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# A Reading Guide to the Study Report for Artists and Their Family Members

This publication is a reading guide to *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*, the two-volume report produced by the Aspen Institute’s National Study of Artist-Endowed Foundations. The guide is intended to facilitate use of the Study Report by artists who are exploring the possibility of creating a foundation, as well as by the family members who are supporting that exploration or considering it themselves after the artist’s death. As such, it is organized around questions artists often ask about whether to create an artist-endowed foundation and provides references to the sections of the report and its related materials that pertain to these questions. The Study Report can be viewed online or downloaded at [www.aspeninstitute.org/psi/a-ef-report](http://www.aspeninstitute.org/psi/a-ef-report).

The purpose of this guide is to familiarize artists and their family members with basic considerations in creating a private foundation so that they may be better informed when discussing these issues with their legal advisors, as well as with persons who might potentially play a role in foundation formation and governance. As with the Study itself, the goal is to promote better understanding as to whether a foundation is an appropriate choice for an artist and, if so, how to plan for a foundation that will be successful in fulfilling its charitable purpose. The information in this guide is general and solely educational and nothing in the guide is intended as legal advice.

## Overview

A decision to create a foundation, whether during an artist’s lifetime or under the provisions of an estate plan, involves the balancing of many considerations—personal, professional, financial, and philanthropic. Artists and their family members who have carefully thought through these considerations are more likely to plan effectively. They also are more likely to understand the need for specialized professional advisors. Several areas of law come into play and need to be in alignment to create a successful foundation. Among these are private foundation law, estate planning law, intellectual property law, and more broadly, art law. It is important that artists have the guidance of legal advisors who are expert in these areas and understand how they intersect in foundation planning and operation.

## Questions Often Asked by Artists

### Threshold Questions

#### What is an artist-endowed foundation?

For the purposes of the Study’s research, an artist-endowed foundation is a private foundation created or endowed by a visual artist, the artist’s surviving spouse, or other heirs or beneficiaries to own the artist’s assets for use in furthering tax-exempt charitable and educational activities serving a public benefit. Artist-endowed foundations typically hold the artist’s works and intellectual property, as well as financial investments and in some cases real property, such as the artist’s former studio and home. An artist-endowed foundation will sell the artist’s works periodically to generate funds to support the foundation and its programs, which might include making grants, or it will use the

artist's works and property for charitable programs, such as exhibitions, a study center, or an artist residency program. Many foundations do both. (See Volume 2, *Glossary of Terms in Practice*, page 3.)

### **What is a private foundation?**

A private foundation is an entity formed under state law (either as a nonprofit corporation or a charitable trust) that is recognized as tax-exempt by the Internal Revenue Service, realizes its charitable purposes through grants and/or by conducting charitable programs directly, and is funded primarily by a single individual, family, or business. Private foundations are required to expend a defined percentage of the value of their assets annually for charitable purposes, pay an excise tax on investment income, file annual reports available to the public listing their income and its sources (including the names of their contributors) and detailing expenditures, and abide by special rules concerning investments, transactions with insiders, grants to individuals, and lobbying activities. Private foundations are distinct from public charities (organizations supported by contributions from the general public), which in some cases may use the word “foundation” in their name, but are not regulated as private foundations by the IRS. (See **Volume 2**, *Glossary of Terms in Practice*, page 9.)

### **How big does a foundation need to be?**

Private foundations are economic entities and must support themselves. In the case of artist-endowed foundations, this is either through investment income or periodic art sales or a combination of the two. The bigger foundations hold hundreds of millions of dollars in assets. Nonetheless, reflecting the large number of newer foundations that are not yet fully endowed, the Study found that total assets among artist-endowed foundations averaged \$11 million and the median value of assets was \$1 million. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Scale and Asset Mix, page 44.)

### **What does it cost to operate an artist-endowed foundation?**

Many factors influence an artist-endowed foundation's expenses, not the least the need to care appropriately for artworks that have been committed to benefit the public. The bigger foundations report total expenditures in the tens of millions of dollars. Nonetheless, reflecting the large number of newer foundations not yet active or only nominally so, the Study found that annual expenditures for all purposes by artist-endowed foundations averaged \$475,000 and the median expenditure was \$100,000. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Scale and Asset Mix, page 44.)

