WHEN YOUR CLIENT IS AN ARTIST, WRITER OR PERFORMER: SPECIAL ESTATE PLANNING CONSIDERATIONS

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The character and nature of a client's assets often dictate the strategy an estate planning attorney implements in structuring an estate plan. This is true whether the estate planning attorney is dealing with oil and gas properties, closely held business interests, or, in the case of a client who is an artist, copyrights and creative works. For the purpose of this paper, the phrase "artist-client" includes not only the visual artist, but the writer and performer.

While your client may not necessarily be the next Picasso, he may be the high school teacher who writes plays in his spare time and who now has several works listed in a catalogue of plays appropriate for high school productions. Or she may be the retiree who took up water color painting and who has licensed some of her artwork to be used on postcards advertising a local winery. Or he may be the aspiring singer-songwriter who has just signed a deal with a recording company. Many of our local universities have artists and writers in residence who in turn encourage and teach others to be artists. These artists may be your clients now or in the future, so it is important to know how to deal with the special assets and concerns that they have.

An estate planning attorney's goal is to use his or her expertise to achieve the client's objectives. Most estate planning clients have the common objective of wanting to transfer assets to the intended beneficiaries at the lowest cost and in the most efficient manner. But the estate planning attorney has to be conscious of the artist client's other unique objectives, which include the management of copyright interests, the minimization of the tax consequences related to copyrights and artwork, providing liquidity for the payment of debts and taxes after death, and the preservation and promotion of a legacy. This paper will focus on the artist client's unique objectives and will offer suggestions on how those unique objectives may be met.

Copyright Law Background.

In order to deal with an artist client's special objectives, an estate planning attorney needs to have a basic understanding of copyright law. U.S. copyright law protects the rights an "author" has to "an original work of authorship fixed in a tangible medium of expression." [1] These rights include the exclusive right to (1) reproduce the work, (2) prepare derivative works based on the copyrighted work, (3) distribute copies by sale or other ownership transfer, or to rent, lease, or lend copies, (4) perform the work publicly, and (5) display the work publicly.[2]

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[1] 17 U.S.C. §102

[2] 17 U.S.C. §106

The easiest way to understand a copyright is to view it as a bundle of different intangible interests.

Copyright ownership is separate from ownership in the work of art. As a result, a transfer of the work of art, including by sale or gift, will not automatically transfer the copyright, unless there is an express writing doing so.[3] The interest in a copyright may be transferred in whole or in part, and in a number of ways, such as by type of use, by different kinds of media, by territory or by duration.[4] Transfers of an interest in a copyright may be exclusive or non-exclusive. The use of the word "transfer" does not necessarily mean a transfer of all of the rights in a copyright, but could mean the transfer of just one of a copyright owner's rights, and the transfer could be for a limited duration. The term of a copyright created on or after 1/1/1978 is the life of the author plus 70 years.[5]

One aspect of copyright law that may come as a surprise to the estate planning attorney is the statutory right of the creator of the work to terminate during a designated period of time the transfer of a copyright and retrieve the copyright interest.[6] The right to terminate the transfer of a copyright interest applies to both exclusive and non-exclusive transfers and cannot be waived in advance. For example, for copyrights created beginning in 1978, this right can only be exercised during the five-year window between 35 and 40 years from the date of the transfer. The creator of the work must give notice that the creator intends to exercise the right to terminate the transfer not less than two years, nor more than ten years, before the before the termination date. If the creator of the work dies before the time for giving notice of termination begins (25 years after the transfer of the copyright) or during the notice period without giving notice (25 to 38 years after the transfer of the copyright), the creator's spouse (50%) and descendants, per stirpes (50%), have the termination right. This outcome cannot be altered by the will of the creator of the copyright. If there is no surviving spouse, the descendants will have 100% of the termination right. If there are no descendants, the surviving spouse will have 100% of the termination right. The termination right may only be exercised by a majority of the owners of the termination right. This results in a "forced heirship" of the copyright if the creator dies when there is an unexercised or unexercisable termination right.

