

## EDITORIAL NOTE

### THE EDITOR

The order of the essays is based on the proceedings of the symposium. As discussions cropped up, amendments were made. At the beginning, Dr. Michael Holtz explains the circumstances, from a legal and tax point of view, which require an examination of the monetary value of art objects and points out the various possibilities of handling these. My contribution follows with the goal of presenting the practical implementation of an appraisal in such a vivid way that those affected will be well prepared to commission a certified expert's opinion and be able to assess its technical quality. This is also done by explaining the work of the certified expert. The moderator of the symposium, Thorsten Klinkner, together with his colleague Mattheo Dominik Ens, made an additional contribution to another problem area – the topic of gifts, donations and endowments of objects of art. The article explains the different economic consequences of gifts and donations for collectors and artists and offers a constructive handling of the existing legal situation. In addition to legal and fiscal reasons, works of art must be evaluated in a commercial context. On the day of the symposium, Maximilian Heidbrink was responsible for the special insurance assessment contribution. His colleague Alina Sucker shed light on the practical work of art insurance and provided answers to questions that arose during the symposium. Since damages to works of art are often liquidated in connection with insurance policies, the article by Dr. Martin Pracher follows. He elaborates how the work of certified experts can be understood and presents his method of making the evaluation of damages and depreciations comprehensible and substantiable. All of the authors work as specialists in their field with true enthusiasm, know and convey a variety of possibilities, and apply them efficiently for collectors, artists, gallery owners, heirs and other market players. The collegial exchange within the framework of the symposium and the work on this publication are also to be seen as preparatory work for the creation of common standards in consultation and administration guidelines.

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## HOW IS ART ASSIGNED A VALUE?

### FOR THE EXPERT VALUATION OF WORKS OF FINE ARTS

#### Introduction

Certain points in life call for a specific monetary value to be attributed to individual works or groups of fine art. Whether a homeowner's insurance or art insurance policy should be taken out or whether the value of the art in question should be quantified in marriage or inheritance contracts is a matter which is decided solely by those involved. This is not the case when an inheritance tax return, a right to a compulsory share, an equalization of earnings at the end of a marriage, a withdrawal from business assets, a museum gift or a donation to a foundation are at stake. Then a valuation is compulsory. If other goods such as real estate, companies or vehicles are to be evaluated for any given occasion, there are generally accepted procedures. In the case of cultural property, the appropriate method is largely unclear.

Various factors complicate the valuation of cultural property. First, there is a widespread reluctance to measure art in monetary terms. With other goods, which can be just as emotionally charged, such as the parental home or the family business founded by the grandfather, this cannot be observed to the same extent. Apparently, this is due to specific characteristics. Collecting means collecting a variety of similar things in a targeted manner according to specific criteria (see also [openthesaurus.de](http://openthesaurus.de), search term "*sammeln*" – in English – “collecting”, searched on 16 August 2017). In the case of works of fine art, a collection is by nature incomplete and the criteria of order sometimes ranges between open, indeterminate, bizarre or banal. Since the art market is characterized by great fluctuations according to whatever is in fashion (Gerstenberg, FR 2015, 984, 992; see also Grafik Artnet/FAZ, “*Der Kunstmarkt im Vergleich zum Aktienmarkt*”, in this book, 17), the question of monetary value is particularly well-suited to shake a collector's sense of honor. In terms of its standing, collecting art fluctuates between the deference to the cultural achievements of individuals, being branded a “*entgleisten Vorratshaltung*” – “derailed stockpile” (Grasskamp, Merkur, Issue 746, 640 ff.) and an “*übersteigertem Geltungsbedürfnis*” – “exaggerated need for recognition” (cf. Ullrich, “*Siegerkunst*”, Berlin 2016) coupled with “*bizarren Formen von Geldvernichtung*” – “bizarre forms of money destruction” (Martin Zeyn on *Deutschlandfunk* on 3 October 2016).

When the estate of a collector/artist or the art accumulated over the duration of marriage is up for appraisal, an attempt is made to express the emotional significance in figures. This means that the value of the art is determined subjectively and out of context. The lack of transparency in the art market – especially in the unstable market for contemporary visual art – is a problem and inaccessible interests present a further complication. In the case of art insurance, more room can be given to subjective aspects, as these are commercial agreements that are negotiable. However, whenever foreign/public interests are affected, an assessment must be made based on objectifiable criteria that can stand up to scrutiny by authorities, courts and opposing parties.

The resilient evaluation of individual works or entire collections often fails at the first step, namely in the selection of the players who will undertake the appraisal.

### Who should assign a value to art?

When asked who should carry out the appraisal, market participants - i.e. dealers, gallery owners and auction houses - are usually automatically listed or publishers of catalogues raisonnés are referred to. None of these persons can describe valuation or appraisal as a core area of their own professional field. Even the sworn auctioneer only appraises in preparation for the sale. Legal components don't come into an auctioneer's consideration.

**Assigning a value to art does not only mean determining a price.** The price is the amount of money that a buyer actually pays for an item. The value, on the other hand, is determined according to objective criteria and is the amount of money independent of the particular interests of a prospective buyer (see *Definitionen: Wert- und Kostenbegriffe im Sachverständigenwesen*, DS 2016, 76 ff.) Achieved prices such as surcharges at auctions are published or can be found out. **However, value allocations are by nature fictitious.** Valuations of art and antiques are carried out by averaging the financial prognoses on the relevant trading places. Auctions are only one part of the market.

Publishers of catalogues raisonnés can, if necessary, confirm the integrity or authenticity of a work - both are important value-forming factors. However, a reliable valuation is based on many other aspects. This leads to the conclusion that by figuring in legal aspects, the assigned value is frequently drastically lower than the possible sales proceeds. The frequently chosen method of comparing the simple numerical value of two different parties

when making donations to a museum does not appear to be the method of choice. After all, two half appraisals do not make a whole.

