

**LETTER OPINION
2005-L-03**

January 17, 2005

Ms. Barbara Whelan
Pembina County State's Attorney
301 Dakota St W # 9
Cavalier, ND 58220

Dear Ms. Whelan:

Thank you for your letter asking whether a photocopy of a death certificate may be filed with the county recorder to transfer title to real estate under N.D.C.C. § 47-19-06, and whether a filing fee is owed for filing a document that is a substitute for a document rejected by the Recorder for which a filing fee had been paid. It is my opinion that N.D.C.C. § 47-19-06 permits only a certified death certificate to be filed under that section to transfer title to real property; where the filing fee did not result in the recording of a document, the filing fee should have been refunded; and that a filing fee is owed for recording the substitute document.

ANALYSIS

Your first question concerns the state law which permits a death certificate to be filed with the county recorder, together with the legal description of the property to which the recording of the death certificates relates, to evidence transfer of the real estate to surviving joint tenants or to the remainder of a life estate. N.D.C.C. § 47-19-06. This law provides:

In all cases of joint tenancy in lands, and in all cases where an estate, title, or interest in, or lien upon, lands has been or may be created, which estate, title, interest, or lien was or is to continue only during the life of any person named or described in the instrument by which the estate, title, interest, or lien was created, a copy of the death certificate of the joint tenant or of the person upon whose life the estate, title, interest, or lien was or is limited, duly certified by any officer who is required by the laws of the state or country in which the record is made, to keep a record of the death of persons occurring within the jurisdiction of the officer, may be recorded in the office of the recorder of the county in which the lands are situated. The legal description of any property to which the recording of

the death certificate relates must be attached to the death certificate. The certified copy of death certificate, or the record thereof in the office, or a duly certified copy of the last mentioned record, is prima facie evidence of the death of the person and the termination of the joint tenancy and all the estate, title, interest, and lien as was or is limited upon the life of that person.

(Emphasis supplied). The first sentence of this section requires that the copy of the death certificate to be filed must be “duly certified.” Id. However, you note that an attorney has questioned whether the last sentence permits the filing of a photocopy.

The last sentence of N.D.C.C. § 47-19-06 does not alter the requirement for filing only a certified copy. The last sentence lists three types of records which constitute prima facie evidence of the death of the person and the termination of the joint tenancy or any interest that was or is limited on the life of that person. This last sentence of N.D.C.C. § 47-19-06 does not state what may be filed in the recorder’s office, but only states what three items will be prima facie evidence¹ of the death of a person holding a joint tenancy, or a life estate. Those three items are the “certified copy of death certificate, or the record thereof in the office [of the recorder], or a duly certified copy of the last mentioned record.” Id. The first item is a certified copy of a death certificate. The second is the record of the certified death certificate in the office of the county recorder which has been filed pursuant to the first sentence of section 47-19-06. The third item is a duly certified copy of the last mentioned record, which would be a copy of the certified death certificate that was filed with the county recorder and which is certified by the recorder as a record of the recorder’s office.² Therefore, it is my opinion that only a certified copy of the death certificate may be recorded as evidence of the transfer of title to real property under N.D.C.C. § 47-19-06.

Your second question concerns a situation where an attorney filed a document entitled an “Affidavit of Possession and of Death” together with a photocopy of a certified death certificate with the county recorder. Your letter states that the recorder assigned a document number but did not record the document. A recording fee was charged at the time it was filed. Subsequently, after being contacted by the recorder and told that the photocopy of the death certificate would be rejected for filing, the attorney presented a certified copy of the death certificate for filing, but refused to pay an additional filing fee.

The law allowing the county recorder to charge and collect certain fees states that the fee is “[f]or recording an instrument affecting title to real estate.” N.D.C.C. § 11-18-05(1). The

¹ Therefore, a court, or an attorney giving a title opinion, may rely on these three types of evidence unless there is competent evidence calling the facts stated therein into question. See N.D.A.G. 85-41.

² See N.D.C.C. § 11-18-05(3) (regarding the fee for making a certified copy of a recorded instrument).

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statute establishes a fee for recording, not for presenting a document to be recorded. Therefore, it is my opinion that if the recorder did not record the document, the recorder is not legally entitled to retain the recording fee. The fee for recording the "Affidavit of Possession and of Death" and the photocopy of the death certificate should have been returned to the attorney who had presented them for recording, together with the recording fee, when these documents were rejected. When that attorney returned with a certified death certificate for filing, which was ultimately recorded, then a recording filing fee should have been charged at that time.

Sincerely,

Wayne Stenehjem
Attorney General

eee/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).