

1989

# Juanita Taft Rogers v. Real Estate Division, Department of Business Regulations, State of Utah : Brief of Petitioner

Utah Court of Appeals

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Gary H. Weight; Aldrich, Nelson, Weight & Esplin; Attorney for Petitioner/Appellant.

R. Paul Van Dam; Attorney General; Sheila Page; Assistant Attorney General; Attorneys for Respondent.

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UTAH COURT OF APPEALS

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MAR 21 1989  
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IN THE UTAH COURT OF APPEALS

JUANITA TAFT ROGERS,

Petitioner-Appellant,

vs.

REAL ESTATE DIVISION,  
DEPARTMENT OF BUSINESS  
REGULATIONS, STATE OF UTAH,

Respondent.

Case No. 890021-CA  
RE87-08-02

Category No. 14a

BRIEF OF PETITIONER-APPELLANT

APPEAL FROM A RECOMMENDED ORDER OF REVOCATION OF PRINCIPAL  
BROKER'S LICENSE, BEFORE THE REAL ESTATE DIVISION OF THE  
DEPARTMENT OF BUSINESS REGULATIONS OF THE STATE OF UTAH,  
J. STEVEN EKLUND, ADMINISTRATIVE LAW JUDGE, PRESIDING

R. PAUL VAN DAM (3312)  
UTAH ATTORNEY GENERAL  
SHEILA PAGE  
ASSISTANT ATTORNEY GENERAL  
236 State Capitol  
Salt Lake City, Utah 84114

Attorney for Respondent

GARY H. WEIGHT  
ALDRICH, NELSON, WEIGHT & ESPLIN  
43 East 200 North  
P. O. Box "L"  
Provo, Utah 84603-0200

Attorney for Appellant

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R. PAUL VAN DAM (3312)  
UTAH ATTORNEY GENERAL  
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ASSISTANT ATTORNEY GENERAL  
236 State Capitol  
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Attorney for Respondent

GARY H. WEIGHT  
ALDRICH, NELSON, WEIGHT & ESPLIN  
43 East 200 North  
P. O. Box "L"  
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REAL ESTATE DIVISION,	:	
DEPARTMENT OF BUSINESS	:	
REGULATIONS, STATE OF UTAH,	:	
	:	Category No. 14a
Respondent.	:	
	:	

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Section 63-46(b)-16, Utah Code Annotated, 1953, as amended.

NATURE OF PROCEEDINGS

This is a Petition for Review of Findings of Fact, Conclusions of Law and a Recommended Order wherein J. Steven Eklund, Administrative Law Judge, recommended the revocation of petitioner's Principal Broker's License consistent with the provisions of Section 61-2-12(1)(f). The recommendation was dated December 14, 1988. A Petition for Review was filed by the petitioner on January 12, 1989.

STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Did the Administrative Law Judge err in denying petitioner's Motion to Dismiss the Complaint of the respondent, which Motion asserted that the respondent's action was barred by

the Statute of Limitations?

II. Is there sufficient evidence to sustain the Conclusions of Law and Order of the Administrative Law Judge?

III. Is the recommendation of the Administrative Law Judge inequitable and harsh under the circumstances of this case?

#### STATUTES

Section 61-2-11, Utah Code Annotated, 1953, as amended.

Section 61-2-12(1)(f), Utah Code Annotated, 1953, as amended.

Rule 9(a)(7), Rules of Real Estate Commission.

#### STATEMENT OF THE CASE

This is a Petition for Review of a ruling by J. Steven Eklund, Administrative Law Judge wherein petitioner's Principal Real Estate Broker's License was revoked. The action was initiated by the Real Estate Division in a Petition dated November 25, 1987, as Case No. RE87-08-02. On June 13, 1988, petitioner filed a Motion to Dismiss based upon a claim that the action of the Real Estate Commission was barred by the Statute of Limitations. Said motion was denied and the matter was set for hearing on September 20, 1988.

The following are the facts found by the Administrative Law Judge on or after the September 20, 1988 hearing.

1. Sometime in 1973, Respondent became licensed as a sales agent by the Division of Real Estate. As relevant herein, Respondent was affiliated with principal broker David R. Harman as of January 1982. On September 1, 1982, she terminated her affiliation with Mr. Harman and became affiliated with principal

broker A. J. Michaels. In late 1982 or early 1983, she terminated her affiliation with Mr. Michaels and became affiliated with K. M. Woolley & Company.

2. By Order, dated August 17, 1983, Respondent's license was suspended for one year and thereafter placed on probation for two years, subject to certain terms and conditions. Said order was based on conduct which occurred between December 10, 1981 and August 22, 1982. Respondent's conduct in that regard was found to constitute gross incompetence and a violation of the fiduciary duty owed to her clients in that transaction. Respondent subsequently became licensed as a principal broker on January 15, 1987.

3. In January, 1982, a Barbara Homeyer contacted Respondent to obtain her services in purchasing a home. Ms. Homeyer, who was recently divorced, resided in a home jointly owned by herself and her ex-husband. Since there had been no property settlement relative to her divorce and Ms. Homeyer's ex-husband was reluctant to cooperate as to the sale of their home, the only assets available to Ms. Homeyer to provide a down payment on the purchase of another home consisted of various items of inherited personal property.

4. During January 1982, Ms. Homeyer and Respondent entered into a verbal agreement, whereby Respondent was to act as Ms. Homeyer's real estate agent and attempt to find a prospective seller who would accept Ms. Homeyer's personal property as down payment for the purchase of a home. On February 21, 1982, respondent and Ms. Homeyer inventoried her property. Ms. Homeyer then delivered that property to respondent, which was held in storage under respondent's control. The property was so transferred to respondent as the means to provide a safe place for its storage and facilitate respondent's access to that property if a prospective seller was located.

5. Between February and late-April 1982, respondent and Ms. Homeyer identified at least two properties for possible purchase. In one instance, an agreement could not be reached as to those items of Ms. Homeyer's personal property which would be acceptable in lieu of a cash down payment. When it became apparent to Ms. Homeyer that no other purchase on the above-described terms would be realized, she authorized respondent to sell certain items as the means to provide cash for the down payment necessary to purchase a home.

6. During March and April 1982, respondent had



some of Ms. Homeyer's property appraised and certain items were sold in antique shows. However, as of late April 1982, no progress in locating a suitable home had been realized, Ms. Homeyer had received no monies from respondent relative to the sale of some of her property and respondent had taken certain property from storage and sold it without Ms. Homeyer's authorization. Further, respondent never advised her principal broker of her activities nor did she deliver to him any of the funds she obtained from the sale of Ms. Homeyer's property.

7. In late-April or early May 1982, Ms. Homeyer underwent foot surgery and was advised that her condition could be cancerous. At the time, it was unknown if a suitable home would be found and whether that would occur prior to her possible death. On May 5, 1982, Ms. Homeyer met with respondent and they executed a written agreement, whereby the former assigned all of her personal property to respondent for sale and/or exchange and authorized respondent to liquidate that property. The agreement further provided that if all property held by respondent was not liquidated prior to Ms. Homeyer's death, the remaining funds would be placed in trust for the benefit of her two minor children.

8. During the next two months, Ms. Homeyer was never advised as to the status of her property and was unable to contact respondent in that regard. In mid-July 1982, Ms. Homeyer retained counsel and made written demand that respondent return all personal property in her possession and provide an accounting as to the sale or other disposition of the remaining property which had been in her possession.

9. By letter, dated October 21, 1982, respondent generally informed Ms. Homeyer as to efforts which had been undertaken to appraise, restore, and/or sell some of the property in her possession. Respondent further mentioned various costs incurred as to the appraisal and restoration of that property. Respondent also reiterated that her efforts had been undertaken to produce funds necessary for a down payment for a home or condominium, but she acknowledged that no suitable residence had yet been identified. Respondent requested Ms. Homeyer to keep her posted "about what you want to do with the housing thing" and she advised Ms. Homeyer of a listing for a two bedroom townhouse duplex and pondered that Ms. Homeyer could live in one side and rent the other.

10. By letter, dated October 28, 1982, Ms. Homeyer advised respondent that purchase of the duplex would not be economically feasible and reiterated that no accounting had been received as to the status of her property or any disposition thereof. By letter, dated October 29, 1982, a second demand was made that respondent return all items of personal property entrusted to her. When compliance with that demand was not forthcoming, Ms. Homeyer initiated litigation. No accounting was provided to Ms. Homeyer until July 9, 1986, when respondent returned certain items pursuant to a writ of replevin.