If the judge in court proceedings lacks the necessary expertise to decide the question, the *Zivilprozessordnung* (ZPO) - Code of Civil Procedure – in § 404 (3) provides him or her with the following aid to help in decision-making:

**If experts are certified for certain types of appraisals, other persons should only be chosen if special circumstances require it.**

The *Bundesfinanzhof* (BFH) – the Federal Fiscal Court – already stated in 2001 in its landmark ruling on the valuation of works of art that a court incorrectly investigates the facts of a case if it accepts its own knowledge and does not appoint an expert (*BFH* of 6 June 2001 - II R 7/98). In the further training of judges today the appropriate selection of experts is increasingly taught. The ZPO deliberately focuses on publicly certified experts. The term "expert" is not legally protected in Germany. Anyone can call themselves an expert. To distinguish publicly certified experts from self-appointed experts, German legislation provides for certification. The requirements for a certification are demanding. It requires excellent professional qualifications. The ability to provide impartial expert reports in accordance with the formal requirements of the *IHK* (Chamber of Commerce and Industry) must be proven (cf. *Empfehlungen für die Erstellung eines Gutachtens neu gefasst, Informationen*, IfS, 2/2017, 4/5). Life and work experience must be added to the special expertise, so that one's first appointment is rarely made before the age of 35. Particularly in the valuation of cultural property, professional and life experience supports the confident handling of provenance legends. Personal aptitude includes being free of criminal record and tax liability. References - also from colleagues - must be presented and proof must be provided that the applicant lives in orderly economic circumstances. This means the applicant cannot be deep in debt. Other aspects of personal suitability are independence and freedom from any directives - meaning dependencies on relationships in the art market are not always unproblematic.

For quality assurance purposes, after an elaborate assessment procedure, a certification is limited in time and must be renewed regularly (every five years). This means that certified experts can lose their status if their qualifications no longer meet the current requirements. Supervision is carried out by investigating complaints and inspecting expert reports, especially in the case of imminent reappointment. For this reason, the extensive list of duties of certified experts (*Sachverständigenverordnung* [SVO]; in English, Expert

Ordinance) includes, in addition to continuous training, and recording and safekeeping responsibilities, also keeping a dossier. The dossier documents any expert reports that have been issued. Certified experts are liable for their assessments and hold financial loss liability insurance. Self-appointed experts are not usually held liable for their information. In accordance with § 203 (2) of the *Strafgesetzbuch* (StGB) – the German Criminal Code – the liability of experts increases with regard to the confidentiality obligation in client relationships. In a market requiring discretion, this sends an important signal (see Sucker, in this book, 74).

### How is the valuation of art commissioned in a precise way?

Once the decision has been made to make use of the services of a certified expert, suitable experts are available for all types of cultural property and can be found via the nationwide *IHK* platforms ([www.svv.ihk.de](http://www.svv.ihk.de)). The *IHK* also provides personal information and mediates the contact, especially for complex questions. When selecting a particular expert, attention should be paid to the purported area of expertise, in other words the precise designation for which the expert has been publicly appointed and sworn in. Especially in the field of cultural assets, many experts are only certified for certain areas such as damages or only for paintings and not for other media such as photos, videos and sculptures. The restriction of the public appointment to a sub-sector does not necessarily also mean a (economic) restriction of the range of assessments. As far as sound knowledge also demonstrably exists in other areas, then these may be co-assessed if the contracting authority is in agreement. However, if the assessment requires specialist knowledge that goes beyond an expert's own knowledge, then advice should be sought from a specialist colleague.

Especially when evaluating larger compilations that contain different media and are used in connection with inheritance, foundation/donation or divorce, a specialist must be selected who is appointed to answer all questions that arise. Sometimes the approved area of expertise of a certified expert does not cover all of the valuation topics mentioned. Ideally, a certified expert will then take over the main expert report and make use of the help of other experts for parts of the valuation that are not covered by his or her expertise. This is permissible if this has been agreed upon with the client and if it is stated in the appraisal what technical assistance has been sought for which part of the appraisal. Once the participants have been selected, the suitability of the expert opinion sought is determined by the tailor-made commissioning.

Different reasons for valuation require their inclusion under a different concept of value, in other words concepts of value are interpreted differently depending on the situation. **“Dem identischen Bewertungsgegenstand wird zu unterschiedlichen Anlässen ein höchst unterschiedlicher Wert beigemessen. Es gibt nicht den Wert an sich, sondern nur den Wert in Verbindung mit dem Bewertungsanlass“** (English: **“On different occasions, the identical object to be evaluated is given a very different value. There is not the value in itself, but only the value in connection with the reason for valuation.”**) / Schlehe, *NJW aktuell* 2012, 14). The legal requirements are scanty, the interpretation in detail is often controversial. In order to obtain a fully usable expert report, it is worth spending some energy on a proper commissioning instead of commissioning an “appraisal” across the board (see Schlehe, *NJW aktuell* 2012, 14). All participants like tax consultants, lawyers and, where appropriate the tax authority should ideally be networked, in order to optimize the commission. General hesitations about the tax authorities, and the idea a certain group of individuals might know and use tax tricks, are unconstructive. The precise description of the reason for the valuation, the purpose of the valuation, and the exact definition of the value concept used can also prevent the (subsequent) use of an expert report for purposes other than those for which it was commissioned.

### The work of the certified expert

After the assignment, the work of the expert can generally begin without any intermediate steps.

#### **Preliminary work**

When evaluating an individual work, the preparatory work is manageable. The expert inspects the work and obtains an overview on the state of preservation, provenance and other bases for assessment. If the certified expert report has been commissioned and made only on the basis of the paper form and without an on-site visit, this must be stated in the report. Especially in civil proceedings, the inspection is occasionally waived for reasons of convenience. Authenticity, measurements and state of preservation are then declared as indisputable in order to save costs and time. However, when evaluating larger compilations, the preparatory work of the client is of decisive importance. The processing of an estate, for example, usually exceeds the resources available at the time of the valuation. **Suitable preparatory work includes a meaningful inventory and an orderly storage.** Preferably, the inventory should be tabular, i.e. digitally accessible. Experience shows that the acquisition of special inventory programs for art collections is rarely

