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2011-2012 Regular Sessions

I N S E N A T E

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Introduced by Sen. LITTLE -- read twice and ordered printed, and when printed to be committed to the Committee on Cultural Affairs, Tourism, Parks and Recreation

AN ACT to amend the arts and cultural affairs law, in relation to consignments of works of art to art merchants by artists, their heirs and personal representatives

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1 Section 1. Section 11.01 of the arts and cultural affairs law, as
2 added by chapter 849 of the laws of 1984, subdivisions 11 and 20 as
3 amended, subdivision 18 as added and subdivisions 19 and 21 as renum-
4 bered by chapter 940 of the laws of 1990, is amended to read as follows:
5 S 11.01. Definitions. As used in this title:
6 1. "Artist" means the creator of a work of fine art or, in the case of
7 multiples, the person who conceived or created the image which is
8 contained in or which constitutes the master from which the individual
9 print was made.
10 2. "Art merchant" means a person who is in the business of dealing,
11 exclusively or non-exclusively, in works of fine art or multiples, or a
12 person who by his occupation holds himself OR HERSELF out as having
13 knowledge or skill peculiar to such works, or to whom such knowledge or
14 skill may be attributed by his OR HER employment of an agent or other
15 intermediary who by his OR HER occupation holds himself OR HERSELF out
16 as having such knowledge or skill. The term "art merchant" includes an
17 auctioneer who sells such works at public auction, and except in the
18 case of multiples, includes persons, not otherwise defined or treated as
19 art merchants herein, who are consignors or principals of auctioneers.
20 3. "Author" or "authorship" refers to the creator of a work of fine
21 art or multiple or to the period, culture, source or origin, as the case
22 may be, with which the creation of such work is identified in the
23 description of the work.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 4. "Creditors" means "creditor" as defined in subdivision twelve of
2 section 1-201 of the uniform [commerical] COMMERCIAL code.

3 5. "Counterfeit" means a work of fine art or multiple made, altered or
4 copied, with or without intent to deceive, in such manner that it
5 appears or is claimed to have an authorship which it does not in fact
6 possess.

7 6. "Certificate of authenticity" means a written statement by an art
8 merchant confirming, approving or attesting to the authorship of a work
9 of fine art or multiple, which is capable of being used to the advantage
10 or disadvantage of some person.

11 7. "Conservation" means acts taken to correct deterioration and alter-
12 ation and acts taken to prevent, stop or retard deterioration.

13 8. "Craft" means a functional or non-functional work individually
14 designed, and crafted by hand, in any medium including but not limited
15 to textile, tile, paper, clay, glass, fiber, wood, metal or plastic;
16 provided, however, that if produced in multiples, craft shall not
17 include works mass produced or produced in other than a limited edition.

18 9. "Fine art" means a painting, sculpture, drawing, or work of graphic
19 art, and print, but not multiples.

20 10. "HEIR" SHALL HAVE THE MEANING PROVIDED IN THE ESTATES, POWERS AND
21 TRUSTS LAW.

22 11. "Limited edition" means works of art produced from a master, all
23 of which are the same image and bear numbers or other markings to denote
24 the limited production thereof to a stated maximum number of multiples,
25 or are otherwise held out as limited to a maximum number of multiples.

26 [11.] 12. "Master" when used alone is used in lieu of and means the
27 same as such things as printing plate, stone, block, screen, photograph-
28 ic negative or other like material which contains an image used to
29 produce visual art objects in multiples, or in the case of sculptures, a
30 mold, model, cast, form or other prototype, other than from glass, which
31 additional multiples of sculpture are produced, fabricated or carved.

32 [12.] 13. "On consignment" means that no title to, estate in, or right
33 to possession of, the work of fine art or multiple that is superior to
34 that of the consignor vests in the consignee, notwithstanding the
35 consignee's power or authority to transfer or convey all the right,
36 title and interest of the consignor, in and to such work, to a third
37 person.

38 [13.] 14. "Person" means an individual, partnership, corporation,
39 association or other group, however organized.

40 15. "PERSONAL REPRESENTATIVE" SHALL HAVE THE MEANING PROVIDED IN THE
41 ESTATES, POWERS AND TRUSTS LAW.

