Solid Foundations on Common Ground: Nevis' Multiform Foundations Ordinance

Jan Dash, Esq., L.E.C., TEP
Liburd and Dash, Attorneys-at-Law
www.LiburdDash.com
JAD@LiburdDash.com

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Foundations. The legal entity known as a "*foundation*" has been a well-established vehicle in the civil law countries of Europe since the Middle Ages. The church, one of the most powerful institutions of the era, was frequently given assets by members of its congregation in an effort to further its beneficial mission. It was the goal of these ecclesiastical foundations to promote charitable, scientific and humanitarian objectives in accordance with the religious aims of the church. The societal conventions at the time believed that the church should be concerned solely with matters of faith and not that of asset management. As a result, legal theorists felt that any asset given to the church should have the ability to manage itself and should be classified as a legal person, separate and apart from the church.

The uses of charitable foundations have evolved beyond the church and in recent years these entities have been established by affluent members of society to fulfill their philanthropic aims. The Alexander S. Onassis Foundation (the "**Onassis Foundation**") was established by the late Aristotle Onassis in 1973 in the name of his predeceased son, to provide funds for education, literature, science and the promotion of Greek culture.[1] The world's wealthiest charity, Stichting INGKA Foundation (the "**INGKA Foundation**"), which is registered in Curaçao, Netherlands Antilles, owns 207 outlets of the multinational furniture store, IKEA. ("Stichting" is the Dutch translation for foundation). The stated purpose of the foundation is to promote and support innovation

[1] www.onassis.gr/english/business/index.php.

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in the fields of architecture and interior design.[2] The Nobelstiftelsen ("Nobel Foundation" in Swedish) is a private institution established in the Last Will and Testament of Alfred Nobel, the inventor of dynamite. The Foundation manages the assets made available through Nobel's Will for the awarding of the Nobel Prizes in Physics, Chemistry, Physiology or Medicine, Literature and Peace. It represents the Nobel Institutions externally and administers informational activities and arrangements surrounding the presentation of several Nobel Prizes.[3]

While the laws in some civil law European countries, such as France, Hungary and Sweden restrict the creation of foundations to purposes which are cultural, scientific or charitable, other continental jurisdictions allow foundations to be used for non-charitable purposes.[4] In 1926, foundations moved beyond their medieval limitations as charitable structures when the government of Liechtenstein enacted legislation to allow their use for commercial purposes.[5] Austria, Germany and Switzerland also now allow the establishment of non-charitable or private foundations for the benefit of families, individuals or institutions.[6]

Today, a foundation can be described as a fund which is endowed by its founder to be utilized for a specific purpose, as detailed in its statutes or to assist certain persons. To ensure compliance with the wishes of its founder, a management board is appointed with the capacity to make policy and to take administrative decisions. It is a self-owning

[2] www.economist.com/PrinterFriendly.cfm?story_id=6919139
[3] www.NobelPrize.org/about.
[4] Law No. 87-571, July 23, 1987; Section 74/A-74/G C.C.; Act 1994:1220.
[5] Personen und Gesellschaft Recht Artikel 552 - 570.
[6] Privatstiftungsgesetzt, BGBI 255/1993, Law No. 694; Stiftungen §§80 – 88, Burgerliche Gesetzbuch (BGB); Civil Code Suisse, Chapitre III: Des foundations, Articles 80 á 89bis et 335.

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structure without shareholders or equity holders. It is autonomous from its founder and acquires the status of an independent legal entity. As such, the foundation is able to enter into obligations, contracts and agreements.

Differences between foundations and trusts. A foundation is more than a civil law version of a trust, which is a more widely known common law concept; there are several fundamental differences between the two. A trust is not a separate legal entity and can only act through the actions of its trustee; a foundation on the other hand, is a legal person in and of itself. Unless the settlor is appointed as Trustee, or powers are reserved by the settlor, a settlor of a trust is required to relinquish control, while the subscriber of a foundation may be appointed as a member of the board and maintain control. Any legal action brought by or against a trust must be done in the name of the trustee, while a foundation may be named as a litigant. Anyone settling a trust needs to be concerned with the Rule Against Perpetuities or possible limitation of duration imposed by the statute, while a foundation can exist forever without such apprehensions.

