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| 437 Madison Avenue<br>37th Floor<br>New York, NY 10022<br>(212) 812-4330 | 101 Second Street<br>24th Floor<br>San Francisco, CA 94105<br>(415) 543-0733 | 6300 Wilshire Boulevard<br>Suite 820<br>Los Angeles, CA 90048<br>(213) 226-0250 |
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## acknowledgements

Rockefeller Philanthropy Advisors (RPA) and U.S. Trust, Bank of America Private Wealth Management (U.S. Trust) wish to thank everyone who helped put together the May 2007 roundtable discussion that led to this publication. This monograph is an initial attempt to raise and clarify issues about an asset class and its impact on philanthropy that are often misunderstood by donors, their advisors, and the charities that stand to dramatically benefit from them. We hope this publication triggers conversation in several quarters, leading to further discussion, education, advocacy, and, perhaps, policymaking.

The symposium was developed by Robert Morrison of The Project Group, with the help and support of U.S. Trust, Andrew Swinney of the Philadelphia Foundation, and Melinda Tuan and Doug Bauer of RPA. The event was sponsored by U.S. Trust and they provided partial underwriting for this publication.

This book was edited by Donzelina A. Barroso, a consultant to RPA, and was designed by Reid Smith of art270. Melinda Tuan wrote the case studies. Editorial support was provided by Doug Bauer, Lauren Russell Geskos, and Karen Perry.

We would like to thank the contributors to this publication—Jessica Darraby, Nancy Gabel, Jack Ginter, Bruce Katsiff, Robert Koo, Jacob Lewis, Robert Morrison, Michael Moses, Washburn Oberwager, Joshua Rubenstein, Lawrence Shindell, Richard Solomon, Lee Stoetzel, Andrew Swinney, Melinda Tuan, and Paige West—for both their thoughtful remarks at the roundtable discussion and their editorial assistance as we turned their presentations into printed remarks. We are also deeply appreciative of Barbara and Donald Jonas for providing such a lovely foreword.

We are eager for your thoughts, comments, and feedback. Please feel free to write to us or send an e-mail to [info@rockpa.org](mailto:info@rockpa.org).

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Edited by Donzelina A. Barroso

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This book is printed on paper made from 30% post-consumer content.

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## foreword

We have been passionate collectors of art for over thirty years. There is a lot of fun in collecting, especially if you do it with your mate. We spent a lot of time getting involved with dealers, museums, and exhibits. We learned as we went and were very careful about our buying. We never bought art for financial remuneration; we never sold, and we never traded. Art has been a major part of our lives for many, many years.

But we are also very aware of market conditions for art and the opportunities that market affords us. We realized the value of our art was so strong and desirable in the market, that we could use our art to follow our wishes for philanthropy and do some important things during our lifetime.

Eli Broad once advised: “Give while you live so you will know where it goes.” These words have stayed with us as we have considered how to make the most of our philanthropy in our beloved New York City. In 2005, we decided to transform 15 pieces of our art collection into \$44 million dollars worth of philanthropic opportunity, a decision that has added a new focus to our lives. While it was difficult to part with pieces of art that had been so important to us, we are excited that we can make a difference in the lives of fellow New Yorkers.

In keeping with our approach to collecting, we have been thoughtful and careful about our philanthropy. As with any venture, we have relied on quality advisors. Rockefeller Philanthropy Advisors has

helped to bring our family members together, to assess their interests, and, ultimately, enabled us to play an active role in addressing a historically neglected area: nursing care in New York City.

We feel proud of what we have done, are excited about what has been accomplished to date, and look forward to seeing what will happen with our philanthropy in the years to come. We have a whole new way of viewing things and of participating in our local community. We would love for others to join us. For the many people who have art, it is a wonderful vehicle through which to expand their giving potential. You cannot take it with you. Why not use it wisely while you are alive and create more joy for everybody?

Barbara and Donald Jonas

*October 2007*

*New York City*

## introduction

Early on, I never thought of myself as a collector; I merely acquired everything from ski posters and trains to baseball cards, eventually focusing on prints of the Pop artists since their work resonated with me both professionally and personally. Yet over the years, I have come to realize that personal collections like my own can have significant value, whether in the form of passionate remembrances inherited from generations past, recently developed collections that focus on unique areas of interest, or contemporary collections that reflect the pulse of the time.

Regardless of the type of collection, what is important to understand is that over time, a treasured collection can become a valuable financial asset. Recently, more collectors and market analysts have come to recognize that art and other tangible assets have both personal and monetary value as accumulated assets. These collections are often referred to as “hidden” or “silent” assets, as they are rarely included and/or evaluated as part of an individual’s total net worth.

What gives art and other tangible collectibles their greatest value, however, are factors that are both intuitive and abstract. Intricate strategies underpin the successful establishment of a collection or an art legacy. Whether an heir or valued institution shares the collector’s aesthetic passions will determine whether a collection becomes a family’s birthright, handed down from generation to generation, a bequest to friends, or a gift to a favorite charity or institution.

Recent trends indicate that collectors must have conversations with their family and financial advisors about the future of their art and collectibles. Recent data indicate that:<sup>1</sup>

- Private collectors own more than \$1 trillion in art and collectible assets;
- Almost \$30 billion in art and collectibles are traded and/or change hands annually;
- High net worth individuals often have 5-to-20 percent of potential net worth in art and other tangible collectibles of value;
- Art often outperforms the S&P 500 annually. The Mei Moses® Annual All Art Index rose 14.52 percent in 2005, versus 4.91 percent total return for the S&P 500 Index.
- Since there is no statute of limitation for estate tax fraud under Internal Revenue Code § 6501, tax penalties on undeclared gifts can add up. This means that years from now, heirs could owe the IRS over 82 percent of the collection’s value in taxes, penalties, and interest.

Contemporary art has become a heady global business, driving collectors to evaluate and assemble

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<sup>1</sup> See Lawrence C. Zale and Philip T. Temple, “Tangible Personal Property, Guidance for its Ownership and Disposition,” *Council on Foundations*, 11 October 2004, and, John J. Havens and Paul G. Schervish, “Why the \$41 Trillion Wealth Transfer is Still Valid: A Review of Challenges and Questions,” *The National Committee on Planned Giving’s The Journal of Gift Planning*, Vol. 7, no. 1, 1st Quarter 2003. pp. 11-15, 47-50.

their collections and art portfolios with a view to bringing the works, eventually, into the hands of their heirs, family or friends, favorite charities, or the public arena. All of this reinforces the long-term value of art as a particular asset class.

Despite these trends, most collectors do not know the fair market value of their collections or review their collections as closely as they do their financial assets. They are likely unaware of the opportunities to use these assets for personal or philanthropic purposes and the unique tax benefits available to them.

Recognizing the critical importance of this hidden philanthropic capital, Rockefeller Philanthropy Advisors and U.S. Trust brought together 16 collectors and thought-leaders from the arts, finance, law, and philanthropy to discuss this topic. The day-long symposium in Philadelphia, Pennsylvania, held in May 2007, centered on pragmatic discussions of how the collector, financial advisor, attorney, charity, or foundation, should consider art and other collectibles as potentially valuable assets, and examine collections for their hidden philanthropic value.

The following monograph captures the rich discussion from *The Fine Art of Tangible Assets* symposium and provides the reader with next steps for transforming treasured collections into valuable philanthropic capital.

Robert J. Morrison  
*The Project Group, Philadelphia*  
October 2007

## THE FINE ART OF TANGIBLE ASSETS

PHILADELPHIA, PENNSYLVANIA  
MAY 17, 2007

### Symposium Participants

**JESSICA DARRABY**, attorney at law, is a founder of an art law firm, Darraby Law, which has offices in Los Angeles and New York, represents a national and international clientele, and offers a full range of art-related and broad-based legal services. Clients include individual, institutional and corporate collectors, galleries, artists, dealers, foundations, nonprofit organizations, museums, government agencies, insurance companies, universities, law firms, and others. The practice includes art, architecture, antiquities, artifacts, public art, the Internet, multimedia, and arts-related technologies. The firm handles corporate, intellectual property, international, estates and trusts and pre-estate plans, as well as nonprofit and transactional work. Ms. Darraby was the former owner and director of J. Darraby Gallery, a contemporary art gallery. Ms. Darraby is the author of *Art, Artifact, & Architecture Law* (12th ed. 2007), updated annually.

**NANCY GABEL** is credentialed as both a lawyer and estates planning expert. Ms. Gabel was formerly with U.S. Trust where she advised families on wealth structuring strategies. She brings a personal passion

and a depth of expertise to her role in helping families educate their children about understanding, valuing, and responsibly utilizing their wealth. Ms. Gabel received a J.D., magna cum laude, from New England School of Law in 1979. Ms. Gabel is a member of the New York State Bar Association, the American Bar Association Section on Real Property, Probate and Trusts and the Estate Planning Council of Westchester County. She sits on the Board of the Irvington Institute for Immunological Research and is active in UJA-Federation. In addition, she is a fundraiser for the 92nd Street Y in New York City.

**JACK GINTER** was formerly head of Pennsylvania for U.S. Trust leading a team of wealth management professionals. Prior to joining U.S. Trust, Mr. Ginter worked at Wachovia Bank in Bryn Mawr, PA, where he most recently served as vice president and partner. There, he was responsible for the management of a client base in the areas of investment management, financial planning, and private banking.

**BRUCE KATSIFF**, director and CEO of the James A. Michener Art Museum since 1990, holds a master of fine arts from the Pratt Institute, and a bachelor of fine arts from the Rochester Institute of Technology. He conducted postgraduate work at Oxford University. He provides overall strategic management and conceptual direction for the exhibition, program, and educational activities of the museum. Prior to this Mr. Katsiff chaired the Art and Music Department at

the Bucks County Community College for 17 years and served as a tenured faculty member. A practicing artist, his photographs have been exhibited at the Pennsylvania Academy of Fine Arts, The Philadelphia Museum of Art, The Allentown Art Museum, The International Museum of Photography, and The Museum of Modern Art.

**ROBERT W. KOO** is a collector and a respected art succession and philanthropy consultant to Bonhams New York, Palm Beach, and Philadelphia. Mr. Koo works with private clients, attorneys, CPAs, financial advisors, trust officers, planned giving officers, and corporate fiduciaries on planning for succession and disposition of art, antiques, and collectibles. Mr. Koo is also a worldwide industry leader in inventory documentation and collection management issues for clients of art and tangible personal property. He created a web-based inventory and collection management application for clients to better manage their portfolio of art objects and share information with their professional advisors. Mr. Koo served as trustee at the Hudson River Museum, among others, and serves as an advisor on art planning for charitable giving to the Norton Museum of Art, the Philadelphia Foundation, and other nonprofit organizations.

**JACOB LEWIS** is an art dealer from West Virginia. Mr. Lewis received his BFA in painting and printmaking from West Virginia University. During his time at WVU, he did an internship at the Pace



Editions print shop, where he worked on publications by both Chuck Close and Jim Dine under the guidance of master printers Bill Hall and Ruth Lingen. He then began working at the Pace Prints Gallery, where he has since become a dealer. Mr. Lewis has been a critic for the DUMBO Art Center's Doctor Sessions (New York), where he talks with younger artists and views their works. He has also run MFA critiques at The New School (Parsons). Mr. Lewis is currently with Pace Prints Gallery, Chelsea, New York.

**ROBERT J. MORRISON** has over 25 years' experience as a writer/producer in the advertising industry. His extensive marketing experience included an early career term at BBDO (New York) and McCann-Erickson (New York & Toronto) and later as executive creative director of several Philadelphia advertising agencies. Mr. Morrison is the recipient of over 235 national and international creative awards, including the US Commercial Film Festival/Gold Palm. He continues his professional endeavors as founder of The Project Group, which focuses on strategic and creative development for Merck, McNeil Consumer Healthcare, Novartis, and a variety of international pharmaceutical firms. Mr. Morrison has been an art collector since the age of twelve, and has focused primarily on the Pop artists.

**MICHAEL MOSES** was a faculty member at The Stern School of Business of New York University for 32 years before his recent retirement. During this period, he researched corporate strategy, supply chain management, and, most recently, the role of art as an asset class. He is co-developer with Jianping Mei of the Mei Moses® Family of Fine Art Indices. These indices track the tenor of the art market from 1875 onward. Research findings have been published in the *American Economic Review*, *The Journal of Finance* and *The Journal of Investment Consulting*. Professor Moses is also co-founder of Beautiful Asset Advisors® LLC. This firm helps individuals and their insurers and wealth managers to better understand the financial implications of the art market and art collections.

**WASHBURN OBERWAGER** is a collector of art. He has served as a director of Marlton Technologies, Inc. since 2002 and was chief executive officer and a co-owner of Western Sky Industries Inc., an aerospace manufacturing company based in Philadelphia, from 1987 to 1999. When his business was divested in 1999, Mr. Oberwager began providing equity capital for high tech companies and is an investor in the Avery Galleries, which specializes in American paintings. In 1996, Mr. Oberwager co-wrote a thriller—*The Piedmont Conspiracy*—that focused on international finance.

**JOSHUA RUBENSTEIN**, co-managing partner at Katten Muchin Rosenman LLP, handles a wide variety of private client matters on a local, national, and international level, including personal and estate planning, the administration of estates and trusts, and contested Surrogate Court and tax proceedings for high net worth individuals, professionals, entrepreneurs, artists, and others with unique property interests. He is an academician, member of the Executive Council, and treasurer of the International Academy of Estates and Trusts Law, a fellow and regent of the American College of Trust and Estate Counsel, and a fellow of the New York Bar Foundation. Mr. Rubenstein is also an adjunct professor at The Brooklyn Law School and is the author of the LexisNexis Answer Guide on New York Surrogate's Court Practice.