### **What does that mean in terms of resources?**

Assuming that five percent of financial assets are used annually, almost \$10 million in financial assets would be needed to support the average annual expenditure, or \$2 million would be needed to support the median annual expenditure. Alternatively, assuming a 50 percent commission paid to an art dealer, periodic art sales would need to total \$950,000 to support the average annual expenditure or \$200,000 to support the median annual expenditure. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Scale and Asset Mix, page 44.)

### **How can I know if my art could support a foundation?**

As a rule of thumb, if art sales do not support you during your lifetime—for example, if you exhibit professionally but still require other sources of financial support, such as a teaching salary, spouse’s income, family wealth, or other type of compensation—then it is unlikely that art sales will be sufficient to support your foundation. In this case, you will need to provide other resources for the foundation to succeed. (See **Volume 2**, 7.2.1 “Economic Models,” Assumptions About Art-Related Income, page 59.)

### **Can’t the foundation promote my art and increase its value?**

Educating about an artist’s creative principles and stimulating interest in the oeuvre among museum curators and art patrons is a long-term, expensive process. It involves scholarship, publications, exhibitions, and the like, alongside appropriate care of the artworks. During this process, there will need to be other resources in addition to art sales proceeds to meet these expenses. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Valuation, Blockage Discount, and Role of Artworks, page 45.)

### **What can I do to provide for my art after my death if I don’t create a foundation?**

Among charitable options, artists have bequeathed their estates in part or in whole to museums, universities, libraries, and research centers, and in some cases, to other types of institutions, such as historical societies, nature conservancies, and architectural preservation organizations. Some have made bequests to community foundations to establish a named fund and others to repositories and foundations that serve multiple artists. (See **Volume 1**, 2.3 “Other Philanthropic Forms Used by Artists,” page 37; and **Volume 2**, 9.7 “Alternatives to Artist-Endowed Foundations: Other Options for Artists,” page 485.)

### **Are there any other options?**

Some artists have made noncharitable bequests to individuals, either outright or in trust. A noncharitable trust can own, manage, and sell the art with the proceeds benefiting designated individuals, for example, family members and friends. Noncharitable options will not receive the same favorable tax benefits that charitable gifts and bequests enjoy, but for artists whose estates are valued below the federal estate tax exemption, which is approximately \$5 million per person as of 2012, this might be less of a concern. Indeed, the estates of many well-respected artists are managed in this way. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Charitable Purpose, Beneficiaries, and Function, page 34.)

### **What is the difference between an artist’s estate and an artist-endowed foundation?**

The term *estate* has two meanings. Initially, after an artist’s death, it refers to the property transferred by the artist’s estate plan. Subsequently, after the artist’s estate is settled, the art world uses the term to refer to the body of artworks and rights owned privately by or for the benefit of individuals who are beneficiaries of the deceased artist, such as family members and friends. In this

usage, an *estate* is neither charitable nor tax-exempt because its proceeds are distributed to designated, private individuals. In contrast, a private foundation, such as an artist-endowed foundation, is a charitable, tax-exempt organization whose activities benefit the general public. (See **Volume 1**, 1.3 “Reflections on Terminology,” Estate, page 15; **Volume 2**, 9.4.2 “Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations,” page 347; and **Volume 2**, 9.4.3 “Public Benefit Obligations and Legacy Stewardship Activities of Artist-Endowed Foundations: Are They in Conflict?,” page 369.)

### ***Estate Planning Choices***

#### **Don’t most artists create foundations because of estate taxes?**

For artists, as for anyone who creates a foundation, motivations range broadly and more than one consideration can be influential—personal, professional, financial, and philanthropic. Given artists’ special challenges and opportunities in estate planning, estate taxes may well be among these considerations, especially if the artist’s works have achieved a strong market. That said, the Study found that 60 percent of deceased artists associated with foundations holding at least \$1 million in assets were not survived by children, suggesting that in these cases estate tax matters were not likely to have been the artist’s primary motivation. (See **Volume 1**, 3.3 “External Influences: Public Tax Policy,” The Federal Estate Tax, page 64.)

#### **Should I create my foundation now or when I die?**

Some legal advisors believe a foundation should be created during the artist’s lifetime so that it will be fully prepared to receive its bequest without delay. Others believe that artists’ lifetime foundations can create complications and potential risks that are best avoided, as noted later in this text; they prefer that a foundation be formed under an artist’s estate plan. Both views have merit and the choice will depend on your particular situation and preferences. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Lifetime or Posthumous Creation, page 35.)

