

**Advisory Commission
on the return of cultural property
seized as a result of Nazi persecution, especially Jewish property**

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**Recommendation of the Advisory Commission in the case of
the heirs of Kurt and Else Grawi vs. Landeshauptstadt Düsseldorf**

The Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property, chaired by Prof. Hans-Jürgen Papier, decided on February 10, 2021, in the case of the heirs of Kurt and Else Grawi versus Landeshauptstadt Düsseldorf to recommend that the painting *Füchse* (Foxes) by Franz Marc be restituted to the community of heirs of Kurt and Else Grawi. The case was decided by a majority of six votes (with three votes against).

1. This case concerns the painting *Füchse* (Foxes) (1913) by Franz Marc (1880–1916). The painting is oil on canvas, 79.5 x 66 cm. The painting entered the holdings of the Städtische Kunstsammlung Düsseldorf (Stiftung Museum Kunstpalast, inv. no. 0.1962.5490) in 1962 as a donation from Helmut Horten (1909–1987). Landeshauptstadt Düsseldorf is the body responsible for the Stiftung Museum Kunstpalast and is represented by the cultural department. The claimants are the descendants of Kurt and Else Grawi.

2. Kurt (Denny) Grawi (1877–1944) was persecuted during the National Socialist era, both individually and collectively. Grawi had qualified as a banker and worked at Darmstädter und Nationalbank (Danat-Bank) as a broker with general powers to execute transactions until 1931. After the collapse of Danat-Bank and its merger with Dresdner Bank during the global economic crisis, Grawi lost his job and became an independent entrepreneur. He acquired stakes in various companies and managed the Gesellschaft für den Bau medico-technischer Apparate m.b.H., based in Berlin.

From 1933 onwards, Grawi and his family increasingly suffered as a result from the pressure of National Socialist persecution. Grawi had married the widowed Else Breit, née Schultz (1894–1964), in August 1929. Else Grawi, who was not of Jewish descent, bore the couple two sons: Wolfgang and Peter. Because Else Grawi's deceased first husband Erich Breit (1878–1925) had been of Jewish descent, the two sons were vilified and discriminated against as "first degree half-breeds". Grawi's younger sister, the actress Irma Neumann, was banned from her profession after 1933. Her resistance activities led to her arrest along with that of her husband on July 22, 1944—her husband was sentenced to three years' imprisonment by the People's Court, while Irma Neumann was deported to Auschwitz. She survived the Holocaust. Grawi's elder sister, Dr. Erna Grawi, was deployed as a forced laborer in armaments factories from 1939; she died from the effects of this work in Berlin at the end of February 1943. Her sister Irma found the body which she secretly disposed of outdoors because she thought a proper burial would be too risky.

Kurt Grawi was also subjected to extensive repressive measures. All his enterprises and shareholdings were forcibly dissolved or “Aryanized” after 1935. The family bought a residential building with six apartments in Berlin-Lankwitz in 1937. In order to protect the asset, Else Grawi acted as the buyer. The family used one apartment for themselves and rented out the others. After the Kristallnacht pogrom, Kurt Grawi was imprisoned in Sachsenhausen concentration camp for several weeks. At the end of April 1939, he emigrated via Belgium to Santiago de Chile, where he joined relatives of his wife’s deceased first husband on June 4, 1939. Grawi was only allowed to take RM 10 with him when he left Germany. He signed the rest of his assets over to his non-Jewish wife Else, who initially remained in Berlin with the two sons. Else Grawi sold the property in Berlin-Lankwitz in August 1939 so that she could emigrate to join her husband, and triggered the imposed compulsory levies: Jewish property tax, emigration tax and Golddiskontbank levy. In December 1939, she and her two sons left Germany and traveled via Italy to Chile, where the reunited family—now virtually penniless—began to forge a new existence. Else Grawi proceeded to earn a living as a dressmaker. Kurt Grawi died from cancer on September 5, 1944.

3. In information he provided to Alois J. Schardt who compiled the catalogue raisonné of Franz Marc’s works, Kurt Grawi stated that he had purchased the painting *Füchse* in 1928. The previous owner had been Max Leon Flemming (1881–1956), who had first offered the work for sale via Galerie Neumann-Nierendorf in 1927. The price Grawi paid is unknown; a sum of USD 3,000 was retrospectively indicated in 1939, although it is not known what exchange rate was applied. In May 1936, Grawi loaned *Füchse* to Galerie Nierendorf in Berlin for its large Franz Marc memorial exhibition.