11. By stipulation, dated October 7, 1986, Ms. Homeyer and respondent identified the status of some of the property which had been in respondent's possession. That property consisted of guns, cameras, furs, clocks and watches, a coin collection, silver, jewelry, flatware, china, pewter, furniture, household and other miscellaneous items. The value of the property which respondent sold was agreed to have been \$6,530.50 and respondent received \$4,495.00 from the sale of that property. It was agreed that certain property, valued at \$6,799.50, was delivered by respondent to third parties and that said property had not been recovered by Ms. Homeyer. It was also agreed that certain property still in respondent's possession should be valued at \$4,820.50.

12. Some of the property which Ms. Homeyer had delivered to respondent was subsequently returned to her. However, in Findings of Fact and Conclusions of Law, dated October 30, 1986, the Court concluded that respondent had sold some of the property below fair market value, had interfered with Ms. Homeyer's possession and control of some of the property by intentionally refusing to return it and had converted the proceeds from the sale of some of the property to her own use. By reason thereof, the Court entered judgment on October 30, 1986 in favor of Ms. Homeyer totaling \$2,035.50 as a result of respondent's breach of contractual and fiduciary duties to Ms. Homeyer, \$4,495.00 as a result of respondent's conversion of proceeds from the sale of the property, \$6,799.50 as a result of respondent's conversion of property upon transferring that property to others and \$4,820.50 as a result of respondent's conversion of property still in her possession.

13. In the above-referenced Findings of Fact, the court also noted that Ms. Homeyer had initiated

bankruptcy proceedings on July 22, 1985 and that respondent had been listed as a creditor in said proceedings. The Court further noted that an order was entered in those proceedings on October 30, 1985, whereby Ms. Homeyer was discharged of all claims, including those of respondent relative to expenses she incurred in her efforts to repair, restore and dispose of Ms. Homeyer's property. The instant record also reflects that respondent initiated bankruptcy proceedings in 1981 and that after entry of the October 30, 1986 judgment, an order was entered in those bankruptcy proceedings relative to respondent, whereby the just-stated judgment was discharged.

After hearing the case on September 20, 1988, Judge J. Steven Eklund concluded that petitioner had entered into and remained in a real estate transaction and contractual relationship with Barbara Homeyer and that her conduct during the term of the contract, which terminated in the late fall of 1982, constituted a violation of the provisions of the Real Estate Licensure Act and the Rules propounded to enforce the act. Judge Eklund recommended and ordered revocation of petitioner's real estate license.

#### SUMMARY OF ARGUMENT

On November 25, 1987, a Petition to revoke the principal broker's license of Juanita Taft Rogers was filed. The petition alleged acts of Rogers which occurred more than five (5) years previously. This Court should enforce a Statute of Limitations, against the Real Estate Division and should reverse the decision of the Administrative Law Judge to deny petitioner's Motion to Dismiss based upon the Statute of Limitations. All the actions

complained of by the Real Estate Commission against Juanita Taft Rogers relate to events which occurred in the year 1982 or earlier. After a period of suspension, petitioner, Juanita Taft Rogers, applied for and received from the Real Estate Division a principal broker's license and has practiced in the field of real estate sales without any suggestion of a threat to the interests of the public at large. The two real estate transactions, if they were real estate transactions for which the petitioner either was suspended or is presently subject to revocation were bizarre, unusual and unique in the real estate field and were handled reasonably by petitioner. Petitioner's present actions and activities as a principal real estate broker do not constitute a danger to the public at large and she is capable and competent to continue in the real estate practice. Revocation of her license is much too harsh.

The May 5, 1982 agreement between petitioner and Barbara Homeyer constituted a new agreement for services unrelated to the real estate field and was simply an authorization and agreement for petitioner to act as a liquidator of property of Barbara Homeyer. The Court erred in construing the May 5, 1982 agreement as a real estate contract, listing agreement or otherwise.

## ARGUMENT

### POINT I

THE PETITION OF THE REAL ESTATE DIVISION DATED NOVEMBER 25, 1987, SEEKING TO SUSPEND OR REVOKE THE LICENSE OF PETITIONER JUANITA TAFT ROGERS IS BARRED BY LATCHES OR THE STATUTE OF LIMITATIONS.

The action brought by the Real Estate Division against the principal broker's license of Juanita Taft Rogers is in its nature "civil." Rule 2 of the Utah Rules of Civil Procedure states: "There shall be one form of action to be known as civil action.'" The words "civil action" are defined in general as:

An action wherein an issue is presented for trial formed by averments of complaint and denials of answer or replication to new matter, White v. White, 98 Ind. App. 587, 186 N.E. 349; an adversary proceeding for declaration, enforcement or protection of a right, redress, or prevention of a wrong, People v. Barker, 29 Cal. App. 2d Supp. 766, 77 P.2d 321; Lee v. Lang, 140 Fla. 782, 192 S.O. 490; Johnston v. State, 212 Ind. 375, 8 N.E. 590. Every action other than a criminal action, City of Neena v. Krueger, 206 Wis. 473, 240 N.W. 402. Black's Law Dictionary, Revised 4th Ed. 1968.

In the civil law, a civil action is a personal action which is instituted to compel payment, or the doing of some other thing which is purely civil. At common law, a civil action is one which seeks the establishment, recovery, or redress of private and civil rights. It is an action brought to recover some civil right, or to obtain redress for some wrong not deemed a crime or misdemeanor. Black's Law Dictionary, Revised 4th Ed. 1968.

Clearly the kind of action brought by the Real Estate

Division against the principal broker's license of Juanita Taft Rogers can be characterized as "civil." Section 78-12-1, Utah Code Annotated, 1953, as amended, is the codification of the Statute of Limitations for the State of Utah and States as follows:

Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute.

Section 61-1 et seq., Utah Code Annotated, 1953, as amended, contain the provisions of law adopted in the State of Utah regulating the Securities Commission and the Real Estate Division. Nowhere in Section 61-1 of the Utah Code is there located a separate Statute of Limitations clause pertaining to affairs or enforcements efforts of the Real Estate Division. On the other hand, actions brought in the name of or for the benefit of the State are subject to the provisions of Section 78-12 et seq., Utah Code Annotated. Specifically, Section 78-12-33 provides:

The limitations prescribed in this article shall apply to actions brought in the name of or for the benefit of the State in the same manner as to actions by private parties.

Thus, unless the real estate statutes under Title 61 Chapter 1 provide for a different period of limitation or make provision in some regard with respect to the limitations of actions by the Real Estate Division, then the provisions of Title 78, Chapter 12

prescribe the appropriate limitation of actions controlling the Real Estate Division. In that regard, Section 78-12-25 provides as follows:

Within four years:

... (2) An action for relief not otherwise provided for by law.

The Utah Supreme Court has construed sub-section 2 of 78-12-25 to apply to all actions, legal or equitable where plaintiff seeks affirmative relief. Branting v. Salt Lake City, 47 Utah 296, 153 P. 995 (1915). The Supreme Court has also stated that the Statute of Limitation under 78-12-25(2) provides a catch-all provision for actions not otherwise provided for by law. Holm v. B. & M. Service, Inc., 661 P.2d 951 (Utah 1983). This provision of the Statute of Limitation provides the longest period of limitation within which the Real Estate Division could conceivably bring its action. All other applicable provisions of the statute of limitations are shorter than the four (4) years. The longer limitation periods prescribed in Title 78, Chapter 12 have no application to the action being taken by the real estate division against the principal broker's license of petitioner Juanita Taft Rogers. A thorough reading of all of the other chapters contained in Title 78 of the Utah Code will disclose that there is not a specific provision describing a licensure revocation such as the one brought here by the real estate division. Thus, such action by the Real Estate Division clearly

falls within the provisions of the catch-all limitation as set forth in Section 78-12-25(2). That being the case, the Division of Real Estate was more than a year beyond the Statute of Limitations when it filed its petition for revocation or suspension of the principal broker's license of Juanita Taft Rogers. Accordingly said petition should have been dismissed and the action barred when the matter was addressed pursuant to petitioner Rogers motion to dismiss filed herein.

A reading of the November 25, 1987 petition filed by the Real Estate Division discloses that all of the acts alleged to have been committed by Juanita Taft Rogers giving rights to a revocation or suspension of her license occurred before November of 1982, some five (5) years before the Real Estate Division filed its action. The Findings of Fact adopted by the Administrative Law Judge at the adjudicative hearing also disclosed that all complained of actions of Juanita Taft Rogers occurred before November of 1982. Thus, petitioner, Juanita Taft Rogers respectfully moves this Court to enter an order reversing the ruling of the adjudicative hearing judge wherein he denied petitioner's Motion to Dismiss. Petitioner further moves this court to remand this matter to the Division of Real Estate with instructions to dismiss the petition filed against Juanita Taft Rogers for suspension or revocation of her principal broker's license.



## POINT II

REVOCATION OF THE PRINCIPAL BROKERS LICENSE OF JUANITA TAFT ROGERS IS UNDULY HARSH AND INEQUITABLE.

