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ATTORNEY GENERAL OPINION NO. 92- 75

Bill McCormick
Director of Federal and
State Affairs
Office of the Governor
State Capitol, 2nd Floor
Topeka, Kansas 66612-1590

Re: State Boards, Commissions and Authorities--
Parimutuel Racing--Prohibited Acts;
Commissioner's Ownership of a Race Horse

Synopsis: Marriage alone does not confer indirect ownership of one spouse's property to the other. Thus K.S.A. 1991 Supp. 74-8810(b)(2), as amended by 1992 Senate Bill No. 383, § 4, does not prohibit a commission member's spouse from owning a horse entered in race meetings conducted in this state unless the commission member has an actual possessory, pecuniary or other beneficial interest in the horse. Cited herein: K.S.A. 23-201; 23-203; K.S.A. 1991 Supp. 74-8810, as amended by 1992 S.B. 383, § 4.

* * *

Dear Mr. McCormick:

As counsel to the governor, you request our opinion regarding the prohibition of K.S.A. 1991 Supp 74-8810(b)(2). You state that the governor has chosen a potential appointee to serve on the Kansas racing commission. The candidate is married to a co-owner of a horse that has and will enter races simulcast in Kansas. You question whether the spouse's ownership

interest in the horse constitutes indirect ownership of the candidate under K.S.A. 1991 Supp. 74-8810(b)(2).

The prohibition in question states:

"(b) It is a class A misdemeanor for any member, employee or appointee of the commission . . . to knowingly:

. . . .

"(2) participate directly or indirectly as an owner, owner-trainer or trainer of a horse or greyhound, or as a jockey of a horse, entered in a race meeting conducted in this state." K.S.A. 1991 Supp. 74-8810(b)(2), as amended by 1992 S.B. No. 383, § 4(b)(2).

The phrase "participate directly or indirectly as an owner" is not defined in the statutes. Accordingly to the interim committee report (published in the 1987 Senate Journal, p. 15), the state task force on parimutuel recommended that commission members be "prohibited from participating in the racing industry in Kansas during their terms." The interim committee amended the task force proposal to extend the prohibition for two years after leaving the commission, but to would allow commissioners "to race animals during that period." The house committee lengthened the two years to five [see K.S.A. 1991 Supp. 74-8810(a)(1)], but subsection (b)(2) was not altered by the legislature in the enactment process. Neither is there any documented discussion of that provision in the committee minutes other than a mention of its existence. Minutes, House Committee on Federal and State Affairs, Jan. 1, 1987, attachment B. A question was raised in committee regarding whether "there was a time limit after tenure on the commission whereby commissioners could have a financial interest in horses, tracks, etc." Minutes, House Committee on Federal and State Affairs, Feb. 11, 1987. Mr. Clarence Kelly of the Missouri racing commission responded that members could not have a financial interest in horses while serving on the commission and felt that there should be a time limit after their term on the commission. Id. See also Mo. Ann. Stat. § 105.452(4) (Vernon 1992). There was no action taken to alter the language of subsection (b)(2) either to extend it's application past the end of the commissioner's term or to limit its application to financial interests. In fact, the exact language in subsection (b)(2)

what is now subsection (e) of K.S.A. 1991 Supp. 74-8810, as amended, to preclude facility owner licensees, facility manager licensees, and officers, directors and employees thereof, from participating directly or indirectly as an owner of a horse or greyhound entered in a race meeting conducted in this state. Minutes, House Committee on Federal and State Affairs, Feb. 17, 1987, and attachment H. [This provision was later amended to cover only live races conducted in this state. 1992 S.B. No. 383, § 4(e).] There was no recorded discussion of the meaning of the phrase "participate directly or indirectly as an owner" at the time of this amendment.

It appears that subsection (b)(2) was lifted from the Iowa racing statutes which provide in part:

"5. A member [of the state racing and gaming commission] shall not knowingly:

. . . .

"b. Participate directly or indirectly as an owner, owner-trainer, trainer of a horse or dog, or jockey of a horse in a race meeting conducted in this state."
Iowa Code Ann. § 990.5 (West 1992).

