

TEXAS ETHICS COMMISSION

IN THE MATTER OF
TOBY GOODMAN,
RESPONDENT

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BEFORE THE
TEXAS ETHICS COMMISSION
SC-2608184

FINAL ORDER

I. Findings of Fact

1. The complaint was filed on August 31, 2006.
2. The complaint alleges that the respondent made or authorized payments from political contributions to purchase real property or to pay the interest on or principal of a note for the purchase of real property, and converted political contributions to personal use.
3. The commission held a preliminary review hearing on October 25, 2007, and determined that there was credible evidence of violations of sections 253.035 and 253.038 of the Election Code, laws administered and enforced by the commission. The respondent waived the right to further proceedings before the commission and requested that the commission issue a final order. The commission met on February 12, 2008, and adopted this final order.
4. At the time the complaint was filed, the respondent was a state representative for District 93 in Tarrant County, who served in that capacity from 1991 until 2007, following a defeat in the 2006 general election. During the time relevant to the complaint, the respondent did not ordinarily reside in Travis County.
5. On December 2, 1998, the respondent and his wife purchased a condominium in Travis County. The respondent and his wife borrowed \$123,200 from a lender by jointly executing a promissory note. The lender retained a vendor's lien on the condominium. According to the deed of trust that secured the lender's interest in the note and the condominium, the covenants and agreements of the respondent and his wife were "joint and several." A clause in the deed stated that if any part of the property or any interest in the property is sold or transferred without the lender's prior written consent, the lender may require immediate payment in full of all sums required by the deed. An attachment to the warranty deed indicates that the respondent and his wife were also required to pay condominium association fees and that, if paid by the lender, such fees would become debt of the borrowers.
6. On February 19, 1999, the respondent transferred his interest in the condominium to his wife by a special warranty deed and a partition agreement. According to the terms of the deed and agreement, the respondent gave his interest to his wife as his wife's separate property and the wife agreed to assume all unpaid debt and interest on the mortgage and indemnify the

- respondent for the unpaid debt on the note. There is no evidence that the lender or the lender's successors or assigns were a party to the special warranty deed or partition agreement or otherwise agreed to the transfer. The partition agreement did not provide that income from the property would be the separate property of the respondent's wife.
7. On October 31, 2003, the respondent's wife sold the condominium to a third party for an undisclosed amount. On November 21, 2003, the owner of the beneficial interest under the original deed of trust, Cendant Mortgage Corp., issued a "Release of Lien" to the respondent and his wife that released them from their obligations on the note executed to purchase the condominium and the deed of trust.
 8. The respondent's campaign finance reports disclosed political expenditures totaling approximately \$69,200 to his wife for rent between January 2000 and September 2003. The payment amounts generally increased over time and ranged from \$1,327.38 in January 2000 to \$1,969.64 in March 2003. The reports also disclosed political expenditures totaling approximately \$8,700 to the respondent's wife for condominium fees, which generally increased over time from \$154 in January 2000 to \$191 in September 2003. The expenditures were made from political contributions and were in connection with the condominium.
 9. The respondent's campaign finance reports disclosed a political expenditure of \$1,327.38 from political contributions in July 1999 to "Mortgage Service Center" for the purpose of "Rent for Austin residence" and a political expenditure of \$1,077.38 from political contributions in August 1999 to "Mortgage Service Center" for the purpose of "Rent on Austin residence." The respondent's campaign finance reports also disclosed three separate political expenditures of \$1,327.38 to "Cendant Mortgage" in 1999 for the purpose of "Rent for Austin residence." The respondent's campaign finance reports also disclosed political expenditures from political contributions of \$154 per month to the condominium complex for condominium association dues.
 10. On March 26, 2004, the respondent and his wife purchased a house in Cedar Park, Williamson County, by jointly executing a promissory note to borrow \$209,700. The lender retained a vendor's lien on the house. According to the deed of trust that secured the lender's interest in the note and the house, the obligations and liability of the respondent and his wife were "joint and several."
 11. On March 27, 2004, the respondent transferred his interest in the house to his wife by a special warranty deed and a partition agreement. According to the terms of the deed and agreement, the respondent gave his interest to his wife as his wife's separate property and the wife agreed to assume all unpaid debt and interest on the mortgage and indemnify the respondent for the unpaid debt on the note. A clause in the deed of trust stated that the respondent and wife, who were the "Borrower" under the deed, "shall not be released from Borrower's obligations and liability under this [deed] unless Lender agrees to such release in writing." There is no evidence that the lender or the lender's successors or assigns agreed to