**LAWRENCE M. SHINDELL**, JD, is chairman and chief executive officer of the ARIS family of companies, which underwrites the broad range of title risks associated with art transactions. Formerly a practicing lawyer, Mr. Shindell represented or litigated against Fortune 500 companies in complex commercial and insurance trial and appellate litigation including litigation in international forums. He later developed an art-consulting firm that focused on art transactional risk management, working with the top echelons of the art museum, dealer, advisor, and scholar communities in the United States and Western Europe. Mr. Shindell remains actively licensed before

several United States trial and appellate bars including the Bar of the United States Supreme Court. Mr. Shindell has presented widely on the subject of the legal and financial complexities of title risks in the art world to the private and public sectors of the art market, the banking, legal and wealth advisory communities, and to the general non-profit community.

**RICHARD SOLOMON** is chairman of Pace/MacGill galleries, and president of Pace Editions Inc. and Pace Primitive. A graduate of Harvard College and the Harvard School of Business Administration, Mr. Solomon has a wide involvement in the arts. He has worked in advertising in the past and has been a trustee and member of numerous committees for such institutions as the Institute of Contemporary Art, Boston, and the Whitney Museum of American Art, New York. In the 1980s, he also served as a member of the Art Dealers Evaluation Committee for the Internal Revenue Service. He was president of the Board of Directors of the International Fine Print Dealers Association, New York, from 1998-2001, and a president of the Board of Directors of the Art Dealers Association of America, New York, from 2003-2006.

**LEE STOETZEL** trained in art and art history at Southern Methodist University in Dallas, Texas. In the early 1990s, Lee worked for contemporary art dealers in Los Angeles and in New York. He installed exhibitions for Jeff Koons, Robert Irwin, and Peter



Halley as well as those of many emerging artists. As director for Tricia Collins Contemporary Art in New York, he worked with artists Vik Muniz, Sal Scarpitta, and St. Claire Cemin. In 1995, Mr. Stoetzel was hired as director of the West Collection, Oaks, Pennsylvania—an emerging contemporary art collection of 2,350 pieces housed at SEI Investments. At any given time 1,000 works from the West Collection are installed at SEI's campus. Mr. Stoetzel has been co-curator of the collection for the last 12 years.

**R. ANDREW SWINNEY**, president of The Philadelphia Foundation since 1998, leads the oldest and largest community foundation in the region. Under his stewardship, foundation assets have grown from \$168 million to over \$325 million. Established in 1918, The Philadelphia Foundation provides philanthropic services to Philadelphia, Bucks, Chester, Delaware, and Montgomery counties. More than 750 families and businesses have turned to The Philadelphia Foundation to help them give something back to their communities by creating permanent, charitable trust funds that benefit quality of life in southeastern Pennsylvania. As president, Mr. Swinney manages a large and growing flow of charitable giving and oversees the Foundation's comprehensive financial and estate planning services. Some \$20 million in grants and scholarships are awarded annually.

**MELINDA TUAN** is a senior fellow at Rockefeller Philanthropy Advisors. Ms. Tuan is recognized nationally for her work in high engagement philanthropy, social enterprise, foundation effectiveness, and evaluation. She has published articles, book chapters, and business school cases, and lectured at several of the leading business schools in the country. Ms. Tuan co-founded REDF in 1997, serving first as associate director and then managing Director through 2003. REDF is a social venture capital fund, which works with a portfolio of nonprofit organizations employing formerly homeless and low-income individuals in market-based business ventures. Prior to REDF, Ms. Tuan was a manager at a national healthcare nonprofit and a management consultant specializing in growth strategies for Fortune 500 companies. Ms. Tuan holds an MBA from the Stanford Graduate School of Business and graduated from Harvard University with a BA in Social Studies focusing on Urban Poverty and Homelessness.

**PAIGE WEST** is the founder and director of Mixed Greens, a company devoted to supporting artists and disseminating emerging and contemporary art. Founded in 1999 on the belief that contemporary art should be accessible to everyone, Mixed Greens is committed to doing things differently to introduce their artists and the idea of collecting art to a new collecting audience. Doing things differently include hosting Art Parties to introduce art to audiences in their own homes, and an online Art Registry allowing

individuals and couples to register for contemporary art as they would register for wedding presents. Since 1995, Ms. West has also been co-curator of the West Family Collection, her family's emerging and contemporary art collection installed at SEI Investments in Oaks, Pennsylvania. Ms. West is author of *The Art of Buying Art: An Insider's Guide to Collecting Contemporary Art* (Collins Design, 2007).

# Roundtable Discussions

## INTRODUCTION

**JACK GINTER:** On behalf of Rockefeller Philanthropy Advisors and U.S. Trust, I thank you all for coming. Many of you may not realize that this event has been close to a year in the making. I wish to thank our partners—Melinda Tuan, of Rockefeller Philanthropy Advisors; Andrew Swinney, of the Philadelphia Foundation; and Robert Morrison, of The Project Group, in particular. Robert Morrison led the effort to bring us together, and he is very pleased that everyone could be in Philadelphia on such short notice. As today's moderator, Melinda Tuan will lead us through some conversation related to art and philanthropy in each of your areas of expertise.

**MELINDA TUAN:** This is an illustrious gathering of people, and I thank you for being here. I wish to acknowledge my colleague, Douglas Bauer, who was also instrumental in making this event possible, but was not able to be with us.

Our conversation today is extremely timely. As many of you are aware, there are over *one trillion* dollars in art and collectible assets in private collections today. It is expected that a significant

As many of you are aware, there are over *one trillion* dollars in art and collectible assets in private collections today. It is expected that a significant percentage of those collections will change hands over the next twenty-to-thirty years.

percentage of those collections will change hands over the next twenty-to-thirty years. Many of these art assets have significant personal and investment value, yet are often not included or evaluated as part of a client's net worth by financial advisors. Collectors themselves are frequently unaware of the options available to them for estate planning for art assets, and for using these assets for philanthropic purposes.

To give you a few recent examples of how art can be used to benefit philanthropy, let me begin by mentioning Rockefeller Philanthropy Advisors' clients, Barbara and Donald Jonas, who in 2005 donated half of their art collection to the Jewish Communal Fund in New York. That collection sold for over \$44 million, and the proceeds of the sale were used to create a donor advised fund through which the Jonases will achieve their own philanthropic goals. In another example, William Gross, founder and chief investment officer of Pacific Investment Management Company, and an avid philatelist, recently announced his plans to sell a portion of his stamp collection to benefit the nonprofit, Doctors Without Borders. Finally, many of you may have heard that David Rockefeller's 1950 Rothko painting, "White Center (Yellow, Pink and Lavender on Rose)," sold for \$72.8 million through Sotheby's in May 2007. The proceeds of that sale also will be also used to benefit charity. Although articles in the media have covered these sales, not much has been written about the initiatives from the collector's perspective, or from the perspectives of experts in art, law, finance, or philanthropy. That is why you here are gathered here today.

Today, we wish to discuss art and philanthropy and the intersection among the different areas that each of you represent. We also hope to identify and discuss the legal and financial issues related to estate planning for, and the gifting of, tangible assets. We will begin with a discussion of the collector's perspective and the current art market, followed by conversations about implications from financial, legal, ownership and provenance, and philanthropic planning perspectives.

## THE COLLECTOR & THE CURRENT ART MARKET

**ROBERT MORRISON:** I started collecting because I truly loved the work and the artists who were creating it. Starting my career in advertising as a writer in New York in my twenties was an extraordinary creative experience. At that time—the 1960s—the Pop art movement was flourishing and, intriguingly, the most prolific and publicized artists—Roy Lichtenstein, Jasper Johns, and Andy Warhol—were also in advertising, working as illustrators or artists. These were artists I admired, and I began collecting posters from their exhibitions.

Richard Solomon commented to me earlier that during the 1960s, he was hard-pressed to afford anything over \$150. I remember acquiring what I considered my first *major* work—a limited edition print from the Albright Knox Gallery. The gallery first

offered me a small Rothko for \$900, but I could not afford it. The curator said, “We have a framed D’Arcangelo for \$300,” so I took that instead. It took me six months to pay it off in installments because I was also paying off graduate school loans.

As my career accelerated, I moved from buying posters to limited edition prints. Working in the center of the art world, I had the very good fortune of meeting gallery owners, curators, and private collectors who became personal friends and took me under their wing. Once they discovered that my passion was authentic, an entire world opened up to me. I got involved with the circle of private collectors. About eighty percent of my collection came from their walls: these collectors thought of me as a stepchild, and became my mentors in the art world.

Due to their guidance and insight, I discovered numerous artists and movements and my collection grew quickly. Yet, I never thought of my art as an investment. In terms of planning for the future of that collection, it was only about six years ago that I began to take this more seriously. I was in the process of organizing duplicates of some prints I had, thinking I could trade them. I was looking specifically for Andy Warhol shopping bags from the 1960s, and could not find them. Eventually three of them fell out of flat files. A curator who was with me said, “You have a lot of important and valuable work here. Have you thought about what will happen to it?” I replied that I had not given it any serious thought. He said, “Maybe you should.” Then he looked in my library, which

houses a collection of about 1,500 books signed by artists, collectors, and curators. At that point, I thought, “I really do have something that is considerably valuable. I hope it can be as important to someone else.” I also realized that as a collector, my collection should have a plan and a destination, and that I had a responsibility to guide its future.

**RICHARD SOLOMON:** Robert, what you did not convey to this group is that in those days there were about 200 people in total who collected. I remember going to a Robert Rauschenberg opening in a loft in Tribeca in New York City. The whole art world—every curator and collector—was in that room.

Today, if you get 2,000 people in Chelsea in New York City on a Thursday evening, it is considered a bad night. We are playing in a very different league. Art has become not only a fiduciary instrument, but a socially acceptable sport. Newspapers now report regularly on the art world from a financial as well as from an aesthetic standpoint. Those of us, like Robert Morrison and me, who have always collected for purely aesthetic reasons, find these changes both fascinating and frightening.

**JESSICA DARRABY:** To speak to Richard Solomon’s comment about the significance of art and how it has changed in our society, when I first pitched my book, *Art, Artifact & Architecture Law*, I had literally just a handful of articles on art clipped from the newspapers and the media. Who would have thought that there

The meaning of art itself has changed in the consciousness of the general public.

would be a market for something as esoteric as art and the law? The book is now in its 12th edition, which includes a new chapter on foundations, trusts and estates, and philanthropic giving. I believe Richard has hit the nail on the head—*the meaning of art itself has changed in the consciousness of the general public.*

**ROBERT MORRISON:** Art is now a commodity.

**LAWRENCE SHINDELL:** Richard, you use the phrase “fiduciary instrument.” What do you mean by that in the context of art as an asset?

**RICHARD SOLOMON:** With the exceptional growth of wealth internationally over the past decade, and the development of new investment vehicles and strategies, wealth managers and their clients have begun to look at art as one method of investment diversification—although I am not denying the aesthetic and social reasons for acquiring art. When wealth managers relate collectibles to stocks, bonds, etc., as part of one’s investment portfolio, how can we help but think of art as a fiduciary instrument? That is one aspect of the issue.

In the late 1980s, the strength of the Japanese yen resulted in very inflated values in the international art and real estate markets. We are seeing this bubble again in both the art and real estate markets, based on wealth and currency disparities in numerous areas of the world. Both American and foreign buyers are ‘overheating’ the contemporary art market because of the tremendous growth of their wealth. In addition,

the extraordinary increase in foreign wealth, as well as the falling value of the dollar, have been major stimulants to the art market. The relative purchasing power of off-shore buyers has definitely overheated the art market. Buying and selling art is a relatively unmonitored method of transferring funds internationally. Because of these and other factors, within the last decade or so, financial motivations for art collecting have resulted in collectibles taking on many characteristics of fiduciary instruments.

**BRUCE KATSIFF:** Robert, does your family share your passion?

**ROBERT MORRISON:** My father did in some ways, although he would not let me hang anything contemporary, which he considered to be awful art. I kept it hidden under the bed. My father understood the concept of what I was doing, and that was the important part. But he never understood the concept of contemporary art and he let me know it.

**ROBERT KOO:** Do you have any potential beneficiaries in mind for your collection?

**ROBERT MORRISON:** I have been giving the issue serious thought. One of the reasons this has been important to me is that I remember that in my twenties and thirties, I was able to buy from older collectors because *their own children did not want the pieces*. Those collectors were anxious to pass the art on to someone who could truly appreciate it.

The extraordinary increase in foreign wealth, as well as the falling value of the dollar, have been major stimulants to the art market.

...wealth managers and their clients have begun to look at art as one method of investment diversification.

I have several options. One is to use the art for philanthropic initiatives, a possibility I have been discussing with Andrew Swinney and Jack Ginter for some time. Another is to put together a collection that would be a little more important than it is now, so that the collection might go to some institution. I have recently discussed this option with Jacob Lewis. I have an interesting Pop print collection, but I would need to acquire some additional pieces to make it more significant. I am still working through the labyrinth. Not being in finance or law, I find the financial and legal aspects of this planning quite daunting.

