and be their own representatives in selling their own work. This workbook includes guidance for the disposition of work in an artist's collection by other artists as well as on their own. The estate executor has an additional responsibility when the art collection must be taken into account. Artwork defined here as “an unusual asset that raises several issues including physical possession, care and maintenance, valuation, and intellectual property rights” is the artist's primary legacy. The extensive discussion about rights, something artists tend to learn about only when a need arises, is invaluable. Artists' rights have changed over the years, often to protect their



legacies, but not always. Many artists enter into agreements and relationships without a full understanding of what they represent.

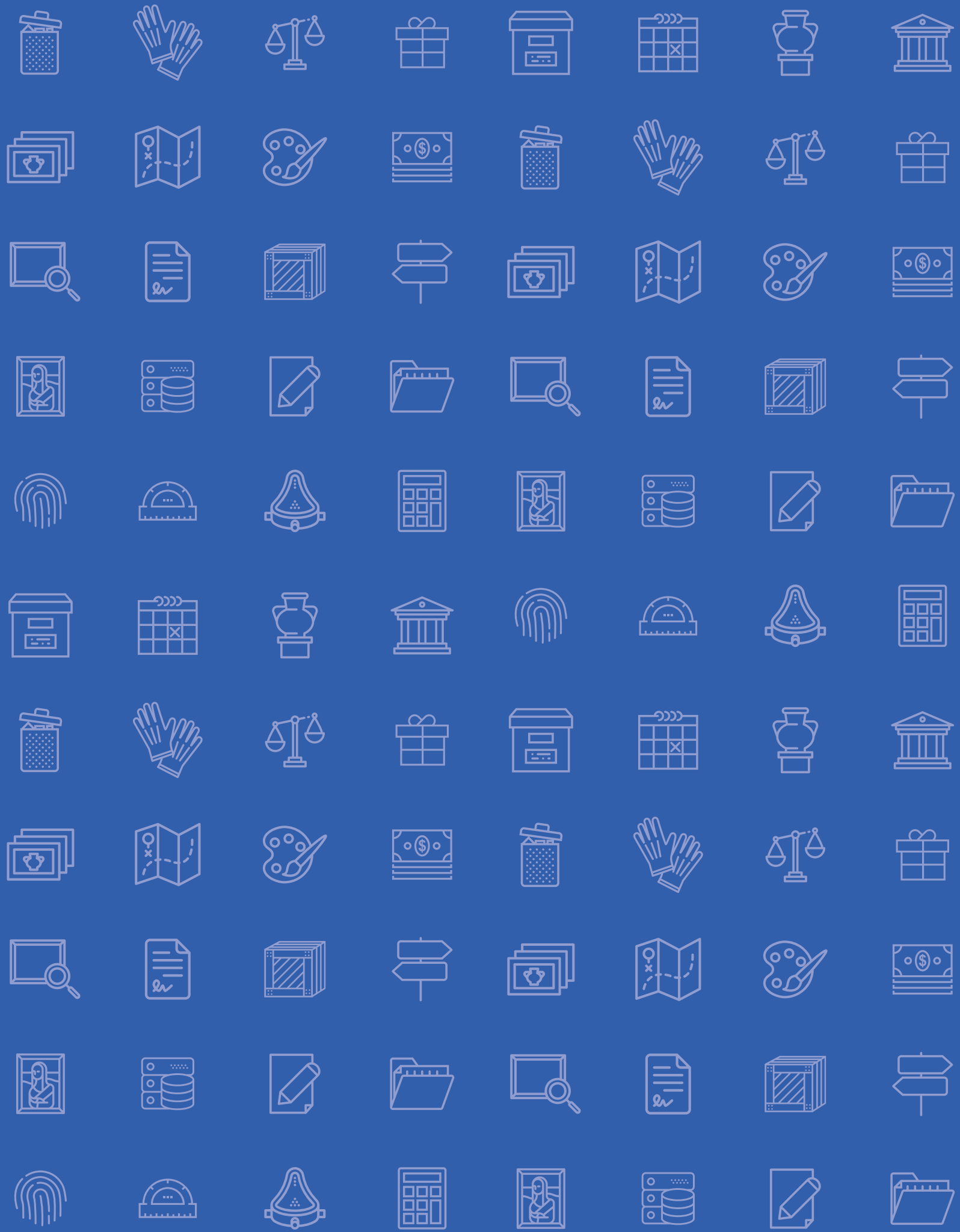
Estate planning is presented in the Estate Planning Workbook for Artists with various vehicles carefully defined and explained. In this Workbook for Attorneys & Executors, definitions and explanations of appropriate legal options are made accessible in everyday language to the artist client as much as the estate attorney. There are choices and options that do not require deep pockets, but as this workbook makes clear, getting legal advice is not optional because making informed choices is crucial.

The “Legacy” chapter in this workbook opens with the phrase: *Ars longa, vita brevis*. Art is lasting, life is short. Once an artist has passed the midlife mark, they must reckon with the inevitability of death. The question that reverberates throughout this publication is “how do you want to be remembered?” What must be done to make that happen can be found right here.



### Note

The information provided in this workbook is for educational purposes only and should not take the place of professional legal advice. All codes, regulations, and principles included herein are current to the best of the authors' knowledge at the time of writing and may be subject to change in time or by jurisdiction. Estate and legacy planning is a complicated process that is unique to each client. For advice and assistance, contact competent professional help.



# Introduction

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Every artist, young or not so young, needs a will. A will that allows for change over time and one that gives instructions about where the artwork should go upon the artist's demise. Artwork is different from cash and real estate.

[CALL ARTIST JAUNE QUICK-TO-SEE SMITH](#)

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If an artist walked into your office today, would you have the knowledge and experience to provide good counsel? Do you know the questions to ask and pitfalls to avoid? Do you have the right tools or know where to go to get this information? According to the National Endowment for the Arts and the 2010 United States Census, there are more than 200,000 fine artists in the United States. However, few estate planning attorneys working in the field are sufficiently familiar with their issues. There are no intestacy laws for an artist's legacy. When an artist dies, no mechanism kicks in to protect an artist's reputation, career, or goals.

Legacy in this context is a combination of potential elements: the ownership, maintenance, and value of physical artwork and intellectual property; impact on other artists through programs, instruction, or bequests; reputation and strategic management; and the disquisition of assets. Estate planning has an important role in enacting an effective legacy plan. Regardless of financial status, every artist has an opportunity to craft a legacy, but they need assistance from knowledgeable professionals like you.

Any artist can leave a legacy, however they choose to define it, and use an estate plan to do

it. An artist need not be a Warhol or a Picasso to benefit from careful planning, or to be penalized for mistakes. For every high-profile dispute over a famous artist's estate, there are thousands of other working artists whose legacies are jeopardized by poor or nonexistent planning. Even for those who do have an estate plan, it is common for the plan not to account specifically for the client's artistic practice, including physical artworks, copyrights, space, materials, equipment, agreements, insurance coverage, and related documentation. Such plans fail to serve the client's best interests and also miss valuable opportunities to preserve the artist's legacy.

The purpose of this workbook is to acquaint professional estate planning attorneys with the needs particular to an artist's practice, to present options, and to indicate issues for further consideration and investigation. For several topics, we have invited experts in their fields to provide a closer look at some of the considerations, concerns, and creative solutions posed by planning an artist's estate.

This guide is not exhaustive and is not intended to act as a textbook; specific points of law may not be up-to-date or applicable in your jurisdiction. It complements the previously published **CALL** Creating a Living Legacy: Estate Planning Workbook for Visual Artists. That text is designed to convey to artists the importance and benefits of estate planning while equipping them with the tools and terminology they will need to begin the process. We encourage you to share this free resource with clients and to use it as an additional reference yourself.

# Legacy

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*Ars longa, vita brevis.*

Art is lasting, life is short.

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Legacy is an opportunity for an artist to answer the question: “How do I want to be remembered?” For some artists, it may be knowing that their work will be cared for or perhaps hang where people may see it from time to time. For others, the goal may be to safeguard a reputation and establish a position in the greater narrative. Quality alone does not guarantee a legacy. Even Vincent van Gogh’s fame is largely dependent on the efforts of his sister-in-law Johanna van Gogh-Bonger to promote his work after his death. Careful management of artwork and assets, the selection of reliable stewards, and clear goals make all the difference in creating a lasting legacy.

Legacy is a highly personal concept and thus has the potential to be a meaningful force in shaping the overall estate plan. As every client is different, every legacy plan will be different.

There is no end of possibilities depending on the artist’s wishes, resources, priorities, connections, practice, output, and history:

- » An internationally famous artist endows a foundation to manage his artwork, conduct research, and make grants.
- » A career photographer donates her equipment and archives to the visual arts department at her alma mater.
- » A landscape painter donates a collection of works to the regional art museum.
- » An artist with moderate commercial success establishes a trust to manage and carefully sell her works over time and advance her reputation.

Legacy is not synonymous with fame. Many artists choose, in addition to or in place of investing in their own reputations, to use their resources to fulfill other goals:

- » A trailblazing artist, whose work celebrated her tribal heritage, worked diligently to create a thorough inventory and archive of her work and related materials, knowing that such information would be of historical interest.
- » A painting professor, recognizing the significance of his first solo exhibition to his career, partnered with a local nonprofit to endow a fellowship program that would grant emerging artists with their own first shows and professional support.
- » A photographer's family established an annual juried competition and lecture series in partnership with a local museum of photography.

- » A lifelong painter and arts patron helped found a program to donate local artists' work to nonprofits and made provisions in her estate to continue making grants to the organizations she had supported during life.

There is no one answer, but it is a question worth asking: "How do you want to be remembered?"

The following stories introduce the possibilities and challenges in approaching an artist's legacy. The first is a warning, a situation where everything went right until it didn't. The second is an opportunity, demonstrating how even those in meager circumstances can enact a meaningful legacy.

## Scenario 1

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Pat and Jamie Smith have been happily married for more than forty years. Jamie has had a long career as an economics professor at a local college, and also holds an MFA from a well-regarded art school and was a practicing photographer for a period, years ago. Jamie has been planning to return to photography upon retiring in a year or two. Pat is a lifelong painter with gallery representation out of state. Pat has had some career achievements and a few series have sold well over the years. The couple owns a nice home and travels extensively. They do not have any children or extended family to speak of.

Over the last few years, the couple has become close with Pim, a professional art instructor and member of a local artist's guild where Pat had started taking classes and exhibiting work. Pim thinks very highly of Jamie's photographs and Pat's paintings. She has introduced Pat and Jamie to a local gallerist friend and they have started talking about possible representation. Pim has also started

working with Jamie on creating an inventory of their slide collection and photo archives and on updating Pat's website with newer works and more images. Pim has even sent some of the older glass slides and negatives out to a service she sometimes uses to restore older images. Pim paid more than a thousand dollars in fees and shipping costs to take advantage of her frequent client discount; Jamie was going to pay her back at the end of the project.

Sadly, Pat and Jamie both passed away in an accident during a recent trip. About ten years ago, they had drafted wills with an attorney. Jamie's income had always been higher, and the estate plan focused on their financial assets. Under the wills, if neither partner survived, all of their property was to be sold with the proceeds going evenly to the college where Jamie worked and the local animal shelter they had always supported. The wills predated their renewed activities in the arts and did not account specifically for any of Jamie's prior artworks or their equipment.



Jamie and Pat shared a studio space in the loft area above the garage at their home. Pim had visited a couple of times when talking about a possible inventory project with the couple. She knew there was a lot of work up there by both partners, but that the studio was not particularly organized. “A happy, creative chaos,” they had called it.

As there are no family heirs, the couple’s attorneys, acting as their executors, are looking to wrap up the estate as quickly as possible. They have hired all-purpose appraisers to go through the house and give estimates prior to a planned estate sale. The appraisers are not art experts, and the service did not spend much time looking at the work in the studio. They plan to include a few of the framed works in the estate sale and get rid of the rest in a couple weeks as they clean out the house.

Pim would like to “rescue” as much of the work as she can and has been reaching out to the attorneys, artist friends, the gallerist she had introduced to the couple, and art donation groups. However, she is not recognized in the will. Additionally, she would like to be reimbursed for the money she has already paid to the conservation company on Jamie’s behalf, but she is having a difficult time getting a response from the attorneys.

## Likely Outcomes

- » Most of Pat’s and Jamie’s accumulated work will be thrown away, despite its value, potential, and meaning to others.
- » Some of Pat’s paintings are still in out-of-state galleries and may become separated from the estate. The estate auction sold a few pieces at well below the gallery prices, which may negatively impact future sales potential.
- » A magazine wants to reprint some of Jamie’s works, but will be unable to as they do not have high-quality copies or negatives.
- » A scholar wants to publish one of Jamie’s photographic series as part of a historical review, but is unable to as the original magazine publisher is claiming (incorrectly) that it holds the copyright.
- » The college where Jamie works has a small art program that would greatly benefit from the tools and materials in Pat and Jamie’s home, but this material will likely be thrown away.
- » Proposed art scholarships that Pat and Jamie discussed funding for the college and the artist’s guild will not be established because no provisions were made for them.
- » Pim will not recoup the money she paid for the work on Pat’s images.

## Scenario 2

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Zee has been a practicing artist for several decades. She has never been represented by a gallery and does not have much of a sales record, but she is still reasonably well known locally. She has gifted much of her work to friends and family and has donated works to nonprofits, libraries, and public offices all over town. She paints in a small room in her apartment, where she keeps most of her past work as well as some high-quality easels and tools she inherited. Zee has limited financial resources, little market potential, and no estate plan.

## Possible Opportunities

- » Zee works to create a program for artists to donate more work to area organizations, including her own after she passes.
- » Zee bequeaths her tools, easels, and other supplies to a local school.
- » Zee grants the copyrights in some of her works to the library, which wants to use them in its promotional materials.

# The Artist Client

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Reviewing so many years of my work has shifted the way I view myself as an artist. I now give my work and myself the respect they deserve.

CALL ARTIST KAZUKO MIYAMOTO

## Getting to Know the Artist Client

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As you know, it is important to get to know your client. Understanding relationships, preferences, goals, concerns, and prospects are essential to anticipating and resolving the variables that challenge good planning.

To borrow from *Casablanca*, artists are just like any other client, only more so. Art is an unusual asset, and artworks are often intricately intertwined with many aspects of a client's life. For many artists, their artwork is intensely personal, representing not just a professional life's work but also an expression of self, a personal history, and a conduit of emotional experience. It is not uncommon to hear artists describe their work as being akin to children.

Understanding the artist's practice is part learning who they are as people and part learning their

business. Artwork may have been sold, donated, or given away, or may be held in consignment by another party, so who owns or possesses a given work and under what terms can vary greatly. It is important to have a thorough understanding of the client's business and sales history as well as any supporting documentation—sale, consignment, and representation agreements; transfers of copyright; appraisals; storage or studio leases. The artwork may factor into other relationships and considerations as well. Heirs may have a more complicated interest in the artwork than they might in other kinds of professional work product. Artwork may be created or stored in the home, or in the homes of friends and family. Valuation is further challenging as both the emotional and financial

value of a given work may be subjective or subject to change.

Learning more about the artistic activity component of the artist's work can also benefit your relationship with the client. The more you know about both the techniques and the business of photography, the better you can serve the photographer client.

Being able to “speak the language” will help you communicate with the client and enhance your own understanding of the client's best interests. Many attorneys with interests or experience in different artistic disciplines have greatly enjoyed working with artist clients. Additionally, a client well served may provide you with many referrals from artists in their creative network.

## Framing the Artist's Legacy

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For all these reasons, making plans around the disposition of the work can be personally daunting for the artist client and challenging for the estate planning attorney. Planning a legacy is related but distinct from planning the estate. The artist may not know exactly what they want, but in discussing

goals and concerns, the attorney and artist can work together to ascertain what legal vehicles will best enable the estate plan and the desired artist's legacy.

The following questions help to frame a conversation about legacy:

How do you want to be remembered?

How do you want your work to be remembered?

Do you want your work to be protected? How?

How do you want your work to be presented, collected, or sold?

How do you want your equipment or other arts-related materials to be used or disseminated? What is the value of this equipment?

Besides your artwork, how do you want your own art collection to be handled?

What do you think your impact has been, however you define it?  
What would you like it to be?

Do you want or intend for your work to generate income for others?

Do you want to support any particular group, location, or charity?

Who could be a steward for your legacy?

How do you want your unique personal papers and ephemera to be handled?

These are challenging questions, and for the most part they are questions only the artist can answer. In making these decisions, the artist may draw upon the guidance and opinion of family, friends, colleagues, and professional relations such as dealers.

In some cases it is left to motivated heirs to construct a legacy for the deceased. They may draw upon all these relationships as well as whatever documentation is left behind, or

conversations they had with the artist. When Belgian painter Philippe Vandenberg died in 2009, his children worked extensively to plan and frame a mission for his estate and legacy.

