

JOAN MITCHELL FOUNDATION



Joan Mitchell at her home in Vétheuil, France, 1984. Photo by Édouard Boubat.

CALL CREATING A
LASTING LEGACY

Estate Planning Workbook
for Visual Artists

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- » The Joan Mitchell Foundation for its leadership and support.
- » 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.
- » Volunteer Lawyers for the Arts programs around the country for their service and extraordinary efforts to provide assistance to their constituencies.
- » Fay Chandler for supporting our efforts to educate artists on estate and legacy planning since 2006.
- » Peter Caruso, Esq., Prince Lobel Tye LLP, who reviewed this manual, helps teach our estate planning classes and who has volunteered to represent countless local artists and arts organizations over the past fifteen years.
- » The Board and Volunteer Panel Attorneys of the Arts & Business Council of Greater Boston.

Dear Reader,

The Joan Mitchell Foundation is committed to preparing artists – as well as their families, loved ones, and supporters – for the business of organizing and protecting their legacy. Recognizing the importance and urgency in raising awareness within both the art and legal community around careful estate planning, we respect and acknowledge how vast and complicated protecting an artist life's work can be and take into account the full scope of their professional practice including medium, intention, cultural context, personal values and financial circumstance.

For that reason, the Foundation has partnered with the Arts and Business Council of Greater Boston and Volunteer Lawyers for the Arts of Massachusetts to develop [Creating A Lasting Legacy: Estate Planning Workbook for Visual Artists](#), a guide designed to be a practical tool for artists and/or their supporters to use when carefully assessing and identifying the unique estate planning needs and concerns specific to the visual arts.

The intention for this workbook is to be a comprehensive and user-friendly introduction to estate planning. The commonly used, technical terminology found in estate planning is supplemented by easy-to-understand language, pragmatic real-life scenarios and applicable action-steps to assist you in an efficient and effective manner. In addition, the workbook questionnaire provides a preliminary point for future education and conversation with an attorney in creating an estate plan that responsibly protects an artists' life's work and legacy.

For the Foundation, [Creating A Lasting Legacy: Estate Planning Workbook for Visual Artists](#) represents an empowering tool for both artists and community organizations to preserve, affirm and advance their historical identity. The efforts to capture, collect and celebrate visual artists and their contributions to their community fosters a sense of cultural vitality that creates a more meaningful and rich living environment for all.

The Foundation intends to continue expanding the national dialogue on artists' legacies by engaging with stakeholders at multiple levels in the years to come. We hope you will join us in these efforts.

Sincerely,



Shervone Neckles-Ortiz

Artist Support Manager
Creating A Living Legacy Program Manager
Joan Mitchell Foundation

About the Joan Mitchell Foundation

The Joan Mitchell Foundation is an artist-endowed non-profit organization established in 1993. Our mission is to celebrate the legacy of Joan Mitchell and expand her vision to support the aspirations and development of diverse contemporary artists. We work to broaden the recognition of artists and their essential contributions to communities and society. This mission is activated through a varied range of programming.

The Foundation awards grants directly to individual artists through its Painters & Sculptors and Emergency Grant programs and provides funding to arts organizations that support visual artists in their respective communities. Since 1994, the Foundation has awarded grants to over eight hundred individual artists and provided funding to over eighty organizations.

Additional programs operated by the Foundation include the Creating a Living Legacy (CALL) program, begun in 2006, that provides support to older artists in creating a comprehensive documentation of their careers. The CALL program has developed new ways to support mature artists through a range of tools, including the CALL Database, comprehensive resource workbooks, and by training emerging artists as Legacy Specialists.

The Joan Mitchell Center, an artist community founded in 2010 and based in New Orleans, aspires to be a place for creation, innovation and transformation, by providing a forum for artists and acting as a welcoming, inclusive gathering place for artists and the broader community of New Orleans. While the Center is undergoing development of its own studios on-site, it has been hosting visiting artists and others working in the arts community. In late 2013 the Center began a year long pilot program designed to support emerging artists by providing free studios, monthly stipends and professional development. The Center also curates and produces public programming, creating events that support values of community, diversity and social equity.

Begun in 1997, the Foundation's Art Education program provides opportunities for both emerging youth and young adult artists through inclusive and diverse arts education programming. All programming is offered completely free and are open to the public. The program enhances the artistic education of young painters and sculptors through studio classes, in concert with other educational opportunities encouraging students to pursue and develop their voice in the arts. Simultaneously, the program supports the artistic development of working painters and sculptors through teaching opportunities, professional development training, and engagement with the artistic community.

The Art Education program began with a single community partner, four Artist-Teachers and two classes that served approximately thirty students on Saturdays. Currently, the Art Education program partners with six organizations, offers Saturday, weekday, and summer programming, employs over forty Artist-Teachers, and serves one thousand students each week. In the summer of 2014, the Art Education program expanded programming as it moved into a newly renovated Education & Research Center in Manhattan, with dedicated classrooms, a media lab, and flexible meeting spaces.

The Foundation includes the promotion and preservation of Joan Mitchell's legacy as part of its mission. To fulfill this, the Foundation provides loans of Joan Mitchell artworks from its collection to museums, academic institutions and other non-profit arts spaces. Their archive houses Mitchell's papers, including correspondence and photographs, and other archival materials related to her life and work.

The Foundation's archives are open to all qualified researchers. Additionally, Foundation staff are available to answer reference questions and direct individuals to works by Joan Mitchell in museum collections. Staff also create educational materials to complement exhibitions and provide useful age appropriate materials for art educators. The new Education & Research Center also houses the archives and the Joan Mitchell Catalogue Raisonné Project established in summer of 2014.

Additional information about the Foundation and its programs can be found online at www.joanmitchellfoundation.org.

About JMF & VLA Partnership

Creating a Living Legacy (CALL) is an initiative of the Joan Mitchell Foundation designed to provide support to mature artists in the areas of studio organization, archiving, inventory management, and through this work create a comprehensive and usable documentation of their artworks and careers.

Since 2007 the Foundation has been developing programs and granting initiatives that support the unique and valued legacies of individual visual artists. The Foundation, and its partners in the CALL Program seek to raise awareness and promote a national dialogue around the importance and process of documenting the diverse cultural histories of individual artists.

With the objective to support artists in protecting their own cultural legacies, the Foundation expanded the CALL Program in 2013 by partnering with Volunteer Lawyers for the Arts of Massachusetts to design the Creating A Lasting Legacy: Estate Planning Workbook for Visual Artists. The workbook presents the artist with the tools to ensure that their legacies, preserved in their own voices, will last into perpetuity.

Volunteer Lawyers for the Arts of Massachusetts (VLA), a program of the Arts & Business Council of Greater Boston (A&BC), has been serving the legal needs of the state's artistic community since 1989. Since its inception the VLA of Massachusetts has expanded its services to include legal services for 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 who embrace the mission of the individual organization.

Recognizing the great need for estate planning for working artists, the VLA of Massachusetts has been developing trainings and tools to help artists and attorneys work together and achieve their goals. In 2006 the VLA of Massachusetts 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 has focused on educating artists through programs and workshops about the necessity for planning their estate 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), both through educational workshops regarding artist-specific issues that arise in estate planning, and outreach to the estate planning Bar committees.

There are many similar Volunteer Lawyers for the Arts programs around the country, many of which have estate planning programs. For a list, please see the Other Resources section at the end of this chapter.

