

2005

Immoral conduct by real estate brokers: Donaldson v Department of Real Estate, 2005

Roger Bernhardt

Golden Gate University School of Law, rbernhardt@ggu.edu

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>

 Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Bernhardt, Roger, "Immoral conduct by real estate brokers: Donaldson v Department of Real Estate, 2005" (2005). *Publications*. Paper 301.

<http://digitalcommons.law.ggu.edu/pubs/301>

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

**Immoral conduct by real estate brokers:
Donaldson v Department of Real Estate. 2005
Roger Bernhardt**

Real estate license not subject to revocation for conviction of unlawful intercourse with minor nonconsent.

Donaldson v Department of Real Estate (2005) 134 CA4th 948, 36 CR3d 577

After Donaldson, a Department of Real Estate licensee, entered a no contest plea to unlawful intercourse with a minor (Pen C §261.5(c)), the Real Estate Commissioner filed a disciplinary accusation to revoke or suspend his license under Bus & P C §§490 and 10177(b), alleging that his conviction was a crime involving moral turpitude and substantially related to the qualifications, functions, or duties of a real estate licensee. At the administrative hearing, Donaldson admitted engaging in unlawful intercourse, but testified that he believed the victim had consented, although he conceded that she lacked the legal capacity to consent. The Commissioner declined to adopt the administrative law judge's proposed decision in Donaldson's favor. Instead, she directed revocation of his license, finding that the victim, his wife's sister, was a nonconsenting participant. Donaldson's mandamus petition was granted on the ground that the weight of the evidence did not support the finding that the intercourse was nonconsensual.

On remand, the Commissioner again revoked the license, omitting any finding that the victim had not consented in fact, but concluding that discipline was proper on the ground that, in criminal law, consent is not a defense to the crime of sexual intercourse with a minor.

The court of appeal reversed. Under §10177(b), Bus & P C §490 limits the Commissioner's discretion to suspend or revoke a real estate license for convictions of crimes involving moral turpitude to crimes "substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued." At the time of Donaldson's conviction, 10 Cal Code Regs §2910 specified that a crime was deemed to be "substantially related" within the meaning of §490 if it involved "[s]exually related conduct causing physical harm or emotional distress to a person who is an observer or non-consenting participant in the conduct."

The court rejected the Commissioner's rationale that a minor is incapable of consenting to sexual relations and is therefore a "non-consenting participant" in any sexual relations he or she may have. The court explained that the statutory presumption of nonconsent was abandoned in 1970, when the legislature struck the offense of sexual intercourse with a minor (commonly known as statutory rape) from the statutory definition of rape and adopted Pen C §261.5, which treats sexual intercourse with a minor as a crime with or without the minor's consent. As the supreme court recognized, in the 1970 amendments "the Legislature implicitly acknowledged that, in some cases at least, a minor may be capable of giving legal consent to sexual relations." *People v Tobias* (2001) 25 C4th 327, 334, 106 CR2d 80. Accordingly, that general principles of criminal law could not support the Commissioner's ruling that the victim here was a "nonconsenting participant" in the sexual intercourse underlying Donaldson's conviction.

THE EDITOR'S TAKE: Donaldson was able to retain his license because the DRE erred in concluding that a 16-year-old was categorically incapable of consenting to sex, not because of any doubts the court had about the relationship of sex with a minor to real estate brokering. I might have thought that the connection between such activities was too slight to support revocation, given that car salesmen are able to hold on to their licenses despite similar misconduct (see *Brewer v DMV* (1979) 93 CA3d 358, 155 CR 643), but then I read the case of *Cannizzaro v Commonwealth of Pennsylvania* (Pa Commw 1989) 564 A2d 564.

In that case, John Cannizzaro, a real estate broker, accompanied by his brother Anthony, a real estate salesperson, and by his father Frank, went to Kenneth Manear's office to complain about a judgment Kenneth was trying to collect for unpaid commissions John owed him. A dispute broke out and, according to the court, "Manear took from John Cannizzaro the baseball bat he had brought with him, struck Frank Cannizzaro with it and began to choke him. Coming to his father's aid, Anthony Cannizzaro struck Manear on the head with a hammer, to no avail, and ultimately shot Manear three times with the gun he carried for self-protection." After the brothers were both convicted of third degree murder, the real estate commission revoked their real estate licenses. The revocations were upheld because the criminal action at issue was perpetrated upon a business associate because of business dealings [W]e cannot say that the penalty of revocation is patently unreasonable, particularly given the Commission's explanation that its decision ultimately turned upon the fact that underlying felony convictions were *undeniably linked to the real estate business* itself. [Emphasis added.]

That tells me that matters may not be as simple as they seem. Moral turpitude, in and of itself, may not be sufficient to lead to license revocation unless there is also some business purpose involved along with it. Donaldson may have been spared because his victim was "merely" a family member; had she been a client or fellow agent, he might have been in real trouble. —*Roger Bernhardt*