

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 07-101

Return of Campaign Contributions

QUESTIONS

1. May the General Assembly constitutionally enact legislation requiring a candidate or political party or organization to return contributions to the rightful owners or parties if the donated funds are found to have been illegally obtained by the contributor?

2. If so, may the General Assembly constitutionally authorize a court to freeze contributed funds in a political account until a determination can be made regarding the funds' origin and rightful owner?

OPINIONS

1. Yes.

2. Yes.

ANALYSIS

You have indicated that, according to various news reports and court filings, allegations have been made that an individual has misappropriated certain retirement funds held in trust by a corporation under the control of that individual and that this individual may have used those misappropriated funds to make campaign contributions. Accordingly, you have asked whether the General Assembly may constitutionally enact legislation that would require a candidate or political party or organization to return contributions to the rightful owners if the donated funds are found to have been obtained illegally by the contributor. This opinion assumes the legislation would apply only to state and local candidates, political parties and organizations, and not to federal candidates, political parties and organizations.

The First Amendment provides that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for redress of grievances." The making of campaign contributions has been recognized by the United States Supreme Court as the

exercise of one's right of freedom of association and freedom of expression and, therefore, is subject to protection under the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976).

Although we have not found any state or federal court decision addressing this issue, we do not think that a court would find that protection under the First Amendment should be afforded to illegal campaign contributions or to campaign contributions from illegally obtained funds. *Cf. United States v. Podell*, 572 F.2d 31 (2nd Cir. 1978) (campaign contributions made in violation of federal conflict of interest statute were recoverable by federal government). Thus, it is our opinion that the General Assembly may constitutionally enact legislation that would require a candidate, political party or organization to return contributions to the rightful owners if the donated funds are found to have been obtained illegally by the contributor. Similarly, the General Assembly could authorize a court to freeze such contributed funds in a political account until a determination can be made regarding the funds' origin and rightful owner(s).

We would caution, however, that any procedures enacted by the Legislature would raise certain concerns under the First Amendment, as those procedures would constitute not only a limitation upon the rights of association and expression of the contributor of the funds, but also a limitation upon campaign expenditures by the affected candidate, political party or organization. The United States Supreme Court has recognized that any limitations upon expenditures "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Buckley*, 424 U.S. at 19. A court order freezing funds in a political account would not simply limit the use of those funds but would constitute a complete prohibition on expenditures from those funds by a candidate or political party until a determination is made regarding the funds' origin and rightful owner(s). Such an order would also threaten abridgement of the contributor's rights of expression and association exercised when he or she made the contribution in the first instance. Consequently, in order to avoid any unconstitutional suppression of protected speech, whether of the contributor or the recipient of the funds in question, we believe any statutory scheme authorizing a court to freeze funds in a political account where the funds are alleged to have been illegally obtained by the contributor must contain a procedure that will "assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous [decision]." *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 779, 124 S.Ct. 2219, 2223, 159 L.Ed.2d 84 (2004) (citing *Freedman v. State of Maryland*, 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)).

We would further note that current statutory law already allows for the voiding of fraudulent transfers and the recovery of illegally obtained funds from the transferee.¹ Tennessee's Uniform Fraudulent Transfer Act, Tenn. Code Ann. §§ 66-3-301, *et seq.*, provides that a "transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose

¹Additionally, Tennessee Courts have long recognized the principle of law in this state that the "theft of goods or chattels does not divest one who owns, or has title to, such property from his ownership of the property; the owner may follow and reclaim the stolen goods wherever he may find them, even if such goods have been changed or improved." *See Butler v. Buick Motor Company*, 813 S.W.2d 454, 458 (Tenn.Ct.App.), *p.t.a. denied* (1991), *cert. denied*, 112 S.Ct. 307 (1991).

before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor of the debtor.” Tenn. Code Ann. § 66-3-304(a)(1). A “creditor” is defined under the Act as “a person who has a claim,” while a “debtor” is defined as “a person who is liable on a claim.” Tenn. Code Ann. § 66-3-302(4) and (6). The term “claim” is broadly defined as “a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” Tenn. Code Ann. § 66-3-302(3).

The Act specifically authorizes the voiding of a transfer under § 66-3-305(a)(1) in an action by a creditor, as well as injunctive and other provisional remedies:

In an action for relief against a transfer or obligation under this part, a creditor, subject to the limitations in § 66-3-309, may obtain:

- (1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor’s claim;
- (2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure described by title 26;
- (3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
 - (A) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
 - (B) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
 - (C) Any other relief the circumstances may require.

Tenn. Code Ann. § 66-3-308(a).

Whether or not a particular transfer is declared fraudulent is determined by the facts and circumstances of each case. *See Macon Bank & Trust Co. v. Holland*, 715 S.W.2d 347, 349 (Tenn.Ct.App. 1986). Furthermore, under the Tennessee Fraudulent Transfers Act, actual intent to defraud must be shown by a preponderance of the evidence. *United States v. Kerr*, 470 F.Supp. 278 (E.D.Tenn. 1978). The Act also provides for certain defenses and protections of a transferee. Tenn. Code Ann. § 66-3-309(a) provides that a “transfer or obligation is not voidable under § 66-3-305(a)(1) against a person who took in good faith and for a reasonably equivalent value” While this section provides an absolute defense to an action for avoidance of a transfer under § 66-3-305(a)(1), the burden is upon the transferee of establishing good faith and the reasonable equivalence of consideration exchanged. *See Chorost v. Grand Rapids Factory Showrooms, Inc.*, 77 F.Supp. 276, 280 (D.N.J. 1948). Otherwise, the Act provides that to the extent a transfer is voidable, the creditor may obtain a judgment against “[t]he first transferee of the asset or the person for whose benefit the transfer was made.” Tenn. Code Ann. § 66-3-309(b)(1).

A campaign contribution is, by its very definition, a voluntary conveyance made without consideration. Thus, it would appear that an action could be brought by the rightful owners of misappropriated funds under Tenn. Code Ann. §§ 66-3-305(a)(1) and 66-3-308(a)(1) of the Uniform Fraudulent Transfer Act to void the transfer of campaign contributions to a candidate, political party or organization, if such owners can demonstrate that the transfer of funds (*i.e.*, the campaign contributions) was made by the contributor “with actual intent to hinder, delay, or defraud any creditor of the [contributor].” Furthermore, Tenn. Code Ann. § 29-12-101 specifically authorizes any creditor, without first having obtained a judgment at law, to file a bill in chancery court to set aside a fraudulent conveyance of property made for the purpose of hindering and delaying creditors. Thus, under this statute an action could also be brought in chancery court by the rightful owners of the misappropriated funds to set aside the transfer of the campaign contributions.

Current law also appears to authorize Tennessee courts to freeze contributed funds in a political account until a determination can be made regarding the funds’ origin and rightful owner. As discussed above, Tenn. Code Ann. § 66-3-308 provides for “[a]n injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property,” subject to the applicable principles of equity and in accordance with applicable rules of civil procedure. Similarly, in an action in chancery court to set aside a fraudulent conveyance pursuant to Tenn. Code Ann. § 29-12-101, the court is specifically authorized to issue writs of attachment and injunctions. *See* Tenn. Code Ann. § 29-12-102. Finally, the chancery and circuit courts of Tennessee are given the general authority to restrain the injury, removal or destruction of personal property in specie by process of injunction, until the cause is finally disposed of. *See* Tenn. Code Ann. § 29-1-102 and Tenn.R.Civ.P. 65. Furthermore, these judicial procedures would all provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm. *See City of Littleton*, 541 U.S. at 781.

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