Say, for example, that a copyright created after 1978 was licensed to a third party when the creator was age 30. At age 50, the creator decides to terminate the copyright when he reaches age 66 (which is within the window of 35 – 40 years after the date of the transfer of the

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[3] 17 U.S.C. §204

[4] 17 U.S.C. §201(d)

[5] 17 U.S.C. §302

[6] 17 U.S.C. §203

copyright). The earliest the creator could give the notice of the termination would be when the creator reached age 56 (10 years before the termination date). The latest the creator could give the notice of termination would be when the creator reached the age of 64 (2 years before the termination date). There would be no forced heirship if the creator exercised the termination right before he died. There would also be no forced heirship if the creator died after the expiration of the time for giving notice of a termination (37 years after the date of the transfer, which would be 2 years before the end of the 39th year marking the end of the period during which the termination could be made – in our case, after age 67). If the creator died before the start of the notice period (at age 56), or during the notice period (age 56 – age 64) without giving notice of the termination, the forced heirship rules would apply.

There are issues the estate planner must grapple with because of the forced heirship possiblity. Even if the creator of the copyright has no problem with a spouse and children holding a copyright together, the estate planner should point out that the value of a copyright could be diluted if too many individuals have the right to exploit the various copyright interests. Also, there are problems associated with possible ownership of a copyright interest by minors.

Goal #1: Management of Copyright Interests.

Because a copyright is an aggregation of many intangible rights, including rights of reproduction and distribution, rights of public performances and display, and the right to prepare derivative works, if there is more than one owner of a copyright (which could be the case if a copyright owner died intestate or if the copyright passed under the copyright owner's will to more than one beneficiary), then each owner, without the joinder of the other owners, could enter into transactions with respect to the subsidiary rights included in the copyright, thus diluting the economic value of the copyright. This could also lead to the copyright owner's heirs or beneficiaries competing with each other to market the copyright. The goal of the estate plan should be to centralize control of the copyright and to facilitate the management of the bundle of rights included in the copyright. With that goal in mind, an estate planning attorney may want to consider the following:

1. **Power of Attorney**. Include in the Statutory Durable Power of Attorney provisions relating to the management of the copyright, including the right to give notice of the termination of a transfer (as described above) so as to avoid the forced heirship situation.

2. **Revocable Trust.** Consider the use of a revocable trust to provide stronger centralized management of the copyright in the case of the artist-client's disability, especially if the artist-client wants to make use of a committee of family members and experts to manage the exploitation of any copyrights.

3. **Testamentary Trust.** The artist-client's will may provide that the copyright passes to a testamentary trust on the death of the artist-client to provide for the management of the copyright.

4. **Business Entity to Hold Copyright.** The artist-client could transfer the copyright to a business created by the artist-client during life. The governing documents of the entity could be drafted to provide for management and exploitation of the copyright.

5. **Trust vs. Business Entity.** In considering whether the owner of the copyright should be a trust or as a business entity such as a corporation, LLC or partnership, the estate planning attorney should review with the artist-client the different fiduciary standards applicable to a trustee and to a director or manager of a business entity. The director or manager of a business entity would be subject to the less onerous business judgment rule in managing the copyright, as opposed to the stricter trust standards of prudence.

6. **Gifting Artwork in Will or Trust.** Remember that the copyright is separate from the creative work, so when drafting language making a gift of original creative works in a Will or Trust, include the copyright, if that is the artist-client's intent. This is especially important if the creative work is passing as a specific bequest. If the copyright is not also devised as part of the specific bequest, it could pass under the residuary clause to a different beneficiary. It may also be appropriate to include in the devise any licensing contracts related to the creative work. One commentator has suggested the following language:

> The words "Artistic Property" mean, refer to and include all my right, title and interest in and to works of art including, but not limited to, paintings, drawings, sculpture and photographs and copyrights therein, rights under contracts or licenses for the reproduction, distribution, publication or other exploitation thereof, and all other rights of any kind or nature in connection therewith, which exist in connection therewith, or which may arise or accrue therefrom, whether my artistic works shall be finished or unfinished at the time of my death, including any and all rights to obtain, renew or extend any copyrights or similar rights therein or relating thereto.[7]

7. **Successor Charitable Beneficiaries.** If the artist-client wishes to make a gift to a particular charity, such as a museum, it would be prudent to include a successor charity, or allow the personal representative to choose another charity, in the event the first charitable beneficiary does not wish to accept the gift.