Nevis. Since the 1990s, legislation enabling foundations to be created has moved beyond Europe and its civil law jurisdictions: Panama, Saint Kitts, The Bahamas and Nevis all have laws which provide for the establishment of foundations.[7] The Caribbean island of Nevis (the "**Island**") is part of the Federation of Saint Kitts-Nevis (the "**Federation**"), a two-island nation and former British colony which received its independence in 1983. English is both the official and spoken language of the Island and

[7] Law No. 25 of June 12, 1995; Foundations Act, 2003; Foundations Act, 2004, as Amended; Multiform Foundations Ordinance, 2004.

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the Federation. The citizens of the Federation enjoy a literacy rate of 97.8 percent, placing the nation twenty-fourth in the World, out of 176 countries.[8] The Federation uses the Eastern Caribbean Dollar ("**EC$**"), which has been pegged to the United States Dollar ("**US$**") at an exchange rate of EC$2.70 to US$1.00 since 1976.[9] The United States Dollar is a widely accepted medium of exchange for many transactions, especially by offshore financial service providers.

Laws of Nevis. The basis of the Federation's jurisprudence is the common law of England, but since independence, it has been supplemented by newer legislation, specifically in the corporate, commercial and financial areas. Nevis and the Federation both have their own financial services legislation, which has encouraged the establishment of banks, mutual funds, captive insurance companies, corporations and trusts. The Constitution of the Federation ensures certain sovereign rights to the Island and, as such, Nevis can enact its own laws which are distinct from those of the Federation. While foundations may also be formed in the Federation under separate legislation, in Nevis, they may be established under the Multiform Foundations Ordinance, 2004, (the "**MFO**").

Multiform Foundations. The MFO terms entities registered under it as "*multiform foundations*", and this not only enables the establishment of new entities, but also allows already existing foreign and domestic business entities to continue, transfer,

[8] United Nations Human Development Programme Report, 2007 – 2008, Table 1, www.undp.org.
[9] International Monetary Fund Eastern Caribbean Currency Union, Staff Report for the 2004 Regional Surveillance, 14TH April, 2004, p. 1.

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convert, consolidate or merge into a Nevis registered multiform foundation.[10] The MFO allows for flexibility in the by-laws, the regulations which govern a multiform foundation. The Ordinance which enables these entities to be established may be similar to a standard foundation, or may assume the form of more recognized business entities. The by-laws may be drafted to allow the entity, for administrative purposes, to take the form of a trust, a company, a limited liability company or a partnership.[11] The stated form of a multiform foundation may be changed, from one form to another, and such change in form will not affect its existence, rights or obligations.[12] The MFO also allows an entity the ability to choose a law, other than the Ordinance and the laws of Nevis, to govern either all or a portion of the multiform foundation.[13]

Management Board and Secretary. The business and affairs of all multiform foundations must be managed by a management board.[14] Its duty is to handle all business arrangements in accordance with the foundation's goals as stated in its by-laws and to administer the assets of the foundation. All entities registered under the MFO are also required to have a secretary which may be a natural or a legal person. However, the secretary shall not be the sole member of the management board.[15] Unless provided for otherwise, a multiform foundation's by-laws may be amended by a ordinary resolution of its management board or a unanimous resolution of its beneficiaries, if any.[16]

[10] Multiform Foundations Ordinance, 2004, Section 2 (1) "foundation".
[11] Multiform Foundations Ordinance, 2004, Section 14 (5).
[12] Multiform Foundations Ordinance, 2004, Section 10 (2) and 10 (5).
[13] Multiform Foundations Ordinance, 2004, Section 6 (5).
[14] Multiform Foundations Ordinance, 2004, Section 17 (1).
[15] Multiform Foundations Ordinance, 2004, Section 18 (2).
[16] Multiform Foundations Ordinance, 2004, Section 6 (5); 8 (1).