**Hélène Vandenberghe** recounts the process and lessons of working, along with her siblings, to establish the Estate Philippe Vandenberg “to foster an appreciation for the work of [the artist] on an international level.”

## EXPERT OPINION

# Managing the Estate Philippe Vandenberg

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BY HÉLÈNE VANDENBERGHE

Every artist is different and so is every estate. But all estates share the common objective of honoring the artist's legacy and mining the actual work that is still actively engaging the contemporary art world. The effective management of an estate requires a team whose knowledge spans a significant number of areas and exhibits the inherent foresight to seek out expertise.

I have two brothers, Mo and Guillaume, and we were very close to our father. He would always talk to us about life, books, art, and ethics, and you could say that we grew up in the studio. He also worried about what would happen to his work when he died, and my brothers and I would always reassure him. “Don’t worry,” we’d say. “We’ll take care of everything.” Little did we know when we made that promise what lay ahead. When my father died in 2009, it came as a huge shock. We suddenly found ourselves responsible for his studio and thousands of works of art, ranging from paintings and drawings to handwritten manuscripts. Hardly any of the work in the studio had been exhibited, there was no gallery on the scene, and my father had died without making a will. We’ve kept our promise and have been managing the Estate Philippe Vandenberg since 2010, and will continue to do so. We see it as both our duty and privilege and cannot imagine it any other way.

As an estate we have three objectives: the first is the management of the collection and the studio; the second is to facilitate research into the oeuvre; and the third is to make the work accessible through exhibitions, books, and sales.





Mo, H  l  ne, and Guillaume in the studio, 2016. Courtesy of the Estate Philippe Vandenberg.   Joke Floreal



Guillaume, H  l  ne, and Mo in the studio, 2016. Courtesy of the Estate Philippe Vandenberg.   Joke Floreal

This is core to our mission and business. We are currently working with nine people on around eight to ten projects a year, with an annual operating budget of approximately €100,000 EUR (approx. \$117,000 USD, 2018).

## 1. Managing the Collection and Studio

The first thing we did after my father passed away was to close the studio. We stopped all collaborations and sales, which bought us time and allowed us to reflect upon the next steps. As a result, we didn't make hasty arrangements.

My brothers and I also spent a lot of time talking, contemplating our options. What were we going to do? What could we do? What would our father have wanted? Do we have the money? Do we have the time?

I'm an art historian by training. When my father died, I was working as the artistic advisor to the CEO of the Centre for Fine Arts (BOZAR) in Brussels. My brother Guillaume is a filmmaker and my brother Mo is an architect. I decided to quit my job in order to focus on the estate and my brothers agreed to help me whenever they could. My work involves the full-time management of my father's estate and the part-time management of the business partnership with my brothers. In our arrangement I'm responsible for the general management of the estate, Guillaume is responsible for all prints and reproductions of the artworks, and Mo looks after the studio and takes care of the layout and presentations of the artwork and exhibitions. But we decide everything together, and depending upon our respective schedules and priorities the tasks can change.

In the beginning, we spent a lot of time in conversation with professionals: artists, curators, museum directors, and collectors. We not only sought their advice about managing the estate, but we also asked their opinion on the quality of the work and its relevance within an international context. As children of the artist, it was difficult at times for us to remain critical and objective. Nonetheless, we maintained our commitment to the process. We needed to understand the full scope of our situation and believed these conversations would give us a better sense of our position and ability to make informed decisions regarding the future of the estate.

We spent a year devising our strategy and defining our goals. Our primary objective would be to keep our father's work alive on the international stage, and every decision we take is weighed against this consideration. We established a private partnership and drew up a contract between the three partners (my brothers and I) that stipulates how our shared capital is managed. The contract stipulates how we will share the incomes, how we decide what works can be sold and which ones we want to keep, and what happens with the estate if one of us dies. The contract took three years to finalize and is fourteen pages long. While this might seem like an incredibly long time, it was absolutely vital to get the document right. We also decided not to appoint an external board but to seek specialist advice on a case-by-case basis. As a result, we have the final say on everything. Seven years down the line, I am proud to say that the arrangement is a success.

Another key consideration during this time was the physical safety of the artworks. We needed to change the studio from a workspace to a storage and presentation facility. Mo





Studio visit, 2017. © Estate Philippe Vandenberg



Studio visit, 2017. © Estate Philippe Vandenberg

redesigned the interior and made new storage boxes for the paintings and drawings. It was a three-year job, and even now we're still trying to solve certain conservation issues. However, all of the works are now secure and the studio has become the ideal location to host site visits, tours, and presentations. My brother Guillaume spent a significant amount of time photographing and cataloging the collection.

## 2. Facilitating Research into the Oeuvre

A good database is a basic research requirement for any artist's oeuvre. We immediately identified the need for a complete inventory of our father's work with associated records pertaining to the medium, provenance, exhibition history, sales records, and bibliographic data. It's a monumental task. Not only do we have to trace the information, but it then needs to be entered into the database and cross-referenced. Needless to say, it's a work in progress.

We spent a long time looking at different types of software before we discovered a small Belgian company. They are designing a custom-made database for us, using an online platform that will allow us to cross-reference our records. The interface is easy to use and turned out to be very affordable when compared to the prices quoted by other international companies. Our website and database are designed to be interlinked.

This database will provide the content for our catalogue raisonné. Our physical archive, which includes documentation, correspondence, photographs, and texts, helps us to produce a catalogue entry for every object. But it's equally important for people to understand the context in which the work was made and its philosophical foundations.

Once we had tidied the studio, we ended up with a mountain of boxes. But none of us had the courage to examine the contents in detail. Sometimes we'd take a box home and start to sift through it—but we soon realized that it was a job for a specialist. As we have a good relationship with Ghent University, we decided to donate the archive to the Department of Art History. A specialist is now working through the archival material and compiling a catalogue, with the added benefit that students are being allocated specific research tasks. For us, this is the best possible outcome: we know that the archive is safe, publicly accessible, and being worked on by qualified professionals. A good contract is important, and we have stipulated that the estate retains permanent access rights to the records and digital files, and also owns all of the copyrights.

It is vital that our father's work is regularly reappraised and reinterpreted if it is to remain relevant. Every artwork lives in relation to its context. As the context changes so too does the interpretation. Creating this synergy is the lifeblood of art. We therefore invite artists, curators, and researchers into the studio to discuss the work. It's interesting how many things come out of these meetings. A good artwork is able to enter into a dialogue with every new context. But the conversation will always be different. This, in turn, results in new exhibitions, books, and research projects. What we hope to have triggered is a never-ending, self-perpetuating process that enables our father's work to reach new audiences.



Portrait of Philippe Vandenberg, 2008. Courtesy of the Estate  
Philippe Vandenberg. © Jean-Pierre Stoop

### 3. Making the Oeuvre Accessible

As I've just mentioned, accessibility is extremely important, and for this reason, we've decided to open the studio to the public. We receive visits from many schools, students, artists, and other interested parties. As an estate, our unique capital is knowledge. And our aim is to share this with the students and volunteers who help us with different aspects of our work, including conservation and documentation.

My father was what you might call an "artist's artist," and fellow artists, in particular, have been very supportive of the estate. They have proven to be the best ambassadors for the work and it is thanks to them that my father's paintings and drawings have re-entered



the international art market. It all began when I was invited, just after my father's death, to curate a Vandenberg exhibition. I didn't think it was a good idea because I'm too close to the oeuvre. So I asked the Belgian artist Berlinde De Bruyckere, a good friend of mine, to visit the studio. It was a meeting that led to her curating two exhibitions and producing a book. We've subsequently worked with other artists, including Koen van den Broek, Dirk Braeckman, Walter Swennen, Harald Thys, and Jos de Gruyter. It's fascinating to discover new facets of my father's work through the eyes of artists, each of whom sees it differently and often in relation to their current projects. For us, it is a very important way of keeping the work alive in a contemporary context.

Related to this is the need to realize sales, exhibitions, and publications. The work needs to circulate. We therefore decided to find an international gallery with an interest in positioning an unknown artist on the international stage. We were incredibly lucky to be brought into contact with an important international gallery, who have been absolutely amazing and have helped us in every respect.

As children of our time, we use the communication channels at our disposal, which inevitably includes social media. We have a Twitter account, a Facebook page, and a website where we publicize the latest news about the estate. We consider these to be important tools since they allow us to reach a wide audience. As we strive to keep the work of our father alive, we focus not only on the established institutions, but also on the people of our own generation and the ones to come. For it is through them that the work will continue to influence future generations.



Hélène's story powerfully illustrates the need for and benefit of effective estate planning. The Estate Philippe Vandenberg is exceptional in its having heirs with the commitment, knowledge, foresight, dedication, and legal standing to nurture the estate in the absence of an estate plan. This will not be the case for most artists. However, many such decisions can be made during an artist's life, and the estate plan can account for the time and money needed to make much of this happen.

This narrative also shows a wide range of potential options for an artist's legacy as well as the diverse entities—artists, dealers, collectors, students, universities, et al.—who may be interested in or benefit from the planned management of an artist's collected works.

## Client Classification

This workbook is written from the perspective of planning for a professional artist client, though basic principles apply for the casual, part-time, hobbyist, or retired artist as well. The arts can factor into estate planning in a variety of ways. There are different considerations for the practicing artist versus the art collector versus the dealer. In the eyes of the IRS, the role of the client vis-à-vis a particular artwork impacts the tax implications, including what art-related deductions are available for expenses, charitable donations, and losses; taxation on sales; and whether the work is a capital asset.

CLIENT AS **Artist** > The artist/owner created the artwork

CLIENT AS **Dealer** > The artist/owner sells artwork created by other artists for profit

CLIENT AS **Collector** > The artist/owner collects and owns works created by other artists, primarily for personal enjoyment

CLIENT AS **Investor** > The artist/owner acquired work for economic reasons (rare)

	Art-Related Expenses	Charitable Deductions	Tax on Sales	Losses	Capital Asset?
Artist	Deductible as business expenses (IRC §162)	Limited to cost of materials only	Ordinary business income	Deductible as business losses	Ordinary income property
Dealer	Deductible as business expenses (IRC §162)	Fair market value or cost basis*	Ordinary business income	Deductible as business losses	Ordinary income property
Collector	Not deductible	Fair market value or cost basis*	Net capital gains taxed at 28%	Not deductible	Capital asset if held >1yr and not a gift from original artist
Investor	Deductible as investment expenses (IRC §212)	Fair market value or cost basis*	Net capital gains taxed at 28%	Deductible as investment losses [IRC §165(c)(2)]	Capital asset if held >1yr and not a gift from original artist

\*The amount of a charitable deduction for a gift of artwork IRC §170(e) from this type of ownership will depend on the nature of the recipient organization. If the donee organization's purpose is a "related use" to the artwork, such as a museum, the donor can deduct the fair market value. If not, only the donor's cost basis can be deducted. This difference can matter a great deal for works that have appreciated significantly in value. Consult a tax professional for further guidance on these issues.

## Note: Professional or Hobbyist?

The IRS distinguishes between professionals (those who engage in an activity for profit) and hobbyists (those who engage in an activity primarily for enjoyment), which can have broad implications for deducting expenses. The IRS "presumes that an activity is carried on for profit if it makes a profit during at least three of the last five tax years, including the current year." Professional artists often experience irregular and erratic income patterns based on dips in sales, gaps between exhibitions, and other factors, and artists are often challenged on claimed business deductions. For more information, see IRS Publication 535—Business Expenses.



# The Estate

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Remember that you've been disciplined for decades in creating your life's work. Maybe compared to that, applying some of that discipline in organizing and documenting your art might be a breeze.

[CALL ARTIST MARIO MARTINEZ](#)

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In order to plan the artist's estate and assess what resources are available for a legacy, it is of course necessary to ascertain what those assets are. Artists will have some combination of typical assets like any other client—cash, investments, real property, and so on.

However, artwork is an unusual asset that raises several issues including physical possession, care and maintenance, valuation, and intellectual property rights. This section explores these aspects and invites professionals to share some insights into the importance of these qualities.



# Inventory

Assessing an artist's estate requires not only ascertaining what an artist owns, but also their work history, contractual relationships, and life's work. An artist will be best prepared to engage in estate and legacy planning when they have a functional inventory of their work. For our purposes, an inventory refers to the systematic and

comprehensive cataloging of an artist's complete artwork, related documents, ephemera, and records. The inventory process helps to track and categorize an artist's career and can itself serve as a kind of legacy.

## A full inventory should cover the artist's entire creative output and track the following information:



**Inventory  
Number**



**Locations  
(exhibited, stored, owned)**



**Title**



**Value/Price**



**Date**



**Exhibitions**



**Medium**



**Installation & Care  
Instructions**



**Size**



**People & Institutions  
Involved (if any)**



**Images**



**Notes**

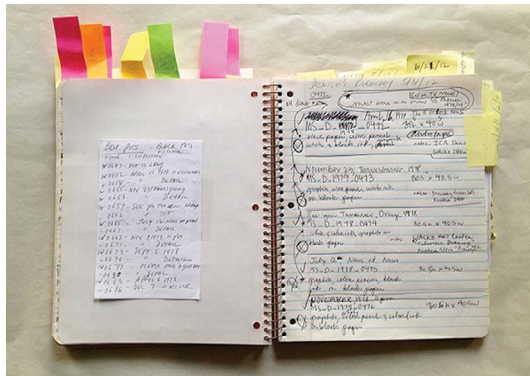
The Joan Mitchell Foundation's Creating a Living Legacy (CALL) Career Documentation for the Visual Artist: An Archive Planning Workbook and Resource Guide (see Additional Resources, page 77) provides an in-depth guide for the importance of and procedures of creating, maintaining, and utilizing a comprehensive inventory of artwork. It further defines and expands on each of these elements and offers a variety of alternative

methods and approaches. We encourage you and your artist clients to make use of this free resource.

The inventory itself can take many forms, and the artist should choose whatever best suits their individual needs, situation, and resources. If the artist is starting from scratch, the task may seem overwhelming. Once a system is in place, diligent management can keep the inventory fresh and

## Types of artist inventory systems:

### Analog Record



CALL Artist Mimi Smith's analog record

### Spreadsheet

INVENTORY NUMBER	DATE	TITLE	DIMENSIONS	MEDIUM	LOCATION	NOTES	IMAGE
CH18C0001	2013	Sunbathes	12.8" x 18.8" (Mixed)	Collage	MTC Studio, Huxley	From The Series Of New Collages After Pastors From The Gulf Of Mexico	
CH18C0002	2013	Dark Spout	10" x 12" (Mixed)	Collage	MTC Studio, Huxley	From The Series Of New Collages After Pastors From The Gulf Of Mexico	
CH18C0003	2013	Coppertone	10" x 12" (Mixed)	Collage	MTC Studio, Huxley	From The Series Of New Collages After Pastors From The Gulf Of Mexico	
CH18C0004	2013	City View	10" x 12" (Mixed)	Collage	MTC Studio, Huxley	From The Series Of New Collages After Pastors From The Gulf Of Mexico	
CH18C0005	2013	Pump	10" x 12" (Mixed)	Collage	MTC Studio, Huxley	From The Series Of New Collages After Pastors From The Gulf Of Mexico	
CH18C0006	2013	Chop Bunk	10" x 12" (Mixed)	Collage	MTC Studio, Huxley	From The Series Of New Collages After Pastors From The Gulf Of Mexico	

CALL Artist Christy Rupp's Excel spreadsheet inventory

### Database

Field	Value
Title	Shadow Catcher (2006)
Date	2006
Dimensions	10" x 12" (Mixed)
Medium	Collage
Location	MTC Studio, Huxley
Exhibitions	<ul style="list-style-type: none"> <li>2006 - MTC Studio, Huxley</li> <li>2007 - MTC Studio, Huxley</li> <li>2008 - MTC Studio, Huxley</li> <li>2009 - MTC Studio, Huxley</li> <li>2010 - MTC Studio, Huxley</li> <li>2011 - MTC Studio, Huxley</li> <li>2012 - MTC Studio, Huxley</li> <li>2013 - MTC Studio, Huxley</li> <li>2014 - MTC Studio, Huxley</li> <li>2015 - MTC Studio, Huxley</li> <li>2016 - MTC Studio, Huxley</li> <li>2017 - MTC Studio, Huxley</li> <li>2018 - MTC Studio, Huxley</li> <li>2019 - MTC Studio, Huxley</li> <li>2020 - MTC Studio, Huxley</li> <li>2021 - MTC Studio, Huxley</li> <li>2022 - MTC Studio, Huxley</li> <li>2023 - MTC Studio, Huxley</li> <li>2024 - MTC Studio, Huxley</li> <li>2025 - MTC Studio, Huxley</li> <li>2026 - MTC Studio, Huxley</li> <li>2027 - MTC Studio, Huxley</li> <li>2028 - MTC Studio, Huxley</li> <li>2029 - MTC Studio, Huxley</li> <li>2030 - MTC Studio, Huxley</li> </ul>

Sample artwork record of a piece by artist and CALL Pilot Advisor Neal Ambrose Smith, created in Joan Mitchell Foundation's custom-built database

accurate with minimal effort. Many artists hire an undergraduate or graduate student from a local archives, art, or art history program to assist in the process; some foundations may offer grants to support this work. There are also many software programs designed for this general purpose. Those aimed at commercial galleries tend to be expensive and focus on sales data. Some programs are on a subscription basis and hosted in the cloud. If the client uses such a program, the password and subscription fees need to be accounted for or all this good work could be lost.

