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Legal Instruments of Foundations (Book Review)

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LEGAL INSTRUMENTS OF FOUNDATIONS. By F. Emerson Andrews.
New York: Russell Sage Foundation, 1958. Pp. 309. \$4.50.

Much concern has been voiced in recent years over the great fortunes being amassed by union welfare funds and the social and economic consequences attendant thereto. Largely unnoticed, at least by the general public, has been the parallel concentration of wealth in "foundations." Although the absence of criminal activity has kept them out of the limelight, a moment's reflection will bring a realization that foundations are now a commonplace on the American scene. Our newspapers daily carry accounts of grants received by, and the activities of, educational and research foundations, as well as those established by the well-to-do of a bygone era and others too numerous to mention. To these we must add the charitable trusts and corporations set up by benevolent or tax-wise testators but which never come into the public eye. Some idea of the scale upon which private philanthropy operates can be gained from one source which estimates that in the last two years contributions totalled slightly under thirteen and one-quarter billion dollars.¹ The role played by foundations in that two-year period was significant and is likely to gain in importance, barring any drastic changes in the federal tax structure. In discussing the rise of foundations, the editor of the book under review states:

Some measure of the current birth rate of foundations is afforded by the *Internal Revenue Bulletin's* lists of all the organizations approved for deductibility of contributions within stated periods. . . . [T]he most recent list, for August through December, 1957, contained a total of 815 organizations that include the word *foundation* in their title, and an additional 108 organizations which by such names as "charitable trust" suggest that they also may be foundations. Even with some downward adjustment, we conclude that currently foundations are being organized at a rate of more than 1,500 a year.²

This rapid growth makes it apparent that many basic questions will have to be answered in the not too distant future. Is the foundation a panacea for the ills of society or is it a leviathan? Is it the bulwark against further extension of the powers of the federal government, or is it a means by which individuals may use tax-free dollars on pet projects, or worse, for unworthy ends? Are corporate gifts and the foundations currently being established by business corporations blatant examples of misfeasance on the part of directors,³ or are they the source from which worthy causes can obtain the funds which formerly came from the now disappearing individual philanthropist? Is tax-motivated giving a perversion of the Internal Rev-

¹ New York Times, Nov. 23, 1958, p. 50, col. 3.

² P. 14.

³ See Eaton, *Charitable Foundations, Tax Avoidance and Business Expediency*, 35 VA. L. REV. 809 (1949). It is estimated that corporate contributions in the last two years amounted to \$1,020,000,000, or slightly under one per cent of corporate net income. See note 1 *supra*.

enue Code and its spirit, or is it a something which should be approved by Congress?⁴ Is the activity of tax attorneys in this area commendable tax minimization, or does it amount in many cases to playing cat and mouse with the Treasury and the taxpayer's money? Should the federal and local government enter the foundation area?⁵ Does the large increase in the number and size of foundations evidence a need for the overhaul of our non-profit corporation statutes?⁶ Should foundations be made subject to an annual accounting or put under the control of a state agency?⁷

However inviting these questions may appear, they are without the scope of the present volume. This compilation was made by the Director of the Russell Sage Library Center, with Professor Albert M. Sacks of the Harvard Law School serving as legal consultant, and the editor's confessed aim was solely to set forth the pertinent documents relative to foundations:

. . . [P]rimarily for persons considering setting up foundations, for their lawyer and banker advisers, for the trustees and staffs of existing foundations who may wish to compare their own with other documents of similar purpose, and for the general student of the development of foundations in America.⁸

The editor sets the background for the book by defining the institution under scrutiny. In his view, a foundation may be described 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."⁹ The generality of the definition would seem to make the task of setting forth typical foundation instruments difficult if not impossible. However, since most foundations are ultimately either charitable corporations or charitable trusts, the editor has set forth instruments peculiar to these two forms. Following this general plan, a chapter is devoted to each of the following: acts of Congress incorporating foundations, charters enacted by state legislatures, wills, trusts, corporate resolutions, certificates of incorporation, by-laws and letters-of-gift. The instruments of 48 foundations are represented, varying in kind so as to include at least one perpetuity, dissolving fund, discretionary perpetuity, company-sponsored foundation, association of foundations, family foundation, captive foundation, foundation engaged in unrelated business activity,

⁴ See, e.g., *Merritt, The Tax Incentives for Charitable Giving*, 36 TAXES 646 (1958).

⁵ The compiler estimates that in the coming year the disbursements of the National Science Foundation, created by Congress in 1950, will exceed the combined outlay of the three largest private foundations.

⁶ See, e.g., *BOYER, NON-PROFIT CORPORATION STATUTES: A CRITIQUE AND PROPOSAL* (1957).

⁷ See *Forer, Forgotten Funds: Suggesting Disclosure Laws for Charitable Funds*, 105 U. PA. L. REV. 1044 (1957).

⁸ Book jacket.

⁹ P. 13.

research foundation, community trust and scholarship fund. To broaden the scope and facilitate comparison, the editor includes several foreign documents and the complete instruments of one foundation. The compilation concludes with some miscellaneous minor forms and a bibliography of treatises and articles on the subject of charitable foundations.

Admittedly the frame of reference of the book is a narrow one and many of the papers presented are sui generis or adapted for a particular situation. Thus, for example, the acts of Congress are largely of historical interest. The acts of the state legislatures are of little value. Then again, the provisions of charters and by-laws which have to do with the minutia of daily corporate existence may be of little interest to most readers. Yet the compilation does have merit. As the editor indicates, it may be of value to the scholar or legislator who wishes to consider the pros and cons of the foundation as a social institution. It may also be of assistance to the attorney in drafting instruments in the estate planning area. Although the documents set forth contain little tax matter (except for the form statements prohibiting the use of funds to influence legislation, etc.), they may be especially useful for those who have to draft long-term trusts or family foundations.¹⁰ Since many of the instruments were drawn in the light of the perpetual existence of the proposed foundations, they are characterized by broad statements of purpose and by provision for changed circumstances. Moreover, the comparative merits and shortcomings of the charitable trust and charitable corporation approaches may be appraised by viewing both types of document side by side.¹¹ Lastly, a perusal of the book may bring a realization of some of the problems peculiar to long term foundations, such as the necessity to provide for accounting and auditing procedures, etc. In short, the compilation may aid the attorney in selecting the most suitable mode for carrying out his client's wishes and in drafting the necessary papers. Needless to say, however, the instruments set forth in the volume should be regarded as little more than a checklist, with the attorney adapting provisions to fit the facts of his own situation and the law of the jurisdiction concerned.

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¹⁰ See the Family Foundation set forth in CASNER, *ESTATE PLANNING* 978 (1956). See also 2 APPLEMAN, *BASIC ESTATE PLANNING* § 379.3 (1956).

¹¹ See the comparison set forth in Vestal, *Critical Evaluation of the Charitable Trust As A Giving Device*, 1957 WASH. U.L.Q. 195, 202-03.

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