

REPORT OF STUDY OF WAYS OF  
ENCOURAGING PRIVATE AND  
COMMUNITY FOUNDATIONS



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TABLE OF CONTENTS

	<u>Page</u>
Assembly Concurrent Resolution No. 67, 58th session of the Nevada legislature (1975), directing the legislative commission to study the ways of encouraging private and community foundations.....	1
I. Introduction and Background.....	2
II. Formation and Operation of Private and Community Foundations Under Nevada Law.....	3
A. Charitable Corporations.....	3
B. Charitable Trusts.....	4
C. Other Statutes.....	5
III. Impact of Federal Tax Laws.....	5
IV. Methods To Encourage Formation and Retention of Foundations In Nevada.....	6
A. Private Foundations.....	6
B. Community Foundations.....	8



Assembly Concurrent Resolution No. 67—Assemblymen Lowman and May

FILE NUMBER 150

**ASSEMBLY CONCURRENT RESOLUTION**—Directing the legislative commission to study and explore courses of action which the Nevada legislature could take to encourage the creation and retention of private and community foundations in our state.

WHEREAS, Since the beginning of our history, private foundations and charitable associations have generously contributed to public morals and welfare in diverse fields such as medicine, education, agriculture and in other eleemosynary pursuits; and

WHEREAS, Philanthropies occupy a unique position as private organizations which promote the public welfare in our society; and

WHEREAS, The growth trend for private foundations has slowed in recent years and the termination rate of existing foundations has quickened; and

WHEREAS, In a time when financial crisis is causing the Federal Government and the State of Nevada to curtail spending, society can ill afford to see its private organizations of charity weakened; and

WHEREAS, The relationship between government and private foundations is based on the reciprocity of benefits which accrue to each in the form of additional social services provided for the public benefit in return for tax benefits to foundations; and

WHEREAS, Nevada taxpayers sacrifice tax revenues so that charitable associations and foundations can devote funds to the service of the people of our state; and

WHEREAS, Private foundations in Nevada expend millions of dollars each year in grants for higher education, medical research, conservation efforts and for many other meritorious civic and educational projects; and

WHEREAS, It is important to Nevadans to assure the continuation of private foundations and charities which bring goodwill, expertise and financial assistance to bear on many of the problems of our state; and

WHEREAS, The tax laws of the State of Nevada have, in a great measure, been responsible for attracting persons of wealth to the State of Nevada as residents; and

WHEREAS, This situation has been of great advantage to the State of Nevada, its institutions and citizens as a result of charitable contributions from such persons and the creation of private foundations; and

WHEREAS, It is of great importance to the State of Nevada to continue to encourage such persons to come to our state and become Nevada residents; and

WHEREAS, It is essential that the State of Nevada encourage the creation and retention of private and community foundations; now, therefore, be it

*Resolved by the Assembly of the State of Nevada, the Senate concurring,* That the legislative commission is hereby directed to study and explore possible courses of action which the legislature of the State of Nevada could take to encourage the creation and retention of private and community foundations in our state; and be it further

*Resolved,* That the legislative commission shall report the results of its study, with any recommended legislation, to the 59th session of the legislature.



REPORT OF STUDY OF WAYS OF ENCOURAGING  
PRIVATE AND COMMUNITY FOUNDATIONS

I. INTRODUCTION AND BACKGROUND

Pursuant to the directive of A.C.R. 67, the study of possible courses of action which the legislature could take to encourage the creation and retention of private and community foundations in Nevada was assigned to the legal division of the legislative counsel bureau. The findings and recommendations of the legal division are presented in this report.

The term "foundation" encompasses a wide variety of charitable endeavors and may be defined as a nongovernmental, nonprofit organization having a principal fund of its own, managed by its own trustees or directors, and established to maintain or aid social, educational, charitable, religious or other activities serving the common welfare. The only types of foundations considered in this study were private and community foundations. Such organizations as the Red Cross, United Fund and other operating charities and fundraising organizations, as well as endowment funds of educational and religious institutions were excluded.

For the purposes of the study, private foundations were deemed to be those defined as such in the Internal Revenue Code and NRS 81.610 and 163.470, and which are characterized by relatively large endowed funds derived from a single source or a limited number of sources such as a principal founder and his family. The Max C. Fleischmann Foundation of Nevada is a prime example.

Community foundations were considered to be those which qualify as such under the Internal Revenue Code, principally by reason of public support and participation. A community foundation is organized to serve as a community agency or resource for a wide variety of charitable purposes, is designed to attract gifts and bequests for general or specific purposes from many persons in the community, provides responsive centralized administration of pooled funds for investment and management purposes, and is operated primarily for the benefit of the community. Use of the word "community" does not imply any limitation on the size of the geographic area in which a community foundation may operate. A single community foundation could serve the entire State of Nevada as well as areas of adjacent states.

To the best of our knowledge the Fleischmann Foundation is the only large private foundation now operating in Nevada, and apparently there are no existing community foundations in the state. A private foundation created as an inter vivos trust by the late E. L. Cord is the beneficiary of a substantial sum under the terms of his will which is presently in probate. It is possible that other private foundations may exist which are presently inactive but have the potential for future activity.