Introduction

Estate planning can be a difficult subject for anyone. No one likes to think about how or when life might end. From the technicalities of financial planning to the emotional issues of choosing beneficiaries and considering end-of-life care, the entire process is a daunting task.

However, estate planning is an essential process both for the future and for your current artistic practice. Consider for a moment- if you had passed away last week, would your loved ones have known what to do with your artwork? Your equipment? Your studio? Come to think of it, do you know what you would want done?

Estate planning provides an opportunity to think seriously about the future, for yourself, your loved ones, and your legacy. Some thoughtful, careful planning now can have real benefits for the present and in the long term. Additionally, sorting out an estate after the fact can be quite expensive. Work that you do now will make it easier and more efficient for your executor, leaving more funds available for your beneficiaries and more support for your plans.

This workbook will help you navigate many of the important issues. There is plenty of information available about estate planning, perhaps even too much information. Here we attempt to distill much of that information in an effort to go from abstract ideas to actual implementation. We want to give you the tools you need to have meaningful discussions with your loved ones, with an estate planning attorney, and those who will help implement your plan; to think seriously about your legacy and to take steps now that will make a difference.

This workbook is not intended to replace the services and advice of an attorney. We cannot elaborate on every possible option for your estate or account for all the particular details of your needs and wishes. Please keep in mind, too, that there are differences in the law from state to state and tax laws constantly change, requiring plans to be updated from time to time. You will want to speak with an expert to be sure your plan accomplishes all that you intend under the laws of your state.

There are many reasons that artists may put off speaking with an attorney. Perhaps you don't feel "done" yet. You may be thinking, "I'm not rich or famous enough to need an estate plan" or "I have too much else to do- I'll think about that tomorrow." Maybe you simply do not know where to begin. One of the most important steps is simply starting the process. Our goal is that this workbook will help you build a team, get started, and alleviate some of those worries.

The bottom line is that it is neither too early nor too late for you to begin this process. But it's time to get started.

Overview

This workbook is designed to outline the benefits of estate planning while equipping you with tools and terminology you will need to begin work with your team. At the end of some sections, there are a series of questions to help assess your particular needs.

» Your Legacy

Estate planning is a way to give legal protection to what you envision as your legacy.

» Basics

This section provides an overview of the basic concepts, tools, and vocabulary used in estate planning. This may help demystify the process and equip you to interpret and discuss these areas with greater ease and understanding.

» Your Team

Many individuals—attorneys, assistants, representatives, family members, appraisers, and more-- may be involved in a comprehensive estate plan. This section breaks it down by role and provides tips on how to select individuals.

» Your Estate

This section will help you determine the scope of what you may own, both **physical** and **intellectual property**, and immediate steps you can take to safeguard it.

» Your Attorney

Speaking with an attorney can be an intimidating prospect for some. Here we provide advice and topics for those initial conversations as you build a relationship.

» Other Resources

Your Legacy

Your legacy will drive your estate plan. The following sections will examine some of the legal considerations and choices in estate planning. These should all be understood as tools in the creation of your legacy.

But before we dive into the details of estate planning terminology, considerations, and participants, it is worthwhile to start with the “Big Picture.” What will your legacy be? The legacy you design will depend entirely on your values, your assets, your culture, your abilities, and your goals.

Your legacy might include guidance on how to protect and disseminate your work, potentially for decades to come. It could include supporting or creating a new program, or assisting artists working in certain genres or geographic areas. Your legacy might be focused on highlighting your culture, race, or religion. A legacy can be simple or grand in scope. It really is up to you.

The ability to execute your legacy will most likely require assembling a team of individuals or organizations to help you with this process. This team could include your accountant, attorneys, insurance brokers, agents, managers or representatives, your conservator, family, friends, executors, landlords, moving companies, financial advisors, public relations specialists, collectors, curators, and more. Thinking about who these people are and how they interact with your plan is one of the most important elements in making sure a plan will be fully implemented, especially over a long period of time.

Consider the following preliminary questions and examples. These questions are intentionally quite broad, and may in fact make assumptions that do not apply to you; everyone will have his/her own unique responses. The examples illustrate different ways artists have approached these questions, and, through estate planning, taken steps to ensure their legacy.

STARTER QUESTIONS

- » 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?

What Could Happen: Worst Case Scenarios

Why does all this matter? The following two examples raise issues of what might happen after an artist passes away without an estate plan that specifically addresses their artwork and captures their legacy. This workbook will address many of the steps that will help artists and their loved ones avoid these common problems.

Artist A

Artist X had a successful and long career. She attended an art school, was represented by six galleries around the country, and was best known for a photograph that became a popular poster. Artist X passed away with only a basic will giving “everything equally to her children.”

POTENTIAL PROBLEMS:

- » The art school contacts the family and claims the artist promised to leave them the negatives and first edition prints for her most famous series
- » The poster continues to appear in film and television projects as set dressing

- » The family does not know about three of the galleries representing the artist, each of which still have about twenty original works in its possession
- » The Artist's children disagree as to whether their mother would have wanted to issue and sell a new poster series
- » The Artist had been intending to give funding and materials to create a photography lab at an inner city school, but no one knew about it

Artist B

Artist B had a long career with mixed success over the decades. He experimented with many styles and materials and worked in a rented fixed-rate studio space that is now filled with work in disorganized stacks, piles, and shelves. He also sometimes traded work with other artists. A long illness used up all of his own savings before he passed away and his out-of-state children have limited resources.

POTENTIAL PROBLEMS:

- » The owners of his studio building contact the family to say that his lease ended with his death and they must clear out the studio in 30 days or everything in it will be thrown out. The children cannot afford to ship and store this volume of work
- » The Artist did not keep an inventory and in many cases the children cannot tell which works are his and which are by other people
- » The local museum is interested in only two pieces and will not accept the rest

Sample Cases

Legacies can take any number of forms- they are driven by personal desires, values, and expectations. The following examples demonstrate the breadth of possibilities and motivations and are offered as illustrations of the range of options. Each example offers just a few of the particular steps that can be taken to activate the plan. Many of the options will apply to legacies of all kinds, and all of these plans will still need to account for the basics, like money management, insurance, contracts, and a will. A more detailed description of those estate planning components will follow in the next few sections.

Artist 1

Artist 1 began showing with galleries early in his career and has had moderate commercial success. For the last several decades, he has worked as a professor at a university, a position that allowed him to continue making work while nurturing young talents. He had a comfortable income and has considerable savings; he is still in possession of nearly a thousand pieces of his own artwork. He continues to create new work and has been hired to do a number of large commissions over the years.

In thinking over his own experience and his work with students, Artist 1 realized how important his first solo show was to him, both personally and professionally. Artist 1 has decided to make his legacy helping other artists achieve that important step. Artist 1 also wanted to make sure his own work is remembered.

Artist 1 partnered with a local arts organization that had a gallery space to endow an exhibition program of the first solo shows for selected emerging artists.

POTENTIAL STEPS TO SUPPORT THIS LEGACY:

- » Work with a financial planner as well as an estate planner to ensure there would be sufficient funding for the project
- » Meet with the hosting arts nonprofit to discuss the program and develop criteria for the selection process
- » Select and arrange for the storage and transportation of works being donated

- » Plan for other artworks to be stored and maintained after his death
- » Design and launch website with his work, history, and description of the exhibition program
- » Find a gallery or agent to represent him now and manage his work after he passes
- » Identify any works in his possession that are by other artists

Artist 2

Artist 2 has been making artwork for several decades that interprets the historic, spiritual, and cultural symbols and styles of her ethnic group. Artist 2 wants to both celebrate the meaning of art in her own life and recognize how rare and difficult it is for persons of her ethnicity to experience a full and fulfilling career in the arts.