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The management board will have different names depending on the particular form of the foundation.[17] If the multiform is a trust, the entity will be known as a "*trust foundation*" and the trustees will constitute the management board.[18] If the form is a company or a limited liability company, it will be known as a "*company foundation*". The management board will be comprised of the directors of a company or the management of a limited liability company. [19] If the stated multiform is a partnership, then it will be known as a "*partnership foundation*" and the managing partner will be the management board.[20] The names of all the entities registered under the MFO shall end in the word "*Foundation*" or the abbreviation "*FDN*".[21]

Purposes and Beneficiaries. A multiform foundation may be formed for any singular purpose or more than one purpose, provided that such purpose is not contrary to the public policy of Nevis.[22] The purpose of a multiform foundation may be charitable, non-charitable, commercial or non-commercial.[23] The subscriber will authorize the transfer of assets to the foundation, which will subsequently be treated as legally separate from those of the subscriber.[24] A subscription to a multiform foundation, either initial or subsequent will be irrevocable unless otherwise provided for in the memorandum of incorporation.[25] There is no requirement for an entity registered under the MFO to name

[17] Multiform Foundations Ordinance, 2004, Sections 17.
[18] Multiform Foundations Ordinance, 2004, Section 2 "trust foundation", "management board" and 10 (9) (a).
[19] Multiform Foundations Ordinance, 2004, Section 2 "company foundation", "management board" and 10 (9) (b).
[20] Multiform Foundations Ordinance, 2004, Section 2 "partnership foundation", "management board" and 10 (9) (c).
[21] Multiform Foundations Ordinance, 2004, Section 14 (1).
[22] Multiform Foundations Ordinance, 2004, Section 11 (1).
[23] Multiform Foundations Ordinance, 2004, Section 11 (2).
[24] Multiform Foundations Ordinance, 2004, Section 2 "subscriber, and 13.
[25] Multiform Foundations Ordinance, 2004, Section 13 (1) (a).

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a beneficiary.[26] The assets of a multiform foundation can be utilized to benefit any person, providing that any payment fulfils the foundation's stated purpose.

Registration and confidentiality. A multiform foundation may acquire a legal personality only when it has been entered upon the Register of Foundations and a Certificate of Establishment is issued. In order to obtain a Certificate of Establishment, the Registrar of Foundations (the "**Registrar**") needs to receive an original English language copy of the by-laws for review.[27] The by-laws are be confidential and are not available for public inspection, unless the foundation so informs the Registrar.[28] The Registrar also needs to be provided with the name and address of the multiform foundation, its registered agent and its registered office in Nevis, the amount of initial subscription, the particulars of the management board and secretary, the form of its initial multiform; and any other information that the Registrar requests.[29] There is no minimal amount for an initial subscription.

Taxation. Under the MFO, a multiform foundation and its beneficiaries, if there are any, will be exempt from the payment of income, capital gains and withholding taxes. However, upon establishment, the foundation may advise the Registrar and choose to become tax-resident in Nevis and will pay such taxes at a maximum rate of one percent.[30] A tax return must be filed annually and payments are based on the entity's stated net retained earnings. Obtaining tax-resident status could be beneficial because it shows that

[26] Multiform Foundations Ordinance, 2004, Section 11.
[27] Multiform Foundations Ordinance, 2004, Section 6 (1) and 3 (3).
[28] Multiform Foundations Ordinance, 2004, Section 6 (2).
[29] Multiform Foundations Ordinance, 2004, Section 4.
[30] Multiform Foundations Ordinance, 2004, Section 93.

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the "*mind and management*" of the foundation is in Nevis and it could help in alleviate or minimize taxes in another jurisdiction because the entity is taxed locally.

Foreign judgments. Foreign judgments are unenforceable; any legal action against a multiform foundation, its beneficiaries or any persons associated with the entity must be brought in the High Court of Nevis (the "**High Court**").[31] The MFO is strict with regard to an action brought by a creditor against a registered entity or anyone with an interest in a foundation. Before commencing an action, the plaintiff-creditor must post a bond in the amount of US$50,000 with the Minister of Finance. This amount is used to guarantee the payment of any costs in the event of an unsuccessful action.[32] Even if an action is brought in the High Court with respect to a multiform foundation, all judicial proceedings, other than criminal proceedings will be held *in camera* (in the Judge's chambers), and no details of the action will be published without a court order.[33] The MFO and the High Court do not recognize the concept of "*forced heirship*", which is an enshrined legal precedent in Japan, civil law countries and jurisdictions using the Shariah.[34] Forced heirship limits the discretion of a testator, and requires that a provision be made under their will for their spouse, children and dependents.