The Administrative Law Judge acknowledged in his Findings of Fact that Juanita Taft Rogers and Barbara Homeyer entered into a May 5, 1982 agreement which was written and signed. A copy of the agreement is set forth in the Appendix of this brief. Petitioner, Rogers, believes that Judge Eklund erroneously concluded that the May 5, 1982 agreement constituted a continuing Real Estate agreement. In the real estate business, when a broker or salesman enters into contractual relationships either with a buyer or seller, particularized forms of agreement are used. When dealing with a seller, a broker or agent of a broker traditionally enters into what is known as a "listing agreement." The "listing agreement" is a specific memorialization of understanding between the parties authorizing the listing agent or broker to sell the property for a certain agreed upon compensation and for a specific period of time. When dealing with a buyer, a broker or sales agent typically and traditionally prepares for execution what is known as an "earnest money agreement." The "earnest money agreement" constitutes an offer and acceptance between a buyer and seller and sets forth the general terms anticipated to be incorporated into a final agreement of sale between the parties. The May 5, 1982 agreement is neither a "listing agreement" or an "earnest money agreement."

The May 5, 1982 agreement is solely and exclusively a contract between Barbara Homeyer and Juanita Taft Rogers authorizing the later to sell personal property (not real property) of Barbara Homeyer and to hold in trust any sale proceeds received after the death of Barbara Homeyer in the event she should meet an untimely death. Nowhere is there any mention that the proceeds from the sale of the personal property be utilized as a down payment or any kind of payment toward a real estate purchase. There is no limitation of time as is typical of listing agreements and there is no commission percentage set forth as is typical of listing agreements. Said document was drafted at the instance and in the presence of Mrs. Homeyer. The hearing court erroneously reasoned in its Conclusions of Law that

if it were respondent's (Rogers) intent to effect a shift in her existing relationship with Mrs. Homeyer, it was incumbent upon respondent (Rogers) to utilize language clearly reflective of that intent, particularly when respondent had come into possession of Mrs. Homeyer's property as her agent in a real estate transaction, respondent had already disposed of some of that property, and it was anticipated that she would retain possession of the remaining property with the written authorization to liquidate it.

The Court concluded that petitioner, Rogers, was in violation of one rule adopted by the Real Estate Division. Said Rule is Rule 9 (a)(7) which provides:

All consideration received by a salesman in connection with a real estate transaction which he is engaged on behalf of his broker shall immediately be delivered by him to his broker....

The Administrative Law Judge also concluded that Mrs. Rogers owed a fiduciary responsibility to Mrs. Homeyer although there was no statutory fiduciary responsibility set forth in the rules or regulations of the Division of Real Estate. The Administrative Law Judge acknowledged that there was no evidence that Juanita Taft Rogers had engaged in any misconduct since 1982. The Administrative Law Judge finally concluded that the principal broker's license of Juanita Taft Rogers should be revoked and entered its recommended order accordingly. The Order of the court flies in the face of equity and justice. Even if one is to assume and conclude that all of the reasons given by the Administrative Law Judge in its conclusions of law are correct, an order of revocation of a principal broker's license cannot be viewed as anything but unreasonable, unjust and inequitable. Not one instance of improper conduct, impropriety, threat to the public or otherwise has been cited against Juanita Taft Rogers in the last seven (7) years. Assuredly, the Division of Real Estate has looked closely and has investigated the background of Mrs. Rogers and particularly her transactions as a Real Estate Broker or agent to determine whether or not any such impropriety exists. Nothing has been found. As a matter of fact, nothing is to be found. To allow a long period of time to pass during which no acts of impropriety are committed, but, on the other hand, professional responsibility has been discharged,

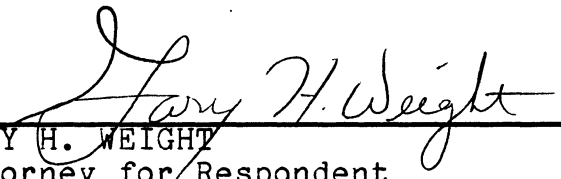
and then allow a license revocation for acts which have long since passed is on its face, inequitable and unduly harsh. Thus, Petitioner Rogers respectfully moves this court to reverse the revocation of her principal broker's license and remand the matter to the Division of Real Estate with instructions to either dismiss the proceedings or to impose alternative sanctions of much less severity.

#### CONCLUSION

The Division of Real Estate is barred by the Statute of Limitations contained within Section 78-12-25(2) Utah Code Annotated, as amended. More than five years lapsed from the time of any unlawful acts committed by petitioner Rogers to the time that the division of real estate filed its petition for license revocation. Because the acts complained of by the Division of Real Estate against petitioner Rogers occurred more than five years before the Petition filed in 1987 and more than seven years from this date, it is inequitable and unduly harsh to impose a license revocation of the principal broker's license of Juanita Taft Rogers. It is the position of Petitioner Rogers that the decision of the Administrative Law Judge should be reversed and

that the case be remanded with instructions to dismiss the  
Petition and licensure proceedings against Juanita Taft Rogers.

DATED this 20<sup>th</sup> day of March, 1989.

  
\_\_\_\_\_  
GARY H. WEIGHT  
Attorney for Respondent

DELIVERY CERTIFICATE

I hereby certify that I mailed four true and correct copies  
of the foregoing Brief to Mr. Paul Van Dam, Utah Attorney  
General, 236 State Capitol, Salt Lake City, UT 84114, this 20<sup>th</sup>  
day of March, 1989.

  
\_\_\_\_\_

## ADDENDUM

of its political subdivisions, upon, or as a condition of, the privilege of conducting the business regulated by this chapter, except that a political subdivision within the state may charge a business license fee if the licensee maintains a place of business within the jurisdiction of the political subdivision. Unless otherwise exempt, each licensee under this chapter is subject to all taxes imposed under Title 59. 1988

**61-2-10. Restriction on commissions — Affiliation with more than one broker.**

It is unlawful for any associate broker or sales agent to accept valuable consideration for the performance of any of the acts specified in this chapter from any person except the principal broker with whom he is affiliated and licensed. An inactive licensee is not authorized to conduct real estate transactions until he becomes affiliated with a licensed principal broker. No sales agent or associate broker may affiliate with more than one principal broker at the same time. Except as provided by rule, a principal broker may not be responsible for more than one real estate brokerage at the same time. 1987

**61-2-11. Revocation or suspension of license — Grounds — Subpoena power of division.**

The division may investigate or cause to be investigated the actions of any principal broker, associate broker, sales agent, prelicensing school, or school instructor licensed or certified by this state, or of any person who acts in any of those capacities within this state. The division is empowered to subpoena witnesses, take evidence, and require by subpoena duces tecum the production of books, papers, contracts, records, other documents, or information considered relevant to the investigation. Each failure to respond to a subpoena is considered as a separate violation of this chapter. The commission, with the concurrence of the executive director of the Department of Business Regulation, may impose a civil penalty in an amount not to exceed \$500 or suspend, revoke, place on probation, or deny issuance or reissuance of any license or the certification of a prelicensing school or instructor, if, at any time, the licensee or certificate holder, whether acting as an agent or on his own account, is found guilty of:

- (1) making any substantial misrepresentation;
- (2) making any false promises of a character likely to influence, persuade, or induce;
- (3) pursuing a continued and flagrant course of misrepresentation, or of making false promises through agents, sales agents, advertising, or otherwise;
- (4) acting for more than one party in a transaction without the knowledge of the other party;
- (5) acting as an associate broker or sales agent while not licensed with a licensed principal broker, representing or attempting to represent a broker other than the principal broker with whom he is affiliated, or representing as sales agent or having a contractual relationship similar to that of sales agent with other than a licensed principal broker;
- (6) failing, within a reasonable time, to account for or to remit any monies coming into his possession which belong to others, or commingling those funds with his own, or diverting those funds from the purpose for which they were received;
- (7) paying or offering to pay valuable consideration, as defined by the commission, to any per-

son not licensed under this chapter, except that valuable consideration may be shared with a licensed principal broker of another jurisdiction or as provided under the Professional Corporation Act;

(8) being unworthy or incompetent to act as a principal broker, associate broker, or sales agent in such manner as to safeguard the interests of the public;

(9) failing to voluntarily furnish copies of all documents to all parties executing the documents;

(10) failing to keep and make available for inspection by the division a record of each transaction, including the names of buyers and sellers, the identification of the property, the sale price, any monies received in trust, any agreements or instructions from buyers or sellers, and any other information required by rule;

(11) failing to disclose, in writing, in the purchase or sale of property, whether the purchase or sale is made for himself or for an undisclosed principal;

(12) conviction of a criminal offense involving moral turpitude;

(13) advertising the availability of real estate or the services of a licensee in a false, misleading, or deceptive manner;

(14) in the case of a principal broker or a licensee who is a branch manager, failing to exercise reasonable supervision over the activities of his licensees and any unlicensed staff;

(15) violating or disregarding this chapter, an order of the commission, or the rules adopted by the commission and the division;

(16) breaching a fiduciary duty owed by a licensee to his principal in a real estate transaction;

(17) any other conduct which constitutes dishonest dealing; or

(18) unprofessional conduct as defined by statute or rule. 1988

**61-2-12. Disciplinary action — Judicial review.**

(1) (a) (i) Before imposing a civil penalty, revoking, suspending, placing on probation, or denying issuance or reissuance of any license, the division shall give notice to the licensee and schedule an adjudicative proceeding.

