

# Donating art: Considerations for the private collector





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# Foreword

For many US-based art collectors, donating artworks to nonprofit and charitable institutions is a vital part of their collecting practice. Those with an extensive collection, as well as the time and means, may find it rewarding to establish a private museum. But for most collectors, gifting their collection or individual artworks to an organization they care about and whose mission they wish to support is more manageable and appealing. To boot, such donations often come with benefits associated with charitable giving.

A desire to give back to their community is what drives many collectors who would like the public to see, enjoy and learn from their collection. For those who do not wish to sell their art but are looking to downsize their collection — perhaps due to the consolidation of properties or a change in collecting focus — donating can be an advantageous solution. It can also be a significant component of estate planning, especially when family members may neither be interested in nor in a position to manage a loved one's art collection. Knowing that the artworks they have chosen and cared for will be preserved, accessible and appreciated by the public can provide great satisfaction and solace to a collector.

Gifting artwork and other collectibles, however, is not as simple as one might expect. For the most favorable outcome, for both themselves and the receiving institution, collectors benefit greatly from advanced planning and careful reflection before initiating a donation.

From working with an institution, to considering how you wish your legacy to be recorded, to understanding IRS regulations, this guide offers a broad overview of the donation process and important factors for collectors to take into consideration. It is not intended to provide legal or tax advice. It is recommended that collectors consult with their lawyer, accountant and art advisor before donating artwork.



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# Generosity of donors

Museums and other charitable organizations in the United States rely heavily on the generosity of donors. It is estimated that upwards of 90% of all museum art acquisitions have been gifts or bequests.<sup>1</sup> In the 19th and 20th centuries, wealthy collectors and philanthropists – including Henry Clay Frick, Andrew Mellon and J.P. Morgan, to name just a few – helped through their art donations to establish and galvanize the dramatic growth of US museums. Motivated by civic responsibility and arguably the prestige that accompanied such gifts, these collectors and many other art patrons advanced philanthropy for the public trust by also establishing and supporting nonprofit hospitals, universities, libraries, archives, parks and other cultural organizations. Donations of art and collectibles, including manuscripts, prints and posters, archival photographs, and many other types of objects, shaped the cultural infrastructure of the United States.



Today, as prices for art reach into the stratosphere, nonprofit collecting organizations depend more than ever on the benevolence of private collectors to help them continue to grow and diversify their collections. Some collectors, partnering closely with the director and curators of an institution they support, purchase artwork on behalf of an organization. In the heated contemporary art market, where there is fierce competition among collectors for primary market works by highly in-demand artists, galleries can make museum donation compulsory in exchange for access to an artwork. Collectors may be obligated to buy one work for a museum (selected by the gallery) in order to gain access to one for themselves. Or, as a pre-requisite to access, they may be compelled to make a promised gift of the artwork they acquire within a specific time frame, often within 1–5 years. While a museum’s acquisition of an artist’s work can have a positive impact on that artist’s career, this form of obligatory donation can be costly and less satisfying for the collector.

<sup>1</sup> Association of Art Museum Directors. “Art Museums, Private Directors, and the Public Benefit.” Jan. 2007.

But helping an institution meet its mission and fill significant gaps in its existing collection can be extremely rewarding. Some collectors supplement their gift of artworks with cash donations to support endowments, organizational and collection care, and programming, ensuring that the impact of their art donation is far-reaching and long-lasting. Since 2012, Jorge Pérez, for example, has donated money and hundreds of artworks by Latin American and Latinx artists to the Pérez Art Museum Miami, resulting in the institution changing its name in his honor.<sup>2</sup> Other collectors opt to bequest their collections to institutions. One remarkable example is the collaborative bequests that three Dallas-based couples have promised to the Dallas Museum of Art. Constituting about 900 works of modern and contemporary art from the collections of Marguerite Hoffman and her late husband Robert, Cindy and Howard Rachofsky, and Deedie and Rusty Rose, this gift, which also includes funding and real estate, is a gamechanger for the institution.<sup>3</sup> These donations reflect the donors' deep commitment to giving back to their communities and to bolstering their chosen museums' prominence as world-class institutions.