An artist's legacy is made up of more than just the artworks they made over the course of their career. Personal and professional correspondence, photographs, audio and video recordings, libraries, studio materials, and personal art collections are all things that can greatly impact the continued health of an artist's market and reputation. These materials are generally thought of as separate from, but supporting and enriching the understanding of the artwork an artist created during their life. Stories behind the works can provide greater context, including the choice of materials, how they were used, the reason for work, and any other background information.

It can be a daunting and costly task, though, to organize, conserve, house, and provide access to these materials, and there are seemingly endless possible methods and systems for doing so.

**Katy Rogers**, Program Director of the Dedalus Foundation, offers insight on her fourteen years working on a single artist: Robert Motherwell.

## The Artist's Archive: Increase Accessibility, Increase Audience

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BY KATY ROGERS

There is no one perfect way to create an archive or lay the foundation for future research. These systems are very much informed by the way the artist worked and maintained records over a career. A professional archivist will contribute a great deal to this process in being able to provide varied and well-informed options for the estate.

Robert Motherwell left his foundation tens of thousands of documents and photographs that included studio records, childhood photographs, images of early states of paintings, collage materials, and so much more. Each of those items has influenced my own research and helped me to present a more holistic picture of Motherwell as an artist and to keep his legacy alive. The materials have also helped me encourage scholars, curators, and students to find new ways to appreciate his art and his writings. He didn't catalogue any of his ephemera, but the estate and foundation made sure that these materials were preserved and that a system was put into place so that people could access them.

A clear internal consistency is key to the success of these systems. In developing an archival system it is primarily important to consider the needs of future users and make sure that the systems are not so idiosyncratic as to be undecipherable later. Investment upfront in a good archival system, adequate storage, and conservation can make a huge difference in exposure for the artist by encouraging interested parties like curators, dealers, scholars, and students to research the artist. Hiring an archives or collections professional can save time and money in the end because they will focus on implementing universal best practices and a good specialist can set up a system that can be used by laypeople. If the budget is small, an estate may be able to work with graduate students in local archives or art history programs. Money invested in resolving these questions will be well spent, and will leave only maintenance costs down the line. The alternative, retroactively documenting or reconstituting support materials and works of art, is extremely difficult if not impossible. Sometimes executors will distribute a library or correspondence or work by other artists without taking the time to review those materials and record them. They might not track where or when artworks were sold or take photographs of the fronts and backs of the pieces for future reference. It will be more expensive to track where or when artworks were sold without good records. It is best to slow down and be thorough, regardless of whether the assessment and recording of materials takes place during the artist's life or posthumously.

An artist or artist's representative can benefit from the experiences of others. Don't hesitate to reach out to or join professional organizations like the College Art Association, Volunteer Lawyers for the Arts, the Art Libraries Society, or the Catalogue Raisonné Scholars Association. Reach out to foundations, estates, or archives you may know of or





Painting materials in Robert Motherwell's Greenwich studio, 1974. Courtesy of the Dedalus Foundation, New York



View of Robert Motherwell's personal and professional archives housed at the Dedalus Foundation, New York. Courtesy of the Dedalus Foundation, New York



admire and see if they might be able to give you specific advice. For questions regarding conservation of materials, the Northeast Document Conservation Center may be of assistance.



View of Robert Motherwell's studio library housed at the Dedalus Foundation, New York. Courtesy of the Dedalus Foundation, New York

Why is it so important to diligently preserve support materials? Many young scholars are eager to identify underexposed research topics for theses, dissertations, articles, and public presentations. A conservator may be interested in scientifically testing paints used by the artist in order to form an understanding of materials used by particular groups of artists during particular eras. A curator may wish to put together an exhibition and need assistance tracking down sold works. Additionally, many exhibitions now display archival and personal materials in tandem with artworks. A gallery may create a thematic exhibition (like husbands and wives or artists of a certain region) and need contextual information gleaned from archival correspondence. If an estate can efficiently provide information, the artist will have a much better chance of being included in all of these opportunities.

It is impossible to anticipate what materials might be of most interest to future scholars and curators. Research is a creative endeavor. Much the same as a painter before a canvas, a researcher explores (archival) materials and is inspired by them. Research is

based nearly as much on interpretation and expression as it is on fact. That said, an artist and their family can prioritize the organization and preservation of certain materials that make sense for that particular artist's narrative. An example of this might be letters related to an important social group the artist belonged to. If materials are sensitive, they can be restricted until a certain period after the artist's death.

The estate itself can also benefit from these resources. Knowing where a work is located both within the estate's collection and out in the world will enable the estate to pull together exhibitions that may lead to sales. Having adequate photography will allow the estate to publish artworks or to put good quality images on social media, which may help expose new audiences to the artist. Finally, preserving these materials will make it easier for the estate to pursue more intensive projects such as a catalogue raisonné, which aims to fully document all works by an individual artist and serves as both a way to establish the authentic oeuvre and as a springboard for future scholarship.

It is most important to remember that these are the things that live on after an artist is gone. Archival and related materials are not static; they can inspire and activate the same way an artwork can.



Robert Motherwell working on collages in his Greenwich studio, 1976. Courtesy of the Dedalus Foundation, New York



## Storage, Location, & Care

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A thorough plan for the disposition of artworks will matter little if the art itself is lost, inaccessible, damaged, or inadvertently thrown away. Creating and maintaining an inventory can impose order in cataloging the scope of a client's work, but the physical location and condition of the art must also be considered.

There are financial issues at stake here. Keeping artwork in good condition can have significant financial ramifications down the road. Condition problems compromise the integrity of a work and reduce its market value. Works that are lost, thrown away, or abandoned will have no value to the estate at all. Artists may also have strong opinions about the future care of the work. One piece might require only specific techniques while for others an

artist might prefer deterioration or change over time as part of the artwork itself.

Furthermore, the costs of storing, shipping, and maintaining artwork must be accounted for in creating the estate plan. If the client rents a studio or storage unit, for example, money should be set aside to continue paying the lease for as long as is needed. Time, effort, and funds will be expended in sorting out even the most organized studio and seeing that artwork or other materials reach their intended destinations undamaged.

Art storage and conservation are big business, and there is a range of options available to suit different budgets. The artist's own preparations and guidance in this area are essential.

### Note: Whodunit?

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Many artists also collect art. It may be on their walls, in their studios, or in storage. Signed pieces should be identifiable, but what about that unsigned work over there—is that a radical departure in style, a past phase, or the work of someone else altogether? If the artist shares studio space, works may be intermingled or perhaps multiple artists collaborated on a joint work. Was it a gift, or is it just being stored here temporarily? Such uncertainty can create problems for the estate. During life, the artist client is in the best position to identify all the artwork in their possession and avoid unnecessary mysteries.



**In planning for the physical care of artwork, the following list of topics and attendant costs should be considered:**



**Location(s)**

- » Where is the artwork?



**Type of facility**

- » Is it a studio space, professional art storage, personal storage, or domestic setting?



**Duration & Terms**

- » Is the space owned (by whom?) or under lease?
- » What are the terms, costs, and duration of the lease?
- » What happens when the lease expires?



**Access**

- » Who has access to the space and by what means?
- » Who has the right to remove items?
- » Does someone have access to the inventory as well as the artwork?



**Organization**

- » Is the work stored in an organized manner such that a given piece could easily be found?
- » Are there external labels to aid identification?



**Climate Control**

- » Is the artwork suitably protected from the elements and changes in climate?
- » Does or will the artwork require specialized climate-controlled storage and has such a facility been located and budgeted?



**Custom Storage or Shipping Containers**

- » Is the work kept in custom storage materials that should be retained?
- » Will the work require custom storage materials in order to be moved or stored long-term?



**Conservation**

- » Does the artist have older works in need of conservation or repair?
- » Is it preferable for the artist to make or supervise the repairs during their life or to provide instructions for later care?
- » Will alteration, revision, and/or restoration be authorized? Prohibited?



**Care Instructions**

- » Does the artwork have any particular maintenance considerations given its format, material, location, or condition?

# Agreements & Relationships

Artwork in the estate, both the physical object and the intellectual property, may be subject to agreements that impact their value or ownership rights. The estate planning attorney should have a thorough conversation with the artist client regarding past contractual agreements. Even where an artist client thinks agreements no longer apply,

written or verbal contracts may nonetheless be enforceable. Some contracts may have implications or stakes that will survive the artist's passing. It may also then behoove the artist to document, renegotiate, or terminate such contracts while the artist is still living.

## A variety of agreements may factor into the client's practice:

### Representation Agreements

- » The artist may have a contract in place with an agent or gallerist. Such agreements may involve a percentage of sales or commissions, either of the artist's total output or specific to certain artworks or locations. (See Note: Representation Agreements, page 34.)

### Consignments

- » The fine art gallery business largely uses the consignment model, whereby the artist retains title in the work while a gallery or representative has the right to sell it, sharing proceeds by a predetermined split. In practice such arrangements often lack written agreements.

### Assignments

- » An assignment transfers the owner's interest in a copyright to another party on a permanent basis. The assignment may be for one or all of the individual copyright rights. A transfer of copyright ownership must be in writing to be valid. Any rights that have been assigned have permanently left the estate, subject to termination rights. (See Valuing Intellectual Property, page 42.)

### Donation Agreements

- » An artist donating work to an institution may wish to create a donation agreement delineating the terms, restrictions, and financial support that accompany the artwork. (See Gifts, page 63, and Donations, page 64.)

### Licenses

- » A license grants others the use of a copyright for a limited period or purpose. The rights may be defined however the owner wishes, as copyrights contain a number of separate rights that can be contracted individually or in combination. (See Valuing Intellectual Property, page 42.) Licenses may generate one-time fees upfront or create royalties, depending on how they are structured.
- An exclusive license means only that party can use the material for the contracted purpose (e.g., only this greeting card company will be able to use this painting on cards and calendars).
- A nonexclusive license means the owner remains free to enter agreements with other parties to use the same material in the same way (e.g., allowing several stock photo companies to include the same photograph in their portfolios).

Your artist client may have one or more representatives with whom they have contractual and personal relationships regarding their work. These relationships take many forms and may be limited to a particular group of work (e.g., all the paintings in an exhibition at the gallery); a geographic area (such as representation throughout New England); or even a universal deal (a percentage of everything an artist sells through any source, akin to an agent.) As part of the process of assessing the artist's holdings, you will want a full understanding of these relationships and whatever obligations they hold over the artist and the artwork.

Ideally, an artist's inventory will keep track of contracts and consignments for each work. In practice, however, artworks (and sales proceeds) can go astray. Once the physical artwork has left the artist's control, there is some degree of risk. A consigned piece could be kept by the gallery on an open-ended basis, and forgotten or unknown, never return to the estate. Galleries are also a challenging business model, as they are so dependent on the cultivation of specific tastes and client bases, and have high failure rates. Unfortunately, in many cases

struggling galleries will use sales from one artist's work to pay a prior artist's due. Since galleries have few assets, artists' work is at risk in bankruptcy proceedings. More than thirty states now have specific statutes that protect consigned fine art and sales proceeds by holding them in trust for the artist. It is better though to reclaim physical possession at the first sign of financial distress than to have to engage as a claimant in a bankruptcy.

For better or worse, this is a relationship worthy of review. Gallerists could be good resources in crafting an artist's legacy or in assisting with the ultimate management of the artwork. A gallerist is an individual at a private commercial art gallery engaged in the sale of artwork. Generally speaking, they have practical, reputational, and financial interests in the artist's work and can collaborate with the estate to continue bringing work to the market in appropriate ways. Those same financial stakes can pose a serious conflict of interest, however. The short-term reward of immediate sales, for example, may not be in the long-term interest of the client's estate.

## Note: Representation Agreements

There may or may not be written contracts capturing this relationship. Gallery representation is commonly a "handshake" or "trust" business. Artists enter the relationship for a variety of reasons at different stages of their careers. Sometimes an eagerness for any representation at all can result in unfair deals. Often artists know on a gut level whether the relationship is good or not. The estate planning process offers an opportunity to commit verbal agreements to writing or exit bad relationships.



## Unique Situations

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Understanding one's client is an important part of the attorney-client relationship and the estate planning process. In working with artists, understanding major aspects of the client's artwork can be just as important. Contemporary artists may work in any number of media and styles that pose particular challenges in planning for the physical care and disposition of the works, as well

as for long-term goals for the artist's work and legacy. **Jill Sterrett**, Director of Collections at San Francisco Museum of Modern Art, and Voices in Contemporary Art Board President, illustrates the importance of working through relevant issues with the contemporary artist client.

### EXPERT OPINION

## Managing Variability

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BY JILL STERRETT

An artist is working on-site on a new installation, and everyone wonders if it will come together for the opening. What results is spectacular, and the rumblings heard next are all too familiar. *Let's keep it.* These three words set waves of new activity in motion for art handlers, curators, conservators, registrars, and technicians. The energies that support an artist's initial installation are not the same as those that will support keeping it.

Contemporary art is about now. To operate in the present means to value agility; keeping current is, after all, key to being who we are today. Default to this brisk tempo, however, and there is a real risk of paving over a host of observations and details that will be critical to ongoing and future interpretations of the artist's work. To avoid this risk, a slower process of looking and looking again is required. What is called for is a mechanism for variable speed. At the heart of variable speed operability lie two questions: "What takes time?" and "What takes the passage of time?"

To answer the first question is to tackle the tensions that arise from too few minutes in a day. Competition among cultural, recreational, and entertainment industries has led organizations to focus on targeting and attracting audiences, managing resources, and securing funding, and to breakneck efficiencies in the way art and exhibitions go up and come down. Further, the question of what takes time begs a closer look at contemporary art forms. It's one thing to keep a painting and another to keep a complex multipart, large-scale installation. Whether it is the unorthodox and transient materials such as soot, lard, and lettuce found famously in works made in Europe after World War II or the wall drawings of Sol LeWitt, which are created for each exhibition occasion and destroyed at the end of the exhibition's run, contemporary art often confounds what constitutes

a finished work, in part because such multipart works live in boxes and crates in storage—or as a set of instructions—only manifesting as an artwork when they have been assembled according to the artist's instructions.

What about the second question? What about the passage of time? This is not minutes and seconds on the clock. This is time with the long view in mind. Take, for example, Barry McGee's *Untitled* installation first made in 1996 then reinstalled in 1998, 2004, and 2010.



Barry McGee, *Untitled*, 1996 (first installation). Photo Ian Reeves, © Barry McGee



Barry McGee, *Untitled*, 1996/1998 (second installation). Photo Ben Blackwell, © Barry McGee





Barry McGee, *Untitled*, 1996/1998/2004 (third installation). Photo Ian Reeves, © Barry McGee



Barry McGee, *Untitled*, 1996/1998/2004/2010 (fourth installation) photo: Ben Blackwell, © Barry McGee

The work comprises hundreds of drawings and found photographs in found frames installed by the artist. He often paints the wall first, giving each installation a distinct look. With McGee's work, there is an active life. Versions are anticipated. Sound methods of documentation are required. In the first and second installations, the frames hang side by side, while in the third they are on top of one another. In the fourth, McGee incorporated an architectural bulge and additional drawings. Imposing some form of false lockdown on this work would have betrayed how the artist intends the work to be in the world. It is open ended.



Traditional methods of art stewardship are guided by the principle that works of art should not change, but rather remain as they were when they were first made. And yet, for some works, the qualities of variability must be honored alongside the material makeup of an artist's creation. This allows for the idea that artworks do transform, and they live and change with each installation.

Taking into account the transitory nature of ephemeral materials, built-in physical variability, and even performative elements that characterize so much of the art of the last sixty years, keeping contemporary art is not business as usual. The challenge of managing variability in contemporary art is a driving force behind shifts in the way artists manage their estates.

For one, keeping contemporary art calls for the involvement of an entire corps of experts. As the works themselves combine the physical and the conceptual, the virtual and the contextual, there's a concurrent commingling of custodial roles. New expertise is often required, from IP lawyers and webmasters to artists and their assistants.



Become familiar with the documentation types that are routinely generated as guides for the installation of artworks. Develop proactive methods of gathering visual and written records from each instantiation of an artwork. Make this a habit since it takes time and resources, which need to be factored into each installation.

Second, the artist's role has changed. With contemporary works comprised of multiple, and often variable, components, understanding builds with each instance of display and this understanding profits from input from the artist. In this way, artists do more than create their work. They are often involved in the strategic handoff of their work over time through a series of occurrences where each instance of display is a telling chapter in the artwork's life.