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[7] Cheryl E. Hader, *Making the Intangible Tangible: Planning for Intellectual Property*, 29 Estate Planning Journal No. 11, November 2002, at 2.

8. **Gift to Charity That Does Not Include Copyright.** If the artist-client wishes to make a testamentary gift to a charity that does not include the copyright, include language that the gift to the charity must be used for the beneficiary's charitable purpose. Otherwise the charitable deduction for the appreciated value of the artwork may be lost for failure to comply with the "related use" rule[8] (discussed in more detail under Goal #2 of this paper). One commentator has suggested the following language:

> I give all photographs, prints, negatives and other photographic material owned by me at my death, not otherwise specifically bequeathed herein, to such charitable organizations or institutions as shall be selected by my Executor provided that each such organization or institution shall be an organization described in both Section 170(c) and 2055(a) of the Internal Revenue Code . . . (or any corresponding section of any tax laws of the United States from time to time in effect) and provided that such charitable institutions are willing to comply with the conditions and restrictions which my Executor may impose including the manner and frequency of exhibition of these materials and their availability for study and research.[9]

9. **Tangible Personal Property Other Than Creative Works.** The artist-client's archives, consisting of business and personal papers, journals, photographs, video tapes, catalogues, etc. may increase the value of the creative works and, if so, it is important that they are safely preserved. If, after death, there is an exhibit of the artist-client's work, the exhibit may be made more meaningful and have more potential for increasing the reputation of the artist-client if the artist-client's personal papers accompany the creative work. For that reason, the artist-client may wish to designate a caretaker for the artist-client's important papers, or the artist-client may wish to direct the personal representative to donate such items to a public institution. The Archives of American Art, which is part of the Smithsonian Institute, collects materials from artists in all areas of the country. As stated in its own words:

> We depend upon the generosity of the visual arts community, their friends, and their families for donations of letters, photographs, sketches, journals, and other files that allow historians, students, and the public to understand and appreciated are and the role of the artist in America.[10]

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[8] I.R.C. 2055(e)(4)

[9] Barbara Hoffman, *Copyright and Other Intellectual Property Issues In Estate Planning and Administration for the Visual Artist, in* A VISUAL ARTIST'S GUIDE TO ESTATE PLANNING, 96, 110 (Barbara Hoffman ed., 1998).

[10] John W. Smith, *The Archives of American Art, in* A VISUAL ARTIST'S GUIDE TO ESTATE PLANNING: THE 2008 SUPPLEMENT UPDATE, 125, 128 (Barbara Hoffman ed., 2008).

10. **Choice of Copyright Administrator.** Unified management of an artist-client's copyrights is necessary to maximize the value of the copyright interests. Those chosen to manage the copyrights, either as executor or trustee, or at the direction of the executor or trustee, must have the knowledge, expertise, background, and familiarity with the artist-client's work to be able to make informed decisions. Sometimes decisions related to the management of the creative works need to be made quicker than the usual trust or estate management decisions. With respect to deals relating to television, recording and film production the fiduciary often must be able to act fast and with authority.[11]

The options for managing the copyright and the artist-client's works range from a single fiduciary, to multiple fiduciaries assigned different tasks, to one or more family members acting in conjunction with an advisory board of experts. The estate planning attorney must explore with the artist-client how the client envisions the promotion of his or her creative works after death. No matter who the artist-client chooses for this task, though, there are two important issues that must be addressed: conflicts of interest and compensation.