POTENTIAL STEPS TO SUPPORT THIS LEGACY:

- » Create a film of her talking about her work, life, and experience, to become part of the cultural record and to inspire others
- » Meet with community leaders to explain plans, seek partners, and garner future support
- » Display, preserve, and keep many important pieces of her work in her community
- » Create a scholarship fund to support others artists in her community in the pursuit of a career in the arts, either endowed by the artist or through a fundraising effort
- » Endow and design an accessible studio space in her community
- » Establish a series of workshops to be held in the community with visiting artists
- » Locate her team of professionals and educate them about her goals to ensure her vision is carried out after she passes
- » Designate any works in her possession that are by other artists

Artist 3

Artist 3 was a prominent photographer, focusing primarily on portraiture. After he passed away without a plan for his work, his family was in possession of a lot of his material, much of which was unsigned. His partner wanted to make sure the work was identified as being by Artist 3 and that it would continue to be shown. The artist's partner worked with an arts nonprofit to set up an exhibition program. The program would feature Artist 3's work on a regular basis, but also exhibit work by other photographers.

POTENTIAL STEPS TO SUPPORT THIS LEGACY:

- » Contact Artist 3's gallery and other spaces to secure a location for regular exhibits
- » Work with a team to document and identify Artist 3's remaining works
- » Partner with the arts nonprofit to facilitate these connections and promote the program
- » Maintain a website promoting Artist 3's work
- » Designate any works in his possession that are by other artists

Note

Photographs are a particular challenge, since prints can be made after the photographer's death, which he or she might not have approved, and which have a dramatically different financial value. (The work of Lewis Hine is famous example of this situation.)

Artist 4

Artist 4 has had a long and successful career, and her work has a strong secondary market. She already has a large taxable estate; furthermore, there is potential for her work to appreciate in value over the years. Artist 4 has some of her earlier work and is still actively making new works. She wants her work to continue to be sold and maintained in the same diligent manner she has practiced herself. She is also concerned about tax consequences.

POTENTIAL STEPS TO SUPPORT THIS LEGACY:

- » Set up a trust or an artist endowed foundation to hold her artwork and finances
- » Work with a financial planner and estate attorney to minimize the estate tax on property passing to her family
- » Review agreements with representatives, like long-term gallery, and enter new agreements for international representation
- » Make sure all copyright registrations are in order and accounted for in the estate plan, along with guidelines for licensing potential & future sales
- » Designate any works in her possession that are by other artists
- » Discuss in advance with friends and family what, if any, role they would like to play in regards to the trust or foundation, and legally formalize as appropriate.

Artist 5

Artist 5 has limited financial resources and little market potential. She has been a practicing artist for several decades, but her art did not go beyond her friends and family and she never established a public profile or following. She has no sales record and limited financial resources.

Though Artist 5 will not have the means or audience to set up a legacy like some of the artists above, there is still a lot she can do to improve the situation for those who will be responsible for her work after the fact:

- » Create a comprehensive inventory of her work, with photographs
- » Designate any works in her possession that are by other artists
- » Discuss with family and friends whether there are any particular pieces they would like to take care of
- » “Clean up” by organizing workspace, getting rid of any work she wouldn’t want seen by others, and getting her records in order
- » Contact local nonprofits or causes she supports who might accept donations of artwork
- » Consider obtaining a life insurance policy to cover art-management related costs for at least a few years after passing, if eligible

Artist 6

Like Artist 5, Artist 6 has created a body of work without a strong sales record; he also does not have much in the way of financial resources. Unlike Artist 5, he does have real commercial potential: his work has been given to collectors, small museums, and friends in the past. Artist 6 is concerned about what will become of the rest of his work when he passes.

All the steps taken by Artist 5 will help Artist 6 ease the burden on his family and loved ones. Other additional steps to support a legacy:

- » Work through network of collectors and other known appreciators of his work to locate a “champion” who can assist in guiding his legacy in the future
- » Seek representation with a gallery that can take on management duties
- » Designate any works in his possession that are by other artists

Legacy Vehicles

Whatever you want to do, there will be a legal tool available to implement your wishes. The following are some of the major legal methods of enacting a legacy. We will cover many of these estate planning terms in greater detail in the Basics section.

Trusts

A “trust” is a legal tool designed to hold property that allows for the instructions of the dead to live on. Trusts can be used for a variety of purposes and can be very flexible in ways that a will may not be; a trust can permit gifts or pay-outs over time, based on the maker’s instructions. Trusts essentially transfer ownership from the “donor” (or “trustor”) to others: the “trustee” has the legal ownership of the property, while the “beneficiary” has what is called a “beneficial interest.”

For example, David can place \$10,000 in trust for the benefit of Benjamin Beneficiary, to pay for his college education. The trust appoints Tracie Trustee as the trustee. Tracie will have the legal ownership of the money, giving her the right to invest it and to write the checks, but Tracie does not have the right to use the money for her own purposes. The money must be used for Benjamin’s college education.

Trusts can play a large part in legacy planning. The possibilities are nearly infinite, as trusts can be tailored to fit your needs, resources, and desires. A trust could be used to fund an arts program or a scholarship for artists meeting certain criteria. They can be limited in duration or last for very long periods of time, benefiting a single individual, a group, or even a whole class of persons. However, a trust can only do what its assets will support. Keep in mind that trustees typically receive some kind of fee, and administrative costs can reduce or even consume a trust’s value over time. When setting up a trust, be thoughtful about putting enough assets in the trust to support and achieve its goals.

Trusts can hold any kind of property, not just money. Your artwork can itself be placed in trust, as can the copyrights to that artwork.

Donations & Gifts

Lifetime Gifts

Lifetime (or “inter vivos”) gifts and donations have many benefits. First, you can enjoy the giving the gift. People sometimes underestimate the value of seeing a gift enjoyed by the receiving party. Second, you can see that the gift goes to the recipient of your choice and that it is utilized in the manner you expect.

Third, there may be certain tax advantages if the gifts are made to charitable organizations as recognized by the Internal Revenue Service. Note that gifts of your own artwork will only be deductible up to the actual cost of materials (see below), rather than their fair market value. Donations of other artists’ work or property are assessed differently. Please see IRS Publication 561 (4/2007) for more information: <http://www.irs.gov/publications/p561/ar02.html#d0e617>

Testamentary Gifts & Bequests

You may also make gifts and donations through your estate plan. These are known as “testamentary” gifts.

To ensure the gift will be successfully received and processed, you will need to obtain the consent of the recipient. Sometimes an intended recipient will not be interested in the gift, or will not be able to maintain it or make use of it in the way the donor intended. The recipient might sell the work, or “disclaim” it, meaning refusing to accept the gift. When a gift is disclaimed, it will fall into the “residuary” unless a “taker in default” has been named. Note, there may be tax consequences for your estate if a gift is disclaimed and becomes part of the residuary.

Any property not specifically given away will be part of the “residuary,” the “everything else” category in a will. The residuary

goes to an individual or group once other specific gifts have been made. Depending on how your estate is structured, the residuary could go to the most important person (example: “\$500 to my nephew, my blue painting to Tom, and everything else to my wife.”) or a more peripheral recipient (example: “our house, bank accounts, art, and savings to my husband; whatever remains to the local animal shelter.”)