It is valuable for an artist to think about what "keeping it" means. Histories are written by expert voices, using gathered evidence, and the artist's voice will always be central to the record of the work. Media artist Rafael Lozano-Hemmer has made a considerable effort to outline best practices for the preservation of his work. As Lozano-Hemmer urges, artists can rely on curators and conservators to assist in the development of preservation plans that include their voices. See: <https://github.com/antimodular/Best-practices-for-conservation-of-media-art> for more information.



Consider the life of a work with built-in variability, and what happens to it when the artist is no longer available. Are there heirs or experts who will serve as the artist's proxy for display and preservation decisions?

When planning works well, the result is a finely tuned machine that reinforces our collective commitment to art and art history, and when it works really well the rewards may be even more far-reaching because we contribute to the ways art and artists enrich and transform our lives every day.



# Valuation

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Assessing the value of artwork is a complicated proposition, but one that greatly impacts the estate plan. Financial values will come to bear on disposition, insurance, and tax questions. Personal, historical, stylistic, and emotional values also motivate legacy planning. In most cases, it will be only a subset of an artist's works that need specific consideration and custom-made planning, but you have to know which ones.

## Personal Assessment

The artist is in the best position to determine the personal value of their work. Which pieces are favorites, or most meaningful, or tied to important events? Which pieces are the best examples of a period or style? Similarly, the artist client can identify works they do not value—misfires, disappointments, experiments, fragments, unfinished works, and so on. Where possible, these stories should be captured in the inventory notes as well. A later section of this guide points

out the value to heirs in identifying and culling the unimportant artwork and ephemera. (See “Activating an Archive for Impact and Value,” page 43.)

Personal value and meaning may affect decisions regarding specific bequests, particularly to family and friends. The artist client may have to consider how to balance personal meaning with financial value in attempts to make equal gifts among heirs. If there are valuable works that are meant to stay “in the family” for personal or financial reasons, additional plans to ensure liquidity will be necessary.

The artist may be considering a trust, foundation, collection gift, or other project that would benefit or require a comprehensive corpus of the artist's work. Breaking up a collection or gifting away significant artworks could weaken the remaining value from a practical, financial, or even educational standpoint.

## Note: DIY

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Famed Russian author Vladimir Nabokov died in 1977, leaving an unfinished manuscript on index cards. He had asked that any unfinished work be destroyed upon his death, but his wife could not bring herself to do it. After her death, however, Nabokov's son published a novel based on the cards, to poor critical reception. Is this what Nabokov would have wanted?

Some artists prefer that some of their past works never be seen by the public. Sandro Botticelli burned old paintings for political reasons, and Claude Monet destroyed at least sixty canvases for being of insufficient quality. While it is somewhat shocking to think of what has been lost in those cases, many current artists may want to pursue a similar path as a means of preserving their reputations. The only way to ensure such works are destroyed is for the artist to do it.



# Professional Appraisals

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Fine art has no index of prices; every piece is unique and its value subject to a variety of shifting factors—quality, taste, trend, condition, history, reputation, demand, rarity, personal relationships, and chance. Whereas artists can assess the personal value of works, their judgment regarding the financial value may not be accurate.

Independent appraisers consider an object on its own merits and in context to propose a financial value.

**Michelle DuBois**, PhD, is Director, New England, for Winston Art Group. Here she discusses how professional appraisers approach evaluating artworks for an artist's estate.

## EXPERT OPINION

### Appraisals for Artists' Estates

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BY MICHELLE DUBOIS, PhD

A cornerstone for all estate planning is proper valuations. In addition to other possessions, artists and their attorneys must also factor in the art they created and still own, which can often number in the hundreds or even thousands of objects. Appraising a collection of art produced by a single artist requires different considerations and strategies for all parties involved.

#### Qualified Appraiser

An appraisal is a professional opinion of value based on quantifiable data. Appraising personal property does not require a professional license; therefore many people in the business of selling art also do appraisals, including dealers and auction houses. For artists and their attorneys, it is important to be cautious that no conflict of interest exists if you hire someone who is in the business of selling the artist's work. Working with an independent qualified appraiser who is an accredited member of the American Society of Appraisers and/or the Appraisers Association of America is ideal. Members of these organizations adhere to methods and ethical guidelines as outlined by the Uniform Standards of Professional Appraisal Practice (USPAP).

For estate planning purposes, the appraiser will determine the fair market value, defined by the IRS as the price that would be agreed upon between a willing buyer and a willing seller, with neither being required to act, and both having reasonable knowledge of the relevant facts.

Implied in this definition is that the appraiser is seeking the most common price in the most common market. That is usually the auction market, but for living artists, it can also be the retail (gallery) market.

## Artists' Collections and Blockage Discounts

When determining value for a collection of art by a single artist, the appraiser must take into account the fact that if a large collection went to market as a whole (or as a block), the market could be flooded with inventory, which might cause values for individual art objects to drop.

Therefore, appraisers would apply a blockage discount. There have been numerous cases in Tax Court on the subject of discount blockages for artists' estates, including the estates of David Smith, Georgia O'Keeffe, Andy Warhol, and others. Throughout the rulings, the IRS has consistently agreed that the main factor in determining the discount is the *time* it would take for objects to sell. If there are hundreds or thousands of objects, they would have to be sold over a period of time in order to maintain their fair market value, and the longer that time is, the larger the discount the appraiser applies to the current value of the collection as a whole.

An appraiser needs to consider the following when applying a blockage discount:

1. History of sales: how many pieces typically sold in a given period (usually on an annual basis) and the most common price realized for different media, size, or other logical groupings. For a midcareer artist, the most common market can be auction but is more likely to be the gallery (dealer) market. Late-career artists are more likely to have both a primary market as well as a secondary market (auction). Appraisers must consider both.
2. Rank of the artwork: determining how many total art objects are in the collection and then dividing the collection into logical groupings, including (but not limited to) medium, size, era of production, or subject matter. The condition of the art object is a consideration also. The appraiser can then rank the work by groupings, determining what is most and least desired by the market, based on research.

A discount is then applied, and here a degree of subjectivity enters in. A rule of thumb: the longer the anticipated time to sell the collection, the greater the discount on the current value. A qualified appraiser will know they need to have a detailed written explanation of their methodology as part of the report.

Blockage discount is often easier to determine for older, late-career artists and for artists' estates, but midcareer artists should be aware of this process and keep very good records of any private sales.



Art values are volatile. All the variables that go into a given appraisal may change over time, sometimes radically. The estate must account for a certain amount of flexibility and liquidity to accommodate these changes. Clients should plan to revisit appraisals made during life every few years. Recall that both the artist client's own work and the artwork they own by other artists may require appraisals.

Currently, the IRS requires professional appraisals for artwork(s) valued at \$20,000 or above. Any work with a claimed value of \$50,000 or more for tax or tax deduction purposes must be reviewed by the IRS Art Advisory Panel, a body of art professionals. Please see IRS Publication 561, *Determining the Value of Donated Property* and IRS Revenue Procedure 96-15.

## Valuing Intellectual Property

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Any artwork or other creative material in the estate may also have intellectual property rights attached, as discussed in a later section of this guidebook. The copyright in an artwork can have value that is distinct from the fair market value of the physical object and that poses multiple financial questions for the estate.

The internet and consumer media create greater opportunities for copyright exploitation than ever before. Licensing and royalty revenues are becoming significant income and value sources for an increasing number of artists. Artists working in digital media may not even have “physical” artworks in a meaningful way. Best practices in this area are still evolving. The basic principles are similar to those for appraising fine art: assessing fair market value by considering the artist's own sales, history,

and current contracts, and looking to comparable figures for similar properties.

The intellectual property may also present potential income in respect of decedent (IRD). IRD is income generated during the decedent's life that the decedent earned or had a right to collect but that has not yet been taxed as income. Sources may include sales, licenses, royalties, or other transactions. IRD is included in the estate for tax purposes. With a license prior to the artist's death, royalties accrued prior to death are treated as IRD but those that accrue after death are not. IRD does not have a stepped-up basis. Please see IRC §691 *Recipients of Income in Respect of Decedents* and IRC §1014 *Basis of Property Acquired from a Decedent* for more information.

## Non-Art Assets

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As part of their estates, artists may have a large amount of valuable non-art assets, including tools, materials, and documentation that may enhance the meaning of the client's artwork and consist of valuable intellectual property in its own right.

**Kate Haw**, Director, and **Josh T. Franco**, PhD, Latino Collecting Specialist, of the Archives of American Art, Smithsonian Institution, discuss the importance of these assets to an artist's legacy and how to incorporate them into a plan.

## Activating an Archive for Impact and Value

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BY KATE HAW & JOSH T. FRANCO, PhD

Artists and their attorneys rightly spend significant time considering how artwork and other assets should be dispersed after an artist's death, but what about materials that may not have substantial monetary value, but will help future scholars tell an artist's story and expand on their legacy? As staff at the Archives of American Art, our energies are focused on all the rare and unique materials that tell an artist's story and lead up to a finished work of art, material that we describe generally as "papers." In our (and most archivists') definition, "papers" includes material such as correspondence, snapshots, scrapbooks, diaries and other unpublished writings, financial records, home movies, audio recordings, sketchbooks, e-mails, and other materials of enduring historical value, that help to establish biography, working style, and other factors that lead to a deeper understanding of an artist's work.

We encourage artists to begin thinking about the legacy they can leave through archives well before the end of life. These are the resources that will create the foundation for future scholarship on an artist's work. Preserving them is important, and it starts with the artist.

**Here are a few things we recommend as artists begin to think about legacy:**

**1. First and foremost, don't throw everything away!**

**2. Start early.**

It's never too early to begin thinking about the kind of material that will help future generations understand an artist's work. Artists should think about archiving substantive e-mail correspondence, saving letters, organizing snapshots (and ideally identifying dates and who is pictured in them), etc. No archival repository will want to collect *everything*, but artists should think about the kinds of things that really help tell the story of their lives and work and shouldn't throw those things away or delete them.

If there is a specific place an artist would like their papers to go, it should be specified as a bequest in the artist's will. In the best-case scenario the artist will have had an opportunity to talk with their preferred repository during their lifetime to see if that repository will collect the artist's papers and to get some guidance on the language to use in the will or codicil. Typically these conversations are initiated by the archival repository, but not always. Artists should keep in mind that if they make a bequest of papers to a repository that has not already reviewed them and agreed to take them, the repository might choose to decline all or part of the bequest.

**3. Find the right repository.**

Each archival repository has a different collecting policy. If an artist has had a strong reputation in their home community but has not exhibited or sold work or had significant influence beyond that community, the artist may want to consider a local or regional



repository. If an artist has developed a national or international reputation, an archival repository that collects on a national or international scale may be more appropriate. Artists should also consider what they would like to have happen to their papers if there is not a repository that wishes to collect them.

#### **4. Keep the archive together.**

We recommend against donating segments of papers to different repositories. It makes it harder for scholars to get a broad picture of an artist's life and work. If there is a particular place an artist wants their papers to go, we believe it's best to give *all* of the papers to that place. In fact, if an artist has given some papers to Institution A during their lifetime, and then the artist or estate comes to us to offer other papers at a later time, we will typically refer them back to Institution A in the interest of keeping the papers together. Though it's sometimes hard for us to turn a collection down for this reason, we think that in most cases the greater good is served by having all of an artist's papers in a single repository. Imagine that a graduate student or even an accomplished art historian wants to write the first scholarly monograph on an artist but can only get funding for one research trip. If the papers of that artist are split between multiple archives across the country, the scholar might be deterred from pursuing the project after all. The monograph is never written, simply because of the logistical challenges presented by split collections.

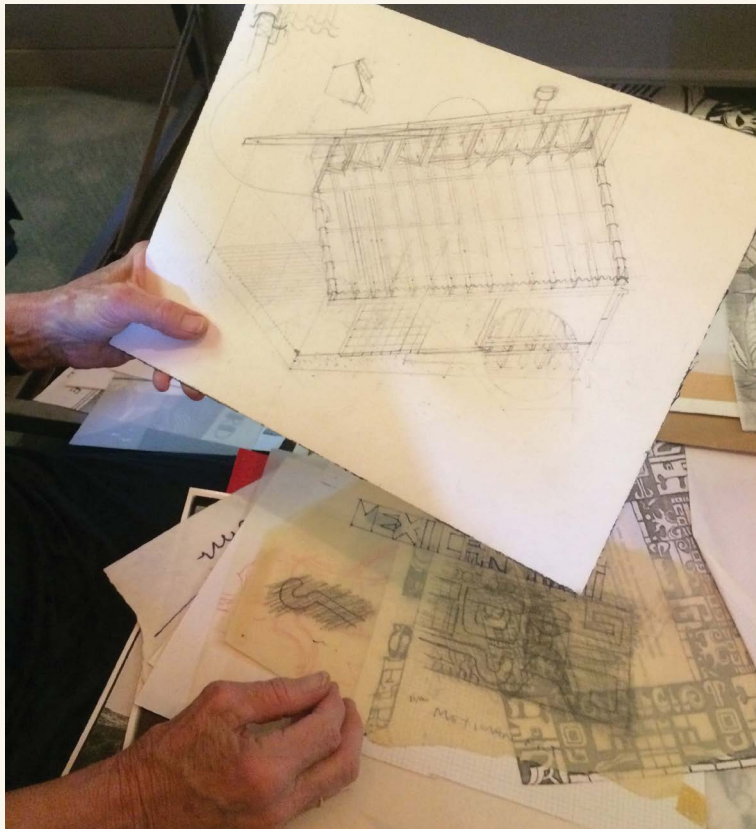
#### **5. Distinguish between artwork and archive.**

Some artists work in such a way that the distinction between artwork and archival material can be fuzzy. If an artist has strong feelings about what constitutes art in their oeuvre, executors need to know that. The more clearly an artist draws that line—preferably through delineation in a will—the better the executors of the estate can carry out the artist's wishes. Early reviews of materials with an archivist present are often helpful as artists make these distinctions.

#### **6. Decide whether to keep papers in a foundation.**

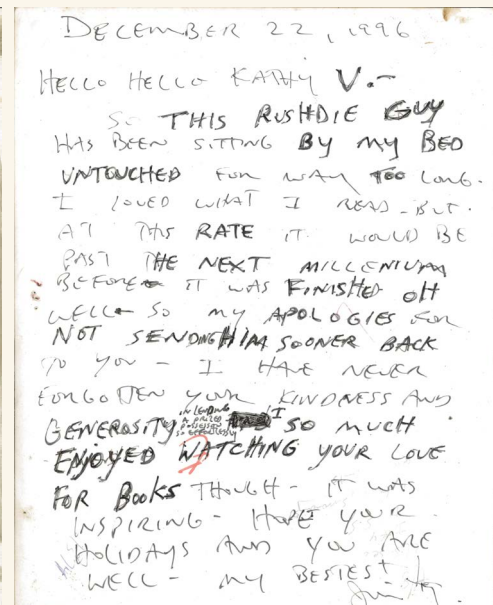
Many artists now choose to establish foundations at or before death. There can be significant financial benefits to doing this, and with sufficient resources, artists can also advance issues important to them by giving through a foundation. Some artists elect to keep their papers within the foundation temporarily or permanently, others donate them to archival repositories immediately. It's important to think about the pros and cons of keeping papers within a foundation. Some questions to consider include:

- » Does the artist want scholars to have access to the papers, and if so, will the foundation have the resources to provide appropriate access (staff to receive scholars, the expertise to properly organize and preserve the papers, a physical space for keeping the papers safe, etc.)?
- » Is digitization of the papers important to the artist? Proper digitization for preservation and (potentially) access is a complex and costly endeavor, so artists should be realistic about the resources required to make it happen.
- » What is more beneficial to the artist's legacy—keeping the papers in a foundation where they are separated from the larger context of the art world, but where access can be more tightly managed; or donating the papers to a repository where they can exist in a larger context and in conversation with the legacies of other art world figures, but where the foundation will have less control over who can consult the papers?



Architectural sketch for studio, Eduardo Carrillo papers, Archives of American Art, Smithsonian Institution

This document exemplifies two categories of documents present in the Archives. First, artists' papers are often great sources of information about studio environments. This pencil sketch lays out Eduardo Carrillo's design for his studio, built above his home in the Santa Cruz mountains. Second, like this sketch, the majority of documents in the Archives' collections are rare, unique originals.



Holiday card from Jim Goldberg, 1996. Kathy Vargas Papers, Archives of American Art, Smithsonian Institution

Archives often demonstrate unexpected connections. For example, a Christmas card from Jim Goldberg to Kathy Vargas might encourage a researcher to think about these two artists' practices in the context of one another. As Goldberg and Vargas are not associated by geography or by exhibition history in any substantial way, this archival document can open up productive lines of inquiry that were previously unavailable. This presents an opportunity for the researcher to shape a truly novel contribution to the history of American art.