Some potential conflicts of interest are obvious. Would an art dealer or publisher be willing to promote the creative works for the long term and give up the possibility of immediate commissions? Would beneficiaries who are acting as trustee or executor be willing to forego profiting from the creative works if a donation to a museum would more likely enhance the artist-client's reputation? Some potential conflicts of interest are less obvious. If the artist-client's "significant other" is also an artist, would that person be likely to devote the time necessary to promote the deceased artist-client's work and reputation if it meant spending less time promoting his or her own? Would a family member who is a fiduciary halt the release of the artist-client's personal papers and writings for fear of exposing private matters concerning the family? The estate planning attorney should help the artist-client work through the various scenarios to help him or her select a management structure that would minimize the potential conflicts of interest and maximize the promotion of the artist-client's work.

Once the artist-client has made a choice with regard to fiduciaries, the estate planning attorney may want to build in some protection for the fiduciary having a conflict of interest. One commentator has suggested adding the following language:

> I realize that a large part of my estate may consist of works of art created by me or by other artists. I authorize and empower my Fiduciaries to act on behalf of my estate in all matters relating to works of art, including, without limitation, decisions as to retention, sale, redemption or other disposition of works of art, despite the possibility that there may be a conflict of interest between the interests of my estate and the individual or other interest of any of my Fiduciaries. Subject to the express provisions of this Will, my Fiduciaries may act in all matters

[11] *Estate Planning Issues for Entertainers,* Entertainment Law and Finance (ALM Law Journal Newsletters) Vol. 22, No. 10, at 2, January 2007.

arising from or connected with any such works of art with the same freedom and latitude that they would have if they owned such works of art in their own right, and my Fiduciaries shall be absolved of any liability or responsibility to anyone interested in my estate because of any action or omission to act taken in good faith with respect to any and all such matters.[12]

Compensation of fiduciaries who are managing copyrights and creative works presents its own set of issues. Typically fiduciary compensation is based on a percentage of the value of the assets under management. That may work for assets that are easily valued, but determining the value copyrights and creative works is difficult, uncertain, and subject to fluctuation. Imposing a requirement that the copyright and works be valued annually may be expensive. If compensation is based on a percentage, consideration should be given to the fact that when creative works are sold, the commissions could be hefty. Therefore compensation in the form of a percentage of the gross value of the works could result in an undue financial burden on the estate. An alternative formula for compensation could rely on a percentage of the net receipts from exploiting the creative works, perhaps with a cap on the amount of compensation. Another option would be to arrive at a fixed dollar amount of compensation, indexed for inflation. As an added protection, the language providing for compensation could include the restriction that compensation should not exceed what would be considered "reasonable."

Another question relating to compensation involves whether a publisher or dealer who is acting as a fiduciary should be entitled to receive commissions on the sale of the works, as well as compensation as a fiduciary. If the artist-client wishes to name a publisher or dealer as a fiduciary, it would be advisable to discuss these issues with the publisher or dealer in advance, so as to avoid a situation where the publisher or dealer declines to act as a fiduciary.

11. **Right of Termination.** A description of how the right of termination works is included in the earlier Background section of this paper. If there is a danger that the copyright interests might be subject to a forced heirship, and the artist-client would rather have the copyright interests pass other than to a surviving spouse or descendants, the estate planning attorney should discuss with the client the possibility of giving up the right to own the copyright, and instead create "works made for hire." A work made for hire is a creative work that is produced by the artist-client in the scope of his employment so that the copyright is not owned by the artist-client, but by the employer.[13] The term of a copyright for a work made for hire created on or after January 1, 1978, ends on the earlier of 95 years from the first publication of the work, or 120 years from the date of the creation of the work.[14] Right of termination and forced heirship rules are not applicable to

[12] Hader, *supra* note 7, at 4.

[13] 17 U.S.C. §101; 17 U.S.C. §201(b)

[14] 17 U.S.C. §302(c)

a work for hire.[15] An artist-client wanting to avoid the forced heirship provisions associated with a right of termination could contract with a business entity (such as a limited liability company or corporation) wholly owned by the artist-client to produce the artwork. The copyright would then be owned by the business entity and no right of termination would exist. In making this decision, the artist-client needs to recognize that the right to terminate is a valuable right. He or she must weigh the value of the right to terminate a transfer of a copyright in order to make a better deal against the chance that the forced heirship might occur.