For example, Artist 7 has always loved Local Museum and used to visit regularly. In his will, Artist 7 leaves all of his work to Local Museum, assuming they will display it in one of their galleries. However, Local Museum does not have the wall space and they specialize in a different kind of art. The Museum decides to disclaim the gift, and the works end up going to the local animal shelter. They hang a couple on the wall, but sell the rest.

If making a large or personally important bequest, be sure to obtain the consent of the recipient. You will want to make sure that the other party expects, wants, and is prepared to accommodate the complete gift. Many organizations might for example be interested in a single artwork but could never accept your entire portfolio. With organizations, like an art museum or nonprofit, consider working with your attorney to draft a donation agreement. This agreement can outline the terms of the gift: for example, that a work be on display a certain percentage of the time, or that it never be sold. You may also stipulate any credit you wish to have attached the gift. Many donations of artwork are accompanied by a financial gift, to ensure there are sufficient funds to fulfill any special terms. However, the more conditions you set, the harder it may be for the recipient to accept. The idea is to discuss issues up front and reach an agreement, so that both parties are comfortable and the gift will be successful.

Recipients

Gifts may be made to individuals or to institutions. Only you can know the persons and places you value enough to trust with your work or other assets. Gifts of artwork can be a meaningful legacy for a loved one or a means of thanking associates or helpers.

There are many ways a gift of art can benefit an organization, but you may wish to consider and make clear the manner in which you are seeking to support them. For instance, is your donated sculpture meant to be displayed, or is it a valuable asset prized primarily for its financial worth? With a donation agreement, you can stipulate how the gift is to be used, along with any restrictions.

Even if you do not have a particular organization you are seeking to support but would like to donate some work, there may be local organizations that would benefit from having original works of art in their offices. For example, The Art Connection in Boston takes works donated by local artists and their estates and places them in other nonprofit organizations that otherwise could not afford to have original artwork in their spaces. The Art Connection has placed thousands of works to date and is in the process of assisting separate groups open similar programs around the country.

Artist Endowed Foundations

Artist endowed foundations are nonprofit legal entities with private foundation status. Essentially, creating an artist endowed foundation is like setting up your own charity. An endowment is essentially a gift to an institution to fulfill a certain purpose. Like a trust, an artist endowed foundation can take on the ownership of your artwork and assets to a particular end. However, a foundation can be a grander and more flexible enterprise, with its own staff and the ability to make new and ever evolving choices and decisions in line with the founder's intent. Note that intent must be a charitable purpose, and not merely to preserve the memory and reputation of the founder. If your foundation will not serve a charitable purpose, such as funding other projects, providing scholarly access to works, and so on, a foundation may not be the right choice for you.

These foundations may be created during the artist's life, as part of the artist's estate plan, or even by family members after the artist's passing. They can be established for a range of functions:

» Grantmaking

The organization provides funding to artists, scholars, organizations, or programs by whatever criteria

» Direct Charitable Activity

Where the foundation does not just fund others' work but provides their own programming, as with a school, museum, exhibition space, residency, studio, study center, etc.

» Estate Distribution

The organization works to execute the estate plan in an active way, distributing assets not otherwise directed in the plan.

» Support the Artist's Legacy

The foundation can support the endowing artist's legacy through exhibitions, public programs, preservation of the artist's archive, and other programs and projects.

The foundation may also be established to accomplish many of the above functions in combination.

Artist endowed foundations may be funded in a variety of ways. Some may be established during the artist's life with only financial assets; others may be stocked with artwork to be sold under certain conditions or at certain intervals. However, the sale and management of such work is critical and must be given careful and professional thought. Real estate, one's studio, or other possessions may be part of the foundation's endowment as well. It all depends on what the artist owns and how he or she wishes to structure it.

Many of the artist endowed foundations currently in existence were created by artists with living spouses and children at the time of their death. Sometimes, though, the immediate family's direct involvement with the foundation is deliberately restricted. These foundations can provide a legal vehicle for one's legacy where the expectations, responsibilities, and preferences of personal relationships are not as large a factor.

The artist endowed foundation may not be suitable for every scenario. The founding artist should have sufficient assets at the outset that will be used to fund the entity. It is important to keep in mind that administrative and other costs associated with managing and maintaining such a foundation for any duration may be considerable and can consume most of a smaller endowment. Therefore, an endowment consisting only of artwork that does not have certain marketability will most likely be insufficient. When working with a smaller amount of assets, consider other possibilities, such as trusts and bequests.

If considering a foundation, be sure to speak with an attorney who has experience with private foundations, as they are subject to particular requirements, both in establishment and in operation.



Sidebar Case: Martha Graham

The famed choreographer Martha Graham left the copyrights to her work to an individual who was the head of the Martha Graham Foundation.

An unanticipated problem arose when that individual had a falling out with the board of directors of the Martha Graham Center of Contemporary Dance, a separate institution, and barred the Center from using any of her dances or written works.

The Center had a potential claim to the works because she had been an employee. The Center faced a financial crisis and an expensive year-long lawsuit followed before the Center was granted the rights.

Would the artist really have wanted this outcome? The creation of particular rules and permissions around the rights to the work could have avoided this problem.

The Basics

This section provides an overview of the basic types of legal documents involved in a comprehensive estate plan, as well as some related terminology.

What is an “Estate Plan”?

An “estate” is the common legal term for all the assets--financial, physical, intellectual, legal-- an individual possesses at the time of his or her passing. Estate planning is a way to protect, define, and distribute these assets through the use of legal documents. Ideally, it is a carefully thought-out, personalized plan for the disposition of your assets to achieve certain goals. These goals will be unique to you, and may range from making sure a certain person receives a particular item, to endowing an art school program, to preserving your studio. A comprehensive plan will also save considerable time and expense for your heirs during what will already be a difficult time.

The estate plan is expressed in a range of documents which make your decisions legally binding and secure. A will is the most familiar estate planning document, but a full estate plan will likely include some or all of the following:

1. Will
2. Trusts
3. Power of Attorney
4. Living Will & Health Care Proxy

Wills

What is a will?

In basic terms, a will is a legal document controlling the transfer of property at one’s death. The individual person is called a “testator” or “principal.” It is the most central document and should factor into every estate plan.

Under a will, the testator can only pass along assets that are owned solely in the testator’s name. Any property held jointly with others, held in trust, or with an otherwise valid designated beneficiary does not pass under a will.

Why do you need a will?

Persons who die without a valid will are said to be “intestate.” Their property is transferred to others under the laws of the state where they lived. Such laws commonly provide a fixed percentage of property to spouse and/or offspring. For example, a surviving spouse might receive 50% of the estate while any children might share equally in the other 50%. This process is both slow and costly, and rarely aligns with an individual’s precise wishes or goals. A will can save valuable time and expense for your heirs.

But what if one child needs more financial support than the others? What if you have other relatives or friends to whom you want to leave property? What if your “estate” is not made up mostly of money, an easily divisible asset, but of real estate, investment interests, or physical property? What if you want to give family heirlooms to particular people? Or keep something “in the family”? And what about your artwork?

