BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of: Opinion requested by: Kenneth Cory State Controller	No. 75-094-A April 22, 1976

BY THE COMMISSION: We have been asked the following question by Kenneth Cory, Controller of the State of California:

> What restrictions and reporting requirements apply to gifts received by my wife ... and to gifts received by my children?

Specifically, Controller Cory has asked whether an elected state officer has received a reportable benefit when his children eat meals at their friends' houses or go on trips with their friends' families, and whether it makes any difference if the children's friends are the children of another elected state officer.

CONCLUSION

Gifts received by the spouse of an elected state officer are the separate property of the spouse and do not have to be disclosed under Chapter 7. Sections 87100, et seq. Similarly, gifts to the children are not income to the state officer and do not have to be reported. However, a gift ostensibly made to the spouse or dependent child of an elected state officer will be considered a gift to the official if:

1. The nature of the gift is such that the official is likely to enjoy direct benefit or use of the gift to at least the same extent as the ostensible donee; and

2. The official in fact enjoys such direct benefit or use; and

3. There are no additional circumstances negating an intent to make an indirect gift to the official.

Pursuant to this standard, the meals and trips are bona fide gifts to Controller Cory's children and, therefore, neither reportable nor, if provided by a lobbyist, prohibited.

ANALYSIS

Controller Cory's opinion request involves consideration of when, if ever, a gift received by the spouse or dependent child of an elected state officer should be treated as a gift to the official under the Political Reform Act. Government Code Sections 81000, et seq.[1] The question may arise in several contexts. If the gift were deemed made to the official and if it were made by a lobbyist and exceeded $10 in value in a calendar month, the making and the receipt of the gift would constitute violations of the Act.[2] Sections 86203, 86204. Even if not received from a lobbyist, if the value of the gift equaled or exceeded $25, the gift would be reportable by the official. Section 87207(a)(1).

For the reasons stated in the first part of this opinion, we conclude that a gift made to the spouse or dependent child of an elected state officer is neither prohibited by Sections 86203 and 86204 nor reportable under Section 87207. However, the purposes of the Act may not be evaded by channeling gifts to the spouse or dependent child which otherwise would be made to the official. In the second part of this opinion, we consider the factual considerations which determine when a gift ostensibly made to the spouse or child is deemed to have been made to the official. Finally, we conclude that under the standards set forth, the meals and trips referred to in the opinion request are bona fide gifts to Controller Cory's children and, therefore, neither reportable nor, if they are given by a lobbyist, prohibited.

I.

A. Gifts received by the spouse.

Controller Cory is required to disclose his community property interest in the income of his wife. Section 82030(a). However, gifts received by Controller Cory's wife are her

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1/ All statutory references are to the Government Code unless otherwise noted.

2/ Controller Cory's opinion request did not specifically concern stated gifts from lobbyists and he has stated that his family does not intend to accept gifts from lobbyists. Letter from Kenneth Cory to Fair Political Practices Commission, April 5, 1976. Nevertheless, this opinion would not respond fully to his question without a discussion of gifts from lobbyists, and such a discussion is, therefore, included herein.

separate property because gifts received by a spouse during marriage are the separate property of that spouse. Cal. Const. Art. I, Sec. 21; Civil Code Section 5107. Consequently, the Controller has no community property interest in a gift received by his wife and is not required to report its receipt under Section 87207.

Lobbyists are prohibited from making gifts aggregating more than $10 in a calendar month to state candidates, elected state officers, legislative officials or agency officials. Sections 86201, 86203. However, the statutory prohibition does not include gifts to spouses of the enumerated officials.[3/] Consequently, the spouse of an elected officer is not prohibited from receiving gifts from lobbyists.

B. Gifts received by dependent children.

Gifts received by the dependent children of Controller Cory are not reportable as income under Chapter 7 because the Political Reform Act does not require public officials to report gifts received by their dependent children. This conclusion is consistent with the established law of this state, which provides that the income of a child is not income to the parent.[4/] Thus, Revenue and Taxation Code Section 17123(a) states:

> Amounts received with respect to the services of a child shall be included in the gross income of the child and not in the gross income of the parent, ...

3/ It is true that Section 86201 includes gifts made "directly or indirectly" to an elected state official. We do not believe a gift to the spouse of an official is necessarily an indirect gift to the official. In Part II of this opinion we set forth standards for determining when a gift ostensibly made to the spouse or dependent child of an official may be deemed a gift to the official.