efficient. Instead, a good inventory thrives on persistent data maintenance and benefits from an easy ability to update and adjust information to actual personal needs. Over longer periods of time, both the supplier and the user side are rarely as efficient as one might expect. The frustration levels of the user can be kept in check with affordable standard solutions for databases. A well-maintained inventory with few data (e.g. artist, a photo, technique, measurements, acquisition and location in house/depot) is more useful than working with the vestiges from a professional museum archive or similar documentation. Collectors' concerns about the inventory of art, such as the fear of providing too much transparency, are counterproductive if collections are to be bequeathed in a tax-optimized manner. Tax concessions only work if the character of a collection, the art historical significance or the holding period of individual works can be determined. The risk assessment of insurance companies is positively influenced by well documented inventories (see Sucker, in this book, 74). In the majority of cases, the real reason for an inadequate inventory seems to be an unpleasant mixture of convenience and disappointment in professional providers in the collection management market. When drawing up inventories of collections and catalogues raisonnés of works by living artists, it is evident that the inventory process has positive effects on those involved. At best, collecting art objects can be explained by game theory (cf. Grasskamp, loc. cit., 640). And the creativity of the artistic community is just as difficult to grasp. Nevertheless, experience teaches: **understanding does not mean demystifying**. Dealing with what is and what was promotes a productive attitude to one's own passion or work and this requires a highly personal approach. Additionally, the complete delegation of the inventory to someone else often leads to high costs and low returns, since one knows one's work or collection and can supplement missing information and avoid errors. The inventory can facilitate a later professional processing of the estate. If an inventory is missing, there are occasions on which it must be compiled, as with the heir's obligation to the persons entitled to a compulsory portion according to § 2314 (1) *BGB* (*Bürgerliches Gesetzbuch*; in English Civil Law Book). The obligation of the heirs to determine the value is also derived from this provision. It follows from this that the heirs must pay the costs of the valuation. The minimum requirement for an orderly storage is, in terms of valuation, that works are findable and accessible.

## The valuation

The valuation of the appraiser thus begins with taking on the commission and the review of the preliminary work. A random survey, for example in the range of 5 to 10 %, whether works are present and in what condition they are, ensures a pragmatic approach to the valuation of very large bundles. All work (not only that of the sample) is then evaluated on the basis of the inventory. Samples must be carried out properly and named in the expert appraisal. Individual outliers that tend upwards in an otherwise broadly-based collection should be given special consideration. The same applies to works in which the state of conservation decides on the market prospects (in a measure) beyond the normal extent. A sample should not lead to the appraiser's distrust of the person who created the inventory. The random sample is part of a professional examination of the facts and does not go against the interests of the client. Particularly in the case of large collections, the sample often reveals that parts of the collection have already been given away, put into a foundation, sold or exchanged. In the case of larger collections, it is therefore necessary to search for "dead files" in order to be able to provide solid ground. Valuation reasons such as divorce, death and insolvency affect the parties involved – who are in exceptional mental states – and an uncritical adoption of the evaluation the objects to be assessed is not advisable. In addition, a collection or artist's works are those parts of the estate inherited by legal heirs - i.e. close relatives – that aren't particularly well known. From the outside, the psychological and social structure of artist and collector families sometimes appears as a confusing mixture that seems to correspond to the deeply individual participants. However, professional experience shows that patterns can be identified that are similar. What and to what extent it has been consumed and produced has often been attributed by those involved to the innermost circle of privacy. Children in particular are often alienated, annoyed or even traumatized by the passion of their parents. At best, one is willing to deal with the monetary value embodied in the art, which is not without guilt.

**The noblest effect of the work of the certified expert can be to contribute to the objectification of such situations.**

The certified expert charges for services in court cases according to the *Justizvergütungs- und -entschädigungsgesetz (JVEG)* – the Judicial Remuneration and Compensation Act. Currently, certified experts receive in the field of art and antiques 75 Euro net per hour. The billing must be transparent. Bavarian higher courts even demand a minute-by-minute billing of the individual time periods. In the case of private commissions, fee agreements



are made on an hourly rate basis and not based on the value in dispute. The finding of valuable items that have already been given away and should not be the subject of the current valuation is in the economic self-interest of the appraiser – not against it.

The catalogue of duties of the certified experts stipulates that an **impartial, conscientious, transparent and comprehensible expert report** must be prepared. Accordingly, the recommendations for the preparation of an expert report by certified experts from the public sector or elsewhere stipulate that the commission or the decision by the court names and then documents the objects for valuation. The reason for the valuation leads to the fact that different value concepts or different interpretations of the value concepts must be applied. The quality of an expert report depends crucially on ensuring the relevant concept of value is clear. The decision as to which interpretation is to be applied must also be addressed for this purpose.

### **Terms of value and reason**

Due to the scant legal provisions and inconsistent application, a brief outline of the spectrum in which the interpretations of the terms of value in the area of cultural property are found is given here.

#### – Contractual valuation scenario insurance

In the case of art insurance, the replacement value must be determined on a regular basis (for details on practice in the insurance sector, see Sucker, 73 f.). The replacement value is the amount that must usually be spent to acquire an object of similar and equivalent value, taking into account the relevant markets (DS 2016, 76, 81). In the case of cultural property, this regularly includes the auction premium in gross or the gallery sales price including taxes.

In order to avoid debates, art insurance companies often resort to agreed values, especially for more valuable works. Sometimes this leads to a valuation that is extremely distant from the market, which is referred to as the collector's or sentimental value. This value is determined by personal and subjective criteria which individual market participants attribute to an object of valuation. Such criteria result in a disparate and non-objectifiable premium on the market value (DS 2016, 76, 78). Since collector's values

sometimes lead to limitations in regulation, caution is required when agreeing on exaggerated values for premium purposes.

The disadvantage of fixed valuations is that they have to be reviewed regularly in order to remain in line with the interests of the collector. A well-managed inventory makes it easier to check whether the values are still in line with the market. (more on damage to cultural property with insurance implications in this book, Pracher, 81 f.)

– Occasions for valuation with limited possibilities

In the case of valuation occasions based on legal relationships, valuations are usually based on the fair market value of § 9 (2) of the *Bewertungsgesetz*

(*BewG*) – Valuation Act: “Der gemeine Wert wird durch den Preis bestimmt, der im gewöhnlichen Geschäftsverkehr nach der Beschaffenheit des Wirtschaftsgutes bei einer Veräußerung zu erzielen wäre. Dabei sind alle Umstände, die den Preis beeinflussen, zu berücksichtigen. Ungewöhnliche und persönliche Verhältnisse sind nicht zu berücksichtigen. Der Preis im Sinne der Vorschrift meint den zu bestimmenden, auf dem freien Markt erzielbaren Preis, also den Wert.” English: “The fair market value is determined by the price that would be obtained in the normal course of business according to the nature of the asset in the event of a sale. All circumstances that influence the price must be taken into account. Unusual and personal circumstances are not to be taken into account. The price in terms of the regulations meant here is the price attainable on the free market, (Kreutziger/Schaffner/Stephany, *BewG* comment, § 9 marg. 11), i.e. the value (see above, 31 f.).

