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| **A PRIMER ON CREATIVE ENTERPRISE PLANNING** |
| **MID-SOUTH SCULPTURE ALLIANCE**  **INTERDISCIPLINARY SCULPTURE CONFERENCE**  **SCHOOL OF DESIGN, ARCHITECTURE, ART & PLANNING**  **UNIVERSITY OF CINCINNATI**  **CINCINNATI, OHIO**  **Thursday, October 21, 2021** |
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**PLANNING**

1. Plan: Evaluate your desired outcomes.
   1. Six step plan to create a plan:
      1. Identify what you want to accomplish
      2. Who are your primary stakeholders
      3. Plan to succeed: Create goals short, medium, and long-term
      4. Implement
      5. Make changes as necessary
      6. Celebrate successes
2. Choosing a Legal Framework
   1. What are the benefits and drawbacks?
      1. Partnership/Joint Venture
      2. C Corporation
      3. S Corporation
      4. Traditional LLC
      5. Trust
      6. Nonprofit
3. New Formation Option – B Corporation

**Partnership/Joint Venture**

1. Definition: An association of persons to carry on, as owners, business for profit.
   1. There are different types of partnerships
      1. Limited Liability Partnership
         1. Partnership Agreement
2. Certificate/Articles of Partnership
3. Only General Partner(s) liable and able to bind entity

ii. General Partnership

* + - 1. Partnership Agreement
      2. Any partner can bind the entity

3. All partners share entity liability

2. Partnership Agreement- filed with the Secretary of State

* 1. The requirements of this agreement may vary by state, so it is important to check with your state of domicile requirements or consult an attorney.
  2. Checklist: The Agreement filed MUST contain the following.
     1. The name of the partnership
        1. Additional requirements for Limited Liability Partnerships (LLP)
           1. Mailing address of principal office
           2. Mailing address of registered agent
     2. The partnership positions and relative authority, or limitations on their authority
  3. Additional Partnership Agreement *Considerations*:
     1. Who are the parties
        1. Contact information
        2. Role in the partnership
     2. What is the purpose of the partnership
     3. What is the duration of the agreement
     4. Who can decide what, or Governance and Management
     5. Financial Contributions towards specific elements including:
        1. Promotion
        2. Production
     6. Agreement on Exhibits
     7. Profits
     8. Dissolution
     9. Signatures

1. Joint Venture: A short term partnership in which the parties undertake a specific transaction of limited duration for mutual profit, general sharing assets and risks.

**C Corporation**

1. Purpose: To make profits for the shareholder and protect the owners’ assets in the event of a business failure
2. Considerations:
   1. Simple to form
   2. Taxes: the corporation is a separate taxable entity
      1. Company profits are taxed
      2. Once profits are distributed, the shareholder is also taxed
   3. Liability protection
   4. Unlimited Shares
   5. Profits taxed at Corporate level; dividends taxed to recipient Shareholders
3. Articles of Incorporation
   1. Keep the articles of incorporation simple
   2. Checklist: Only 4 items are required
      1. Corporate Name
      2. Authorized shares
      3. Registered agent
      4. Incorporators
4. Bylaws
   1. More detailed agreement
      1. Number of directors
      2. Procedures for calling for meetings
      3. Special voting procedures
      4. Rules regarding shares
      5. Titles and duties of corporate officers
      6. Buy-Sell Restrictions and Procedures
5. Adhere to Corporate Formalities
   1. Convene at least annual meetings and memorialize all Director and Shareholder Meetings with Minutes
   2. Keep financial accounts separate; no commingling

**S Corporation**

1. Definition: The S corporation is a closely held corporation
   1. The S corporation is a federal tax election (Form 2553)
2. Checklist
   1. To be eligible for S Corp you MUST meet the following requirements: <https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations>
      1. Be a domestic corporation
      2. Have only allowable shareholders
         1. May be individuals, certain trusts, and estates and
         2. May not be partnerships, corporations or non-resident alien shareholders
      3. Have no more than 100 shareholders
      4. Have only one class of stock
      5. Not be an ineligible corporation (i.e. certain financial institutions, insurance companies, and domestic international sales corporations).
3. Benefits:
   1. Flow through of income and losses on personal income return
   2. Limited liability protection
4. Adhere to Abnormalities

