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**REAL ESTATE BROKERS AND SALESMEN: Trust and custodial accounts.**

A real estate broker may not delegate his duty to draw funds from a trustee or custodial account provided for by Act 306, P.A. 1919, as amended.

No. 4535

March 22, 1968.

Mr. Lenton G. Sculthorp, Director  
Department of Licensing and Regulation  
Lansing, Michigan

You advise me that the Department of Licensing and Regulation, in administering Act 306, P.A. 1919, as amended (the Real Estate Brokers and Salesmen's Act), which provides that real estate brokers maintain real estate custodial trust or escrow accounts, requires that the broker in a sole proprietorship or associate brokers affiliated with a partnership or corporation, could be the only signatories on the bank record and that they alone could draw from the trust or custodial fund in the account.

I understand that objections have been made by the industry of this interpretation because it tends to impair or disrupt the operation of the real estate business when the broker is absent from the office due to vacation, illness, etc.

You ask "whether a broker as trustee of a trust or custodial account can delegate the right to withdraw funds from such an account through a person not licensed under the provisions of Act 306 of Public Acts of 1919, as amended, such as a secretary, wife, or other third party including a real estate salesman, or whether a broker as trustee of the trust or custodial account is the only person under the law authorized to draw from the custodial or trust fund account."

Section 13 of Act 306, P.A. 1919, as amended (C.L.S. 1961 § 451.213; M.S.A. 1964 Rev. Vol. § 19.803) provides:

"The commission may upon its own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any real estate broker or real estate salesman or any person who shall assume to act in either such capacity within this state and shall have the power to suspend or revoke any license issued under the provisions of this act at any time where the licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of:

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"(j) Failing to deposit in a custodial trust or escrow account all moneys belonging to others coming into the hands of the licensee in compliance with the following requirements:

"(1) All deposits or other moneys accepted by every person, co-partnership, corporation or association holding a real estate broker's license under the provisions of this act *must be retained by such real estate broker pending consummation or termination of the transaction involved, and shall be accounted for in the full amount thereof at the time of the consummation or termination.*

"(2) Every real estate salesman *promptly on receipt by him of a deposit or other moneys on any transaction in which he is engaged on behalf of his broker-employer shall pay over the deposit or other moneys to the real estate broker.*

"(3) Under no circumstances shall a broker permit any advance payment of funds belonging to others to be deposited in the broker's business or personal account or be commingled with any funds he may have on deposit belonging to him.

"(4) Every real estate broker shall immediately deposit such moneys, of whatever kind or nature, belonging to others in a separate custodial or trust fund account maintained by the real estate broker with some bank or recognized depository until the transaction involved is consummated or terminated, at which time the real estate broker shall account for the full amount received.

"(5) Every real estate broker shall keep records of all funds deposited therein, which records shall indicate clearly the date and from whom he received the money, the dates deposited, the dates of withdrawals, and other pertinent information concerning the transaction, and shall show clearly for whose account the money is deposited and to whom the money belongs. All such records shall be subject to inspection by the commissioner or his deputies and by employees of the commission. Such separate custodial or trust account shall designate the real estate broker as trustee, and such account must provide for withdrawal of funds without previous notice." (Emphasis supplied)

It is the general rule that trustees must retain custody of trust funds and execute the trust themselves and not through the instrumentality of an agent; or, as it is sometimes said, they cannot delegate their powers. *Anderson et al. v. Roberts et al.*, 48 S.W. 847 (Mo. 1893).

In the case of *Meck v. Behrens et al.*, 252 P. 91 (Wash. 1927), the Court held that while a trustee may delegate to another a purely ministerial duty, he may not delegate his discretionary power. See also, *Cheever v. Ellis*, 134 Mich. 645 (1903).

It is difficult to understand how the withdrawal of funds from the trustee account provided for in Act 306 would be only ministerial as it would be within the discretion of the broker to determine in each transaction whether funds should be withdrawn.

Reading Section 13 of the act, it is my opinion that the broker alone is trustee of this custodial account and, as such, may not delegate that authority to anyone else.

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*Attorney General.*