While in Brussels shortly before continuing his onward journey to Chile, Kurt Grawi wrote a letter on April 30, 1939, to Ernst (Ernest) Simon, who had been driven by persecution to emigrate in 1937. The letter says that *Füchse* had been left with a “mutual friend”, Dr. Paul Weill, for onward shipment to New York. Weill was staying in Paris at that time, with the aim of emigrating from there to Argentina. The painting was shipped from Le Havre to New York, where Simon was to sell it on behalf of Grawi “despite the unfavorable times”. Grawi further emphasized that, for himself and his family, “the result of the sale will provide the basis for our emigration”.

On August 9, 1939—while Else Grawi was in Berlin preparing to leave Germany—Ernst Simon informed the Museum of Modern Art (MoMA) in New York that he had the painting *Füchse* in his possession and that the owner was a German refugee who urgently needed cash (“The owner of this painting is a German refugee who is trying to obtain some cash which he is in dire need.”). Grawi was said to have originally purchased the painting for USD 3,000. By November 6, 1939, the painting had been taken to the museum to be viewed. On January 2, 1940, a purchase price of USD 800 was offered at the suggestion of the director Dr. Alfred Barr. Simon announced that he would consult the owner on the matter. Among the notes relating to the offer, there is a telegram from Montevideo dated February 9, 1940, addressed to Simon in which a limit of “1,250” is stated. The parties agree that this can be interpreted as a rejection of the offer and the setting of a minimum price by Grawi. Simon had the painting collected from MoMA by art dealer Curt Valentin, who had emigrated from Berlin to New York in 1937. Between February 19 and September 27, 1940, it was sold for an unknown price to

the German-American film director William (Wilhelm) Dieterle and his wife Charlotte in Los Angeles by the art dealer Karl Nierendorf, who had likewise emigrated from Berlin to New York. In June 1961, the couple consigned the artwork to an auction held by Galerie Klipstein & Kornfeld in Berne. It was withdrawn from this auction and acquired by Helmut Horten for the purpose of donating it to a museum. Horten donated *Füchse* to the Städtische Kunstsammlung Düsseldorf in 1962.

4. The parties are in agreement that Kurt Grawi was the owner of *Füchse* until at least February 1940 and that the painting had been sold in New York to William and Charlotte Dieterle by September 1940 at the latest via Karl Nierendorf in a transaction brokered by Ernst Simon.

a) Landeshauptstadt Düsseldorf asserts that Kurt and Else Grawi had already managed to pay the imposed compulsory levies through the sale of the real estate asset and some of the furnishings. These sales, according to the current holders, would have generated more liquid funds than the amount that would have been permitted to be exchanged into foreign currency. Accordingly, Else Grawi even decided not to sell a box of silver cutlery worth approximately RM 4,000 before she left Germany and instead gave it to her mother for safekeeping. In addition, according to Landeshauptstadt Düsseldorf, it was possible to transport the painting *Füchse* to New York with substantial support from other émigrés who had also fled persecution, and sell it there. It was true that there was no evidence concerning the exact circumstances of the sale to William and Charlotte Dieterle which was conducted via Karl Nierendorf between February and September 1940, and in particular concerning the purchase price finally agreed or the transfer of this to Kurt Grawi by Ernst Simon. Nevertheless, Landeshauptstadt Düsseldorf holds the view that the New York art market would have guaranteed a fair purchase price, and the seller is assumed to have been free to dispose of it. There was no evidence that the sale took place contrary to Grawi's instructions or that he did not receive the purchase price. This assumption was also supported by the further connection between Else Grawi and Paul Weill, and also Paul Weill and Ernst Simon beyond 1945. The buyers of the painting, William and Charlotte Dieterle, were firmly committed to supporting émigrés and frequently did so successfully—for example, they had provided financial assistance to Alois J. Schardt and his family who emigrated to Los Angeles in fall 1939. There was therefore nothing to suggest that Kurt Grawi was disadvantaged in any way, especially since he was in a position to settle the terms of the sale himself, as demonstrated by the rejection of the offer from MoMA. Taking all known events into consideration, the transfer of ownership was not considered to be confiscation as a result of National Socialist persecution, but a sale governed by civil law which took place outside the National Socialist sphere of influence.