(ii) If the licensee is an active sales agent or active associate broker, the division shall inform the principal broker with whom the licensee is affiliated of the charge and of the time and place of the hearing.

(iii) If, after the hearing, the commission determines that any licensee is guilty of a violation of this chapter, the license shall be suspended, revoked, or denied reissuance by written order of the commission in concurrence with the executive director.

(b) If the hearing is delegated by the commission to an administrative law judge, and a ruling has been issued by the commission and the executive director, the licensee may request reconsideration by filing a written request stating specific grounds upon which relief is requested.

(c) Any applicant or licensee, or person aggrieved, including the complainant, may obtain judicial review of any adverse ruling, order, or decision of the executive director and the commission.

(d) If the applicant or licensee prevails in the appeal and the court finds that the state action was undertaken without substantial justification, the court may award reasonable litigation expenses to the applicant or licensee as provided under Chapter 27a, Title 78, Small Business Equal Access to Justice Act

(e) (i) No order, rule, or decision of the executive director and the commission may take effect until 30 days after the time for appeal to the court has expired

(ii) If an appeal is taken by a licensee, the division shall stay enforcement of the commission's action in accordance with the provisions of Section 63-46b-18

(f) (i) When the notice of appeal is filed, the appellant shall file with the notice a \$200 bond for costs on appeal, conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed

(ii) The appellant shall request of the court, in writing, within two months after the issuance of the writ of certiorari, a date certain for the review hearing. Appellant's failure to comply with the requirements of this subsection shall result in dismissal of the appeal with prejudice

(2) The commission and the executive director shall comply with the procedures and requirements of Chapter 46b, Title 63, in their adjudicative proceedings

1988

**61-2-13. Grounds for revocation of principal broker's license — Automatic inactivation of affiliated associate brokers' and sales agents' licenses.**

(1) Any unlawful act or any violation of this chapter committed by any real estate sales agent or associate broker employed or engaged as an independent contractor by or on behalf of a licensed principal broker or committed by any employee, officer, or member of a licensed principal broker is cause for the revocation, suspension, or probation of the principal broker's license, or for the imposition of a fine against the principal broker in an amount not to exceed \$500 per violation

(2) The revocation or suspension of a principal broker license automatically inactivates every associate broker or sales agent license granted to those persons by reason of their affiliation with the principal broker whose license was revoked, pending a change of broker affiliation. A principal broker shall, prior to the effective date of the suspension or revocation of his license, notify in writing every licensee affiliated with him of the revocation or suspension of his license

1988

**61-2-14. List of licensees to be available.**

The division shall make available at reasonable cost a list of the names and addresses of all persons licensed by it under this chapter

1983

**61-2-15, 61-2-16. Repealed.**

1973

**61-2-17. Penalty for violation of chapter.**

(1) Any individual violating this chapter, in addition to being subject to a license sanction or a fine ordered by the commission, is, upon conviction of a first violation, guilty of a class A misdemeanor, any imprisonment shall be for a term not to exceed six months. If the violator is a corporation, it is, upon conviction of a first violation, guilty of a class A misdemeanor. Upon conviction of a second or subsequent

violation, an individual is guilty of a third degree felony; imprisonment shall be for a term not to exceed two years. If a corporation is convicted of a second or subsequent violation, it is guilty of a third degree felony. Any officer or agent of a corporation, or any member or agent of a partnership or association, who personally participates in or is an accessory to any violation of this chapter by such corporation, partnership, or association, is subject to the penalties prescribed for individuals

(2) If any person receives any money or its equivalent, as commission, compensation, or profit by or in consequence of a violation of this chapter, that person is liable for an additional penalty of not less than the amount of the money received and not more than three times the amount of money received, as may be determined by the court. This penalty may be sued for in any court of competent jurisdiction, and recovered by any person aggrieved for his own use and benefit

(3) All fines imposed by the commission and the executive director pursuant to this chapter shall be deposited into the Real Estate Education, Research, and Recovery Fund to be used in a manner consistent with the requirements of the Real Estate Recovery Fund Act

1986

**61-2-18. Actions for recovery of compensation restricted.**

(1) No person may bring or maintain an action in any court of this state for the recovery of a commission, fee, or compensation for any act done or service rendered which is prohibited under this chapter to other than licensed principal brokers, unless the person was duly licensed as a principal broker at the time of the doing of the act or rendering the service

(2) No sales agent or associate broker may sue in his own name for the recovery of a fee, commission, or compensation for services as a sales agent or associate broker unless the action is against the principal broker with whom he is or was licensed. Any action for the recovery of a fee, commission, or other compensation may only be instituted and brought by the principal broker with whom the sales agent or associate broker is affiliated

1985

**61-2-19. Repealed.**

1983

**61-2-20. Rights and privileges of sales agent, associate brokers, and principal brokers.**

Real estate licensees may fill out those forms approved by the Utah Real Estate Commission and the attorney general and those forms provided by statute, with the following exceptions

(1) Principal brokers and associate brokers may fill out any documents associated with the closing of a real estate transaction

(2) Real estate licensees may fill out real estate forms prepared by legal counsel of the buyer, seller, lessor, or lessee, or any legal counsel, provided that the Real Estate Commission and attorney general have not approved a specific form necessary to that transaction

1985

**61-2-21. Remedies and action for violations.**

(1) (a) If the director has reason to believe that any person has been or is engaging in acts constituting violations of this chapter, and if it appears to the director that it would be in the public interest to stop such acts, he shall issue and serve upon the person an order directing that person to cease and desist from those acts



(viii) a statement of the reasons why the petitioner is entitled to relief.

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.

(b) The Utah Rules of Evidence apply in judicial proceedings under this section. 1988

#### 63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure [Rules of the Utah Supreme Court], except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that dem-

onstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious. 1988

#### 63-46b-17. Judicial review — Type of relief.

(1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

(i) order agency action required by law;

(ii) order the agency to exercise its discretion as required by law;

(iii) set aside or modify agency action;

(iv) enjoin or stay the effective date of agency action; or

(v) remand the matter to the agency for further proceedings.

(2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute. 1987

#### 63-46b-18. Judicial review — Stay and other temporary remedies pending final disposition.

(1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules.

(2) Parties shall petition the agency for a stay or other temporary remedies unless extraordinary circumstances require immediate judicial intervention.

(3) If the agency denies a stay or denies other temporary remedies requested by a party, the agency's order of denial shall be mailed to all parties and shall specify the reasons why the stay or other temporary remedy was not granted.

(4) If the agency has denied a stay or other temporary remedy to protect the public health, safety, or welfare against a substantial threat, the court may not grant a stay or other temporary remedy unless it finds that:

(a) the agency violated its own rules in denying the stay; or

(b) (i) the party seeking judicial review is likely to prevail on the merits when the court finally disposes of the matter;

(ii) the party seeking judicial review will suffer irreparable injury without immediate relief;

(iii) granting relief to the party seeking review will not substantially harm other parties to the proceedings; and

(iv) the threat to the public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action under the circumstances. 1987

#### 63-46b-19. Civil enforcement.

(1) (a) In addition to other remedies provided by law, an agency may seek enforcement of an order by seeking civil enforcement in the district courts.

(b) The action seeking civil enforcement of an agency's order must name, as defendants, each alleged violator against whom the agency seeks to obtain civil enforcement.

(c) Venue for an action seeking civil enforcement of an agency's order shall be determined by

- Section  
 78-12-27. Action against corporate stockholders or directors.  
 78-12-28. Within two years.  
 78-12-29. Within one year.  
 78-12-30. Actions on claims against county, city or town.  
 78-12-31. Within six months.  
 78-12-31.1. Habeas corpus — Three months.  
 78-12-31.2. Post-conviction remedies — 30 days.  
 78-12-32. Action on mutual account — When deemed accrued.  
 78-12-33. Actions by state or other governmental entity.  
 78-12-33.5. Statute of limitations — Asbestos damages — Action by state or governmental entity.  
 78-12-34. Repealed.

