

ART & MUSEUM MAGAZINE INSIDE

FAMILY OFFICE MAGAZINE

SPRING 17 ISSUE



MONACO FAMILY OFFICES

FAMILY OFFICES - UHNWI - WEALTH - PHILANTHROPY- FINE ART - LUXURY - LIFESTYLE

Subscription \$100 per year

www.familyofficeelite.com

ART & MUSEUM



Spring Issue 2017

BEAUTY
OF THE
BELLE ÉPOQUE

THE
INAUGURAL
ISSUE
2017

Art settled on trust: best practices checklist for trustees

By Nadja Weber-Guido & Sandrine Giroud



Nadja Weber-Guido



Sandrine Giroud

Nowadays many sophisticated trust structures for UHNW clients don't just include plain-vanilla bankable assets but contain movable chattels such as yachts, aircraft, classic cars, artworks or even consist of an entire art collection.

Holding such trust assets poses a different set of challenges for trustees and, as many trustees find, is not without its complexities and risks. Trustees and fiduciaries often feel more comfortable with traditional asset classes and sometimes tend to leave the management of art to beneficiaries or non-independent third parties. However, all risk still rests with the trustee. The nature of the art market that is often driven by the passion of collectors, is mirrored in high-value goods whose valuation frequently is a subjective and elusive matter. In addition, the discretion (if not opacity) surrounding art transactions, the number of international actors involved, plus a lack of regulations can create a knowledge asymmetry and thus add a further layer of perils for trustees.

A trustee as the legal owner of a trust's assets not only holds the rights of legal ownership, but also bears its burdens. The process of accepting trusteeship first includes the proper transfer of the assets or ownership into the trustee's hands. The trustee is then responsible for the proper maintenance of the trust's assets (i.e. ensure the maintenance of its value and condition), the payment of related taxes and fees and must monitor the fulfilment of any obligations and liabilities associated with such assets.

Here is a check list of key actions to be followed by trustees when managing art on trust:

Settling art on trust

The principle of equity gains particular importance when transferring movable chattels such as art and antiquities on trust. Remembering that 'equity will not perfect an imperfect gift', the trustee must be sure that the transferor (i.e. settlor) has the proprietary capacity to transfer. This means that the trustee needs to verify that the

current owner possesses the proper legal title by verifying the provenance of the artwork(s). Careful Customer Due Diligence (CDD) includes both anti-money laundering (AML) and terrorist financing checks, as well as inquiries into the legal title of the artworks, their authenticity and the potential liabilities related to them (e.g. tax or customs liabilities). In particular, such due diligence checks include:

- Title
- Documentation (e.g. contracts, bill of sale, invoice, inventory, catalogue)
- Provenance
- Condition
- Appraisal
- Insurance
- Customs and tax

Among others, trustees should check the major databases of stolen and looted art and scrutinise the source of funds used to purchase the artworks and request detailed related documentation, especially in cases of recent collections.

The proper transfer of legal ownership to the trustee for chattels such as artworks ideally should occur by deed of gift. Trustees must conduct an inventory, record the condition of the assets upon receipt, be present or appoint a duly qualified representative to receive the assets and issue a delivery receipt. If no recent insurance evaluation by a competent specialist is documented, the trustee is well advised to request one to make sure the insurance in place is adequate. Equally, trustees should ensure that taxes and customs duties related to the art has been fully settled to avoid any subsequent liabilities or issue at import or export.

Acquiring and selling art through a trust

The same due diligence obligations apply when art is acquired or sold through a trust.

Trustees should take care to select properly qualified and experienced advisers to assist them with the transactions to assure full transparency of the parties involved and the commissions received, as well as to guarantee that a competitive transaction process is selected (e.g. through auction houses or private sales). Above all, trustees should keep in mind that art dealers and auctioneers (even eminent and well-known ones) might not necessarily be adequate advisors from the trustee's perspective since their objectives are not necessarily matching. When choosing independent advisors, trustees should be careful in their selection and give preference to regulated providers.

Monitoring art assets

Once placed in trust, the trustee is responsible for the assets and must monitor that the artworks are kept in a suitable environment or adequately

stored, that the insurance coverage is up-to-date and continuous and, if an artwork is kept in a private home or otherwise in use, regular checks by the trustee or an appointed specialist on the condition of the assets and/or to conduct an inventory are advised as best practice.

It goes without saying that the trustee must maintain proper documentation and records at all times. This includes the regular monitoring of the value of the assets, which should be done by getting periodic valuations.

There are a variety of tools available to facilitate the management of the complex and abundant data related to artworks. In particular, trustees may wish to consider:

- implementing a collection management system (CMS) that enables them to maintain a comprehensive overview of the collection that can assist with bookkeeping and administration;
- engaging curatorial management services that can manage cataloguing and inventorying, provide insurance valuations, security and disaster recovery planning, physical care of the artworks, logistics and regular condition reporting.

Trustees must also keep abreast of new developments in art management. For instance, besides traditional damage insurance, title insurances have been developed to insure ownership risks and help protect ownership against restitution claims or in cases when the person the artwork was bought from becomes entangled in divorce, bankruptcy, probate or other legal proceedings that question the seller's right to dispose of the art. Similarly, cutting edge technology such as blockchain is being applied to the

certification, provenance verification and registration of artworks and trustees must be attentive that the management tools they are using do not become outdated.

In cases where beneficiaries keep the art in their homes or as part of their personal possession, such beneficiary has received a distribution from the trust and the trustees must not only document accordingly, but also examine potential tax consequences for such beneficiary before using their dispositive powers. Trustees must also ensure fair distributions and thus rely on adequate and up to date appraisals of the artworks. Should a beneficiary move to another jurisdiction and plans to bring the artwork with him, the trustee must keep in mind the tax consequences, and, most importantly, check the rules concerning export control. For certain classes of artwork (e.g. if classified as cultural heritage or of national importance), the export is either outright forbidden or an export license is required.

Take away

As Hippocrates stated: 'Life is short, art long, opportunity fleeting, experience perilous, and decision difficult.' Beyond the common notion of 'art', Hippocrates meant art as craft and technique. Trustees who have been entrusted with artworks must honour and live up to their fiduciary craft and take the necessary measures for the proper management of these beautiful but fragile and sometimes challenging assets. They must fulfil their duty as prudent and wise guardians of the works entrusted to them and ensure that the passion and financial stakes invested in the art is treated with the appropriate care and diligence – to be passed on to the beneficiaries and the world as a whole.