## II. FORMATION AND OPERATION OF PRIVATE AND COMMUNITY FOUNDATIONS UNDER NEVADA LAW

Foundations are created under state law and may be formed as charitable corporations or as charitable trusts. A review of Nevada law applicable to private and community foundations is contained in this section.

### A. Charitable Corporations:

Either a community foundation or a private foundation may be created under the provisions of NRS 81.290, et seq., relating to nonprofit corporations for educational, scientific, charitable or eleemosynary activities, which govern the procedures to form the corporation, its powers, the exercise of corporate powers by a board of trustees and their selection, and examination of its affairs by the attorney general.

The Charitable Corporation Act of 1971 (NRS 81.550, et seq.) applies to both community and private foundations organized as charitable corporations. In general, its purpose is to assure compliance with certain Internal Revenue Code provisions and regulations necessary to minimize federal income and excise taxes on foundations. NRS 81.660 also permits conversion of a private corporate foundation to a community foundation.

It appears that existing statutory provisions relating to charitable corporations are adequate; and that at present no additional legislation is necessary to foster the creation and retention of private or community foundations in corporate form.

## B. Charitable Trusts:

Creation of a charitable trust is largely a matter of common law rather than statutory law, although subsequent administration of the trust is governed by both statutes and common law rules. There are two principal types of trusts: (1) testamentary trusts, which are created under the will of a decedent and become operative after his death, and (2) inter vivos trusts, created by a written trust indenture or other document executed by the trustor and which become operative during his lifetime and continue thereafter. Since community foundations are usually formed by groups rather than individuals, they are more commonly of the inter vivos type.

Nevada statutes relating to trusts in general apply to foundations which are charitable trusts. These include NRS chapters 162 (Fiduciaries), 163 (Trusts), 164 (Administration of Trusts) and 165 (Uniform Trustees' Accounting Act). Chapter 153 of NRS, relating to administration of testamentary trusts, would seem to apply to testamentary charitable trusts although, unlike chapter 165, there is no specific mention of charitable trusts in chapter 153.

The Charitable Trust Act of 1971 (NRS 163.420, et seq.) applies to both community and private foundations organized as charitable trusts. As in the case of charitable corporations, the general purpose of the Act is to assure compliance with certain Internal Revenue Code provisions and regulations necessary to minimize federal income and excise taxes on foundations. NRS 163.550 also permits conversion of a private foundation trust (such as the Max C. Fleischmann Foundation of Nevada) to a community foundation.

A significant difference in the statutory treatment of testamentary and nontestamentary trusts occurs in NRS ch. 165 with respect to inventories and accountings required of trustees, and court approval of such accounts. In brief, testamentary trustees are required to file an initial inventory of the trust estate as well as annual accountings with the court and seek court approval of the latter at least every 3 years (NRS 165.030, et seq.). The provisions of NRS 165.120, concerning the effect of court approval, apply to testamentary trust accountings only. Nontestamentary trustees are not required to file an inventory nor to file regular accountings with any court. NRS 165.135 provides for furnishing annual accountings to each beneficiary and to the attorney general in the case of charitable trusts (NRS 165.230); but, under

NRS 165.160, the provisions of chapter 165 are made inapplicable to all nontestamentary trusts unless specifically made applicable by the trust instrument. Thus, it appears that trustees of nontestamentary trusts (including charitable trusts) have no statutory duty to render accountings unless the trust instrument so provides, but are not relieved of their common law duties and responsibilities in this regard.

Also, under NRS 165.120, trustees of nontestamentary trusts are not afforded the benefits accorded to testamentary trustees. Research indicates that the exemption of nontestamentary trustees from a statutory duty to render periodic accountings was intentional; and it does not seem necessary to change this policy to foster formation of inter vivos charitable trusts in the future. If the founders of such a trust desire to do so they could, by appropriate provisions in the trust instrument, require the trustees to account in the same manner as trustees of testamentary charitable trusts, and NRS 165.120 could then be amended to apply to such accountings.

With the exception noted infra concerning possible clarification of NRS 163.550, no changes in statutes relating to charitable trusts are recommended.

### C. Other Statutes:

NRS 86.190, which requires annual financial reports to be filed with the secretary of state by charitable organizations which receive "major" support from public donations, would no doubt be applicable to a community foundation because of the public support requirements necessary to its qualification under federal laws and regulations. The reporting requirement is not onerous and should not impede formation of a community foundation.

Under the provisions of NRS 86.100, et seq., it is possible for an existing charitable association to incorporate; but those provisions are limited in scope and do not appear to be intended for use in formation of the types of foundations which are the subject of this report.

## III. IMPACT OF FEDERAL TAX LAWS

Although foundations are creatures of state law, federal tax laws exert virtual life or death control over their formation and continued existence. This situation exists because

foundations are dependent almost wholly upon charitable contributions and income from endowed funds to support their operations, and the amount of money available for charitable giving is governed to a high degree by whether or not a gift qualifies as a charitable contribution deductible by the donor for federal income and estate tax purposes. The deductibility of a gift to a foundation depends upon the foundation's classification as a tax-exempt organization.

