FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

CONCURRING OPINION

OF

COMMISSIONER SCOTT E. THOMAS

ADVISORY OPINION 1991-10

I agree with the Commission's conclusion in Advisory Opinion 1991-10 that a candidate may obtain a bank loan for his campaign by using as collateral up to one-half the value of property jointly held with his spouse as tenants by the entirety. I write this separate statement only in response to Commissioner Elliott's concurrence which opines that a candidate may go even further and use as collateral the full value of property jointly held with his spouse as tenants by the entirety. In my opinion, the Commission's regulations and current Massachusetts law indicate that only one-half the value of property held by a candidate under a tenancy by the entirety may be considered the "personal funds" of the candidate.

The Federal Election Campaign Act of 1971, as amended, ("the Act") provides for a $1,000 limitation on contributions by any person, including the candidate's spouse, to a federal candidate with respect to any election for federal office. 2 U.S.C. §441a(a)(1)(A). The Act includes in the definition of contribution "any...loan...made by any person for the purpose of

influencing any election for Federal Office..." 2 U.S.C. §431(8)(A)(i). Commission regulations indicate that a loan guarantee, endorsement, or other form of loan security is also a contribution. 11 C.F.R. §100.7(a)(1)(i). Thus, the co-signer of a bank loan to be used for a candidate's campaign would be a contributor and limited to signing on a bank loan only up to $1,000.

On the other hand, a candidate may make unlimited contributions and expenditures from the candidate's personal funds on behalf of his or her campaign. 11 C.F.R. §110.10(a). Commission regulations define "personal funds" to mean:

> (1) Any assets which, under applicable state law, at the time he or she became a candidate, the candidate had a legal right of access to or control over, and with respect to which the candidate had either:
>
> (i) Legal and rightful title, or
> (ii) An equitable interest.

11 C.F.R. §110.10(b)(1) (emphasis added). There are no limits to the amount of personal funds which a candidate may pledge as collateral to secure a bank loan for the candidate's campaign.

Commission regulations also allow a candidate to use a portion of assets jointly owned with his or her spouse as personal funds. With respect to jointly owned assets, the regulations state, in pertinent part:

> The portion of the jointly owned assets that shall be considered as personal funds of the candidate shall be that portion which is the candidate's share under the instrument(s) of conveyance or ownership. If no specific share

> is indicated by an instrument of conveyance or ownership, the value of one-half of the property used shall be considered as personal funds of the candidate

11 C.F.R. §110.10(b)(3). The regulations also allow a candidate's spouse to be a signatory to a loan without being a contributor so long as the value of the candidate's share of the jointly owned property used as collateral for the loan equals or exceeds the amount of the candidate loan. See 11 C.F.R. §100.7(a)(1)(i)(D). If, however, the amount of the candidate loan exceeds the candidate's interest in the jointly-owned collateral, the spouse is considered to be making an excessive contribution.

Commissioner Elliott's concurrence concludes that "a properly executed conveyance in this case could transfer all the equity in the home to the campaign without causing the spouse to become a contributor." Elliott Concurrence at 2 (emphasis added) (footnote omitted). Relying on four Massachusetts court decisions (the most recent of which was decided in 1965), the concurrence reasons that "[b]ecause each spouse owns the whole estate, and because the proceeds of the mortgage are held in the entirety, the spouse's co-signature will not cause a contribution by her even if the amount of the loan exceeds one-half of the equity in the estate." Id.

The main problem with Commissioner Elliott's concurrence is that it fails to acknowledge current Massachusetts law regarding tenancy by the entirety. The Massachusetts statute unambiguously states that the husband and wife have an equal right to possession and control of the property:

> A husband and wife shall be equally entitled to the rents, products, income or profits and to the control, management and possession of property held by them as tenants by the entirety.

Mass. Gen. L. ch. 209, §1 (emphasis added). Under the plain language of the statute, I can see no basis whatsoever for claiming that a candidate has a "legal right of access to or control over," see 11 C.F.R. §110.10(b)(1), all of the property jointly held as tenants by the entirety. As a tenant by the entirety with his wife, it seems clear that the candidate in Advisory Opinion 1991-10 may consider only one-half of the equity jointly held by them in the home as his personal funds under current Massachusetts law.

Nor do I think that this result would change under the old Massachusetts common law. For those tenancies by the entirety created before February 11, 1980 (the effective date of the amendments to Mass. Gen. L. ch. 209, §1) and for which a husband and wife have not reconveyed their property to guarantee that their tenancy is governed by the 1980 amendments, the Massachusetts courts have still looked to the common law. See Turner v. Greenaway, 391 Mass. 1002, 459 N.E. 2d 821 (1984). Even if the Massachusetts common law were applied (and from the

facts presented in the Advisory Opinion Request, we do not know whether it would apply in light of the above), I am not prepared to find that the full value of the property held in a tenancy by the entirety would be considered the candidate's "personal funds" as defined by 11 C.F.R. §110.10(b)(1).

There is no question that the husband held very significant rights in a tenancy by the entirety under the old Massachusetts common law. Yet, despite all of the advantages held by the husband in the tenancy, the wife retained a most important right in the tenancy -- an indestructible right of survivorship. The Massachusetts courts discussed the effect of the wife's right of survivorship in this manner:

> Alienation by either the husband or the wife will not defeat the right of the survivor to the entire estate on the death of the other. There can be no severance of such estate by the act of either alone without the assent of the other, and no partition during their joint lives, and the survivor becomes seised as sole owner of the whole estate regardless of anything the other may have done.

Carey's, Inc. v. Carey, 25 Mass. App. 290, 517 N.E. 2d 850, 853 (1988) quoting Pineo v. White, 320 Mass. 487, 492, 70 N.E. 2d 294 (1946). Thus, the Massachusetts courts have concluded:

> any attempted conveyance of property held in a tenancy by the entirety by one tenant during the lifetime of the other was void. Both spouses had to join in a deed in order to convey the entire estate and destroy both survivorships.

Carey's, Inc. v. Carey, supra, 517 N.E. 2d at 853 (emphasis added).

Because of the wife's right of survivorship in property held as a tenancy by the entirety, there are significant limitations on the husband's actions regarding the property. For example, the above-quoted case law indicates that the husband alone could not sell the property; only a joint action of the husband and wife can transfer the estate. Moreover, it appears that the husband's creditors could not seize ownership of the property if the property were used by the husband alone as collateral on a defaulted loan; again, the wife has an indefeasible right of survivorship in the entire tenancy which would protect the property from her spouse's creditors. Under these circumstances, I cannot find that the candidate possesses the requisite "legal right of access to or control" over a tenancy by the entirety to consider the full value of the property as "personal funds" as defined by 11 C.F.R. §110.10(b)(1).

Commissioner Elliott's concurrence does not address the straightforward language of current Massachusetts law and reads far too much into the old common law (which may not even be applicable in this case). Accordingly, I disagree with the notion that a candidate may consider the entire value of a

tenancy by the entirety held in Massachusetts as "personal funds." Under either the current Massachusetts statute or the former common law, it is my opinion that the candidate may consider as "personal funds" for FECA purposes only one-half the value of property held by the candidate as a tenant by the entirety.

6/20/91
Date

Scott E. Thomas
Commissioner