

Using a Private Foundation to Preserve an Artist's Legacy

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Thoughtful estate planning is essential for artists seeking to ensure the long-term preservation, management, and presentation of their lifelong work. Although executors and trustees can competently administer the legal and financial aspects of an estate, they may lack the specialized knowledge required to oversee a significant body of artistic work. Establishing a private foundation—whether in the form of an operating foundation that directly manages, displays, and loans artwork, or a non-operating foundation that supports public charities—can provide a structured and durable mechanism for stewardship. By appointing directors who are artists or professionals familiar with the creator's oeuvre, these entities can administer, conserve, and promote the artwork in a manner consistent with the artist's intent. As a result, private foundations can serve as an effective vehicle for extending an artist's legacy and ensuring that their work remains accessible and properly managed for many years beyond the administration of the estate.

Structure of a Private Foundation: Corporate vs. Trust

A private foundation can be established in either trust format or as a nonprofit corporate entity. Choosing the format of the entity depends on desired flexibility, liability, and administrative burdens. Nonprofit corporations are generally preferred for their flexibility, greater liability protection for their directors, and ease of modification. Trusts are simpler to form but are more rigid, often requiring court approval to amend, and are best for straightforward non-operating or grant-making foundations.

Nonprofit Corporations

- **Flexibility:** Allows for amending bylaws, changing the charitable purpose, or moving the location — all without court intervention.
- **Liability:** Offers better protection for its officers and directors.
- **Structure:** Requires a board of directors, regularly scheduled meetings held at least annually, minutes, and formal state filings.
- **Best for:** Foundations with complex activities, multiple individuals in charge, or that may evolve over time.

Trusts

- **Simplicity:** Easier and less expensive to set up, with fewer administrative requirements such as regular meetings and minutes.
- **Control:** Usually in the hands of one or more trustees who are appointed by the donor, who provides rigid guidelines in the governing instrument that are difficult to change.

- **Modification:** Amending a trust often requires court approval, making it less flexible and adaptable to change.
- **Best for:** Simple, grant-making foundations with a specific, unchanging purpose.

What is the difference between operating foundations and non-operating foundations?

An operating foundation is a private foundation that focuses on direct service by running its own programs in support of its charitable purposes, while a non-operating foundation is a charitable entity that distributes funds to public charities rather than operating its own programs.

An operating foundation actively conducts its own programs, such as operating a museum, library, or research facility. An operating foundation may also provide grants to individuals, provided that those grants are within the foundation's purposes. It must meet IRS "income" and "asset/service" tests to prove it is actively running programs rather than just holding assets. Generally, an operating foundation offers higher tax deductions for donors (up to 50%-60% of adjusted gross income) than a non-operating foundation. However, an operating foundation must spend at least 85% of its annual income on direct, active charitable activities.

A non-operating foundation exists to support one or more specific public charities. It is typically funded by one or more individuals and focuses on grant-making to other qualified non-profits. Deductions to a non-operating foundation are limited to 30% of an individual's adjusted gross income, and the foundation is required to pay out at least 5% of its assets annually to public charities.

Since most artists' foundations are formed to support and promote an artist's legacy, they are usually formed as operating foundations unless the foundation is formed to sell the artist's works and donate the proceeds to public charities.

What are the duties and responsibilities of the board of directors of a private foundation?

The board of directors of a private foundation leads the organization by defining its strategic vision, managing operations, and ensuring financial, legal, and ethical compliance. They are responsible for overseeing the officers of the foundation, who are the face of the organization with respect to fundraising, stewarding donors, cultivating relationships, and overseeing grantmaking programs that align with the foundation's mission. The board of directors is usually composed of at least three individuals.

Some of the key responsibilities of the board of directors include:

- **Mission & Strategy:** Developing long-term goals, policies, and strategic plans for the foundation.
- **Financial Oversight:** Managing the foundation's investment portfolio, approving budgets, reviewing audits, and ensuring tax compliance.
- **Grantmaking and Programs:** Developing grant guidelines and monitoring the distribution of funds.
- **Leadership Oversight:** Hiring, supporting, and evaluating the officers of the foundation, actively identifying and managing potential conflicts of interest, and ensuring transparency and accountability.
- **Governance:** Recruiting new board members, planning for succession, and maintaining foundation records.

How do the foundation directors and officers interact with an artist's works and intellectual property?

The directors and officers are responsible for overseeing the management, preservation, and use of both the foundation's physical artworks and its related intellectual property rights. Their authority and responsibilities are defined by the foundation's governing documents, applicable state nonprofit law, and federal tax-exempt organization rules.

Some examples include ensuring the proper care, conservation, storage, and security of the foundation's art collection; overseeing how copyright or other intellectual property rights to the artist's work are licensed, enforced, or shared; ensuring

that all interactions with the artwork and intellectual property comply with the IRS's private foundation rules.