**ROBERT KOO:** Very much like Robert Morrison, I have nothing to do with finance. When my wife Shirley and I started our journey together, I was going to be a certified public accountant, but I just could not get through the two required statistics courses. I decided to go to art school. I actually graduated even though I could not paint, sculpt, or make any other form of fine art. But I *did* make a commitment very early on that we would support artists, not so much by building a collection, but by buying from emerging artists in order to enhance their desires of becoming great artists. We still remember the first print that we bought at a Master's in Fine Arts show in Brooklyn. At the same time, I had the good fortune of having worked for Sylvan Cole, Jr., a major print dealer and mentor, for almost 12 years.

My wife and I now have so many pieces that some are stored unmatted and unframed, although all

are inventoried. We have decided that we will systematically take a piece out of the drawer and donate it to a charity rather than write a check.

Our children do not want our collection. They even looked at our *baby*—our Andy Warhol—in strictly dollar terms. I think we all need to make better plans for sharing our passions. Many of us assume that because we love our possessions, our children will love them as well. It is absolutely not true.

**PAIGE WEST:** In my family, it is my generation, the children, who are actually building the West Collection. We are more passionate than our parents about the artworks themselves, although our parents are paying, primarily, for our acquisitions. They are passionate about the collection as a whole, but are not involved in putting it together. My siblings and I are very lucky to have such supportive parents. Lee Stoetzel and I are the sole curators.

Our goal from the beginning has been to support artists. We have not been collecting for our homes or for ourselves. We have taken this commitment one step further by making the collection available to the public. So, in terms of planning for the collection's future, our scenario is somewhat different from that of other people here today.

The West Collection is now housed predominantly at SEI Investments, in Oaks, Pennsylvania, and is viewable by appointment only. We have over 2,000 works of contemporary and emerging art, much of which cannot fit into the five

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barn-like structures at SEI. Our current challenge is to find a permanent home for the art that will allow it to be open to the public without an appointment.

**BRUCE KATSIFF:** I would like the dealers and gallerists in the room to comment on the kind of passion that we heard about from Robert Morrison, Robert Koo, and Paige West. Is passion still the principle force behind collecting? Or, are there increasing numbers of people who think of art as a financial investment and who approach collecting from a purely investment perspective?

**NANCY GABEL:** What I have heard recently from many curators is that they sometimes feel that they are competing against “hedge fund guys.” Gallerists and dealers have been approached by investors who say to them, “I have X amount of dollars to spend. Please buy me a piece of art.”

I do agree with Richard Solomon that there is a huge amount of money out there right now. This makes it difficult for museums to collect the pieces they want because they are competing against buyers with very significant amounts of money. They are also fighting the buyers who buy art for the sake of valuing the market itself. It is a double-edged sword. But, of course, there continue to be very passionate collectors in the field.

**BRUCE KATSIFF:** An increase in the value of an artwork in no way helps a museum. If a museum’s collection is growing old—which, as static collections they all do—then an increase in a piece’s value raises insurance costs. That is the *only* impact an increase in value has to a fine arts institution.

**JACOB LEWIS:** As an art dealer, I have made sales where a print has gone for \$100,000 or more, and I have also worked with collectors who have far less to spend. The latter are generally my contemporaries—people in their late twenties and thirties. My generation is very interested in art and is focused on collecting. Many of them collect with passion; the idea of making money off of art, at least right now, does not make sense to my generation.

Young collectors also tend to be interested in artists not necessarily appreciated by older generations. Our aesthetic eye is different. What we see as important in art reflects issues relevant to us in our societies, and different generations have different interpretations of what is significant.

The “hedge fund guys” are extremely concerned with money, but they are also extremely interesting. They are so caught up in the idea of making a deal that buying art is really just another hobby for them. I do count some “hedge fund guys” among my best clients because they are truly passionate about what they collect. Yes, they want key pieces, but mainly because they enjoy them visually. We all have personal desires—but these individuals have the luxury of being able to afford them.

An increase in the value of an artwork in no way helps a museum. If a museum’s collection is growing old—which, as static collections they all do—then an increase in a piece’s value raises insurance costs.

I am sure that sooner or later they will ask what to do with their collections. I will encourage them to make donations, to find other venues for their works, and to help artists and the art world in general. If we keep going down the same path, we are going to make that bubble Richard Solomon referred to burst again and the market will simply destabilize. The “hedge fund guys” understand this. Of course, they are trying to please themselves, but they are also trying to help value the art market.

Aside from *selling* to collectors, I also feel I am here to *educate* them. This applies to every client—from a twenty-eight-year-old buying her first print, to a gentleman who has bought million-dollar paintings. It is extremely important to educate clients about the quality of the work they purchase and the significance of what the artist has done for American society or the art world as a whole.

**MELINDA TUAN:** I would like Michael Moses to address the big picture of art as an asset to frame our subsequent conversation.

**MICHAEL MOSES:** I would like to posit the following: if the bubble breaks, who cares? There are some people who will be affected. But if art is an asset like other assets, then it may burst just as other assets have burst. The beauty of thinking of art in that sense is that all assets bounce back at one time or another.

We had one bubble in art, from 1985-1990. The Mei Moses® Annual All Art Index shows that even

for post-war and contemporary painting, growth in price over the past five years has not matched that of the 1985-1990 period. We should keep the current market in perspective.

In the 1960s, the 200 people Richard Solomon mentioned were not the entirety of the art world—they *represented the entirety of the art world interested in contemporary painting*. There were, simultaneously, collectors buying impressionist, American, and old master artworks, among a multitude of other categories. We tend to focus on what is hot right now, which is true with stocks as well. If fine art is an asset, then we must treat it like—and expect it to act like—any other asset. It will go up and down. It will have bubbles. It will have style changes. That is life.

From the individual’s point of view, the question really is whether there is a point at which one has too little or too much art before one starts to think about philanthropy. How much art—if you consider art as an asset—should you have? Five or six years ago, that was where we were trying to head when we began to think about how to clarify art as an asset.

We built a database—the Mei Moses® Annual All Art Index—that now includes 10,000 repeat auction sale pairs, making it somewhat representative of the entire market. Given that information, the index can explain a great deal of the variability in the underlying assets that make up the Index. Once we had everything indexed, we could ask how our Index compared to other financial indices.

The question really is whether there is a point at which one has too little or too much art before one starts to think about philanthropy. How much art—if you consider art as an asset—should you have?

The Index compares the risk-return tradeoff between the classic, simplified portfolio of most individuals—cash, stocks, and bonds—and works of art. One of the beauties of art is that it is a non-correlated asset with almost any other asset. Therefore, when you add art to a portfolio of assets, it reduces the risk without reducing the return. Every financial intermediary who says to a collector, “Ignore your art when you allocate your assets,” is, therefore, exposing his client to more risk than necessary.

Financial and legal intermediaries must begin to look at art as they determine asset allocation, and to include it among the other usual asset classes. That is the only way to get a truly balanced portfolio.

If you really have too much art, should you get rid of it? If you do not want to get rid of it, at least you are in a position to *think about* making some gifts during your lifetime. This will benefit both the institution and the donor, and help to keep the donor’s portfolio in balance.

But before we can do that, we really must begin to think about art as a quantitative part of the wealth portfolio. I know of no collectors who love their art who say they are in it for the money. However, not one of them throws a piece away when they are done with it. They know it has value, and they either trade it or sell it. They all know it is part of their wealth, even though it may not determine the individual investment or planning decisions that they make.

Financial and legal intermediaries must begin to look at art as they determine asset allocation, and to include it among the other usual asset classes. That is the only way to get a truly balanced portfolio.

## The Diversification Benefits of Art

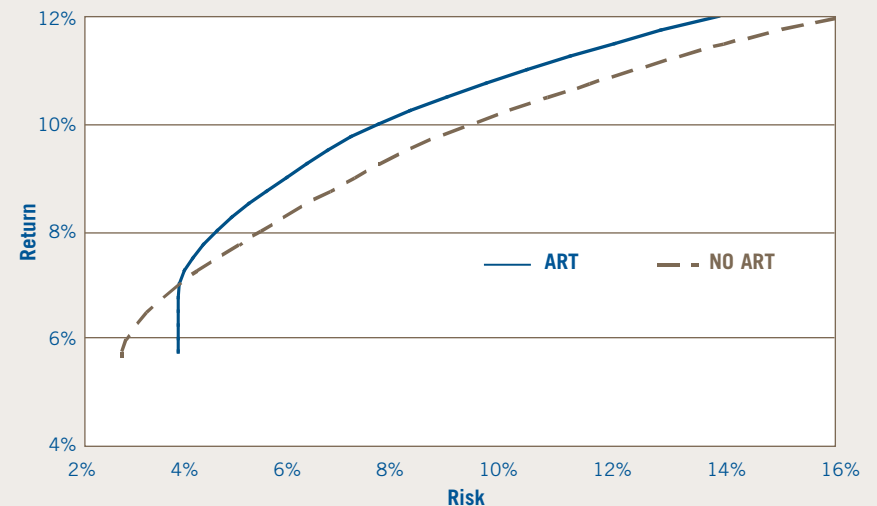
The Mei Moses® All Art Index is based on a proprietary set of over 10,000 repeat sale pairs of art objects that have sold at auction more than once. It tracks four important collecting categories: American Painting before 1950, Impressionist and Modern Paintings, Old Master and 19th Century Painting, and Post War and Contemporary Painting. The resulting art indices can be compared to financial indices to investigate relative performance. Those indices can also be used to undertake portfolio optimization studies that include art and create “mark to market” art valuations. The data can also be used to answer questions about the role of purchase price, artist quality, overpayment and overbidding, and holding period on returns. The Mei Moses® All Art Index satisfies the transparency and replicability requirements of all financial indices.

Art is less liquid than stocks or bonds, but on a par with real estate, timber, and private equity, for example. Art has high transaction costs, but very low holding costs make it better for long-term investing. This advantage is reinforced by the fact that as the holding period increases, mean return stays the same while risk decreases.

Over the last 50 years, the Index has shown returns similar to the Standard and Poor’s 500 Total Return Index. For the past 25 years, the Index had substantially lower returns, and in the past 10 and 5 years, it has had higher returns. For any period, art has higher risk but low correlation with equities (less than 0.1) and a negative correlation with bonds (less than –0.1).

This graph shows optimized portfolios of cash, stocks, bonds, and bills with no art, and with art constrained at the 15% level. Ignoring a client’s existing art collection that represents 15% of their total assets would expose that client to unnecessary risk for all but the most risk averse. Thus, portfolio allocation advice should, at a minimum, include existing art holdings.

Risk Return Tradeoff With and Without MEI Moses® Annual All Art Index (1955–2005) Fixed at 15% of Assets



**BRUCE KATSIFF:** The notion that buying art is going to reduce your financial risk is revolutionary. I have never heard of such a thing in my life.

**ROBERT KOO:** I guess we should keep balancing our art portfolios.

**RICHARD SOLOMON:** If we discuss art as an asset, then we must discuss liquidity issues as well. Current liquidity issues are very different from liquidity issues when the bubble bursts. While in the financial markets, there is always liquidity if you are willing to sell, that is not the case in the art world.

**MICHAEL MOSES:** I do not agree. In the financial markets, when the NASDAQ stock market peaked at 5,000, there was liquidity. There was also liquidity on the way down; a year later, things were selling at half the price. There *is* liquidity in the art market—the question is, “Are you willing to take a loss?”

**ROBERT KOO:** Let me pose a question to both Michael Moses and Richard Solomon. This industry is reported to amount to some \$25 billion annually, with just \$8 billion between the two major auction houses, Sotheby’s and Christies. Where is the rest?

**RICHARD SOLOMON:** It is basically in the private sector.

**LAWRENCE SHINDELL:** The best statistic we have shows that worldwide auctions represent twenty-five percent of total sales of artworks worldwide.<sup>2</sup>

**ANDREW SWINNEY:** We have been talking about the art world, which I understand is the most visible market. But the popularity of investment in art and the growth of that market have also stimulated interest in many non-art collections. The amount of money available in this market in the United States is stimulating growth in the value of those collections.

Is there a difference in the handling of a collection of automobiles versus art or teapots or decoys? Does the growth in value of these other collections affect the marketplace for some of those collections? Are we likely to see museums collecting “stuff” as opposed to art work?

**BRUCE KATSIFF:** There already are museums of every type and variety. There is a barbed wire museum, for example. Other museums collect dolls, cars, etc.

**MICHAEL MOSES:** *Everything* is collected. As soon as we can start to get pricing that is transparent, people can study the car market, the violin market, and

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<sup>2</sup> See “Report from the Commission to the Council on the examination of the impact of the relevant provisions of Council Directive 94/5/EC on the competitiveness of the Community art market Compared to the third countries’ art markets, COM (99)185 final, 28.04.1999,” available online through the University of Pittsburgh’s Archive of European Integration (AEI), <http://aei.pitt.edu>.

all the other markets. But you cannot make any sort of pronouncement to the financial community if you do not have transparent pricing. That is the key. Without transparency, there is no way to price objects other than by gut feeling. That is why the auction market is the *only* market we can talk about if we are discussing art as an asset; it is the only place where such transparency exists.

**LEE STOETZEL:** My next comment speaks to a larger issue, which any bank or financial advisor would probably have with a collection: when you assess a family's collection, it may be difficult to find any value. The family may have spent millions, and they may have amassed a great deal of work. But it may or may not have currency on the open market. Or, it may have value as a collection in its totality, but not as individual pieces.

We also find, when we are dealing with valuation, that it is difficult to assign value to works by contemporary artists. Sotheby's and Christies sell pieces by artists who by and large have a reputation. But other artists are not on the auction house lists, or on the Artnet database. So, without an auction record, it can be very hard to get a good sense of value.