A will can address all these concerns and many more. Some particular issues an artist might want to consider include the following:

- » Tax clauses to address who will bear the tax burden (the recipient or the estate); this is particularly important for assets whose value may be difficult to pinpoint, such as art
- » Designate a guardian for your minor children

- » A provision to ensure obtaining or continuing insurance policies for the work
 - » A provision to provide for the payment of storage or shipping so that such costs do not fall on those you name as beneficiaries
 - » A provision to specify how you wish your works to be conserved, exhibited, or sold

Process

A will is reviewed and implemented by a court of law in what is known as the “probate” process. The “executor” or “personal representative” represents the estate and the will during this procedure before a probate court and can be appointed in the will itself. The process is governed by state law and thus procedures may vary depending on where you live. Probating an estate can be a lengthy and involved process, lasting anywhere from 9 months to multiple years, and the cost can vary considerably. The more organized your estate plan and inventory are and the more informed your personal representative is can streamline the process significantly. Note that assets are generally “tied up” during the probate process, and thus may not be immediately available to your heirs and loved ones. Talk to your attorney about making provisions to cover expenses during the probate period.

Trusts

As described in the previous section, trusts are a legal ownership vehicle. A trustee is appointed to manage the property (money, artwork, real estate, etc.) in the trust according to the instructions of the donor.

Trusts can supplement, coexist with, or even largely replace your will. The latter is known as a “pour-over trust,” created where the will says something along the lines of “everything into my trust, to be dispensed under its terms.” Trusts have the benefit of being governed by rules of your own design and can be made to play out over a longer period of time or account for changing circumstances. This system of continuous management endures from the time the trust is created through potential periods of incapacity and after death.

Power of Attorney

A full estate plan addresses not only what happens after we die, but also accounts for the real possibility of losing the ability to make certain decisions towards the end of life. You can designate someone to have certain powers by “granting power of attorney.” The power can be defined as you wish, from the very broad to the very narrow. For example, the designated individual might be empowered to pay certain expenses, to manage your investments, or to make gifts to family members.

A “durable” power of attorney creates this power immediately, as soon as the document is signed and lasts until it is revoked or the person giving the power has died. A “springing” power of attorney gives another person the authority to act on your behalf if and only if and when you become incapacitated, to be determined by your state’s procedure. Because state procedures can be complicated, it is not uncommon to create a durable power of attorney in a person you trust not to take advantage of it until the situation arises, per your prior understanding.

Please note that granting someone power of attorney is a very significant and potentially risky step. Because the power of attorney gives the other person so many abilities, it can be ripe for abuse. In many cases there have been problems even when the recipient is a close and trusted friend or family member. Other problems can arise when the person receiving the power does not fully understand or appreciate the donor’s real wishes and plans. This power should be appointed only to an individual whom you trust completely and who is competent to perform the designated tasks.

Healthcare Proxy & Living Will

In addition to documents that take care of your possessions, a complete estate plan may include documents that can help take care of you.

A “living will,” sometimes called an “advance medical directive,” is a document expressing choices as to certain medical procedures if the individual no longer has capacity to make his or her own choices.

Living wills have their share of benefits and limitations. The benefits include an opportunity to express strongly held wishes and to alleviate family members of the burden of making difficult decisions. However, a document will not be able to anticipate every possible scenario and thus may not entirely address the purpose.

For that reason, a living will is most effective when it has been shared and discussed with others in advance, such as family members and healthcare providers in advance. Be sure to provide copies to such individuals as well.

You might also wish to designate a “healthcare proxy.” The proxy is empowered to make healthcare decisions for another person when that person no longer has the capacity to do so. This individual should be someone you trust, who knows you well, and with whom you have discussed your choices in some detail.

Many states do not recognize living will or healthcare proxy. Even where not legally binding, the documents may provide useful guides to your friends and family as to your wishes. Be sure to discuss these documents with your attorney.



Note

The laws that control estate planning vary considerably from state to state. If you move to a new state after creating an estate plan, you may need to consult an attorney to make any necessary changes that will ensure your plan works as you intended. This is especially important if you divide your time between or hold property in two or more different states.

Your Team

Choosing Your Personal Representatives

One of the benefits of a complete estate plan is having a team of individuals playing different roles to protect your interests. Each member of the team works in a separate capacity, as described below. Not every plan will call for all of these representatives, and often one person can play multiple roles.

Executor

The executor is the individual responsible for overseeing and executing the terms of a will. An executor is often an attorney, but need not be; friends and non-immediate family members are also commonly chosen. An executor should be a responsible individual, someone who knows and understands your plan. Remember the probate process can be very time consuming, in terms of both the work required and the duration of the process, which may go on for years. Be sure you select an executor who is willing and able to perform these duties, and consider setting aside some funds in your estate as compensation.

Healthcare Proxy

As described in a prior section, the healthcare proxy is an individual appointed to make medical care decisions regarding you when you are no longer able.

Guardian

A legal guardian has the rights and powers of a parent. Those with minor children should include a guardian in their wills. While the ultimate decision rests with the court, the judge will give substantial weight to the choice designated in a will.

This is one of the most personal roles and should be chosen accordingly. Issues to consider include values, financial stability, lifestyle, location, age, willingness, and preexisting relationship with the child. Family members are common choices, though others prefer close friends living in the same area.

This role is essential to discuss with the chosen guardian. It is also common to make the guardian a beneficiary of the will above and beyond the child's inheritance.

Power of Attorney

As described previously, the power of attorney gives someone the authority to act in your place for legal, financial, and other matters. The exact powers can be broad or narrow depending on how you choose to define them.

This individual should be trustworthy and competent to perform the duties assigned. Unlike the role of guardian, which is a highly personal choice, choosing the power of attorney has more to do with practicality. You should choose someone who understands your interests and priorities and has sufficient financial and legal literacy to enact them.

Consider also that since that actions by the power of attorney will be necessary when something has happened to you, consider whether it will be too great a burden on those closest to you during a difficult time.

Cultural Advisor (Cultural "Executor")

In addition to the executor, who manages the legal disposition of property in the probate process, you might choose a "cultural executor" to safeguard your artwork and legacy. The cultural executor could be empowered to manage and sell your artwork, make decisions regarding exhibitions or licenses, and generally see to your legacy, or they could be available to advise the executor on decisions pertaining to your artwork.

Unlike the executor of your estate, a cultural executor does not have default official legal authority, though some powers may be

granted. The cultural executor should be someone who knows you and your work well and has sufficient skills and knowledge of the art world to execute the role the successfully. This might be a longtime artist's assistant, or even a major collector of your work.

Trustee

The trustee is the person with legal ownership and control of any properties placed in a trust, subject to the terms of the trust itself. The trustee's powers may be very broad or carefully outlined in the trust. A trustee is legally bound by "fiduciary duties" to abide by the terms of the trust and to act in the best interest of the trust and its beneficiaries.

Estate Planning Attorney

Your estate planning attorney naturally plays an important role in crafting your estate plan. You will work closely with this individual. See the next section for tips and more information about that relationship.

You may have worked with other attorneys in a different capacity, perhaps over sales agreements, property acquisitions, family matters, or other issues. If that is case, be sure your estate planning attorney knows who these individuals are.

An attorney is often chosen to be a trustee, executor, or one of the other positions described above. Often people are reassured knowing their representative has a professional understanding of the law and experience in these roles. However, do not assume that your attorney(s) will fill these roles or that you must choose any attorney to fill them. Be sure to discuss any expectations you might have as part of your decision-making process.

Insurance Broker

Insurance can itself be a useful tool in taking care of your work and your family as part of an estate planning. Depending on your situation, your needs, and your goals different insurance products may play a role in your plan and a trusted broker can help you make these choices. You might insure your work or your workspace as a practicing artist. You might also consider taking out an affordable policy to fund the management of your artwork after your passing.

Your Estate

An important step in planning your estate is realizing what you own in the first place. The word “estate” may summon images of mansions and vast fortunes, but it is really just a word used to mean “stuff.” Almost everyone has an estate. This section will focus on assessing the rest of your possessions, property, and assets as part of your estate.