With the art market's continued strength and expansion, collectors may decide that proceeds from a sale, as opposed to donation of the artworks themselves, can have more of an impact along with potential tax benefits.<sup>4</sup> Some collectors and artists (typically along with their galleries) support their chosen charities by donating artworks to be sold to raise funds. Benefit auctions, due to their altruistic purpose, can encourage more spirited bidding as buyers recognize that their acquisition also supports a good cause. The possibility for strong returns at auction may also inspire philanthropically focused collectors to decide to sell their collections at auction rather than donating the artworks themselves to an institution. The auction of Microsoft co-founder Paul G. Allen's expansive collection at Christie's in November 2022, which saw a total return of over \$1.5 billion, is a case in point. Allen, who signed The Giving Pledge, stipulated in his will that more than 150 masterworks from his collection would be sold to benefit a variety of charities.<sup>5</sup> Other collectors, like Barbara and Donald Jonas, have donated artworks to a private charity – in their case the Jewish Communal Fund – that administered philanthropic funds and agreed to sell the artworks at auction. The record-breaking sale proceeds went into the fund and incurred no capital gains taxes.<sup>6</sup>

<sup>2</sup> Loos, Ted. "Jorge M. Pérez to Give \$10 Million to Pérez Art Museum Miami." *The New York Times*, 29 Nov. 2016.

<sup>3</sup> Spears, Dorothy. "When Serious Collectors Band Together." *The New York Times*, 28 Mar. 2007.

<sup>4</sup> Reyburn, Scott. "Why the Global Explosion of Billionaires Will Keep Auction Houses Afloat—for Now." *The Art Newspaper*, 11 Nov. 2022.

<sup>5</sup> Pogrebin, Robin. "Paul G. Allen's Art at Christie's Tops \$1.5 Billion, Cracking Records." *The New York Times*, 10 Nov. 2022.

<sup>6</sup> Kino, Carol. "Turning a Collection into a Foundation, without a Big Tax Bill." *The New York Times*, 14 Nov. 2005.

# Donation criteria

While nonprofit and charitable organizations depend on the beneficence of individual donors, they are also mandated to uphold their mission and required to follow strict criteria when accepting gifts of artwork. Prospective donations undergo a formal review process by an institution's acquisitions committee, which typically consists of the director, curators, trustees, collections management staff and outside advisors. These reviews tend to occur just a few times a year, so the full donation process can take quite a bit of time. Ultimately, the committee determines if the proposed gift meets the institution's obligation to its community. There are many factors that go into this consideration, and it is helpful for a prospective donor to understand these deliberations.

As public institutions, nonprofit museums and other collecting organizations serve as stewards of their collections and commit to its display, care and scholarly promotion. Whether it is for a history museum, a municipal park or a library, every object added to a collection must fit explicitly within the institution's collecting priorities and curatorial focus. Organizations evaluate the quality of the artwork, assessing its aesthetic, historical and educational characteristics, and ask how it would fit into the collection. For example, does the artwork fill an important gap in the collection or would it be considered redundant? Does the artwork deepen and/or strengthen a particular component of the existing collection? Or does it open up an entirely new collecting focus, allowing the organization to represent a desired subject within its mission? Many large collecting organizations maintain various categories of collections, and while some objects may not be deemed worthy of display, they could contribute to an institution's commitment to scholarship and teaching. Therefore, another question is whether the object is best suited for exhibition, research or educational purposes.

The condition of the artwork, any special accommodations and security measures it may require, and whether the institution can properly care for and preserve the object are other key considerations. Donors should accompany any art donation with records of past conservation treatments. Space – more pointedly the dearth of it – is also of utmost concern. Most museums are able to show just a small percentage of their permanent collection at any time due to limited exhibition space. Compounding this is the scarcity of storage that most collecting institutions have, so they must be especially fastidious in accepting donations.

An institution will also conduct due diligence on a proposed donation, ensuring authenticity of the artwork and that all legal and ethical standards are met. A donor needs to be able to show clear title of ownership and should provide any information they have on the object's provenance (history of ownership), exhibition and publication history. Where applicable, donors should also provide export documentation and relevant certificates of authenticity. The institution will also evaluate the reputational standing of the donor and consider the collector's motives for donating.

Finally, it is important that the collector shares any relevant information they may have about an artwork. This could include technical details or contextual background an artist or previous owner may have shared. Interpretive evidence and first-hand accounts about the object can be extremely valuable for an institution's analysis of the artwork.

# The right relationship

There are more than 35,000 museums in the United States and countless other nonprofits that accept donations of artworks.<sup>7</sup> Finding an organization that is the right fit for a donor involves several factors. At the onset, for collectors looking to gain tax benefits from their donation, it is essential that they give to a qualified charity (this is discussed in greater detail later). When considering a gift specifically to a museum, collectors should give precedence to those that are accredited by the American Alliance of Museums (AAM), which recognizes institutions engaged in industry leading practices.

