LETTER OPINION
2002-L-39

July 12, 2002

Ms. Linda Hickman
Williams County State's Attorney
PO Box 2047
Williston, ND 58802-2047

Dear Ms. Hickman:

Thank you for your letter asking numerous questions about the county recorder's duties under N.D.C.C. § 30.1-11-01, regarding the safekeeping of wills.

Section 30.1-11-01, N.D.C.C., is part of North Dakota's enactment of the Uniform Probate Code. N.D.C.C. §30.1-01-01. As originally enacted, N.D.C.C. §30.1-11-01 allowed a testator to deposit a will 'with any court for safekeeping, under rules of the court." 1973 N.D. Sess. Laws ch. 257, § 1. Section 30.1-11-01, N.D.C.C., has since been amended to read as follows:

> **30.1-11-01. (2-515) Deposit of will in testator's lifetime.** A will may be deposited by the testator or the testator's agent with a recorder for safekeeping. The will must be sealed and kept confidential. During the testator's lifetime, a deposited will must be delivered only to the testator or to a person authorized in a writing signed by the testator to receive the will. A conservator may be allowed to examine a deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible, and to ensure that it will be resealed and kept on deposit after the examination. Upon being informed of the testator's death, the recorder shall notify any person designated to receive the will and deliver it to that person on request; or the recorder may deliver the will to the appropriate court.

This section is to be construed to further the underlying purposes and policies of the Uniform Probate Code including discovering and making effective the intent of a decedent in distribution of the decedent's property and promoting a speedy and efficient system for liquidating the estate of a decedent and making distribution to the decedent's successors. N.D.C.C. § 30.1-01-02(2)(b) & (c).

You first ask two questions concerning whether the county recorder may disclose the existence of the will and the fact that it has been deposited for safe keeping to an individual other than the testator during the testator's life. If so, you ask if there are any limitations as to who may receive the information. Section 30.1-11-01, N.D.C.C. states: "[t]he will must be sealed and kept confidential." The arguable implication that the very existence of the will is to be kept confidential by the county recorder is inconsistent with another provision in the Uniform Probate Code that allows a testator to have a will drafted in a specific form and recorded with the Secretary of State as part of a public registry system allowing persons to discover the existence of the testator's will. See N.D.C.C. ch. 30.1-08.2 (International Wills), specifically N.D.C.C. § 30.1-08.2-09. As noted, the Legislature changed the depository of wills from the court to the recorder's office. Compare 1973 N.D. Sess. Laws ch. 557, § 1 with 1999 N.D. Sess. Laws ch. 278, § 55 (effective Jan. 1, 2001). The change made the record of the deposit of a will subject to the open records law. N.D.C.C. § 44-04-17.1. See also 2002 N.D. Op. Att'y Gen. L-06 (open records law does not apply to court records). The "sealed and confidential" language suggests that it is the content of the will that is confidential, not fact of the deposit of the will. Because an exception to the open records law must be specific and will not be implied, Hovet v. Hebron Pub. Sch. Dist., 419 N.W.2d 189 (N.D. 1988), it is my opinion that the county recorder may disclose the fact that the testator has deposited a will for safekeeping to members of the general public who request the information, but not the contents of the will.

You next ask whether, during the testator's lifetime, the will may be delivered to the personal representative designated in the will. Section 30.1-11-01, N.D.C.C., provides: "[d]uring the testator's lifetime, a deposited will must be delivered only to the testator or to a person authorized in a writing signed by the testator to receive the will." The testator may authorize any person to receive the will from the deposit, so long as authorization is in a signed writing. However, the will must be sealed and kept confidential, which means that the will itself cannot be the source of this authorization because the county recorder may not necessarily know who is the personal representative named in the will. Therefore, it is my further opinion that only the testator or a person authorized in writing by the testator may receive the will, and the personal representative named in the will may not receive the will without this specific written authorization before the testator's death.

Your next set of questions concerns the recorder's authority to require proof that the signed writing authorizing a person to receive the will was in fact signed by the testator, whether proof of identity may be required of the testator or the person designated in writing to receive the will, and whether the person receiving the will may be required to sign a receipt. None of these questions is addressed in N.D.C.C. § 30.1-11-01. The issue is whether the county recorder has inherent authority to require such proof. Where the powers and duties of an officer are prescribed by the constitution or statutes, these powers and duties are measured both by the terms of the grant of the powers and duties and

those necessarily implied from those terms. Brink v. Curless, 209 N.W.2d 758, 767 (N.D. 1973) overruled on other grounds by City of Bismarck v. Muhlhauser, 234 N.W.2d (N.D. 1975). County officers have the powers expressly or impliedly conferred upon them by statute and the powers reasonably necessary to carry into effect the powers and duties that have been delegated by statute. Id. at 769. It is reasonable for the county recorder to seek to protect both the county's and the testator's interests by verifying the identity of the person who received the will and proof of receipt.

You also ask whether the signed writing authorizing a person to receive the will needs to be notarized or otherwise authenticated. There is no requirement for notarization in N.D.C.C. § 30.1-11-01, implying that none is required. A person who makes a material false written statement that the person does not believe to be true in a governmental matter is guilty of a class A misdemeanor. N.D.C.C. § 12.1-11-02(2)(a). This statute penalizes a person who submits a forged document in order to receive another individual's will. Further, a person who, without lawful authority, knowingly destroys, conceals, removes, or otherwise impairs the availability of a government record commits a class A misdemeanor. N.D.C.C. § 12.1-11-05(1)(b) and (2)(b). A will kept under N.D.C.C. § 30.1-11-01 is, for this purpose, arguably a government record. N.D.C.C. § 12.1-11-05(3). These penalties should be borne in mind when determining what are reasonable precautions for a county recorder to take in protecting a will deposited under N.D.C.C. § 30.1-11-01. Notarization would not necessarily enhance security beyond these statutes, and may unnecessarily hinder individuals acting under this statute. Requiring proof of identification from persons claiming to be authorized to receive the will and requiring the person receiving the will to sign a receipt not only reasonably protects the recorder's office but helps to provide proof for a prosecution if the person is acting falsely.