### Article 3

#### Miscellaneous Provisions

- 78-12-35. Effect of absence from state.  
 78-12-36. Effect of disability.  
 78-12-37. Effect of death.  
 78-12-38. Effect of death of defendant outside this state.  
 78-12-39. Effect of war.  
 78-12-40. Effect of failure of action not on merits.  
 78-12-41. Effect of injunction or prohibition.  
 78-12-42. Disability must exist when right of action accrues.  
 78-12-43. All disabilities must be removed.  
 78-12-44. Effect of payment, acknowledgment, or promise to pay.  
 78-12-45. Action barred in another state barred here.  
 78-12-46. "Action" includes special proceeding.  
 78-12-47. Separate trial of statute of limitations issue in malpractice actions.  
 78-12-48. Statute of limitations — Asbestos damages.

#### 78-12-1. Time for commencement of actions generally.

Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute. 1967

### ARTICLE 1

#### REAL PROPERTY

#### 78-12-2. Actions by the state.

The state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the state to the same, unless:

- (1) such right or title shall have accrued within seven years before any action or other proceeding for the same shall be commenced; or
- (2) the state or those from whom it claims shall have received the rents and profits of such real property, or some part thereof, within seven years. 1963

#### 78-12-3. Actions by patentees or grantees from state.

No action can be brought for or in respect to real property by any person claiming under letters patent or a grant from this state, unless the same might have been commenced by the state as herein speci-

fied, in case such patent had not been issued or grant made. 1963

#### 78-12-4. When letters patent or grants declared void.

When letters patent or grants of real property issued or made by the state are declared void by the determination of a competent court, an action for the recovery of the property so conveyed may be brought either by the state, or by any subsequent patentee or grantee of the property, his heirs or assigns, within seven years after such determination, but not after that period. 1963

#### 78-12-5. Seizure or possession within seven years necessary.

No action for the recovery of real property or for the possession thereof shall be maintained, unless it appears that the plaintiff, his ancestor, grantor or predecessor was seized or possessed of the property in question within seven years before the commencement of the action. 1963

#### 78-12-5.1. Seizure or possession within seven years — Proviso — Tax title.

No action for the recovery of real property or for the possession thereof shall be maintained, unless the plaintiff or his predecessor was seized or possessed of such property within seven years from the commencement of such action; provided, however, that with respect to actions or defenses brought or interposed for the recovery or possession of or to quiet title or determine the ownership of real property against the holder of a tax title to such property, no such action or defense shall be commenced or interposed more than four years after the date of the tax deed, conveyance, or transfer creating such tax title unless the person commencing or interposing such action or defense or his predecessor has actually occupied or been in possession of such property within four years prior to the commencement or interposition of such action or defense or within one year from the effective date of this amendment. 1963

#### 78-12-5.2. Holder of tax title — Limitations of action or defense — Proviso.

No action or defense for the recovery or possession of real property or to quiet title or determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four years from the date of the sale, conveyance or transfer of such tax title to any county, or directly to any other purchase thereof at any public or private tax sale and after the expiration of one year from the date of this act. Provided, however, that this section shall not bar any action or defense by the owner of the legal title to such property where he or his predecessor has actually occupied or been in actual possession of such property within four years from the commencement or interposition of such action or defense. And provided further, that this section shall not bar any defense by a city or town, to an action by the holder of a tax title, to the effect that such city or town holds a lien against such property which is equal or superior to the claim of the holder of such tax title. 1963

#### 78-12-5.3. Definitions of "tax title" and "action."

(1) The term "tax title" as used in Section 78-12-5.2 and Section 59-2-1364, and the related amended Sections 78-12-5, 78-12-7, and 78-12-12, means any title to real property, whether valid or not, which has been derived through or is dependent upon

**78-12-24. Actions against public officers — Within six years.**

An action by the state or any agency or public corporation thereof against any public officer for malfeasance, misfeasance, or nonfeasance in office or against any surety upon his official bond may be brought within six years after such officer ceases to hold his office, but not thereafter. 1983

**78-12-25. Within four years.**

Within four years:

(1) An action upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.

(2) A claim for relief or a cause of action under the following sections of Chapter 6, Title 25, the Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1).

(3) An action for relief not otherwise provided for by law. 1988

**78-12-25.5. Injury due to defective design or construction of improvement to real property — Within seven years.**

(1) (a) An action to recover damages for any injury to property, real or personal, or for any injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, or any action for damages sustained on account of the injury, may not be brought against any person performing or furnishing the design, planning, surveying, supervising the construction of, or constructing the improvement to real property more than seven years after the completion of construction.

(b) In an action regarding property boundary surveys, the seven-year time period commences when the property survey is either recorded in the county recorder's office or filed in the county surveyor's office under Section 17-23-17.

(2) The time limitation imposed by this section does not apply to any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of the improvement constitutes the proximate cause of the injury for which an action is brought.

(3) This section does not extend or limit the periods otherwise prescribed by state law for the bringing of any action.

(4) As used in this section:

(a) "Person" means an individual, corporation, partnership, or other legal entity.

(b) "Completion of construction" means the date of issuance of a certificate of substantial completion by the owner, architect, engineer, or other agent, or the date of the owner's use or possession of the improvement on real property. 1988

**78-12-26. Within three years.**

Within three years:

(1) An action for waste, or trespass upon or injury to real property; except that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting such waste or trespass.

(2) An action for taking, detaining, or injuring personal property, including actions for specific recovery thereof; except that in all cases where the subject of the action is a domestic animal usually included in the term "livestock," which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant.

(3) An action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(4) An action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state.

(5) An action to enforce liability imposed by Section 78-17-3, except that the cause of action does not accrue until the aggrieved party knows or reasonably should know of the harm suffered. 1986

**78-12-27. Action against corporate stockholders or directors.**

Actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created, by law must be brought within three years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability accrued, and in case of actions against stockholders of a bank pursuant to levy of assessment to collect their statutory liability, such actions must be brought within three years after the levy of the assessment. 1983

**78-12-28. Within two years.**

Within two years, an action:

(1) against a marshal, sheriff, constable, or other officer upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this section does not apply to an action for an escape;

(2) for recovery damages for the death of one caused by the wrongful act or neglect of another; or

(3) for injury to the personal rights of another as a civil rights suit under 42 U.S.C. 1983. 1987

**78-12-29. Within one year.**

Within one year:

(1) An action for liability created by the statutes of a foreign state.

(2) An action upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

(3) An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state.

(4) An action for libel, slander, assault, battery, false imprisonment, or seduction.

(5) An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned upon either civil or criminal process.

(6) An action against a municipal corporation for damages or injuries to property caused by a mob or riot.

(7) A claim for relief or a cause of action under the following sections of Chapter 6, Title 25, the Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to four years, under Section 25-6-10; or

(b) Subsection 25-6-6(2). 1963

#### 78-12-30. Actions on claims against county, city or town.

Actions on claims against a county, city or incorporated town, which have been rejected by the board of county commissioners, city commissioners, city council or board of trustees, as the case may be, must be commenced within one year after the first rejection thereof by such board of county or city commissioners, city council or board of trustees. 1963

#### 78-12-31. Within six months.

Within six months:

An action against an officer, or an officer de facto:

(1) to recover any goods, wares, merchandise or other property seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to, any goods, wares, merchandise or other personal property seized, or for damages done to any person or property in making any such seizure.

(2) for money paid to any such officer under protest, or seized by such officer in his official capacity, as a collector of taxes, and which, it is claimed, ought to be refunded. 1963

#### 78-12-31.1. Habeas corpus — Three months.

Within three months:

For relief pursuant to a writ of habeas corpus. This limitation shall apply not only as to grounds known to petitioner but also to grounds which in the exercise of reasonable diligence should have been known by petitioner or counsel for petitioner. 1979

#### 78-12-31.2. Post-conviction remedies — 30 days.

Within 30 days:

No post-conviction remedies may be applied for or entertained by any court within 30 days prior to the date set for execution of a capital sentence, unless the grounds therefor are based on facts or circumstances which developed or first became known within that period. 1979

#### 78-12-32. Action on mutual account — When deemed accrued.

In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side. 1963

#### 78-12-33. Actions by state or other governmental entity.

The limitations in this article apply to actions brought in the name of or for the benefit of the state or other governmental entity, the same as to actions by private parties, except under Section 78-12-33.5. 1968

#### 78-12-33.5. Statute of limitations — Asbestos damages — Action by state or governmental entity.

(1)(a) No statute of limitations or repose may bar an action by the state or other governmental entity to recover damages from any manufacturer of any construction materials containing asbestos, when the action arises out of the manufacturer's providing the materials, directly or through other persons, to the state or other governmental entity or to a contractor on behalf of the state or other governmental entity.

(b) Subsection (a) provides for actions not yet barred, and also acts retroactively to permit actions under this section that are otherwise barred.

