

MASSACHUSETTS' CONSIGNMENT OF FINE ART LAW: A PRIMER FOR ARTISTS AND ART GALLERIES

Introduction

As most artists and gallery directors know, artists and galleries typically work together to sell artwork in a consignment relationship. An artist will provide a gallery with a work of art and the parties split the proceeds from the sale when the work is sold. Much of the time this arrangement is not even written down in a formal contract, but is simply the standard industry practice.

What many artists and art dealers may not know is that this artist/art dealer relationship is actually governed by a law: the "Consignment of Fine Art" law, Massachusetts General Laws Chapter 104A ("104A"). 104A is similar to laws enacted in nearly 1/2 of the states, including CA and NY. The goal of these laws is to protect artists who otherwise have little recourse if they have trouble receiving payment, recovering their works of art or are owed monies when a gallery goes out of business. 104A sets out duties and responsibilities for artists and galleries in their consignment dealings with each other. The specifics of how the law works are discussed in the "Overview of the Law" section, below. Recently, several changes have been made to the law to strengthen and clarify its requirements and protections. These changes create better protections, but also impose additional obligations on both art dealers and artists who consign their fine art to galleries.

Changes to 104A were made through a bill introduced by Senator Jack Hart. The signing of Senate Bill 2461 into law is a historic moment for the Joint Committee on Tourism, Arts and Cultural Development and for the Commonwealth. The working feedback group for this Bill included artists, commercial galleries, nonprofit arts organizations, and art lawyers. Two key organizations involved were the Artists Foundation and the Volunteer Lawyers for the Arts of Massachusetts, both located in Senator Hart's district.

The VLA has put together this primer to introduce artists and gallery owners to the Consignment of Fine Art law and help them understand both their rights and obligations under the law. Because so many artists and art dealers are not even aware of the law, we are taking the opportunity to explain all parts of the law, both old and new, so everyone affected by it will be fully informed going forward. (For those who are interested, footnotes explain what aspects of the law existed previously and what have been changed). It is our hope and belief that this newly refurbished law will bring greater clarity and guidance to everybody, create accountability and predictability in the gallery system, and ultimately benefit both artists and galleries throughout Massachusetts.

History and Significance of 104A

The Consignment of Fine Art law was introduced to simplify the gallery consignment process and ensure that artists and their works of art are protected when they consign them to an art dealer. Absent 104A, gallery consignments would be governed by

the Uniform Commercial Code (“UCC”), a series of laws governing commercial transactions. Under the UCC, artists would have to “perfect” every consignment they make, i.e., fill out a form at the appropriate state agency confirming where and when the good was consigned, and to whom it belongs. Failure to “perfect” would ultimately leave artists and their works exposed and vulnerable if the art dealer either mishandled the works or went out of business, because the artist’s consignment would not be recognized as having any priority standing. (In bankruptcy law, “priority” refers to the order in which creditors are paid monies owed; i.e., the higher the priority, the earlier the creditor stands in line to get paid). Understanding the realities of the gallery system, and the threat to artists and their works if governed by the UCC, state legislatures enacted laws like 104A to protect art and artists and simplify the rules governing the consignment of fine art. 104A also expressly overrides any conflicting provisions of the UCC, thus making it clear that it is the governing law for the consignments of fine art.¹

In the past several years, two prominent Boston art dealers (Boston Corporate Art and Haley & Steele) have gone out of business. When both of these galleries closed, they were in possession of a large number of consigned artworks. The closing of a business brings into play several laws, including the UCC and the federal bankruptcy laws. When the courts were trying to determine the resolution of these two defunct galleries, 104A was the saving grace that allowed the artists to get back their artworks. (Absent 104A, the artists would almost certainly have lost all right to their artwork). However, both cases dragged on for many months, requiring extensive legal work and time to resolve. In both cases, the VLA, through its staff and volunteer attorneys, took the lead in representing the artists, and thus came to an intimate understanding of the law. In response to the problems that became apparent when lawyers and courts tried to apply 104A, the VLA and Artists’ Foundation formed a committee of art lawyers, artists and gallery owners who worked together to update the existing law to make it both clearer and stronger in its protections.