#### **What happens if my spouse outlives me?**

Currently, as a general rule, your surviving spouse may inherit your works and other property without incurring a federal estate tax. Some artists choose to leave their works to their surviving spouse to enable him or her to be supported by art sales. This might be done with a provision that a foundation be created after the spouse’s death, or the choice might be left to the surviving spouse, who would decide whether or not to establish a foundation and, if so, whether to create it during lifetime or at death. Some foundations are created during the spouse’s lifetime, but there are potential complications in this option, as noted below, that need careful consideration in consultation with an attorney who is expert in private foundation law. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Lifetime or Posthumous Creation, page 35.)

### **Can I provide for family members as well as create a foundation?**

In many cases, the estates of artists whose works enjoy a strong market are planned so that family members receive financial assets and other types of property and a foundation receives the artworks and rights. Where there is not a strong market for the art, however, a foundation will need to receive other types of assets in addition to the art, so that it is viable economically. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Roles of Heirs and Beneficiaries, page 41.)

### **Can I split my art between family members and a foundation?**

This arrangement presents significant limitations all around and should be discussed carefully with an attorney who is expert in private foundation law. The law that applies to private foundations prohibits insiders, including an artist’s family members, from engaging in transactions with the foundation, such as selling or exchanging artworks or licensing copyrights. The law also limits foundation activities that benefit insiders. An example would be programs to educate about and promote the artist’s works while foundation insiders own and sell the art or own and license the rights. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Roles of Heirs and Beneficiaries, page 41; 7.2.3 “Conflict of Interest Policies and Practice,” page 79; and 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

### ***Intentions for the Future***

#### **How can I be sure the foundation will do what I want it to do when I’m no longer around?**

You will define the foundation’s charitable purpose, which under the provisions for tax exemption will be educational or charitable in nature or a combination of these. The foundation’s governing body then has the duty, by law, to ensure that its activities fulfill this purpose. State attorneys general regulate foundations on these and other matters. In exceptional circumstances, such as insufficient financial resources or a purpose drawn too narrowly to be operable, the foundation’s governing body can seek permission to revise these terms. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Donor Intentions, page 34; and 9.3.1 “Creativity and Generosity: Considerations in Establishing an Artist-Endowed Foundation,” page 271.)

#### **How can I be sure my intentions for the foundation will be honored?**

There are various ways for you to express your intentions, which you certainly should do, and these options will need to be discussed carefully with your attorney. Ultimately, however, the competency and commitment of the individuals chosen by you to form and govern the foundation will be the deciding factor in fulfilling your intentions. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Foundation Viability: Individuals and Their Motivations, page 46.)



### **Can I require the foundation to employ my staff after I'm gone?**

You may request but cannot obligate a foundation to employ specific individuals, and your request does not alter the duty of the foundation's governing body to employ appropriately qualified staff and to supervise their performance in the foundation's best interests. In addition, compensation paid by a foundation must be in line with the field's pay rates for the position, regardless of the compensation you've previously paid the staff member. (See **Volume 2**, 7.1.2 "Considerations in Foundation Planning," People and Expertise, page 39.)

### **Can I stipulate that a family member will be employed by the foundation?**

You may request but cannot obligate the foundation on employment matters. The foundation's governing body is responsible for employing appropriately qualified staff, which could indeed include a family member, as well as supervising them and compensating them reasonably. (See **Volume 2**, 7.1.2 "Considerations in Foundation Planning," People and Expertise, page 39.)

### **What if I don't want the foundation to last forever?**

While many artist-endowed foundations are created to exist in perpetuity, others are not. Those that are created as *estate distribution foundations* to accomplish the charitable disposition of property remaining in an artist's possession at death typically terminate when their distribution activities are complete. Given the complexity of such a task, however, setting a short time frame—for example, ten years or less—would be risky. (See **Volume 2**, 7.1.2 "Considerations in Foundation Planning," Existence in Perpetuity or for a Limited Term, page 36; and 7.3 "Considerations in Terminating Artist-Endowed Foundations," page 91.)