(2) As used in this section, "asbestos" means asbestiform varieties of:

- (a) chrysotile (serpentine);
- (b) crocidolite (riebeckite);
- (c) amosite (cummingtonite-grunerite);
- (d) anthophyllite;
- (e) tremolite; or
- (f) actinolite. 1968

#### 78-12-34. Repealed.

1961

### ARTICLE 3

#### MISCELLANEOUS PROVISIONS

#### 78-12-35. Effect of absence from state.

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action. 1967

#### 78-12-36. Effect of disability.

If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either under the age of majority or mentally incompetent and without a legal guardian, the time of the disability is not a part of the time limited for the commencement of the action. 1967

#### 78-12-37. Effect of death.

If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced against the representatives after the expiration of that time and within one year after the issue of letters testamentary or of administration. 1963

#### 78-12-38. Effect of death of defendant outside this state.

If a person against whom a cause of action exists

things are going to be there  
What can she do?

Handwritten  
C

5 May, 1982  
Provo, Utah

re: The inherited items in the personal estate of Barbara Eisenhand Homoyer

All items in the above mentioned estate are assigned for sale &/or exchange to the personal agent to Barbara Eisenhand Homoyer, Ms. Juanita Taft Rogers.

Said agent, in the event Barbara Eisenhand Homoyer's death occurs before the entire estate is liquidated, will put the remaining funds into a trust for the minor children: Gerald William Homoyer, born 8 January, 1970 and Richard Edward Homoyer, born 21 September, 1972, to be given to them on their eighteenth birthdays. Said trust is to be so established or designated either by a court appointed trustee; a representative from the Division of Family Services; or a member of the existing Bishopric &/or Stake Presidency. Said designated trust representative will make all decisions with the review and approval of Ms. Betty Jean Byrd, personal family representative.

The existing personal residence of Barbara Eisenhand Homoyer is located at 345 South 1450 East; Provo, Utah 84601.

Ms. Barbara Eisenhand Homoyer  
Ms. Barbara Eisenhand Homoyer

Ms. Juanita Taft Rogers  
Ms. Juanita Taft Rogers, Agent for  
Inherited estate of Mrs. Homoyer  
2411 Locust Lane  
Provo, Utah 84604

Ms. Betty Jean Byrd  
Ms. Betty Jean Byrd, Witness

The original of this document is in the possession of Juanita Taft Rogers, agent to Ms. Barbara Eisenhand Homoyer.

cc: Ms. Betty Jean Byrd; 386 South 1450 East; Provo, Utah 84601

DIVISION OF REAL ESTATE  
DEPARTMENT OF BUSINESS REGULATION  
RICHARD M. MERCER, DIRECTOR  
PO BOX 45802  
160 EAST 300 SOUTH  
SALT LAKE CITY, UT 84145  
TELEPHONE: (801) 530-6747

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BEFORE THE UTAH STATE REAL ESTATE COMMISSION

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In the Matter of  
JUANITA TAFT ROGERS to Act  
as a Real Estate Principal Broker

PETITION  
CASE NO. RE87-08-02

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The Division of Real Estate of the Department of Business Regulation of the State of Utah (the Division), by and through its Director, Richard M. Mercer, upon knowledge and belief, hereby complains and alleges as follows:

PRELIMINARY STATEMENT

The cause of action was investigated by the Division upon complaints that Juanita Taft Rogers (Rogers) has engaged in acts and practices which constitute violations of Utah Code Annotated Section 61-2-1, et seq. (1953, as amended).

JURISDICTION

1. Utah Code Annotated Section 61-2-11 provides that the Utah Real Estate Commission may suspend or revoke the Real Estate license of any salesagent or broker who, while engaging in acts for which such a license is required, is found guilty of:

a. "... (6) Failing within a reasonable time, to account for or to remit any monies coming into his possession which belong to others, or commingling those funds with his own, or diverting those funds from the purpose for which they were received;"

b. "... (8) Being unworthy or incompetent to act as a principal broker, associate broker, or salesagent in such manner as to safeguard the interests of the public;"

c. "... (15) Violating or disregarding this chapter, an order of the Commission, or the Rules adopted by the Commission and the Division.

d. "... (16) Breaching a fiduciary duty owed by a licensee to his principal in a real estate transaction.

2. Rogers is a real estate principal broker duly licensed by the State of Utah under License No. PB 14700.

3. At all times material to this action, Rogers was acting in her capacity as a real estate licensee.

#### STATEMENT OF THE FACTS

4. In January, 1982, Rogers was a salesagent affiliated with principal broker David R. Harman. On September 1, 1982, she terminated her affiliation with Harman and became affiliated with principal broker A.J. Michaels. In late 1982 or early 1983, she terminated her affiliation with Michaels and became affiliated with K.M. Woolley & Company. Rogers' license was suspended from September 15, 1985 through September 15, 1986, and placed on probation from September 15, 1986 through September 15, 1988, as a result of case #1737, which involved a 1981-1982 real estate transaction. Rogers obtained a license as a principal broker on January 15, 1987.

5. In or about January, 1982, Homeyer and Rogers orally agreed that Homeyer would give Rogers some inherited personal property to hold. Rogers was to find a seller of a home who would accept personal property instead of cash for a down payment. If such a seller could not be found, Rogers was to arrange for the sale of some of the property to generate cash for a down payment. If a sale was consummated, Rogers would receive some of the personal property in an amount equal to a 6% commission.

6. During February and March, 1982, Homeyer delivered numerous items of personal property to Rogers, who stored it in two storage

units owned by a Mr. Miller. Miller had listed the storage units for sale with Rogers.

7. A seller who was willing to take personal property was not found. On or about May 5, 1982, Homeyer gave Rogers written authorization to liquidate the property.

8. Rogers sold a number of items for a total of \$4,495.00 which had a fair market value of \$6,530.50. Rogers did not deliver the sale proceeds to her principal broker to hold in trust for Homeyer. Rogers gave possession of certain items valued at \$6,799.50 to various individuals with instructions to repair, restore, or appraise the items.

9. In or about July, 1982, Homeyer orally demanded that Rogers give her the proceeds of the sales and return the balance of the personal property which had not been sold. In July, 1982 and on October 29, 1982, Homeyer's attorneys demanded that Rogers return all property still held, and account for all property which had been transferred, sold, or disposed of by Rogers. Rogers refused to comply until ordered to do so by court order in July, 1986.

10. Rogers did not turn over to Homeyer the \$4,495.00 in proceeds from the sale of items, nor did she retrieve the \$6,799.50 worth of items which had been given to others to repair, restore, or appraise. In addition, Rogers still had in her possession or had otherwise disposed of other items valued at \$4,820.50.

11. On October 30, 1986, Homeyer obtained a judgment in the amount of \$18,150.00 against Rogers based on conversion of personal property and sale proceeds and on breach of fiduciary duty. After the judgment was entered, Rogers converted her Chapter 11 bankruptcy, which had been pending since 1981, to a Chapter 7 bankruptcy. Homeyer has filed a \$10,000.00 claim against the Real Estate Recovery Fund.



12. The Division realleges and incorporates by reference its allegations set forth in paragraphs No. 1 through 11 as if specifically set out herein.

13. Utah Code Annotated Section 61-2-11 (1953, as amended), provides that a real estate license may be suspended or revoked if the licensee is found guilty of: "... (6) Failing within a reasonable time, to account for or to remit any monies coming into his possession which belong to others, or commingling those funds with his own, or diverting those funds from the purpose for which they were received;"

14. As outlined above, Rogers sold items of personal property and received \$4,495.00, which she did not remit to Homeyer or account for. Rogers commingled the funds with her own and expended them.

15. The above action(s) by Rogers constitute violation of Utah Code Annotated Section 61-2-11 (6) as amended.

#### COUNT II

16. The Division realleges and incorporates by reference its allegations set forth in paragraphs No. 1 through 15 as if specifically set out herein.

17. Utah Code Annotated Section 61-2-11 (1953, as amended), provides that a real estate license may be suspended or revoked if licensee is found guilty of: "... (8) Being unworthy or incompetent to act as a principal broker, associate broker, or salesagent in such manner as to safeguard the interests of the public;"

18. As outlined above, Rogers received personal property from Homeyer which was to be used in connection with a real estate transaction, and failed to safeguard the property. Numerous items were delivered to parties who did not return them. Other items were kept by Rogers or otherwise dissipated. Additional items were sold by Rogers below market value. Rogers did not give the sales proceeds to her principal broker to hold in trust or to Homeyer.

19. The above action(s) by Rogers constitute violation of Utah Code Annotated Section 61-2-11 (8) as amended.

COUNT III

20. The Division realleges and incorporates by reference its allegations set forth in paragraphs No. 1 through 19 as if specifically set out herein.

