



STATE OF KANSAS

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July 16, 1981

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ATTORNEY GENERAL OPINION NO. 81-163

Mrs. Jean Duncan
Investigator
Kansas Real Estate Commission
Room 1212, 535 Kansas
Topeka, Kansas 66603

Re: Personal and Real Property--Real Estate Brokers
and Salesmen--Prohibited Acts

Synopsis: The providing of a home protection plan by a real estate broker constitutes a gift or gratuity which is contingent upon a client's listing, purchasing or leasing property, and such action by a broker is a violation of K.S.A. 1980 Supp. 58-3062(a)(12). Cited herein: K.S.A. 1980 Supp. 58-3034, 58-3062; L.1975, Ch. 296, §1.

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Dear Mrs. Duncan:

On behalf of the Kansas Real Estate Commission, you request our interpretation of the Real Estate Brokers' and Salespersons' License Act, K.S.A. 1980 Supp. 58-3034 et seq. Specifically, you ask whether a real estate broker may provide, at no cost, or at "reduced" costs, a "home protection plan" to a seller during the listing period, and to the purchaser for a period of one year commencing on the date of closing. Briefly stated, the home protection plan is a contract offered by a separate company or corporation which would pay for certain necessary repairs to a home, and there would be no cost to either the broker or the seller if no sale occurred. If a sale were to take place, the seller's share (if any) of the cost of the plan

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would be withheld from the proceeds at closing, and the broker's share of the cost (which could be 100% depending upon the particular agreement) would be deducted from the broker's commission. The propriety of a broker offering such a plan to clients listing property with the broker is the question which has been raised.

K.S.A. 1980 Supp. 58-3062 prohibits certain acts by real estate brokers and salespersons, and provides, in part, as follows:

"(a) No licensee shall:

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"(12) Offer or give prizes, gifts or gratuities which are contingent upon a client's listing, purchasing or leasing property."

In order for an act to come within the above-quoted prohibition, two essential elements must be present: (1) A licensee must offer or give a "prize," "gift," or "gratuity"; and (2) the prize, gift, or gratuity must be contingent upon a client's listing, purchasing or leasing property.

In our judgment, an offer by a broker to provide, either at no cost or a reduced cost, a home protection plan to prospective clients satisfies the second-stated element essential to a violation of K.S.A. 1980 Supp. 58-3062(a)(12). It cannot be seriously contended that a broker would provide a home protection plan where the broker was not employed by one of the parties to a real estate transaction; rather, it seems clear that the plan would be offered only where a broker will receive a commission or other compensation for services rendered in the sale of real estate. Therefore, in our opinion, the offer of a home protection plan would be contingent upon a client's listing property with the broker.

A more difficult question, however, is whether the offer of a home protection plan satisfies the first-stated element essential to a violation of the above-quoted statute, i.e., does the providing of such a plan to a client listing real estate constitute a prize, gift, or gratuity? In Attorney General Opinion 78-311 (copy attached), former Attorney General Curt Schneider, in construing the provisions of L.1975, ch. 296, §1 (now repealed), opined that a broker's offer to provide a home warranty policy free of charge to a prospective lister was not the offer of a "prize." We agree with that interpretation. In Attorney General Opinion No. 79-128, we opined that a real estate broker could

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offer an unconditional gift certificate to any person who lists real estate for sale upon a standard listing contract. However, that interpretation was based upon a provision of the Kansas Real Estate Brokers' License Act (now repealed) which prohibited

"soliciting, selling, or offering, for sale, real property by offering 'free lots,' or conducting lotteries, or contests or offering prizes for the purpose of influencing a purchase of real property." (See L.1975, ch. 296, §1.)

The above-quoted provision was repealed upon enactment of the present license law (see L.1980, ch. 164, §47), and was, in effect, replaced by K.S.A. 1980 Supp. 58-3062(a)(12). As the present law includes a prohibition against "gifts" and "gratuities," whereas the former law did not, the question which now must be addressed, for the first time, is whether an offer to provide a home protection plan constitutes an offer of a "gift" or "gratuity" under K.S.A. 1980 Supp. 58-3062(a)(12).

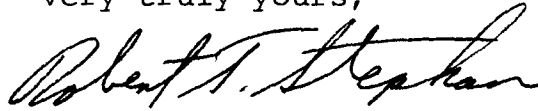
In construing statutory provisions, there is a presumption that the legislature understood the meaning of words it used and intended to use them. Rogers v. Shanahan, 221 Kan. 221, 223-224 (1977). There also is a presumption that the legislature used words in their ordinary and common meaning. Id. In this regard, it has been held that a "gift" is a voluntary transfer of property without consideration or compensation, and cannot be dependent upon an agreement. Signacon Controls, Inc. v. Mulroy, 329 N.Y.S.2d 175 (1972); see, also, 18 Words and Phrases 487. A "gratuity" has been defined as "something given freely or without recompense; a gift" United States v. Toner, 77 F.Supp. 908, 913 (1948); see, also, 18 Words and Phrases 435. However, it must be recognized that if the statutory prohibition against "gifts" and "gratuities" implies a total absence of consideration, the prohibition would be illusory and senseless: a broker could never offer a "gift," for the reason that the broker receives valuable consideration in the form of the lister's promise to pay the broker a commission should a sale be closed. Therefore, any construction of the terms "gift" and "gratuity," as said terms are used in K.S.A. 1980 Supp. 58-3062(a)(12), which requires an absence of consideration (as an essential element of a violation) runs afoul of the rule of statutory construction that it is to be presumed that the legislature did not intend to do a useless and senseless thing. See Herd v. Chambers, 158 Kan. 614, 628 (1944).

In our judgment, the legislature intended, by the use of the terms "gift" and "gratuity" in K.S.A. 1980 Supp. 58-3062(a)(12), to prohibit a real estate broker from offering or giving anything

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of value, other than the broker's services in the sale of real estate, upon the contingency of a client's listing, purchasing or leasing property. We believe that such an interpretation is the only reasonable method of resolving the ambiguity inherent in the statute, since, as stated above, the alternative construction creates an illusory and useless prohibition. Therefore, it is our opinion that the providing of a home protection plan by a real estate broker constitutes a gift or gratuity which is contingent upon a client's listing, purchasing or leasing property, and that such action by a real estate broker is a violation of K.S.A. 1980 Supp. 58-3062.

Very truly yours,



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