## **Charitable Use of an Artist's Assets After Death**

### **I would like my property to be used as a place for artists. Is that possible?**

A growing number of artist-endowed foundations own a residency facility, often the artist's former home or studio, and operate an artist residency program. Sufficient financial resources will be needed to convert the facility from private use to institutional use, which involves compliance with different codes and rules, as well as to fund operation of the program and long-term maintenance of the facility. A variety of other factors will influence the feasibility of this idea. (See **Volume 2**, 8.2.5 "Real Property," Residencies, page 219.)

### **Isn't it a problem for a foundation to own a lot of art because of payout?**

Speaking generally, a private foundation is required each year to expend for charitable purposes a defined percentage of the value of its assets that are not used to conduct activities fulfilling its charitable purposes. It will meet this *payout* requirement by making grants and/or by expending funds to operate programs directly. When art is used for charitable purposes, such as in exhibition programs, its value is not subject to this calculation, but of course there will be an expense to conduct those programs. (See **Volume 2**, 7.1.2 "Considerations in Foundation Planning," Common Foundation Models, page 28.)

### **Can the foundation sell my art and use the money to make grants?**

In cases where the art has a strong market, and thus economic value, it can be sold periodically by a foundation to fund its operations and support its programs, including grantmaking. If your works don't have a robust market, funds for making grants must come from other resources that you give to the foundation. (See **Volume 2**, 7.2.1 "Economic Models," page 55.)

### **I want my foundation to make grants to artists, but I've heard this is complicated.**

Prior approval by the Internal Revenue Service is required for programs that make grants to individuals; an attorney expert in private foundation law will be familiar with this process. With proper guidance, making grants to individuals should not be complicated. A variety of foundations of different sizes have secured this approval and make grants directly to individuals, such as artists, scholars, and students. There also are alternatives. For example, your foundation could provide funds to a re-granting organization that specializes in grants and awards to individuals. (See **Volume 2**, 8.1.1 "Making Grants to Individuals," page 103; and 9.5.2 "A Commitment to Support Individual Artists Worldwide: Reflections on the Experience of One Artist-Endowed Foundation," page 395.)

### **Should the foundation keep my archive?**

Many artists, or their foundations, have placed their archives with an institutional repository that has a professional capacity to care for the material and make it broadly accessible to scholars, students, and others. Foundations whose charitable purpose is to facilitate scholarship, and that have sufficient resources to appropriately care for and professionally administer the archive, often retain ownership, either temporarily for use in a finite scholarly project or permanently. (See **Volume 2**, 8.2.1 "Archives," page 147; 9.6.2 "Artist-Endowed Foundations: Archives, Access, and Scholarship," page 463; and 9.6.3 "Artist-Endowed Foundations Stewarding Artists' Archives and Libraries: The Importance of Standards and Access," page 473.)

### **I want my art to be placed in museum collections. Can a foundation do that?**

Many artist-endowed foundations make grants of artworks to museums and educational institutions. As a practical matter, the ability to do this depends on there being an interest among collecting institutions in acquiring the art. To the extent that it would be possible to stimulate interest among potential recipients in the works of lesser known artists, long-term cultivation efforts—such as scholarship, publications, and exhibitions—are likely to be necessary. (See **Volume 2**, 8.1.3 "Making Grants With Artworks," page 133; and 9.6.1 "Artist-Endowed Foundations and Museums: Observations on the Relationship," page 455.)

### **I would like my artworks kept together for the public's enjoyment in a single-artist museum.**

Operating a museum—a facility open on a regular basis to the general public and featuring a collection—is a very costly proposition. As a result, foundations involved in operating museums, even those that generate income from admissions, often discover that they must seek outside funding beyond their artist's bequest. A variety of factors will influence whether or not a single-artist

museum can successfully attract the level of external support required to be viable. (See **Volume 2**, 8.2.5 “Real Property,” House Museums and Public Exhibition Spaces, page 218.)

### **What about a study center?**

In contrast to museums, study centers generally are visited by appointment. Assuming there are sufficient resources for appropriate care of materials and for professional administration, foundations with a charitable purpose to facilitate scholarship can fulfill this by operating a study center—sometimes the artists’ former studio or home upgraded for this purpose—holding an archive and study collection. (See **Volume 2**, 8.2.5 “Real Property,” Study Centers, page 219; and 9.5.3 “Toward a Public Library of American Culture: Reflections on the Centrality of Art and Importance of Access in Artist-Endowed Foundations,” page 413.)