Chapter 104A – Overview of the Law

104A was initially enacted to govern the relationship between art dealers, or “consignees” and artists who consign “fine art” (as defined in the statute). Under the revision, the protections for artists were expanded to include all art owners who consign work to a gallery, not just the artists who created the work.² The law considers a consignment to take place whenever a consignor delivers a work of fine art to an art dealer/consignee. (N.B. While technically the art dealers are “consignees” and the artists or owners are “consignors” we refer to them as “art dealers” and “art owners” in this article to reduce confusion. However, the statute itself uses the consignee/consignor language.) Before addressing the changes that have been made, what follows is a brief

¹ See 104A, section 6

² This protection was spurred in large part by the Haley & Steele case, in which many art owners who had consigned their works for re-sale were left unprotected. Additionally, the definition of “fine art” was substantially expanded to account for new methods and technologies in art media.

explanation of the rights protections under both the old and new versions, the “heart” of the statute that remains unchanged.

a. 104A Obligations in the Normal Course of Business

104A creates a trust relationship between art owners and art dealers. A “trust” is defined as “a property interest held by one person for the benefit of a third party.”³ Under the language of trusts, the art dealer is the “trustee” and the art owner is the “beneficiary” of the trust. The law of trusts imposes on the art dealer a “fiduciary duty,” i.e., a heightened responsibility to protect the trust assets of the art owner (i.e., their works of art and sales fees) as trust property. In practical terms, this means that an art dealer cannot use or claim an art owner’s fine art as property of the gallery. It also means that when money from the sale of a work comes to the art dealer, the law views the money as property of the art owner, not the art dealer, so that the dealer cannot use it to pay other debts or obligations, or collect his percentage from the sale until the art owner’s share has been paid. (It is worth noting that this aspect of the law has always been in effect under 104A, and is not part of the recent revision.) Art owners benefit from this protection, but also have heightened duties when consigning works, detailed in the “art owners’ responsibilities” section below

b. 104A Obligations When a Gallery Goes out of Business

The statute also comes into play when a gallery goes out of business and/or files for bankruptcy. 104A, section 3 states “a work of fine art received as a consignment shall remain trust property and shall not be subject to claim by a creditor.” (A creditor is generally someone who has loaned or provided assets to a business, such as a bank, credit card company, copier service, etc). Ordinarily, if a business goes into bankruptcy, any consigned goods in the possession of the debtor (the company going out of business) become part of the bankruptcy estate.⁴ The bankruptcy estate is a legal entity that gathers all the assets of the estate and uses them to pay back creditors. In practical effect, this would mean that any consignor would lose ownership of their goods and would have to get in line with all other creditors to try to get money or goods back. However, under the federal bankruptcy laws, property held in trust is excluded from the bankruptcy estate.⁵ Therefore, because 104A regards consigned art work as trust property, it is protected as the artist’s property in the event of a bankruptcy.⁶

New Requirements Under Revised 104A

a. Reasons for Revising 104A

The fundamental rights and protections of 104A discussed above have remained unchanged in the recent revision. However, under the earlier version, putting the protections of the statute into practice has sometimes proved difficult. This was often

³ Black’s Law Dictionary

⁴ The law governing this arrangement is codified in the Uniform Commercial Code (UCC), which is a state law. 104A, section 6 explicitly overrides conflicting UCC provisions, thus protecting artists who otherwise would have little protection for their works from the gallery’s creditors.

⁵ Codified at 11 U.S.C. section 541(a)(1) and (d).

⁶ 104A section 4(b) strengthens this protection by explicitly stating that art is deemed to be held in trust as defined in the federal bankruptcy laws.

because the informality of the artist/gallery relationship made it hard to determine what works were consigned, when they were sold, when monies were received and whether artists were paid in a timely manner. The majority of changes have been implemented to address these practical issues. Both consignors and consignees have increased obligations under the statute, but these were created with the input of artists, art dealers and arts attorneys and are meant to codify the “best practices” in this area.

b. Art Owners’ Responsibilities

When an art owner consigns a work of art to a gallery, he or she needs to provide the gallery with a written statement upon delivery of the work.⁷ At a minimum, the statement needs to include the following:

- the name of the artist and/or the owner of the work
- title of the work
- medium and dimensions of the work
- date of completion of the work
- the delivery date
- the anticipated fair market value of the work.

The gallery will maintain a copy of the statement for its records. It is recommended that the art owner also retain a copy of the statement for her records, although this is not required under the Act.