**LAWRENCE SHINDELL:** If a gallery sells a painting for X thousands of dollars, the buyer cannot walk right back in and sell the painting back to the gallery for the same value. Auction transactions include buyer and seller commissions and guarantee

structures. Because of these and the many other factors in private sector and auction transactions, the art market is not really a transparent market. This makes getting a good sense of art values and other transaction-related issues in the art industry very difficult.

**ROBERT MORRISON:** The great part of this discussion so far for me is that what I collected with so much enthusiasm ended up becoming an asset. But the disconnect for me is the passion versus the fiscal reality. How do you merge those two? That is really the open discussion of today. Art *is* a commodity, but that seems contradictory to me.

**LAWRENCE SHINDELL:** Technical points aside, it really does go back to the group's question—in effect, is art *passion plus*? The bank perspective of art is strictly as an asset. What we need to embrace from the collector's perspective (where collecting is passion-driven), is: how does one embrace that passion while also recognizing the need to properly manage the art transaction because it involves a financial 'asset'?

**JESSICA DARRABY:** I do not think the collateralizing of a piece diverts the passion from it.

**NANCY GABEL:** Absolutely not. Many clients say, "I need to monetize my piece(s) because I want to buy more art."

The disconnect for me is the passion versus the fiscal reality. How do you merge those two?

## FINANCIAL AND LEGAL PERSPECTIVES

**MELINDA TUAN:** Washburn Oberwager will begin our discussion of the financial and legal aspects of art and philanthropy by sharing his experiences as a collector whose assets have appreciated. Nancy Gabel and Joshua Rubenstein will then provide some information from the perspectives of financial and legal advisors.

**WASHBURN OBERWAGER:** I would like to paint a picture of what our family faces. I have six children and all but the youngest is passionate about art. In fact, some of our children now buy art on their own. Art is really the heart and soul of our family.

What happened with our family is that our art had appreciated. As Bruce Katsiff commented earlier, the market had not helped me—it had caused my insurance rates to increase. We now have a potential tax problem around how to give the art to the children. Ironically, the appreciation of the market also prevents us from buying more art.

Art is not like Google stock. When it comes off the wall, it is no longer part of the family, and it is missed. The issues we are grappling with are: how do we gift art to our children? Do we monetize some of the art and pay the tax? Do we give the art to a charity and have the charity sell it to try to offset the estate taxes? I had not thought about these issues in the past

because at the time, art was not a major part of our potential estate.

**MELINDA TUAN:** This is an excellent case study for us to start our discussion. I am going to ask Nancy Gabel to talk about the financial issues involved.

**NANCY GABEL:** One of the things I do is to sit down with families and have a conversation about their problems and the solutions we might be able to offer. When dealing with a family's liquid assets, I come to know a lot about them.

When we do financial planning for a family, we involve the parents, the grandparents, and the children. We carry out financial education for each generation. When we do wealth management for them, we deal with estate planning, tax planning, and investment management. Often there are collectibles involved. We do not draft instruments, but we can talk to a family about what we think they should be doing, and bring in the outside experts to do the drafting for the family.

Most clients are passionate about their collections the way Washburn Oberwager, Robert Morrison, Robert Koo, and Paige West are. People buy art because they love it and they teach their children to love it as well. The children may not love what their parents love, but they may be passionate about another type of art. We will get them to curators and/or dealers who will help them start their own collections.

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The issues we are grappling with are: how do we gift art to our children? Do we monetize some of the art and pay the tax? Do we give the art to a charity and have the charity sell it to try to offset the estate taxes?



**JOSHUA RUBENSTEIN:** I think art is the most difficult asset to plan for. There are two broad reasons. One is that there is an enormous bias against art in the Internal Revenue Code. Congress is convinced that you are doing something underhanded with art, whereas it is perceived that if you invest in companies selling shares of stock, you are spurring the economy. There is a higher capital gains tax rate on collectibles than on any other category. The Internal Revenue Service is truly paranoid about the valuations put on artworks.

The second reason that art is so hard to plan for is that it does not work well for most estate plans. All the bread-and-butter planning devices for estates depend on cash flow. There is no cash flow from art, so options are very limited with regard to comparisons to true financial assets. Having said that, there are things you can do, but they are dependent on whether or not your child will sell the collection, and whether you are willing to give some portion of it to charity—things you may not know in advance. The easiest option in estate planning for an art collection is to give it all to charity. But again, the IRS has clear biases against anything short of outright gifting: they feel people do so in order to avoid taxes.

When people draft standard wills for art collections, they make horrible mistakes. A standard will that sets out just to pay all the estate taxes off the top and leave the rest to whoever is a bad

choice. If you have a valuable asset that represents a disproportionately high percentage of your estate, you can bankrupt the rest of your estate by exempting that asset from apportionment estate tax. Let us say you wanted to leave your Picasso to child X, and the rest of your estate is divided into equal shares among three children. If the Picasso is worth half of your estate, there is virtually no estate left after taxes. So you have to be very careful to say to child X, “The privilege of receiving this valuable Picasso is that you are going to borrow the money to pay the taxes because I cannot afford to have my estate pay them for you.”

This then moves over into the life insurance arena. If you have illiquid assets that you do not wish to sell, you have a permanent liquidity need. The earlier you start an insurance program to help defray taxes that you were not willing to cover with a charitable deduction, the better off you will be.

Families can also create private foundations. A standard *charitable foundation* has to distribute a percentage of its assets each year, equal to five percent of its total value. On the other hand, *private operating foundations* have no minimum payout requirements. This is an interesting option. Unlike works that you buy through a normal foundation, which you cannot keep in your home, if you have office space for your private operating foundation, which you should, there is no reason why you cannot see the paintings bought by your private operating foundation in your office.

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Home offices are questionable because people do not respect those boundaries.

I hope we begin to see more *charitable split interest trusts*, an option open to families willing to involve charity in their plans to some extent. In this case, the trust could give to the charity, which would then sell the pieces. But they cannot sell until three years after the gift is made. Congress is making things harder and harder for donors and recipients.

**JESSICA DARRABY:** The practice of our firm is to prepare the pre-estate plan. I liaise between the passion part of the collection and the technical part of the asset management. Collectors tell us: “I have X collection. My spouse and I are unsure about what we want to do. We have children (or not). We might want to set up a foundation. We give X dollars per year to this museum but we think that when we die we want to give in another way.” They have a variety of questions. The practice is to conduct a site visit and review the collection together. My background as an art dealer is helpful in this regard. I have often seen the gallery show from which the works were bought, especially if it is contemporary or modern art. I often know whether it is bought from Richard Solomon, Sidney Felson, or Larry Gagosian. The collector or artist says, “This is what I want to have happen when I die. And, while I am alive, I would like these various things to happen.”

The collector package offered by my firm assures the work is appraised, insured, archived, catalogued, and inventoried appropriately. We then create a book for the collection that contains all the pertinent information. That book is then turned over to the trusts and estates lawyer. We meet again with the collector, and occasionally with the financial advisor, when the art is included in the collector’s portfolio. We work collaboratively with financial advisors and estate lawyers for a cost-effective service for the collector.

So that a client’s wishes are honored, we recommend appropriate charitable vehicles for the client. This ensures that the passion for what they collect has an appropriate philanthropic outlet. We deal with many different situations. I do not think it is the drafter of the wills or the lawyers that cause the problems. There has usually been a communication gap about the collector’s or the artist’s goals.

The catalogue that we create closes that gap. I had never thought of it as *combining passion with procedure*, but that is really what we do, and what the book represents. It ends up being a very gratifying process for the collectors and/or artists planning their estates because it allows them, in life, to have some control over what happens in the future. We often do a gift plan as well. The client does not need to wait until death to make a gift. I think an important part of thinking of art as an asset is to recognize that the art is

part of the daily life of the collector, who enjoys being involved in the decisions made about his or her art.<sup>3</sup>

**ROBERT KOO:** One of the biggest challenges I face when I sit with collectors and we begin to talk about their collecting is that they believe everything in their collection is incredible—I call this the “Oh my God” factor. I go through a litmus test with these individuals. I ask, “Would you buy it all back again today?” Eventually we make three groups, each with varying degrees of enthusiasm—Oh my God! (masterpieces), Oh my (significant objects), and Oh (less important pieces). Collectors must come to the realization that their collection is not just one entity. It

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<sup>3</sup> JESSICA DARRABY: Another area that is equally important and complex is the value of intangible personal property. When we assess collections, we also look at all the intellectual property interests—copyrights, for example—associated with that collection. These may be available to the collector, especially in collections acquired over a long period of time. In some instances, the intellectual property value is higher than that of the physical work itself. Copyright can be assigned to philanthropic entities. It is something every wealth management advisor should ask their client about when they discuss the client’s art collection.

*Intellectual property rights can also be used for philanthropic purposes. Reproduction rights revenues are generated from royalties, licensing agreements, sub-licensing agreements, and international licensing agreements. Although the art world historically has been adverse to the notion of copyright, it is now a very popular aspect of revenue generation. If artists and heirs pay attention to the potential of copyright, and works by Andy Warhol and others are examples, then the philanthropic world needs to be equally savvy.*

*BRUCE KATSIFF: As an example, the author James A. Michener gave all of the royalties from his works to Swarthmore College.*

*JOSHUA RUBENSTEIN: It is only fairly recently that copyrights and works themselves have been treated separately. With music, that has always been the case. Person X writes a song, but artist Y wants to perform it: the artist must pay royalties to the songwriter. So too, reproduction rights of an artwork do not necessarily follow the work itself; one person may own the copyright, while another owns the physical work. If someone wants to produce a catalog and use an image, the owner of the copyright gets to charge for that.*

has many different facets.

If the masterpieces account for just twenty percent of the collection, what is going to happen to the remaining eighty percent if the children do not even want the masterpieces? I suggest collectors start taking that remainder and giving it away or selling it strategically. Even if they can only deduct the basis (original cost), and not the appreciated value of the work, they could take that tax savings and use it for wealth replacement for their children. They could put that wealth into something as simple as a *charitable remainder trust* (CRT).

## CHALLENGES FOR MID-WEALTH COLLECTORS AND FAMILIES OF ARTISTS

**ANDREW SWINNEY:** It is fascinating to hear about large, valuable collections that need specialists and private wealth management firms. But there are many people who have lesser collections and unsophisticated financial advisors. These people do not seek out major financial institutions because they do not perceive themselves as their clients. They rely on smaller institutions and financial advisors who do not necessarily have the depth of expertise to serve them well.

The challenge, I find, is that there are people who have fairly large estates that they did not anticipate, and who have no sophistication around the related issues that we have been discussing. These are

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people who have seen their collection's value increase because the market has taken it up. Or, they may have inherited a piece of art that suddenly becomes valuable. Strictly speaking, they are not collectors. They are also not high net worth individuals. And yet they may want to be philanthropic with their assets or pass them to the next generation.

How do we get knowledge and information out to these less sophisticated clients, and/or the unsophisticated financial advisor to whom they turn? The average trust and estate lawyer does not necessarily specialize the way Joshua Rubenstein has. The average lawyer will simply draft a standard will for their client.

The second part of the challenge is: how do we develop information that is useful and educative to a *broader* financial or professional advisory market, and which deals with a number of people who are at the right age to start estate planning for their minor collections? How do we provide a primer on these issues for them? *Antiques Roadshow* could be the place.

**JESSICA DARRABY:** *Antiques Roadshow* is the place in terms of asset value and what the owner will do with the object. Every appraiser on the show is from Christies, Sotheby's, or Bonhams. We need someone from the philanthropic world standing among them. Often the owner is asked, right after the appraisal, "Will you keep it, or sell? It is worth two million." "Oh, I never knew it was worth so much," they reply. Andrew's point is *so* important. The long-term and

philanthropic aspects of their piece/ collection are never addressed.

**JOSHUA RUBENSTEIN:** It is always the middle wealthy that have the hardest time, not the very wealthy. The very wealthy have many more options and more access to resources.

**MELINDA TUAN:** I would like to turn now to Robert Koo. Could you talk about the different layers of personal wealth that we are addressing?

**ROBERT KOO:** I wanted to follow on Andrew's point by sharing a story. I was sent by the planned giving officer of a nonprofit organization to the home of a middle-market individual. He and his wife had been benefactors of this institution for a number of years. I knocked on their door and said, "It is so nice to meet fellow collectors." They looked at me as though I had three heads. There was a major disconnect as to why I was there. I knew that there was a liquidity issue with regard to one of their financial assets, but as I sat with them, I could not help but notice that their home was filled with truly beautiful objects. I asked, "When did you start to collect?" "We do not collect," the wife replied. I said, "Okay, tell me about your things." She then began to tell me when each piece had been bought. After 50 years of marriage, they had accumulated quite a number of pieces. They had no plans for the future of their "collection." I said, "I really need to know why you do

How do we get knowledge and information out to these less sophisticated clients, and/or the unsophisticated financial advisor to whom they turn?

not consider yourselves collectors.” Basically, the wife said, “Do you see any Picassos here? Do you see any Degas or Monets? We do not collect like the Rockefellers or the Whitneys or the Vanderbilts.”

People have objects that they have put together with no knowledge of their value. This couple had never had any of their pieces appraised or insured because they assumed they were not worth anything. It turned out the appraisal was in excess of seven figures, after we had divided the collection into three groups to solve some liquidity issues. So a collection—the “silent asset”—really can become a financial instrument to create family and philanthropic capital and to increase cash flow. Among their valuable possessions, this couple had a wonderful Blue and White Dutch Delft collection. I was able to arrange several pieces for an exhibition loan with the Museum of Fine Arts in Boston.