12. **Right of Publicity.** Chapter 26 of the Texas Property Code[16] allows the testamentary disposition by the artist-client of his or her name, voice, signature, photograph, or likeness after the death of the artist-client. This right is called the right of publicity. Consideration should be given as to whether this right needs to be addressed in any testamentary instrument.

13. **The Visual Artists Rights Act.** In 1990, Congress amended the Copyright Act to give artists a "moral right" in works of visual art, defined as original or limited edition copies of paintings, drawings, prints, or sculptures.[17] The Act gives the artist the right, in certain circumstances, to prevent the distortion, mutilation, or other modification of the work which would adversely affect his or her honor or reputation. If the work has "recognized stature," the artist has a limited right to prevent the destruction of the work. While these rights are only enforceable during the artist-client's lifetime, the estate planning attorney should at least be familiar with the fact that these rights exist in the event they need to be exercised.

14. **Orphan Works Act.** The estate planning attorney who is advising the artist-client should also be aware of a proposed bill that has passed the U.S. Senate known as the Orphan Works Act.[18] The proposed bill, which is popular with museums, but not with artists' groups, would allow the public use of creative works whose copyright holders are unknown or impossible to locate. Under the Act, the creative work could be used if the user documents a diligent, good faith effort to locate the copyright holder. If the copyright holder comes forward after the creative work has been used, the Act provides for reasonable compensation to be paid to the copyright owner, but not the statutory damages that are associated with infringement.

Goal #2: Minimizing Taxes

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[15] 17 U.S.C. §203(a)

[16] TEX.PROP.CODE ANN. §§26.001 – 26.015

[17] 17 U.S.C. §106A

[18] S. 2913, 110th Cong. (2008)

Copyrights and the business transactions relating to copyrights carry their own unique set of tax concerns. The way artists are often compensated (participations, deferments, and residuals) give rise to IRD (income in respect of a decedent) issues. Rules on gifts of artwork and donations of artwork and copyrights to charities can complicate the estate plan. Difficulties in valuing the artwork can result in challenges by the IRS.

1. **Income in Respect of a Decedent.** Income in respect of a decedent (IRD) is income that accrued to the artist-client before death, but was not received until after death.[19] Compensation measured by the net profits or gross receipts from motion pictures (known as "participations"), fixed future payments (known as "deferments"), payments related to future use of a recorded performance, such as a commercial or TV situation comedy (known as "residuals"), and royalty payments to recording artists measured by future recording sales, are all deferred payments that fall under the heading of IRD if paid after the death of the artist-client.[20] In addition to being subject to income tax, IRD is included in the artist-client's estate for estate tax purposes, but an income tax deduction is allowed for the estate tax attributable to the IRD items.[21] Items of IRD do not receive a step-up in basis to the date of death value.[22]

   There is a difference between the way a sale of a copyright and a licensing of a copyright is treated for IRD purposes. Proceeds received after death from the sale of a copyright before death will be treated as IRD and there will be no stepped-up basis for the copyright.[23] Royalty payments from the licensing of a copyright before death, that accrue after death and are received after death, will not be treated as IRD and the copyright will receive a stepped up basis. Royalty payments that accrued before death, but were paid after death, will be treated as IRD. The artist-client should be advised of the different tax treatment when considering a sale as opposed to a license of a copyright.

   When an appreciated asset is used to satisfy a pecuniary bequest, there is taxable gain to the extent that the fair market value of the asset is more than its tax basis. As a result, taxable gain will likely result if an IRD asset is used to satisfy a pecuniary gift under a will because the IRD asset has not received a stepped-up basis at death. If it is anticipated that the artist-client will have a taxable estate consisting of large amounts of IRD, and the artist-client's will includes marital deduction planning, the estate planning attorney may wish to consider the use of a fractional-share formula in funding a marital

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[19] I.R.C. §691(a)

[20] *See generally* Jeffrey K. Eisen and Allan E. Biblin, *Estate Planning for Clients in the Entertainment Business*, Estate Planning Journal, Vol. 33, No. 2 (February 2006).