### **I want my foundation to be located in New York.**

Foundations with educational purposes that seek to incorporate in New York State, or are formed elsewhere and want to operate in the state, require the consent of the New York State Department of Education, governed by the New York State Board of Regents. This body regulates all educational activities in New York, including the incorporation process of collection-owning charitable organizations with educational missions. Art assets owned by such entities are generally assumed to be educational collections and, if so, potentially could be subject to limits on deaccessioning, among other matters. An attorney well versed in this system should advise your foundation’s formation. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Legal Form and Jurisdiction, page 37; and Study Report Supplement 2013, “Incorporating in New York State: Forming Charitable Organizations with Cultural and Philanthropic Purposes,” page 153.)

### **Stewardship Intentions**

#### **Can I specify how my art should be used by the foundation?**

You will define the foundation’s charitable purpose—what it is you wish the foundation to accomplish for the public’s benefit. The role of your art will be indicated broadly in this. Your bequest can include provisions for the use of the art, including, among other matters, specification that disposition of the art may be by gift or sale. It is important, however, that the persons you select to govern the foundation be able to use their judgment about these matters as situations unforeseen by you now are likely to arise in the future. (See **Volume 2**, 9.3.2 “Enter the Lawyers: Choosing and Working with Estate and Foundation Counsel to Secure an Artistic and Philanthropic Legacy—What Legal Language Can Accomplish and Its Limits,” page 296.)

#### **What if my archive holds information about another person that shouldn’t be made public?**

Your bequest can include the provision that access is to be restricted for a defined period of time to any materials in the archive that divulge the private information of a living person. This type of restriction generally is in place for a specified number of years after the death of the persons whose privacy should be protected. (See **Volume 2**, 8.2.1 “Archives,” page 147.)

### **Should my copyrights go to the foundation?**

Ownership of your copyrights is essential if the foundation’s charitable purpose will be realized by programs intended to increase public access to and knowledge about your art. This typically involves activities that make use of the copyrights, such as publications, exhibitions, licensing of images and text, etc. Be certain your estate planning counsel is knowledgeable about copyright matters, including statutory termination rights—rights of family heirs, under certain circumstances, to take possession of copyrights at a later date, even if intended by you for the foundation. (See **Volume 2**, 8.2.3 “Copyrights and Intellectual Property,” page 181; and Study Report Supplement 2013, “Statutory Copyright Termination and Artist-Endowed Foundations,” page 167.)

### **A corporation I created owns my art and copyrights.**

Current law restricts a foundation from owning more than a limited percentage of a for-profit corporation, even if it is received as a charitable bequest. If you want the foundation to own the works and rights held by a corporation, it will be necessary to have guidance from an attorney expert in private foundation law, along with a tax attorney, to evaluate the choices in this situation. If you currently are considering creating a corporation, be sure to research this issue thoroughly. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Limits to Assets by Law, page 39; and Study Report Supplement 2013, “Artist-Endowed Foundations Holding Stock in Artists’ Corporations: A Costly Arrangement,” page 159.)

### **Why would an artist authorize posthumous productions?**

In some cases, artists might view posthumous production as important in realizing a foundation’s charitable purpose. For example, a sculptor or a photographer might authorize completion of incomplete editions so that works, properly marked as posthumous casts or images, are available for educational use, for contribution to museums and educational institutions, or for sale to generate funds to support the foundation’s programs. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Valuation, Blockage Discount, and Role of Artworks, page 45.)

### **Artists’ Lifetime Foundations**

#### **Can I create a foundation and give it my art during my lifetime?**

This is not advisable. Owning or managing your works during your lifetime can run afoul of the law prohibiting self-dealing by foundation insiders. This would be the case, for example, if the foundation’s activities with the art—such as exhibitions, sales of the art, publications, and making grants with the art—serve to promote your professional interests. (See **Volume 2**, 7.2.3 “Conflict of Interest Policies and Practice,” Factors That Heighten Potential Risks, page 85; and 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

#### **What about giving my foundation works that I own made by other artists?**

Artists have established lifetime foundations whose charitable purposes include assembling collections of art made by others and exhibiting or making grants with that art. Regardless of their

creator, however, artworks owned by the foundation cannot be displayed privately in your home or on your property. (See **Volume 2**, 7.2.3 “Conflict of Interest Policies and Practice,” Practical Points, page 86; and 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