## **7. Consider any restrictions on access.**

How does the artist feel about scholars or other members of the public having access to personal papers? Personal correspondence and diaries, for example, are some of the richest and most important materials scholars can use in understanding an artist's life and career, but some people are more comfortable than others with this material being accessible. If an artist wishes to donate papers to a public repository but is concerned about revealing information about their personal life, should the artist consider a restriction on access for a period of time? For example, should access be closed for a period of five years after death? Different repositories have different policies on access restrictions. If this is important to the artist, the artist should take the opportunity to discuss these concerns with the intended repository to understand the options, and should then outline any restrictions in the will.

## **8. Visit a variety of archives.**

We encourage artists to visit archives. Whether it is the repository being seriously considered by an artist or simply one nearby, spending time in archives can have a strong impact on an artist's understanding of their function. Visits afford artists an up-close view of everything from preservation methods (how materials will be physically treated) to institutional context. A university library-based archive has a different feel from a museum-based or independent archive, for instance. Additionally, visits and tours give artists the opportunity to look at existing collections to see who else is present there through their papers. They might be surprised by the mentors and friends they encounter, and this may help their decision-making substantially. People like to be with their friends!

There are many other questions for artists to consider as they think about legacy, but thinking about these eight issues should help to build a framework for considering how to handle archives.



Mock up for mural, Juan Sánchez Papers, Archives of American Art, Smithsonian Institution.

The Archives of American Art takes whatever measures necessary to conserve materials we have committed to preserving. This can include ordering custom archival boxes for odd-sized documents, such as this mural proposal mock-up from the papers of artist Juan Sánchez. Sánchez is also a participant in Joan Mitchell Foundation's Creating a Living Legacy (CALL) program.





Artist's customized archival boxes, Charles "Chaz" Bojórquez Papers, Archives of American Art, Smithsonian Institution

To the greatest extent possible, the Archives of American Art strives to maintain the artist's original order when accessioning papers into our collection. For instance, Chaz Bojórquez's papers were painstakingly organized by him and his wife, Christina. They then grouped the papers in boxes customized by Chaz with an image of his own design. After confirming with the Archives' registrar that the boxes met institutional conservation standards, it was decided the papers could remain in these boxes permanently.



The Archives of American Art is always on the lookout for new ways to activate and share collections beyond the reading room and website. In 2016, artist Paul Ramirez Jonas participated in a pilot event in which a typically private conversations was put on display. Paul sent two boxes to the office in Washington, DC, which were left unopened until the event. On a Friday afternoon, Paul and national collector Josh T. Franco joined guests in the Archives' Lawrence A. Fleischman Gallery and proceeded to open the boxes and review the contents, an exchange that normally happens in a donor's home or studio. A second one occurred with Andres Serrano at Pace Gallery in New York City in June 2017.

# Intellectual Property & Copyright

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Creativity belongs to the artist in each of us.

CORITA KENT

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An artist's estate and legacy plan must account for the entire estate, including intellectual property (IP). Creative clients over the course of their careers generate a large volume of copyrights in their expressive works; in some cases IP may be the most significant part of the estate. Intellectual property is property, capable of being valued,

owned, and distributed like any other tangible or real property. However, copyrights may be easily overlooked or underappreciated in the creation of an estate plan, to disastrous effect. As copyright protections last for the **life of the artist + 70 years**, it is essential to understand and plan for them.

## Copyright Eligibility

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The copyright code extends protection to “original works of authorship fixed in any tangible medium of expression” in the following categories [17 USC §102]:

- » **literary works**
- » **musical works, including any accompanying words**
- » **dramatic works, including any accompanying music**
- » **pantomimes and choreographic works**
- » **pictorial, graphic, and sculptural works**
- » **motion pictures and other audiovisual works**
- » **sound recordings**
- » **architectural works**

These categories encompass most of what is generally considered to be in the “arts” as traditionally construed, but note that for a variety of reasons copyright law specifically does not extend to fashion design, furniture, fonts, perfume, recipes, or anything that could be considered “useful” (the domain of patent protection).

Works must be original to receive copyright protection. Works that contain elements from the public domain or *scènes à faire* (tropes, stock characters, and the like) will only be protected to the extent of the artist’s new contributions.

## Note: Public Domain & Fair Use

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Some artists’ work uses elements originally created by other people, and that use may or may not create problems.

The **public domain** is the huge body of work that is not currently under copyright protection and thus may be freely used by anyone in anyway. This includes all work created prior to 1923, such as works by Shakespeare, Austen, Puccini, and Monet. These may be used without permission from anyone in any manner one chooses. The public domain also includes works from certain years whose copyright lapsed under then-required registration procedures, works created by the government, works deliberately offered with full permissions to the public, and other subcategories. (See chart on page 53 for guidance on whether a work may still be under copyright protection.)

Fair use, on the other hand, is an affirmative defense against claims of infringement where one author has made use of the work of another under certain conditions. Use for “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” is considered fair and thus permissible where it passes the multifactor test of “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market” [17 USC §107]. Parody—a form that requires some component of or reference to the original subject—may be considered “fair” as well. There is no blanket exception for expressive artwork, however, even where an artist’s style is “appropriation” or similar.





## The “Rights” in “Copyright”

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“Copyright” is better understood as a bundle of many different rights, as enumerated in 17 USC §106:

- (1) to reproduce the copyrighted work in copies or phonorecords;**
- (2) to prepare derivative works based upon the copyrighted work;**
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;**
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;**
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and**
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.**

These rights can be contracted away individually or all together. Granting others a copyright through a contract for a short period of time or limited purpose is called a “license.” “Assignment” means granting the rights on a permanent basis. A license may be “exclusive,” meaning the other party is now the sole owner of the copyright, or “nonexclusive,” meaning the original author or artist continues to control the copyright and can enter other nonexclusive contracts with other parties for use of the same material.

It is important to understand and remember that **copyright is separate and distinct from the physical artwork**. Unless an artist has specifically transferred a copyright through a written contract, the artist still owns the copyright in the works of art they have created, even if they are no longer in possession of the original. This applies to works that have been sold, loaned, consigned, donated, or exhibited, as well as to works that are unfinished or that have been destroyed.

## Ownership

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Copyright vests in the “author,” or creator, the moment a work is made. Thereafter, the only way to transfer ownership is through a **signed written agreement**.

There are two exceptions:

### Joint Authorship

Where two or more individuals have collaborated in the creation of one artwork, with the intention that their contributions have merged into a single work, they are considered to be “joint authors.” Joint authors each have full copyright in the artwork, including each separate right. The only limit is that neither joint author may enter an “exclusive” contract regarding a right without the other’s consent. The term of protection for a jointly authored work is life of the **surviving author + 70 years**.

### Work for Hire

The term “work for hire” is often misunderstood and misused. Under Copyright Law, a “work for hire” is a work where the copyright goes not to the artist but to the entity or individual who has hired that artist as an employee whose job it is to create such work. A “work for hire” may also apply to a

work created by an independent contractor in the following circumstances, where there is a written agreement:

- » Contribution to a collective work
- » Part of a motion picture or other audiovisual work
- » Translation
- » Supplementary work
- » Compilation
- » Instructional text
- » Test or answer material for a test
- » Atlas

In any other circumstance, the author will retain the copyright, even where the other party is claiming it is a “work for hire.”

However, do not rely on a misunderstanding in your client’s favor. Be sure you understand the other party’s expectations. Many agreements will include language along the lines of “This is a work for hire. If it is found not to be a work for hire, the author grants the [company/patron] an assignment of all rights to the work.” If the agreement includes assignment language, it is important to understand that the artist has transferred all ownership rights in the work including copyright.

## Registration

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American law no longer requires registration with the Copyright Office to secure a copyright in original works. However, registration provides substantial benefits. Registration puts the rest of the world “on notice” that the artist has created a particular artwork. Registration is required in order to bring a lawsuit over infringement. In such cases, registered works are eligible for statutory damages, an additional award of financial compensation, as well as attorneys’ fees. Works that are not

registered at the time of infringement may only receive actual damages for the amount of financial harm the copying has caused.

Registering the copyright may not be appropriate for every single work. The registration fee is \$35 per work. Collections of *unpublished* works may be copyrighted under a single registration; *published* works may be registered as one where they were published as a collection. While this can add up quickly, it can also be considered a “cost of doing

business” when putting work out in the public sphere and as an investment in protecting the artist’s work and career.

Registration for individual works is a straightforward process and can be done online ([copyright.gov](https://copyright.gov)). The username and password should be retained in the artist’s records and shared with a legacy specialist or other member of the team.

You will need the following information for each work you register:

- » **Type of work**  
This will most commonly be “Work of Visual Art”
- » **Title**
- » **Year of creation/dimensions/medium**
- » **Author/Artist’s contact information and birthdate**
- » **Contact information of any individual who is or will be handling permissions requests (“Rights and Permissions”)**
- » **Contact information for person handling the application (“Correspondent”)**
- » **Digital image(s) of the work(s) to upload**
- » **Credit card for the application fee [\$35]**

The Copyright Office will review the submitted application and, barring any issue, will issue a certificate to the designated recipient and include the listing in its database. The registration benefits will extend retroactively to the date the Copyright Office received the application.

## Photographs

Additionally, there is a special provision for **collections of photographs**. Published photographs in sets up to 750 may be registered together for \$65. To be a collection, the photographs must have been taken by the same photographer (even if the “author” is an employer in a work for hire scenario), all photographs must have been published in the same calendar year, and all of the photographs must have the same copyright claimant. To submit an application for a collection of published photographs, one must first obtain permission from the Visual Arts Division (202-707-8202). Any number of unpublished photographs meeting the same requirements may be registered together. The artist may wish to strategize and be selective with registering collections; registering individually works that have been licensed or have greater market potential may maximize potential damage awards should an infringement issue arise.

## Record-Keeping Tips

Remember to keep careful records of registered copyrights as part of a comprehensive inventory.

Naming an agent on the Copyright Office website and keeping that information updated will make it much easier for people interested in using an artist’s work to contact the estate for permission.



## Duration

Under current American law, copyright in an original work lasts for the **life of the author + 70 years**.

By definition, then, the property right will survive the decedent and must be accounted for in an effective estate plan.

The ownership period remaining on the copyright for a given work may vary, however, as copyright law has changed over the years. Works created prior to 1963, which may constitute a good portion of the creative output by current clients, may no longer be protected if they were not properly renewed.

Creation Date	Start	Term	
Works created on or after <b>1/1/1978</b>	Fixation	Individuals	Life + 70 years
		Joint authors	Life of the surviving author + 70 years
		WFH (work for hire), anonymous, pseudonymous	95 years from publication or 120 years from fixation, whichever is shorter
Works created but not published before <b>1/1/78</b>	Jan. 1, 1978	Life + 70 years, but © lasted at least until 12/31/2002. If published before 12/31/2002, then © lasts until at least 12/31/2047	
Works published between <b>1964–77</b>	Publication	28-year initial term	67-year automatic renewal term
Works published between <b>1923–63</b>	Publication	28-year initial term	67-year renewal term, but only if it was properly renewed
Works published before <b>1923</b>		No © protection as of 2007—in the public domain	

## Additional Rights

### Termination 17 USC §203 & 17 USC §304c-d

Copyright law includes a mechanism for original authors to reclaim their full copyright interests many years after contracting them away, and it is important for estate planning attorneys to know about and plan for this option. Termination applies to the transfer of any or all copyrights, be they exclusive or nonexclusive, licenses or full assignments. Termination does not apply to works for hire. Termination rights cannot be waived or assigned, but they must be properly claimed.

Regaining full copyrights can have great appeal. Termination can be quite important in situations where the original grant took place on unfavorable terms or if the property in question became more valuable than originally contemplated. The exercise of termination rights has been particularly popular, for example, among recording artists whose initial

deals with record companies provided very little compensation for songs and albums that turned out to be big hits.

Termination is a powerful tool and thus the law creates a strict procedure that must be conscientiously followed. There is a short window—five years—when a copyright transfer may be terminated, and notice of the termination must be given within ten and no later than two years prior to the effective date of the termination.

When the termination window occurs depends upon the date and circumstances of the transfer. For transfers occurring on or after January 1, 1978, the window begins thirty-five years after the grant of rights, or the earlier of thirty-five years from the transfer or forty years from publication for grants that include the right of publication. Termination rights for works transferred prior to January 1, 1978, are calculated slightly differently, per the table below, and explained in 17 USC §304c-d.

Copyrighted Work	Five-Year Termination Window Begins...	
Works in 1st or renewal copyright term on 1/1/78 and transferred prior to 1/1/78	Original copyright date + 56 years	
Copyright prior to 10/27/37 and in renewal term on 10/27/98	Original copyright date + 75 years	
Transferred on/after 1/1/78	Transfer includes right of publication	Earlier between transfer + 35 years or publication date + 40 years
	Transfer does not include right of publication	Transfer + 35 years



The effective date (ED) of the termination must fall within that five-year period. Notice must be served on the transferee subject to the following:

- » Notice must be served no more than ten, and no less than two years prior to the effective date.
- » A copy of the notice must be registered with the Copyright Office prior to the effective date.
- » Notice must be in writing signed by the person or persons holding a majority of the termination interest right.
- » The notice must comply with all the requirements set forth in 37 CFR §201.10.

Termination rights vest separately from copyright. They will permit family members or the estate to terminate a transfer in the artist's stead. However, **termination does *not* apply to transfers by will**. If your client chooses to bequeath a copyright to a non-family party, the family will not be able to exercise a termination against that transfer.

The Copyright Act stipulates to whom the termination right passes:

<b>Surviving spouse only</b>	<b>100%</b>
<b>Surviving spouse &amp; living children or grandchildren</b>	<b>Spouse: 50%</b> <b>Children &amp; grandchildren: 50% per stirpes</b>
<b>Surviving children &amp; grandchildren</b>	<b>100% divided per stirpes</b>
<b>No spouse, children, or grandchildren</b>	<b>Executor, administrator, personal representative, or trustee: 100%</b>

Termination must be exercised by a person or united persons holding a majority of the termination interest. When a copyright transfer is terminated, the ownership of the rights return to the family or estate according the table above. The copyright owner(s) are then free to exploit the right, including regranteeing them to the original transferee, if they so choose.

Agreements made by the transferee under the original grant will endure, but subject to the reclamation of the rights. So, a derivative work can continue under its full contract but that party cannot make new, additional use of the underlying property without the consent of newly restored copyright owner.

Termination applies to the original transfer of the artist's copyright to another party, but it will not extend to derivative works following that transfer. Once a transfer has been terminated, any agreements made by the transferee under the original grant from the artist(s) will endure, subject to the reclamation of the rights. For example, if the transferee has made an agreement with a third party for the creation of a derivative work, that use can continue under its full contract. However, the third party cannot then make new additional use of the underlying property without the consent of the newly restored copyright owner.

It should be noted that termination powers also apply to transfers made by the artist to separate legal entities founded or owned by the artist. If, for example, an artist has transferred copyrights to a foundation to fund their philanthropic interests, that transfer could be subject to termination by the artist's heirs. As this right cannot be waived, heirs have sometimes acted contrary to the wishes of the decedent artist in reclaiming copyrights.

## Visual Artists Rights Act of 1990 (VARA) 17 USC §106A

With the Visual Artists Rights Act (VARA), additional rights protecting a creator's authorial interest and reputation joined the Copyright code. These rights, also known as moral rights, move closer to European models protecting an artist's inherent and continued interest in their physical artwork, even if it is no longer in possession. These rights are limited enhancements to the Copyright Act and will likely be meaningful for only a few works, if any, in an artist's estate. However, where they are valuable, it is essential to understand the benefits the act confers. For some works, VARA rights last as long as the current copyright term, and thus should be accounted for in an estate plan.

VARA, as the name implies, applies only to the visual arts and does not benefit musicians, writers, performers, or creators in other disciplines. To be eligible, an artwork must be in one of the traditional fine arts categories: paintings, sculptures, drawings, and prints or photographs (single copies or signed and numbered limited editions of up to 200).

### Note

Moral rights remain with the artist even if ownership of the copyright and/or physical object has been transferred. Moral rights cannot be transferred, but can be waived. The waiver must be a signed writing that specifies the artwork and the particular uses being waived.

VARA protects an artist's reputation by granting the artist the right of attribution, including the rights to:

- » claim authorship of that work
- » prevent the use of their name as the author of any work of visual art that they did not create
- » prevent the use of their name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to their honor or reputation.

Additionally, VARA provides some limited protection for the physical artwork itself. The artist may

- » prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to their honor or reputation
- » prevent any destruction of a work of **recognized stature**.

### Note

The term "recognized stature" is not further defined and may be difficult to assess. It is generally argued with a combination of the artist's standing, expert testimony, and evidence of recognition or esteem by the community or media.

The physical nature of the artwork is important here. The mere wear and tear of time or natural decline of the materials used will not constitute a violation unless there has been gross negligence or an intentional act. Further, VARA does not extend to copies, images, or duplications of the artwork; only the original object(s).