**BRUCE KATSIFF:** Speaking to Andrew’s point about people who are not at the high net worth level, I think the same problems exist, to a great extent, for families of artists. I have seen problems occur when the artist’s work increases in value only after his or her death. We often see the second or third generation family members faced with escalating values of works they have inherited. They cannot pass the works on to the next generation because they do not have the resources to pay the estate tax on that work when they die.

This situation, frankly, is one of the strong motivators for gifting to art museums. Often a child or heir would like to have a particular painting, but they

are not prepared to pay the \$100,000 estate tax on it.

I think the answer is that much of the education has to come through the philanthropic community itself. *It must come through the organizations, the foundations, and the charities that will benefit from a more knowledgeable donor base.* Those are the people we somehow have to reach, and museums can play a role in that. But there is also no question that there is a middle ground of people who are under our radar screen and who need to be addressed.

**NANCY GABEL:** I usually took the attitude that we would talk to almost anyone. It is only when you sit down to talk that you find out what people really have. You need to be willing to talk to everyone because collections emerge from unexpected sources.

**MELINDA TUAN:** I have a question for Jacob Lewis. What materials do you think would be helpful for your peers who will need services some thirty years down the road, when their collections have appreciated significantly?

**JACOB LEWIS:** First and foremost, my generation needs to gain an understanding of financial issues—at an individual and family level. I did not learn any of these things in college. I went back to school while working for Richard Solomon to try to figure out how to handle my own money. I do not feel that families are open with their children about finances. I have seen this frequently with my younger collectors; I am

We often see the second or third generation family members faced with escalating values of works they have inherited. They cannot pass the works on to the next generation because they do not have the resources to pay the estate tax on that work when they die.

I usually took the attitude that we would talk to almost anyone. It is only when you sit down to talk that you find out what people really have. You need to be willing to talk to everyone because collections emerge from unexpected sources.

## TURNING WINE INTO A COLLEGE FIELD HOUSE

Park B. Smith, a businessman who experienced great success in the home furnishings industry, is an avid wine collector. He is also a huge benefactor to his alma mater, the College of the Holy Cross in Worcester, Massachusetts. Mr. Smith, a 1954 graduate and trustee of Holy Cross, wanted to fix the college field house and decided to sell some of his wine to help fund the capital improvements. Mr. Smith auctioned off 14,000 bottles—including 50 cases of the highly desirable 1982 Mouton Rothschild—from his private collection of over 60,000 bottles through Sotheby's in New York. Sotheby's sale of the Park B. Smith Collection resulted in proceeds of over \$5.3 million.

Father Michael McFarland, college president at Holy Cross, was quoted in a *Wall Street Journal* article about the transaction, expressing relief that he received the auction proceeds rather than thousands of bottles: “We don’t even have a wine cellar—just a couple cases stuffed under a sink.”<sup>4</sup>

### Missed Opportunities?

Without knowing all the details and reasoning behind the structuring of the transaction, it appears there may be missed philanthropic opportunities in this case. Namely: Would it have been better for the College of the Holy Cross if Mr. Smith had donated the 14,000 bottles to the college instead of selling them and donating the proceeds of the sale?

Mr. Smith could have avoided paying higher capital-gains taxes (which can run upwards of 28 percent) by donating the bottles instead of selling them directly. Robert W. Koo, an art succession and philanthropy consultant with Bonhams commented that while there may have been other considerations that influenced Mr. Smith to sell versus donate his wine collection, he could have donated the collection to Holy Cross and arranged for the sale of the collection in collaboration with the College. “This would have enabled him to donate the whole dollar to Holy Cross instead of the dollar less 28 cents,” noted Koo.

To address Father McFarland's concerns, the college would not have had to take possession of the 14,000 bottles. “Rather, if the legal ownership of the wine was transferred to the charity, the donor could have continued to store the wine until it was sold. Provided that the benefits of ownership were legally transferred to the charity prior to any obligation to sell the wine, the donor would not have realized a taxable gain on the sale.”<sup>5</sup> Koo added, “Some auction houses eliminate their seller’s commission rate, which typically runs at 20 percent, or charge a lower rate when the seller is a nonprofit organization,” allowing more resources to go directly to the nonprofit. For example, Sotheby’s charged a reduced commission rate in the Park B. Smith case because it was for a good cause. The bottom line is: collectors need to carefully examine all the benefits and drawbacks of selling a collection versus of donating it directly to a nonprofit, in order to ensure they maximize the philanthropic benefit for the institutions they want to help.

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<sup>4</sup> The Wall Street Journal, 15 September 2006 “Donor to Turn Wine Into Bread.”

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<sup>5</sup> Thanks to G. Randolph Macpherson, CPA, Managing Director, WTAS, West Palm Beach, Florida, for clarification on this issue.



positive that they know nothing about the intricacies of their family businesses or financial standings. When families receive financial and estate planning information, their children need to be included.

Collectors who purchased contemporary art thirty or more years ago have seen a tremendous appreciation in the value of their collections. Should they decide to realize this appreciation by selling in this very hot market, I would suggest they use some of the proceeds from those sales to purchase works by artists of the current generation. Not only would those collectors be invigorating their collections, but they would once again be supporting young artists, as well as making their collections more relevant to their heirs.

When families acknowledge that they may not generationally share aesthetic tastes, they can compromise and begin to update their collection. Maybe then the grandchildren will want to keep the collection going. Yes, it will always change, but hopefully it will not end. But if it does come to a point where everything is donated or passed down, or completely liquidated, you have collected a huge circle of work that will not have focused solely on one generation. Why are families not getting together and talking about what the next generation of artists is doing, and how they can become part of their collection?

**JOSHUA RUBENSTEIN:** The government is very suspicious of art. It has simply branded art as an unfavored category of assets. Things that used to be possible are either extremely difficult to accomplish or

simply no longer possible.

**BRUCE KATSIFF:** The government takes an *even more* unfavorable view of artists themselves, when you consider that artists are unable to take a deduction for the market value of their own works that they choose to donate. They receive a deduction only for the cost of goods associated with making the piece.

**JOSHUA RUBENSTEIN:** Bruce's point applies to artists or the first person to receive the piece as a gift from an artist.

**ROBERT KOO:** With regard to Jacob Lewis's and Richard Solomon's point about revamping a collection, one of the biggest challenges that we collectors face is that we get taxed when we go into a transaction, and we get highly taxed when we come out.

That means that each of our dollars, if we live in New York, taking into account both state and city taxes, is taxed almost 45 cents on a sale. That is a lot of money to give to the government. When collectors tell me they are not philanthropic I say, "What do you think you are doing when you write those checks?" I think one of the greatest vehicles available to us is the *charitable remainder trust (CRT)*, if you know you are going to part company with the works. I would rather derive a lifetime income from a work than hold on to it. That is how I would handle the capital gains issue. Or, we could use a *1031 exchange* if we want. However, dealers and collectors cannot use these exchanges; only investors qualify for this option. Investors in art are

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able to conduct *1031 exchanges* for works of art to defer federal and state income taxes on profits from sales. Given the combined taxes, this can often save the investor up to a third of built-in profits.

**LEE STOETZEL:** Robert, are you talking about tax on an outright sale?

**ROBERT KOO:** I am talking about the following: let us say I bought an Andy Warhol print from Richard's gallery for \$100. Today, I want to sell it, and it is worth \$1,000. That is a \$900 spread in terms of profit. I need to write a check to the IRS for twenty-eight percent, plus the appropriate state and city tax.

**LEE STOETZEL:** Now, Bruce, when he gives your institution the thousand dollar Warhol, how do you assess fair market value for him?

**BRUCE KATSIFF:** We do not. The receiving institution is not allowed to be involved. But there are other options. If he does not want to give the piece to the institution, what about a bargain sale? We can organize a sale where he can sell it to the museum for below market value and receive a deduction for a portion of that value. When you crunch all the numbers, you may be able to sell that work to a museum for below market value and end up with more money, or almost as much money, in your pocket as if you had taken it to auction. In this case, the donor's name will be attached to a partial gift to the institution. This means, of course, that we have cut the

dealers out of the equation. We are always exploring those bargain sale opportunities with potential donors and trying to keep them aware of the option.

**JOSHUA RUBENSTEIN:** You could also do a sale in exchange for an annuity.

**BRUCE KATSIFF:** Yes, we have done some of those transactions.

One of the devices that we have used very successfully with donors who are truly philanthropic in nature and who would like to remove artwork from their estate so that they do not (A) have the problem of dividing a Picasso among the five children or (B) the problem of paying taxes, is something our attorneys call an *irrevocable trust agreement*. Basically, the work gets placed into a trust, and the person has it during their lifetime. At any point, they can convert that trust to a gift if their situation changes and they need the tax deduction. But if they want to, they can keep the work until they die. And at their death, the work comes out of their estate prior to the taxes.

**JOSHUA RUBENSTEIN:** For people who are truly philanthropic, who are going to buy an item with the purpose of turning around and giving it, you can offset some costs, certainly any gains tax, through a gift to a museum.

If you were going to give a piece to charity in any case, that is another reason to have your own private operating foundation, so that at the turn around, you get a deduction for the fair market value

of the painting. That way, at purchase, you do not pay the sales tax.

**BRUCE KATSIFF:** Our answer to donors who want to buy a work of art for the museum is, “Give us the cash. Let us buy the work of art.” In those cases, the donor takes the deduction for the cash donation and avoids all the problems with the IRS and the valuation.

**ROBERT MORRISON:** In the last five years, I have helped organize planned giving seminars with a group of people including Robert Koo, Jack Ginter, and Andrew Swinney. The first was held two years ago in Bucks County, Pennsylvania, for thirty-two relatively high net worth people.

Several things came to the forefront during that four-hour discussion. They were delighted with the conversations we had started, and they wanted more education. But what I feel was most important was that some seventy-eight percent of attendees said *they did not know how to pick an appropriate charity*. They were unhappy with their own financial advisors for not having initiating the conversation. At the subsequent seminars, that same sentiment was echoed by between seventy-eight and eight-five percent of attendees. Education in this arena should definitely be at the forefront of any future conversations.

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## PROVENANCE & OWNERSHIP

**ROBERT KOO:** Having clear title to an artwork or other piece of tangible property is critical to either donation or sale. I would like Lawrence to talk a bit about how we make sure the piece that I donate to a charity does not get totally unwound in terms of my tax, estate, or charitable plan? Look what happened to Steven Spielberg—he bought a piece that turned out to be on the FBI watch list. I consult with Lawrence about this topic all the time.

**LAWRENCE SHINDELL:** Provenance is a broad issue and can be addressed at many different levels. Most important to us for today’s symposium, of course, is what this issue means from a philanthropic perspective.

Galleries that have set themselves up as a limited liability company (LLC) do not have the ability to assume the financial risks related to the works they sell. Any lawyer representing a buyer or seller tries to negotiate in some way what the warranty title of the work should be. The goal of the seller is to take on the least amount of risk, while the buyer tries to get the most indemnity protection possible on a private indemnity basis. In the case of title, the auction houses manage the issue through the consignor’s guarantee and the rescission clause of their sales agreements. The rescission clause, in combination with the consignor’s guarantee, contractually mean that if there is a problem with clear legal title of the

## STEVEN SPIELBERG AND THE STOLEN ROCKWELL: THE IMPORTANCE OF PROVENANCE

In 1989, Steven Spielberg bought a Norman Rockwell painting, “Russian Schoolroom,” from a respected art dealer from whom he had purchased multiple art pieces. Unbeknownst to Spielberg and the dealer, the painting had been stolen in 1973 from a now-defunct Missouri gallery owned by Jack Solomon. At the time, Solomon had reported the theft to the police and the FBI but no one could locate the work. He was reimbursed by insurance for his loss but Solomon claims he never gave up title to the work.

In 1988, the Rockwell resurfaced at an auction in New Orleans with no mention of its checkered past. The painting was purchased for \$70,400 by Judy Goffman Cutler, a Rhode Island-based collector of American illustrators. One year later, Goffman Cutler sold the painting to Spielberg for \$200,000.

In February, 2007, one of Spielberg’s staff spotted the Rockwell painting’s image on an FBI web site listing stolen works of art and notified Mr. Spielberg and the FBI about the painting’s current location. The FBI confirmed the painting’s authenticity and asked Spielberg to retain the painting, whose value had risen to \$700,000–\$1 million, in Los Angeles so it would not cross any more state lines until its disposition could be determined.

The case of the stolen Rockwell continued to become more complicated for Spielberg. After the FBI announced the Rockwell had been stolen, Goffman Cutler offered to extricate Spielberg from the controversy by giving him another Rockwell in exchange for the title to “Russian Schoolroom.” Spielberg accepted. In May, 2007, Solomon filed suit against Spielberg for refusing to return the painting to him as the original owner of the Rockwell. “We are the victim,” said Spielberg’s spokesman Marvin Levy. “Steven is an innocent bystander in all this.”

work post-auction, then the auction house can unwind that transaction on both the buyer and the seller. This is true without explicit time limitation and regardless of the financial decisions the consignor and buyer have each made in reliance on the presumed permanency of the auction transaction. The reality is title or ownership issues which do arise—the art industry is a largely unregulated one—cannot be managed by the individual parties themselves. The risk must be transferred to a third party, and that is the role of the insurance company.