- the transfer or released either the respondent or his wife from any obligations or liabilities under the note or deed of trust. The partition agreement did not provide that income from the property would be separate property of the respondent's wife.
12. The house is located in a residential subdivision in the City of Cedar Park in Williamson County. The house has 2,293 square feet of living space and was appraised by the Williamson County Tax Appraisal District (WCTAD) in 2007 at a value of \$238,631. According to the 2007 tax appraisal by WCTAD, the respondent's spouse owns 100% of the property.
 13. The respondent's campaign finance reports disclosed five payments of \$1,800 for rent in connection with the house, beginning in May 2004 and ending in September 2004. The reports disclosed twelve payments of \$2,000 for rent in connection with the house from October 2004 until September 30, 2005. The reports disclosed political expenditures totaling approximately \$7,580 for utilities from April 2004 to May 2006. The expenditures were made from political contributions and were made in connection with the house.
 14. In response to the complaint, the respondent swears, "I used political contributions to pay 'reasonable housing or household expenses,' i.e., rent, for the use of my spouse's separate property." He also swears that at different times, and with respect to two properties, he "paid rent from [his] campaign/officeholder account to [his] spouse for the use of her separate property." He also swears that he relied on Ethics Advisory Opinion No. 319 (EAO 319), which addressed a legislator's use of political contributions to pay a spouse for the rent of the spouse's separate property.
 15. The respondent states that "[section 253.035 of the Election Code] does not state that I may not use political contributions to rent a residence that is located a few feet outside Travis County." The respondent also states that the exception to the personal use prohibition simply provides examples of what is not a personal use and "is not intended to be an all-inclusive list."
 16. As of June 14, 2007, numerous properties in Cedar Park were available for rent, including: (1) an unfurnished house with 2 bedrooms, 2 bathrooms, 1,012 square feet at \$715 per month; (2) an unfurnished house with 4 bedrooms, 2 bathrooms, 1,854 square feet at \$1,250 per month; and (3) an unfurnished house with 4 bedrooms, 3 bathrooms, 1,988 square feet at \$1,295 per month.
 17. The respondent's personal financial statements did not disclose an interest in the house or condominium, a financial liability on the note executed to borrow funds to purchase the house or condominium, or income received from renting the house or condominium.

II. Conclusions of Law

1. Disposition of this case is within the jurisdiction of the Texas Ethics Commission. GOV'T CODE § 571.061.
2. A candidate or officeholder may not knowingly make or authorize a payment from a political contribution to purchase real property or to pay the interest on or principal of a note for the purchase of real property. ELEC. CODE § 253.038(a).
3. Ethics Commission rules prohibit the commission from considering an allegation barred from criminal prosecution by operation of the applicable statute of limitations. Ethics Commission Rules § 12.5(a). The criminal offense for a violation of section 253.038 of the Election Code is a Class A misdemeanor. ELEC. CODE § 253.038(b). The statute of limitations for a Class A misdemeanor is two years from the date of the commission of the offense. Code of Criminal Procedure, Article 12.02. All of the rental payments made in connection with the condominium and four rental payments totaling approximately \$7,200 made in connection with the house occurred more than two years before the complaint was filed (August 31, 2006). Therefore, the allegations that the respondent violated section 253.038 of the Election Code by making these payments are not within the commission's sworn complaint jurisdiction. The allegations regarding the remaining approximate \$25,800 in payments made for rent in connection with the house are within the commission's sworn complaint jurisdiction.
4. It is a defense to prosecution or to imposition of a civil penalty that the person reasonably relied on a written advisory opinion of the commission relating to the provision of the law the person is alleged to have violated or relating to a fact situation that is substantially similar to the fact situation in which the person is involved. GOV'T CODE § 571.097.
5. In EAO 319, the commission addressed whether a legislator may use political contributions to pay rent and maintenance fees for a condominium in Travis County that the legislator's spouse owns as separate property. Ethics Advisory Opinion No. 319 (1996). In the opinion, the commission concluded:

[A] legislator's use of political contributions to make a rental payment to his spouse for the use of her separate rental property does not constitute a payment to purchase real property and does not violate section 253.038 of the Election Code.

