PART 1

Before We Get Started

Art is an asset of passion. This, coupled with its unique financial characteristics, makes it perhaps the most difficult asset to incorporate into an overall estate and financial plan. But this is imperative, and planning is always best done ahead of time, by the artist or the collector, rather than left to the family.
Collecting art involves virtually every area of law, from property law, to contract law, to tax law, and so on. Property and contract law are probably the most essential, as they define the rights of all parties to the purchase and ownership of art.

This book, however, is not about “art law” per se. It is primarily about two related areas: first, planning for the ultimate disposition of art, including how to incorporate the wealth represented by the art into overall estate and financial planning, and second, practical considerations for collectors, while they are collecting and as they relate to the first area, planning for the ultimate disposition of the art. This second edition expands that discussion to commercially successful artists, who have unique planning issues.

As such, it is a book written for four people. Not just four individuals, mind you, but four types of people: first, the trusts and estates practitioner who has clients who collect or create art but who does not currently have substantial experience representing those clients who are art collectors or creators; second, art collectors who are in the process of determining the ultimate disposition of their collection; third, commercially successful artists who are in the same process (most of the discussion pertaining to artists is included in part 5); and fourth, allied professionals such as art advisors, risk-management advisors, and valuation advisors—in short, all of the professional advisors who should be working with the collector or artist as they prepare and implement their plan for the ultimate disposition of their art.
The book focuses on art. However, most of the discussion also applies to the broader world of collectibles: coins, stamps, antiques, collectible firearms, and the like. Several rules apply only to art, and those will be pointed out as they are discussed.

For those who are interested in a broader and deeper discussion of art law, selected additional resources—most notably, the seminal work, *Art Law* by Ralph E. Lerner and Judith Bresler, referenced throughout—are listed in the Resources section of this book.¹

For many collectors, not only is their art among the most valuable assets that they own. They are also more passionate about their art than they are about their stocks, bonds, real estate, and maybe even the family business. They have spent considerable time, energy, and resources to develop their own expertise in art and have built a collection according to their personal aesthetic tastes and interests. Their interest may be in a particular artist, period, or medium, and they have likely developed relationships with artists, auction houses and galleries, and other collectors as well. Collecting art has gone way beyond a weekend hobby or a means to decorate their homes; it has become their passion.

Although they probably realize that there will be some sort of disposition of their art, they are most often more focused on the passion of collecting, not disposing. My experience has been that when they do consider the ultimate disposition of their collection, they are often overwhelmed by the seemingly endless number of choices of what to do. Their art is intensely personal to them and involves their passion and emotions much more than their pocketbook. When faced with all of these perceived choices, human nature takes over, and it all too often results in selecting the default planning option—doing nothing. It is not unlike a child at a toy store or candy store—their options seem endless, so they are hard-pressed to make a decision.

These same considerations apply to artists except that they are often dealing with a large inventory of their own works rather than a collection of others’ works. This presents its own set of issues, which are addressed in part 5.

Often, the professional advisors to the collector or artist are not aware of the extent, or value, of their clients’ collections, and planning consists of a simple, standard bequest of tangible personal property to the sur-
viving spouse or, if not, then to the children or other heirs to divvy up as they agree. For a valuable collection, this simple solution will almost always lead to hard feelings and family conflict at the least—and perhaps to expensive, protracted litigation.

The value of art and other collectibles is significant, and it is estimated that between $4 and $6 trillion of collectibles will pass intergenerationally in the next 40 years. Those collectibles, the most common of which is art, are owned by your clients, and they need your help in determining how to properly plan for the disposition of their collections.

The failure to plan for or face the disposition of these assets during the collector’s lifetime may be costly on many fronts. Beyond federal income, estate, and gift tax considerations, the failure to plan may lead to a grossly inequitable division of estate assets or a fire sale from the estate. It will most certainly result in family discord—and perhaps litigation. Finally, the failure to plan will most assuredly lead to a disposition different from what the collector would have wanted if he or she had taken the time to properly plan.

This book is the result of working through the seemingly endless options with many collectors and artists, as well as observing the distress of families where planning has not occurred. That experience has helped me to develop a process to help collectors and artists focus on the few real planning options available for the disposition of their collections—specifically, their art. I will share examples of those experiences, as you, too, have likely encountered similar situations. The examples throughout the book will likely offer up some surprises as well and will help you, and your clients, to avoid those surprises.

“Art” is the subject of many books detailing the countless issues surrounding the ownership of art, proving that this subject cannot be covered in just one relatively short book, such as this. I, therefore, specifically exclude a number of art-related topics, which are simply beyond the scope of this book and, in some cases, the author’s subject matter knowledge. I will not cover

- Art as an investment. I am not an expert on art, nor am I an expert on investments, so I am certainly not an expert on art as an investment. Although most collectors engage in this passion for aesthetic
and personal reasons, a growing number of individuals are focusing more on the potential investment return from their art purchases, and the media are full of stories of the vast wealth represented by art. I will leave that topic to others much more qualified.