21. Utah Code Annotated Section 61-2-11 (1953, as amended), provides that a real estate license may be suspended or revoked if the licensee is found guilty of: "... (16) Breaching a fiduciary duty owed by a licensee to his principal in a real estate transaction."

22. As outlined above, Homeyer entrusted Rogers with personal property in connection with a proposed real estate transaction. Rogers failed to protect the property, and refused to return it to Homeyer when requested to do so. Rogers sold a number of items at below market value and kept the proceeds.

23. The above action(s) by Rogers constitute violation of Utah Code Annotated Section 61-2-11 (16) as amended.

COUNT IV

24. The Division realleges and incorporates by reference its allegations set forth in paragraphs No. 1 through 23 as if specifically set out herein.

25. Utah Code Annotated Section 61-2-11 (1953, as amended), provides that a real estate license may be suspended or revoked if the licensee is found guilty of: "... (16) Violating or disregarding this chapter, an Order of the Commission, or the Rules adopted by the Commission and the Division."

26. Rule 4.2, adopted pursuant to Utah Code Annotated Section 5.5 (1953, as amended), requires that all funds received by a licensee in a real estate transaction must be delivered to the principal broker and deposited in the broker's trust account within three banking days.

27. As outlined above, Rogers sold Homeyer's personal property to generate funds for a down payment on a real estate purchase, but did not deliver the proceeds to her principal broker for deposit into the broker's real estate trust account.

28. The above action(s) by Rogers constitute violation of Rule 4.2 and Utah Code Annotated Section 61-2-11 (15) as amended.

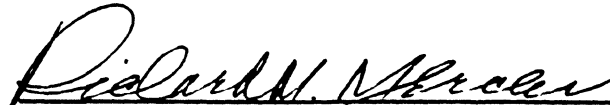
WHEREFORE, the Division requests the following relief:

1. That Rogers be adjudged and decreed to have engaged in the acts alleged herein.

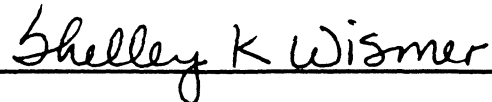
2. That by engaging in the above acts, Rogers be adjudged and decreed to be guilty of the provisions of Utah Code Annotated Section 61-2-11 (6), (8), (15), and (16) (1953, as amended).

3. That Rogers license to act as a real estate licensee be suspended or revoked accordingly.

DATED this 25 day of November, 1987.

  
RICHARD M. MERCER, DIRECTOR  
DIVISION OF REAL ESTATE  
DEPARTMENT OF BUSINESS REGULATION

Appeared before me this 25th day of November, 1987,  
, who deposes and says that the information listed above is true to the best of his knowledge and belief.

  
NOTARY PUBLIC

My Commission Expires:

8-5-91

Residing at: Salt Lake City, Utah

MAILING CERTIFICATE

I hereby certify that I have this day served the foregoing document upon Juanita Taft Rogers by mailing a copy thereof, properly addressed, with postage prepaid, to the following address:

A copy of the foregoing document has been mailed this day prepaid to Gary Weight, attorney for Juanita Taft Rogers, at Aldrich, Nelson, Weight & Esplin, P.O. Box L, Provo, Utah 84603.

Dated at Salt Lake City, Utah this 1<sup>st</sup> day of December, 1987.

*Don T. Jones*  
SIGNATURE

SKW87-08-02-P

**BEFORE THE REAL ESTATE DIVISION  
OF THE DEPARTMENT OF BUSINESS REGULATION  
OF THE STATE OF UTAH**

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<b>In the matter of the license of Juanita Taft Rogers to act as a Real Estate Principal Broker</b>	<b>:</b>	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER</b>
	<b>:</b>	<b>Case No. RE-87-08-02</b>
	<b>:</b>	

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**Appearances:**

**Sheila Page for the Division of Real Estate**

**Gary H. Weight for Respondent**

**By the Administrative Law Judge:**

The above-entitled matter came on regularly for hearing on September 20, 1988 before J. Steven Eklund, Administrative Law Judge for the Department of Business Regulation. Thereafter, certain preliminary motions were presented by respective counsel.

Based thereon, Counts I and III set forth in the Petition, dated November 25, 1987, were dismissed. Further, Count IV was amended to reflect the rule to be properly designated therein. Respondent's motions to dismiss the instant proceeding on the basis that the hearing should be conducted by the Commission rather than the Administrative Law Judge and that the Division should be estopped to take any action on Respondent's license were denied.

Thereafter, evidence was offered and received. The Administrative Law Judge, being fully in the premises, now enters the following Findings of Fact, Conclusions of Law and Recommended Order.

**FINDINGS OF FACT**

1. Sometime in 1973, Respondent became licensed as a sales agent by the Division of Real Estate. As relevant herein, Respondent was affiliated with principal broker David R. Harman as of January 1982. On September 1, 1982, she terminated her affiliation with Mr. Harman and became affiliated with principal broker A. J. Michaels. In late 1982 or early 1983, she terminated her affiliation with Mr. Michaels and became affiliated with K. M. Woolley & Company.

2. By Order, dated August 17, 1983, Respondent's license was suspended for one year and thereafter placed on probation for two years, subject to certain terms and conditions. Said order was based on conduct which occurred between December 10, 1981 and August 22, 1982. Respondent's conduct in that regard was found to constitute gross incompetence and a violation of the fiduciary duty owed to her clients in that transaction. Respondent subsequently became licensed as a principal broker on January 15, 1987.

3. In January 1982, a Barbara Homeyer contacted Respondent to obtain her services in purchasing a home. Ms. Homeyer, who was recently divorced, resided in a home jointly owned by herself and her ex-husband. Since there had been no property settlement relative to her divorce and Ms. Homeyer's ex-husband was reluctant to cooperate as to the sale of their home, the only assets available to Ms. Homeyer to provide a down payment on the purchase of another home consisted of various items of inherited personal property.

4. During January 1982, Ms. Homeyer and Respondent entered into a verbal agreement, whereby Respondent was to act as Ms. Homeyer's real estate agent and attempt to find a prospective seller who would accept Ms. Homeyer's personal property as down payment for the purchase of a home. On February 21, 1982, Respondent and Ms. Homeyer inventoried her property. Ms. Homeyer then delivered that property to Respondent, which was held in storage under Respondent's control. The property was so transferred to Respondent as the means to provide a safe place for its storage and facilitate Respondent's access to that property if a prospective seller was located.

5. Between February and late-April 1982, Respondent and Ms. Homeyer identified at least two properties for possible purchase. In one instance, an agreement could not be reached as to those items of Ms. Homeyer's personal property which would be acceptable in lieu of a cash down payment. When it became apparent to Ms. Homeyer that no other purchase on the above-described terms would be realized, she authorized Respondent to sell certain items as the means to provide cash for the down payment necessary to purchase a home.

6. During March and April 1982, Respondent had some of Ms. Homeyer's property appraised and certain items were sold in antique shows. However, as of late April 1982, no progress in locating a suitable home had been realized, Ms. Homeyer had received no monies from Respondent relative to the sale

of some of her property and Respondent had taken certain property from storage and sold it without Ms. Homeyer's authorization. Further, Respondent never advised her principal broker of her activities nor did she deliver to him any of the funds she obtained from the sale of Ms. Homeyer's property.

7. In late-April or early May 1982, Ms. Homeyer underwent foot surgery and was advised that her condition could be cancerous. At the time, it was unknown if a suitable home would be found and whether that would occur prior to her possible death. On May 5, 1982, Ms. Homeyer met with Respondent and they executed a written agreement, whereby the former assigned all of her personal property to Respondent for sale and/or exchange and authorized Respondent to liquidate that property. The agreement further provided that if all property held by Respondent was not liquidated prior to Ms. Homeyer's death, the remaining funds would be placed in trust for the benefit of her two minor children.

8. During the next two months, Ms. Homeyer was never advised as to the status of her property and was unable to contact Respondent in that regard. In mid-July 1982, Ms. Homeyer retained counsel and made written demand that Respondent return all personal property in her possession and provide an accounting as to the sale or other disposition of the remaining property which had been in her possession.

9. By letter, dated October 21, 1982, Respondent generally informed Ms. Homeyer as to efforts which had been undertaken to appraise, restore and/or sell some of the property in her possession. Respondent further mentioned various costs incurred as to the appraisal and restoration of that property. Respondent also reiterated that her efforts had been undertaken to produce funds necessary for a down payment for a home or condominium, but she acknowledged that no suitable residence had yet been identified. Respondent requested Ms. Homeyer to keep her posted "about what you want to do with the housing thing" and she advised Ms. Homeyer of a listing for a two bedroom townhouse duplex and pondered that Ms. Homeyer could live in one side and rent the other.