From a philanthropic standpoint, provenance or good legal title ultimately takes us to questions about tangible wealth transfer. Whatever the strategies are along the way in building a collection and in the later treatment of this important asset—whether *1031 exchanges*,<sup>6</sup> sales, exhibition loans to museums (for cultural purposes and to enhance the value of the art through the curatorial scholarship associated with exhibitions) or estate-transfer strategies—if the owner does not have clear legal title to the art, none of these strategies hold up and there are significant financial and philanthropic implications for the parties to each transaction because of defective title to the art.

The issue also bears on the concept in the wealth advisory community of “negative” wealth transfer. The failure to properly manage art transaction title risks can become a negative legacy for

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<sup>6</sup> As of the date of this publication, Senate Bill 2242 is pending. If passed as currently drafted, this provision will eliminate IRS § 1031 treatment for collectibles. See Senate Bill 2242, Section 507, pp. 204–205. For information on the current status of this legislation, the reader should contact his or her tax advisor.

the collector's heirs, who will later have to assume potential liability for these legal title issues. For example, heirs may have to sell a work of art at auction in order to create liquidity for estate tax purposes; or may choose to sell a work to fund a gift to an institution. Just as the seller must guarantee to the auction house that he or she has clear legal title to the work, so too estate settlement or bank trust equally must guarantee clear legal title to works of art when settling estate assets, or engaging in trust activities such as sales of trust assets.

Similar issues exist for museums, which over the past 15 to 20 years have had challenges around accepting charitable gifts because of the costs of storing the works and, when permitted, selling the works to acquire other works. For donors, the related challenge has been that museums may not want what the donor wants to gift at any particular time. In today's environment, the additional consideration is that no museum can afford to accept title or ownership exposure. This development is compounded by the fact that directors' and officers' insurance liability policies now also contain exclusions for decisions producing title related losses. This puts museum trustees, directors, and curators, at risk for individual liability for the title-related decisions they make that may eventually produce financial losses for the museum.

In the case of Steven Spielberg's Norman

Rockwell painting, suppose that Mr. Spielberg had gifted this work to an institution before the FBI showed up to say, "Museum, that work of art is not yours. You must give it back to person X." The museum's challenge is whether to use funds that have been gifted for general or specific uses to the museum to defend the title dispute. (Title dispute costs can easily reach ranges of \$500,000 to \$1 million or more.) If they do, patrons may well claim that the museum has "wasted" or otherwise improperly used their gifted funds. If, alternatively, the museum goes out and raises money from patrons specifically to defend the legal title to the work, then the museum faces a public relations problem. The third alternative for the museum is to concede that ownership of the gifted work belongs to the claimant. But now the museum faces not simply alienating the donor of that work but also causing the donor financial loss because the museum's concession of defective title will likely invalidate the taxpayer's gift and create additional taxes, interests and potential penalties. The donor may say, "I would not have conceded the title issue. Your doing so has now destroyed my charitable gift. I have taxes, interest, and penalties to pay." The donor and institution find themselves in a conflict of interest because the title risks, which exist with all art transactions to varying degree, were not taken out of the equation by transference to a third-party insurer.

If we talk about driving passion and philanthropy, at the end of the day we must talk about securing the transaction. Title insurance is what anchors all strategies around art as an "asset" and

For donors, the related challenge has been that museums may not want what the donor wants to gift at any particular time. In today's environment, the additional consideration is that no museum can afford to accept title or ownership exposure.



permits art to be used effectively. This question of title assurance returns us to Michael Moses' point about the liquidity of this asset: How readily can I sell, gift, or otherwise transact my art if neither I nor the buyer can be guaranteed in real financial terms that there is not an ownership or title issue with this asset?

**BRUCE KATSIFF:** How prevalent is this title problem? Other than the realm of antiquities and World War II, stolen art is pretty well covered with the Art Registry. How often does this even present itself as a problem?

**LAWRENCE SHINDELL:** It is a significant problem. The World War II issue represents only about 25 percent of all exposures. Aside from other practical constraints, the registries only address thefts that have been reported to them. One of the few explicit, published statistics on the rate of unreported art theft is that twenty to thirty percent of art thefts are not reported for a variety of reasons, including a perception that not reporting the theft will result in the work emerging more quickly in the marketplace.<sup>7</sup>

Think about Robert Morrison's situation, for example. Let us say Robert gives some pieces he bought privately to a museum. In this example he was forward thinking, as some donors are, and made an *unrestricted* gift, meaning that the museum can do as

they wish with the piece in the future. We might think there is no risk. But that is because Robert is alive and can explain where and how he obtained the pieces. But 20 years from now, if Robert is gone and the museum needs to sell one of his gifted pieces, at that point they must guarantee title to the auction house or private buyer. Robert is no longer available to provide whatever ownership history he may have. This scenario raises fiduciary issues for the museum, which now operates in a factual vacuum with regard to the provenance of Robert's gifted pieces.

Another issue museums now face is the selling of works from their permanent collections. While current museum standards pretty much state that once you have received a work through a gift, you cannot sell it (at least not to support general operating expenses), this will likely change in the industry. Museums face other, often vague, restrictions on the ability to sell works even for acquisition purposes, particularly with gifts made years before the complexities of the art world and art transactions evolved. Advisors to both donors and museums need to be sensitive to these issues and to manage the risks associated with the legal ability to sell works received via gifts, and what this means for title related exposures, whether from the donor or institutional side.

**BRUCE KATSIFF:** Let me start by clarifying the position of museums with regard to the sale of artworks. Both the American Association of Museums

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<sup>7</sup> See S. Gandert, *Protecting Your Collection: A Handbook, Survey & Guide for the Security of Rare Books, Manuscripts, Archives & Works of Art*, Haworth Press, 1982, p. 30.



## PROVIDING ART FOR ART'S SAKE

Gerry and Marguerite Lenfest began collecting Pennsylvania Impressionist art in the early 1990s, purchasing canvasses by painters who lived and worked in the areas where their company, Suburban Cable, provided television service. These works represented some of the best pieces by a colony of well-known painters who became known as the “New Hope Painters.”

Gerry recalled, “I was enamored with these artists,” including painters such as William Lathrop, Daniel Garber, and Edward Redfield. Gerry had grown up on a farm in New Jersey located across the Delaware River from New Hope, where many of the paintings were created. Over a period of a decade, the Lenfests assembled a collection of 59 impressionist pieces by the New Hope painters, which they exhibited at the Suburban Cable headquarters in Oaks, Pennsylvania.

In 1999, the Lenfests decided to gift their entire 59-piece Pennsylvania Impressionist collection to the James A. Michener Art Museum in Doylestown, Pennsylvania. Founded in 1988, and located just eight miles from New Hope, the Michener Art Museum is a relatively young institution dedicated to preserving, interpreting and exhibiting the art and cultural heritage of the Bucks County region. The Lenfests originally structured their gift as an irrevocable trust agreement, which allowed them to remove the collection from their estate and put the paintings into a trust, with the option of converting the pictures into an outright gift over time. Since the time of the original donation, the entire collection has been converted into an outright gift to the Michener Art Museum.

In addition to providing their collection of art in 1999, the Lenfests also donated \$3 million in unrestricted funds toward the Michener Art Museum endowment, to help provide for the care of the donated art in the years to come. Constance Kimmerle, Curator of Collections at the Michener Art Museum noted that, “In providing an endowment gift to care for the works in their bequest, Marguerite and Gerry Lenfest have ensured that the physical and cultural life of the collection will extend beyond the present to future generations.”

In November 2000, almost one year after the Lenfests made their donation of their impressionist art collection, the Michener Art Museum opened its permanent exhibition, *The Lenfest Exhibition of Pennsylvania Impressionism*. Housed in a newly remodeled, custom-designed gallery, the 59 pieces, in addition to the museum’s previous holdings, establish the Michener Art Museum as the owner of the finest collection of Pennsylvania Impressionist paintings in the world.

“Very often, a gift to a smaller institution can make a more profound impact than one to a more high profile institution,” commented Bruce Katsiff, Director and CEO of the Michener Art Museum. Not only did the Lenfests’ gift ensure that museum visitors can experience the art of the New Hope Painters in the very environment which inspired their work, but as Katsiff added, “Gerry and Marguerite’s gift has helped catapult the Michener Art Museum into a higher orbit.”

...museums are ethically allowed to deaccession works from their collection.... Under the current ethical standards there is only one thing you are permitted to do with that money—and that is to buy more art.

(AAM), and the Association of Art Museum Directors (AAMD) take the position that museums are ethically allowed to deaccession works from their collection. There are no prohibitions, assuming they have clear title, and assuming the gifts are not restricted. The ethical issues are focused on what you do with the money *after* you deaccession. Under the current ethical standards there is only one thing you are permitted to do with that money—and that is to buy more art. You cannot use the money for conservation, to pay the mortgage, to reduce the institution's deficit, or to finance construction. But ethically, museums absolutely can deaccession as long as the money is used to improve the collection.

The issue of restrictions is a separate one. Frankly, I feel the responsible party in these cases is the museum. I do not see unrestricted giving so much the result of a forward-thinking donor as the result of a forward-thinking *museum*. Museums that accept gifts with significant restrictions are not being smart. If a museum's director accepts a work as a gift and accepts restrictions that it cannot be sold, that it will always be exhibited, etc., then he or she is tying the hands of that institution for years into the future. It is not uncommon that in many cases, if not most, museum gifts are only accepted as unrestricted gifts. Frankly, the gift has to be something really remarkable for an institution to accept it on a restricted basis.

Let me add that really forward-thinking donors also include an added endowment to help care for donated artworks. Those are the donors the

institutions *really* welcome. The donor might say, "Here is a \$3 million unrestricted endowment gift to help care for the collection."

The final point I would like to make is that there is no question that provenance can be very sticky. My institution, the James A. Michener Art Museum, went through an experience with a Franz Kline painting we had received as a gift. It was appraised and the donor took a deduction, etc. Years later, we began to suspect that it was not authentic. We have basically buried the piece. We are not going to sell or deaccession it because we have no confidence in its authenticity.

## IMPLICATIONS FOR PHILANTHROPY

**MELINDA TUAN:** I will ask Andrew Swinney to lead our discussion on the implications for philanthropy.

**ANDREW SWINNEY:** I come at this subject from the purely and simply philanthropic side. I was thinking about the fact that philanthropy has become a very competitive business. It used to be that a nonprofit competed with another nonprofit for a donor's cash. Then it eventually competed for their appreciated securities. Now, we are also in competition with for-profits, who manage assets, and want to make fees off those assets. We, the nonprofit, may end up

being an ultimate beneficiary, but only after much machination by the for-profits. As we think about the introduction of competitiveness and the for-profit angle, this took us from a donor who gave cash support, to one who gave appreciated securities, to one who then said, “Take my tangible assets.” It was okay when the tangible asset was a piece of real estate, because we understood what to do with a piece of real estate, and because there was a ready market for it.

But listening to Joshua Rubenstein and Lawrence Shindell talk about the complexities of tangible assets, I ask, *how does a nonprofit in today's world, dealing with today's donor, wrap their minds around all this information?* How does philanthropy take advantage of the value of the collections that are out there, be they art or anything else, without spending a lot of cash that they cannot afford on insurance, or on legal or financial advice?

If my donor has a relationship with their insurance salesman, or their stock broker, that is who they will use for a referral for a financial adviser. They are not going to Joshua Rubenstein or to Jessica Darraby. So, we have not only an unsophisticated nonprofit world that does not have the resources to spend on protecting themselves—both insurance-wise or in terms of getting the right advice—but we have a whole new market of professional advisors who are unsophisticated. Joshua has rightly commented that the U.S. Congress further complicates matters.

I look at this question of tangible assets and I ask, “Where is it going for the nonprofit sector? What does it mean in the long run? Should we just stay out of it?” When you have to dispose of your mother’s estate and nobody wants her possessions, you end up at a thrift store and you get 20 cents on the dollar, and that is the end of it. In those cases, the nonprofit loses 80 cents on the dollar because they were not sophisticated enough to be able to handle the donation.

If Richard Solomon wants to donate a particular artist’s collection to a nonprofit, they may say, “We do not know what to do with it or how to dispose of it, so we cannot accept it.” I run a small community foundation. We have a number of donors. We have a separate limited liability company (LLC) to handle real estate and “tangible assets.” But I do not have anybody on my staff who would know what to do with a collection of jewelry, for example, if it landed on our doorstep—and we are relatively sophisticated. Here again, the nonprofit sector loses out because we lose the value of some of these collections.

Another point I would like to reiterate is that these issues pertain not only to fine art, but to all kinds of collections. Even though Michael Moses has created a tool to measure art, many of the other things people collect currently have no valuation process.

Those are the complexities on the philanthropic side. I look to you financial and legal professionals to educate those of us involved and to simplify the process.

It is the charities that have to understand the issues, and understand how they are going to monetize a donor family's art works.

**WASHBURN OBERWAGER:** I still believe the charities are the key. The charities really command the audience we are trying to reach. It is the charities that have to understand the issues, and understand how they are going to monetize a donor family's art works. It seems to me that we need someone from a large foundation who really understands the issues to be actively involved. They can then work with the charities to spread the word to other nonprofits and to families with collections.

**LAWRENCE SHINDELL:** What our discussions really come back to is educating the philanthropic market. The people who are in the position to provide philanthropy know that there is a cost to every transaction. They know this from the careers that generated the wealth they now have available to transfer. If we can help these individuals understand the nature of the transaction and the value of the legal, risk management, insurance, financial, and other advice that might be necessary for their situation—ultimately the individual can focus on their real passion and their philanthropy. If we can send a message that art can be an enormous source of philanthropy, and that this asset and the transaction must be managed in the same way that one manages other important assets and transactions, then our overall message will resonate.