Donations are more easily facilitated when a collector has a sustained relationship with the receiving institution, particularly as museums and charitable organizations rarely accept unsolicited donations of artworks. Exploring their desire to donate with an organization's director and curators will allow the collector to express the intent behind their gift. It will also allow the institution to discuss with the prospective donor the ways they see the artwork fitting within their existing collection and how they anticipate being able to utilize it in the future. These conversations may reveal that the institution requires financial support to properly accommodate a donation. Collectors might consider providing funding to cover necessary resources, including collections management, curatorial expertise, conservation and preservation, and exhibition and storage space. Alternatively, in consultation with the institution, they may move forward with the understanding that some of the donated artworks may be sold (after the requisite holding period as described below) to offset the cost of care and maintenance. As negotiations around a donation evolve, it is best when the donor and organization feel that they are in partnership.

A cooperative approach is also the most pragmatic. It can be difficult for collectors to relinquish control as to how, when and where an artwork is displayed, especially one they may have loved and spent a significant amount of time, energy and money on acquiring. Some donors wish to place specific stipulations and/or restrictions around their gifts. But most institutions require that donations are unconditional and irrevocable. For a variety of possible reasons (including space restraints, shifting curatorial prerogatives and institutional priorities), they will typically not guarantee that artworks will be on view at any particular time or that an entire collection will be shown together. While there have been special occasions when organizations have acquiesced to a collector's requirements, such arrangements involve lengthy legal negotiations.



<sup>7</sup> Institute of Museum and Library Services. "Government Doubles Official Estimate: There Are 35,000 Active Museums in the U.S." 19 May 2014.



It is recommended to have an experienced art advisor included in the discussions. They can be helpful in navigating the landscape of possible recipients willing to accept the gift that meets with the donor's conditions. They can also facilitate negotiations with the recipient organizations.

Even if a collector has a sustained relationship with an institution, their donation (or parts of it) may be declined if artworks of similar type and quality are already represented in the collection, do not align with their specific curatorial and educational priorities, or exceed institutional care and storage capacity. If an institution undergoes a change in leadership, there may be a corresponding shift in vision that may no longer accommodate a collector's donation.

For those who do not have a relationship with an institution, or if a donation is declined, there are other ways to find an organization that might welcome a donation. An art advisor can help make connections and facilitate introductions. Galleries that work with or represent an artist or estate whose work a collector is looking to donate may also be familiar with institutions looking to bring a work into their collection. A new digital platform founded by veteran museum professionals offers collectors looking to donate in North America a wide net to find an institution. For a fee, Museum Exchange manages all the logistics of the donation process, from identifying an organization to securing IRS-approved valuations to overseeing shipping. As its name suggests, this platform connects donors and museums, and since 2022 the platform also connects donors with hospitals, universities, libraries and other nonprofit organizations looking for art donations.



# IRS regulations

Donations of artwork to charity can be wonderful gifts for the nonprofit organization and give the donor a sense of happiness and satisfaction that the piece can potentially be accessible and enjoyed by a wider audience. However, donations of artwork and other collectibles are not as straightforward as one might expect. For example, the IRS regulations for donations of artwork are different if you are the creator of the artwork, if the donation is being made to a private nonoperating foundation, or if the use of the artwork by the nonprofit does not relate to the nonprofit's charitable mission.

## Classifying donors

Donors can be classified into different types which can impact the charitable tax deduction the donor receives for the donation of the artwork. For the artist, the IRS views the artwork they create as their professional trade. Basically, this means artwork is treated as income-producing property rather than capital gain property, and therefore no charitable tax deduction is available for the artist to donate their own work.

For the collector of the artwork, if certain conditions are met by both the donor and the recipient organization, donations of artwork may garner a charitable tax deduction of the fair market value and the donation may not be subject to capital-gains tax treatment. From the donor's perspective, the artwork must be deemed to be long-term capital gain property, meaning that the donor owned the artwork for more than one year prior to the donation. If the value of the artwork is \$5,000 or greater, the IRS requires the donor to obtain a qualified appraisal to determine the fair market value of the deduction. The IRS provides guidance as to what constitutes a qualified appraisal; and in many instances for artwork valued at \$50,000 or more, the IRS Art Appraisal Service may refer the appraisal to the Commissioner's Art Advisory Panel for further review.

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Whether an art collector donates during their lifetime or as part of their estate plan, the requirements for the donor and the recipient nonprofit organization are the same. Donating artwork as part of the estate plan gives the donor the ability to enjoy the artwork privately during their lifetime. Donating during one's lifetime, however, may give the donor the ability to see the public enjoying the artwork. Regardless of the timing of the donation, it is important that the agreement between the donor and the nonprofit be negotiated and documented even when the gift is a bequest.