VARA issues most frequently arise for public artworks or murals, as well as works that are placed in or connected to the real property of another entity and subject to their uses. The act includes exceptions and procedures for instances where the art is incorporated into a building. [17 USC §113(d)] Where removal of the artwork from the building cannot be done without damaging the piece, VARA will not apply if the work was made prior to December 1, 1990, or if the risk was acknowledged in a signed written document by the artist. Where the work could be removed without damaging the piece, the property owner will not be liable if they made a good faith but unsuccessful effort to contact the artist, or, if contact was made, the artist failed to remove the work or pay for its removal within ninety days.

VARA rights sit within the copyright code, but the duration is not necessarily coextensive. For

works created prior to December 1, 1990 (VARA's effective date), these additional protections last for the term of copyright. For works created *after* December 1, 1990, VARA rights expire upon the artist's death (or in the case of joint authorship, that of the last surviving artist). In planning for these rights, it will be important to make sure appropriate contact information for any registered copyrights is up to date and that someone is actively monitoring important works for violations.

### Note

Some states have their own moral rights laws, including New York, Massachusetts, and California. Check to see what laws may apply in your state.

## Note: Digital Content

Remember that IP rights are distinct from ownership rights in any physical object that may embody the IP. While copyright law gives the owner the ability to stop another person from using the material, it does not grant the IP owner a right to any physical copy or the best copy. So, it is possible for someone to inherit the rights to a photography collection, for example, but only have access to poor quality thumbnails. Treat the physical embodiment of digital material such as hard drives as you would other tangible fine art in ensuring that the recipient has a good copy of the work.



# Legacy Vehicles

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To create one's own world takes courage.

GEORGIA O'KEEFFE

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This workbook assumes your professional expertise in estate planning. The companion text **Estate Planning Workbook for Visual Artists** (available at [callresources.org](https://callresources.org)) provides definitions of the basic estate planning vehicles including wills, trusts, power of attorney, and healthcare proxy & living will. In this section, we will address some art-specific variations and considerations in selecting appropriate legal forms.

## Will

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The will establishes the estate plan and thus can help frame an artist's legacy. What further vehicles to use and establish will depend on the artist's ambitions and resources, and there are any number of alternative approaches. Understanding the artist's intentions around legacy will enable you to exercise your full professional expertise in creating the best possible plan to support the client's goals.

In dealing with an artist's estate, there are additional reasons to avoid probate. The careful management of an artist's body of work can impact the estate's prospects. Probated artworks become part of the record, both their value and their existence. In some cases it can have a negative impact on the potential market for the work if values are lower than asking price or if it appears that there is a large number of works readily available.

Some general tips apply for the will and trusts:

- » Identify artworks included in the plan as clearly as possible to avoid any subsequent disputes. The identification should be consistent with the artist's inventory. The recipient individual, organization, or other entity should also be clearly identified.
- » If transferring artwork, state clearly whether the copyright or other intellectual property rights are included in the devise.
- » Recall that copyright contains a bundle of rights, each of which can be transferred

separately. The right to receive financial benefit from a copyright (licensing fees, royalties, etc.) is separate from the right to control the copyright (ability to enter licensing agreements, etc.).

- » Provide liquid resources for the storage, care, shipment, maintenance, insurance, appraisal, inventory, and appoint the power to use said funds for this purpose to the executor, trustee, or representative responsible for these activities.
- » Specify who or what entity is responsible for any estate taxes related to an artwork devise.
- » If it is intended that artwork be sold to provide liquidity or to comport with the artist's wishes, specify clearly which works and under what conditions.

Depending on the artist's situation and plans, a will, perhaps with a simple trust, could be sufficient. If the client is looking to simply disburse property to a number of heirs, effective and efficient means of moving the artwork and copyrights from A to B may be satisfactory. If, however, the legacy plan calls for ongoing management and maintenance of artwork(s) under some kind of uniform vision, an additional entity to continue that work may be necessary.

## Trusts

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For an estate concerned with managing and maintaining value in a collection of artwork and/or its related intellectual property over time following the artist's death, a trust can provide a legal vehicle framed by the artist client's express desires. The artist client can establish guidelines for how artwork should be maintained and entrust its management

to knowledgeable trustees bound by fiduciary duties and enumerated restrictions.

Fundamentally the trust will serve to preserve the artist's legacy as the artist defines it. This could mean maintaining a cohesive and comprehensive body of work, caring for works over time to sell under the most advantageous conditions, using the



works as a financial engine for the benefit of the family, a variety of charitable ends, and so on.

Structuring the trust(s) depends on the full scope of resources and the extent of the client's goals. As with so many decisions, there are trade-offs to consider between establishing firm guidelines and permitting the trustees flexibility. Underfunded trusts barring sales under any circumstances, for example, will fail. With proper planning, a trust should shield the estate or heirs from having to sell work to satisfy pecuniary demands. The artist client and estate planning attorney have a number of options to consider in preserving value for the estate. For those with a ready market, sales of some works are a possibility to create substantial initial financial resources. Being forced to sell works, however, can negatively impact an artist's sales record and long-term prospects, and anything sold is no longer under the management and protection by the trust in service of the artist's legacy.

The choice of trustee(s) or representative(s) plays an important role, at least in the short term. (Trusts intended to endure will see the pool of known trustees reduced over time.) The ideal trustee or representative for an artist's interests will have knowledge of the artist's work and legacy plans, professional expertise, knowledge of the field, background, and contacts to effectively stand in the artist's shoes. However, many of the individuals who could fill that role may also have conflicts of interest with the artist's estate that could impede fiduciary duties. A gallerist representing the artist could have a direct financial stake, which could motivate short-term sales or later strategies about which works to sell when. Family members who own works by the artist or otherwise stand to profit may similarly be in potentially conflicted positions. You may consider including language to absolve or shield appointed representatives and trustees from liability for actions or omissions undertaken in good faith on behalf of the trust.

## Note: Cultural Executors, to CE or Not to CE?

Given the importance of a legacy to the artist client and the intricacies of the art world, many artists may wish to appoint a "cultural executor" in addition to the estate executor. A cultural executor, also known as a cultural counsel, literary trustee, or similar term, is a person (or persons) appointed in the will and charged with maintaining, safeguarding, and utilizing the body of an artist's work and managing the artist's legacy. Granting someone with art expertise great authority can be quite appealing, but it is important to avoid any scenario in which there is uncertainty or debate over who has authority to execute the will and fulfill the requirements of the estate. Rather than appointing a "cultural executor" consider including in the will or incorporating by reference a memorandum indicating whom to consult regarding art-related decisions, or enumerating only specific powers. Situations requiring more elaborate and constant care may be better served by a well-defined trust and its trustees.



## Trusts and the Estate Tax

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The client's financial profile and tax-planning needs will direct how to structure the trust, particularly where estate taxes could be a concern. An artist with financial resources that do not meet the estate tax threshold at the time of death may yet have a body of artwork that could cause the estate to become taxable at the state or even federal level.

It may be suitable to make transfers of artwork up to the annual exclusion value. For example, Crummey Trusts permit the grantor to make annual exclusion-sized contributions for each identified beneficiary; the beneficiary has the right to withdraw the money or artwork but typically does not do so, allowing it to accrue further value. Other forms to consider

may include a Generation Skipping Trust (GSTs), designed to “skip” a generation by benefiting grandchildren or similarly positioned heirs, minimize tax exposure, and keep wealth or artwork in the family for a long period of time.

Many such structures, if created with a corpus of artwork, will require appraisals and also require the artist to relinquish ownership and control of the artwork during life. Work with a tax specialist where estate tax issues may arise to ensure desired outcomes and effectiveness given the status of state and federal laws.

## Artist-Endowed Foundations

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Artist-Endowed Foundations (AEF) are tax-exempt private foundations established by an artist, heirs, or estate to promote, preserve, and protect an artist's work and legacy for public benefit. Such foundations typically own a corpus of the artist's physical works and intellectual property, which they may sell, license, or otherwise exploit to augment any financial endowment. AEFs may run a variety of programs, such as grants, artist residencies, research projects, education programs, exhibitions or museums, or other initiatives.

Artist clients may express interest in forming their own AEF, and it may seem like an appealing solution to the question of an artist's legacy — why not set up a foundation to own and manage assets and provide desired programming while bolstering the artist's reputation? Doesn't that solve everything?

In practice, the answer is probably not. Establishing an AEF is a major undertaking and should not be entered into lightly. Formed as 501(c)(3) private foundations, AEFs are subject to a number of legal requirements and conflicts policies that may impede other goals for the artist's legacy. For

example, prohibitions on conflicts of interest will restrict the involvement of surviving spouses, heirs, and dealers in the foundation's activities and will impact decisions regarding what assets those beneficiaries could or should receive. Additionally, the costs of any staff, programming, maintenance, and spend-out requirements may also present considerable financial burdens. If one of the goals is access to artist archives for research purposes or exhibitions of artwork, the AEF would need specialized facilities and knowledgeable staff, posing further costs.

In some cases an AEF may still be the best way to structure an artist's legacy. The many considerations and details involved exceed the scope of this guidebook. Any work in this area should be done by or in close consultation with attorneys who are expert in nonprofit organizations. The Aspen Institute Artist-Endowed Foundations Initiative conducts ongoing research in the field and has published several useful guides and reports on the status, needs, challenges, and function of such private foundations. (See Additional Resources, page 77.)

## Note: Lost in Foundation?



As a general rule of thumb, depending on operational goals, an artist should have \$2-5 million in assets to start an Artist-Endowed Foundation. Otherwise, operational costs will quickly drain the endowment.

## Philanthropic Partnerships & Endowments

The artist client may be interested in exploring a programmatic legacy but on a scale that does not require establishing a new entity. Some of the functions and benefits of Artist-Endowed Foundations may be utilized instead through the formation of philanthropic partnerships with existing nonprofit entities. An artist client might be interested in establishing a scholarship fund; setting up a themed exhibition program with a local museum; starting (and perhaps participating in) a lecture series; donating tools and materials to an arts center along with training sessions. There are any number of options.

A partnership or endowment must be arranged in advance to ensure the program will be received. The artist client has a choice then whether to begin active collaboration during life or to fund/supply the planned collaboration solely through the estate. Being involved during life can be rewarding. The artist can witness and enjoy the program taking effect, perhaps meeting scholarship recipients or teaching students honed skills. There may be tax reasons to engage earlier than later as well. The arrangement should be memorialized with a restricted gift or donation, such that the funds or property will only be used for the intended purpose.

An artist might already be working with such an organization and want to support or expand additional programs.

If the artist is trying to find a new organization with which to partner, there are several factors to consider:

### Mission Fit

- » Does the organization's mission and usual activities align with the intended purpose?

### Capacity & Responsiveness

- » Does the organization have the staff, experience, and resources to support the program beyond what the artist can provide?
- » Is the organization enthusiastic about the partnership?

### Longevity

- » Is the organization limited in time or likely to wind up its operations in the near or far term?
- » Is there a successor entity that could continue the partnership?

### Need

- » Is this organization the best positioned to achieve the intended results?
- » How meaningful is the artist's participation?

### Recognition

- » If desired, how will the artist's support be recognized?

## LLC/Business Entity

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LLCs posit several alternatives to trust or nonprofit organization options. The artist client may already operate their practice as a separately incorporated LLC or other business entity. Such corporations will raise separate tax and financial questions. A different fiduciary standard will apply as between a trustee and business manager, which may

be more or less appealing depending on goals and circumstances. Practically, there is also the possibility that the artist client's artwork could be considered a work-for-hire of the company, such that the copyright would belong to the company from the moment of its creation; termination rights then would not apply.

## Life Insurance

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Artworks can be quite valuable, financially and emotionally, but they are not readily fungible. Depending on the structure of the plan, additional life insurance may generate much needed liquidity, to pay estate taxes, fund the care and management

of artworks or a studio, or other needs. A thoughtful legacy plan can easily come apart if artwork has to be sold or cannot be maintained with the resources available.

## Gifts

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A client may wish to give artwork either during life or as part of an estate plan. As usual, the better choice depends on the preferences of the client and the particulars of the situation.

In order to be considered a gift, the transfer of an artwork must meet the usual requirements: **donative intent**, **delivery**, and **acceptance**.

### Gifts of artwork pose some additional concerns:

#### Valuation

- » Artworks whose present value may meet or exceed the annual exclusions may be challenged and should be reported on annual gift tax return.
- » Artwork should be appraised and documented by a professional (See "Professional Appraisals," page 40.)
- » Any insurance on the artwork should be updated.

#### Intellectual Property

- » Physical transfer of the artwork does not automatically include a transfer of the embodied intellectual property rights (see "Intellectual Property & Copyright" on page 48).
- » Any intended transfer of copyright should be included in a written deed of gift.

## Delivery

- » Gifted artworks should be delivered to the donee and leave the possession of the artist client to avoid the appearance of retaining a life estate under IRC §2036 and incurring a challenge by the IRS.

## Fractional Interests

- » Relatedly, divvying up ownership portions of an artwork, sometimes with lease-back arrangements, can be quite complicated and should be undertaken with caution and purpose, as proving donative intent and fair market value of the lease is problematic.

## Taxes

- » If the donee plans or is likely to sell the gift during life, it will be taxed as ordinary income.

## Inventory

- » Record gifts clearly in the artist's inventory, along with copies of any deed of gift or other documentation.

## Sidebar Case: Jasper Johns



In 2013, Jasper Johns's former assistant was arrested and sentenced to eighteen months in prison for stealing twenty-two of Johns's works. Claiming that they had been gifts from the artist over their two decades of working together, he sold them for millions of dollars over several years. Johns was still living and able to dispute the "gifts." But what would have happened if this had emerged later on, when the artist would not have been able to confirm or deny? Gifts of artwork should be documented and included in the inventory just like sales to avoid future disputes or confusion.

## Donations

Similar to both partnerships and gifts, art donations to existing institutions can be a meaningful way for an artist to manage the estate while fulfilling legacy goals.

In the following essay, attorneys **Brooke Penrose** and **Jordan P. Bowne** of the law firm Burns & Levinson LLP take us through issues to consider in planning a donation of artwork to an institution.



## Donations to Institutions

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BY BROOKE PENROSE & JORDAN P. BOWNE, BURNS & LEVINSON LLP

There are a myriad of reasons to donate art to museums and just as many legal and practical considerations to account for before your client's art makes it into a museum by way of donation. Donating art will typically involve elements of tax law, estate planning, contracts, personal property, and intellectual property. Without proper guidance and timing, your client's altruistic intentions of gifting art to a museum could result in legal and financial headaches. Here are a few tips to get you started.

### Determine Client Priorities and Goals

At the outset, understanding why your client wants to leave art to a museum, archive, or library will help inform your guidance. Every client will have their own unique set of priorities but the most common considerations worth understanding are your client's goals with respect to:

#### Tax Planning

- » Is your client interested in realizing tax benefits during their lifetime?

#### Public Exposure

- » Does your client value maximizing the public display and/or publication of the work over the size of the institution? Is there a particular community or audience your client is hoping to reach?

#### Prestige

- » Does your client value having the work be part of a larger/more prestigious collection even if its public display or publication is limited?

#### Personal Relationships

- » Are there any unique circumstances to consider regarding your client's relationship with the work, such as family relationships? Does your client have relationships with others in the art world that need to be considered?

Once you have an understanding of your client's donation priorities, you should work with your client on assessing whether the work is donation worthy.

## Assessing the Work for Donation

Many institutions are unable to accept every gift of art that is offered. Despite the benefits of a gift of art, acquisitions generally come with expenses to the museum, such as the cost of potential conservation, storage, insurance, etc. It is important to begin preparing a work for donation and work with a target museum well in advance. Two key preparatory factors to consider are the physical condition of the artwork itself and its provenance, or record of ownership.

Your client may want to engage an appraiser to look at the work to get a better sense of its value, significance, and condition to help assess whether the work would be attractive for donation. A work that is very rare, particularly significant, and is in excellent condition would generally be a better candidate for donation than a work that is extremely common, of little relevance, and would require significant repair and conservation before it would be ready for public display.

In preparation for approaching museums regarding donation, your client should also gather all documentation regarding the provenance of the work(s) being donated. Museums are particularly wary of gaps in provenance during World War II, as well as transfers of indigenous art during times of conflict or colonization. In 2015, Honolulu Art Museum sued one of their donors for \$880,000 for claims related to failing to prove provenance of the works after the U.S. Department of Homeland Security took hold of seven pieces from the museum's collection, which had allegedly been smuggled out of India during illegal looting prior to the museum's acquisition. Your client should try to have as much information as possible regarding how the work came to be in their possession.

After your client has prepared the work for donation, you should help guide them on assessing target museums to approach for donation proposals. Broadly speaking, the question really is "what is an appropriate home for the art?" In order to properly assess target museums for donation proposals, consider the following:

- » Does the museum have the facilities and expertise to properly care for your client's art?
- » Is the museum's mission consistent with your client's donation goals?
- » Will your client's art reach the right audience (e.g., a six-hundred-year-old Renaissance masterpiece may not reach the appropriate audience if housed at a contemporary art museum).