[21] I.R.C. §691(c)

[22] I.R.C. §1014(c)

[23] *Id.*

trust or a credit shelter trust, as opposed to a pecuniary bequest formula, so as to avoid income taxes on funding the trust.[24]

Because the artist-client's estate may be the recipient of royalties and other forms of deferred compensation, if a trust is created under the artist-client's will, the language governing the allocation of such receipts to principal or income should be reviewed to make sure that it reflects the artist-client's intent.

2. **Gifts of Artwork to Donee During Life.** When making a gift of artwork to a donee, delivery of the artwork into the possession of the donee and acceptance by the donee are necessary for the transaction to be viewed by the IRS as a completed gift. If the artist-client retains possession of the artwork until death, the IRS could argue that the artwork is includible in the artist-client's estate under §2036(a)(1) of the Internal Revenue Code.

3. **Donations to Charities.** Tax laws discourage artists from donating their creative works to charities during their lifetimes. An artist is allowed as a charitable deduction only his or her basis in the creative work (which is the cost of materials) rather than the fair market value of the creative work.[25] Because a gift of a creative work to a charitable organization at the artist-client's death will receive a charitable deduction equal to the creative work's fair market value, the better course of action (from the point of view of obtaining the maximum charitable deduction) is for the artist-client to make charitable contributions of creative works at death.

An alternative would be for the artist-client to make a testamentary gift of the creative work to a surviving spouse who could then make the donation to charity. Because the creative work was included in the artist-client's estate, the spouse would have a stepped up basis in the creative work and the subsequent donation to the charity would yield an income tax deduction based on the creative work's fair market value. There would be no estate tax on the testamentary gift to the surviving spouse because of the marital deduction.

The charitable deduction will be allowed to the artist-client's estate if the gift of the creative work includes the copyright.[26] If a gift of a creative work to a charity does not include the copyright, the charitable deduction may be denied if the use of the creative work by the charitable organization does not relate to the charitable purpose of the organization. This is explained more fully in Example 1 of IRC Regs §20.2055-2(e)(1)(ii)(e):

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[24] Eisen and Biblin, *supra* note 20, at 9.

[25] I.R.C. §2055

[26] Treas. Reg. §1.170A-4

Example (1). A, an artist, died in 1983. A work of art created by A and the copyright interest in that work of art were included in A's estate. Under the terms of A's will, the work of art is transferred to X charity, the only charitable beneficiary under A's will. X has no suitable use for the work of art and sells it. It is determined under the rules of §1.170A-4(b)(3) that the property is put to an unrelated use by X charity. Therefore, the rule of paragraph (e)(1)(ii)(a), which treats works of art and their copyrights as separate properties, does not apply because the transfer of the work of art to X is not a qualified contribution. To determine whether paragraph (e)(1)(i) of this section applies to disallow a deduction under section 2055, it must be determined which interests are treated as passing to X under local law.

(i) If under local law A's will is treated as fully transferring both the work of art and the copyright interest to X, then paragraph (e)(1)(i) of this section does not apply to disallow a deduction under section 2055 for the value of the work of art and the copyright interest.

(ii) If under local law A's will is treated as transferring only the work of art to X, and the copyright interest is treated as part of the residue of the estate, no deduction is allowable under section 2055 to A's estate for the value of the work of art because the transfer of the work of art is not a qualified contribution and paragraph (e)(1)(i) of this section applies to disallow the deduction.

The artist-client should either make a testamentary gift of the artwork together with the copyright to a charity or, if only the artwork is being devised to the charity, condition the gift on its use for a purpose related to the charity's exempt function.

4. **Deductibility of Expenses.** There may be hefty commissions owed if the artist-client's estate sells any of the creative works through a dealer or other agent. Section 2053 of the Internal Revenue Code allows these expenses to be deducted only if the expenses are necessary to pay debts, administration expenses, taxes, or to preserve the estate, or to effect distribution to the beneficiaries. To avoid having to comply with this "necessity test," an artist-client who knows that he or she wants certain pieces of artwork to be sold should include language in his or her testamentary document expressly instructing the personal representative to sell those works.