42 [14.] 16. "Print" in addition to meaning a multiple produced by, but
43 not limited to, such processes as engraving, etching, woodcutting,
44 lithography and serigraphy, also means multiples produced or developed
45 from photographic negatives, or any combination thereof.

46 [15.] 17. "Proofs" means multiples which are the same as, and which
47 are produced from the same masters as, the multiples in a limited
48 edition, but which, whether so designated or not, are set aside from and
49 are in addition to the limited edition to which they relate.

50 [16.] 18. "Reproduction" means a copy, in any medium, of a work of
51 fine art, that is displayed or published under circumstances that,
52 reasonably construed, evinces an intent that it be taken as a represen-
53 tation of a work of fine art as created by the artist.

54 [17.] 19. "Reproduction right" means a right to reproduce, prepare
55 derivative works of, distribute copies of, publicly perform or publicly
56 display a work of fine art.

1 [18.] 20. "Sculpture" means a three-dimensional fine art object
2 produced, fabricated or carved in multiple from a mold, model, cast,
3 form or other prototype, other than from glass, sold, offered for sale
4 or consigned in, into or from this state for an amount in excess of
5 fifteen hundred dollars.

6 [19.] 21. "Signed" means autographed by the artist's own hand, and not
7 by mechanical means of reproduction, after the multiple was produced,
8 whether or not the master was signed or unsigned.

9 [20.] 22. "Visual art multiples" or "multiples" means prints, photo-
10 graphs, positive or negative, sculpture and similar art objects produced
11 in more than one copy and sold, offered for sale or consigned in, into
12 or from this state for an amount in excess of one hundred dollars exclu-
13 sive of any frame or in the case of sculpture, an amount in excess of
14 fifteen hundred dollars. Pages or sheets taken from books and magazines
15 and offered for sale or sold as visual art objects shall be included,
16 but books and magazines are excluded.

17 [21.] 23. "Written instrument" means a written or printed agreement,
18 bill of sale, invoice, certificate of authenticity, catalogue or any
19 other written or printed note or memorandum or label describing the work
20 of fine art or multiple which is to be sold, exchanged or consigned by
21 an art merchant.

22 S 2. Section 12.01 of the arts and cultural affairs law, as added by
23 chapter 849 of the laws of 1984 and paragraph (c) of subdivision 1 as
24 added by chapter 675 of the laws of 1995, is amended to read as follows:

25 S 12.01. Artist-art merchant relationships. 1. Notwithstanding any
26 custom, practice or usage of the trade, any provision of the uniform
27 commercial code or any other law, statute, requirement or rule, or any
28 agreement, note, memorandum or writing to the contrary:

29 (a) Whenever an artist or craftsperson, [his] OR THE heirs or personal
30 representatives OF SUCH ARTIST OR CRAFTSPERSON, delivers or causes to be
31 delivered a work of fine art, craft or a print of [his] SUCH ARTIST'S OR
32 CRAFTSPERSON'S own creation to an art merchant for the purpose of exhi-
33 bition and/or sale on a commission, fee or other basis of compensation,
34 the delivery to and acceptance thereof by the art merchant establishes a
35 consignor/consignee relationship as between such artist or craftsperson,
36 OR THE HEIRS OR PERSONAL REPRESENTATIVES OF SUCH ARTIST OR CRAFTSPERSON,
37 and such art merchant with respect to the said work, and:

38 (i) such consignee shall thereafter be deemed to be the agent of such
39 consignor with respect to the said work;

40 (ii) such work is trust property in the hands of the consignee for the
41 benefit of the consignor;

42 (iii) any proceeds from the sale of such work are trust funds in the
43 hands of the consignee for the benefit of the consignor;

44 (iv) such work shall remain trust property notwithstanding its
45 purchase by the consignee for his own account until the price is paid in
46 full to the consignor; provided that, if such work is resold to a bona
47 fide third party before the consignor has been paid in full, the resale
48 proceeds are trust funds in the hands of the consignee for the benefit
49 of the consignor to the extent necessary to pay any balance still due to
50 the consignor and such trusteeship shall continue until the fiduciary
51 obligation of the consignee with respect to such transaction is
52 discharged in full; and

53 (v) SUCH TRUST PROPERTY AND TRUST FUNDS SHALL BE CONSIDERED PROPERTY
54 HELD IN STATUTORY TRUST AS DEFINED AND CONTEMPLATED BY 11 U.S.C. SECTION
55 541 AND OTHER RELEVANT BANKRUPTCY LAW, AND no such trust property or
56 trust funds shall BECOME THE PROPERTY OF THE CONSIGNEE OR be subject or

1 subordinate to any claims, liens or security interest of any kind or
2 nature whatsoever OF THE CONSIGNEE'S CREDITORS.