You may also want to discuss with your client whether to include a financial donation to offset any costs the museum may incur to care for the work. For example, large and/or light sensitive works (particularly photographs) can be costly to store so it may make sense to consider a financial donation to account for this. In addition, if your client wants the work to be published, either in a formal print publication or to appear on the museum's website, they may want to include a financial gift to help cover the professional photography or other digitization costs. For donations of large collections it may also make sense to include a financial donation to endow a staff position (often curatorial) to devote scholarship resources to further enrich the value of the collection.

## Gift Restrictions

It is not uncommon for donors to require museums to agree to certain provisions as a condition of donating the work. Donors who are gifting highly desirable and/or rare works may be able to attach more strings. However, it is important to counsel your client on considering the relative burden each condition may place on the target museum lest such conditions become breaking points for the intended donee. Some common gift restrictions include:

- » Requiring a donor credit line be displayed near the work.
- » Any special conditions for public display (particularly if the subject of the work is a family member or other sensitive subject).
- » Any required publication of work (this condition is often limited to donations of large, cohesive collections).
- » Restrictions on deaccessioning the work. Museums may be unable to agree to an outright restriction but it is not unusual for there to be some type of control (e.g., proceeds may only be used to purchase comparable works, etc.)
- » Any restrictions on loaning the work out to third parties.

Special consideration to potential rights issues should be given to gifts of art that come from an artist or the artist's estate. In these instances, your client may have rights in the work, such as copyright and moral rights, that exist separately from the physical art object and are not necessarily transferred or waived upon the transfer or donation of the physical artwork. If your client is the artist, or otherwise holds the copyright to the work, they may wish to consider pre-authorizing the museum to make certain uses of copies of the work and require other types to be reviewed by the artist on a case-by-case basis so they can assess whether the project is appropriate and/or consider whether license fees should be assessed (most frequently associated with producing merchandise).

## Approaching the Museum

Once your client has identified target institutions, and the work and any provenance information has been prepared, it is time to approach the museum with your client's donation offer. If possible, professional photography of the work can be a helpful tool for museums to preliminarily assess the work.

Depending on the size of the institution, there may be a designated department for donations of art. When in doubt, begin by contacting the appropriate curatorial department. The donation offer should include the name of the donor (unless it is being donated anonymously), the "tombstone" details of the work (title, artist, date created, medium, dimensions), and any relevant details about the donation itself (e.g., any critical conditions for the donation, if the work is in particularly good or bad condition, anticipated timeline for the museum to take physical custody, etc.).

Each museum will have its own internal process to determine whether or not to accept your gift. This may include secondary costs associated with the acquisition and whether your proposed donation is consistent with the museum's current acquisition strategy.

## Financial Considerations: Remember A.R.T.

For a collector, having a piece from their collection displayed in a museum may be a lifelong goal. If your client wants to realize that goal during their lifetime, there may be added incentives in the form of significant tax deductions, if your client follows some important steps:

### Appraisal

- » Prior to donating to the museum, be sure to get the art appraised by a “qualified appraiser,” as defined by the IRS, to determine the fair market value of the art. Many museums will not appraise art as a matter of policy, though museum staff may be able to refer your client to qualified appraisers. Retaining a non-qualified appraiser may result in rejection of the appraised value and can even result in tax penalties for the donor, so beware!

### Related Use

- » Your client must also comply with the “related use” rule to maximize tax benefits and be able to deduct the full fair market value of the donated art. The related use rule requires that the museum's use of the donated art be related to the museum's charitable purpose or function.

### Time

- » Your client must have held the art for at least one year prior to the donation, such that the art is considered long-term capital gain property, in order to deduct the full fair market value of the donated art. If the donation does not satisfy the related use rule, then the collector is limited to deducting their original cost of the art, rather than its full fair market value—a distinction that can result in significant loss of tax benefits to the collector.

An artist has far less of a tax incentive for lifetime donations of their own work to a museum. The IRS considers the artist's own work to be “ordinary income property,” in that it is primarily used for sale to customers in the artist's ordinary course of business. As a result, the artist is limited to taking an income tax deduction of the cost of their materials in producing the artwork, when making a lifetime charitable donation to a qualified museum. Despite the diminished tax incentive, the artist may still seek to make a charitable lifetime donation of the work to a museum as a means of raising their profile and sales.

## Final Considerations

Thoughtful donations arranged in partnership with a museum can result in amazing enrichment of the collections of public institutions and provide donors with the joy of seeing new audiences engaged with their artwork. Locally, for example, in 2012, the Museum of Fine Arts, Boston was gifted one of the largest (more than six thousand works) and arguably, most significant collections of photography by Saundra Lane, whose collection included works by Edward Weston, Ansel Adams, and Charles Sheeler. The donation was transformative; it more than doubled the museum's photography collection, and soon spurred multiple public exhibitions curated from the collection as well as a dedicated publication broadening the public's access to Lane's remarkable collection of works.

Artists and collectors have numerous options when it comes to donating art. In addition to the considerations detailed above, if your client is planning to bequeath art, instead of gifting it during their lifetime, consider including language granting the personal representative (executor) of your client's estate the power to make alternate arrangements with other museums or charities prior to executing an estate plan, unless arrangements with the target institution have already been made. By including such a provision, it could prevent the legal and financial headaches for the Personal Representative if the bequests of art to your client's favorite museum are not accepted by the target institution.





# Summative Activities & Final Notes

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# Conclusion

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BY SCHWANDA ROUNTREE, ESQ.

As both an arts professional and attorney, I find the CALL Estate Planning Guide for Visual Artists to be a useful tool for protecting artists' creative works currently and posthumously. Legacy building is significant and rewarding for many, including artists. This publication is a pragmatic, comprehensive resource designed specifically for attorneys and artists that will serve as a valuable reference point throughout the legacy-building process, anticipating artists' needs and establishing specific steps toward comprehensive estate planning.

This guide has carved out specific, real-life scenarios to demonstrate useful examples of artists' estate planning needs in furtherance of artists and their family members' goals in creating a legacy for the artists' work once they have passed on. More importantly, this guide creates important dialogue surrounding a not-so-easy topic: what should happen when the artist is no longer with us? Hopefully, this discussion can build, refine, and continue, in the interest of properly planning for the future of artists' estates.

This text is just as essential for legal professionals as it is for artists, as it will aid practicing attorneys in identifying the unique needs of their clients. The art market framework is ever-evolving, and estate planning preparation needs to be well thought-out and in alignment with legal statutes in order to aid artists and their loved ones in protecting the artists' work. Too often, hard-working artists transition with no cohesive plan or direction for their artwork or studios. Proper estate planning can eliminate the stress and financial pitfalls that often occur when a loved one dies without a will and/or trust. Artists must anticipate the same goals for preserving finances and accounting for artwork when planning for their futures as well.

This workbook has highlighted many key areas of preparation needed in order to establish the estate plan and shape the artist's legacy, including inventorying, cataloguing, storing and properly caring for artwork, art contracts, art appraisal, intellectual property and copyright, business formation, life insurance, art donations, and creating wills and/or trusts. Additionally the workbook makes it clear that estate planning extends beyond just the typical will and/or trust. You have seen a diverse range of planning options throughout this guide—establishing scholarships, endowing foundations, donating artwork to local area organizations, donating art supplies and studio materials to local schools, granting copyrights to libraries or research programs, and even establishing annual juried competitions and lecture series with a local institution or organization. All of the various examples presented are great options artists can consider in creating a meaningful legacy.

Comprehensive estate planning for artists and their families no longer has to be a Herculean process—especially when there are solid resources readily available to artists, like this publication. This artist-specific estate planning guide will serve to create and preserve legacy in the hopes of protecting art of value that will, in the long term, contribute to research, art history, and culture. I extend my appreciation to the valuable, hardworking contributors that made CALL Estate Planning Guide for Visual Artists possible.



# Estate Planning Questions for the Artist

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## I. Legacy

- » How do you want to be remembered?
- » How do you want your work to be remembered?
- » Do you want your work to be protected? How?
- » How do you want your work to be presented, collected, or sold?
- » What do you think your impact has been, however you define it? What would you like it to be?
- » Do you want or intend for your work to generate income for others?
- » Do you want to support any particular group, location, or charity?
- » Who could be a steward for your legacy?

## II. Inventory/Valuation of Your Artwork

- » Do you have a current written inventory of all the artwork you have created?
- » Does it include all the components recommended by the CALL program?
- » Did someone assist you in its creation and/or do you need further assistance?
- » Do you have a current written inventory of all the artwork you have sold, gifted, or bartered?
- » Do you have a current written inventory of all original works in your collection made by other artists?
- » Do you have computer backups and/or hard copies of digital works?
- » Will your digital work, websites, cloud storage, or other online activity be accessible?

### III. Significant Business Relationships

- » Are you represented by an agent or manager?
  - » If yes, who and what is your agreement with this individual?
  - » Have you defined this relationship in a written contract?
  - » Do you have a copy of this contract?
- » Do you currently have a relationship with a gallery/dealer/publisher/record company/record publisher/film company/film producer, etc. who shows/distributes/produces/publishes or sells your work?
  - » If yes, what work have you licensed/consigned/assigned/sold, and to whom and under what conditions? Do you have those agreements in writing?
  - » Do you keep a list of the artworks that are on loan or on consignment?
  - » If yes, could an executor easily locate it?
- » Are there other gallery/dealer/publisher/record company/record publisher/film company/film producer who have shown/distributed/produced/published or sold your work in the past?
- » If yes, to whom and what work? What has subsequently happened to that work?
- » Have you ever had any of your work appraised by a professional?
- » By whom? Do you still have copies of any such appraisals?
- » Has any of your work ever been sold at auction?
- » What auction house and who purchased the work?
- » Was it a charitable auction?
- » Do you have in your possession contracts such as location releases, image releases, synchronization licenses, image licenses, collaboration agreements, gallery consignment contracts, etc? For which project(s) and with whom?



## IV. Storage & Maintenance

- » Do you currently have a dedicated studio space?  
Address \_\_\_\_\_
- » Own or rent? What is the lease term?
- » Do you currently have dedicated storage space?  
Address \_\_\_\_\_
- » Own or rent? What is the lease term?
- » Have you made arrangements for the maintenance and storage of your work pending its distribution?
- » Does your artwork require unusual storage, preservation, maintenance, or care?
- » Have you made any arrangements to insure your work?
- » Have you made arrangements for the maintenance, storage, and distribution of your art-making equipment and supplies?
- » Have you estimated the total cost of your planned disposition of your art, equipment, and supplies at your death (storage, distribution, conservation)?
- » Do you currently have insurance on:  
your studio \_\_\_\_\_ your artwork \_\_\_\_\_ other/home, etc. \_\_\_\_\_ At what values?
- » Do you have an insurance policy or other specially designated funds to pay for any such artwork-related estate administration costs?

## V. Preservation Plan

- » Do you have a preservation plan that describes the unique care and maintenance needs for your artwork, books, digital assets, and ephemera?
- » Have you clearly identified what artwork/s need to be preserved?
- » Have you identified a plan for handling site-specific works/happenings/installations/performances?
- » Do you want the site-specific works/happenings, installations, and/or performances to be restaged or reproduced? If so, have you included the specific instructions and/or sketches on how to recreate the work in your inventory?
- » Have you indicated which works are irreplaceable and are not to be conserved or displayed if an exact replica cannot be located?
- » How do you intend to conserve your timed-based media works?

## VI. Gifts & Bequests

- » Do you wish to make specific bequests of your artwork to certain individuals in your will?
- » If yes, to whom?
- » If you are not leaving your artwork to family and/or friends, have you considered other means of ultimately distributing your artwork on your death, such as through a charitable organization?
- » If yes, to which charitable organizations do you plan to donate work?
- » Have you notified and received approval from the donee organization regarding your planned bequest(s)?

## VII. Trusts & Foundations

- » Have you considered a trust to manage your collection?
- » Do you have a relationship with an institution, nonprofit, school, program, or other entity that could be a partner in your legacy?

## VIII. Copyright Issues

- » Have you ever licensed, assigned, or given away a copyright?
- » If so, to whom and under what circumstances? Is it in writing?
- » Have you ever registered a copyright and do you have a current listing of the copyrights that you have registered?
- » Have you ever donated an artwork but not the copyright along with it?
- » Do you control the copyrights of any works produced by others?
- » Did you create any projects or works with a collaborator? Do you have an agreement governing the collaboration?
- » Could your executor find records of the copyrights you own (in works created by you or by others)?
- » Do you want to give more than one person the copyright interest in individual works?
- » Is there anyone in your immediate family (spouse, children, grandchildren) that you would not want to be able to control your copyrights?
- » Have you addressed how unfinished works are to be treated? Can a third party finish your work?
- » Do you have specific instructions or restrictions on how your works may be used or licensed (e.g., cannot be sold, commissioned books in the same series, music performed at certain venues, etc.)?

## Additional Resources

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### Artist as Philanthropist

#### The Aspen Institute Artist-Endowed Foundations Initiative

<https://www.aspeninstitute.org/programs/program-on-philanthropy-and-social-innovation-psi/artist-endowed-foundations-initiative>

#### The Artist as Philanthropist Vol. 1

Findings: Overview of the Field

<https://www.aspeninstitute.org/publications/volume-one-artist-philanthropist-strengthening-next-generation-artist-endowed-foundatio>

#### The Artist as Philanthropist Vol. 2

Considerations in Practice

<https://www.aspeninstitute.org/publications/artist-philanthropist-strengthening-next-generation-artist-endowed-foundations>

### Estate Planning Resources for Artists

#### Creating a Living Legacy:

##### Estate Planning Workbook

Publication by the Joan Mitchell Foundation & Arts & Business Council of Greater Boston and Volunteer Lawyers for the Arts of Massachusetts  
<http://callresources.org/estate-planning-workbook>

#### Crafting Your Legacy:

##### A Guide for Putting Your Non-Artistic Assets to Work in an Estate Plan

Publication by CERF+ and Mark Richard Leach  
<https://cerfplus.org/legacy-estate-planning>

#### Volunteer Lawyers and Accountants for the Arts

For a complete listing of Volunteer Lawyers for the Arts programs around the country, please visit:  
<https://vlaa.org/get-help/other-vlas>

### Career Documentation & Inventory Systems for Artists

#### Artists' Studio Archives

<http://artistsstudioarchives.org>

#### CALL: Career Documentation for Visual Artists | An Archive Planning Workbook and Resource Guide

Publication by the Joan Mitchell Foundation  
<http://callresources.org/career-documentation>

#### CALL: DIY Archive Online Resources

Joan Mitchell Foundation  
<http://callresources.org>

### Gifts & Valuation

Please see **IRS Publication 561 (4/2007)** for more information:

<https://www.irs.gov/publications/p561#d0e617>

#### Revenue Procedure 96-15

<https://www.irs.gov/pub/irs-drop/rp96-15.pdf>

#### IRC §691

Recipients of Income in Respect of Decedents  
<https://www.law.cornell.edu/uscode/text/26/691>

To learn more about the **Art Connection's art donation programs**, visit  
[www.theartconnection.org](http://www.theartconnection.org)

#### Income Tax, Gift, & Estate Tax Issues

Tips for Art Collectors and Artists  
<http://www.artbusiness.com/estax.html>

#### Society of American Archivists

A Guide to Donating Your Personal or Family Records to a Repository  
<http://www.archivists.org/publications/donating-familyrecs.asp>

## Copyright

For more information or to register works, visit  
[www.copyright.gov](http://www.copyright.gov)

### **ASCAP: Estate Planning for Music Copyright Owners**

<https://www.ascap.com/help/my-ascap-membership/estate-trust-planning>

### **American Bar Association**

Estate Planning and Copyright  
[https://www.americanbar.org/publications/landslide/2012\\_13/january\\_february/estate\\_planning\\_and\\_copyright.html](https://www.americanbar.org/publications/landslide/2012_13/january_february/estate_planning_and_copyright.html)

### **Entertainment Law Institute**

Protecting an Artist's Legacy through Estate Planning, Probate, and Post-Death Administration of an Artist's Rights (pdf)  
<http://www.jdsupra.com/legalnews/protecting-an-artists-legacy-through-es-08360/>

## Conservation & Preservation Management

### **American Institute for Conservation of Historic and Artistic Works**

[www.aic-faic.org](http://www.aic-faic.org)

### **American Library Association**

[www.ala.org](http://www.ala.org)

### **The Association for Preservation Technology International**

[www.apti.org](http://www.apti.org)

### **Northeast Document Conservation Center**

<https://www.nedcc.org>

### **Regional Alliance for Preservation**

<http://www.preservationresources.org>

### **Society of American Archivists**

[www.archivists.org](http://www.archivists.org)

### **Conservation Center for Art & Historic Artifacts**

<http://www.ccaha.org>

## Additional Research & Publications

### **A Visual Artists' Guide to Estate Planning**

Marie Walsh Sharpe Foundation, by William Keens, Anne Watson

[https://www.pittsburghartscouncil.org/storage/documents/visual\\_artists\\_estate\\_plan.pdf](https://www.pittsburghartscouncil.org/storage/documents/visual_artists_estate_plan.pdf)

### **Artists' Estates: Reputations in Trust**

Edited by Magda Salvesen and Diane Cousineau

### **The Artist Estate: A Handbook for Artists, Executors, and Heirs**

by Loretta Würtenberger

### **The Research Center for Arts & Culture**

Research on needs of aging artists  
<http://artsandcultureresearch.org/research/>

# Biographies

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## Workbook Authors

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### Megan Low

As the Director of Services for the Arts & Business Council of Greater Boston for five years, Megan managed the Volunteer Lawyers for the Arts and Fiscal Sponsorship programs. Megan holds a BA degree in History of Art and Architecture from Harvard University, a JD from Boston College Law School, and is a member of the Massachusetts and New York State Bar Associations. Prior to law school, Megan graduated from Sotheby's Institute of Art in New York and managed the art gallery at a nonprofit cultural center in Manhattan. She has also worked as a travel writer, a freelance grant writer for nonprofit arts and education groups, a producer of undergraduate theater, and an adjunct professor teaching courses on Museology and Arts Administration.

