BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Ferguson for Congress and	)	
William Morrison, as Treasurer	)	MUR 5138
Representative Mike Ferguson	)	
Thomas and Roberta Ferguson	)	
	)	
	)	

STATEMENT OF REASONS OF COMMISSIONERS SMITH AND TONER

On June 10, 2003, by a vote of 4-2,[1] the Commission accepted the Office of General Counsel's ("OGC") recommendation to accept a conciliation agreement finding that Ferguson for Congress and William Morrison as Treasurer, and Representative Mike Ferguson violated 2 U.S.C. § 441a(f), and Thomas and Roberta Ferguson violated 2 U.S.C. § 441a(a)(1)(A) and (a)(3) with respect to funds paid to Michael Ferguson from a family trust. The conciliation agreement levied a civil penalty of $210,000, which is one of the largest fines the Commission has ever assessed against a congressional campaign.

We voted against the General Counsel's recommendation to assess a civil penalty in the amount of $210,000 because we believe that the penalty is grossly disproportionate to the offense.

Analysis and Conclusions

This matter arose out of a complaint filed by Thomas P. Giblin ("Complainant"), Chairman of the New Jersey Democratic State Committee, alleging that during the 2000 election cycle Representative Mike Ferguson ("Candidate") accepted contributions from

[1] Chair Weintraub and Commissioners Mason, McDonald, and Thomas voted in favor of the General Counsel's recommendation. Commissioners Smith and Toner voted in the negative.

Thomas and Roberta Ferguson ("Candidate's parents") in excess of the contribution limits permitted by the Federal Election Campaign Act ("FECA" or "the Act").

FECA prohibits individuals from contributing to any candidate and his or her authorized political committees with respect to any election for Federal office which in the aggregate exceed $1,000.[2] 2 U.S.C. § 441a(a)(1)(A). The Commission has defined the term "contribution" as: "A gift, subscription, loan…advance or deposit of money or anything of value made… for the purpose of influencing any election for Federal office." 11 C.F.R. § 100.7(a)(1). The Regulations allow candidates for Federal office to make unlimited expenditures from personal funds. 11 C.F.R. § 110.10(a). The Commission has defined the term "personal funds" as including: "bequests to the candidate; income from trusts established before candidacy; income from trusts established by bequest after candidacy of which the candidate is the beneficiary; gifts of a personal nature which had been customarily received prior to candidacy." 11 C.F.R. § 110.10(b)(2). The Commission has interpreted gifts to a candidate not to be contributions if they are "of a personal nature which had been customarily received prior to candidacy." 11 CFR 110.10(b). *See also* AO 2000-8, 1988-7.

The Supreme Court has upheld the constitutionality of FECA's contribution limits as applied to members of a candidate's family, while invalidating any limits on a candidate's use of his or her own funds. However, even while upholding FECA's limits against family member contributions, the Court made clear that the potential for actual or apparent corruption from familial contributions is not as great as from contributions from persons outside a candidate's family. "The prevention of actual and apparent corruption of the political process does not support the limitation on the candidate's expenditure of his own personal funds . . . Although the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members, we cannot say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors." *Buckley v. Valeo*, 424 U.S. 1, 53 (1976).

In light of the Court's ruling in *Buckley*, we accept and respect that family member contributions to a federal candidate are subject to FECA's contribution limits. However, we also believe the Commission has the power, and indeed the responsibility, to ensure that any penalties that are levied in this area are commensurate with the seriousness of the offense and take into account the relative importance of these kinds of violations relative to other types of violations of FECA.