The “gemeiner Wert” – common value – is interpreted differently depending on the reason for the valuation – or the application and interpretation are controversial in detail. If the art to be assessed is only privately traded - i.e. outside of the trade in so-called private sales - the assessment can be shortened. Because if the valuation (...) is not possible, because the artists do not have a meaningful market, an estimate is made according to expert knowledge in accordance with § 162 (1) of the *Abgabenordnung* (*AO*) – the German Fiscal Code. The expert's estimate is based on what private individuals would pay among themselves. This figure can also arise when valuation objects turn out to be fakes or are not authentic. Decorative objects are left, which are valued as such. If art is to be traded on the art market - i.e. in galleries and at auctions - the approaches to arriving at a numerical value vary widely. The main point of contention is how to deal with the margins

of the trade. If what counts as sales revenue as defined by the law, what the consignor receives after deduction of all premiums and discounts, or does what count what the successful bidder pays? When transferred to the art trade and gallery market, the following question arises: are the proceeds as defined by the law what the private seller receives from the gallery owner or what a third party pays the gallery owner?

## 1. Inheritance

When the occasion is an inheritance, a distinction must be made between the value for the inheritance tax return and the value for calculating the right to a statutory share or the division of the inheritance. Different valuations may have to be taken into account for tax and civil law purposes (see *OLG [Court of Appeals] Report 98, 337* with numerous references; Heuer, *NJW* 2008, 689 and 690).

### Inheritance tax

In terms of inheritance tax, the common value of § 12 of *Erbschaftsteuer- und Schenkungsteuergesetz (ErbStG)* – the Inheritance Tax and Gift Tax Act – in conjunction with § 9 of the *BewG* (see also *DS* 2016, 76, 77) is relevant. Pursuant to § 9 (2) *BewG*, the fair market value is determined by the price which would be obtained in the normal course of business (...) in the event of a sale. The expert valuation of an estate is based on the degree to which the assets of the estate can be sold. If works are sold via (art) dealers and not by private sale, as described above, disregarding objects without a market, the fair market value is determined by the dealer's purchase price or the net surcharge in the auction (see *BFH II R 7/98* of 6 June 2001 *BFH/NV* 2002, 28; Heuer, *DStR* 1995, 438 Rössler/Troll, § 110 note 119; Scherer/Lehmann, *ZErB* 2003, 69). In addition, sales costs such as transport and insurance may be deducted (cf. Viskorf, *DStZ* 2002, 881, 882). This is an aspect that is taken into account in the expert assessment on a flat-rate basis. Inheritance tax therefore only has to be paid for the actual enrichment of the heir beyond possible allowances (general and additional for household effects) (see Heuer, *NJW* 2008, 689, 690; Heuer/von Cube, *ZEV* 2013, 641, 642). The “Vergleichswertverfahren” (comparative value method) is used for unique properties. “Beim Vergleichswertverfahren werden die wertbildenden Faktoren wie Format, Sujet, Qualität, Provenienz, Marktfrische, Erhaltungszustand etc. beurteilt und gegen andere Verkäufe und Angebote im Handel oder auf Auktionen abgewogen.” (English: “In the comparative value method, the value-forming factors such as format, subject, quality, provenance, market freshness, condition, etc. are assessed and weighed against other sales and offers

in the trade or at auctions.” (cf. *BFH* of 6 June 2001 I II R 7/98; Heuer, *NJW* 2008, 689 et seq.) In the case of editions, a comparison is sought in the timely trade of other objects in the edition. Since provenance and state of conservation are also included in the valuation in this case, caution must nevertheless be exercised, and prices must not be arrived at uncritically.

In the case of individual works or small estates, the application of these principles is possible without restriction. Inheritances, however, are mainly characterized by the transfer of ownership of a large number of estate objects. There is disagreement as to how such lots are to be assessed.

“Wegen der Gesamtrechtsnachfolge, die im Erbgang vorliegt, fingiert man, dass alle Nachlassgegenstände zum Zeitpunkt des Erbfalles auf den Markt geworfen werden.” (English: “Because of the universal succession that exists in the inheritance, it is assumed that all estate’s assets are put on the market at the time of the inheritance.”) (Viskorf, *DStZ* 2002, 881, 882 with verifications). “Kulturgüter sind kein vordergründig volatiles Vermögen.” (English: “Cultural assets are not ostensibly volatile assets.”) (cf. Heuer/von Cube, *ZEV* 2013, 641, 642). “Die Finanzämter werden in Erbschaftsteuerrichtlinien aufgefordert, unter Berücksichtigung der schwierigen Verwertungsaussichten den Wert vorsichtig zu ermitteln.” (English: “Inheritance tax guidelines call upon the tax offices to cautiously determine the value, taking into account the difficult prospects of pinpointing them.”) (R B 9.3 *ErbStR* 2013). For unlike other estate objects, art is at best profitable when sold. The basic idea of the fiction of a sale is that the market would be flooded resulting in the result of market distortion and price erosion. “Die Anwendung von Paketabschlägen ist ein Ansatz, dieser Überlegung Rechnung zu tragen.” (English: “The application of package reductions is one approach to consider taking.”) (see Heuer, *NJW* 2008, 689, 691).

A package reduction with regard to art is considered if a large number of similar works or a collection (as a whole) is to be appraised. This sometimes leads to considerable reductions (DS 2016, 76,81). “Dass es Paketabschläge geben soll, ist akzeptiert, auch wenn sie ein Einfallstor für schwerlich objektivierbare Vereinfachungen und Pauschalierungen sind.” (English: “It is accepted that there should be package reductions, even if they are a gateway to simplifications and lump-sum payments that are difficult to objectify.”) (cf. critically Viskorf *DStZ* 2002, 881, 883).