**Limited Liability Company**

1. What is an LLC
   1. An LLC is a mix between Partnership and Corporate law
   2. It is currently the legal entity of choice
   3. Owners are called members
2. Considerations:
   1. Provides similar liability protection as a corporation
   2. Allowing more flexibility in management
   3. Investors can offset future company profits with past losses on individual tax returns (flow-through)
3. Articles of Organization
   1. Checklist:
      1. Name of the LLC
      2. Mailing address of the company’s principal office
      3. Name and mailing address of the company’s registered agent
4. Operating Agreement
   1. The operating agreement is similar to the corporate by laws
5. Adhere to Formalities

**B Corporation: A Purpose Driven Business**

1. Benefits and Drawbacks
   1. The B Corp gives legal status to social goals
   2. Counterpoint: third-party standard may not be in agreement with your goals
2. Financial
   1. Con: Tax benefits are no different than a regular for-profit corporation
   2. Pro: Profits are shared with shareholders
3. Liabilities and fiduciary (financial) duties of directors are the same as a traditional corp
   1. Pro: Personal liability protection
   2. Con: additional liability for failure to pursue “benefit” goals
   3. Con: Because the B Corp is a relatively new entity, how the courts will treat legal issues may not be as predictable as a traditional corporation. This is because the issue may not have been heard in that court or the issue may be altogether new.
4. Key Differences: Benefit Corporations are different than traditional corporations
   1. The traditional corporate goal is to maximize shareholder profits
   2. Benefit corporations seek profits but in addition, have encompassed social and environmental goals
5. Gaining Legal Status
   1. STATE LAW: Benefit Corporations are governed by state law
      1. Not every state recognizes benefit corporations
      2. See your states’ Secretary of State website for more details or consult with an attorney
   2. For a list of states that allow benefit corporations (interactive map) see: http://benefitcorp.net/policymakers/state-by-state-status
      1. Currently, 34 states have laws on benefit corporations
6. Accountability
   1. B Corps are held accountable to shareholders for the “benefit” goals
      1. Creates a shareholder right against the company to sue if the B Corp is not meeting both the prong of profits and also the social and environmental goals
      2. Annual Benefit Report
         1. The report is public
         2. Assessed against a third-party standard
7. Mandatory Checklist
   1. FILE WITH SECRETARY OF STATE: Corporations are governed by state law, so each state has individual benefits and drawbacks.
   2. ARTICLES OF INCORPORATION: To obtain the tax and liability benefits of a B Corp you must file Articles of Incorporation with your Secretary of State.
      1. The articles of incorporation may vary by state but generally MUST include ALL of the following:
         1. Name of Corporation
         2. Purpose
         3. Name and Address of Registering Agent
         4. Authorized stock amount
         5. Names of Board of Directors and Trustees
         6. Signatures of Incorporators, Registered Agent and any other parties involved
   3. ADDITIONAL REQUIREMENTS
      1. The requirements are similar to a traditional Corporation but in order to be a B Corp in addition to the traditional filing requirements of a corporation you MUST:
         1. Must declare benefit corporation status
         2. Must declare corporate purpose to create general public benefit. May add any specific benefits as applicable.
   4. PAY: filing fee to the Secretary of State
      1. Generally, between $70 -$200
8. Transition:
   1. It is possible to transition from a traditional corporate status to a B Corp
      1. Your Articles of Incorporation must be amended
      2. See your state laws or an attorney for specific guidance

**Income Tax Considerations**

1. Types of Taxes to Consider
   1. Income Tax
   2. Sales Tax
   3. Property Tax
   4. Entity Tax
   5. Gross Receipts Tax
   6. Occupational License Tax
   7. Self-Employment Tax
2. Limitations on Deductions
   1. Charitable Contribution of Art – Cannot deduct value of the art. Limited to cost to produce the work (i.e. cost of supplies, canvas, etc.)
   2. Hobby Loss Rules – If engaged in the creation of art for recreation or as hobby, cannot deduct any losses. Can only deduct expenses to the extent of gross income derived from the activity.
3. Factors to Determine if Engaged in Trade or Business (Prove primary objective is profit)
   1. Manner in which taxpayer conducts the activity
   2. Expertise of taxpayer or advisers
   3. Time and effort spent by taxpayer in carrying on the activity
   4. Expectation that assets used in the activity may appreciate in value
   5. Success of taxpayer in carrying on other activities
   6. Taxpayer’s history of income or losses with respect to the activity
   7. Amount of occasional profits
   8. Financial status of taxpayer
   9. Elements of personal pleasure or recreation

