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A Guide for Artists and Their Lifetime Foundations: The Dos and Don'ts

This publication is based on research findings detailed in *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*, the two-volume report produced by the Aspen Institute 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 private foundation during their lifetime. As such, it is organized around questions artists often ask about this topic 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/aefi.

The purpose of this guide is to familiarize artists with basic considerations in creating and operating a private foundation during their lifetime 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. The goal is to promote better understanding as to whether a foundation is an appropriate choice for an artist and, if so, how to create and operate a foundation during the artist's lifetime that will be successful in fulfilling its charitable purposes. The information in this guide is general and solely educational and nothing in the guide is intended as legal advice, nor can it be used in place of advice from qualified legal counsel.

Overview

Artist may create a private foundation during their lifetime (*inter vivos*) or under the terms of their estate plan (*testamentary*). There are different reasons to choose either option, however attorneys knowledgeable about private foundation law caution that artists who create a private foundation during their lifetime need to understand the risks the artists face if they do not strictly observe the separation between the foundation and their own professional endeavors. Some of these risks may not exist when analyzed only on narrow legal terms, but even the appearance of an involvement between the foundation and the artist's professional interests can damage the foundation's reputation for integrity, and that of the artist's as well. Avoiding such risks is the prudent course as well as a responsibility of the foundation's governing body.

Artists' Lifetime Foundations are Different

Many artists are surprised to discover that artist-endowed foundations with living artist-founders – artists' lifetime foundations – differ significantly from those associated with deceased artists. This difference results directly from the U.S. tax code's prohibitions of self-dealing for private foundations specifically and of inurement and private benefit for all types of charitable organizations, whether they are private foundations or public charities.¹ (See term definitions, below.)

Given the tax code's prohibitions, artist-endowed foundations progress through a lifecycle with respect to the assets they own and the activities they undertake. In line with this, the following definition used for AEFI's research purposes describes the typical assets and activities of private foundations associated with deceased artists, but not those that have living artist-founders:

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.

What Can Artist-Endowed Foundations Do During the Artist's Lifetime?

The following questions are asked often by artists who are exploring creation of a private foundation and may be considering a lifetime foundation. The answers are drawn from the research findings of AEFI's National Study of Artist-Endowed Foundations.

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

This is possible only if you have ceased completely to sell artworks created by you and all of the extant works you created and still own are committed to the foundation, or the foundation in combination with another charity. If this is not the case, and the foundation owns or manages your creative works during your lifetime, it can run afoul of the law prohibiting self-dealing, inurement, and private benefit. This would be the case, for example, if the foundation's activities with your art—such as exhibitions, sales of the art, publications,

¹ This guide references a reading of private foundation law with respect to living artists and their private foundations as explicated in the briefing paper *Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations*, Volume 2 of the Study Report of the Aspen Institute's National Study of Artist-Endowed Foundations, page 311, viewable at www.aspeninstitute.org/aefi.

or 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 Volume 2, 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 directly or indirectly, such as furthering their professional interests, which is potentially the case were the foundation to fund, facilitate, or produce your catalogue raisonné during your lifetime. The same would apply to authenticating your art, conducting or funding scholarship on your oeuvre, conducting or funding publications, films, or websites about you and your creative works, 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 Volume 2, 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

Can I give my archive to my foundation during my lifetime?

This is not practical. If the archive is owned by the foundation, it may not be accessed by you or anyone else for your private purposes. Likewise, if the archive is loaned to the foundation, even at no cost, the foundation will be using its assets impermissibly to relieve you, an insider, of the expense of caring for and managing the archive. (See Volume 2, 7.2.3 “Conflict of Interest Policies and Practice,” Factors That Heighten Potential Risks, page 85; and Volume 2, 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

Other living artists’ foundations, for example in Europe, do such things.

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

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 other artists 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 or used for your private purposes. The foundation’s collection may be stored on premises you own as long as storage conditions meet standards for care of charitable assets and do not impeded the foundation’s

access. In addition, artworks owned by the foundation cannot be offered as a quid-pro-quo for the exhibition or purchase of your own works by museums, their board members, or patrons. (See Volume 2, 7.2.3 “Conflict of Interest Policies and Practice,” Practical Points, page 86; Volume 2, 8.2.2 “Art Collections,” Art Collections and Insiders, page 170; and Volume 2, 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 generally prohibits use of a private foundation’s property by insiders or for their private purposes as well as transactions between a foundation and its insiders, such as leasing property. (See Volume 2, 7.2.3 “Conflict of Interest Policies and Practice,” Prohibited Transactions, page 80; and Volume 2, 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

What can my foundation do during my lifetime?

It can make grants and conduct charitable programs as long as these have nothing to do with your 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 and nature preserves, and assembled collections of art made by others for contribution to museums, among other things. (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 (for example, 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 to conduct programs equal to the contributions received. (See Volume 1, 4.3 “Activities of Artists’ Lifetime Foundations,” page 125.)

How can I staff my lifetime foundation?

Many lifetime foundations are staffed by the artist’s studio/office employees—for example, the business manager. Should you wish the employee to be compensated additionally for administering the foundation, the foundation may separately hire and compensate the

employee, as long as compensation is reasonable, but it may not reimburse you or your studio/business operation for the expense. (See Volume 2, 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

Can I hire a family member as foundation staff?