### **Can I give my foundation my studio/home/property during my lifetime?**

This would be a practical option only if you and your family members ceased to use the property. The law prohibits use of a private foundation’s property by insiders or for their purposes as well as transactions between a foundation and its insiders, such as renting or leasing property. (See **Volume 2**, 7.2.3 “Conflict of Interest Policies and Practice,” Prohibited Transactions, page 80; and 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

### **Can my foundation produce my catalogue raisonné during my lifetime?**

This is not advisable. Private foundations generally are prohibited from conducting activities that benefit insiders, such as furthering their professional interests, which is potentially the case were the foundation to fund or produce your catalogue raisonné during your lifetime. The same would apply to such activities as authenticating your art, conducting or funding scholarship on your oeuvre, conducting or funding exhibitions of your art, or managing or promoting your copyrights. (See **Volume 2**, 7.2.3 “Conflict of Interest Policies and Practice,” Factors That Heighten Potential Risks, page 85; and 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

### **But there are foundations of living artists, for example in Europe, that do these things.**

Artist-endowed foundations in the US and in other countries share many common features and may look very similar at first glance, but they are regulated under different legal systems. The rules for private foundations in the US are much stricter, particularly with respect to prohibitions on insider benefits. (See **Volume 2**, 9.7.3 “Artist-Endowed Foundations Internationally,” page 505.)

### **What can my foundation do during my lifetime?**

Artists’ lifetime foundations in some cases are dormant, but if active, they typically make grants and conduct programs that have nothing to do with the artist’s art or professional career. For example, artists’ lifetime foundations have made grants to support art education, cultural opportunities for underprivileged youth, HIV/AIDS services, the performing arts, local community betterment, animal welfare, humanitarian aid, historic preservation, and environmental conservation, among many topics. Artists’ lifetime foundations have operated artist residency programs, stewarded nature preserves, and assembled collections of art made by others and contributed them to museums, among other activities. (See **Volume 1**, 4.3 “Activities of Artists’ Lifetime Foundations,” page 125; and **Volume 2**, 9.5.1 “Artist-Endowed Foundations: Opportunities for Philanthropic Impact in the Arts and Culture,” page 383.)



## **How should I fund my foundation during my lifetime if it isn't advisable to give it my art to sell?**

As is true for the foundations of other types of living donors, artists' lifetime foundations typically are funded with contributions of financial assets (cash and appreciated investments). Also like those of other types of living donors, artists' lifetime foundations often function on a pass-through basis, receiving periodic financial contributions and making grants or expending funds for special projects equal to the contributions received. (See **Volume 1**, 4.3 "Activities of Artists' Lifetime Foundations," page 125.)

## ***Involving the Right People***

### **Who should be on my foundation's board?**

A foundation's governing body needs members who together will provide the expertise required to fulfill the board's duties in setting policy, overseeing programs, and stewarding assets. In addition to knowledge about your art, this includes expertise in the foundation's program areas, knowledge of private foundation administration, business acumen and investment experience, and curatorial expertise, including knowledge of the art world. (See **Volume 2**, 7.1.2 "Considerations in Foundation Planning," Administrative Competencies, page 40.)

### **Should members of my family be on the board of my foundation?**

A family member who is knowledgeable about your works or has expertise in other required areas could make a positive contribution as a member of the board. To manage conflicts of interest, a majority of the board should be independent and not related to you. Putting family members who will own and sell your art on the board presents risks that need to be discussed carefully with an attorney expert in private foundation law. In such cases, it might be preferable to have family members serve on a separate advisory committee or honorary board with no direct governance responsibilities. (See **Volume 2**, 7.1.2 "Considerations in Foundation Planning," Roles of Heirs and Beneficiaries, page 41; and 9.4.1 "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," page 311.)

### **Should my art dealer be on the board?**

If your art dealer is to represent the foundation in selling your works, it is not advisable for the dealer to serve on the foundation's board. The law prohibiting transactions between private foundations and their insiders would limit the range of activities that an art dealer who serves on the board could undertake for the foundation, and thus diminish the dealer's effectiveness. Likewise, dual roles in governance and art representation heighten the potential for conflict of interest, and even the appearance of a conflict of interest can distract from a foundation's good works. (See **Volume 2**, 7.2.2 "Professional Advisors," Art Dealers, page 65; and 9.4.1 "Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations," page 311.)