4/ The general prohibitions of Sections 87100, et seq., apply to certain investments and interests owned by the spouse and dependent children of a public official, but the prohibitions do not include income received by the dependent children. Section 87103 provides, in relevant part, "... indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, ... A business entity is controlled by a public official if the public official, his ... spouse and dependent children hold more than fifty percent of the ownership interest in the entity. A public official has a substantial interest in a trust when the official, his spouse and dependent children have a present or future interest worth more than one thousand dollars ($1,000)."

Accordingly, a statement of economic interests disclosing income of the parent is not required to disclose the income of the child.

Gifts by lobbyists to dependent children of an elected state officer are not prohibited because, as was the case with gifts to the spouse, gifts to dependent children are not included in the definition of "gift" in Section 86201.

II.

Part I of this opinion makes it clear that gifts to the spouse and dependent children of an elected state officer are not subject to the reporting provisions or the prohibitions of the Political Reform Act. We do not believe, however, that the mere fact that a gift is designated as a gift to the spouse or dependent child is conclusive for the purposes of the Political Reform Act. Such an interpretation might tempt donors to circumvent the disclosure provisions and lobbyist restrictions by making gifts to public officers by channeling them through the spouse or dependent children of the official. In order to prevent such abuse we believe that a gift made ostensibly to the spouse or dependent child of an elected officer constitutes a gift to the official within the meaning of the Political Reform Act, if:

1. The nature of the gift is such that the official is likely to enjoy direct benefit or use of the gift to at least the same extent as the ostensible donee;

2. The official in fact enjoys such direct benefit or use; and

3. There are no additional circumstances negating the donor's intent to make a gift to the official.

If these criteria are met, we believe that the donor has made a gift to the official within the meaning of the Act, regardless of whether the gift is addressed or delivered to the spouse or child.[5/]

5/ If a gift is received by both the husband and wife, the gift is reportable only when the extent of the filer's interest equals or exceeds $25, that is, when the total value of the gift equals or exceeds $50. See Opinion requested by Assemblyman Art Torres, 2 FPPC Opinions 31 (No. 75-163, February 4, 1976).

The first criterion is met if the official is likely to enjoy direct benefit from or use of the gift to the same extent as his or her spouse or dependent children. For example, a work of art, a television set or packaged foods and beverages are, by their nature, likely to be shared and thus the official is likely to enjoy direct benefit or use of these gifts. On the other hand, an article of clothing, a wrist watch or a free hang gliding lesson given to the spouse or dependent child of an official would not directly benefit the official, and it cannot be anticipated that the official would use the gifts. Accordingly, such gifts would not, absent unusual circumstances, be gifts to the official.[6/]

Even if the first criterion is met, the gift is not received by the official unless he or she in fact uses or benefits from the gift. For example, if an official's spouse receives a painting which is hung in his or her office, the work of art is not a gift to the official. Although a work of art is likely to be shared by both spouses, in this hypothetical situation, the official has not benefited from the gift, and thus the painting is not a gift to the official. This second criterion enables an official to "save" a lobbyist from committing a violation of the prohibiton against gifts, Section 86203, by refraining from using or directly benefiting from the gifts. This is no anomaly, however, for even gifts made directly to an official may be refused. See Section 82030(b)(4).

Even where it is apparent from the nature of the gift that the official will benefit from the gift and the official, in fact, has used the gift, we believe that additional facts may negate the donor's intent to make a gift to the official. In particular, the existence of a working or social relationship between the donor and the spouse or child will rebut any inference that the donor intended to make a gift to the official. Such a relationship would exist if, for example, the spouse of an official received a retirement gift from his or her employer or from a personal friend who is unacquainted or only casually acquainted with the official. Such a relationship would indicate that the donor did not intend to make a gift to the official. In these situations, the official has not received a gift even if the nature of the gift is such that the official is likely to enjoy direct benefit of the gift and in fact he or she did enjoy such benefit.

6/ We also should observe that in the situation in which from the nature of the gift it would not be expected that the official would enjoy equal benefit or use, we do not believe a gift has been made to or received by the official even if for some reason he or she does use or directly benefit from the gift. This assumes, of course, no prearrangement to make a gift indirectly to the official.

III.

The "benefit-use" standard set forth in Part II makes it easy to answer Controller Cory's specific questions. The meals and trips provided to Controller Cory's children do not directly benefit the Controller. The gifts are given by the children's friends, and the facts provided do not suggest an attempt to circumvent the Act or to make a gift to Controller Cory. Accordingly, we conclude that, under the standards set forth, the meals and trips are neither reportable nor, if they are given by lobbyists, prohibited. Our conclusion is not affected if the donor is an elected state officer.

Approved by the Commission on April 22, 1976. Concurring: Brosnahan, Carpenter and Lowenstein. Commissioners Lapan and Quinn abstained.

Daniel H. Lowenstein
Chairman