b) The claimants, on the other hand, are of the view that the painting was sold solely out of necessity. Kurt Grawi had tried to avoid selling it for as long as possible and was eventually compelled to do so only because he had to emigrate as a result of persecution. As late as August 1937, he had refused to sell the painting to Josef Nierendorf and, at most, offered the prospect of parting with it in the event of a change of residence. As he himself wrote in his

letter of April 1939, the proceeds of the sale would form the “basis for emigration”. He emphasized that it was not a favorable time for a sale. It is thus clear that, had there been no National Socialist rule, the sale would not have taken place—its sole purpose was to finance the Grawi family’s escape to South America. All persons involved in the sale were aware of the owner’s plight, meaning that his negotiating position was weakened. Furthermore, the exact circumstances of the sale are not known. It has not been established what price was achieved or whether Grawi even received this. Taking all of these factors together, confiscation as a result of Nazi persecution therefore must be assumed.

5. The Commission believes that the painting *Füchse* by Franz Marc should be restituted to the claimants, even though the sale took place outside the National Socialist sphere of influence. The sale in 1940 in New York was the direct consequence of imprisonment in a concentration camp and subsequent emigration, and was so closely connected with National Socialist persecution that the location of the event becomes secondary in comparison.

a) It is immaterial that a fair price was probably paid for the painting. The “Guidelines for implementing the Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property” of December 1999 (new edition 2019) (hereinafter: *Guidelines*) declare the “objective market value” to be the decisive criterion in this regard, i.e. the market value “the object would have had at the time of sale had the seller not been subject to persecution”. According to this definition, a fair purchase price would generally be assumed outside the National Socialist sphere of influence because—in purely formal terms—there were always buyers who were not subject to Nazi persecution. However, this conclusion is subject to constraints. The assumption that, on the market outside the National Socialist sphere of influence, participants were fundamentally free and equal between 1933 and 1945 may also be disrupted by long-distance effects of political persecution. Landeshauptstadt Düsseldorf has also stated that the persons involved were aware of the persecution-related constraints under which Grawi acted. In his letter to MoMA dated August 9, 1939, Simon, the intermediary used by Grawi, explicitly referred to the predicament: “The owner of this painting is a German refugee who is trying to obtain some cash which he is in dire need.” The museum’s own note “Any offer which the Museum cares to make would apparently be considered.” can certainly be read in the sense that the museum was aware of its negotiating position.

The painting was not purchased by the museum in the end, presumably because a minimum price of USD 1,250 was stipulated via a telegram from Montevideo. The purchase price that Grawi ultimately achieved is unknown. The failure of negotiations with MoMA suggests that Grawi was not compelled to accept any offer. Landeshauptstadt Düsseldorf has cited a number of factors to indicate that Grawi’s situation was not exploited by the persons involved. In particular, William Dieterle was well known for supporting immigrants from Germany in honorable ways, so it was not expected that he took advantage of Grawi. In addition, according to the submission from Landeshauptstadt Düsseldorf, it could be assumed that Grawi was just as involved in the negotiations between Simon, Nierendorf and Dieterle as he was previously

in those between Simon and MoMA. Therefore the agreed price would not have deviated significantly from Grawi's expectations. As Landeshauptstadt Düsseldorf has stated, the assumption that this was an achievable market price in the United States at that time and thus a fair purchase price in line with the *Guidelines* was not implausible.

b) Also irrelevant to the decision is the assumption that the purchase price was transferred to Kurt Grawi. It should be noted that the free right of disposal according to Military Government Law no. 59 did not have to be proven with the same unconditionality by the buyer as that stipulated by the *Guidelines* for their legal successors. For foreign sales by émigré owners in particular, the burden of proof should not be excessive. Landeshauptstadt Düsseldorf has presented several indicators which suggest that payment of the purchase price as directed was the probable course of events. Payments from Dieterle to Nierendorf can be proven to have been made for this period, but cannot be attributed to individual paintings. It cannot be assumed that Nierendorf or Simon withheld the purchase price; there is also no evidence of any technical problems that may have prevented the money being transferred from New York to Kurt Grawi in Santiago de Chile. More evidence cannot be expected from Landeshauptstadt Düsseldorf.

