

TEXAS ETHICS COMMISSION

IN THE MATTER OF

EUGENE J. "GENE" SEAMAN,

RESPONDENT

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BEFORE THE

TEXAS ETHICS COMMISSION

SC-2609193

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (the commission) met on June 29, 2007, to consider sworn complaint SC-2609193. A quorum of the commission was present. The commission determined that there is credible evidence of a violation of section 572.023 of the Government Code, a law administered and enforced by the commission. To resolve and settle this complaint without further proceedings, the commission proposes this resolution to the respondent.

II. Allegation

The complaint alleges that the respondent failed to disclose required information in personal financial statements.

III. Facts Supported by Credible Evidence

Credible evidence available to the commission supports the following findings of fact:

1. The respondent is a former state representative for District 32 and served in that capacity from 1997 until January 2007 after a defeat in the 2006 general election.
2. According to a special warranty deed filed with Travis County, the respondent's wife purchased a condominium in Austin, Texas on or about May 6, 1999. The deed neither contained the respondent's name nor stated that the condominium was separate property of the respondent's wife. The deed did not provide that income received from the condominium was the respondent's wife's separate property.
3. The respondent's personal financial statements filed in 2004, 2005, and 2006 do not disclose that the respondent had a beneficial interest in the condominium or a residential property ("homestead") in Corpus Christi, Texas. The respondent's personal financial statements

filed in 1996 and 1997 disclosed a beneficial interest in a residence in Nueces County. In several personal financial statements filed through 2004, the respondent disclosed a liability on a mortgage for a residence.

4. In response to the complaint, the respondent swears that the condominium is separate property of his wife, that he did not exercise any actual control of the condominium, and that he was merely a tenant of the condominium.
5. After the complaint was filed, the respondent filed a correction to his personal financial statement filed in 2006 that disclosed an interest in real property located in Corpus Christi and described as "1 lot consisting of my homestead." The affidavit filed with the correction indicated that the correction was made for the personal financial statement due in 2006 (covering calendar year 2005.) The affidavit also stated that "several items were inadvertently left off the original report."
6. The respondent submitted a \$500 payment as a late penalty with the corrected personal financial statement.
7. None of the respondent's personal financial statements disclosed an interest in rent received from the condominium.

IV. Findings and Conclusions of Law

The facts described in Section III support the following findings and conclusions of law:

1. A financial statement must include an account of the financial activity of the individual required by this subchapter to file a financial statement and an account of the financial activity of the individual's spouse and dependent children if the individual had actual control over that activity for the preceding calendar year. GOV'T CODE § 572.023(a).
2. The account of financial activity must include, in part, an identification by description of all beneficial interests in real property and business entities held or acquired, and if sold, the category of the amount of the net gain or loss realized from the sale. *Id.* § 572.023(b)(6).
3. Regarding the allegations that the respondent failed to properly file personal financial statements, the criminal offense for a violation of section 572.023 of the Government Code is a Class B misdemeanor. GOV'T CODE § 572.034. The statute of limitations for a Class B misdemeanor is two years from the date of the commission of the offense. Code of Criminal Procedure, Article 12.02. Of the personal financial statements at issue, the statement filed in 2004 was due on February 11, 2004, a date more than two years before the complaint was filed (September 26, 2006). Therefore, the allegation that the respondent violated section 572.023 of the Government Code by failing to properly file the personal financial statement

filed in 2004 is not within the commission's sworn complaint jurisdiction. The allegations regarding the personal financial statements filed in 2005 and 2006 are within the commission's sworn complaint jurisdiction.