**Estate Planning and Administration Concerns: 10 Issues**

1. Value
2. Transfer of Rights
3. Exploitation of Rights
4. Protection of Rights
5. Posthumous Publicity Rights
6. Fractionalization of Interests
7. Digital Assets
8. Trade Secrets
9. Termination of Rights
10. Pending or Unfilled Applications
11. Valuation
    1. For 2021—Federal Estate Tax Exemption = $11,700,000
    2. For 2026 – Federal Estate Tax Exemption = $5,000,000 (increased for inflation)
    3. Federal Estate Tax Return Due 9 months after death
    4. For 2021—Federal Gift Tax Exemption = $11,700,000
    5. For 2026—Federal Gift Tax Exemption = $5,000,000 (increased for inflation)
    6. For 2021—Federal GST Tax Exemption = $11,700,000
    7. For 2026—Federal GST Tax Exemption = $5,000,000 (increased for inflation)

* State Inheritance Tax return, due date varies by state
* Use specialized appraisers familiar with Intellectual Property
* Pending legislation could affect and reduce these exemptions

1. Transfer of Rights
   1. During Life – Gift Implications
      1. Annual Gift Tax Exclusion = $15,000
      2. May assign rights to a Corp, LLC, Family Limited Partnership (FLP), trust or other entity
   2. At Death –
      1. Law Of State of Domicile Governs
      2. Include Clear Transfer Language in the Will
      3. Personal Tangible Property as opposed to Residuary
         1. Memorabilia or art is personal property
            1. Can sell, loan, gift to museum, or hall of fame
            2. Control and oversight issues if loan
            3. Able to Limit or Restrict Rights Transferred
            4. Transfer of physical object does not transfer the copyright or other intellectual property rights associated with that object

Record Transfer with USPTO or Copyright Office

1. Exploitation of Rights
   1. Literary Executor v. Heirs
      1. Literary executor: person entrusted with the handling of copyrights and intellectual property rights on behalf of the heirs
      2. Heirs: potential beneficiaries of the benefits of the intellectual property or copyright
         1. Division: because shares of copyrights and “intellectual property” can depreciate or grow in value it is better to give shares of the overall value.
         2. Class Gift: “my children”
   2. Publishing/Licensing Consideration
2. Protection of Rights
   1. Must police and monitor or risk abandonment
   2. Must continue to use trademarks – presumed abandoned after 3 years of non-use
   3. Renew when appropriate
      1. Copyright – expires 70 years from the date of death of the author
      2. Copyright for anonymous, pseudonymous, and many “works for hire” expires at the earlier of 95 years from first publication or 120 years from creation (fixation).
      3. Trademark – no expiration if consistently renewed
         1. 15 U.S.C. § 1058 – must file a Declaration of Continued Use between 5th and 6th year after registration
         2. 15 U.S.C. §1059 – must file a Declaration of Continued Use and Renewal Application between every 9th and 10th years after registration
3. Posthumous Publicity Rights
   1. Some states terminate publicity rights at death
      1. List of states that terminate: [Split Personality: Constructing a Coherent Right of Publicity Statute (americanbar.org)](https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017-18/may-june/split-personality/)
4. Fractionalization of Interests
   1. Generally, each owner has the right to use and license but must account to other owners
   2. Can create substantial difficulty in managing intellectual property portfolio and decrease the value of such rights
5. Digital Assets
   1. Online accounts (Facebook, Twitter, I Tunes), web pages, blogs, passwords, as well as computer, smartphone, and other electronic data (photographs and other valuable data, whether sentimental or otherwise), etc.
   2. Review Terms of Use to determine if passwords, accounts, etc. can be reset after death or disability
   3. Deceased may want web pages or blogs continued
   4. Web pages or blogs can be used for death announcements, etc.
   5. Uniform law now adopted by most states, so may want to add appropriate language to wills, trusts, and powers of attorney
6. Trade Secrets
   1. Can be secret materials, documents, recipes, designs, etc.
   2. Must take adequate precautions to maintain secrecy to protect trade secrets
   3. Avoid tell-all books or unauthorized movies and disclosures
7. Termination of Rights
   1. Transfers of rights can be terminated during the 5 years following the 35th year of a copyright term.
   2. Need to file and send proper notice of the termination
8. Pending or unfilled Applications
   1. Generally, the personal representative of the deceased’s estate can step in and file an application or continue a pending application, so long as the Personal Representative follows appropriate procedures