You may not hire or set compensation for an individual related to you, nor can any other foundation insider who is related to that person. Nonetheless, an individual related to you may be hired and compensated by the independent members of the foundation’s governing body, as long as the individual is qualified for the position and is paid reasonably—i.e., in line with the pay rates for the position paid by other organizations in the field. It is the duty of the foundation’s governing body to employ appropriately qualified staff and to supervise their performance in the foundation’s best interests. (See Volume 2, 7.1.2 “Considerations in Foundation Planning,” People and Expertise, page 39 and Volume 2, 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

Where can my lifetime foundation be housed?

In physical terms, artists’ lifetime foundations typically comprise a file drawer of documentation kept in the artist’s studio/office at no charge to the foundation or in the office of the foundation’s attorney. If you wish the foundation to cover its administrative costs—office space, telephone, computer, etc.—these expenses, which must be reasonable, must be paid directly to each vendor by the foundation and cannot be reimbursed to you or your studio/business operation. (See Volume 2, 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

Can I share supplies and equipment with the foundation?

Under certain circumstances. The foundation may use supplies and equipment you own if you provided these free to the foundation but supplies and equipment owned by the foundation may not be used for private purposes by you or any person. (See Volume 2, 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

Can my studio and my lifetime foundation share a website?

No. Your studio website exists to promote your professional practice and it is important to keep a strict separation between the foundation and its charitable activities and your professional endeavors. A few artists’ lifetime foundations have their own separate websites in order to administer grant programs with online application processes, but these websites do not feature information about the associated artists or their creative works, or link to

such information. (See Volume 2, 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

So, 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 following the artist’s death. Others believe that artists’ lifetime foundations can create potential risks that are best avoided, as discussed here; they prefer that the foundation be formed under the 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.)

Where can I get knowledgeable advice about a lifetime foundation?

You should consult an attorney expert in private foundation law (sometimes called exempt organization or nonprofit law) to ensure that a lifetime foundation and its activities will be in compliance with the regulations for private foundations, as well as for charitable nonprofit organizations in the respective state. (See Volume 2, 7.2.2 “Professional Advisors,” Attorneys, page 69.)

An attorney expert in private foundation law will help the governing body establish a conflict-of-interest policy designed to safeguard the foundation’s tax-exempt status and ensure the foundation’s reputation for integrity, in fact and in appearance. The policy will prohibit acts of self-dealing, inurement, and private benefit, and set out the procedures the governing body should follow in order to identify, evaluate, and deal with conflicts of interest, i.e., decisions or transactions by the foundation in which its insiders, or their relations, have a direct or indirect interest. Lastly, in order to be able to implement a conflict of interest policy, it is advisable that the governing body of an artist’s lifetime foundation include a majority of independent directors—persons not related to or controlled by the artist. (See Volume 2, 7.2.3 “Conflict of Interest Policies and Practice,” Prohibited Transactions, page 80; and Volume 2, 9.4.1 “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

Anything else I should know?

You can find a discussion of matters you will want to consider in deciding to create a foundation, whether during your lifetime or under your estate plan, in this publication: *A Reading Guide to the Study Report for Artists and Their Family Members*, viewable online at www.aspeninstitute.org/aefi. Topics include what type of foundation you may want to create, who should serve on your foundation’s board, and how to determine whether a foundation will be economically feasible, among many others.

Definition of Terms Relevant to Artists' Lifetime Foundations

Private Foundation—A nongovernmental, nonprofit organization, formed as a charitable trust or nonprofit corporation, with funds provided by a single person, family, or business, that is established to further social, educational, religious, or other charitable activities serving the common welfare through grants or through direct charitable activities. Private foundations are tax-exempt under Section 501(c)(3) of the Internal Revenue Code and are subject to stricter regulation than are public charities, which are charitable, tax-exempt organizations supported by members of the general public and not funded solely by a single person, family, or business. (See Volume 2, 9.4.I “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

Self-Dealing—The Internal Revenue Code defines self-dealing as any direct or indirect transaction between a private foundation and a disqualified person (such as a substantial contributor, the creator, their family members, persons controlled directly or indirectly by them, as well as officers and members of the governing body); such transactions are prohibited, with few exceptions. Acts of self-dealing are subject to excise taxes, which can be considerable, and are applied until the self-dealing acts are undone. Willful and repeated acts of self-dealing result in the loss of tax exemption and fines equal to all tax benefits previously received by the foundation. (See Volume 2, 9.4.I “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

Inurement—A charitable organization is not operated exclusively for exempt purposes, as is required to qualify for and maintain tax exemption, if its insiders (such as officers, members of its governing body, staff, or anyone exercising significant control) receive undue benefit from their association with the foundation or its activities. (See Volume 2, 9.4.I “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

Private Benefit—To qualify for and maintain tax exemption, an organization must establish that it is not organized or operated for the private benefit of any person. This includes persons who have a direct interest in the organization and also persons who do not have a direct interest in the organization, such as any private individual. (See Volume 2, 9.4.I “Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations,” page 311.)

Citations in this paper reference these publications available at www.aspeninstitute.org/aefi:

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. Volume 1, *Overview of the Field* and Volume 2, *Considerations in Foundation Practice*;

Study Report Supplement 2013, the five-year interval update to the original Study Report publication; and

Reading Guide to the Study Report for Artists and Their Family Members, a digest of select highlights from the Study publications.