There are no reported Iowa cases interpreting this provision, but it is enlightening to note the differences between this provision and those in other states. In Oklahoma, "[n]o individual shall be a member of the Commission if the individual or a member of the family of the individual . . . owns an interest in any racehorse which participates in any race meeting supervised by the Commission." Okla. Stat. Ann. tit. 3A, § 202 (West 1992), emphasis added. In Illinois, "[n]o person shall be appointed a member of the Board or continue to be a member of the Board who is (or any member of whose family is) . . . financially interested in . . . any racehorse competing at a meeting under the Board's jurisdiction." Ill. Ann. Stat. ch. 8 § 37-6(a) (Smith-Hurd 1992), emphasis added. See also, Ill. Ann. Stat. ch. 8 § 37-12(a)(2) (Smith-Hurd 1992). Nebraska statutes provide only that "[n]o horse in which any member of the State Racing Commission or its employees has any interest shall be raced at any meet under the jurisdiction of the commission." Neb. Rev. Stat. § 2-1219(1) (1991), ¶ 2-1219(1). Minnesota's statute is similar to Nebraska's. See Minn. Stat. Ann. § 240.28, subd. 1 (West 1992). Thus, in contrast to the statutes in Oklahoma and Illinois, K.S.A. 1991 Supp.

74-8810(b)(2), as amended, does not specifically preclude members of a commissioner's family from owning a horse or greyhound entered in a race conducted in Kansas. Had the legislature intended to make such an across the board prohibition, it could have done so using language similar to that used in Oklahoma or Illinois, or even K.S.A. 1991 Supp. 74-8810(c). In the absence of such language, it is our opinion that K.S.A. 1991 Supp. 74-8810(b)(2), as amended, does not per se prohibit a commission member's spouse from owning a horse or greyhound entered in race meetings conducted in this state. In other words, being married to someone who has an ownership interest does not necessarily constitute indirect ownership by the commission member. See K.S.A. 23-201; 23-203; In Re Oettinger, 49 B.R. 41, 43 (Bkrcty, D.Kan. 1985) (under normal circumstances a spouse has no interest in the separate property of the other); Sanspar Restaurant Corp. v. Ring, 319 N.Y.S.2d 230 (1971) (patrolman's marriage to a woman who owned a 50% interest in a tavern business did not, ipso facto, confer on the patrolman "in-direct interest in the business"); Independent Bankers Assoc. of Ga., Inc., v. Dunn, 197 S.E.2d 129, 140 (Ga. 1973) (absent a statute to the contrary, mere ownership of stock by company officers and their family members did not constitute indirect control by the company); People v. Simpkins, 359 N.E.2d 828, 832 (Ill. 1977) (general rule that the wife's interest is not necessarily the husband's interest, provided the contract is not a mere subterfuge for husband's own pecuniary interest. "We interpret 'indirect interest' to refer to the interest of the official, such as ownership of stock or a beneficial interest in a trust, not the individual interest of another to whom the official is related").

While an indirect ownership interest in a spouse's property is not automatically created by operation of law, the facts of any particular case may nevertheless disclose indirect ownership. Right of control or subjection to liability (Sanspar, supra at 238), a beneficial interest or a pecuniary interest in the property (Simpkins, supra) evidence indirect ownership, even though actual legal title rests in someone else. We do not have sufficient facts to determine conclusively whether the potential appointee in question is an indirect owner of the horse, but that can be determined through the background investigation of the appointee.

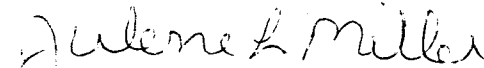
In conclusion, marriage alone does not confer indirect ownership of one spouse's property to the other. Thus K.S.A.

1991 Supp. 74-8810(b)(2), as amended by 1992 Senate Bill No. 383, § 4, does not prohibit a commission member's spouse from owning a horse entered in race meetings conducted in this state unless the commission member has an actual possessory, pecuniary or other beneficial interest in the horse.

Very truly yours,



Robert T. Stephan
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

RTS:JLM:jm