OPINION
66-349

June 23, 1966 (OPINION)

Mr. Roger A. McKinnon

State's Attorney

Oliver County

RE: Taxation - Estate Taxes - Nonresident Attorneys

This is in reply to your letter of April 12, 1966, in which you asked that we give our opinion concerning certain questions regarding the determination of estate taxes by the county courts and the state tax commissioner. In addition, you also asked certain questions relative to who may represent an administrator or executor in a probate matter and in the determination of estate taxes.

We herein submit our opinion relative to your questions which we have quoted preceding our opinion to each of your questions.

1. If any of the property in North Dakota left by a nonresident decedent must eventually be probated in North Dakota in order to get title to it decreed to the proper beneficiary, must the estate tax determination be made by the county court, subject to the approval of the tax commissioner,-

    a. If a probate proceeding has been started in the county court prior to the filing of the application for estate tax determination?

    b. If a probate proceeding has not been started in the county court at the time the application for estate tax determination is filed?"

Question "1.(a)" in essence inquires whether or not the estate tax determination of a nonresident decedent in which a probate has been commenced "must" be made by the county court, subject to the approval of the tax commissioner, and question "1.(b)" inquires whether or not the same proposition is true if a probate proceeding had not been commenced before the filing of the application for an estate tax determination.

Section 57-35-15 of the North Dakota Century Code provides that the county court having jurisdiction over the estate "shall" assess the estate tax payable thereon before final distribution of the estate. Section 57-37-26 provides, in part, that "The tax commissioner shall approve the determination by the county court of the amount of the estate tax required to be paid, * * * *."

Assuming that an ancillary probate of the nonresident decedent's property in this state has been commenced, it is clear that the

estate tax determination must first be made by the county court, subject to the approval of the tax commissioner. However, if such probate proceedings have not been initiated, it is apparent that upon application being made to him the tax commissioner may determine and assess the amount of estate tax due without any prior or subsequent submission f the estate tax matter to any county court. See Section 57-37-27(1), (1965 Supp.) which provides, in part, that where there is an "* * * * absence of administration in this state upon the estate of a nonresident, the tax commissioner, at the request of an executor or administrator duly appointed and qualified in the state of the decedent's domicile, or of a grantee under a conveyance made during the grantor's lifetime, * * * *."

Your second question is quoted as follows:

> 2. Is there any situation under Section 57-37-26 in which the tax commissioner has exclusive authority to make the estate tax determination for the North Dakota estate of a nonresident decedent, that is, the matter never goes through the county court?"

The tax commissioner does not have "exclusive" jurisdiction to make an estate tax determination for any particular type of gross estate of a nonresident decedent if by exclusive jurisdiction it is meant that the county court would never under any circumstance have jurisdiction to make the estate tax determination for that particular type of gross estate. For example, where a probate proceeding will eventually be necessary to decree a nonresident decedent's property to the proper beneficiaries but not probate proceeding has actually been started, it is our opinion that application for estate tax determination may be made either to the appropriate county court (in which case the tax would be determined and assessed by the county court subject to the approval of the tax commissioner) or the application may be submitted directly to the state tax commissioner who would then determine and assess the tax without any action of any kind by any county court being required. Similarly, if the nonresident decedent's gross estate in North Dakota consisted only of property held in joint tenancy or that had been transferred by joint tenancy or that had been transferred by decedent in contemplation of death or was for any other reason a part of his North Dakota gross estate but in no event subject to probate proceedings, application for estate tax determination may be made either to the county court or directly to the tax commissioner. This is apparent from the provisions of Section 57-37-17 and subsection 1 of Section 57-37-27 (1965 Supp.)

Your third question is quoted as follows:

> 3. Is there any situation under Section 57-37-27 in which the county court, for example, of Oliver County, has exclusive jurisdiction to determine the estate tax, subject to the tax commissioner's approval, for the property of a nonresident decedent if some or all of the property in this state is located in Mercer County?"
>
> (Oliver)

We believe "Mercer County" was inadvertently named in the last line of this question in place of "Oliver County", since it is obvious that Oliver County would not have jurisdiction if none of the property were located in it and we will therefore answer the question on the basis that Oliver County rather than Mercer County was intended.

The last sentence of Section 57-37-27(1) is quoted as follows:

> * * * *Whenever in such case the tax is not adjusted within four months after the death of the decedent, the proper county court, upon application of the tax commissioner, shall appoint an administrator in this state."

It appears that in such cases where the tax is not adjusted within four months after the death of the decedent, and the tax commissioner has requested that the proper county court appoint an administrator, that such county court acquires jurisdiction to make the appropriate estate tax determination, subject, however, as in any other case, to the approval of the tax commissioner. If some of the nonresident decedent's gross estate were in Oliver County and some in another county, the county court of the county in which the administrator was first appointed would have jurisdiction to determine and assess the tax, subject to the tax commissioner's approval, and the other county should not thereafter entertain any application for determination of the estate tax. Similarly, if the nonresident decedent's North Dakota gross estate was not subject to probate proceedings because it consisted only of joint tenancy property or property transferred in contemplation of death or other property not subject to probate but subject to estate tax determination, the county court to which the application for estate tax determination was first submitted would have jurisdiction to determine and assess the tax on the entire North Dakota gross estate.