The Joan Mitchell Foundation CALL Workbook “Career Documentation for the Visual Artist: An Archive Planning Workbook and Resource Guide” provides an in-depth guide at the importance and procedures of creating, maintaining, and utilizing a comprehensive inventory of your artwork and is an essential resource. For our purposes, an inventory refers to the systematic and comprehensive cataloging of your complete artwork, related documents, materials, ephemera, and records following the guidance in that workbook.

This workbook includes an Estate Planning Questionnaire. This questionnaire is intended to act as a fact-gathering tool in preparation for working with an attorney or your team on the estate planning process. You can use it to fill in the information described in this section.

Basic Information

People

Your estate plan will involve many people, either as beneficiaries or agents. Make it as clear and as easy as possible for yourself, your attorney, and your heirs by clearly identifying these individuals. You don’t want a will that just says “to John” and have it be ambiguous as to whether you mean cousin John, uncle John, friend John, or John down the street.

For your spouse, family, and anyone to whom you wish to make a gift, you will want to assemble the following information:

- » Full name and any other names used (maiden names, etc.)
- » Date of birth
- » Social security number
- » Up-to-date contact information
- » Citizenship
- » Relationship

In addition to beneficiaries, you may be appointing individuals to perform certain duties. The executor of your estate, guardian for minor children, cultural conservator, healthcare proxy, and durable power of attorney may all factor into your estate plan. You should have all of their contact information available.

More importantly, you will want to discuss these roles in full before you include them in your legal documents. See the “Personal Representatives” section for more information.

Assets

Similarly, you will want to keep a centralized listing of your financial interests. The Questionnaire includes a long list of assets, such as real estate, various bank accounts, life insurance, and investments. For each, you will want to know:

- » Location of asset
 - » Bank name for investments
 - » Physical location for property
- » Date of purchase/acquisition
- » Current value
- » Whether the asset is jointly held with a partner or other individual

Be sure to keep copies of relevant documentation together and to share them with your attorney.

Note: Representation Agreements

An artist's estate may be subject to both state and federal estate taxes. This tax is paid out of the estate's assets before the estate passes to beneficiaries. If an estate is of high enough value to trigger the estate tax, but does not have sufficient money to pay for the tax, either other estate assets will have to be sold to pay the taxes or recipients may have to pay the taxes. This can be a real issue for estates consisting only of valuable artworks or property.

The estate tax is calculated based on the total value of an individual's estate, including all money, intellectual property, tangible property, real estate, and other interests at the time of the individual's death, using the fair market value (the current value, not what was paid for it at the time of acquisition.) If the total value exceeds a certain figure, the estate tax for that year will apply. For example, in 2014 the Massachusetts estate tax applies to estates worth \$1 million dollars and above; the federal estate tax applies to estates valued at \$5.34 million dollars. Estates that are not large enough to reach these values are not subject to the tax.

Effective tax planning can be a complex and detailed process. Tax laws vary by state and are subject to constant revision on both the state and federal level, so be sure to work with a professional to make the most effective plan for your situation.

Liabilities

You will need to take the same care in documenting any debts or obligations as you do with your assets.

- » Mortgages
- » Loans, notes, and personal guarantees
- » Divorce payments or transfer obligations

Additional Documents

As in your inventory, you should keep a complete set of important documents organized and in a secure place. These documents are essential to creating an accurate and functional estate plan. Where possible, you may want to include some of these documents in your inventory system. You will want to have copies available to bring to your attorney. These documents include:

- » Existing wills or trusts (either created by you or benefiting you)
- » Real estate deeds
- » Investment or retirement plan statements

Tip

Keep a list of usernames and passwords in a secure location, like a security deposit box, so a trusted person can access accounts if necessary.

- » Gift tax returns, previously filed
- » Most recent income tax return
- » Any current domestic partner or prior divorce agreement(s)
- » Any relevant closely held business financial statements
- » Business documents, including sales agreements, representation/gallery agreements, and gifts
- » Copyright information, including registrations

Note: Representation Agreements

It is very important that you keep track of and fully understand any agreements you may have entered into with others to represent you or your artwork, either written or verbal. Such agreements might be with a gallery, agent, expert, or other art professional. Such agreements might not automatically expire upon your death. These agreements may have legal implications for your artwork, intellectual property, and other assets, as well as your or your executor's ability to enter into other agreements concerning your work.

Be sure to keep track of these agreements in your inventory and discuss these relationships with your attorney.

Separate Property vs. Community Property

Estate laws vary state by state. One of the most important differences is between what are called "separate property" and "community property" states.

In "separate property" states, each party to a marriage owns whatever s/he earned and/or purchased during the marriage, be it income, real estate, or physical property.

However, in "community property" states everything acquired (earned or purchased) after marriage is automatically owned 50-50 between the couple, even if it is in only one spouse's name. This will apply to any money earned during the period living in the state and to any real estate owned in the state.

Community property states are: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Wisconsin, and Washington.

Physical Artwork

The previous section has addressed in detail the importance of a complete inventory. That same inventory will play a large role in your estate planning. Be sure that the inventory is comprehensive, including not only works still in your possession, but all works, whether sold, lent, donated, on exhibition, or on consignment.

Keep in mind works that are in:

- » Museums
- » Collections
- » Galleries

You will want to keep track of their current locations and status (sold/unsold/consignment/loan/etc.) in your inventory system. You will also want to keep any agreements relating to these works in an organized, clear system.

Tip

As you create your career timeline, you should include where you lived and when you lived there. Be sure to share this information with your attorney, as it may impact your estate plan, as well as listing any real estate owned in the above-mentioned states.

Additionally, be careful to document art works you own but that were created by other artists. These works should be included in your inventory and your estate plan. You do not want there to be subsequent confusion over whether or not you created a work, who owns it, and its current status.

As you work on or even complete your inventory, you need to consider what will become of all that work. Most of these categories will apply to every kind of property, but our discussion will focus on your artwork. The following topics offer options and other considerations to keep in mind.

Valuation

Part of knowing the extent of your property is having some idea of what it is worth financially. As part of your inventory system, be sure to track the prices of any works sold. If you are aware of a secondary market for your work (works being resold between other parties), try to keep track of those values as well.

Appraisals

You might want to consider having some of your work professionally appraised. An appraisal is an official opinion of a work's value by an impartial third party. A number of art professionals may offer this service, from professional appraising firms to auction houses to, in some cases, galleries. You may also want to obtain insurance riders or statements as to how the work is being valued for property or damage purposes.

Note

Selling a large amount of work, whether at auction or through a gallery, at one time can reduce the value of the work; this is sometimes known as “blockage discount.” Consider putting safeguards in place to avoid having a large body of work “dumped” on the market at once. The difference between what might have been the fair market value of a single work versus the actual value it could get in a crowded market has created disputes with the IRS for estate tax purposes. Where this is a concern, speak with your attorney and cultural executor.

Actual costs

As part of your inventory process, keep track of the actual material costs of producing your artwork. These costs will be useful if you decide to donate any of your artwork while you are still living. The IRS bases the charitable deduction for works donated directly by a living artist on the cost of materials, NOT on the fair market value.

“Actual costs” only include the canvas, paint, and other media used to create the work. They do not include your time, general studio expenses, staff, etc. You may be able to determine standard costs [example: a 20” x 20” oil painting costs \$80 in materials] to keep this process simple. However, you may want to take particular care for works of unusual size or that use precious or expensive materials.