3 (b) Waiver of any provision of this section is absolutely void [except
4 that a consignor may lawfully waive the provisions of clause (iii) of
5 paragraph (a) of this subdivision, if such waiver is clear, conspicuous,
6 in writing and subscribed by the consignor, provided:

7 (i) no such waiver shall be valid with respect to the first two thou-
8 sand five hundred dollars of gross proceeds of sales received in any
9 twelve-month period commencing with the date of the execution of such
10 waiver;

11 (ii) no such waiver shall be valid with respect to the proceeds of a
12 work initially received on consignment but subsequently purchased by the
13 consignee directly or indirectly for his own account; and

14 (iii) no such waiver shall inure to the benefit of the consignee's
15 creditors in any manner which might be inconsistent with the consignor's
16 rights under this subdivision].

17 (c) [proceeds] PROCEEDS from the sale of consigned works covered by
18 this section shall be deemed to be revenue from the sale of tangible
19 goods and not revenue from the provision of services to the consignor or
20 others, except that the provisions of this paragraph shall not apply to
21 proceeds from the sale of consigned works sold at public auction.

22 2. IF A CONSIGNEE FAILS TO TREAT THE TRUST PROPERTY OR TRUST FUNDS
23 IDENTIFIED IN PARAGRAPH (A) OF SUBDIVISION ONE OF THIS SECTION IN
24 ACCORDANCE WITH THE REQUIREMENTS OF FIDUCIARIES IN SECTION 11-1.6 OF THE
25 ESTATES, POWERS AND TRUSTS LAW, SUCH FAILURE SHALL CONSTITUTE A
26 VIOLATION OF THIS ARTICLE AND OF SECTION 11-1.6 OF THE ESTATES, POWERS
27 AND TRUSTS LAW AND SHALL BE SUBJECT TO THE PENALTIES PROVIDED THEREIN.

28 3. ANY PERSON WHO HAS BEEN INJURED BY REASON OF A VIOLATION OF THIS
29 ARTICLE MAY BRING AN ACTION IN HIS OR HER OWN NAME TO ENJOIN SUCH UNLAW-
30 FUL ACT, TO RECOVER HIS OR HER ACTUAL DAMAGES, OR BOTH. THE COURT MAY
31 AWARD REASONABLE ATTORNEYS' FEES, COSTS AND EXPENSES TO A PREVAILING
32 PLAINTIFF IN ANY SUCH ACTION. UPON A CONSIGNOR'S ESTABLISHING IN ANY
33 SUCH ACTION A PRIMA FACIE CASE THAT THE CONSIGNOR DELIVERED OR CAUSED TO
34 BE DELIVERED SUCH WORK OF FINE ART, CRAFT OR PRINT TO A CONSIGNEE AS
35 DESCRIBED IN PARAGRAPH (A) OF SUBDIVISION ONE OF THIS SECTION AND MADE A
36 DEMAND FOR RETURN OF THE WORK OR SALE PROCEEDS, THE CONSIGNEE SHALL HAVE
37 THE BURDEN OF PROVING ITS DEFENSES TO THE CONSIGNOR'S CLAIMED RIGHT TO
38 RETURN OF SUCH WORK OR SALE PROCEEDS THEREFROM.

39 4. Nothing in this section shall be construed to have any effect upon
40 any written or oral contract or arrangement in existence prior to
41 September first, nineteen hundred sixty-nine or to any extensions or
42 renewals thereof except by the mutual written consent of the parties
43 thereto.

44 S 3. This act shall take effect on the thirtieth day after it shall
45 have become a law.