- Planning as it relates to art dealers. Special planning rules apply to art dealers. Although I mention some of those special rules in this book, reference additional resources at the end of the book, and may someday write another edition of this book that includes a discussion of considerations that pertain specifically to art dealers, this is not that book.

- Specific advice with respect to acquiring, displaying, storing, insuring, and transporting art. Each of these topics will be mentioned as it pertains to planning for the care and disposition of your collection, but specifics as to each of these topics are beyond the scope of this book. It does seem that I spend an increasing amount of time discussing these matters with collectors, so do not assume that just because your client has amassed a large collection they are engaged in appropriate collection management practices.

- Specific advice with respect to regulated or illegal assets, such as collectible firearms or art made from illegal-to-possess property, such as African ivory or Native American artifacts.

- Specific advice with respect to state law matters, including state income, estate, gift, and sales tax laws. Reference is made to these topics, and consideration should be given to these topics as part of the planning options discussed below because, where applicable, they could add significantly to the cost of any contemplated transaction. This is particularly true with respect to state sales tax, the collection of which has become an increased focus of state taxing authorities.

- Specific advice with respect to foreign or international laws or treaties. The world of art is truly international, and basic legal concepts and rights and duties may vary significantly from country to country. Extra care should be taken when a transaction is consummated in a foreign country.

- Sample documents. This is not a form book. I am licensed to practice law but do not currently engage in the practice of law, so I do not feel it is appropriate for me to provide samples of documents. For
those who do seek sample forms to complete transactions or dispositive planning related to art, reference is made to *Art Law* by Lerner and Bresler. Of course, any such forms should always be used with care to ensure they comply with state law and are appropriate to the particular facts and circumstances of your transaction.

Planning as it relates to artists was specifically excluded from the first edition of this book. However, as more artists achieve commercial success, the financial aspects of their aesthetic achievements become more important. Furthermore, artists often leave significant amounts of inventory of their work behind, and inventory management and legacy management become particularly important. Special planning considerations and different tax rules apply to artists because their self-created works of art are in fact inventory, whereas the works of art held by collectors and investors are capital assets. For those reasons, I have added part 5 to this second edition to discuss these concerns.

Beyond that major addition, the focus of this book will continue to be to help collectors and those who work with collectors to plan for the ultimate disposition of their collections.

### Some Definitions

Most books of a technical nature include a glossary of terms or definitions. Rather than including a glossary, I have chosen to list below a few definitions of terms you will encounter throughout the book. Additional, less frequently used terms are defined when first used in particular sections. In alphabetical order, terms used throughout include the following:

**AEA** is the applicable exemption amount, which is the amount that may be transferred free of federal estate or gift tax. The AEA was increased by the Tax Cuts and Jobs Act (“2017 Tax Act”), signed into law effective January 1, 2018. The tax-free amount is $11,400,000 for 2019 and is indexed for inflation thereafter, until 2026, at which time the AEA is scheduled to revert to its 2017 level of $5,490,000, indexed for post-2017 inflation.
Art probably does not need a definition for anyone who is reading this book! Dictionaries define it broadly to include any creative or imaginative activity, but for our purposes, let us think of it in a narrower context, perhaps as a creative or imaginative activity as expressed in paintings, sketches, lithographs, sculpture, and the like. Art is truly in the eye of the beholder.

Artist refers to an individual who creates art and, for our purposes, is engaged in the business of selling art to the public, be it directly or through a dealer.

Collector refers to someone who buys and sells art primarily for personal pleasure and is not a dealer or an investor. For federal income tax purposes, a collector usually cannot deduct expenses and losses incurred in collecting activities.

Dealer refers to an individual who is engaged in the trade or business of selling art to customers—either directly or through a business entity. Whether one conducts a trade or business is primarily dependent on whether the person regularly engages in the activity, expects to make a profit from the activity, and holds themselves out to others as engaged in such activity.

Donate refers to gratuitous transfers of art, during the collector’s life, to museums or other charitable, nonprofit institutions. Also see “Give or Gift.”

Give or Gift refers to gratuitous transfers of art, during the collector’s life, to family members or other individuals, other than charitable institutions.

Investor refers to someone who, individually or through an entity, buys and sells art primarily for investment rather than for personal use and enjoyment (a collector) or as a trade or business (a dealer). The primary difference between a collector and an investor is that the latter engages in the activity primarily to make a profit.

IRC or Code refers to the Internal Revenue Code of 1986, as amended.

IRS or Service refers to the Internal Revenue Service.

Treas. Regs. refers to the regulations promulgated by the Department of the Treasury under the IRC.

Other resources, particularly Art Law by Lerner and Bresler, contain numerous case law citations further defining these terms.
Notes

2. Boston College’s Social Welfare Institute estimates that of the $41 trillion that it projects will pass intergenerationally by 2052, between $4 and $6 trillion will represent art and antique assets.
4. IRC § 183.
5. IRC § 162 and Treasury regulations thereunder. There are numerous cases addressing what constitutes a “trade or business,” including, for example, Gajewski v. Commissioner, 723 F.2d 1062 (2d Cir. 1983), cert. denied, 459 U.S. 818 (1984).
6. IRC § 1221 and Treasury regulations thereunder.