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How Courts Value and Divide Artwork in a Divorce

By Kimberly Keyes | January 29, 2020

Family Law Divorce Division of Assets

Attorney Kimberley Keyes explores the complexities of valuing and dividing fine art in a divorce.

Unique property, such as valuable artwork, can pose special challenges in the divorce context. A closely-watched divorce between wealthy art collectors in New York (where else?) in 2018 illustrates how judges sometimes struggle to value and divide unique property, such as artwork, in divorce cases. The case, *Macklowe v. Macklowe (2018)*, shines a spotlight on the difficulty valuing unusual assets, the role of expert testimony and independent valuation.

In January 2020, New York's appellate division ordered that certain pieces of the art collection are to be sold, consistent with the divorce court's 2018 judgment. We explore the details below.

Real Estate Mogul and Art Collector Divorce

Perhaps unsurprisingly, *Macklowe v. Macklowe* involves the divorce of a high net worth couple. The Court's factual summary presents the husband as a self-made real estate tycoon in New York City, who had built a portfolio of real estate in Manhattan worth an estimated $7 billion by 2007. The wife is presented as an art critic and board member for the Metropolitan Museum of Art. Together, the parties amassed an internationally recognized art collection with value exceeding $500 million over the course of their 59-year marriage.

The Court described the parties' interest in art as follows:

The parties collected art almost from the beginning of their marriage. They now possess an internationally renowned collection of modern and contemporary art. … The Wife was, and still is, passionate about art. She devoted significant time to curating the collection and maintaining relations with artists and gallery owners, but the art was purchased with funds earned by the Husband during the marriage. The Husband also enjoyed collecting art. He too developed relationships with artists and gallery owners, including assisting people in the art world with real estate transactions.

According to the opinion, the couple experienced financial difficulty following a downturn in the business world. The parties avoided bankruptcy and selling their art collection, but much of the real estate was sold off over the span of a few years.

In July 2016, the wife, then 80 years old, filed for divorce. The trial lasted 14 days and centered on the division of marital assets, which included the art collection, which was purportedly worth $700 million. The decision was highly anticipated in the divorce world because it featured one-of-a-kind assets that could be difficult to value without actually selling the artwork itself.

The Difficulty of Valuing Unique Assets Like Artwork

At trial, the divorce court was hard pressed to value the multitude of assets, much less divide said assets in an equitable manner. For some assets, the resolution was simple: The couple had approximately $90 million in cash, which the judge split it down the middle, assigning each spouse approximately $45 million.

The 165-piece art collection was another matter. Many of the pieces had not been sold in years. Other items were anomalies in the artist's career, making valuation difficult based on comparable sales by the same artist. Each party's expert stretched to find similar sales to use as guidance for determining the current value of many of the works.

The Court provides an illustrative example of the experts' disagreement over value:

As an example, the parties own the sculpture Le Nez by Alberto Giacometti. They purchased it in 1992. There are only five versions of this sculpture in existence. [Wife's expert] used as comparable auction sales two versions of a

different sculpture by Giacometti sold in 2010 and 1990 and a sale of another version of Le Nez from 1992 with sale prices ranging from $25 million to less than $1 million. [Husband's expert] used two auction sales in 2010 and 2013 of different sculptures by the artist that sold in the $50 million range. She also discussed more recent sales of other works by Giacometti at auction and by private sale ranging from $50 million to $100 million. She noted that there has been a recent surge of interest in Giacometti's work. [Wife's expert] opined that the fair market value of the … piece is $35 million whereas [Husband's expert] opined its fair market value to be, conservatively, $65 million.

Imagine a similar process repeating itself over 165 similarly outstanding works of art. Thus was the judge's challenge.

Expert Testimony Solicited by Parties Fails to Ascertain Value of Artwork

Although the experts agreed (or their valuations were close enough to be averaged) on the value of 86 pieces worth a combined $40 million, as well as the value of Andy Warhol's famed "Nine Marilyns," which the experts found to be worth $50 million, they disagreed to a significant extent on many other pieces in the collection.