If the purchase price was transferred to Grawi, he was also free to dispose of it. The criterion of free disposal was defined primarily in legal terms during the period in which the Allied restitution laws were in force. It referred to conditions which, on racist or ideological grounds, restricted the rights of individuals to freely dispose of their own assets, such as the obligation to pay into a blocked account. Purely economic constraints or restrictions that were not directly ideologically based did not militate against free disposability, however. That is why there was no clear consensus even on the emigration tax as a relevant restriction of free disposability, despite its undeniable discriminatory impact, because it existed prior to January 30, 1933, and therefore was not an instrument of National Socialist persecution. The same also applies to foreign exchange regulations.

This definition appears too narrow from today's perspective. Even though the emigration tax or foreign exchange limits may have applied to everybody in the same way, victims persecuted under the Nazi regime were overwhelmingly affected by them after 1933. To regard economic and legal constraints not as restrictions of free disposability solely because they were the consequence of merely de facto discrimination but not of normative discrimination, is not convincing in light of a clearly discriminatory legal reality. Nevertheless, there cannot be an exclusion of free disposability in every restriction of economic usability. In the case of Grawi, the proceeds from the sale were not used to pay emigration taxes or other compulsory levies. Though Grawi himself was reliant on external support from Brussels onwards, his family's emigration was financed by other means. According to the criteria in the *Guidelines*, he would therefore have been free to dispose of the purchase price.

c) The two further criteria for checking whether property was seized as the result of Nazi persecution, which are mentioned in the *Guidelines* for sales from September 15, 1935 onwards,

are clearly tailored to sales within Germany. This is due to the fact that, historically, the *Guidelines* were developed from Allied military legislation, which aimed to rectify the unlawful movements of assets that had taken place within the Nazi sphere of influence. The “transfer of assets abroad” cited therein as an example, which enables a present-day owner to rebut the presumption of seizure, therefore also applies in cases involving the transfer of proceeds to safety abroad following a sale in Germany. The opposite scenario—which also applies to the current case— in which the cultural property itself had already been taken abroad prior to its sale and the price was paid in full there, is not dealt with in the *Guidelines*.

However, this does not mean that property in such situations would not be suitable for restitution. The assumption of a loss as the result of Nazi persecution does not formally relate to the domain of National Socialism, but to the pressure of persecution manifested in this domain. However, this pressure of persecution did not necessarily diminish as soon as a victim of persecution left the borders of the German Reich behind. In this respect, though, the *Guidelines* are limited to the severability clause that even if an item changed hands outside the National Socialist sphere of influence, it “still cannot be ruled out” that it changed hands as a result of Nazi persecution. But the *Guidelines* do not mention any further indicators of when confiscation as the result of persecution can be assumed outside the National Socialist sphere of influence in an individual case. However, there is no apparent reason for applying the tighter criteria of the *Guidelines* and taking into account emigration tax and other compulsory levies in a case where property was sold in a forced sale shortly before emigration, while declaring the direct consequences of the deprivation of rights in Germany to be irrelevant in a case where property was sold after emigration. Just because an immediate danger to life was averted does not mean economic, political or legal opportunities were restored at the same time, especially if the escape abroad was preceded by imprisonment in a concentration camp and the seizure of virtually all assets.

d) In view of the above, the Commission concluded that Kurt Grawi’s sale of the painting *Füchse* is considered to have occurred as the result of Nazi persecution, even though the sale was completed outside the National Socialist sphere of influence and, in the light of information currently available, the payment of a fair price and the opportunity for free disposal are plausible. The sale was a direct consequence of the forced emigration. The decision to sell and the arrangements for the sale directly resulted from National Socialist repression. All in all, there was such a close connection between persecution, escape and sale that the impact of the first continues to have an effect in the last.

Kurt Grawi did not plan to sell the painting. For the period prior to January 30, 1933, there is no evidence of any intention to sell. The question can be left open as to whether the letter mentioned by the claimants from Josef to Karl Nierendorf dated August 30, 1937, actually related to Franz Marc’s *Füchse*. It refers in general terms to a painting Grawi intended to sell should the need arise if he had to move, but does not describe it in detail. A few weeks after this letter, the Grawi family put some of their furniture up for auction because they had moved into a much smaller apartment at the start of the year. However, the family did not take this

as an opportunity to part with the painting *Füchse*. Grawi decided to sell the painting only when he was forced to leave Germany.