Note

Not all valuation is financial. Some pieces may have great sentimental value to others. Consider having a frank conversation with family and loved ones about your work. You might be surprised by which pieces they hope will “stay in the family.” Specific gifts should be included in a will or trust. Be sure to make a notation in your inventory and share this information with your cultural advisor or executor.

Tips

Make sure there is a name or attribution on the back of the artwork itself, in case it becomes separate from its documentation.

If you have collaborated with other artists on joint projects, take special care in how you manage these works in your inventory and estate. You will want to clarify ownership of both the physical and intellectual property with the other artists so you can account for it in your plan.

Subsequent Care & Storage

Keep in mind that you will want to designate adequate funding to maintain a storage facility of your preference in your estate plan.

The financial needs could vary depending on your plans. Perhaps you wish to pay an additional year's rent on your studio to allow adequate time for dispersing the contents, or several years' payment for a storage facility. Your plans may require conservation, framing, photography, packing, shipping, and insurance to transport works.

Additionally, you may wish to set aside some funds as compensation for the individuals who will be caring for your work or overseeing its transition. This might be your assistant, cultural advisor or executor, a friend or family member, or someone else.

Unfinished Works

Depending upon your style and habits, you may still be in possession of unfinished art works. Additionally, you may be in possession of works of lesser quality, finished or unfinished, from many stages in your career, or works that have sentimental or educational value, but which you do not consider finished or appropriate for display.

You will want to give some thought to how these works should be treated. There may be pieces you never want sold or displayed, but think may have some archival value.

You might also want to identify unfinished pieces in your inventory and ensure that they are never finished by a third party. Unfortunately, unfinished works by established artists have in some instances been "finished" by another hand and passed off as originals, to the detriment of the artist's reputation, market value, and truthful legacy.

Estate Planning Questions for the Artist

I. INVENTORY/VALUATION OF YOUR ARTWORK

Do you have a current written inventory of all the artwork you have created? Yes ☐ No ☐

Do you have a current written inventory of all the artwork you have sold, gifted or bartered? Yes ☐ No ☐

Do you have a current written inventory of all original works in your collection made by other artists? Yes ☐ No ☐

Do these inventories include clearly labeled or identified photographs of each and every work? Yes ☐ No ☐

II. SIGNIFICANT BUSINESS RELATIONSHIPS

Are you represented by an agent, manager, or other business representative? Yes ☐ No ☐

If yes, who and what is your agreement with this individual?

Have you defined this relationship in a written contract? Yes ☐ No ☐

Do you have a copy of this contract? Yes ☐ No ☐

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? Yes ☐ No ☐

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? Yes ☐ No ☐

If yes, could an executor easily locate it? Yes ☐ No ☐

Are there other gallery/dealer/publisher/record company/record publisher/
film company/film producer who have shown/distributed/produced/published
or sold your work your work in the past?

Yes ☐ No ☐

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?

Yes ☐ No ☐

By whom? Do you still have copies of any such appraisals?

Has any of your work ever been sold at auction by you or a third party?

Yes ☐ No ☐

What auction house did you use 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?

III. STORAGE & MAINTENANCE

Do you currently have a dedicated studio space?

Yes ☐ No ☐

Address

Own ☐ or rent ☐ ? What is the lease term?

Do you currently have dedicated storage space ?

Yes ☐ No ☐

Address

Own ☐ or rent ☐ ? What is the lease term?

Have you made arrangements for the maintenance and storage of your work pending its distribution?

Yes ☐ No ☐

Have you made any arrangements to insure your work?

Yes ☐ No ☐

Have you made arrangements for the maintenance, storage and distribution of your art-making equipment and supplies?

Yes ☐ No ☐

Have you estimated the total cost of your planned disposition of your art, equipment and supplies at your death (storage, distribution, conservation)?

Yes ☐ No ☐

Do you currently have insurance on: your studio ☐ your artwork ☐ other/home etc. ☐

And at what values? your studio _____ your artwork _____ other/home etc. _____

Do you have an insurance policy or other specially designated funds in your will to pay for any such artwork-related estate administration costs?

Yes ☐ No ☐

IV. GIFTS & BEQUESTS

Have you made specific bequests of your art work to certain individuals in your will?

Yes ☐ No ☐

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?

Yes ☐ No ☐

If yes, to which charitable organizations do you plan to donate any work?

Have you notified and received approval from the donee organization regarding your planned bequest(s)?

Yes ☐ No ☐

V. TRUSTS & FOUNDATIONS

Have you considered a trust to manage your collection?

Yes ☐ No ☐

If yes, who are the intended beneficiaries? Trustee? Terms?

Copyright

In addition to a vast inventory of physical artworks, you have created and likely own an equally large catalog of **intellectual property** in the form of **copyright**.

Under American copyright law, copyright protection exists automatically as soon as the work is created and lasts for the **life of the artist + 70 years**. These rights will by definition continue after you are gone, so it is important to understand and plan for them.

The “rights” in “Copyright”

Copyright is better understood as a bundle of many different rights. For visual art, these rights include:

- » the right to make copies
 - » Examples: reproductions, posters, postcards, images in books
- » the right to distribute copies of your work
- » the right to display
- » the right to make “derivative works”
 - Examples: versions, subsequent installations in a series, sequels

These rights can be contracted away individually or all together. Granting others your copyright through a contract for a short period of time or limited purpose is called a “license.” “Assignment” means granting your rights on a permanent basis. A license or assignment may be “exclusive” meaning the other party is now the sole owner of the copyright, or “nonexclusive,” meaning you yourself continue to control the copyright and you 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 you have specifically transferred your copyright through a written contract, you still own the copyright in the works of art you have created, even if you are no longer in possession of the original. This applies to works you have sold, loaned, consigned, donated, or exhibited, as well as to works that are unfinished or that have been destroyed.

Ownership

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 hold 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 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 you have transferred all your ownership rights in the work, including copyright.

Registration

American law no longer requires registration to secure a copyright in original works. However, registration provides substantial benefits. Registration puts the rest of the world “on notice” that you have 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,” or the amount of financial harm the copying has caused.

Registering the copyright may not be appropriate for every single work you create. 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 into the public sphere and as an investment in protecting your work and career.

Registration for individual works is a straightforward process and can now be done online (www.copyright.gov). You will be asked to create a username and password that can be used for all subsequent registrations. Be sure to retain this information and share it with your team as part of your records.

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”)
 - » This may be you, a member of your team or someone else
- » Digital image(s) of the work(s) to upload
- » Credit card for the application fee [\$35]

Once you have submitted the application, the Copyright Office will review it. Barring any issue, the office will issue a certificate to the designated recipient and include the listing in its database. The registration benefits will extend retroactively to the date they receive 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.

Tip

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

Naming an agent on the Copyright website and keeping that information updated will make it much easier for people interested in using your work to contact you for permission.

Estate Planning Questions for the Artist on Copyright

COPYRIGHT ISSUES

Do you control the copyrights of works in your collection
(whether produced by you or by other artists)?

Yes ☐ No ☐

If no, who has control of such copyrights?

Do you control the copyright for works produced by you that
are now physically owned/controlled by third parties?

Yes ☐ No ☐

If no, who has control of such copyrights?

Do you have a current listing of the copyrights that you have registered?

Yes ☐ No ☐

Did you create any projects or works with a collaborator?

Yes ☐ No ☐

Do you have an agreement governing the collaboration?