Are the foundation directors and officers permitted to donate the artist's artwork, organize exhibits, or sell the artwork?

In general, the directors and officers of a private art foundation may donate, exhibit, or sell artwork only to the extent that those activities are consistent with the foundation's governing documents, tax-exempt purposes, and fiduciary duties. A private foundation's charter, bylaws, and mission statement typically define how the artwork may be used and the scope of the directors' and officers' authority.

Directors and officers may donate artwork if the donation furthers the foundation's exempt purposes, for example, advancing the arts or supporting educational or cultural institutions. However, directors must avoid *self-dealing*, meaning the artwork cannot be donated in a way that benefits disqualified persons, including directors, officers, substantial contributors, or related parties.

Directors and officers are generally permitted to organize exhibitions, loan artworks, or otherwise make the collection accessible to the public. These activities are typically well aligned with a private operating foundation's mission to directly manage and display the artist's work, or a non-operating foundation's mission to benefit public charities that further the foundation's purposes. Directors and officers must ensure that exhibition or loan arrangements are documented at fair market terms and are consistent with the foundation's charitable objectives.

Directors and officers may sell artwork when doing so is allowed by the governing documents, consistent with the foundation's purpose, and conducted at arm's length and for fair market value. Sales to insiders or related parties can raise significant self-dealing concerns under IRS rules applicable to private foundations. When permitted, sales may be used to fund operations, conservation efforts, or long-term endowment needs.

Finally, directors and officers must always act in the foundation's best interests, preserve charitable assets, and comply with the Internal Revenue Code rules governing private foundations, including those related to self-dealing, excess benefit transactions, and prudent investment of assets.

How often do foundation directors meet? How are the meetings, held and what is discussed in those meetings?

Board meetings are necessary because directors have legal fiduciary duties, which include the duties of care, loyalty, and obedience, all of which require active oversight and informed decision-making. Regular meetings ensure that the foundation complies with nonprofit and tax-exempt requirements, documents major decisions, manages charitable assets responsibly, and carries out its mission. Written and recorded minutes of all board meetings are essential to provide a clear governance record should the foundation ever face audit, regulatory review, or future questions about its stewardship of the artist's legacy.

The frequency and format of board meetings for a private foundation are determined primarily by the foundation's governing documents, its bylaws, and organizational policies. Most private foundations hold board meetings at least annually, while many choose to meet quarterly or semi-annually to fulfill fiduciary oversight responsibilities. Additional special meetings may be convened as needed, particularly when significant decisions arise concerning the foundation's assets, including the management or disposition of artwork.

Meetings may be held in person, virtually, or through hybrid formats, provided the bylaws and applicable state nonprofit law permit remote participation. Virtual meetings have become increasingly common due to their practicality and flexibility. Regardless of format, directors must receive proper notice, and the foundation must maintain accurate minutes documenting the actions taken.

At each meeting, directors review matters related to governance, finances, and program activities. For an art-focused private

foundation, discussions often include the following:

- **Collection Management:** Conservation needs, storage conditions, insurance coverage, cataloguing updates, and loan requests.
- **Exhibitions and Programming:** Potential exhibitions, partnerships with museums or cultural institutions, and educational initiatives.
- **Intellectual Property Management:** Licensing requests, reproduction permissions, and protection of the artist's moral rights.
- **Financial Oversight:** Review of operating budgets, endowment performance, fundraising (if applicable), and compliance with expenditure responsibility rules.
- **Legal and Compliance Matters:** IRS private-foundation compliance, conflict-of-interest reviews, self-dealing safeguards, and approval of significant transactions.
- **Strategic Planning:** Long-term preservation of the artist's legacy, mission alignment, and governance succession planning.

Are foundation directors compensated?

The directors of a private foundation may be compensated with a "reasonable" salary or fees. Compensation should be outlined in the foundation's bylaws or governing documents, must not be excessive, and is typically based on industry standards. However, most directors of private foundations serve without compensation; only about 25% of private foundations compensate its board members, often using methods like annual retainers or per-meeting fees.

Directors' compensation is considered reasonable if it is what similarly situated individuals are paid for similar work at comparable organizations. Directors can be paid for professional and administrative services, including managing investments, legal work, accounting, overseeing foundation operations, and any work that is necessary to conduct the foundation's exempt purposes. Directors are prohibited from receiving compensation for routine clerical work, physical labor, or services not related to the charitable purpose. Since directors are "disqualified persons," improper or excessive compensation can trigger IRS penalties (excise taxes) for self-dealing.

Common methods of compensation include monthly or annual retainers, per-meeting fees (often \$2,000+), or salaries. It is essential to document board approval and justify the salary amount to ensure it is not excessive, particularly for founder salaries, which are often 10%–25% of revenue.

How are private foundations exempted under Section 501(c)(3) of the Internal Revenue Code?