Question four is quoted as follows:

4. If the estate tax determination for the North Dakota property of a nonresident decedent either can be or must be made by the county court, subject to the tax commissioner's approval, is a nonresident attorney who is not licensed to practice law in North Dakota authorized to handle the estate tax matter in the county court and is he authorized to handle the probate matter if a probate is conducted?"

We will first determine whether a nonresident attorney not licensed to practice law in North Dakota is authorized to conduct either an ancillary or a domiciliary probate in a county court of this state.

Section 27-11-02 of the North Dakota Century Code established the fundamental rule for admission to the practice of law in the State of North Dakota. It vests in the Supreme Court the power to admit persons to practice as attorneys and counselors at law.

In an order dated June 20, 1963, the Supreme Court adopted "RULES OF COURT FOR THE DISTRICT COURTS OF THE STATE OF NORTH DAKOTA", to become effective August 1, 1963, wherein the court established the rules for the admission to practice of nonresident attorneys before

the district courts in North Dakota. The rule is quoted as follows:

"RULE I

ATTORNEYS

(a) Nonresident Attorneys. An attorney at law duly admitted and licensed to practice law in a foreign state or country may file pleadings or other instruments relating to litigation in the District Court provided he first appoints as his associate attorney a resident attorney duly admitted and licensed to practice law in the State of North Dakota. The name of the associate attorney shall be subscribed to all pleadings and other instruments before they shall be received for filing by the Clerk, and the associate attorney must appear personally and, unless excused by the court, shall remain in attendance with the nonresident attorney in all appearances before the Court.

(b) Stipulations. No agreement or consent between the parties or their attorneys with respect to proceedings in the District Court shall be binding, in case of a dispute as to its terms, unless reduced to writing and signed by the parties or their respective attorneys or made in open Court and read into the record of the proceedings.

Since a similar rule has not been promulgated concerning the admission to practice in the county courts, the courts in which the exclusive jurisdiction in probate matters is vested by Section 111 of the North Dakota Constitution, we believe we must draw our conclusions from the interpretation of Section 27-11-27 of the North Dakota Century Code, which is quoted as follows:

"27-11-27. WHEN FOREIGN ATTORNEYS MAY PRACTICE IN THIS STATE. Any member of the bar of another state actually engaged in any cause or matter pending in any court in this state may be permitted by such court to appear in and conduct such cause or matter while retaining his residence in another state and without having complied with the provisions of this chapter designating the persons entitled to practice law in this state; provided that such right to appear in the courts of this state shall terminate immediately whenever such person is disbarred from appearing in the courts of his own state."

Section 27-11-27 provides that a member of the bar or another state who is actually engaged in "any cause or matter pending in any court in this state" may be permitted by the court to appear in the pending cause or matter. We believe the quoted language "any cause or matter pending in any court in this state" to be the crucial language in this section.

Insofar as an action is concerned, we believe that the use of the word "pending" means that the action has been instituted in the court by counsel licensed to practice within the State of North Dakota. The consequences of this interpretation would mean that resident counsel has instituted the action by personally signing the pleadings in the action, subsequently calling upon nonresident counsel to

assist in the litigation of the action. The nonresident counsel "may" then be permitted by the court to assist in the action.

Although this exact situation concerning Section 27-11-27 has not come before the Supreme Court of this state, the Supreme Court did construe this section relative to the admittance of a nonresident attorney in the prosecution of a criminal matter in State v. Kent, 4 N.D. 577, 62 N.W. 631. The Supreme Court also stated that the trial judge could refuse the nonresident attorney the right to continue in the action should he deem such refusal necessary.

We do not believe that there is any question that a nonresident "may" be admitted to practice in the courts of this state in "* * * *any cause or matter pending in any court * * * *." However, we do believe and it is our opinion that the action or other cause or matter must be instituted by legal counsel licensed to practice in this state, or by nonresident legal counsel who has first appointed as his associate attorney a resident attorney duly admitted and licensed to practice law in the State of North, who has subscribed his name to all pleadings or other instruments before they are received for filing by the clerk of court. We recognize the fact that no such rule has been promulgated for the county court, but since all decisions of the county courts are subject to appeal to the district court, we believe our opinion should be consistent with that of the Supreme Court rule for practice in the district court.

Although pleadings per se are not filed in the county court to institute a probate matter, it is our opinion that a probate proceeding in the county court is a "cause of matter" within the purview of Section 27-11-27 by virtue of the fact that it is an adversary proceeding between parties of interest which results in the determination of their respective rights upon hearing and order of the court.