### **How about one of my collectors?**

As with family members, putting a collector who owns and sells your art on the board of the foundation would present risks. In such cases, it might be better to have your collector serve on a nongovernmental, advisory body. Although collectors often serve on museum boards, most museums are public charities, a type of tax-exempt organization whose rules about insider benefits are less strict than those for private foundations. (See **Volume 2**, 7.2.3 “Conflict of Interest Policies and Practice,” Factors That Heighten Potential Risks, page 85; and 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

### **My business partner?**

In general, transactions between private foundations and their insiders are prohibited, as are shared investments of a certain scale. If as a result of your estate plan the foundation will share an ownership interest in the business or be engaged in transactions with your business partner, it is likely this person would not be able to serve as a board member. (See **Volume 2**, 7.2.3 “Conflict of Interest Policies and Practice,” Prohibited Transactions, page 80; and 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

### **Should my attorney be on the board?**

An attorney advising a foundation should be available as needed whether or not serving on the board. Foundations require a range of legal advice, which will change over time, and it may be difficult for a board to change legal advisors as necessary if the attorney is on the board. The same is true for the foundation’s accountant and investment advisor. Appointing an attorney, accountant, or investment advisor to the board as a strategy to secure pro-bono services is not advisable. (See **Volume 2**, 7.2.2 “Professional Advisors,” Attorneys, page 69.)

### **What types of people should be on my foundation’s board?**

In addition to people knowledgeable about the fields in which a foundation’s programs are active, examples of the types of persons who can be found serving on artist-endowed foundation boards include: museum directors, curators, and art historians; art educators and artists; officers of other foundations and managers of other charitable nonprofits; businesspersons; and civic leaders and community members. (See **Volume 2**, 7.1.2 “Considerations in Foundation Planning,” Administrative Competencies, page 40.)

### **Getting the Right Advice**

#### **Can my current attorney take care of all of this?**

It depends on your attorney’s qualifications. Your foundation’s organizing documents should be prepared by an attorney who is expert in private foundation law, sometimes referred to as exempt organization law or nonprofit law. Your estate plan should be prepared by expert estate planning counsel familiar with artists’ issues, such as intellectual property and the practical realities of art as

an asset. An attorney who is expert in private foundation law should review your estate plan to ensure that the assets and insiders planned for your foundation will comply with the regulations for private foundations generally, as well as for charitable nonprofit organizations in your state. (See **Volume 2**, 7.2.2 “Professional Advisors,” Attorneys, page 69.)

### **How do I know if an attorney has the right expertise?**

As with doctors who are medical specialists, attorneys who specialize in certain areas of law—such as private foundation law or estate planning law—often participate in associations of professionals in that particular field. Their firms’ websites typically cite these specialized credentials. In addition, they regularly fulfill their continuing professional education requirement by taking courses on the latest developments in that particular field. More generally, attorneys often publish and lecture on their area of special knowledge. (See **Volume 2**, 7.2.2 “Professional Advisors,” Attorneys, page 69.)

### **I hate paying for legal advice.**

Many artists share that view. But it is very risky not to seek legal advice or to seek it from attorneys who are not expert in these particular matters, even if they are expert in other areas or offer to charge a lower professional fee. Frugal artists might save pennies scrimping on legal advice; foundations and families of such artists have been known to spend tens of thousands of dollars fixing the mistakes. (See **Volume 2**, 7.1.1 “Motivations and Challenges in Foundation Formation,” Observations on Challenges in Formation, page 18.)

## **Two Final Questions**

### **What are the common mistakes I should avoid?**

There are a relatively small number of artist-endowed foundations, but it is possible to see patterns in the challenges some face due to missteps in formation. Technical errors, and situations in which assets and insiders planned for a foundation do not comply with the applicable law and regulations, often are due to the lack of advice by specialized legal counsel. More broadly, an artist-endowed foundation will find it difficult to realize its donor’s charitable intentions if it is not properly funded, if there are unrealistic expectations about the value of its art assets, if its governing body is hampered by conflicts of interest, or if its board lacks individuals with the expertise and commitment needed to govern and manage the foundation and its programs. (See **Volume 2**, 7.1.1 “Motivations and Challenges in Foundation Formation,” Observations on Challenges in Formation, page 18.)