## Classifying recipients

When donating to a qualified public charity, the donor may receive a charitable tax deduction of the fair market value of the artwork, limited to 30% of the donor's Adjusted Gross Income (AGI), and the donation may not be subject to capital-gains tax treatment. The artwork must also be put to a use related to the charity. This means that the nonprofit's use of the artwork must be related to its tax-exempt purpose. For example, a university that offers classes in art restoration techniques that receives artwork and uses it as an educational tool would meet the "related use" condition. If that same donation was made to a food bank, it most likely would not meet the condition, as it's unlikely that the tax-exempt purpose of the food bank is to exhibit or restore art. For artwork valued below \$5,000, the period of related use is at least one year, while for artwork valued at \$5,000 and above it is at least three years. If the recipient nonprofit does not meet the related use condition for the specific period of time, the donor would not receive the fair market value for the donation but the lower of fair market value or the donor's cost basis.

Donations of artwork to private operating foundations are somewhat similar in nature to those donated to qualified public charities. Private operating foundations engage primarily in direct charitable activities, operating charitable programs or directly providing charitable services; its primary activity is not grant making. They are typically funded by one funder or a small group of family members. Unlike private nonoperating foundations, private operating foundations are not subject to the minimum payout requirements. Rather, they must spend at least 85% of their adjusted net income on their exempt activities and meet one of three other specified tests. The related use rule would still apply to donations of artwork to a private operating foundation. The artwork must be held by the donor for more than one year so that typically the donor may receive a charitable tax deduction of the fair market value of the artwork, limited to 30% of the donor's AGI with no resulting capital-gains tax treatment.

Donations of artwork to private nonoperating foundations, those that engage primarily in grant making activities, will typically garner a charitable tax deduction of the cost basis of the artwork, limited to 20% of the donor's AGI. The private nonoperating foundation must also determine whether the artwork is held for charitable purposes or non-charitable purposes. This is important because the minimum payout requirement of private foundations is predicated on certain values of the non-charitable assets. The IRS provides guidance to determine whether an asset is considered a charitable asset. Basically, the asset must be used (or held for use) directly in carrying out the exempt purpose of the foundation. If the artwork is held for charitable use, no additional valuation is required, as the value to the foundation is provided by the donor based on the qualified appraisal for artwork valued at \$5,000 or more. In addition, direct expenditures for maintenance, storage and insurance of the artwork held for charitable purposes are deemed to be qualifying distributions, meaning such expenditures also qualify toward the foundation's minimum payout requirement. If the artwork is deemed to be a non-charitable asset, the fair value is still provided by the donor based on the qualified appraisal and the value is included in calculating the minimum payout requirement. Any direct expenses for the upkeep of the non-charitable assets can be deducted against the foundation's investment income. In addition, the valuation must be updated annually. For subsequent years' valuations, the date of valuation is the same date as the original valuation, and a qualified appraisal is not required to determine the valuation.





# Your legacy

Before donating, every collector should consider their legacy and how they would like to be acknowledged for their gift. This includes, from the most basic, the credit line that accompanies an artwork when it is exhibited, to the more complex, such as naming rights for a gallery or a special exhibition devoted to the donation. A donor may wish for their donation to be accompanied by a publication, in either physical form or online, or some other published acknowledgment. Some collectors participate in a recorded interview that documents their stories about how and why the collection was built, allowing the donor to archive their role in forming the collection. A donor's wishes should be discussed with the receiving institution as part of the donation process.

Drafting a statement of intent behind their donation and their expectations of the receiving institution is a useful exercise for a collector seriously considering a donation. Having one's financial, legal and art advisors review or contribute to such a statement can help a donor further clarify their wishes and avoid potential future disputes.

# Expert advice

It is recommended that donors consult their legal counsel, tax professional and art advisor when contemplating donations of artwork to nonprofits. This group of experts can be helpful in negotiating and documenting the transaction to ensure there are clear, enforceable terms. While the regulations vary and compliance with them can be onerous, a gift of artwork can be priceless and well worth the effort.



## Collector's donation sample checklist:

- Understand how IRS regulations impact your donation
- Ensure you meet the IRS guidelines for a qualified appraisal for your donation
- Consider the timing of your donation – do you wish to donate the object now or leave a bequest?
- Have clear title and be able to provide provenance, exhibition and publication histories of each object
- Record any special stories you know about the artwork or anything the artist might have told you
- Understand and memorialize the terms and conditions of your donation and ensure the nonprofit agrees to these terms in writing
- Think about how you would like to be acknowledged by the receiving institution



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