

The Bad Planning That Leaves So Many Artists' Estates Tangled in Lawsuits

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Robert Indiana with his 'LOVE' sculpture in Central Park, New York City in 1971. Jack Mitchell/Getty Images

The end of a famous artist's life might be thought of as a time of tributes and celebration, but not for Robert Indiana, who was beloved for his 1965 image of the stacked letters L-O-V-E. He died at his island home in Vinalhaven, Maine on May 19, just a few months short of his 90th birthday, embroiled in a legal battle over his iconic works of art.

Just a week before his death, a lawsuit was filed by the artist's agent, the Morgan Art Foundation, against his studio manager, Jamie L. Thomas. It also named a company in its suit, the New York-based American Art Image, which Thomas allowed to produce allegedly unauthorized editions of the artist's work. American Art Image is accused of copyright and trademark infringement.

Indiana, described in the lawsuit as "bedridden and infirm," and intentionally isolated by Thomas, had a new will drawn up in 2016, (superseding a 2013 will) that turned over power of attorney to Thomas. "It is our contention that Indiana was in poor health, and he had a difficult time reading," said Luke Nikas, partner in the New York law firm Quinn Emanuel Urquhart &

Sullivan that is representing the Morgan Art Foundation. “He was not aware that he had assigned power of attorney and not mentally competent.” They allege he was unable to provide informed consent to what was being done in his name.

And what might that include? Fraud, they say, and potentially even forgery. And it has lent an air of suspicion to the artist’s passing. Shortly after Indiana’s death, an FBI agent arrived on the island to investigate, ordering an autopsy, the results of which have not been made public. What a mess...though it’s one we see repeated again and again when artists die. The reason there are so many legal disputes over artists’ legacies, though, is due to a number of complex and interwoven problems.

When There’s No Will...Or Too Many

Life can be messy and chaotic before you die, and death doesn’t do any tidying up. Pablo Picasso, for instance, did not leave a will, but he did leave behind a crazy-quilt assortment of children, grandchildren and ex-lovers who spent the six years after he died in 1973, and a combined \$30 million, settling the issue of who gets what. Tens of thousands of artworks waited in limbo while the courts straightened things out.

Painter Thomas Kinkade, on the other hand, appeared to leave behind two wills when he died unexpectedly in 2012 after overdosing on alcohol and Valium. One will appeared to favor his estranged wife and children and another, hand-written and signed shortly before his death, favored his current girlfriend. Each will identified who would get his mansion and control over his paintings. More work for lawyers. (They reached a settlement, the details of which have not been disclosed, in December 2012.)

A will identifies what the deceased person intended with his or her assets, making the disposition of property orderly and often with an eye toward reducing or eliminating the payment of estate taxes. When someone dies intestate—without a will—state intestacy laws take over, determining how one’s property, which includes all securities, bank accounts and real estate, is distributed and to whom. Whatever intentions the dead person might have said they had for these belongings (you should get this, I don’t want him to get anything, donate all these) become secondary.

Even with carefully laid plans, “a will doesn’t solve everything,” Nikas said, noting that the issue of the amount of money paid to estate executors brought lawsuits with the estates of both Andy Warhol and Robert Rauschenberg. But it does, at least, “insure that the intentions of the person who [has died] are carried out.”

When Family Members Have Different Plans

Intentions matter. Sculptor Harry Bertoia, who died in 1978, did leave a will—just one—the traditional type that left everything to his wife and three children. However, according to his daughter Celia, her father “talked about what he wanted done with his works with me, my

brother and sister and with friends,” and much of what he reportedly talked about concerned where he wanted his work exhibited and donated, and that certain pieces be kept together.

All of those people “remember things differently. People just did what they wanted. There was a lot of selfishness and greed.” In 2013, Celia Bertoia started both the Harry Bertoia Foundation and what turned out to be a three-year lawsuit against her brother, who had kept a large number of the artist’s works in a barn in Pennsylvania, to recover pieces in order that their father’s wishes be carried out. “Those were three miserable years of my life that I won’t get back,” she said, but Celia Bertoia did prevail, and much of the Harry Bertoia estate currently sits in Bozeman, Montana.

The moral, to Celia Bertoia, is for artists to put their intentions in writing so that there will be no disputes about what they wanted. That works sometimes, not all the time. Saul Ostrow, a critic and partner in the newly created company, Art Legacy Planning, which provides estate management services to artists and art collectors, noted that one artist (whom he could not name) wrote in his will that paintings from his estate would be gifted to the Met, MoMA and the Whitney. “Each of these museums had one drawing by the artist in their collections, and he thought that since they each had a drawing they would want his paintings, too,” he said. The artist was wrong. “The museums didn’t want the paintings, and the executors of the estate had to go to court to break the will” in order that something else could be done with these artworks.

Another (possible) option is to create a trust or foundation, during the artist’s lifetime or upon his or her death, to which all or most of that person’s artwork and archives will be donated. Usually, some cash will also be given to the foundation in order to cover the costs of legally setting up the entity, as well as the ongoing expenses of storing and insuring the artwork. The foundation (some morph into a private museum) keeps the art together as a collection, rather than sold or divided among heirs or cherry-picked by museum curators or dealers, and the living artist or the estate gets the benefits of a charitable deduction and the opportunity to promote the artist’s legacy and market through exhibitions, controlled gifts and sales.

In both his 2013 and 2016 wills, Robert Indiana had directed that the assets of his estate be transferred to a foundation he was starting, the Star of Hope Foundation, and that his former residence would become the site of a museum of his work. In the 2016 will, Jamie Thomas was named executive director of the Star of Hope Foundation, Nikas said.