In any case, it is debatable how packages are put together and how high the reductions should be.

## **Package reductions**

With regard to the structure of the collection, it becomes clear in advance whether the idea of a possible price distortion applies to the collection.

Homogenous compilations:

An artistic estate is often a homogenous bundle. If a large number of an artist's works come onto the market, then a distortion of the market is almost self-evident. In an artist's estate, a distinction must be made between the market body of work and marginal pieces of no commercial value. This means the works from phases of creation that are at best relevant to the genesis of the work and unfinished/unsigned works must be considered separately.

Heterogenous compilations:

In the case of collectors' estates, we are mainly dealing with a large number of works by different creators. The collections are therefore heterogeneous and can be characterized by having larger sub-groupings of works. In any case, items without the character of a work, such as personal souvenirs with a complimentary signature, can be excluded from the valuation. Only in very rare cases do they have market value. In private estates, there are often individual top works that would hold their own in the market. The majority of the holdings, however, are somewhere in the middle of the range. This means that alongside top works, there are often more or less disparate, associative individual works or small groups. There are exceptions, for example, if the complete graphic works of an artist is brought together, making this internal volume particularly valuable. The normal case with fine art collections, however, is the creation of different specific holdings such as a larger number of a specially promoted artist or an artist who has been accompanied over a longer period of time. Sometimes such holdings are extremely redundant. This means that the works are so similar that the market would not accept them without compulsion. Sometimes, however, collectors of works by a single artist carefully create an entire body of work with a museum-like quality.

Accordingly, it is sometimes argued that the estate should be divided into different segments - in this way, only internal sub-groupings would be discounted (Gerstenberg, *FR* 2015, 984, 988). But this gives the bizarre result that the clever, knowledgeable collection receives smaller reductions or even surcharges. “Ein Sammlungszuschlag kommt nur ausnahmsweise in Betracht, wenn eine Sammlung mehr wert ist als die Summe ihrer Teile, zum Beispiel wegen Vollständigkeit oder einer besonders wertbildenden Provenienz.” (English: “A collection surcharge is only considered in exceptional cases if a collection is worth more than the sum of its parts, for example because of its completeness or a provenance that is particularly valuable.”) (cf. DS 2016, 76, 81).

It cannot be in the interest of the community of law that redundant, less attractive and insignificant collections are given special privileges. It is therefore partly assumed that, in addition to the fictional sale on the cut-off date, it is considered that the art collection will be put on the market in one piece, i.e. without the possibility to sell the good pieces individually. Here it is important to note that the Inheritance Tax Act (§ 13(1) No. 2 *ErbStG*) refers to art objects and collections. “Die verschiedenen Begriffe meinen Verschiedenes.” (English: “The different terms mean different things.”) (according to Heuer/von Cube *ZEV* 2013, 641, 642). “Der Vorteil, dass unterschiedliche Arbeiten dieselben Privilegierungen erfahren sollen, wird begründet durch die Klammer der Zugehörigkeit zu einer Sammlung, die als Ganzes zu betrachten sei.“ (English: “The advantage that different works should enjoy the same privileges is justified by the fact that they belong to a collection that should be considered as a whole.”) (Heuer/von Cube, op. cit.). “Eine Sammlung im Rechtssinne ist eine wirtschaftliche Einheit, geprägt von bestimmten erkennbaren Ordnungskriterien wie Stil, Epoche, Ausdrucksform, Technik. Aber auch die Abwesenheit von objektiven Kriterien wie die Zuordnung zu einer bestimmten Person kann eine Sammlung ausmachen.“ (English: “A collection in the legal sense is an economic unit, characterized by certain recognizable criteria of order such as style, epoch, form of expression, technique. But also, the absence of objective criteria such as the assignment to a certain person can constitute a collection.”) (cf. Lindenau, *ZErb* 2015, 245, 248/249 with verifications).

Accordingly, the use of the term collection is evaluative and not merely descriptive.

What is surprising is that the tax debtor makes this assessment. In any case, it is not known whether an authority is questioning whether culturally worthless consumption can

be assumed in this case (see above "*Entgleiste Vorratshaltung*" – "derailed stockpiling", Grasskamp, loc. cit.) (cf. Heuer/von Cube, *ZEV* 2013, 641, 643: The authors refer to German history, which makes it inconceivable that a German authority would declare that cultural assets are not worth preserving in the public interest).

Although artists leave behind a commercial business and not a collection that is designed to cohere rather than sell, the considerations are extended to artists' estates. However, the cultural aspect, which leads to a favorable treatment in inheritance law, is cancelled by income tax law, if the art is transferred from the artist's business assets to the private assets of the heirs. The fact that a collector's entire estate of art objects can be regarded and privileged as a collection with few hurdles is appropriate under the aspects of equal treatment and tax regulations. After all, professional experience shows that a passion for art is only very rarely economically advantageous on the balance sheet. Individual top works and individual dream careers deceive about the actual conditions. Thus, the very cautious valuation of art objects in inheritance tax law actually reflects the economic reality.

If a collection is to be appraised in the legal sense, it seems laborious, in view of the package reductions/flat rates/special treatments that follow, to assign an individual value to each art object. A resilient expert opinion does this nevertheless, not only to be complete and transparent, but also to remain completely useable. Because the clients who commissioned the expert report have the possibility to plan differently than envisaged when placing the order. If expectations are not fulfilled, new findings emerge or exemptions are not effective, the tax debt is to be paid with art, or the inheritance is to be divided ("*Realteilung*"), with certain objects given to certain inheritors, then individual values become useful.

Regardless of how the certified expert decides to approach the large bundle and determine a value of the art objects or a collection value, his or her train of thought must be coherent. Because it is not up to them to make the legal decisions. It is up to them to make appropriate decisions that are appropriate to the individual case in terms of a market-driven valuation. The use in the legal context is then incumbent on others who should be able to build on this valuation with their own power of judgement.