Id.
6. All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse. TEX. CONST. art. XVI, § 15. A spouse's separate property consists of, in pertinent part: (1) the property owned or claimed by the spouse before marriage; and (2) the property acquired

- by the spouse during marriage by gift, devise, or descent. FAM. CODE § 3.001. Community property consists of the property, other than separate property, acquired by either spouse during marriage. *Id.* § 3.002.
7. Property possessed by either spouse during marriage is presumed to be community property. *Id.* § 3.003(a). The degree of proof necessary to establish that property is separate property is clear and convincing evidence. *Id.* § (b).
 8. Spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse. TEX. CONST. art. XVI, § 15. At any time, spouses may partition or exchange between themselves all or part of their community property, then existing or to be acquired, as the spouses may desire. FAM. CODE § 4.102. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property. *Id.* The partition or exchange of property may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouse. *Id.*
 9. Under Texas law, whether property is separate or community is determined by its character at inception, or when a party first has a right of claim to a property, i.e., when title is finally vested. *McClary v. Thompson*, 65 S.W.3d 829, 834 (Tex.App.—Fort Worth 2002).
 10. The evidence shows that the respondent and his wife executed a promissory note and deed of trust on March 26, 2004, and were assigned rights, title, interest, and claims in the house, subject to a vendor's lien, on that same date. The respondent and his wife were spouses on that date, and, thus, the house is presumed to be their community property because it was acquired during marriage.
 11. The evidence shows that on March 27, 2004, the respondent conveyed his interest in the house to his wife by special warranty deed and partition agreement. Thus, the house became his wife's separate property on that date in accordance with their partition agreement under section 4.102 of the Family Code. Therefore, the house was separate property of the respondent's wife at the time the respondent used political contributions to pay his wife for rent of the house. The partition agreement did not, however, provide that income (rent) from the property would be the separate property of the respondent's wife.
 12. The evidence shows that the respondent remained liable under the note executed to borrow funds to purchase the home, and the deed of trust that secured the lender's interest in the home, since they were executed on March 26, 2004, and that all of the rental payments the respondent made to his wife with political contributions occurred during that time.
 13. A legislator's use of political contributions to rent real property owned by a spouse at a time when the legislator remains liable on the outstanding unpaid debt and interest that were incurred to purchase the real property was not a fact raised or addressed in EAO 319, the

opinion upon which the respondent placed his reliance. Thus, the respondent could not have reasonably relied upon EAO 319 because the fact situation in EAO 319 is not substantially similar to the fact situation in which the respondent was involved.

14. The respondent used political contributions to pay approximately \$25,800 to his spouse to rent the house at a time when he remained liable on principal and interest on the note executed to purchase the same property. Thus, there is credible evidence that the payments were made to purchase real property or to pay the interest on or principal of a note for the purchase of real property. Therefore, there is credible evidence that the respondent violated section 253.038 of the Election Code in connection with the payments made to rent the house.
15. A person who accepts a political contribution as a candidate or officeholder may not convert the contribution to personal use. ELEC. CODE § 253.035(a).
16. Ethics Commission rules prohibit the commission from considering an allegation if the alleged violation is not also a criminal offense and if the allegation is based on facts that occurred more than three years before the date the complaint is filed. Ethics Commission Rules § 12.5(a). There is no criminal offense for a violation of section 253.035 of the Election Code. ELEC. CODE § 253.035. Therefore, the allegations that the respondent converted political contributions to personal use regarding payments for rent, condominium fees, and utilities that occurred more than three years before the complaint was filed (August 31, 2006) are not within the commission's sworn complaint jurisdiction. Of the payments for rent and condominium fees made in connection with the condominium, only one payment of \$1,169.64 for rent and one payment of \$191 for condominium fees were made on or after August 31, 2003. Therefore, of the payments in connection with the condominium, only the \$1,169.64 payment for rent and the \$191 payment for condominium fees are within the commission's sworn complaint jurisdiction. Regarding the payments for rent and utilities made in connection with the house, all were made after August 31, 2003, and are within the commission's sworn complaint jurisdiction.
17. "Personal use" means a use that primarily furthers individual or family purposes not connected with the performance of duties or activities as a candidate for or holder of a public office. *Id.* § 253.035(d). The term does not include: payments made to defray ordinary and necessary expenses incurred in connection with activities as a candidate or in connection with the performance of duties or activities as a public officeholder, including payment of rent, utility, and other reasonable housing or household expenses incurred in maintaining a residence in Travis County by members of the legislature who do not ordinarily reside in Travis County, but excluding payments prohibited under section 253.038 of the Election Code. *Id.* § 253.035(d)(1).
18. The evidence shows that the respondent and his wife executed a promissory note to borrow the funds to purchase the condominium during marriage. The evidence also shows that on February 19, 1999, the respondent conveyed his interest in the condominium to his wife by