On September 26, 2000, the Candidate's parents established a trust naming each of their four children, Michael, Thomas Jr., Maggie, and Cathleen as beneficiaries of $1 million each upon the successful completion of three stipulations: the attainment of age thirty, the receipt of a bachelor's degree from an accredited college, and marriage. Resp't Br. at 10-11. The trust was established after both of the Candidate's parents were diagnosed with cancer and the Candidate's mother was given an uncertain amount of time

[2] The Bipartisan Campaign Reform Act of 2002 (BCRA) passed in 2002 raised the individual contribution limit from $1,000 to $2,000. The activity at issue here occurred prior to the effective date of BCRA.

to live. Resp't Br. at Ex. A. Prior to the establishment of the trust, the Candidate's parents made substantial gifts to all of their children, including $257,000 to the Candidate in 1997, $319,035 in 1999, and $42,500 in 2000.[3] *Id.* at 11-12.

Prior to establishing the trust, the Candidate and the Candidate's parents sought and obtained an opinion of counsel that the transfer of funds from the trust to the Candidate would not be a violation of FECA. *Id.* at Ex. E. The Candidate is the only one of the four Ferguson children who has qualified to receive the proceeds from the trust as he is married, turned thirty on July 22, 2000, and has received his bachelor's degree. *Id.* at 11. The Candidate's portion of the trust was paid to him on September 28, 2000. Gen. Counsel's Rep. #3 at 5.

The Candidate filed his Statement of Candidacy on May 10, 1999. *Id.* Beginning on September 30, 2000, the Candidate made a series of loans to the Committee totaling $525,000. First Gen. Counsel's Rep. at 5.

The violations in this matter resulted from a bona fide family arrangement, namely the estate planning goals established by the Candidate's parents. The Candidate was not the only named beneficiary of the trust and the criteria established in the trust agreement were all non-candidacy related, i.e. the requirement of marriage, receipt of a bachelor's degree, and the attainment of age 30. The Candidate and his parents relied in good faith upon the advice of counsel, sought and obtained in advance of the establishment of the trust, that none of the transactions violated FECA; accordingly, the Candidate did not knowingly and willfully violate FECA. Additionally, there was an established history of giving to the Candidate prior to the filing of his statement of candidacy. *See* AO 1988-7. The Candidate's parents gave the Candidate $618,535 over the course of several years before he filed his Statement of Candidacy in 1999. The payment of $1 million from the family trust was in keeping with previous gifts to the Candidate, was not unlike gifts previously given to the Candidate and his siblings, and the record indicates that the establishment of the trust was triggered by the seriousness of the Candidate's mother's illness, her uncertain prognosis, and her deteriorating health.

Given this record, and the Supreme Court's admonition in *Buckley* that contributions from family members do not have the same potential for actual or apparent corruption as other kinds of contributions, the Office of General Counsel recommended a much higher civil penalty than we thought appropriate. We could not support such a grossly disproportionate penalty, particularly where, as here, the Candidate relied in good faith on advice of Counsel, it is undisputed in the record that the trust was created after the Candidate's mother's illness worsened, and there was an established pattern of giving to the Candidate and to other members of the Candidate's family.

[3] In 1997 Thomas Jr. received $20,340; in 1998, Thomas Jr. received $243,033 and Cathleen received $312,810; in 1999 Thomas Jr. received $36,650 and Cathleen received $44,700; and in 2000, Thomas Jr. received $171,445 and Cathleen received $774,913. Resp't Br. at 11-12. Maggie's equestrian activities were funded through a L.L.C. established by the Candidate's parents. Expenses for Maggie's activities totaled in excess of $3 million dollars with $212,000 spent in 1997, $525,000 spent in 1998, in excess of $200,000 in 1999, and $2,300,000 in 2000. *Id.* at 12.

Most importantly, we do not believe a civil penalty of nearly a quarter of a million dollars in this matter– which is one of the highest penalties the Commission has ever assessed against a congressional campaign– is consistent with the Court's teaching in *Buckley*. The civil penalty here greatly exceeds the civil penalties that the Commission has imposed in other matters that involve much more serious violations of core provisions of FECA.

For all the foregoing reasons, we declined to accept the recommended conciliation agreement in this matter.

June 12, 2003

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Bradley A. Smith, Vice Chairman

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Michael E. Toner, Commissioner