## Exemptions

In the case of cultural property, the law provides for exemptions from inheritance tax in § 13 (1), No. 2, *ErbStG* (Inheritance Tax Law) (for more details, see Holtz, 25). “Es wird unter bestimmten Voraussetzungen eine 60%ige Verschonung oder sogar eine 100%ige Verschonung (Abschlag auf den Wert des begünstigten Gegenstandes) gewährt. Das Erhaltungsinteresse, also die kunsthistorische Bedeutung, das Zugänglichmachen für die Öffentlichkeit und die Unrentabilität (Kosten müssen die Einnahmen übersteigen) sind für den Wertabschlag von 60 % gefordert. Zur vollen Verschonung (100 %) muss der Steuerpflichtige zusätzlich bereit sein, die Werke dem Denkmalschutz zu unterstellen. Außerdem müssen sich die Gegenstände seit mindestens 20 Jahren im Familienbesitz befinden oder im Verzeichnis national wertvollen Kulturguts eingetragen sein. (English: “Under certain conditions, a 60% or even a 100% exemption (reduction on the value of the beneficiary object) is granted. If there is a preservation interest, i.e. the art historical significance, providing access to the public and the unprofitability (costs must exceed income), a 60% would have to be granted. For full protection (100 %), the taxpayer must also be prepared to make the works subject to historic preservation. In addition, the objects must have been in family ownership for at least 20 years or be entered in the register of nationally valuable cultural assets.”) The law requires inheritors to retain the art for ten year and forbids them from selling during that time period, otherwise the exemptions for the past are not applicable.

The concept of family is interpreted broadly. “Die Unterstellung unter den Denkmalschutz muss formal eingehalten werden, ist Ländersache und hat im Ergebnis nur deklaratorischen Charakter”. (English: “The subordination under the preservation of historical monuments must be formally adhered to, is a matter for the state and has only a declaratory character.”) (see Heuer/von Cube, *ZEV* 2013, 641, 644; Mues in *FAZ*, 27 August 2016, 15). Initially, monument preservation is only responsible for immobile cultural assets. Resources for assessing the art historical significance of movable objects of contemporary fine art are not evident.

Since experts from various countries are certified to value cultural property, depending on their opinion, they can check whether the conditions for the preservation regulations are met.



The numerical value which is stated in the inheritance tax return after deduction of the exemptions is decidedly not equal to the value which is used as the basis for the calculation of claims to a statutory share.

### **Statutory share/splitting of the estate**

Exemptions under inheritance tax law cannot be held against the beneficiary of the compulsory portion. This means that valuable collections can be inherited with 100% exemption from inheritance tax but are a factor in the right to a compulsory portion because of their high market chances and can lead to considerable liquidity problems. Among heirs, the fact that they are spared is also irrelevant. By its nature, the community of heirs aims at distribution.

To keep the collection together, the community of heirs would have to achieve a high degree of unity in the long run. In statutory inheritance law, the surviving spouse has a claim for the house contents against the heirs, which they have to fulfill in advance. This means that works of art, insofar as they can be regarded as household effects of the surviving spouse, are not included in the quota. The extent of a reasonable household inventory in this respect is to be decided on a case-by-case basis and depends on the lifestyle of the persons involved. As a result, when determining the value of cultural property among heirs and those entitled to a statutory share, it is taken as a baseline that they should participate in the actual estate. The principle of "Realteilung" real division between heirs applies. In this case, it is sufficient to have a uniform set of values, which is indisputable among the parties, according to which the division is made. If all the works, or at least the more valuable ones, are assigned values in the insurance policy, the division according to these values is pragmatic. However, as soon as payments are to be made, this value is not relevant. Meanwhile, the statutory share is geared towards compensation in money. In this case, a collection value / estate value must be determined without applying the exemptions.

### **2. Gift value/value of the foundation contribution**

Life-time donations to museums or charitable foundations may be exempt from gift tax pursuant to § 13 (1) no. 16 or 17 *ErbStG*. In the case of donations, the endowment of a foundation and endowments to existing foundations, however, income tax advantages are also of importance. Indirectly, the private collector "profits" from the tax deductibility of the donation as a special expenditure. The situation is different if the donation comes from business assets (e.g. from artists). In this case, the donation also represents a withdrawal

from the business assets subject to income tax. For artists, therefore, this favorable effect does not arise from donating or donating their own works.

The collector's interests are exactly the opposite of those of the heir when he makes a donation to a foundation or a museum. Here a high value results in a high donation receipt. The assessment in the case of an endowment is thus made in the area of conflict between the (also) financial interests of the founder and the tax discipline of the tax authorities. (For further details on this problem in this book, Klinkner/Ens, *Besonderer Bewertungsanlass Stiftung/Schenkendung/Sachspende*, 55 f.)

In individual cases, the prerequisites for successful plausibility are stated, for example, by stating the historical acquisition price or the price of comparable works in galleries. So far, credibility by means of expert reports has rarely been required, at least not in the first round. Only in the case of obviously excessive valuations or a valuation by the foundation's own board or directors have – as far as can be seen – expert reports been (subsequently) requested. If such an expert report is requested, the determination of the relevant valuation standard is missing. As the requirements for a properly established and managed foundation are becoming increasingly stringent, this is likely to change.

At present, there is no uniform approach as to whether the donor has to accept the trader's margin/expenses of the auction. It is therefore questionable whether the museum / foundation is enriched by the purchase price or by the expected proceeds from the sale of the item. In real estate, the contract costs (broker, notary, land transfer tax) are not included in the market value. If one adds the auction surcharge for art (i.e. including the seller's discount and taxes), this initially appears to be contrary to the system. After all, repeated sales, each time triggering a premium and discount from the auctioneer, do not make the object itself more valuable. However, the normal business transaction for the present asset, objects of art deposited in foundations, or donated to museums, is the sale by trade or by auction (cf. the parallel formation of insurance values, in this book, Sucker, 74 f.). Contemporary art often does not yet have a meaningful auction market. Here, trading in galleries is the normal course of business. The purchase price of the galleries from the artist today ranges between 50 % and 70 % of the later gallery sales price.

In the guidelines of *ErbStR* B 9.3 clause 2, the relevance of the valuation in this context was apparently not considered. Cautious valuations are only advantageous if taxes have

to be paid. The opposite case, when the citizen has an advantage from an optimistic valuation, is not discussed. Collectors would have to accept a deduction of the dealer's margin for every work of art they bought in a gallery, and thus regularly accept a donation receipt. It goes without saying that this interpretation would limit the willingness to turn over works of art. However, since public institutions have little or no acquisition budgets and 75% of the holdings in public museums are the result of private donations (see Ridler, *Privat gesammelt - öffentlich präsentiert: Über den Erfolg eines neuen musealen Trends bei Kunstsammlungen*, Dissertation, Bielefeld 2012, 231), there is a high public interest in not allowing the stream of donations be interrupted.