Yes ☐ No ☐

Have you specifically addressed the disposition of any copyrights
you hold in your will?

Yes ☐ No ☐

Could your executor find records of the copyrights you own?

Yes ☐ No ☐

Are you giving more than one person the copyright interest in individual works? Yes ☐ No ☐

Have you addressed how unfinished works are to be treated? Yes ☐ No ☐

Can a third party finish your work? Explain.

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.?

Talking With an Estate Planning Attorney

The previous sections are all intended to assist you in preparing for the creation of your estate plan. The more prepared you are, the more efficient it will be to work with an estate planning attorney. However, you do not need to have accomplished every recommendation or decided on every question posed in this workbook. An attorney may be a valuable resource and guide through this process, helping you determine what legacy vehicles and estate planning tools are most appropriate for you and your goals.

Don't be afraid to ask questions

You are not expected to know the ins-and-outs of trust laws or the technical aspects of executing a will. However, you do not want to go through this process and come out the other side with a plan that either you do not understand or does not reflect your wishes. Go ahead and ask for clarification- "I don't quite understand what that means- could you explain it a different way?" You may know generally what you want to have happen, but not how to set it up: "I think I want to give most of my work to a local art school. What are my options?"

Don't be afraid to answer questions

Your attorney will need to know a lot about you, your work, your life, and your relationships in order to make a plan that actually suits your needs. It is common to feel uneasy and vulnerable, but remember, your estate planning attorney is there to help you. Remember that your conversations, as well as any documents you provide, will be kept confidential.

You are the client

You may wish to work with a friend, family member, or other member of your team in preparing for the estate planning process. However, you are the attorney's client and this is your estate plan. There may be times when it is not appropriate for a third party to be in the room or involved in the conversation and the attorney will likely ask them to leave the room for a least a short time to check in with you and make sure you are controlling the decision making process.

Cost

One concern with working with an attorney is always going to be cost. Attorneys commonly bill clients based on the amount of time spent on a client's needs ("billable hours.") Other attorneys charge a flat fee for a set of services; this is increasingly common among estate planning attorneys. You should be prepared to pay for these valuable professional services, but you should not pay more than you can really afford.

After initial conversation, you will receive an engagement letter that will describe and explain the costs and scope. It is entirely appropriate to discuss fees early in your conversation with an attorney. Often a first meeting is offered at no or low cost. The attorney should be able to give you a reasonable estimate for their intended services. Recognize that as the attorney begins working with you and learning more about your needs and goals, additional costs may arise. For example, you may decide that it would be better for your plans to create a number of trusts in addition to a will. Typically, an attorney will give an estimate and will not work beyond that estimate without your express authorization.

One of the ways you can use an attorney's time most efficiently is by being as prepared and organized in advance as possible. This workbook contains Estate Planning Questionnaires that will assist you in identifying and gathering the kind of information you will need to build an effective and comprehensive estate plan. The questionnaire and this section will also help acquaint you with some of the questions that may arise in planning an artist's estate so that you may raise them early.

You may also qualify for free legal services with your local Volunteer Lawyers for the Arts-type program. All the programs do not have the same name or operate in the same manner. Please contact your local program to see how and if they can assist you.

Updates

Over time, your wishes, relationships, and plans may change. Any time you have a major life change – marriage, divorce, widowed, new child or grandchild, move to a new state, etc.—you should meet with your attorney to discuss the impact on your estate plan. Estates law varies considerably from state to state, and merely moving, or moving in combination with any of the above, could substantially alter the impact and effectiveness of your plan.

Contact

For suggestions, comments, and to provide additional resources, please contact Volunteer Lawyers for the Arts of Massachusetts at estateplanning@artsandbusinesscouncil.org.

Other Resources

Volunteer Lawyers for the Arts

For more information about Volunteer Lawyers for the Arts of Massachusetts Estate Planning program, please visit: www.artsandbusinesscouncil.org/estate-planning-overview/estate-planning-resources.html

For a complete listing of Volunteer Lawyers for the Arts programs around the country, please visit: www.vlany.org/resources/

Estate Planning for Artists

The Marie Walsh Sharpe Foundation
www.sharpeartfdn.qwestoffice.net/

Gifts & Valuation

Please see IRS Publication 561 (4/2007) for more information:
www.irs.gov/publications/p561/ar02.html#d0e617

To learn more about the Art Connection's art donation programs, visit
www.theartconnection.org

Income Tax, Gift, and Estate Tax Issues: Tips for Art Collectors and Artists:
www.artbusiness.com/estax.html

Society of American Archivists: A Guide to Donating Your Family or Personal Papers to a Repository
www.archivists.org/publications/donating-familyrecs.asp

Artist Endowed Foundations

For more detailed information and a thorough survey and study of artist endowed foundations, see the Aspen Institute's Program on Philanthropy and Social Innovation:

www.aspeninstitute.org/psi/a-ef-report

Copyright

For more information or to register works, visit:

www.copyright.gov

American Bar Association: Estate Planning and Copyright

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)

www.jdsupra.com/legalnews/protecting-an-artists-legacy-through-es-08360/

Workbook Contributors

ARTS & BUSINESS COUNCIL OF GREATER BOSTON

Jim Grace

Jim Grace is the Executive Director of the Arts & Business Council. 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 over 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 co-author of best selling *The Worst Case Scenario Handbook: Golf*. To date he has been involved in the publication of over eight books. Jim serves 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.

VOLUNTEER LAWYERS FOR THE ARTS OF MASSACHUSETTS

Megan Low

As the Director of Services for the Arts & Business Council, Megan manages the Volunteer Lawyers for the Arts and Fiscal Sponsorship programs. Megan holds a Bachelor of Arts degree in Art History from Harvard University and a JD from Boston College Law School. 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 as an adjunct professor at Stonehill College, teaching a course on Museology.

JOAN MITCHELL FOUNDATION**Laura Morris**

As Archivist for the Joan Mitchell Foundation, Laura Morris is responsible for research and documentation of Joan Mitchell's life and work. This includes managing Mitchell's personal papers and other archival materials, and providing scholars and other interested parties information and access. Laura grew up in Tennessee, and received a B.A. in Interdisciplinary Studies from the University of Virginia, where she was an Echols Scholar. Following several years of teaching ESL to political refugees and art to K-5 students on Seattle, she moved to France, where she studied painting and drawing at the Marchutz School in Aix-en-Provence, France.

Laura returned to the U.S. to study Library and Information Science and History. She holds an MLIS with an Archives Management concentration, as well as an M.A. in History, from Simmons College. She conducted extensive research in French archives while completing her Master's thesis. Laura has worked as Archivist for the Harvard Art Museums, the Harvard Business School, the Harvard University Archives, and the New York Public Library / Manuscripts Division. While she has been responsible for a wide range of materials - from Babylonian tablets to the archives of The New York Times - she is most interested in artists' papers and materials. In her creative life, Laura paints, binds books, marbles paper, knits, and bakes.

Shervone Neckles-Ortiz

As the Artist Support Manager for the Joan Mitchell Foundation, Shervone Neckles-Ortiz manages the New York City and national programs for both the Creating a Living Legacy (CALL) and Professional Development Program. 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 Yulou 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 Graphic 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 M.A. from Teacher's College, Columbia University, M.F.A. from Queens College and B.F.A. from the College of New Rochelle.

Notes

**JOAN MITCHELL
FOUNDATION**

545 West 25th Street, 15th Floor
New York, NY 10001

212-524-0100

www.joanmitchellfoundation.org
info@joanmitchellfoundation.org