Changes in the Internal Revenue Code effected by the 1969 Act, which ostensibly were necessary to correct previous abuses by private foundations, have tended to discourage formation and continued existence of private foundations and, conversely, to encourage formation of community foundations. The restrictions on private foundations, which necessitated enactment of the Charitable Corporation Act of 1971 and the Charitable Trust Act of 1971 (discussed in section II), are such that it is highly unlikely that any new private foundation of significant size will be formed in Nevada while they remain in effect. The possibility of the restrictions being lifted is so remote as to be virtually nonexistent because of firmly established nationwide fiscal and social policies which the people of Nevada are powerless to change even if a majority of them wished to do so.

#### IV. METHODS TO ENCOURAGE FORMATION AND RETENTION OF FOUNDATIONS IN NEVADA

##### A. Private Foundations:

As previously noted, the Max C. Fleischmann Foundation of Nevada is the only sizable private foundation presently operating in Nevada, and it is extremely unlikely that any new private foundations will be formed. The benefits which the State of Nevada and adjacent areas of California have received from the Fleischmann Foundation are so numerous and so widely known that no further discussion of them is required in this report.

The Max C. Fleischmann Foundation of Nevada is a private foundation trust established for general charitable, scientific or educational purposes of strictly eleemosynary nature and is managed by a board of trustees as a testamentary trust under the jurisdiction of the First Judicial District Court of the State of Nevada. The trustees have absolute discretion in the selection of beneficiaries. In terms of assets and income it is one of the largest private foundations in the United States.

The trust instrument provides that the "trust estate shall be so managed and administered as to insure the complete disposition of the principal and consequent termination of this trust within twenty (20) years after the death of Sarah Hamilton Fleischmann, the wife of the Grantor." The 20th anniversary of the death of Sarah Hamilton Fleischmann will occur in 1980.

The Nevada legislature cannot legally take any direct action to prevent termination of this trust in accordance with the terms of the trust instrument without the consent of the trustees. Any statute which attempted to do so would be violative of the provision of the United States Constitution forbidding the states to impair the obligation of contracts. See Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L.ed 629 (1819).

A general statute having retroactive application to all charitable trusts would be subject to the same attack and probably would be opposed by settlors and trustees of existing or potential charitable trusts.

There are three possible ways in which the benefits of the Fleischmann Foundation might be preserved for the State of Nevada, any of which would require acquiescence, concurrence, or affirmative action on the part of some or all of the trustees.

1. The Fleischmann trustees or the attorney general, under his common law powers to represent the state as *parens patriae*, could seek judicial reformation of the trust instrument to extend the term of the trust or provide for its perpetual existence, which is permitted by the Nevada constitution (Art. 15, § 4). However, the legal basis for reforming the trust instrument in this regard is questionable since it would involve a somewhat tortuous application and extension of the *Cy Pres* doctrine which could be considered to set a dangerous precedent applicable to charitable trusts in general.
2. The Fleischmann trustees, in the exercise of their absolute discretion in the selection of beneficiaries, could distribute all or any portion of the trust estate to a Nevada community foundation organized for the specific purpose of receiving such assets and administering their

application in accordance with existing policies and procedures of the Fleischmann Foundation. A community foundation for such purpose could not be established by a special act as an agency of the state because, by definition, a community foundation is a nongovernmental organization. However, in order to meet the "public support" requirements of the Internal Revenue Code for qualification as a community foundation, it could be necessary in the future for the state to provide direct financial support in case the response from private donors was insufficient.

3. The Fleischmann trustees, with the concurrence of the attorney general, could, under the provisions of the Charitable Trust Act of 1971, seek judicial modification of the trust instrument to effect termination of the private foundation status of the trust and its conversion to community foundation status as is permitted by the Internal Revenue Code. Such modifications could include a provision for the trust to have perpetual existence as a community foundation. NRS 163.550 specifically authorizes "any modifications, revisions, deletions or additions to the term, (emphasis added) or to the conditions and provisions of the articles of any trust \* \* \*, for the trust to conform with the requirements for termination of private foundation status \* \* \*." The quoted language appears to be sufficient for the above purposes. However, the authority of the court could be further clarified by amending the last quoted phrase to read "appropriate for the trust to conform with the requirements for termination of private foundation status \* \* \*." if interested persons so desire.

It should be noted that under this alternative as well, the possible need for future direct financial support from the state would exist.

#### B. Community Foundations.

The community foundation concept offers the best hope for continued charitable foundation activities in Nevada and the attendant benefits to the state.

Since community foundations are nongovernmental organizations and the concept is based on private philanthropy rather than government operation of charitable programs, the initiative for formation of a community foundation

must come from private donors rather than from state government. The necessary legal machinery is available, and it remains only for interested private citizens to come together and establish an appropriate community foundation. Until that is done, there is little state government can do but lend moral support.

It appears that the community foundation concept and its potential for benefit to the state is not widely known nor understood by the general public or even among community leaders. One way in which state government might foster establishment of a community foundation would be formation of a broadly based governor's committee representative of both public and private organizations to arouse interest in creation of an appropriate community foundation and to coordinate efforts to that end.