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### **Legal Ownership of Art**

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This month's article is going to be a little different. It is based on a presentation I did with a panel of experts geared to art collectors and donors entitled *Art Donation and Charitable Contribution Basics*. I began the program by discussing the legal ownership of art and my fellow speakers continued with summarizing some of the tax implications of donating art to non-profit organizations. I will summarize my presentation on ownership in this article and recommend that you speak with a CPA or tax attorney regarding tax questions.

#### **Acquiring Art**

The first question about art ownership is how to come to possess the piece of art and what exactly did you get? Simply put – do you have it in your possession? Where it is?

There are four basic ways to acquire art:

1. create the art yourself;
2. commission an artist to create a particular work of art for you;
3. purchase the art; or
4. be given the art as a gift or a prize.

Each of these methods has their own nuances. If you create the art yourself, what was your purpose in creating it? Did you plan to expand your portfolio, experiment with a concept, sell it, exhibit it, give it away? The copyright laws in the US indicate that at the moment of creating your art you own it, unless it was a "commission" or "work for hire." So you can pretty much do whatever you'd like to with it – including destroying it to reuse the materials for another piece.

If you commission an artist to create a particular work of art for you keep in mind the specifics you put into the contract as this is considered a "personal service" being rendered for you. Discuss with the artist the issue of "personal satisfaction" – will this be a criteria to accept the art and pay for it? IF you are the artist you must get this cleared with the "client/purchaser" or you may end up in litigation to get compensation due you if they refuse to accept the work and don't pay.

Individuals who purchase art often do so for one of two reasons: to enrich their lives (and enjoy it) or as an investment (to sell it). Under the IRS code a collector and an investor can be treated differently from a dealer or the artist. It is often a good idea to purchase art you like, especially if you intend to display it in your home or office where you will see it every day. True collectors will spend a lot of time researching the genre of the art, particular artists and trends in the art market. Investors will do the same research but will weigh the financial aspect more than the aesthetic to it when considering whether to buy or not. When you purchase do not forget

to get an appraisal done to ensure that the purchase cost and the item value is not inconsistent to your detriment – everyone likes a good bargain, but a Picasso for \$1,500 is not the real thing.

One last method of acquiring art is to be given the art as a gift or as a prize. Again, the IRS will view the value of the art and what you owe or don't owe in taxes depending on whether it was a gift or a prize. This is another important point to discuss with the CPA - there are gift taxes (someone else purchased the art and gave to you or the artist gave the art to you), estate taxes (if you got it because someone died and left it to you in their will), capital gain taxes (relating to auctions), or income tax, etc.

Well you physically have it, but what exactly do you own? This comes down to documentation regarding the art work itself. Documents you should have include: a bill of sale or receipt, letters of authenticity, an artist bio or statement regarding the work, and an appraisal of the art's value. As an artist selling your work, make sure you have these documents ready for your customers, although the appraisal is usually the responsibility of the purchaser who often wants an unbiased opinion.

There is one other piece of documentation that may be included – copyright transfer or assignment or a license agreement for the copyright. You may own the art but not the copyright in the art – especially in regards to contemporary art, whose creators keep the rights so as to make derivative works (such as postcards or coasters) or to use the image of the art in audiovisual applications – such as films, Facebook, etc. In the U.S. copyright lasts the life of the author + 70 years – and can expand in total to about 95 years. This is different for different countries (so something to consider if you purchase art outside the US). It is usually safe to say that art works created prior to 1923 are free of copyrights – they exist in the public domain. But always check. Because the art and its copyrights are different types of property (the art is personal property; the copyright is intellectual property), you as the owner can assign those rights separately as well. More on that later.

One last note on this – there is a new phenomenon occurring in which various individuals can purchase “time-shares” in a particular work of art. Some artists are using social media platforms such as Kickstarter.com to raise funds for materials to produce art and promise in exchange a poster or other derivative from the work. It is an interesting concept to monitor.

### **What can I do with it?**

The second question relating to ownership is what can I do with it now that I own it? There are six basic things to do with art you own:

1. Store it away;
2. Display in your home or office;
3. Loan it to someone;
4. Give it to someone;
5. Sell it; or
6. Destroy it.

Sometimes you purchase art and don't have a place for it – it could be because you are moving from one place to another or you just don't have room. Some individuals like to change the décor in their homes or office and might switch art around. In these cases it is important to protect the art during transportation and storage. Things to consider might include a professional art handler; the carrier being used to transport the art; and insurance for the art. Do keep an inventory of the art you have in storage in a safe place and reference it in your will.

Most people will want to display or exhibit the art they purchased in their home or office. Be sure to safely hang or display the art. Using the right tools, including hooks, etc. can make a big difference. Some may opt to use a

professional installation service, which may also provide suggestions on lighting and placement of the art to showcase it in all its glory.

During your lifetime you may decide to “loan” the art to a museum or gallery as part of one of their exhibits, or to the artist him/herself if they are doing an exhibit of their work. Make sure to have a written agreement outlining the specifics of the loan – title of the art work; size, description and medium of the artwork; who is responsible for insurance and transporting the artwork; how long the loan is for; liability if the art is damaged while on loan; if there will be a fee; etc. As the owner of the art you have every right to layout the parameters of the loan.

You can also decide to give the art during your lifetime or after you die (in a will). Again you can specify terms for the gift. For example, that you want it displayed at least 50% of the year or that it can only be displayed in such and such exhibit space. It is important to have realistic expectations of what will happen to your gift after you die. Will the recipient accept the gift? We have had a few cases where museums have requested to deaccession certain pieces of art to be able to sell them and get revenue to pay bills, etc. One popular case is the Georgia O’Keffe collection. The court will look at the giver’s intentions first, but can then consider the consequences and burden of keeping the gift vs. having it deaccessioned.

You can also sell the art you purchase. Your tastes or circumstances may change and you may want to get rid of some art and replace it with others. You will need all your documentation as this will help continue to record the provenance (ownership trail) of the art. This is useful for verifying the artist or date the artwork was created to determine whether it was an original or just from the school of. If you purchased the art in the European Union (especially Italy and France) you did need to be aware of artist resale rights – this means that the artist receives a royalty each and every time his/her artwork is sold forward. We do not have this in the U.S. although California is getting close to passing legislation on this issue.

The last thing you can do with art is modify or destroy it. Can you take a painting you purchased and cut it up into 6 different pieces? Can you cover it with paint or add elements to it? Can you burn it in a bonfire or throw it out? This has happened but whether you can or cannot do it depends in great part as to where the artist is located. In the European Union there are strong morale rights for artists in terms of attribution and integrity. In the US we have the “first sale doctrine” which states that once we purchased something it is ours to do with what we like. IT stems from the concept of personal property laws. However, the US recently passed the Visual Artist Rights Act (VARA) to give some morale rights to US artists. We have seen it used mainly for big works of art that have been commissioned for public spaces. Most of the cases settle so we are still not sure how VARA is applied.

### **Art from Abroad: Art vs. Souvenirs**

Just a few last thoughts on art you purchase overseas whether you are on vacation or on business. Make sure what you purchase is not cultural heritage property and that it is ok to purchase. Do not purchase black market items. Beware of counterfeits, knock-offs and fakes. Make sure to get all the necessary documentation for what you purchase as this will be important for insurance and customs reasons. Take special considerations if you purchase jewelry as art, stones can be quite valuable or can easily be substituted.

## **Conclusion**

Creating and collecting art can be enjoyable and enriching. Donating or giving that art to a non-profit can have its rewards too. But be careful how you do it. Make sure to plan ahead and in the meantime – enjoy the beauty you have brought into your life.