5. **Valuation.** The value of the artist-client's creative works will determine whether the artist-client's estate is subject to estate tax and to what extent.[27] In addition, ascertaining the value of an artist-client's donation to a charity during lifetime or at death requires knowledge of the value of the works being donated. In both cases, an appraisal will be necessary. When valuing an artist-client's work for estate tax purposes, an appraiser must value not only the creative work, but the contracts related to the work, such joint venture

[27] I.R.C. §2031

agreements, contracts with publishers and dealers, royalty contracts, profit participation agreements, licensing agreements and revenue streams.

The IRS has established an Art Advisory Panel to assist the IRS in reviewing and evaluating appraisals of artwork submitted by taxpayers in conjunction with federal income, estate, and gift tax returns.[28] Twenty-five art experts who serve without compensation make up the Panel. If a return containing a claimed value of $20,000 or more for a piece of artwork is selected for audit, the case must be referred to the Art Advisory Panel.

An artist-client, or the personal representative of the artist-client's estate, may pay a user fee and request from the IRS an expedited review of art valuations for income, estate and gift tax returns. The procedure is outlined in Revenue Procedure 96-15 (as modified by Ann. 2001-22, 2001-CB 895, 2-15-2001) and applies to an item of art that has been appraised for $50,000 or more.

How can the artist-client during his or her lifetime assist with making the appraisal process a smoother one? By organizing the creative works and maintaining an inventory that includes the following:

a. Date of creation (helps to determine for copyright purposes when the work was "fixed in a tangible medium")
b. Details of the work such as size, medium, etc. (helps with fighting infringement and with finding lost or stolen works)
c. Location of creative works, including works on consignment or on loan
d. Expenses for the production of each work to establish the tax basis during life
e. Notations as to whether any works are "works made for hire"
f. Record of licenses, gifts, other business arrangements

In addition to helping with the appraisal process, the inventory will also be invaluable with respect to promoting the artist-client's work after death.

If the artist-client is concerned that the appreciation of the creative works, or the copyright interests, may cause an estate tax, the artist-client may use the estate planning technique of transferring the work during lifetime to an entity, such as an irrevocable trust benefiting the artist-client's intended beneficiaries, so that the appreciation of the work will be removed from the artist-client's estate. The artist-client may also include in the trust provisions restrictions on the use of the copyright to further dilute its value.

Goal #3: Providing Liquidity to the Estate

One situation prevalent among the estates of artist-clients is the lack of liquidity to pay debts, funeral expenses, taxes and the costs of estate administration. The estate planning attorney

[28]IRS Audit Manual, MT 42(16)4 (11-19-82).

should review the artist-client's other assets and ask the client the hard questions relating to how these expenses are going to be paid and whether future expenses such as storage and marketing costs should be anticipated. If there is no plan for paying these expenses, the result may be a "fire sale" of the artist-client's work with very little chance of enhancing the artist-client's legacy. The initial suggestions are the easy ones:

1. **Life Insurance.** If possible, the artist-client should buy life insurance to cover the potential expenses. Care should be taken with the beneficiary designation to make sure that the life insurance proceeds are used for their intended purpose. One possibility is for the proceeds to be paid to a trustee designated in the artist-client's will. The will could include instructions as to how the proceeds should be used.

2. **Avoid Joint Tenancy With Right of Survivorship and Payable on Death Accounts.** If the artist-client's will contains a plan for paying debts and managing the creative works, the artist-client's non-probate assets should be coordinated with the plan so that they may be used to implement the plan.

3. **Section 6166 Election to Defer Payment of Estate Tax.** If it appears that an estate tax liability is imminent, and the required percentage of the artist-client's estate consists of creative works, it may be prudent to transfer the creative works and the copyright interests to a closely held business entity owned by the artist-client. If the artist-client is actively involved in the business managing the creative works and the copyrights, the business should not be considered a passive investment and the estate may be eligible to elect to defer the payment of estate taxes under Section 6166 of the Internal Revenue Code.