- special warranty deed and partition agreement. Thus, the condominium became his wife's separate property on that date in accordance with their partition agreement under section 4.102 of the Family Code. Therefore, the condominium was separate property of the respondent's wife at the time the respondent used political contributions to pay his wife for rent of the condominium. The partition agreement did not provide, however, that the income (rent) from the property would be the respondent's wife's separate property.
19. The evidence shows that the respondent was not released of his obligations on the note executed to borrow the funds to purchase the condominium, or the deed of trust that secured the lender's interest in the condominium, until he and his wife were released of their obligations by a release of lien on November 21, 2003. Thus, the respondent remained liable under the note and the deed of trust from the time they were executed on December 2, 1998, and all of the payments the respondent made to his wife with political contributions for the condominium occurred during that time.
 20. The commission stated in EAO 319 that a legislator may use political contributions to reimburse himself for the use of personal assets for campaign or officeholder purposes. The opinion also stated that it is also permissible for a candidate or officeholder to use political contributions "to pay a family member for the use of the family member's assets for campaign or officeholder purposes." Ethics Advisory Opinion No. 319 (1996). Any reimbursement "should be based on fair market value of the use of an asset," and a conversion to personal use would occur if a legislator paid his spouse more than fair market value for the use of her real property for officeholder purposes. *Id.*
 21. A legislator's use of political contributions to rent real property owned by a spouse at a time when the legislator remains liable on the outstanding unpaid debt and interest that were incurred to purchase the real property was not raised or addressed in EAO 319, the opinion upon which the respondent placed his reliance. EAO 319 also states that a payment for the use of the spouse's property would constitute a conversion to personal use if the payment exceeds the fair market value of the use of the property. EAO 319 also did not address property located outside Travis County. Thus, the respondent could not have reasonably relied upon EAO 319 in using political contributions to rent either the house or the condominium because the fact situation in EAO 319 is not substantially similar to either of the fact situations in which the respondent was involved regarding the house or the condominium.
 22. The respondent used political contributions to pay approximately \$33,000 to his spouse to rent the house at a time when he remained liable on the debt incurred to purchase the property. Thus, the rental payments primarily furthered individual or family purposes not connected with the performance of duties or activities as a candidate for or holder of a public office because they were made to discharge the respondent's liability on the debt incurred to purchase the house. In addition, there is evidence that the payments exceeded the fair market value of the use of the house. Thus, there is credible evidence that the payments constituted a conversion of political contributions to personal use.

23. The respondent used political contributions to pay approximately \$1,360 to his spouse to rent a condominium at a time when he remained liable on the debt incurred to purchase the property. Thus, the rental payments primarily furthered individual or family purposes not connected with the performance of duties or activities as a candidate for or holder of a public office because they were made to discharge the respondent's liability on the debt incurred to purchase the condominium. Thus, there is credible evidence that the payments constituted a conversion of political contributions to personal use.
24. Therefore, there is credible evidence that the respondent violated section 253.035 of the Election Code in connection with the payments made to rent the house and the condominium.
25. The evidence shows that the respondent used political contributions to pay utilities for a house that was not located in Travis County. There is insufficient evidence that the respondent violated section 253.035 of the Election Code in connection with the payments made for utilities.

III. Confidentiality

This final order describes violations that the commission has determined are neither technical nor *de minimis*. Accordingly, this final order is not confidential under section 571.140 of the Government Code and may be disclosed by members and staff of the commission.

IV. Sanction

The commission imposes a \$10,000 civil penalty against the respondent. The commission orders that the respondent pay the penalty within 30 days of the date of this order.

Date: _____

FOR THE COMMISSION

David A. Reisman
Executive Director
Texas Ethics Commission