**MELINDA TUAN:** So the trillion dollar question for us, *literally*, is, 'What does this mean for philanthropy?

How can we translate art as an asset?' How can we help people, whether they are in high, moderate, or lower wealth categories, to understand their opportunities and limitations? Robert Koo, do you have any thoughts?

**ROBERT KOO:** Every nonprofit that I know of suffers from a lack of financial resources. But there are a multitude of external resources out there. If someone comes to you with a gift of jewelry, you should be able to pick up the phone and determine whether it can be monetized *before* accepting the gift.

Many nonprofits, including small colleges, have realized that tangible assets are an untapped market for philanthropic capital. Those groups understand that they can say, "Would you consider leaving us the same legacy, using your collection instead of cash?" to a potential donor who is hesitant to write a check. The development officer involved may know nothing about the intricacies of the process, but he or she should be aware of it. Certainly the people around this table can provide some initial resources.

I cannot tell you how many solicitations I receive by mail toward the third and fourth quarters of every year. I can guarantee that none of them says, "If you collect, let us show you how your collection can help you and us." This is an educational process. People need to be exposed to the relevant information. At a recent regional planning giving council meeting, a few local groups acknowledged that tangible assets are

Many nonprofits have realized that tangible assets are an untapped market for philanthropic capital.

an important tool. They have also educated themselves about resources like the Mei Moses® Annual All Art Index and ARIS' art title protection insurance to mitigate risk exposures for donors and donees.

**LEE STOETZEL:** I would like to point out that the internet might be helpful to smaller philanthropy. Just as Michael Moses' index can be useful to organizations that do not have the manpower to order appraisals when a gift is in question, a parallel tool is the Artnet database. On Artnet, we can browse through objects online for a very modest yearly subscription. We can determine values very quickly, and we could, ourselves, appraise a collection in minutes. Five or ten years ago, it would have been impossible to have this knowledge if you had no resources.

Our insurance company, for example, now accepts a printout from Artnet in lieu of a regular appraisal. This is very useful because nonprofits no longer have to invest \$25,000 per year in appraisals.

**MICHAEL MOSES:** What we wanted to do with the Mei Moses® Annual All Art Index is to give users the opportunity to compare the current situation to 1995 or before. You can use the index to bring a piece's value to the present-day value on the assumption that it performed like the market. It may be up or down somewhat, but in general, using market values gives a pretty good forecast of current worth.

For philanthropic purposes, the trouble with Artnet is that it does not include collectibles to the extent they should be. It is really for art. But for a small institution that has potentially been given a work of art, these databases are just fantastic. There are two or three competitors, which is also great. That could be the opportunity: to find a similar object that sold, and then use an index like ours to bring it up to present-day values. If something similar has been just sold then you do not need us. If it was last sold in 1995, you have our vehicle. It makes life a lot easier even for the smaller institution, and that is the beauty of it.

**BRUCE KATSIFF:** I have learned that some of the smaller auction houses will sell objects without taking a commission if the proceeds are intended for charity. If we could encourage the auction houses—particularly the large ones—to adopt that model, it would provide a profound way to get information to potential donors.

**ROBERT KOO:** What we are doing at Bonhams Trusts and Estates practice is to help educate nonprofits to understand the 'related use' rule, because no one wants to unravel the donor's charitable tax deduction. We will work with nonprofits to do an inventory and to appraise, catalog, and manage the process, and then systematically—after the three-year holding period has passed—to start to annuitize the pieces that may not fit in the collection on behalf of the charities.<sup>8</sup>

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<sup>8</sup> The Pension Protection Act of 2006 increased the holding period from two to three years.

I am presently working with several nonprofits on a number of philanthropic opportunities. These would be gifts by significant, wealthy individuals, who do not want to write checks. The planned giving officer and director of development of these institutions are planning preliminary discussions with their donors and we will be there as third-party advisors—providing advice to the donors and the institutions on the most appropriate ways to structure each gift.

**BRUCE KATSIFF:** If I give an object to a nonprofit, and that object is unrelated to their mission, am I correct in believing that I can take a deduction on whatever it realizes at auction—if that object goes immediately to auction—without the nonprofit ever having held it?

**ROBERT KOO:** In the instance of one small institution, they actually have a related use for the tangible personal property. So, the donor got a fair market value appraisal on the items that were donated to this university. The institution is going to use and show the pieces. In addition, as part of the transaction with the donor, if the institution determines that the purpose served by the donation no longer exists, after the appropriate holding period has passed, the institution could sell the property. Proceeds of the sale would support the original intent of the gift. However, if the institution accepts the gift and turns around and sells it, the donor would receive his or her cost basis as

a charitable tax deduction, and the institution would receive the monetary value from the sale.

**BRUCE KATSIFF:** That I understand. But let us say I am talking about a gift with no related use—for example, a gift of a car to the Kidney Foundation.

**JOSHUA RUBENSTEIN:** In those cases, you deduct the basis of the fair market value of the donation. If it is sold more than three years after the gift was made, the donor recaptures the entire deduction and pays a ten percent penalty on top of that.

**ROBERT KOO:** In the case of the Jonas gift, part of their collection was donated to the Jewish Communal Fund.

**MELINDA TUAN:** The Jonases made the gift to the Jewish Communal Fund with the understanding that the Jewish Communal Fund would sell it at auction. The proceeds went into a donor advised fund that the Jewish Communal Fund manages on the Jonases' behalf.

The Jonases paid no capital gains. In addition, residents of New York who bought items at the auction did not have to pay sales tax because the items were being sold by a nonprofit. That served as an additional incentive to buy. However, the Jonases did not benefit from the full market deduction. As Donald Jonas was quoted as saying in the *New York Times*, “There is a terrible consequence taxwise by doing it



## TRANSFORMING A CHERISHED COLLECTION INTO CHARITABLE GIVING

Sometimes a donor's vision results in an entirely new model of giving that can help shape the lives and plans of countless others. This was the case with Barbara and Donald Jonas, philanthropists and noted art collectors who had decided to increase their giving during their lives. The couple auctioned off 15 of their abstract expressionist artworks in May 2005, using the \$44 million in proceeds to create the Barbara and Donald Jonas Family Fund.

Beginning in the 1970s, Barbara and Donald Jonas began collecting art together—a project that quickly became a passion for the couple. Over the years, Barbara, a former social worker and philanthropist, and Donald, a co-founder of the Lechters Housewares chain, created a collection of art that included works from the top names in contemporary and post-war art: de Kooning, Rothko, and Kline.

In 2004, the Jonases updated their insurance appraisal and realized their art collection had appreciated significantly—by about 20 percent since 2000. “The art was always going to be given to charity at our death,” said Donald, “but as the value of the work kept appreciating, we thought, ‘Why not give ourselves the joy of doing it in our lifetime?’” He added, “I was taught by my mentors to have the fun of doing it myself rather than letting the lawyers do it after I am gone.”

Working with their lawyer, the Jonases decided to donate half of their collection to the Jewish Communal Fund (JCF), a New York-based public charity that administers philanthropic dollars on behalf of donors. They requested the JCF to sell the works through Christie's, with sale proceeds going into their pre-existing donor-advised

fund for future philanthropic giving. The pieces for sale had the advantage of being sales-tax-exempt in most states as they were being sold by a nonprofit organization.

Christie's put the 15 artworks, including a de Kooning abstraction entitled “Sail Cloth,” an untitled painting by Rothko, and Kline's “Crow Dancer,” up for auction in its May 2005 sale, listing the JCF as the seller. All but one of the 15 works were sold, garnering \$44,334,800; setting three Top 10 prices for the de Kooning, Rothko, and Kline; and breaking a number of other artists' records. All the proceeds, which were free of capital gains tax, went directly into the Barbara and Donald Jonas Family Fund to further their philanthropic goals.

“We decided that we wanted to do some things for New York City, where we have lived our whole lives, *during* our lifetimes,” reflected Donald. “If you die rich, you die poor really. You have an obligation to do things while you can. We had every reason to do this sale.” While the Jonases received minimal tax benefits from their donation (original cost as opposed to current value if they had donated the artworks to a museum), it has allowed them, as Donald said, to “do something really worthwhile and to do it as a family.”

Long involved with local arts, education and medical institutions, Barbara and Donald wanted to put as much effort into learning about effective giving as they had when they were novice art collectors. They knew they wanted to be focused in their giving, involved with grantees, and wanted to have a tangible impact. The Jonases engaged Rockefeller Philanthropy Advisors (RPA)

*continued*

## TRANSFORMING A CHERISHED COLLECTION INTO CHARITABLE GIVING, *continued*

to help them identify issue areas where help was most needed. It quickly became clear that the nursing profession sorely lacked philanthropic support and leadership. The more the Jonases and RPA worked together on the issue, the more the Jonases grew concerned and intrigued by the impact of the nursing shortage on patients in New York City. The issue struck a personal chord and the Jonases decided to focus on the improvement of nursing in New York City as their cause.

The city's nurses needed a champion to help tackle complex matters related to the nursing shortage, and they found it in the Jonas Center for Nursing Excellence, a first-of-its-kind philanthropic program dedicated to advancing the nursing profession in New York City. RPA helped the Jonases to establish the Center, to structure grantmaking guidelines, and to deliver on the Center's key goals of serving as a convener and bringing together opinion leaders to develop solutions to longstanding problems.

Just one year after parting with their beloved artwork, Barbara and Donald Jonas were surrounded by hundreds of nurses and advocates as they officially launched the Center in 2006 with 11 grants totaling \$3 million. Six months later, the Center's first symposium on critical issues in nursing drew more than 400 representatives from the academic, practice, policy, business and philanthropic worlds.

Barbara still misses the art that they sold, but says the tradeoff has been more than worthwhile. "These treasures gave us an enormous amount of pleasure for 30 years," she reflected. "Now, because of them, we have the chance to do things that other people are *not* doing in philanthropy."

The Jonases hope that this model—grantmaking paired with advocacy and convening—will attract other funders and will be replicated in other regions of the country. RPA continues to work with the Jonases as they expand the Center's reach and explore future initiatives linked to mental health and disadvantaged children—giving efforts that will involve their own children and grandchildren. Turning 15 works of art into priceless gifts, Barbara and Donald Jonas established a new philanthropic model that will touch untold numbers of lives for years to come.

the way we did. We get no credit for the present-day value of the art—it's original cost only.” But the Jonases added that that loss was mitigated by the fact that the transaction had a strictly charitable intent and they did generate \$44 million for causes about which they care deeply.<sup>9</sup>

**ROBERT KOO:** They also saved almost \$17.5 million in capital gains, which benefits the nonprofit.

I find it very interesting that according to the *Chronicle of Philanthropy*, more than twenty of the wealthiest Americans gave well over \$100 million each. On the other end of the spectrum, *Independent Sector* showed that eighty-two percent of Americans who make less than \$60,000 also give. That is a wide gap. I think the key is how we work with our trusted advisors and how we share the information.<sup>10</sup>

Why would educated people such as ourselves go to an attorney and tidy up our business succession, real estate interests, financial dealings, and leave our collecting passion out in left field? If we look at this asset class and use indices, use Artnet, and work with our charities, I think we can truly change the face of philanthropy.

<sup>9</sup> The New York Times, 14 November 2005, “Turning a Collection Into a Foundation, Without a Big Tax Bill.”

<sup>10</sup> Please see Independent Sector ([www.independentsector.org](http://www.independentsector.org)) and the Chronicle of Philanthropy ([www.philanthropy.com](http://www.philanthropy.com)) for further information.

## IMPLICATIONS FOR PUBLIC POLICY

**RICHARD SOLOMON:** Let me pick up on what I feel is the key to much of what we have been discussing today. Public policy in this country is opposed to collectibles and fine arts. Until that changes, many things will not happen.

There is no reason why you should not be able to easily give art to a hospital or to a school to sell for the benefit that institution. It is a truly short-sighted policy. Why is art, which is now a fiduciary instrument, so restricted in use? If it were possible to get the power structure in this country, all of whom own tangible assets, to realize that they are being put at a great disadvantage, maybe something would change. We have a very hard time getting trustees of museums, for example, to write their local senators and congressmen to tell them that some of these laws should be changed. We need our government to take a very different attitude. When they do, philanthropies are going to be great beneficiaries of that change. I think that all of us should be conscious of that possibility and work toward change.

**JOSHUA RUBENSTEIN:** Let us discuss the elephant in the room. I mean no disrespect to the representatives from the nonprofit community, but charity is afraid of biting the hand that feeds it. There is no bigger incentive to philanthropic giving than a high estate tax. Fewer than one-tenth of one percent of Americans pays an estate tax. The fact of the matter is that this tax affects only the wealthiest of the

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wealthy—those people who are in the position to do the most for society. Forgive me if this sounds socialist, but tax policies of all modern nations are not flat. They are graduated in design to promote socially desirable behavior. We are not building highways with the estate tax. It does not bring in much money.

What the estate tax *does do* is create incentives people otherwise sometimes lack. The government says that we can avoid estate tax in three ways, all of which we deem to be socially responsible. (1) Do not leave impecunious surviving spouses. The government does not want to have to put them on welfare, so if you leave money to your spouse there is no tax. (2) Promote charity because tax dollars go only so far. Since you do not want to pay taxes, give it to some other venture so that the government does not have to fund it. Your donation means that social welfare programs, art museums, and other entities, will be funded by private dollars. (3) Give your wealth to your children during your lifetime, and not when you die at 110 and they are 92 and senile.

