

**LETTER OPINION
2005-L-23**

September 21, 2005

Ms. Lisa B. Gibbens
Towner County State's Attorney
PO Box 708
Cando, ND 58324

Dear Ms. Gibbens:

Thank you for your letter asking whether a personal representative's deed may be recorded under N.D.C.C. § 11-18-03(3) even if it does not terminate a joint tenancy or life estate. You further ask whether amendments to N.D.C.C. § 11-18-03(3) effective August 1, 2005, apply to deeds dated before that time. It is my opinion that any personal representative's deed may be recorded under N.D.C.C. § 11-18-03(3), not just those terminating a joint tenancy or a life estate. It is my further opinion that the recording date, not the date a deed was signed and dated, determines whether the 2005 amendments to N.D.C.C. § 11-18-03(3) apply to the instrument.

ANALYSIS

Specific instruments affecting real property may be recorded without an auditor's certificate as required by N.D.C.C. § 11-18-02 under the exceptions contained in N.D.C.C. § 11-18-03. Among those exceptions are:

A personal representative's deed or any document terminating joint tenancy or a life estate or any judgment or decree affecting title to real estate, which must be presented to the auditor's office prior to being placed of record in order to allow the auditor to make such changes in the tax rolls of the auditor's office as may be necessary.

N.D.C.C. § 11-18-03(3). You question whether the limiting words "terminating joint tenancy or a life estate" apply only to the word "document" or also apply to a personal representative's deed.

The North Dakota Supreme Court has provided guidance for use when interpreting statutes:

When interpreting a statute, we first determine if the statute, on its face, is unambiguous. . . . If it is, we apply the plain language. . . . However, when a statute is not clear on its face, we look to intrinsic aids, such as legislative history, to determine the legislature's intent.

State v. Eldred, 564 N.W.2d 283, 289 (N.D. 1997) (citations omitted). This statute is ambiguous because it is not clear whether the limiting words "terminating joint tenancy or a life estate" apply only to the immediately preceding word "document" or whether they apply both to a "document" and to a "personal representative's deed." A generally accepted rule aiding the construction of statutes is that a limiting phrase or clause is to be restrained to the last antecedent. Kohler v. Stephens, 24 N.W.2d 64, 72 (N.D. 1946). This rule is only applied, however, if the subject matter or context does not indicate a different legislative intent. Id.

Fortunately, this issue was discussed when N.D.C.C. § 11-18-03(3) was amended by the 2005 Legislative Assembly. 2005 N.D. Sess. Laws ch. 103. Malcolm Brown, representing the Real Property and Probate Section of the State Bar Association of North Dakota, explained the bill to the House Judiciary Committee:

A Personal Representative deed is what is used to distribute out of a probate, and then what we've also added is a document determining joint tenancy, instead of an order. Because we don't get orders terminating joint tenancy any more. All that's required to terminate a joint tenancy is the simple recording of the death certificate.¹

Hearing on S.B. 2180 before the House Comm. on the Judiciary, 2005 N.D. Leg. (Mar. 2) (statement of Malcolm Brown). This testimony indicates that the word "order" was changed to "document" to update the statute to the current practice. Orders are no longer used to terminate a joint tenancy or a life estate; instead, all that is required to terminate such an interest is the recording of a death certificate. The limiting language was intended to address only the recording of such a document, and was not intended to address a personal representative's deed.

In addition, the 2005 amendments replaced "final decree of distribution" with "personal representative's deed." 2005 N.D. Sess. Laws ch. 103. Again, this change was made to update the law to reflect current practice. Hearing on S.B. 2180 before the House Comm. on the Judiciary, 2005 N.D. Leg. (Mar. 2) (statement of Malcolm Brown). ("What we're doing is bringing this section into the 21st Century. A final decree of distribution . . . is crossed out. We haven't used final decree of distribution since the Uniform Probate Code . . . went into effect in 1975"). A decree of distribution is an instrument by which heirs receive the property of a deceased person. Black's Law Dictionary, 419 (7th ed. 1999).

¹ See N.D.C.C. § 47-19-06 concerning the purposes for and effect of recording a death certificate.

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The decree distributed property of an estate and was not subject to the limiting words. The 2005 change updated the law; it was not meant to subject "personal representative's deed" to the limiting words.

Therefore, it is my opinion that the limiting words "terminating joint tenancy or a life estate" apply only to the last antecedent term "document" and do not apply to a personal representative's deed.

You also asked whether the 2005 amendments to N.D.C.C. § 11-18-03(3) apply to deeds dated prior to the amendment's effective date. Senate Bill 2180, 2005 N.D. Leg., amended N.D.C.C. § 11-18-03(3) and became effective August 1, 2005. N.D. Const. art. IV, § 13, N.D.C.C. § 1-02-42. The North Dakota Supreme Court has indicated support for the principal that a recording act is applied as it exists at the time a deed is recorded, not when it is dated. The Court quoted an earlier United States Supreme Court case stating, in part, "[i]t is within the undoubted power of state Legislatures to pass recording acts, . . . and the power is the same, whether the deed is dated before or after the passage of the recording act." McCoy v. Davis, 164 N.W. 951, 953 (N.D. 1917), quoting Jackson ex dem. Hart v. Lampshire, 3 Pet. 280, 7 L.Ed. 679 (1830).

Much more recently, the North Dakota Supreme Court applied the law that was in effect at the time an action is taken under that law, instead of the law in effect when the action was initiated or contemplated, when it held that a new township ordinance charging reviewing costs for application permits was effective against applicants who had begun the process but who had not yet obtained their permit. Fairmount Township Board of Supervisors by the Fairmount Township Zoning Board v. Beardmore, 431 N.W.2d 292, 294-95 (N.D. 1988). See also N.D.A.G. Letter to Meyer (July 25, 1991) (statute not retroactive because it draws upon antecedent facts for its operation or because part of the requisites of its action are drawn from time antecedent to its passage). Therefore, it is my further opinion that the recording laws in effect at the time a deed is recorded govern its recording rather than the recording laws in effect at the time the deed was signed or dated.

Sincerely,

Wayne Stenehjem
Attorney General

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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).