Statute of Limitations. The MFO provides an attractive statute of limitations provision for debtors. Under the Ordinance, any amounts contributed or "*subscribed*" to the multiform foundation will not be fraudulent, if the subscription occurred after one

[31] Multiform Foundations Ordinance, 2004, Section 110.
[32] Multiform Foundations Ordinance, 2004, Section 83.
[33] Multiform Foundations Ordinance, 2004, Section 113 (2); The Confidentiality Relationships Act, No. 2 of Saint Christopher and Nevis.
[34] Multiform Foundations Ordinance, Section 46.

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year from the date that the creditor's cause of action accrued or the subscription occurred before the creditor's cause of action accrued.[35] If the subscription occurred before the expiration of one year before the creditor's cause of action accrued and creditor failed to bring action before the expiration of six months since the subscription took place, the subscription will also not be considered fraudulent.[36] The "*Statute of Elizabeth*", an old English statute which specifies that a transfer may be voided with respect to future unknown creditors, is not applicable to trust foundations.[37] The MFO allows for a foundation to be established under a Last Will and Testament, and provides that the testator will be considered the subscriber.[38]

In recent years, the use of non-charitable foundations has grown and they have been utilized for the following purposes:

1. **Maintaining control of a family business;**
2. **Corporate stability;**
3. **Collection of royalties and payments;**
4. **Holding and managing personal and real property; and**
5. **Providing security for a lender.**

Maintaining control of a family business. The Garfield Weston Foundation (the "**GW Foundation**") was established in 1958 by the late Willard Garfield Weston ("**Willard Weston**"), the founder of Associated British Foods ("**ABF**"). The Foundation was endowed with a donation of family-owned company shares and is today, the ultimate

[35] Multiform Foundations Ordinance, 2004, Section 108 (3) (a) and (4).
[36] Multiform Foundations Ordinance, 2004, Section 108 (3) (b).
[37] Multiform Foundation Ordinance, 2004, Section 115; 13 Elizabeth 1 Ch. 5 (1571).
[38] Multiform Foundations Ordinance, 2004, Section 9 (1).

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controller of the ABF.[39] Willard Weston was succeeded as Chairman of both ABF and the GW Foundation by one of his sons, Garfield Howard Weston ("**Garry Weston**"), who helped the company grow and diversify its holdings. Garry Weston died in 2002 and was succeeded by George Weston as the Chief Executive of ABF, while Guy Weston became the Chairman of the Foundation. While the GW Foundation provides money to charitable causes, its true mission is arguably to allow the members of the Weston family to maintain control of ABF. All of the trustees of the foundation are now and have always been lineal descendants of the founder.[40]

Corporate stability. The aforementioned INGKA Foundation owns the privately-held Curaçao registered company, INGKA Holding B.V., which is the parent company of the majority of the outlets of the Swedish multinational furniture store chain, IKEA. The foundation's objects require it to "obtain and manage" shares in the INGKA Holding group and to manage its shareholding in a way to ensure "the continuity and growth" of the IKEA group. It has been speculated that the real purpose of the INGKA Foundation is to act as an anti-takeover device for INGKA Holding B.V., since its shares can be sold only to another foundation with the same objects and executive committee, and the foundation can be dissolved only through insolvency.[41]

Collection of royalties or payments. The Green Bay Packers Foundation (the "**Packers Foundation**") was created in 1986 by the National Football League ("**NFL**")

[39] www.GarfieldWeston.org/About.
[40] www.abf.co.uk/About/History_2000.asp.
[41] www.economist.com/business/displaystory.cfm?story_id=6919139.

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franchise, the Green Bay Packers (the "**Packers**"). The Foundation distributes funds to civic and charitable groups throughout the American State of Wisconsin. To fund its charity, the Packers Foundation collects royalty fees from the use of the Packers' oval G logo, on officially licensed NFL merchandise and on Wisconsin license plates.[42] The Packers are the only community owned franchise in major league North American team sports, and are the last remaining small-town team left in the NFL. The town of Green Bay, Wisconsin has approximately 100,000 residents, while most other franchises play in big cities where the population numbers in the millions. To ensure that the team stays in Green Bay, the Packers' Articles of Incorporation provides that any profit from a sale of the franchise would go to the Packers Foundation.