If a collection is placed in a foundation, package reductions would have to be applied. However, the deposit into a foundation (as far as it is not a "Verbrauchsstiftung"- principle depleting foundation) is precisely not made in order to bring it to the market, but to withdraw it from the market. The collection should remain together. Accordingly, this would have to lead to surcharges, as the market is being squeezed out by donations to museums and in foundation assets. An expert report should state whether the donation under assessment will lead to a shortage on the market in order to assist the tax authorities with the point. The certified expert cannot resolve the still inconsistent application of the regulation.

At present, an entanglement in this conflict can basically only be resolved by a commission identifying the opportunities, i.e. the prices achieved.

### **3. Gains compensation**

The determination of the value of the initial and final assets for the calculation of a possible claim to gain compensation at the end of a marriage through divorce is regulated in § 1376 BGB (Civil Code of Germany) (for details see this book, Holtz, 17). However, there are no legal provisions on the valuation method. It is generally assumed that the full real value should be applied. This is understood to be the market value, i.e. the proceeds of a sale taking advantage of all market opportunities. It is debatable whether these sales proceeds should be adjusted for any costs and deferred income taxes. The exploitation of market opportunities may well be understood to mean that package reductions have no effect, because exploitation of all market opportunities can be based on a step-by-step, well-considered realization without necessity and haste. In the case of divorce, the rules of civil

procedure apply, i.e. the principle of settlement. In case processing, it is noticeable that disputes frequently arise over individual objects whose value has probably increased. However, objects that have fallen in value could be offset. Certified experts cannot advise on this or point it out, as this is not included in the scope of their responsibilities. In the consultation - or if one is personally affected - it should however be remembered. Since the valuation method is not legally prescribed, the usability of the certified expert report also depends here on the fact that the assignment is precise, and the appraisal is written in a transparent manner.

### **The assessment itself**

Once the concept of value has been established, it must be evaluated in the narrower sense. This means that the opportunities on the relevant markets are determined with the aid of the "Vergleichswertverfahren" (comparative value method). Suitable comparisons are sought in databases and by means of information to be obtained from the marketplaces relevant to the art objects in question.

In the case of edition items, timely sales of other copies of the series are particularly important. Conceivable marketplaces are regional, national and international auction houses in their branches and on their internet platforms, galleries including program gallery and society gallery, art trade, intermediaries like art consultants, but sometimes also artist galleries, and eBay (with careful handling).

Search results from databases appear at first glance to be a convenient tool but are not to be taken at face value. Even the input in the search mask implies a rating. Depending on the period of time, the auction house, the medium and the format of the artist you are looking for, you will get lists that are more or less relevant for answering the question at hand. A proper appraisal explains both the criteria of the search for information as well as the weighting of the search results: Under which aspects are the traded works compared; are the sales timely; were there outliers downwards and upwards, what must be left out of consideration; are there enough sales to be meaningful; have works been offered frequently in a short time and therefore been left behind (technical jargon: "burnt") and so forth. When evaluating databases, it must always be borne in mind that, in principle, valuations require the object of the valuation to be looked at closely. When evaluating the results of an auction, there is naturally no visual inspection of the traded objects.

Accordingly, the uncertainty factor in regard to the comparability of the condition remains. Especially for (light-)sensitive works this can play a major role. Conversely, if the state of preservation of the subject of the expert appraisal is known to be excellent and the conservational care is exemplary, this can lead to a significantly different and higher assessment. The publication of auction results is not entirely uniform. The fact that considerable result-related premiums and reductions have to be paid for consignors and auctioneers which are not necessarily made public and may also be subject to taxes, makes database research complicated. Currencies must be standardized; fluctuations must be taken into account.

Determining the market chances of a work of art outside auctions requires access to the players, especially in the art trade and galleries, because prices achieved are not published here. Even at art fairs, at which, at least in Germany, there is an obligation to show prices, these are rarely found out without making considerable effort. Added to this are uncertainty factors such as value added tax, the amount and accrual of which often depends on the individual case. Whether or not the prices demanded are ultimately loosely linked to the prices actually achieved must be considered and differs depending on the market used. In any case, galleries are trading companies and are not obliged to provide truthful information about the prices of their goods in general, i.e. independently of a purchase request.

The players in the art market often professionally reconcile the need to protect their business secrets and at the same time to work together in a small market in the long term. If this is not successful and the comparative value method cannot be applied without compulsion due to the non-transparent market, certified experts must explain where they have encountered restrictions. In order to give the judge, the tax official or other exploiter the opportunity to use the expert appraisal as a basis for their own considerations and decisions, such details must be disclosed.

An indication that the market has been examined in recent years through Artnet research and by consulting galleries' price lists is not sufficient for a reliable expert report. Comparative work must be presented in a verifiable manner by making the research accessible.

Once the information has been compiled, it must be evaluated in a comprehensible way.

The empirical principles applied shall be disclosed and the value of the technical statements shall be indicated. This means that the degree of probability must be differentiated: Is it a conjecture, an overriding probability or certainty? Photographs, tables and diagrams can contribute to comprehensibility, but must also be verbalized and must not stand on their own without further explanation.

Weighing the value-forming factors authenticity / genuineness, state of preservation, format, subject, attractiveness, relevance in the context of the work, provenance, market freshness etc. requires a high degree of expertise and experience. For, like the object of valuation and its market, the value-forming factors are determined less objectively than contextually. Authenticity and genuineness are very important value-forming factors and must always be checked as well, unless the client wishes to verify authenticity and genuineness (this must be indicated in the expert appraisal as part of the basis of assessment).

