

OGC Docket

AGENDA DOCUMENT #96-2



FEDERAL ELECTION COMMISSION
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AGENDA ITEM

For Meeting of: JAN 10 1996

MEMORANDUM

TO: The Commission

FROM: Scott E. Thomas
Commissioner *[Signature]*

SUBJECT: Advisory Opinion Request 1995-42 (Rep. McCrery's child care expenses)

At the meeting of December 14, 1995, I offered to prepare an alternative draft that would allow the use of campaign funds to pay for child care expenses in the limited circumstances presented here. This is the result of that tender.

While I believe there are several distinctions or conditions that we could include in the text of the opinion, getting a consensus is probably easier with a 'bare bones' response. In the text we could simply say that the use is permitted "because you and your wife both occasionally need to attend the campaign events involved and because the child care expenses will be incurred only as a direct result of campaign activity and would not exist otherwise."

We can leave for another day the question of whether child care expenses incurred to enable the spouse to work for compensation on behalf of the campaign could be paid with campaign funds. For what it's worth, I would view such child care expenses as no different than those incurred to enable the spouse to work for any other employer. The use of campaign funds to pay for child care costs incurred to enable a spouse to earn a living is personal use, in my view. Those expenses would exist irrespective of the campaign.

Similarly, we can forego for now the issue of whether elder care expenses could be paid for with campaign funds. It is not raised by the requestor. I would allow such payments if the circumstances were similar to those presented in the request, by the way.

While some have voiced discomfort with letting campaign funds be used to pay child care costs, I believe that in the circumstances presented there is no legal basis for prohibiting the practice. Our regulation requires that to be prohibited the expense must be one that would exist irrespective of the campaign. One can easily argue that these child care expenses exist only because of the campaign. The reality is that because the requestor is a candidate who has access to campaign funds for campaign activities, some opportunities exist for him that do not exist for those of us who are not candidates. (This distinction also makes unhelpful any comparison to the tax consequences of an employer's payment of compensation in the form of child care or to the denial of tax deductibility of child care expenses as business expenses.)

I do not think we are starting a 'parade of horrors.' As noted above, we can properly distinguish situations where child care costs emanate from a spouse's (or candidate's) decision to work for compensation. Indeed, our legal test would seem to work well in that situation. This very common phenomenon exists irrespective of any involvement in a campaign. For example, as has been noted by some, this is the situation in which many on our own staff find themselves.

Likewise, a permissive ruling here would not sanction the use of campaign funds for child care costs that have nothing to do with campaign activity, such as child care expenses to facilitate a vacation, to enable a candidate or spouse to take classes or engage in charity work, or to enable a candidate or spouse to simply have free time.

We will no doubt have some difficult advisory opinion requests in the future that explore the boundaries of the approach I am setting forth. For example, what if the need for child care arises virtually all day every day for several months? What if the child care relates to an event held in the candidate's home? Does child care extend to boarding school tuition? Can child care payments be made to a close family member? But while these and other questions may await us, I'd prefer to give the right answer to each than the wrong answer to any one of them.

Accordingly, I would substitute the following for the language beginning at line 1 on page 4 and ending at line 5 on page 5:

The Commission concludes that you also may use campaign funds to pay for child care expenses in the limited circumstances you present. This is because you and your wife both occasionally need to attend the campaign events involved and because the child care expenses will be incurred only as a direct result of campaign activity and would not otherwise exist. See 11 CFR 113.1(g)(1)(ii)(A); see also Advisory Opinion 1995-20.