The owner is also responsible for providing the gallery with contact information (name, mailing address, phone number, fax number and/or email address) and with making sure that this information is updated and kept current.⁸ This requirement helps to maintain accurate records and allows for easy communication between galleries and artists when necessary. Failure to maintain current contact information has two important consequences. First, if the gallery has attempted in good faith to contact the owner for one year in order to return the work and has failed because the contact information has not been kept current, the owner forfeits her rights in the work. Upon forfeiture, a gallery may dispose of the work in any manner it deems appropriate. Second, if a gallery is unable to locate the owner within four years of the sale of the work, the owner forfeits her right to the payment due to her. Fortunately, both of these results can be avoided simply by maintaining accurate contact information with the art dealer.

c. Art Dealer Responsibilities

Under 104A, art dealers are charged with maintaining accurate records for better transparency both in day-to-day business and in the event of a bankruptcy filing. Art dealers must keep a copy of the written statement provided by the art owner upon delivery of the work.⁹ When the art work is sold, the dealer needs to record the date of the sale, the amount of the sale, and the name and contact information of the purchaser.¹⁰

⁷ 104A, section 2(b)

⁸ 104A, section 4(c)

⁹ 104A, section 2(c)

¹⁰ 104A, section 2(c)

If the consignor is the artist who created the work (or the artist's heirs), the dealer must provide the artist with the name and contact information of the purchaser of the work.¹¹ The purpose of this last requirement is to allow artists to control their copyright in their works and have access to owner information for retrospective shows and books.

The dealer must show the accounts of each art owner separately on its books.¹² The goal of this requirement is both to keep accounts accurate and easily reviewable, and to prevent co-mingling of client funds. It is strongly recommended, although not required, that galleries maintain separate sub-accounts at its bank for each art owner.¹³ Upon request, all records pertaining to the art owner must be made available to the owner within a reasonable time.¹⁴ Art dealers must keep copies of all books and records for at least four years after the completion of the consignment.¹⁵

104A also provides guidelines for payment when a consigned work is sold.¹⁶ A gallery must pay the artist monies due from the sale of the consigned work within 90 days of receipt of payment. The failure to provide payment within 90 days subjects the gallery to an additional payment for damages (5% interest plus reasonable attorneys fees), which further increases if payment has not been made to the artist within 180 days (3 times the amount owed plus 5% interest).¹⁷ The rationale behind these added fees is to encourage galleries to make timely payment, with a modest late fee incurring after 90 days and significant penalties if payment is not made within 180 days. Because the money is technically trust property, these incentives merely ensure that the dealer's obligations, as the trustee, are performed. As noted above, an artist's failure to provide current and accurate contact information may limit or eliminate these damages.¹⁸ Additionally, a dealer will not be held responsible for failure to pay the artist when the purchaser's bank or credit card company denies the purchase; however, in such a case, the gallery is responsible for getting the art work back from the purchaser.¹⁹ The art dealer is at all times responsible and liable for the loss of or damage to the work of fine art.²⁰

¹¹ 104A, section 2(c)

¹² 104A, section 4A(a)

¹³ 104A, section 4A(a) Maintenance of separate sub-accounts at its bank serves as *prima facie* evidence of fulfillment of the separate accounting requirement.

¹⁴ 104A, section 2(c)

¹⁵ 104A, section 2(c)

¹⁶ 104A, section 4A(b) & (c)

¹⁷ Specifically, under section 4A(b) and (c), failure to pay within 90 days entitles the consignor to be awarded the amount owed plus interest calculated at a rate of 5% per annum, together with court costs and reasonable attorneys fees incurred by the consignor in collecting the monies owed. Failure to pay the consignor all monies owed with 180 days entitles the consignor to be awarded a sum equal to three times the amount owed the consignor plus interest, calculated at the rate of five percent per annum, as well as court costs and reasonable attorneys fees.

¹⁸ 104A, section 4A(e)

¹⁹ 104A, section 4A(d)

²⁰ 104A, section 3(c) While this provision does not expressly require that gallery owners keep insurance for the work, it does impose full liability for loss of or damage to the work, so insurance is strongly recommended.

Finally, in the event that the gallery closes, the dealer must notify the art owner of its intention to close.²¹ Any consigned work and any money owed to the owner for consignment must be returned or paid within 90 days.²² Records relating to the gallery must be kept and maintained by the “controlling person” of the gallery for at least four years after the close of the gallery.²³

Last, any provision of a contract or agreement whereby an artist or owner waives any of the protections of 104A is automatically void.²⁴

Conclusion

The revisions to 104A were a collaborative effort to clarify and strengthen the rights and obligations of artists, owners and art dealers in consignment relationships. The record-keeping and notice provisions aid the parties in their dealings, both in the general course of business and in the unfortunate situation of bankruptcy proceedings. We view the specific guidelines and obligations as a means toward putting into effect the protections the statute is meant to provide. In the end, we believe that the greater clarity, responsibility and predictability will strengthen the gallery industry as a whole.

²¹ 104A, section 4A(f)

²² 104A, section 4A(f)

²³ 104A, section 4A(f)

²⁴ 104A, section 5