Unless you are Bill Gates and have a social conscience, people do not give to charity if it does not save them money, and people do not give their money to their children now if it does not save them any money. People love to hoard and to have control. Nonprofits are taking it on the chin already. Reforms are only making it worse. The estate tax reform has been a travesty. The income tax reforms and the Pension Protection Act are beyond a travesty; they are downright anti-charity.

Charities have to look donors in the eye and say, “You must look at the bigger good. I am sorry if your tax rates are going up. You are the guys who can afford the planning. Help us out here.”

**MELINDA TUAN:** Does someone want to respond to Joshua’s statement?

**BRUCE KATSIFF:** The problem has been the conflict between the perceived self-interest of trustees and the interest of the institutions. That is what has stood in the way of institutions taking the position against, for example, elimination of estate taxes. There are few institutional directors who are going to stand up and say, “Best not eliminate estate taxes because it is going to devastate philanthropy.” They have to face all of their trustees who would benefit from the elimination of those same taxes.

**RICHARD SOLOMON:** The real question is, “How were you brought up?” If you were brought up in an environment in which charity or philanthropy was part of your makeup, starting with support of your school and expanding from there, then it will always be of interest to you. Our country has a tremendous tradition of philanthropy. But unless the government takes a position to encourage philanthropy, people with the bent will not have the stimulus.

**JOSHUA RUBENSTEIN:** One of the problems is that the government is going after a butterfly with an

Our country has a tremendous tradition of philanthropy. But unless the government takes a position to encourage philanthropy, people with the bent will not have the stimulus.

Uzi. What they are truly worried about is that you were giving to charity just to avoid the capital gains tax. But the government did not have to pick on art this way. They already have similar rules for assets that are under contract-of-sale. If you have stock in a closely-held corporation that is subject to a buyout, and you then transfer it to a charity before the closing takes place, you have to pay the capital gains tax even though it was technically sold by charity. They could have applied the same rule to art. But there is a fear of art. I think that is where the educational process needs to begin. Art should be treated as though it were any other asset, but not worse.

**NANCY GABEL:** I think Joshua has hit the nail on the head. From the perspective of those of us in the room who are lawyers, we really need Congress to do something. We need to build a grassroots effort, beginning here. We need to continue to work with each other, and to learn from our various experiences.

**JESSICA L. DARRABY:** I have a boutique firm. We always look for synergies with people—from people at other firms, to advisors and wealth management people, to museums, galleries, and private dealers. Providing opportunities for clients means opportunities for philanthropy.

What I find of note is that in our pre-election campaigns, not one candidate—Republican or Democrat—has even mentioned an arts policy. And although I agree with you that we need to have this or

that tax law amended, I think the bigger picture is more important. We are one of the only countries in the world that does not have a cultural arts policy. Without such a policy, changing the tax code seems incredibly complicated. If we had a policy, or at least a dialogue around the arts, then maybe we could initiate some of the changes we have discussed here. I think we should all bear that in mind as a goal.

**JOSHUA RUBENSTEIN:** I remain more convinced than ever that we really have two groups to educate: mid-range potential donors and government. With regard to the potential donating public, it is logical for them to make philanthropic gifts, particularly as tangible property becomes a mainstay of people's holdings.

With regard to educating government, we cannot leave this to anyone else because nobody knows more about the subject than we do. As tangible assets become more and more a portion of what many people own, government has to stop looking at them as the two-headed monster. It needs to find an appropriate way to look at them. They are not like stocks and bonds. You do not buy AT&T stock because you like the way the certificate reads. You buy it because you like something about the company and you think you could make some money off of it. But with real estate, for example, it is more than a financial investment, it is buying a *home*. People tend to buy houses to which they are emotionally attached. Yet nobody questions that real estate is also a financial investment—perhaps

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one of the biggest investments any of us will ever make. Maybe art has to be perceived more like real estate: something that is a mixture of a good investment and passionate feelings, and about which the government should not feel threatened.

## CONCLUSIONS

**ANDREW SWINNEY:** When I started down this path with Robert Morrison and Jack Ginter, to figure out how to use collections for philanthropic purposes, I never realized the number of challenges that exist, at the government, tax, and insurance levels.

What I take away from this is that there is a huge opportunity to educate individuals and nonprofits. In addition, there is an opportunity to educate the professional advisors to whom individuals go. The breadth of advice around managing money and estates is vast and yet very thin in terms of expertise when it comes to philanthropic issues.

We were thinking of one publication, but I think there is opportunity for several, each focused on different audiences. To Richard Solomon's and Joshua Rubenstein's points, if we come together, whether with the individuals who own the art, the nonprofits who want it, or the professional advisors who are the middlemen, we need to tackle government and advocacy around how collections—not just of fine art, but of collectibles as well—can positively impact philanthropy.

The government is cutting back. Corporations are cutting back and going global. Philanthropy is becoming more critical to the welfare of any community. If we have an opportunity not only to educate, but to *advocate* for change, then we will have moved the needle dramatically.

**ROBERT MORRISON:** As I mentioned at the beginning of our discussion, collecting for me has been both a voyage and a passion. As a collector, I now realize that it is also an obligation and a responsibility. I have an obligation to the extraordinary artists and mentors who have guided me through this journey to make sure the collection lives on. And I have a responsibility to honor the artistic and fiscal value of the work by finding good homes for parts of my collection. But I also wish to leave a legacy to my favorite charities by using the “hidden” value of my pieces—a goal I will achieve with the guidance of various advisors. Ultimately, I wish to ensure that my collecting passion is transmitted to my descendents and to other collectors.

In closing, I would like to quote the Philadelphia Foundation's slogan—“Connecting people who care ... with causes that matter.” After today's session I would amend that to read, “Connecting people who care... with the equally passionate and knowledgeable experts who can connect them with the causes that matter.” That to me would be the opportunity I see for philanthropy as we leave this session: to help collectors to build on their passion for art in order to leave a legacy.

As a collector, I have an obligation to the extraordinary artists and mentors who have guided me through this journey to make sure the collection lives on.



**MELINDA TUAN:** It has been a pleasure moderating this symposium today. On behalf of Rockefeller Philanthropy Advisors, I would like to thank everyone for participating and sharing their professional and personal insights on this topic of transforming art and collectibles into philanthropic assets. Clearly, this conversation is just the beginning of what will hopefully be more dialogue between members of this group and the fields of art, law, finance, and philanthropy. I still find it amazing that there are over one trillion dollars of art and collectible assets in private collections. What is even more amazing to contemplate is the impact we could have if we encouraged collectors to contribute even a portion of their collections for investment in nonprofit organizations and in improving the lives of countless others.

**JACK GINTER:** Let me say thank you to everyone who has made the commitment to be here. We are most appreciative of that effort.

Thank you to Nancy Gabel, Andrew Swinney and Robert Morrison. This day could not have happened without Nancy or Robert, and Andrew has been supportive of this effort since day one—including by calling me at seven a.m. today to tell me to be in my office for a radio interview about the symposium. Finally, but certainly not least, thank you to Melinda Tuan and to Rockefeller Philanthropy Advisors’ commitment to the project. Melinda quickly jumped into the subject matter to be able to moderate this

session. We also want to thank Rockefeller Philanthropy Advisors for putting the proceeds into published form.

## NEXT STEPS FOR THE COLLECTOR: PLANNING YOUR COLLECTION'S FUTURE

*Collectors have spent many passionate years creating and developing a valuable collection. Most likely they have spent far less time thinking about the future of their collection than they have about the future of their financial and other assets. Here are some helpful steps that can guide a collector and collection on a comfortable path:*

**Reflect.** How and when did the collection begin, and, particularly, how did the collection grow? Look at the depth of a collection. If there are multiple collections, which is the collector most passionate about? Has there been a discussion with your family and heirs about the collection? Would they want to keep the entire collection or part of it? What is the collection's future; are all parties familiar with all the options? Who would want to enjoy the collection and will they?

**Evaluate.** Is there a detailed review and evaluation (cost basis) for each piece in the collection? What would each item be worth today? Has the collection been evaluated and appraised by certified and qualified experts? Are there documents certifying each piece and its provenance? Is the collection properly protected and insured? What other steps have been taken to ensure its safety and protection?

**Assess.** Have all parties discussed the collection openly and in detail with all family members and advisors? Are they aware of its current value and possible future interests and options for it? If there is a decision to sell or donate parts, or all of the collection, is everyone familiar with the potential tax implications? If the entire collection is passed on to heirs, do they know what the potential tax implications are for them?

**Plan.** Has there been a discussion about the future desires for parts of the entire collection: family, heirs, friends, college, university or other institution, or a favorite charitable organization? What help and guidance has been sought in designing a financial and legal plan that offers options for a collection?

**Donate.** Is there a lifetime charitable plan in place? What charitable or philanthropic organizations is the collector equally passionate about? Which ones would really want parts of or the entirety of the collection? Does a favorite charity know how to properly evaluate and use the collection? Can the charity assist in designing a philanthropic plan for the collection?

## GLOSSARY OF TERMS

**Charitable Foundation:** a charitable foundation is established as either a tax-exempt trust or a nonprofit corporation. There are two types of foundations—public and private. Public foundations derive their funding from a number of sources, including private foundations, government sources, and individual donors. Although they may provide direct charitable services to the public as other nonprofits do, their primary focus is on grant making. In order to maintain their public status, these foundations must pass one of two public support tests as defined by the IRS, both of which are designed to ensure that a charitable organization is responsive to the general public rather than a limited number of persons. A private non-operating foundation is a nongovernmental, nonprofit organization with funds (usually from a single source, such as an individual, family or corporation) and program managed by its own trustees or directors, established to maintain or aid social, educational, religious or other charitable activities serving the common welfare, primarily through grant making. U.S. private foundations are tax-exempt under § 501(c) (3) of the Internal Revenue Code and are classified by the IRS as a private foundation as defined in the code. Private non-operating foundations must comply with a range of regulations and pay a modest tax on net investment income.

**Charitable Lead Trust:** a charitable lead trust is a split-interest trust in which the beneficial interests are divided between individuals and charity. One or more qualified charitable organizations receive payouts, for a fixed number of years or for the life or lives of one or more specified individuals, after which the remaindermen receive the property either outright or in continued trust. Generation-skipping transfer tax considerations can arise if, for example, the remainder interest is to pass to grandchildren or more remote descendants. In addition, the charitable lead trust is irrevocable. Accordingly, after the creation of the trust, the grantor cannot change the trust's terms, including the amount of the charitable payout.

**Charitable Remainder Trust:** a charitable remainder trust is set up to initially make payments to the donor and/or beneficiaries for a set period of time, after which, the remainder of the principal is designated for charity. The term of the non-charitable interest may not exceed 20 years or the life or lives of the individual beneficiary or beneficiaries. The remainder interest, which must not be less than 10% of the net fair market value of the property contributed, may be paid outright to one or more charities, or kept in a continuing, wholly charitable trust.

**Charitable Split Interest Trust:** a charitable split interest trust (either a charitable remainder trust or a charitable lead trust) can make annual distributions to both noncharitable and charitable entities, while providing tax advantages for the donor.

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**Donor Advised Fund:** a donor advised fund is a philanthropic vehicle that is set up under the tax umbrella of a public charity. Donor-advised funds are irrevocable gifts that can be set up with relatively modest amounts of money and allow donors to make recommendations for gifts to charity during their lifetime, while also providing tax advantages and the convenience of having a public charity provide the oversight and the legal framework necessary for maintaining the fund's tax exempt status.

**Irrevocable Trust Agreement:** an irrevocable trust agreement is simply a trust that by its very definition cannot be revoked or modified in any way.

**Private Operating Foundation:** is a private foundation whose primary purpose is to conduct research, social welfare, or other programs as determined by its governing body or establishment charter. Operating foundations use the bulk of their income to provide charitable services or to run charitable programs of their own. They usually make few, if any, grants to outside organizations. To qualify as an operating foundation, specific rules, in addition to the applicable rules for private foundations, must be followed.

**1031 Exchange:** a taxpayer is generally required to recognize gain on the sale of property if the sale price is more than the cost basis. However, Internal Revenue Code § 1031 provides a "like-kind exchange"

exception to this general rule with regard to the exchange of certain types of property. The like-kind exchange strategy does not alleviate the taxes due, but rather allows for the deferral of capital gain until the exchange property is disposed of in a future taxable transaction. At such time, the tax is then realized. A 1031 exchange refers to the Internal Revenue Service Code § 1031 governing the exchange of like-kind property for business or investment only. The IRS defines like-kind property as being "of the same nature or character even if they differ in grade or quality."<sup>11</sup> If business or investment property is exchanged for like-kind property, then there is no gain or loss recognized under the IRS Code § 1031. If the exchange includes property that is not of like-kind, then gains are recognized.

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<sup>11</sup> *There are some subtleties as to what qualifies as like-kind, and what types of exchanges are permitted. Please see the Internal Revenue Service's website, [www.irs.gov](http://www.irs.gov), for more information on the subject.*

## about the editor

**Donzelina A. Barroso** has been a philanthropic consultant at Rockefeller Philanthropy Advisors since 1999. Ms. Barroso advises the JB Fernandes Memorial Trust I on grantmaking in Portugal and Madeira and also works on educational funding strategies for disadvantaged Portuguese communities in North America. Ms. Barroso has edited and authored a number of Rockefeller Philanthropy Advisors publications. In 1998, her interview with Nobel prize winning Portuguese author, José Saramago, was published in *The Paris Review*. She received a B.A. from Barnard College in Medieval and Renaissance Studies, and is currently an MPA candidate at NYU's Robert F. Wagner School of Public Service.

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