### Jim Grace

Jim Grace is the Executive Director of the Arts & Business Council of Greater Boston. Previously he was the Executive Director of the Volunteer Lawyers for the Arts of Massachusetts (VLA) from 1998 until 2008, when it merged with the A&BC. Jim has experience working with artists and arts organizations in the areas of publishing law, public art, copyright, estate and legacy planning, nonprofit incorporation and mergers, negotiation training, and artist live/work and nonprofit board issues. Jim was an adjunct professor for Boston University's Masters in Arts Administration program for more than five years where he co-taught a course on Legal Issues in Arts Administration. In addition, Jim is a working author, book editor, and publishing attorney. He is the coauthor of the best-selling *The Worst-Case Scenario Survival Handbook: Golf*. To date he has been involved in the publication of more than eight books. Jim serves on the board of the Brookline Community Foundation. In the past Jim served on the board of Associated Grant Makers and is a founding member of the Arts Services Coalition, as well as a former founding board member of the Fort Point Cultural Coalition.



## Project Manager

### Shervone Neckles-Ortiz

As the Artist Support Manager for the Joan Mitchell Foundation, Shervone Neckles-Ortiz manages the Creating a Living Legacy (CALL) program and professional development programming. Before joining the Foundation, Shervone worked as an art education consultant and adjunct professor for Pratt Institute and other leading NYC art institutions and organizations. For several years, Shervone served her Brooklyn community as a high school teacher in the NYC Department of Education before moving into roles as a department chair and contributor to the Arts Achieve: Investing in Innovation (i3) Grant Program. She currently serves on the advisory board for the Castle Gallery of the College of New Rochelle.

As a mixed-media artist, Shervone has held residencies in areas as diverse as the Youselou Arts Foundation in St. Vincent and the Grenadines in the West Indies, The Center for Book Arts in New York, The Fabric Workshop & Museum in Pennsylvania, and the Skowhegan School of Painting and Sculpture in Maine. Previous awards include grants from The Puffin Foundation, Joan Mitchell Foundation, and fellowships from Robert Blackburn Printmaking Workshop and Manhattan Graphics Center. Her work has been shown worldwide in both solo and group exhibitions. Her practice also includes curatorial projects: *Amplify Action: Sustainability through the Arts* with Pratt Center for Community Development and Bedford-Stuyvesant Restoration Corporation in Brooklyn, 2012; and *From Taboo to Icon* at The Ice Box Gallery, Philadelphia, 2008. She's earned an MA from Teacher's College, Columbia University; MFA from Queens College; and BFA from the College of New Rochelle.

## Contributors

### Jordan P. Bowne

Jordan P. Bowne is an Associate in Burns & Levinson's Private Client Group where he focuses his practice on all aspects of divorce, family law, and probate and trust litigation. In his practice, Jordan has experience handling issues involving the valuation and division of collections of art, trust assets, and intellectual property on behalf of divorcing spouses, as well as for fiduciaries and beneficiaries of trusts and estates. Jordan has a passion for the many nuances of art law and has written articles on subjects ranging from estate planning and tax consequences related to art donation to cultural property protection during armed conflict.

### Michelle DuBois, PhD

Michelle DuBois has a PhD in art history from Boston University. Her specific area of expertise is mid-twentieth-century American abstract painting, and she also has a strong depth of knowledge in nineteenth- and twentieth-century American painting, European modern art, African American modern art, and photography. As head of Winston Art Group's Boston office, Michelle focuses primarily on business development in the Northeast, including Massachusetts, Vermont, New Hampshire, Maine, Connecticut, and Rhode Island. She has been engaged in various aspects of the art world for more than twenty years. She has worked in retail gallery and museum settings, taught university-level art history courses, and has lectured on a variety of art historical topics in settings such as the Museum of Modern Art in New York, as well as venues in Seattle, Boston, Providence and Newport, RI. Michelle is the author of numerous publications, the most notable being the co-authorship of the catalogue raisonné on Jacob Lawrence and the monograph *Jacob Lawrence: Over the Line*, which was awarded The

George Wittenborn Award for Excellence in Art Publications. Prior to joining Winston Art Group, Michelle had her own appraisal and advisory practice in Boston for six years.

### Josh T. Franco, PhD

As National Collector at the Archives of American Art at the Smithsonian Institution, Josh Franco works to identify, investigate, and acquire personal papers, institutional records and other primary sources that tell the stories of American art. In addition to ensuring their preservation at the Smithsonian, Franco advises researchers working in the Archives, making them aware of materials relevant to their pursuits. He also advises early and mid-career artists on planning for the future of their personal papers. Previously, Franco served as Latino Collections Specialist at the Archives of American Art from 2015 to 2017. He completed his PhD in the Art History department at Binghamton University in April 2016. His graduate work was supported by the Clifford D. Clark Fellowship, the Ithaca College Predoctoral Diversity Fellowship, and the Imagining America PAGE (Publicly Active Graduate Education) Fellowship. Franco was an Artist-Guide at Judd Foundation, 101 Spring Street from 2013 to 2015. He has presented scholarly and critical work in the following venues: Marfa Book Co., Stanford University, College Art Association, Association of Art Historians, Utrecht University, American Comparative Literature Association, Dartmouth College, HEMI Graduate Student Initiative (Hemispheric Institute), zingmagazine, The Frick Collection, ...mightbegood, Latino Art Now!, the National Association of Latino Arts and Culture, Joan Mitchell Foundation, and Independent Curators International.

### Kate Haw

Since 2013, Kate Haw has been Director of the Archives of American Art at the Smithsonian Institution. Leading the world's largest resource for the study of American art, she sets the direction for collecting, preservation, and dissemination of a growing collection of more than twenty million documents and 2,300 oral histories, providing leadership in the field on emerging research trends and adoption of digital tools in the study of art history. Prior to joining the Smithsonian, Kate held curatorial roles at the National Gallery of Art and the American Federation of Arts, where she helped to organize exhibitions including *Johannes Vermeer*, *Georges de La Tour and His World*, *Gerard Ter Borch*, *Degas and the Dance*, *American Impressionists Abroad and at Home*, and *The Sensuous and the Sacred: Chola Bronzes from South India*. In 2004, she transitioned to fundraising and institutional leadership, serving as Director of External Affairs at the American Federation of Arts from 2004 to 2006 before becoming Co-Director of the renowned Skowhegan School of Painting & Sculpture in New York and Maine from 2006 to 2011. Among her achievements at Skowhegan was the establishment of a comprehensive archive and the school's oral history program. Immediately prior to joining the Archives of American Art, Kate served as Vice President for Development at the National Building Museum in Washington. Kate received a BA in art history and religion from Sweet Briar College in Virginia, and an MA in art history from the University of North Carolina at Chapel Hill.

## Brooke Penrose

Brooke Penrose is an Associate in Burns & Levinson's Intellectual Property group and formerly worked in the Intellectual Property department at the Museum of Fine Arts, Boston. She concentrates her practice on counseling creators and innovators of all sizes in a variety of intellectual property transactional matters. Brooke is an experienced copyright attorney who has cleared publication rights, prepared registration applications, appealed application refusals, advised on DMCA take down matters, counseled on infringement and fair use defenses, and drafted and negotiated license agreements.

## Katy Rogers

Katy Rogers is the Programs Director and Director of the Robert Motherwell Catalogue Raisonné project at the Dedalus Foundation, where she also serves on the board of directors. A graduate of the University of Colorado, Katy received her MA in art history from Hunter College. She is an alumna of the Whitney Museum of American Art's Independent Study Program (ISP) where she was a Helena Rubinstein Curatorial Fellow.

Katy is the coauthor of the catalogue raisonné of Motherwell's paintings and collages (Yale University Press, 2012), and of *Robert Motherwell: 100 Years* (Skira, 2015). She is currently working on a catalogue raisonné of Motherwell's drawings. Since 2013, she has been the President of the Catalogue Raisonné Scholars Association where she co-organized the 2015 conference "The Catalogue Raisonné and Its Construction" and the 2018 conference "The Afterlife of Sculptures: Posthumous Casts in Scholarship, the Market, and the Law."

In her role as the inaugural Programs Director at the Dedalus Foundation, Katy and her team have collaborated closely with other nonprofit and community-based organizations on inclusive, extensive, and high-quality arts education initiatives, exhibitions, and public programs, primarily in the Sunset Park neighborhood of Brooklyn.

## Schwanda Rountree

Attorney and art consultant, Schwanda Rountree, places contemporary art in museums and private collections, domestically and internationally. She currently serves as an Advisory Board Member of the Spelman College Museum of Fine Art. Schwanda has also served as Board of Directors Member for Rush Philanthropic Arts Foundation, Advisory Panel Member of CulturalDC, Executive Board Member of the Porter Colloquium on African American Art, Member of ArtTable, and Advisory Board Member for the *30 Americans* exhibition at the Corcoran Gallery of Art.

Schwanda has curated several art exhibitions including ones during Miami Art Basel and the DC Jazz Festival. She has spoken on art panels at institutions and galleries, such as the Corcoran, the Phillips Collection, the National Museum of Women in the Arts, and Rush Arts Gallery in New York. She has served as contributing writer for the *International Review of African American Art*.

## Jill Sterrett

Jill Sterrett is Deputy Director, Museum Affairs and Strategic Impact at the Smart Museum of Art at the University of Chicago. Prior to this appointment, Jill worked at the San Francisco Museum of Modern Art as Paper Conservator from 1990 to 2000, Head of Conservation from 2000 to 2002, and Director of Collections from 2002 to 2018. There she oversaw the activities of six allied departments in a museum structure designed to put the voices of living artists at the center of collaborative approaches to art stewardship and research. Jill publishes and teaches on the subjects of contemporary art, museums, and conservation and she is particularly interested in the role of museums in contemporary society. In 2007, Jill was a Fulbright scholar at the University of Porto in Portugal. She has also worked at the Fine Arts Museum of San Francisco, the Library of Congress, the Philadelphia Museum of Art, the National Library of Australia, and the National Gallery of Victoria. Jill is a graduate of Denison University with a BA in chemistry and a BA in art history. She earned her MA in art conservation from the Cooperstown Graduate Program. In addition to her leadership at SFMOMA, she serves on the boards of Voices in Contemporary Art (VoCA) and Beta by Design, two organizations dedicated to art and education.

## Hélène Vandenberghe

Hélène Vandenberghe has been co-managing the estate of her father Philippe Vandenberg since 2009. As an art historian, she began her career in 2000 as a curator in Huis van Alijn, Ghent. In 2002 Vandenberghe cofounded the heritage weekend in Flanders and Brussels, and from 2008 she worked as artistic advisor to the CEO of the Centre for Fine Arts (Bozar) in Brussels. Since 2015, she has served as advisor for The Institute for Artists' Estates in Berlin.

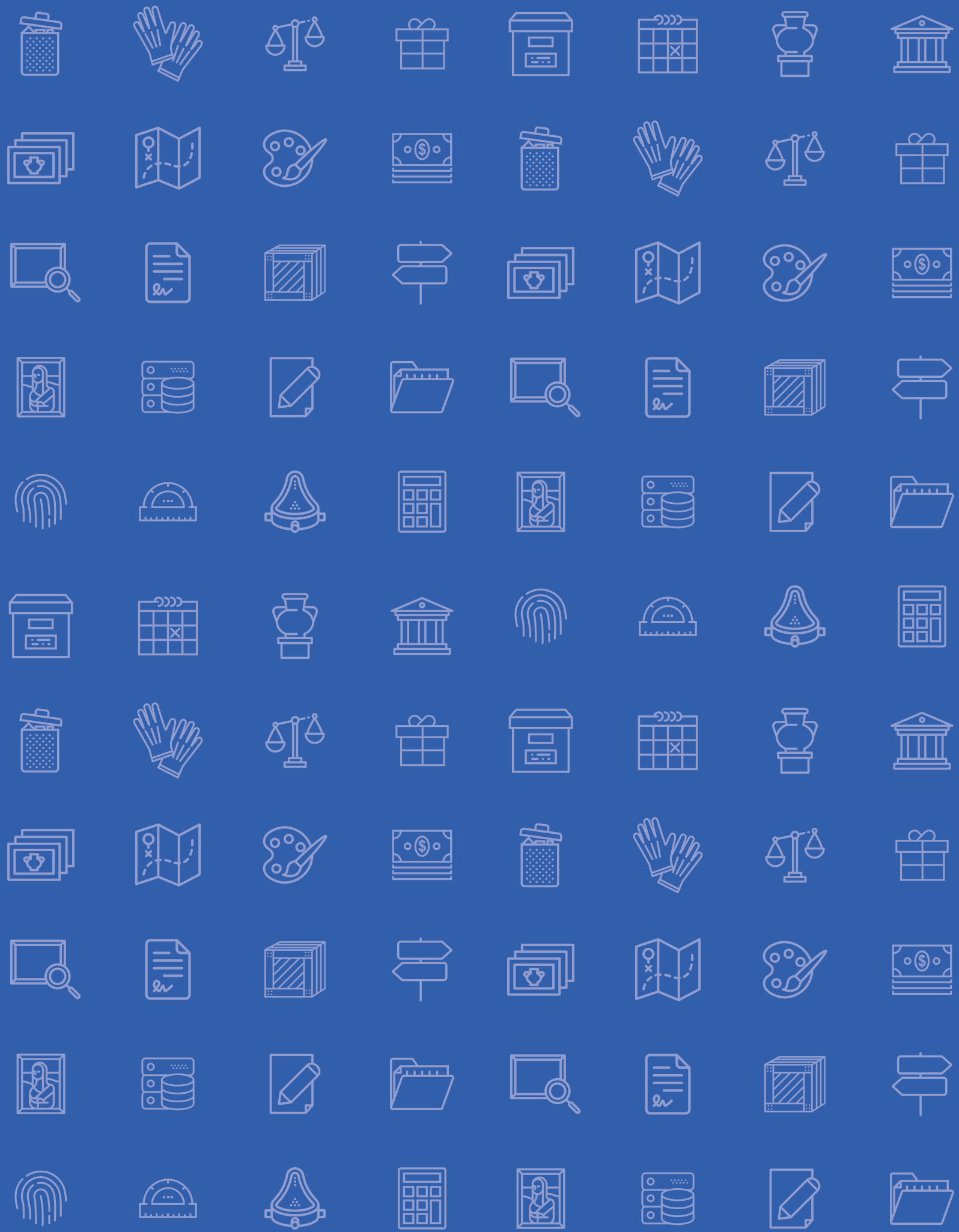
## Margaret Rose Vendryes, PhD

Margaret Rose Vendryes is an art historian, visual artist, and curator. She received her BA in fine arts from Amherst College, MA in art history from Tulane University, and PhD in art history from Princeton University. She taught at Princeton University and Amherst College before entering the faculty at York College & The Graduate Center of the City University of New York where she received tenure in 2006. Among several honors, Vendryes held an American Association of University Women Fellowship and was a Scholar-in-Residence at the Schomburg Center for Research in Black Culture. In 2008, University Press of Mississippi published Vendryes's book *Barthé, A Life in Sculpture*, the first comprehensive monograph on the late African American sculptor Richmond Barthé.

"The African Diva Project" is a painting series enhanced by Vendryes's scholarly engagement with African aesthetics and its intersection with popular Black music and visual culture. She began "The African Diva Project" in 2007, which has grown to more than forty-five works of art celebrating popular Black women soloists. Vendryes has had solo exhibitions in Boston; NYC; and Biloxi, MS as well as exhibited in several group shows over the last decade. She is currently associate professor and chair of the Department of Performing and Fine Arts and Director of the Fine Arts Gallery at York College. Her work can be seen at [margaretrosevendryes.com](http://margaretrosevendryes.com).







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