Section 30.1-11-01, N.D.C.C., permits a conservator to examine a deposited will of a testator during the testator's lifetime. You have asked who qualifies as a conservator and whether proof of identification may be required. A conservator "means a person who is appointed by a court to manage the estate of a protected person," and includes limited conservators. N.D.C.C. § 30.1-01-06(8). A limited conservator is a person or nonprofit corporation appointed by the court to manage certain financial resources specified by the court for a person with limited capacity. N.D.C.C. § 30.1-01-06(31). Conservators are appointed by a court pursuant to N.D.C.C. ch. 30.1-29. See N.D.C.C. §§ 30.1-29-07, 30.1-29-08 (order for appointment); 30.1-29-21 (letters of conservatorship). Therefore, any person claiming to be a conservator would have an appointment by a court and should be able to prove this appointment. A conservator's powers may be restricted. N.D.C.C. § 30.1-29-26. Therefore, a person dealing with a conservator should check whether there are restrictions on the powers of the conservator because these restrictions are effective regarding third persons such as the recorder. N.D.C.C. § 30.1-29-23. It would therefore be reasonable for a recorder to check and obtain a copy of the conservator's order for appointment or letters of conservatorship.

You next ask whether it would be permissible for the testator to review the will "without necessarily withdrawing it from safekeeping." Section 30.1-11-01, N.D.C.C., permits the deposited will to be delivered to the testator, and would permit the testator to immediately redeposit the will with the recorder. It would be within the recorder's discretion to permit the testator to review the will in a private part of the recorder's office. The testator could return the will under seal to the recorder for deposit without the will having even left the recorder's office.

You also ask a second set of questions addressing the situation where a testator has died with a will on deposit with the recorder. After the death of the testator, the recorder has two choices for whom to deliver the will. "Upon being informed of the testator's death, the recorder shall notify any person designated to receive the will and deliver it to that person on request; or the recorder may deliver the will to the appropriate court." N.D.C.C. § 30.1-11-01.

In order for a testator to designate a person to receive the will, county recorders should put in place a means allowing the testator to make this designation. Since the will is required to be sealed and kept confidential under N.D.C.C. § 30.1-11-01, the will itself cannot be the source to inform the recorder who has been designated to receive the will. However, either this designation may be made by the testator and left with the recorder, as indicated above, or the testator may leave a designation in writing with another person who will deliver it to the recorder after the testator's death.

You first asked to whom the recorder may disclose the existence of the will following the testator's death. As indicated above, this is public information. The recorder should, however, seek the person designated by the testator to receive the will or deliver the will to the appropriate court.

You next ask to whom may the county recorder release the original will following the death of the testator. Section 30.1-11-01, N.D.C.C., determines that this can be to a person designated to receive the will, presumably designated by the testator prior to death, or "the appropriate court." While the appropriate court is not stated with great specificity, it may be inferred that this would be the court having jurisdiction in which the testator's will may be probated. See N.D.C.C. § 30.1-13-01(1).

You also ask whether the recorder may release the will to the personal representative by opening the will to determine who is the personal representative. Because section 30.1-11-01, N.D.C.C., requires that the will must be sealed and kept confidential, the will itself cannot be the source of information to determine who is designated to receive the will. Therefore, the person who is designated to receive the will must be designated in some writing other than the will itself.

You next ask whether the recorder may permit a review of the will following the death of the testator, and if so, are there any limitations regarding who may review the will. On the initial question, the statute is silent. However, upon being informed of the testator's death, the recorder is to either notify a person designated to receive the will and deliver it to that person upon request or to deliver the will to the appropriate court. N.D.C.C. § 30.1-11-01. Therefore, if a person who is authorized in a writing signed by the testator to receive the will, wishes to examine the will, the recorder would be within the bounds of the law to permit the person to do so. More often than not the nominated personal representative, an heir, or a devisee will have a copy of a will disclosing the named personal representative. Regardless, if there is no designation in writing regarding delivery to a person after death the only other option is to deliver the will to the court.

The next several set of questions involve protecting the testator's intent and the office of the recorder from fraud or deceit. You ask whether the recorder may require a death certificate or other proof of death before releasing the will. As noted previously, the recorder would have substantial discretion in implementing N.D.C.C. § 30.1-11-01. Requiring proof of death, such as a death certificate, before delivering the will to the court, would be a reasonable requirement under N.D.C.C. § 30.1-11-01, and it would be within the recorder's discretion to require this for the protection of the testator, and the office of recorder. Section 30.1-11-01 otherwise permits delivery to a person designated in writing before or after death so there would need to be no determination of death to make delivery to the designated person.

You also ask whether the county recorder may maintain a copy of the will. Section 30.1-11-01, N.D.C.C., requires that the will must be sealed and kept confidential, and that upon being informed of the testator's death the recorder's duties are to deliver the will to a person designated to receive it or to deliver the will to the appropriate court. None of these duties would require the county recorder to maintain a copy of the will, which would require that the seal on the will be broken. Therefore, N.D.C.C. § 30.1-11-01 would not support the recorder maintaining a copy of the will.

Sincerely,

Wayne Stenehjem
Attorney General

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