Not every disagreement over value was as pronounced as the debate over Le Nez. The experts' disagreement over "Vest with Aqualung" by Jeff Koons, presented a more subtle problem for the judge. Both experts used two prior sales of the Koons sculpture—the first in 2006 for $4,608,000, the second in 2014 for $11,589,000 – in their valuation. The wife's expert estimated its value at $10 million while the husband's expert estimated it was worth $11 million.

According to the Court, the husband generally ascribed higher values to the art, but there were exceptions:

Although the Husband's expert ascribed a higher value to more of the art than the Wife's expert, that was not always the case. As an example, for Number 17 by Jackson Pollock, Gaillard valued the work at $35 million whereas Von Habsburg valued the work at $15 million.

Given that Wife ultimately sought to retain the art collection, while Husband sought it is sale, it is perhaps unsurprising that Husband assigned a higher value to the collection than the Wife. Ultimately, the experts were unable to

agree on the value of 79 works, which Wife valued at $625,650,000 and Husband valued at $788,700,000.

Experts Use Competing Methodologies

As noted in our blog about business appraisals in divorce, the choice of valuation method can have a major impact on how a court values a particular asset. In *Macklowe v. Macklowe*, the Court described each expert's proposed valuation method as follows:

In valuing the art, the Husband argues that the court should determine the fair market value of each piece of art. This valuation method provides for a value based on a hypothetical arm's length sale between a willing buyer and willing seller, without consideration of the cost of the transaction or tax implications. The Wife argues that the court should determine the marketable cash value of each piece. This valuation method provides the value realized, net of expenses (e.g., commissions, shipping, insurance, etc.) by a willing seller disposing of property in a competitive and open market to a willing buyer, both being reasonably knowledgeable of all relevant facts, and neither being under constraint to buy or sell. Thus, she argues, the value of each piece in the collection is the fair market value less the expenses incurred in selling the artwork.

In assessing the merits of each valuation method, the Court appeared somewhat more attracted by the Husband's expert's approach:

Each expert agreed that it was appropriate to use the sales comparison valuation methodology, and in doing so each used public auction comparable sales of art by the artist whose work was being appraised. However, [Wife's expert] relied solely on auction sales even if the comparable sales used were dated or not really comparable. The limitations of this rigid approach became evident when he relied solely on comparable sales from years or even decades before the appraisal date or compared sales of artwork that did not physically resemble the subject work. …

…

[Husband's expert] took a more nuanced approach and opined that where comparable public auction sales did not exist, it was appropriate to consider other data to determine the value of a work of art (e.g., the marketability of an artist's work at the time of valuation; information regarding private sales; consideration of values for insurance where fair market value was used by the

insurance company). Although the court finds that she did not sufficiently disclose some of the data she relied on (e.g., the sources of her information regarding private sales), her approach was a reasonable attempt to address the imprecision in valuing the rare artwork owned by the parties, as well as accounting for the different markets in which art of this quality is sold.

Although reluctant to definitively choose one valuation method over the other, the Court objected to simply “splitting the difference” between each expert’s value:

Simply averaging expert appraisals is frowned upon unless the court can articulate its reason for doing so. Here, the court recognizes that appraisal of art is inexact and that the differences between the two values is inconsequential given the overall value attributed by each expert for that individual piece.

In the end, the Court did not choose either expert’s method over the other. Instead, the Court found that there was insufficient data for the Court to assign a definitive value to much of the collection:

The disparity in the valuations for the remaining art in the collection precludes this court from assigning a value to those works. Both experts agree that many of the remaining pieces in the collection are of significant value, often rare examples of that artist's work. The difference in the experts' valuations is often because there has been no recent auction sale of comparable work by the artist.

This finding is consistent with appellate decisions in Massachusetts that favor the sale of assets for which a clear value cannot be ascertained by the Court. The Court added:

In distributing 50% of the assets to each party, given the anticipated value of the art collection, it is impossible to distribute the art entirely to one party, nor would it be equitable given each party's participation in creating their "crowning achievement" collection.