10. By letter, dated October 28, 1982, Ms. Homeyer advised Respondent that purchase of the duplex would not be economically feasible and reiterated that no accounting had been received as to the status of her property or any disposition thereof. By letter, dated October 29, 1982, a second demand was made that Respondent return all items of personal property entrusted to her. When compliance with that

demand was not forthcoming, Ms. Homeyer initiated litigation. No accounting was provided to Ms. Homeyer until July 9, 1986, when Respondent returned certain items pursuant to a writ of replevin.

11. By Stipulation, dated October 7, 1986, Ms. Homeyer and Respondent identified the status of some of the property which had been in Respondent's possession. That property consisted of guns, cameras, furs, clocks and watches, a coin collection, silver, jewelry, flatware, china, pewter, furniture, household and other miscellaneous items. The value of the property which Respondent sold was agreed to have been \$6,530.50 and Respondent received \$4,495.00 from the sale of that property. It was agreed that certain property, valued at \$6,799.50, was delivered by Respondent to third parties and that said property had not been recovered by Ms. Homeyer. It was also agreed that certain property still in Respondent's possession should be valued at \$4,820.50.

12. Some of the property which Ms. Homeyer had delivered to Respondent was subsequently returned to her. However, in Findings of Fact and Conclusions of Law, dated October 30, 1986, the Court concluded that Respondent had sold some of the property below fair market value, had interfered with Ms. Homeyer's possession and control of some of the property by intentionally refusing to return it and had converted the proceeds from the sale of some of the property to her own use. By reason thereof, the Court entered judgment on October 30, 1986 in favor of Ms. Homeyer totalling \$2,035.50 as a result of Respondent's breach of contractual and fiduciary duties to Ms. Homeyer, \$4,495.00 as a result of Respondent's conversion of proceeds from the sale of the property, \$6,799.50 as a result of Respondent's conversion of property upon transferring that property to others and \$4,820.50 as a result of Respondent's conversion of property still in her possession.

13. In the above-referenced Findings of Fact, the Court also noted that Ms. Homeyer had initiated bankruptcy proceedings on July 22, 1985 and that Respondent had been listed as a creditor in said proceedings. The Court further noted that an order was entered in those proceedings on October 30, 1985, whereby Ms. Homeyer was discharged of all claims, including those of Respondent relative to expenses she incurred in her efforts to repair, restore and dispose of Ms. Homeyer's property. The instant record also reflects that Respondent initiated bankruptcy proceedings in 1981 and that after entry of the October 30,



1986 Judgment, an order was entered in those bankruptcy proceedings relative to Respondent, whereby the just-stated Judgment was discharged.

#### CONCLUSIONS OF LAW

Respondent urges that her May 5, 1982 agreement with Ms. Homeyer terminated the real estate agent/principal relationship which had previously existed between them. Respondent further asserts that her subsequent conduct pursuant to that contract had no relevance respecting her status as a licensed sales agent and provides no basis upon which to enter a sanction as to that licensure. Respondent further urges that there is no proper basis to now conclude she is incompetent or unworthy to practice as a principal broker, inasmuch as whatever occurred prior to May 5, 1982 does not reflect either a continuing or presently existing pattern of misconduct.

Section 61-2-11, Utah Code Annotated (1953), as amended, provides that a real estate license may be suspended or revoked if the licensee is found guilty of:

- (8) being unworthy or incompetent to act as a principal broker, associated broker, or sales agent in such manner as to safeguard the interests of the public;  
\* \* \* \* \*
- (15) violating or disregarding this chapter, an order of the commission, or the rules adopted by the commission and the division.

Rule 9(a)(7) further provides:

All consideration received by a salesman in connection with a real estate transaction in which he is engaged on behalf of his broker shall immediately be delivered by him to his broker . . .

Upon a considered review of the conflicting evidence presented, Respondent's assertion that the May 5, 1982 agreement transformed what had been a real estate transaction between a principal and an agent to that of a contract between private parties is not well founded. The May 5, 1982 agreement does not reference the previously existing relationship between Ms. Homeyer and Respondent and, importantly, does not explicitly sever or alter that relationship. If it were Respondent's intent to effect a shift in her existing relationship with Ms. Homeyer, it was incumbent upon Respondent to utilize language clearly reflective of that intent, particularly when Respondent had come into possession of Ms. Homeyer's property as her agent in a real estate transaction, Respondent had already disposed of some of that property, and it was anticipated that she would retain possession of the remaining property with the written authorization to liquidate it.

Nothing in the May 5, 1986 agreement reflects that Ms. Homeyer no longer desired to obtain another home or that Respondent would no longer attempt to locate a home for Ms. Homeyer. Significantly, Respondent's efforts in that regard did not cease after that agreement was executed. To the contrary, Respondent acknowledged in her subsequent correspondence with Ms. Homeyer that continuing efforts to locate a home had been made. As of October 21, 1982, possibilities in that regard were still being explored. Simply put, the May 5, 1982 agreement did not change the relationship between Ms. Homeyer and Respondent as it relates to the purpose for which possession of Ms. Homeyer's property was initially transferred to Respondent. Thus, the manner in which Respondent disposed of that property is a matter properly cognizable by the Commission as to whether any basis exists to enter a sanction on Respondent's licensure as a real estate principal broker.

Concededly, the transaction under review occurred approximately six years ago and there is no evidence that Respondent has engaged in any misconduct since that time. Nevertheless, a violation of Section 61-2-11(8) may be established upon sufficient evidence of aggravated misconduct by a licensee during the course of a single real estate transaction. The instant record clearly reflects that Respondent held, sold or otherwise disposed of Ms. Homeyer's property in a manner entirely inconsistent with Ms. Homeyer's interest in that property. In certain instances, Respondent acted without authorization from Ms. Homeyer and failed to safeguard the latter's interest in the property which had been entrusted to her. Although Respondent's conduct was not governed by an statutorily mandated fiduciary duty between herself and Ms. Homeyer, Respondent clearly owed such a duty as a sales agent to Ms. Homeyer throughout the time under review and she failed to properly discharge that duty.

In addition to Respondent's breach of the fiduciary duty which she owed to Ms. Homeyer, Respondent failed to deliver to her principal broker the consideration she received from the sale of Ms. Homeyer's property. Thus, Respondent violated Section 61-2-11(15) and Rule 9(a)(7) relative thereto. Furthermore, Respondent knew that she had been given the only assets available to Ms. Homeyer which could be used to effect the purchase of another home. Without explanation, Respondent failed to account for those assets when repeated requests to do so had been made between July 1982 and October 1982, yet

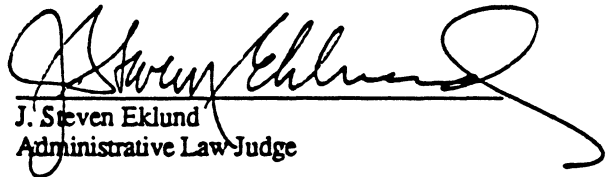
she ostensibly held herself out to Ms. Homeyer as being willing to continue to assist in the search for a home.

Arguably, the agreement between Ms. Homeyer and Respondent was somewhat unique and Respondent may have engaged in relatively unconventional efforts in her attempt to obtain a home for Ms. Homeyer. Respondent may also have encountered unforeseen difficulties in liquidating the property to generate cash and in her on-going relationship with Ms. Homeyer. Notwithstanding the foregoing, Respondent should have consistently acted in Ms. Homeyer's best interests and there is simply no evidence that she did so. To the contrary, the egregious nature of Respondent's misconduct operated to produce substantial financial harm to Ms. Homeyer. Based thereon, and given the disciplinary sanction which was entered in 1983, an appropriately severe sanction should now enter as to Respondent's licensure.

#### RECOMMENDED ORDER

WHEREFORE, IT IS ORDERED that Respondent's license to practice as a real estate principal broker be revoked, said revocation to become effective consistent with the provisions of Section 61-2-12(1)(f).

Dated this 14<sup>th</sup> day of December, 1988.

  
J. Steven Eklund  
Administrative Law Judge


ORDER

The foregoing Findings of Fact, Conclusions of Law Recommended Order are accepted as written. It is hereby ordered that the Utah real estate license of Juanita Taft Rogers will be revoked effective February 14, 1989.


Dated this 14th day of December, 1988.


UTAH REAL ESTATE COMMISSION

  
MARVIN L. HENDRICKSON

  
FREDRICK FROERER, III

  
WILLIAM H. COLEMAN

  
JERRY HAWLEY

  
PAUL NEUENSCHWANDER

The above Order is confirmed and approved by the undersigned this 15 day of Dec, 1988.

  
WILLIAM E. DUNN, EXECUTIVE DIRECTOR  
DEPARTMENT OF BUSINESS REGULATION