



An International  
Joint Venture  
Law Firm

## ZAG-S&W ART & MUSEUM LAW CLIENT ADVISORY

# Massachusetts High Court Clarifies That A Written Agreement Is Not Required to Create Consignment of Fine Art

The Supreme Judicial Court of Massachusetts has answered a lingering question about the interpretation of Massachusetts's fine art consignment law, G.L. c. 104A, § 2. Laying to rest any doubts about whether a written agreement is required at the time of delivery to create a consignment under the statute, the SJC has interpreted the 2006 amendments to the law for the first time and clarified the roles of everyone involved. Once an artist delivers a work of art for the purpose of exhibition or sale, it is a consignment, and the seller/consignee holds it in trust for the artist with all attendant fiduciary responsibilities. The decision also makes clear the advantages and importance of a well-drafted prospective agreement for everyone involved.

## THE FINE ARTS STATUTE

The fine art consignment statute was originally enacted in 1978 as St. 1978, c. 286, and was amended in 2006, (St. 2006, c. 353, at 10). The 2006 amendments to the fine art consignment statute were enacted in the wake of the insolvency of two large art galleries in Boston that generated wide-spread public concern about the difficulties faced by artists seeking to reclaim their art work.

The provision at issue, G.L. c. 104A, § 2, reads:

Section 2. (a) Notwithstanding any custom, practice or usage of the trade to the contrary, or any other language herein, whenever a consignor delivers or causes to be delivered a work of fine art to a consignee in the commonwealth for the purpose of exhibition or sale, or both, on a commission, fee or other basis of compensation, the delivery to and acceptance of the work of fine art by the consignee shall constitute a consignment, unless the delivery to the consignee is pursuant to an outright sale for which the deliverer of the work of fine art receives or has received compensation for the work of fine art upon delivery.

(b) A consignor who delivers a work of fine art hereunder shall, upon delivery of the work of fine art, furnish to the consignee a separate written statement of delivery of the work of fine art, which shall include at a minimum the following information:

## IF YOU WOULD LIKE ADDITIONAL INFORMATION, PLEASE CONTACT:

Nicholas M. O'Donnell  
617 338 2814  
nodonnell@zag-sw.com

### BOSTON

ZAG-S&W  
One Post Office Square  
Boston, MA 02109

### NEW YORK

ZAG-S&W  
1633 Broadway  
New York, NY 10019

### WASHINGTON, DC

ZAG-S&W  
1666 K Street, NW  
Washington, DC 20006

### ISRAEL

Zysman, Aharoni, Gayer and Sullivan &  
Worcester LLP  
41-45 Rothschild Blvd., Beit Zion  
Tel Aviv, 65784 Israel

- (1) the artist's name and the name of the owner of the work of fine art;
- (2) the title, if any, of the work of fine art;
- (3) the medium and dimensions of the work of fine art;
- (4) the date of completion of the work of fine art;
- (5) the date of delivery of the work of fine art; and
- (6) the anticipated fair market value of the work of fine art.

(c) The consignee shall maintain a copy of the consignor's written statement as an acknowledged acceptance of delivery of the art work. If the work of fine art is sold, the consignee shall record the date it sold, for what amount it sold, and name and contact information of who purchased the work of fine art. If the consignor is the creator of the work of fine art or the artist's heirs or legatees, the consignee shall disclose the name and contact information of the purchaser of the work of fine art to the consignor with payment of the funds owed to the consignor.

The consignee shall make all records pertaining to that consignee, including records of accounts, available for the consignor to review during consignee's normal business hours, within a reasonable time after consignor's request, and shall provide copies of the account records to the consignor when requested. The consignee shall keep copies of all books and records for at least 4 years after completion of the consignment.

"Consignment" and "consignor" are defined in G.L. c. 104A, § 1 as "a delivery of a work of fine art under which no title to, estate in, or right to possession of, the work of fine art superior to that of the consignor shall vest in the consignee, notwithstanding the consignee's power or authority to transfer and convey to a third person all of the right, title and interest of the consignor in and to the work of fine art," and "a person who consigns a work of fine art

to a consignee, including but not limited to an artist who creates works of fine art, an artist's heirs or legatees, or an owner of a work of fine art who holds title to the work of fine art," respectively.