In contrast to art objects of other epochs, the authenticity of contemporary art is very rarely disproved by scientific methods due to the available materials and accessible techniques. Scientific methods can only ever disprove an attribution, but not make an attribution. This becomes particularly relevant when living artists refuse to confirm that a work, which is objectively authentic, is by their hand. This is done primarily due to unrelated factors and is especially a problem with works bought directly from the studio and without further proof. In this case, the price advantage of purchasing by bypassing official, regulated art market channels is reversed. This is because works that are not authorized by the artist or his estate are in fact not tradable. Authenticity and provenance are inter-linked. An intact provenance underpins the authenticity and, depending on the class of the chain of provenance, it has a considerable influence on the value. Advantageous here is the trading place, preferably a renowned gallery, well-known previous owners such as collections with illustrious names and finally the participation in exhibitions. It is also helpful if there is an illustration and discussion in publications such as the catalogue raisonné or exhibition catalogues.

Authenticity means that the work in the present form corresponds to the authorship of the artist. Changes in the character of works of art due to restoration, suspensions, montages, clippings, additions etc. limit the authenticity. A screen print by Warhol remains genuine in the sense that the material comes from the studio. However, if such a print is applied by

someone else's hand and covered with varnish to make a canvas, the result is not an authentic Warhol painting, but an artefact that has no (or no longer) market value as part of the artist's oeuvre.

Since the market has become more transparent in some places due to the research possibilities of the internet, the investigators of the investigating authorities such as René Allonge in Berlin (*Landeskriminalamt* – State Criminal Police Office) and Dieter Sölch in Munich (*Landeskriminalamt* Bavaria) observe that the insurance industry is increasingly being used as a pawn for the sale of fake works. Work that is not genuine or not authentic is first insured (preferably at agreed rates) and then suffers a loss. Because of the comfortable conditions of all-risk insurance, especially the cash option (see Sucker's article in this book, 78), it is a trap to focus exclusively on the damage and sell a work that is worthless as a result to the insurance company. Accordingly, in the expert valuation of works of art, care should be taken when authenticity and genuineness are predetermined. Here, it is particularly important to ensure the certified expert's independent and legal work and that the submissions by the contracting bodies are critically must critically examined.

Restorations are to be considered in connection with authenticity, as mentioned with the example of Warhol. Not every restoration leads to a noticeable reduction in value. However, despite technically perfect restorations, it can be a blemish for the (relevant) market that the work was touched at all. Since the legal system does not compensate for every conceivable damage, this aspect must be handled restrictively. On the other hand, a particularly successful restoration, which is accompanied by a fresher impression of the work, must also be viewed critically from the point of view of authenticity. The professional standards of restorers over the course of time must be observed here. (More on this issue in Pracher, in this book, 85 f.) The state of conservation must always be assessed in the context of the work. Sometimes crumpled paper, coffee stains and footprints are inherent in the work or are understood to be associated with the term "studio character". In other artistic positions, where the explicit absence of the creative hand plays a role as in the case with Hanne Darboven, for example, even small damages reduce the value of the work. Within an artistic work, this can be evaluated differently depending on the group of works. In some of Günther Förg's works on paper, the imprint of the coffee cup on the work is virtually a means of painting and design. A photo print of the same artist with a coffee stain would probably be a total loss. The expert's professional understanding of the artistic work and its market environment is crucial here.

The classification of technique, size and relevance in the artist's work also requires tact and expertise. What is taken from the mid-range of an artist's market works or is merely a minor work must be recognized. It must be determined whether, for example, a particularly large format is difficult to trade or whether it is museum-like and more or less valuable depending on how you look at it. In the case of contemporary art, it is more common for artists not (yet) to play a role in auctions on the one hand, but at the same time to be traded at very high prices in galleries. Empathetically and at the same time unaffected by the hysteria of the market, the view of the expert should bring the different marketplaces together into an acceptable result.

In addition to the standardization of currencies, the comprehensible expert assessment includes the harmonization of units of measurement and of gross and net. The reporting of sales taxes, surcharges and reductions etc. is prone to errors and sometimes only possible in approximate terms.

## **Conclusion**

In the end, it must be noted that the valuation of art objects is made more difficult by the extensive silence of the lawmakers. As a result, the requirements that tax authorities and courts place on valuations and credibility are inconsistent. However, due to the increasing relevance (keywords: boom in the establishment of foundations, generation of heirs, increasing willingness to give art to public institutions), a sense of the matter and a growing sovereignty in dealing with it can increasingly be observed among the authorities. The interpretation of the scanty legal requirements by the authorities appears to be citizen-oriented in the sense that a rational view of collectors prevails, especially in the context of inheritance tax. For the most part, collecting is considered more a bizarre destruction of capital (as aforementioned) and a private quirk – rather than the successful escape into material assets that is suspected. Fears that the tax authorities in particular have reservations about "the rich collectors", which can be explained by ill will and social envy, are occasionally stirred up - obviously guided by interests. In professional practice, there's no evidence of that. Legal or supreme court comprehensive clarifications are not to be



expected. Standardization in everyday application can be achieved by reference to dossiers such as the “Wert- und Kostenbegriffe im Sachverständigenwesen” (The Value and Cost Concepts in the Expert System) (DS 2016, op. cit.) and action maxims yet to be established. Symposiums such as “Der Kunst einen Wert zuweisen” (“Assigning a Value to Art” are working on such guidelines.

Independent certified experts are particularly ready for the implementation of valuation appraisals according to the agreement on the application of the relevant concept of value.

This ensures that even ambitious commissions such as the valuation of large estates or other extensive compilations are handled properly. With regard to donations to museums, it can be observed in the wake of the Beltracchi affair and a new generation of museum directors that the mindfulness with regard to the documentation of the value of a donation has increased. Since collectors are increasingly buying from a wide variety of gallery owners, the construct of purchasing from just one gallery (“Hausgalerie”, principle supplier), who also feels responsible for secondary aspects of collecting and preparing valuations, appears less and less. Collections are increasingly being professionally managed according to international standards, so that questions of insurance, documentation and future orientation are dealt with and result in a proper valuation. In the meantime, there are courses for the further training of judges on the effective selection of certified experts.

Accordingly, it can already be observed and can be expected in the future that the objective and impartial valuation of cultural property is a topic of increasing relevance and the demand for the services of certified experts is growing accordingly.

A general objectification in the clarification of the legal and economic questions about art may grow out of this, so that the joy of collecting and immersing yourself in art can develop freely.

Translation: Johanna da Rocha Abreu