### **When should I begin making these plans?**

The Study found that artists now typically engage in estate planning decisions involving creating a foundation when they are in their mid-seventies, although it might well be better to start prior to that. In some cases, important options for effective estate planning narrow with age, so beginning this process earlier in life could offer you a greater range of choices to realize plans both for family members and for posthumous philanthropy. (See **Volume 2**, 7.1.1 “Motivations and Challenges in Foundation Formation,” Optimal Circumstances for Foundation Formation, page 20.)

## **Conclusion**

The body of work that an artist creates over a lifetime has aesthetic and cultural significance in its own right and also may provide the resources for posthumous philanthropy. The number of artists who hold a long-term philanthropic vision and have substantial resources to commit to their goals is continuing to grow. For some of these artists, creating and endowing a private foundation will be the appropriate path. For others, an alternative option will offer a better fit with personal circumstances and intentions. The report of the Aspen Institute's National Study of Artist-Endowed Foundations, viewable online at [www.aspeninstitute.org/psi/a-ef-report](http://www.aspeninstitute.org/psi/a-ef-report), is a resource for artists who are exploring the possibility of creating a foundation, as well as for the family members who are supporting that exploration or considering it themselves after the artist's death. In all cases, the mission of the Study, and the aim of its publications, is to help the next generation of artist-endowed foundations make the most of its donors' generosity in service to a charitable purpose.

*Note: Thank you to the artists and to the artists' family members and associates who generously provided questions and reviewed and offered feedback on this Reading Guide.*

# **The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations**

## **A Study of the Emerging Artist-Endowed Field in the US**

[www.aspeninstitute.org/psi/a-ef-report](http://www.aspeninstitute.org/psi/a-ef-report)

### **Study Report Briefing Papers Relevant to Reading Guide Citations**

*Note: Unless otherwise noted, all briefing papers are included in The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations, 2 vols. (Washington, DC: The Aspen Institute, 2010).*

Alberta Arthurs, “Artist-Endowed Foundations: Opportunities for Philanthropic Impact in the Arts and Culture,” Volume 2, page 383.

Charles C. Bergman, “A Commitment to Support Individual Artists Worldwide: Reflections on the Experience of One Artist-Endowed Foundation,” Volume 2, page 395.

James J. Fishman, “Incorporating in New York State: Forming Charitable Organizations with Cultural and Philanthropic Purposes,” Study Report Supplement 2013, page 153.

James T. Demetrian and Lowery Stokes Sims, “Artist-Endowed Foundations and Museums: Observations on the Relationship,” Volume 2, page 455.

Marion R. Fremont-Smith, “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” Volume 2, page 311.

Stephen Gillers, “Enter the Lawyers: Choosing and Working with Estate and Foundation Counsel to Secure an Artistic and Philanthropic Legacy,” Volume 2, page 293.

Frances R. Hill, “Public Benefit and Exemption: The Public Benefit Requirement as a Practical Aid in Designing, Organizing, and Operating Artist-Endowed Foundations,” Volume 2, page 347.

Jill S. Manny, “Artist-Endowed Foundations Holding Stock in Artists’ Corporations: A Costly Arrangement,” Study Report Supplement 2013, page 159.

Joan Marter, “Artist-Endowed Foundations: Archives, Access, and Scholarship,” Volume 2, page 463.

Tom McNulty, “Artist-Endowed Foundations Stewarding Artists’ Archives and Libraries: The Importance of Standards and Access,” Volume 2, page 473.

Joseph L. Sax, “Public Benefit Obligations and Legacy Stewardship Activities of Artist-Endowed Foundations: Are They in Conflict?” Volume 2, page 369.



Lowery Stokes Sims, "Alternatives to Artist-Endowed Foundations: Other Options for Artists," Volume 2, page 485.

Robert Storr, "Toward a Public Library of American Culture: Reflections on the Centrality of Art and Importance of Access in Artist-Endowed Foundations," Volume 2, page 413.

Lee-Ford Tritt, "Statutory Copyright Termination and Artist-Endowed Foundations," Study Report Supplement 2013, page 167.

Stephen K. Urice, "Creativity and Generosity: Considerations in Establishing an Artist-Endowed Foundation," Volume 2, page 271.

Christine J. Vincent, "Artist-Endowed Foundations Internationally," Volume 2, page 505.