Private foundations qualify for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code by being organized and operated exclusively for charitable purposes, such as educational or cultural activities. To obtain this status, the foundation must (i) have organizing documents that limit its purposes to those permitted under §501(c)(3), (ii) refrain from activities that provide private benefit to insiders, and (iii) file Form 1023 or Form 1023-EZ with the IRS to request recognition of exempt status. Once approved, the foundation must comply with the private-foundation rules, such as restrictions on self-dealing and minimum distribution requirements, to maintain its exempt status.

If the application for a charitable exemption under Section 501(c)(3) of the Internal Revenue Code is submitted within 25 months of the formation of the private foundation, gifts to the foundation will be eligible for a charitable exemption under Section 170(c) and Section 2522 of the Internal Revenue Code dating back to the date of formation of the entity.

Filing Form 1023 within 25 months (which is within the 27-month deadline) allows a non-profit to be recognized as tax-exempt retroactively from its date of formation. If the application is filed after the deadline (27 months from the end of the month of formation), the exemption is only effective from the date of the submission, meaning previous years may require amended tax filings by both the entity and its donors. Filing before the 25-month deadline ensures that all income earned since formation is exempt, and donations made to the organization are tax-deductible from the inception, provided it met 501(c)(3) requirements.

during that period. If done properly, the organization avoids having to pay corporate income tax for the period between its formation and the approval of the exemption, avoiding potential "gap" issues where tax might be owed.

What are other team members in a private foundation?

A private foundation typically relies on a broader team beyond its board of directors to ensure proper governance, financial management, and strategic oversight. While the board of directors is ultimately responsible for fulfilling fiduciary duties and guiding the foundation's mission, several key roles support the foundation's operations and compliance.

Officers are the public face of a foundation. There are four types of officers that help the directors manage a private foundation, and they include the president, vice president, secretary, and treasurer. Each role serves a different purpose, but it is common for one person to hold one or more roles.

President/CEO

The president or chief executive officer provides overall leadership, reports to the board, sets agendas, and ensures that the foundation operates in accordance with its mission and governing documents. The president often serves as the primary liaison between the board and the public, including donors, museums, advisors, and service providers.

Vice President

The vice president supports the president and may assume leadership responsibilities in the president's absence. Depending on the bylaws, the vice president may oversee specific committees or initiatives, such as exhibition planning or legacy programs.

Secretary

The secretary maintains the foundation's official records, including meeting minutes, board resolutions, and governance documents. This role is critical for ensuring transparency, regulatory compliance, and properly documented decision-making, particularly important for a private foundation managing valuable artwork.

Treasurer

The treasurer oversees financial matters, including budgeting, accounting practices, investment oversight, and compliance with IRS rules governing private foundations. The treasurer works closely with financial advisors and accountants to ensure proper stewardship of assets and adherence to annual reporting requirements.

In addition to the directors and officers, the foundation may engage other professionals to serve as part of its advisory team. Although not required, these individuals can help ensure that the foundation operates smoothly and effectively.

Legal Counsel

Attorneys experienced in nonprofit and tax-exempt organizations help interpret IRS rules, draft governance documents, review contracts (e.g., loan agreements or licensing deals), and advise on self-dealing and conflict-of-interest safeguards.

Accountant / CPA

A certified public accountant plays a central role in maintaining the foundation's financial books, preparing the annual federal tax Form 990-PF, ensuring compliance with private-foundation excise tax rules, and advising on issues such as valuation of artwork, endowment management, and expenditure responsibility.

Art Advisors, Curators, or Conservators

For foundations centered on an artist's legacy, professionals with expertise in art handling, conservation, exhibition planning, and market knowledge may assist the directors and officers in making informed decisions about the artwork.

Executive Director or Administrative Staff (if applicable)

Some foundations appoint an executive director or administrative team to manage day-to-day operations, coordinate

programs, and support the board in implementing strategic initiatives.

Together, these individuals form a governance and advisory structure that ensures the private foundation operates responsibly, fulfills legal obligations, and effectively advances its charitable mission, particularly important for foundations entrusted with preserving and promoting an artist's work.

For artists, the process of estate planning involves more than transferring assets; it requires establishing a structure capable of preserving, interpreting, and managing a lifetime of creative work. A private foundation can serve as a legally durable vehicle to steward an artist's collection, intellectual property, and reputation in a manner consistent with the artist's intentions. Whether organized as an operating foundation dedicated to managing and exhibiting the artwork directly, or as a non-operating foundation whose purpose is to support public charities, this approach provides a clear governance framework and ensures that qualified directors are entrusted with long-term oversight.

Given the legal, tax, and fiduciary complexities associated with forming and administering a private foundation, artists should seek guidance from competent legal counsel. An attorney experienced in nonprofit, tax-exempt, and estate planning matters for artists can help determine whether a foundation is the appropriate vehicle and ensure compliance with applicable state and federal laws.