After his imprisonment in a concentration camp, Grawi had to give up his place of residence at very short notice. No direct order to leave Germany is documented on file, but at the same time it is highly likely one was issued. Just four months after being released from the concentration camp, Grawi found himself practically destitute in Brussels. A return to Germany was not possible. His efforts to sell the painting *Füchse* were directly linked to his expulsion from Germany and his attempt to build a new life abroad. Grawi himself took the painting abroad, probably at great personal risk. The first record of an intention to sell the artwork can be dated to April 30, 1939, when Grawi, then still in Brussels, informed Ernst Simon in New York that he planned to ship the painting there, expressing his hope of obtaining a “basis for our emigration [...] despite the unfavorable times”. Else Grawi and the couple’s two sons were still in Germany at that point. The emigration tax was not set until October 1939. Grawi himself had no more funds and was reliant on assistance from friends even for his onward journey from Brussels. Whether the Grawis still owned assets in Germany is of no importance because there was no prospect of being able to access these assets in the foreseeable future.

The fact that the sale was eventually completed a good year after Grawi left Germany does not take away the direct connection between this event and Grawi’s escape. Such transactions often take a long period of time, even under normal circumstances. At the same time, the suffering associated with the escape did not only begin on the day of departure from Germany and end on the day of arrival abroad. Else Grawi and the children were not able to travel to Chile until December 1939. The family has vividly described the difficulties facing the Grawis as they made a new start in Chile. Along the way, Grawi continued his efforts to sell the painting on terms that would enable the family to begin a new life in Chile. Had this been possible without selling the painting, he would have had the option of canceling the sale at any time.

There is no question that the Dieterles supported émigrés and persecuted victims of the Nazi regime in honorable and exemplary ways. It is not known to what extent Grawi was able to benefit from this. However, honorable intentions on the part of the buyer do not diminish the fact that the sale was necessitated by Grawi’s emigration. The *Guidelines*—like Military Government Law no. 59—assume a regular causality between persecution and loss, the disruption of which is the exception requiring proof. Therefore the critical factors are the situation and motives of the seller at that time, not the ethos and intentions of the buyer. Thus it is of no relevance whether William and Charlotte Dieterle perhaps only bought the painting in order to help Grawi start a new life in exile. In particular, there is nothing to indicate the protection of Grawi’s property interests here—irrespective of the question whether this can be taken into account anyway as an exonerating factor in the case of a sale abroad. For this, a commitment would be expected that goes beyond what a contract partner of average loyalty would have done in this situation, while behavior merely in accordance with the contract is not sufficient. The fact that the sale probably led to a result that was presumably in line with market conditions at the time and perhaps not as bad as Grawi had feared, is therefore not protecting Grawi’s property interests “in an unusual manner and with substantial success”.

e) Landeshauptstadt Düsseldorf has repeatedly stated that, in the event of a sale in Germany under the same conditions, it obviously would have restituted the painting. That it has not adopted the same approach towards initiating a return in the event of this sale which has now been proven to have happened abroad is evidently due to the fact that the *Guidelines*, as discussed, do not offer any useful criteria for such situations. It is regrettable that more than 20 years after the Washington Conference, it has not been possible to come to conclusions in this respect which are valid beyond the individual case. However, in accordance with the general principles, the Commission has decided to recommend that Landeshauptstadt Düsseldorf restitute the painting to the heirs of Kurt Grawi.

In the event of disputes concerning cultural property seized as a result of Nazi persecution, the function of the Advisory Commission is to mediate between those currently in possession of the cultural property and the former owners, or their heirs, if requested to do so by both parties. Contributors to the above recommendation as members of the Commission in an honorary capacity were Prof. Hans-Jürgen Papier (chairman), Prof. Wolf Tegethoff (deputy chairman), Marieluise Beck, Marion Eckertz-Höfer, Prof. Raphael Gross, Dr. Eva Lohse, Dr. Sabine Schulze, Dr. Gary Smith and Prof. Rita Süßmuth.

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