Initially, the 2006 proposal did not include the phrase "any other language herein" after the term "[n]otwithstanding" in the first paragraph above. The Legislature did not adopt this version, however, but instead adopted a revised bill that added both the provision in § 2(b) requiring that a consignor furnish a written statement of delivery, and the qualification that § 2(a) is to apply "[n]otwithstanding . . . any other language herein."

## THE TEST CASE

The SJC's involvement arose on a somewhat unusual bankruptcy posture. Kenneth Wynne III and Allyson Wynne owned a gallery called Wynne Fine Art, Inc. in Chatham. While in possession of a large number of artworks that had been delivered for consignment by various artists, the Wynnes, and the gallery itself, all filed for bankruptcy. The gallery filed a Chapter 7 petition, meaning that the corporation intended to liquidate itself, rather than reorganize and emerge to try again.

As is typical in that scenario, a bankruptcy trustee is appointed to oversee the liquidation. That trustee took the position that the paintings were the property of the estate, and moved for permission to sell the art and use the proceeds for the debts of the estate. The downside to the artists was enormous: rather than receive the actual artwork back, which they could sell or treat however they want, the art would have been sold and the sales proceeds added to the overall bankruptcy estate, against which the artists would have claims as unsecured creditors (*i.e.*, not secured by any specific collateral or priority), certain to get back pennies on the dollar of the art's value, if even that.

The trustee's position was based on the interplay between the Uniform Commercial Code (the U.C.C.) and G.L. c. 104A. In a general context, unless a consigner "perfects" its interest under the U.C.C. by filing a U.C.C.-1 financing statement, anything in the actual possession of a debtor becomes property of the bankruptcy estate when the petition is filed. The trustee argued that since none of the artists had filed U.C.C.-1 financing statements *before* the bankruptcy, all of the artwork was estate property.

She rejected the artists' reliance on c. 104A, § 2, because they had not provided a statement of delivery. Thus, she argued, there was no consignment, and the artists were merely unsecured creditors under the U.C.C.

Citing the foregoing legislative history, the artists pointed the SJC to the provision immediately prior to § 2(b), the "Notwithstanding any custom, practice or usage of the trade to the contrary, or any other language herein," provision added late in the process.

This distinction is critical, because G.L. c. 104A, § 3(b) dictates that if art is lent on consignment, then it becomes property held in trust for the benefit of the consignor. Property held in trust creates fiduciary obligations on behalf of the consignee, chief among them in this case that he cannot use the property for his own benefit. So, if the artwork was consigned, then it was trust property and the Wynne's insolvency would be irrelevant. The artists would be entitled simply to get the art back without waiting in line as bankruptcy claimants.

After the trustee moved the Bankruptcy Court for permission to sell, the court certified the previously un-interpreted provision to the SJC for an answer under Massachusetts law. The Bankruptcy Court framed the question this way:

Under Mass. Gen. Laws. c. 104A, the Massachusetts fine art consignment statute ('Chapter 104A'), must a consignor transmit a written 'statement of delivery' to a consignee as a necessary prerequisite to the formation of a 'consignment'; or, alternatively, under Chapter 104A does a consignment arise upon the delivery by a consignor, and acceptance by a consignee, of a work of fine art for sale on consignment, regardless of whether a written 'statement of delivery' is sent by the consignor?

## **THE SUPREME JUDICIAL COURT'S CLARIFICATION**

The unanimous court found for the artists. Considering the purpose for the amendment against its actual language, the SJC concluded that "it is apparent that the directive of G. L. c. 104A, § 2(b), to provide a written statement of delivery was designed as part of a recording system for consigned art work, and not as a prerequisite for a consignment. General Laws c. 104A protects consignors' interests in their art work by providing that consigned works of art are not the property of the consignee, but are rather held in trust for the consignor."

The trustee's view, the court said, would render meaningless the description of how a consignment comes into being. The written agreement required is to protect the artists, not lay a trap for them. That is, artists are supposed to accompany their consignment with a written agreement and thus create a recording system for fine art. If they fall short, they will have problems of proof (potentially he said/she said about what was delivered), but they still have a consignment. In this case, the trustee did not really dispute the circumstance of the delivery, so the result flowed from there.

The upshot of this decision is a bolstering of artists' rights, and a necessity for all sides in an art sale to get the consignment agreement in place ahead of time. A prospective agreement protects everyone, by making the parties' rights and obligations clear so there is nothing to argue about later. Anyone on either side of such a transaction will do well to pay close attention and seek counsel about what it should include.

*September 2014*