



FEDERAL ELECTION COMMISSION

91/FR 17 P. 12-02

WASHINGTON D C 20463

**CONCURRING OPINION OF
COMMISSIONER LEE ANN ELLIOTT
TO ADVISORY OPINION 1991-10**

I concur with the result reached by the Commission in Advisory Opinion 1991-10. I write separately to explain my views on how the candidate in this case may mortgage his jointly-held home.

Commission regulations allow a candidate to expend an unlimited amount of his or her own personal funds on their own campaign. 11 CFR 110.10(b)(1). If personal funds¹ are jointly held with a spouse, the candidate may only use the "candidate's share" of the property. 11 CFR 110.10(b)(3). If a spouse's signature is required to obligate the jointly held property, the spouse will not be considered a contributor so long as the loan to the campaign does not exceed the "candidate's share" of the jointly held property. 11 CFR 100.7(a)(1)(1)(D).

A common question is what is the "candidate's share" of jointly held property. In community property states, or where property is held in a joint tenancy or in a tenancy in common, the answer is simply one-half of the equity of the property. 11 CFR 110.10(b)(3). When property is held in a tenancy by the entirety, as is the candidate's home in this case, this one-half division may not be the right answer.

A tenancy by the entirety is an estate held by a husband and wife as one person. Blacks Law Dictionary 1313-14 (5th ed. 1979). The whole estate is owned concurrently by the two, and each spouse does not have a separate, individual share. *Id.* A tenancy by the entirety cannot be partitioned or defeated by one spouse since each owns the whole together as one. See, e.g. Coleman v. Jackson 286 F.2d 98 (D.C. Cir. 1960)

1. The term "personal funds" means "any asset the candidate had legal right of access to or control over" and has either legal title or an equitable interest. 11 CFR 110.10(b)(1).

In Massachusetts, tenancies by the entirety retain much of their common law glory. J. Cribbett, Principles of the Law of Property, 96 (2nd ed. 1975). Each spouse is seized of the whole property and neither can divide the estate. Licker v. Gluskin, 265 Mass. 403, 164 N.E. 613 (1929). One spouse cannot obligate the other's interest by a unilateral mortgage since there is one indivisible estate in them both. Pineo v. White, 320 Mass 487; 70 N.E.2d 294 (1946). While one spouse may convey his or her rights to the other spouse, the recipient spouse receives no more property or title than he or she previously owned. Hale v. Hale, 332 Mass. 329, 125 N.E.2d 142 (1955). Lastly, the proceeds from a sale or mortgage of real property held in the entirety is also held in the entirety by both spouses as one. Smith v. Tipping, 349 Mass. 590, 211 N.E.2d 231 (1965).

In today's case, the home being mortgaged is held in the entirety by the candidate and his wife. Because 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. In my opinion, 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.²

Additionally, for purely FECA purposes, the proceeds from a properly executed mortgage on the whole value of a estate by the entirety can be considered the "personal funds" of the candidate since he has "legal right of access" to the whole. 11 CFR 110.10(b)(1). This is, of course, different from a tenancy in common where there is only the legal right of access to half, or with a joint tenancy that can be partitioned. There can be no halving or defeating of an estate by the entirety as with these other co-tenancies. Any severance of this estate into equal halves is unwarranted and contrary to "applicable state law" which our regulations specifically state we are

2. Importantly, my opinion is not based on the old principle of a husband's estate of jure uxoris in a wife's property. The rules for mortgaging an estate by the entirety would be the same even if the wife was the candidate and the husband was co-signing the mortgage.

to follow. 11 CFR 110.10(b)(1). Any federal attempt to change the effect of one state law to conform it with other state laws to "level the playing field" is beyond our authority and contrary to Buckley v. Valeo, 424 U.S. 1 (1976).

Further, just because a candidate may need his spouse's signature to mortgage their property does not mean he lacks a "legal right of access" to the property. Quite the opposite, securing a co-signature is how a spouse may access the property legally. See also Statement of Reasons MUR 3097 Louis Dupont Smith (Jan. 14, 1991) (incompetent candidate has legal right of access to trust funds despite requirement to obtain written approval from the court for release of funds).

My opinion today will not affect a large number of candidates. In fact, it may not even affect the requestor since he is not seeking a mortgage on more than half the value of their home. Nevertheless, I feel it is important to respect and follow state property laws (no matter how unique) and ensure candidates can use all the personal funds to which they are entitled.


Lee Ann Elliott
Commissioner

April 16, 1991