4. The evidence shows that the respondent has had a beneficial interest in a residence in Corpus Christi for several years, including 2004 and 2005. The respondent's personal financial statements filed in 2005 and 2006 did not originally disclose a beneficial interest in that property, although the address of the respondent's homestead has appeared as his mailing address on all personal financial statements and some information regarding the homestead was disclosed in other personal financial statements. Therefore, there is credible evidence that the respondent violated section 572.023(b)(6) of the Government Code by failing to properly disclose a beneficial interest in his homestead.
5. 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.
6. The commission shall rely on opinions issued by the attorney general and the courts of this state. *Id.* § 571.096(c).
7. In Attorney General Opinion No. H-269, the Attorney General addressed whether a husband, who is required to file a personal financial statement, must report the financial activities of his wife's separate property over which he had no actual control during the preceding calendar year. Att'y Gen. Op. No. H-269 (1974). The opinion stated that a filer must "report on his own financial activities and on those activities of his spouse or children over which activities he exercises or has the right to exercise control." *Id.* at 3. The opinion clarified that this does not require "exclusive" control, but only "any degree of control, legal or factual." *Id.*
8. In Ethics Advisory Opinion No. 319 (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 wife owns as separate property. Ethics Advisory Opinion No. 319 (1996). In the opinion, the commission recognized that in Texas, "a married person has the sole management, disposition, and control over his or her separate property" and further stated that "[a] man who pays rent to his spouse for the use of real property does not thereby acquire or 'purchase' an interest in that property." 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.

9. 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.
10. 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 as separate property is clear and convincing evidence. *Id.* § (b).
11. 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.*
12. 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).
13. The evidence shows that the respondent's wife received an interest in the condominium on May 6, 1999, when she and the respondent were already married. The respondent and his wife were spouses on that date. Thus, the condominium is presumed to be their community property because it was acquired during marriage.
14. Although property acquired during marriage is presumed to be community property, courts in Texas have generally held that this presumption may be overcome by providing clear and convincing evidence that shows that the property was originally purchased with separate property. *See, e.g., Hodge v. Ellis*, 268 S.W.2d 275, 282 (Tex. Civ. App. 1954) (stating that property bought with separate funds of a spouse is separate property). In *Walton v. Johnson*, it was held that:

Separate property will retain its character through a series of exchanges so long as the party asserting separate ownership can overcome the presumption of community property by tracing the assets on hand during the marriage back to property that, because of its time and manner of acquisition, is separate in character.

Walton v. Johnson, 879 S.W.2d 942, 946 (Tex. App.—Tyler 1994).

15. There is some evidence that the condominium was separate property owned by the respondent's wife. The evidence also shows that the respondent had no actual control over the condominium. The respondent had a basis to reasonably believe that the condominium was his wife's separate property and that he was not required to disclose a beneficial interest in the condominium. Therefore, there is credible evidence that the respondent did not violate section 572.023(b)(6) of the Government Code in connection with disclosing a beneficial interest in the condominium.

V. Representations and Agreement by Respondent

By signing this order and agreed resolution and returning it to the commission:

1. The respondent neither admits nor denies the facts described under Section III or the commission's findings and conclusions of law described under Section IV, and consents to the entry of this order and agreed resolution solely for the purpose of resolving this sworn complaint.
2. The respondent consents to this order and agreed resolution and waives any right to further proceedings in this matter.
3. The respondent acknowledges that an individual filing a personal financial statement must include an account of the financial activity that includes an identification by description of all beneficial interests in real property. The respondent agrees to comply with this requirement of the law.

VI. Confidentiality

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

VII. No Sanction

After considering the seriousness of the violation described under Sections III and IV, including the nature, circumstances, and consequences of the violation, and after considering the sanction necessary to deter future violations and the fact that the respondent has corrected the personal financial statements at issue, the commission imposes no civil penalty.

VIII. Order

The commission hereby orders that if the respondent consents to the proposed resolution, this order and agreed resolution is a final and complete resolution of SC-2609193.

AGREED to by the respondent on this _____ day of _____, 20____.

Eugene J. "Gene" Seaman, Respondent

EXECUTED ORIGINAL received by the commission on: _____.

Texas Ethics Commission

By: _____
David A. Reisman, Executive Director