Dozens of artists have set up foundations during their lives or upon their deaths, most of them acting to promote the artists’ legacy. “I knew I had to do something or there would be less interest in my work and ideas after I died,” said 86 year-old Chicago-based environmental artist Chapman Kelley. “I could have left everything to my son, but he wouldn’t have known how to manage things.” As a result, in 2015, Kelley set up a foundation to promote his work and ideas, and he views the foundation as making “a difference between whether things are preserved and seen or put in someone relative’s attic or, worse, put out with the trash.”

When an Artist Isn’t Sure Who to Trust With Their Legacy

That brings up the next issue for artists: Whom do you trust with your legacy—the continuing presence of your artwork and establishing a place for yourself in art history? Perhaps, by default, a relative: Celia Bertoia has been busy arranging exhibitions of her father’s work at various museums, scanning her father’s documentary archives and arranging with a publisher to locate an art historian to write a book about the artist.

Ostrow noted that family members may be quite protective and fiercely loyal to an artist, but they are also more likely to hold resentments or have other motivations for how they treat an artist’s work. The estranged husband of the late sculptor Anne Chu crammed much of her work into an uninsulated and leaky shipping container in Long Island, which led to some of those artworks being ruined. The artist’s sister is suing her ex-brother-in-law for \$500,000.

Additionally, family members or trusted friends may not be knowledgeable about how the art trade operates, or capable of promoting that artist’s work. One of Art Legacy Planning’s first clients was the widow of David Craven, a painter who died in 2016 at the age of 70. “Craven left his wife 400 paintings,” he said. “But she had spent her entire career working in a genetic lab in Canada and didn’t know the first thing about the art world. She was afraid that, when she died, the works would end up in a dumpster.”

Kelley noted that his son will not have a role in his foundation—“he lives in a big house on a hill in California and is happy there”—and has placed on the organization’s board two long-time supporters of his career, a retired professor and a local businessman. His lawyer, Scott Hodes, who helped him set up the foundation, is a co-executor of the artist’s will.

There is no ideal executor of an artist’s estate or foundation. “Dealers might take charge, since they usually have the best understanding of the art market and how to promote an artist’s work,” Hodes said. “They have an interest in the future.” But they may also just want to pick-and-choose among an artist’s most sellable works and show little interest in the rest. And, since a lot of artists’ markets die when they do, dealers often are apt to drop an artist upon his or her death. He also claimed that lawyers make good executors (“they know that a legacy is adversely affected by lawsuits”) and that “bankers would be the least self-interested” of all potential executors. All true, but he added that they may have less knowledge about how to promote an artist’s work posthumously than those who are insiders.

Of course, the most notorious case of art world insiders doing wrong by an artist involved the estate of painter Mark Rothko. Two years before taking his life in 1970, Rothko had drawn up a will, naming three executors who would create a foundation that would receive the bulk of his paintings: Bernard Reis, an art collector and accountant; Morton Levine, an anthropology professor at Fordham University, who was also named guardian of the artist’s youngest child, Christopher Rothko; and Thodoros Stamos, a painter and younger member of the New York School of abstract expressionism who was a good friend of the artist. (Rothko’s wife died of heart failure six months after her husband’s passing.)

One of the executors' first actions was to sell 798 of Rothko's paintings to New York's Marlborough Gallery for \$1.8 million and consign to the same gallery 698 more at a 50 percent commission. Rothko's children sued, accusing the three executors of conspiracy to defraud the estate and waste its assets: Frank Lloyd, the owner of Marlborough Gallery, had purchased a huge quantity of artwork by a major American artist for far below its actual value, and some quick sales that he made on a number of those paintings realized profits of 800 percent for him.

Reis was charged with self-dealing for being the accountant to both the Rothko family and the Marlborough Gallery at the time of these contracts, while Stamos was accused of going along with the deal in order to be taken on as a Marlborough artist. In fact, in 1971, Stamos became part of Marlborough's stable, and his first exhibition at the gallery was held the following year. His friendship with Rothko came to be seen as partly mercenary.

In a ruling handed down in 1975, the three executors were removed from the Rothko estate and the contracts they made selling and consigning the 798 paintings to Marlborough were canceled. Stamos and Reis, jointly with Frank Lloyd of Marlborough, were deemed liable for the present value of the paintings sold by Lloyd, or \$9.3 million.

What Happens to Even the Best-Laid Plans

Living artists are rightly more interested in their next creation than in preparing for the world without them, said Jason Andrew, independent curator and foundering partner in Artist Estate Studios, an organization that serves artists and the estates of artists (including those of painters Jack Tworkov and Elizabeth Murray) in the management and cataloguing of their art, as well as the promotion of their legacy. Still, maintaining good records of their works and sales, and picking the right someone to manage the inventory of artwork is a key decision for an artist.

The main qualifications for that person are that he or she be "organized and intimately familiar with the artist and their work." Relying on a gallery's record-keeping is not sufficient, he stated, adding that artists should make it integral to their studio practice to maintain for themselves a written or computerized system of documenting the titles, dates and descriptions of all their work, as well as an up-to-date listing of where and when their pieces have been consigned, loaned or sold. No less important are what he called "ephemera," or contextual information about the artist's work and career, such as announcements, reviews, articles and publications, which may provide useful information if and when research is done on the artist by scholars.

Finally, he said, "An artist should have a will and one that is up-to-date. Nothing in our judicial system will prevent heirs, family members or invested individuals from pushing against this important document, but it is very difficult for a court to go back on explicit directions expressed in this legal document." Which version of Indiana's intentions is deemed valid, however, remains to be seen.