Without a Clear Value, Divorce Judge Orders Sale of Artwork

It is important to note from the offset that “the parties agree that the marital property should be distributed 50% to each party.” The parties simply disagreed about which party should keep:

The Wife asks this court to award to her the art collection and award the real estate interests to the Husband, with a cash distributive award to the Husband to equalize any discrepancy. The Husband asks that the court order the sale of the art and the profit distributed equally.

The Court noted that while the art collection was a labor of love, it was a serious financial investment for the parties:

The art collection is the parties' most valuable marital property. It is an extraordinary collection and the achievement of a lifetime's effort. It is an artistic accomplishment of which both parties have the right to be proud of having achieved. However, the parties also intended the collection to be an investment. The parties hold significantly less in stocks or other investments compared to the value of the art collection. The Husband credibly testified that the art enabled diversification and was an alternative investment form. … The Wife conceded that they sold art as well as bought it during the marriage. The Wife also acknowledged that it would be her intent to sell art to sustain her extraordinary standard of living. The court concludes that as much as both parties enjoyed the aesthetics of collecting art, the collection also served as a device to preserve and increase their personal wealth.

In the end, the Court assigned $40 million in art – i.e. the 86 pieces for which the parties agreed on a value – to the Wife. Numerically, this meant that Wife retained approximately half of the pieces in the collection. In terms of value, however, the Court ordered the vast majority of the collection to be sold:

The sale of the item listed in Schedule II [i.e. disputed values] is necessary because of its extraordinary value and to enable an equal distribution of the marital assets. According to the parties, the fair market value of the art to be sold ranges between $625,650,000 and $788,700,000. Thus, the sale of these pieces will enable each party to share in most of the value of their lifetime achievement. At the same time, the award of the Schedule I [i.e. agreed value] art to the Wife will provide her with more than half of the collection, with 17 pieces valued at more than $500,000. This collection will enable the Wife to continue to enjoy her involvement in the art community.

The Court assigned a “receiver” – essentially a trustee appointed by the Court – to conduct the sale of the contested artwork. Following the Wife’s appeal of the divorce judgment, a New York appellate court ordered that the sale move forward in January of 2020, vacating a stay that had been in place since 2018.

Lessons Learned from Macklowe

The biggest takeaway from Macklowe is the reality that courts will order the sale of an asset if a present value cannot be reliably established. In Massachusetts, courts have articulated a clear preference for assigning a present value to an asset – and assigning ownership of said asset to one party – when possible. However, as noted in the leading case, Baccanti v. Morton (2011), when a current valuation is impossible, the Court will order a process for assigning the assets in the future:

Although a present division of assets is generally preferable, if present valuation is uncertain or impractical, … "the better practice is to order that any future recovery or payment be divided, if and when received, according to a formula fixed in the property assignment."

In Macklowe, the "future recovery" was the sale of the art collection performed by the court-appointed receiver.

A second takeaway from Macklowe focuses on the value of reaching agreement on complex issues. It appears clear from the record that the parties in Macklowe were not going to agree on the overall value of the collection. However, it may have been possible for the Wife to retain a greater share of the collection by pursuing compromise values on a greater share of works. (Of course, it is impossible to know is such a compromise was really achievable.)

The final takeaway from Macklowe focuses on absolute necessity – and significant limitations – of expert witnesses. As the decision makes clear, neither party could have presented an effective case without a competent art expert on their team. However, the case also shows that when each party has a highly qualified expert presenting a well-reasoned opinion, it is often difficult for the judge to choose the best option. Given the Wife's desire to retain the art collection in the divorce, coupled with their agreement to divide the overall marital estate 50/50, each party had a vested interest in a given position: The

Husband sought a higher valuation while the Wife preferred a lower value. Nevertheless, the Court was unable to point to either expert's approach and declare it superior to the other.

Had the Macklowe case come down to just a handful of works of art, the decision could easily have been different. With a smaller collection, the Court (and the experts) could have focused more carefully on each piece, and the judge could have tackled each valuation with greater confidence. With such a massive collection, however, it would have been difficult for the judge to focus carefully on any one piece, even with 14 days of trial.

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