Holding or managing real property. The aforementioned Onassis Foundation contributes to philanthropic causes benefiting residents of Greece and promotes Hellenic culture. Besides these aims, the entity operates the seventeen vessels owned by Olympic Shipping and Maritime, S.A., (the "**Olympic Shipping Group**"), the successor-in-interest to the company established by the late Aristotle Onassis. In addition to the ships, the foundation operates an investment portfolio and owns real properties in New York, London and Athens, which serves as offices for subsidiaries for the Olympic Shipping Group.[43]

Providing security for a lender. A foundation may be used to hold orphan companies in off-balance sheet transactions. In such transactions, the structure can be

[42] www.packers.com/community/packers_foundation.
[43] www.onassis.gr/english/business/index.php.

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used to provide security for the lender or to keep the asset and liability from appearing on the purchaser's balance sheet. For example, a purchaser wishes to buy an asset from a seller. To accomplish the purchase, the purchaser establishes a foundation which incorporates an underlying company. To finance the purchase, the underlying company borrows funds from a lender and gives the lender a pledge of its shares as security. The underlying company leases the asset to the purchaser and utilizes any rental income received from it to discharge its debt to the lender. When the debt is repaid, the lender releases its security and any surplus assets could either go to the purchaser or be held in the foundation until used up.

A foundation could be advantageous as an asset protection and estate planning tool and could be used for many of the aforementioned purposes. There are two primary reasons why one should consider utilizing such an entity as part of tax, estate or business planning:

1. **Allowing the subscriber to maintain control of their structure; and**
2. **Avoiding controlled foreign corporation reporting requirements.**

Allowing the subscriber to maintain control of their structure. A major concern of the settlor of an offshore trust is the lack of control over the investment and distribution of the assets. The legal ownership of the trust is held by a trustee with whom the settlor is most likely unfamiliar. Although the settlor may desire to make suggestions with regard to the administration, it is the trustee who has legal ownership and complete discretion over the trust assets, subject to any limits mandated by the law and imposed by the trust deed. Many settlors are reluctant to establish an offshore trust based on these

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parameters. A solution which may alleviate the settlor's concerns is the establishment of a multiform foundation. The settlor could be appointed to the management board and determine what purposes the entity should fulfill. This strategy would allow the settlor to maintain control over their assets and perhaps pursue a more aggressive investment strategy than a professional trustee may be willing to pursue.

Avoiding controlled foreign corporation reporting requirements. As part of their tax planning strategy, many people use a company which is registered in a jurisdiction in which they do not reside. The United States, Canada and many Western European countries have strict tax regulations which require their citizens and residents to submit statements which declare any ownership or interest in such companies, which are better known as "*controlled foreign corporations*" ("**CFCs**"). Instead of holding the shares in their own name, a person may establish a Nevis multiform foundation to hold the shares, thus avoiding the CFC reporting rules. The advantage of using a multiform foundation as a shareholder for a CFC is the removal of ownership from an identifiable person. The transfer of the CFC to a self-owned structure with neither owners nor beneficiaries confers anonymity and privacy on the subscriber.

Conclusion. A foundation created under the Nevis Multiform Foundations Ordinance, 2004 could be readily accepted by clients and professional intermediaries from civil law countries because they are more familiar with the concept of a foundation as opposed to that of a trust. A Multiform Foundation can also meet the needs of persons

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from common law jurisdictions because it provides users with a certain level of control and privacy.

The Ordinance allows foundations established thereunder to assume the form of other more familiar entities, such as a trust, company or partnership. A multiform foundation is not required to name a beneficiary and may be formed for any purpose, except one which is contrary to Nevis' public policy. The by-laws of a multiform foundation ensure the entity a certain level of anonymity since these documents are held in confidence by the Registrar. A multiform foundation is tax-exempt in Nevis, but may choose to become tax-resident in Nevis and pay taxes at a maximum rate of one percent. Any legal action brought against a multiform foundation must be brought in the High Court of Nevis. The court will not entertain any action based on forced heirship, since such a concept is not recognized on island.

An entity created under the Ordinance is a valuable tool in the fields of estate administration, tax planning and commercial transactions. A multiform foundation can be used to ensure corporate stability, secure family control of a business or provide security for a lender. Since it is an entity which does not to name any beneficiaries, it can anyone who has a financial interest in the structure, avoid controlled foreign corporation reporting requirements.

In drafting its foundation legislation, Nevis combines the principles found in common law with concepts originating to civil law jurisdictions. The Multiform

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Foundations Ordinance enhances Nevis' vibrant offshore financial services industry with legislation which allows subscribers to establish solid foundations on common ground.

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