

# A FINE ART: DEALING WITH ART AND CHATTELS ON DIVORCE

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It is often claimed that London is the 'divorce capital' of the world. The city also plays an important role in the global art market, being home to world-famous auction houses and galleries.

It is not surprising therefore that the division of art collections increasingly crops up within the context of divorce proceedings. Over the last 10 years, diverse investment portfolios are more likely to include tangible assets such as art, wines, watches and jewellery. The valuation of such items can be difficult however and the division between a couple in the event of their divorce can be contentious.

## Valuation

Valuation is a central issue in most divorce cases. The family courts need to calculate the assets in the case and categorise them as 'matrimonial' or 'non-matrimonial'. Only once the valuation exercise is complete can the parties (and the judge) turn their minds to considering the division of the matrimonial assets between the couple (and if necessary invading the 'non-matrimonial' property) to effect a fair financial outcome.

The court can sanction the instruction of an expert within matrimonial proceedings under Part 25 of the Family Procedure Rules.

The benefits of expert valuations are that they can:

- Provide a clear understanding of value and can prevent heartache, arguments and expensive legal wrangling.
- Support compliance with the financial disclosure required by Form E and each party's duty to give full and frank disclosure of their worldwide assets.
- Help to minimize conflict, so all parties are using the same figures when entering into negotiations.
- Help both parties find a fair and informed division of the assets once values are understood.

The expert owes a duty to the court to help on matters within their expertise. This duty supersedes their obligations to the paying party so their report can be truly independent and reliable.

The letter of instruction to an expert is a vital document. It needs to clearly set out the relevant background and to ask the right questions. Key



considerations for instructing an art expert include:

- Individual pieces vs a collection

Valuing a single piece of artwork may be easy. But what of a collection? The expert needs to know if they are valuing the collection as a whole or the individual pieces. A well curated collection may be worth more than the sum of its parts, and this value needs to be accurately recorded.

In the case of a large collection being sold, the total price achieved can often far exceed presale price expectations. Factors in this are varied but with art, the price achieved is linked to the quality, breadth and date of the works in the collection and also the profile of the owner in the art world.

A good example is the recent sale in New York of the Macklowe collection of contemporary art. The sale came about as a result of a very high profile, acrimonious and long running divorce battle in the courts between Harry and Linda Macklowe. The disagreement reached a stalemate, which was ended by a judge declaring that the art must be valued and then sold by public auction. The works were spread over two major auctions in New York in November 2021 and May 2022. Every single lot sold and the total of \$922 million became the highest total ever achieved for a private collection at auction.

## Purpose of Valuation

The purpose of the valuation can also impact the value. A valuation which assumes a fire sale may differ markedly from a considered sale over time. This may differ again from a value for tax purposes, insurance or probate.

For the purpose of valuation for matrimonial proceedings, the value level required is referred to by the courts as 'fair market value' and is defined as:

'the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts'.

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### The Court's Approach

The court starts with an assumption that assets generated during the marriage, which are considered 'matrimonial', should be shared equally. These sharing claims are cross checked against the parties' financial needs, which are assessed in the context of the couple's standard of living during their relationship and all the available resources. If required to meet their respective income and housing needs (and those of any children), one spouse may be awarded more than 50% of the 'matrimonial' assets, or potentially even a share of the other spouse's 'non-matrimonial' assets.

The categorisation of assets as 'matrimonial' or 'non-matrimonial' is not straightforward. An artwork purchased during the marriage by the couple together using their joint funds is almost certainly 'matrimonial' whereas an inherited piece kept in storage paid for by one party from their own funds is most likely 'non-matrimonial'. But the court will also have to grapple with the less clear scenarios - perhaps a piece purchased by one party with their sole funds during the marriage, or an inherited work declared to have been gifted from one spouse to the other.

The division of chattels, particularly artworks, between the couple on divorce can be particularly challenging. One spouse may connect with a certain piece, regardless of when it was purchased and by whom. It is not necessarily the case that the art purchased during the marriage will be physically shared item by item, to be displayed in either party's home, but it is essential to capture its value in the calculation of the marital pot. The parties can agree whatever terms they feel achieve fairness, failing which the court has a wide discretion to divide the assets (or order their sale) to achieve overall fairness in the circumstances of the case.

For items of particular sentimental value, it is common for parties to want to impose a condition that the receiving party leave by will to their children. The court does not have the power to order this as English law allows for testamentary freedom but, if the parties can agree, their settlement can provide, for example, that one party enter into an irrevocable deed to leave certain items to the parties' children upon their death.

### Protecting Artwork on Divorce

Ultimately, to protect any asset from sharing in the event of a divorce, it is prudent to enter into a pre/post-nuptial agreement setting out how their assets should be divided in the event of a divorce. Nuptial agreements are becoming increasingly popular with couples who wish to agree the division of their assets and avoid a potentially contentious divorce in the event of marital breakdown.

Spouses should also ensure that the purchase and ownership of the art is clearly documented and consider where it should be stored or displayed. Disputes about gifts are also common in divorce cases - one spouse may argue that a piece was gifted to them individually, whilst the other claims that it was gifted to them both. Care should be taken to ensure that gifts are evidenced and insurance policies are in the right name.

Open and honest communication, whether in negotiations surrounding a nuptial agreement or otherwise, can help to avoid disputes on separation. Early professional advice is crucial in identifying and valuing artwork to achieve an overall fair settlement in divorce proceedings.



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