Goal #4: Preserving the Legacy

Most artist-clients have a strong desire to leave a legacy. Many of the steps outlined earlier in this paper have this goal as their ultimate purpose. That's why it is important to make sure that there is unified management of the copyright interests and creative works, that taxes are minimized so more assets may be devoted to enhancing the artist-client's reputation, and that there is enough liquidity in the estate so that the plan for managing the creative works may be implemented.

One way to increase the awareness of an artist-client's work is through donations to museums, libraries, universities, and other entities that encourage scholarly research. If the artist-client wishes to make such a donation, either during life or at death, it would be prudent to contact the institution first to ascertain the institution's interest. These institutions have more offers of artwork than they can handle, and even if the institution expresses an interest in the gift, the artist-client may want assurances that the artwork will not be relegated to a storage facility for an indefinite period of time.

Because of the minimal income tax deduction that the artist-client can obtain during life for charitable donations of creative works, and because artists are interested in creating a plan to

manage their artwork after death, there has been an increase in artists creating private foundations in their testamentary documents.[29] This course of action has been followed not only by wealthy artists, but by artists of little or no wealth, who rely on volunteers and patrons to carry on their legacy.[30]

Foundations can take the form of a trust or a corporation. One consideration in deciding which form the foundation should take is that banks and other institutions the foundation might be dealing with are more familiar with the corporate form.

The same considerations that apply to choosing a structure for managing the artwork and copyright interests in the artist-client's testamentary documents apply to choosing the managers of a private foundation. The duties of the managers of the private foundation could include the following:

a. Inventory the creative works and copyright interests

b. Record all assignments, licenses (exclusive and non-exclusive), and other business ventures

c. Assemble and organize private papers, journals, press clippings, etc.

d. Seek out and enter into agreements with critics, historians and other scholars for exploitation of the creative works

e. Authenticate creative works (The artist-client can help with increasing the likelihood of leaving a legacy if the artist-client signs all works or otherwise indicates that works are originals. This increases the value of the works and helps the foundation avoid possible liability for authenticating works that later turn out to be fakes.)

f. Prepare a catalogue of the creative works

g. Sell the creative works (familiarity with auction house protocol and procedures would be valuable)

h. Loan or arrange for exhibits of the creative works

i. Review the requests of scholars and publishers, such as university presses, for reproducing pictures of the works, letters, excerpts, etc.

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[29] *See generally* Christina M. Baltz and Victoria Bjorklund, *Artists' Foundations*, *in* A VISUAL ARTIST'S GUIDE TO ESTATE PLANNING, 87 (Barbara Hoffman ed., 1998).

[30] *Id.* at 91.

If it would be unrealistic for a small estate to create a private foundation, the artist-client may wish to explore opportunities in the community that would help keep the artist-client's work in circulation after his or her death. There may be an artists' collective group that would be willing to provide storage facilities and schedule exhibitions of the work of deceased artists who were members of the group. A similar course of action was suggested by Tina Summerlin, the director of the Mapplethorpe Foundation, when she was asked how the works of lesser known artists could be promoted after death. Ms. Summerlin stated:

> "I would set up a volunteer advisory group of dealers, art consultants, auction experts and museum curators to look over a choice group of work from each artist involved, and then establish a specific level for each artist on a given scale of some sort, based on each artist's history. I would then work on a system of selling or dispersing work, trying to find as many diverse outlets as possible for each level of artist."[31]

Conclusion.

When representing the artist-client, the estate planning attorney should be aware of the special nature of creative works and the unique problems they present in the planning process. The estate planning attorney should work with the artist-client to devise a plan designed to achieve the goals of providing unified management of the creative works, tax minimization, liquidity, and promotion of the artist-client's legacy after death. This process also gives the estate planning attorney the added satisfaction of knowing that he or she has contributed toward an increased awareness of the importance of art in our society.

[31] *Id* at 92.