As to that part of Question 4 which it is asked whether a nonresident attorney not licensed to practice law in North Dakota is authorized to handle any state tax matter in a county court, it is evident from the preceding paragraphs that if the estate tax matters arises in connection with the probate of an estate, the attorney licensed in North Dakota to handle the probate will, as a practical matter, also be handling the estate tax matter.

There is then left to be considered from Question 4 the question of whether a nonresident attorney who is not licensed to practice law in North Dakota is authorized to handle an estate tax matter in a county court in this state if the estate tax matter is not incidental to or connected with a probate proceeding, such as, for example, an estate tax determination in a joint tenancy matter or in any other matter (such as transfers in contemplation of death) where no probate is involved.

As to estate tax determinations in such instances, it is not entirely clear whether the county court's determination of the amount of estate tax liability is actually a judicial determination or whether, in determining and assessing the estate tax, the court is functioning in an executive capacity of administering the estate tax law.

Although the form prescribed for the estate tax determination indicates that the determination is an "order" of the court, nowhere does the statute require that the court make such an "order." It appears that the practice of calling the determination an "order" developed as a means of certifying that the county court had, in fact, made the determination in the matter. We do, however, believe that this question is resolved by virtue of our opinion to question five, wherein we have determined that the qualifications for the preparation of an estate tax return are such that the return must be prepared by a person with the qualifications of an attorney licensed to practice law within this state.

Question five is quoted as follows:

5. In connection with Question No. 5, must an attorney handle any estate tax matter in the county court when the county court determines the tax or handle it before the tax commissioner in any case where the tax commissioner might determine the tax or can someone else not licensed to practice law represent the administrator or executor or other representative in the estate tax matter?"

The question concerning who may practice law or engage in activities which have legal consequences is not a question of first impressions in this state. In Cain et al v. Merchants National Bank & Trust Co. of Fargo, 66 N.D. 746, 268 N.W. 719 (1936), the North Dakota Supreme Court held that at page 723:

"Both rules and exceptions must be applied with reason. A careful study of the many decisions of the courts relative to what constitutes practicing law, when applied to the facts in this case, leads us to the conclusion that a person who is not a member of the bar may draw instruments such as simple deeds, mortgages, promissory notes, and bills of sale when these instruments are incident to transactions in which such person is interested, provided no charge is made therefor. These simple instruments are usually prepared upon or with the aid of printed forms and seldom involve a high degree of legal skill. The drawing of complicated legal instruments such as wills or trust agreements require more legal knowledge than is possessed by the average layman. They must be framed from a mass of facts so as to convey the intention of the parties and bring about a desired legal result. * * * *."

In the syllabus of the court, the court stated:

2. The practice of law is not limited to the preparation of cases and their conduct in court. It includes legal advice and counsel and the drawing of instruments, when such instruments set forth, limit, terminate, claim, or grant legal rights."

With particular reference to the practice of law in matters of taxation, the courts apparently have not established defined guidelines but rather have tended to make their demarcation relative to the particular facts of each situation presented to them. There is, however, a general conclusion that a layman may dispose of

obvious and incidental legal matters where the legal facet may be so clear that none would insist on calling a professional counselor. See Annotation, 9 A.L.R. 2d, 797; 34 North Dakota Law Review 35.

In the Matter of New York County Lawyers Association, 273 App. Div. 524, 78 N.Y.S. 2d 209, an accountant undertook for a fee, the giving of advice to a taxpayer with respect to accounting on an accrual basis as to whether the amount paid on a proposed settlement of a disputed liability for city sales and compensation taxes is deductible, in ascertaining liability to federal income tax, in the year in which the settlement is made rather than in the years in which the disputed taxes were assessed. The court concluded that this constituted the unlawful engagement in the practice of the law.

The court concluded as follows:

> "The preparation of an income tax return is not primarily a matter of law and generally and mainly is not a matter of law. It may usually be prepared by one having no legal knowledge, from instructions prepared for lay consumption. A taxpayer should not be required therefore, and is not required, to go to a lawyer to have a tax return prepared. It is a practical, reasonable and proper accommodation to business men and the accounting profession not only to permit accountants to prepare tax returns but to permit them, despite the risks involved, to assume jurisdiction of the incidental legal questions that may arise in connection with preparing tax returns. It is quite another thing to say that apart from preparing a tax return and from doing the accounting work in connection with the return an accountant should be permitted as an independent consultant to pass upon specific questions which are questions of law, especially when the occasion for such consultation is apt to be, as it was in law here, as elsewhere, is a rational and practical adjustment of conflicting interests, objectively calculated to be of the greatest public benefit."

Although the court sets forth the proposition of what constitutes the practice of law, and makes particular reference to the fact that certain instruction for income tax purposes are prepared for lay consumption, we believe that the question with regard to the preparation of estate tax returns is distinguishable by virtue of the fact that instructions for the preparation of estate tax returns are not prepared for the consumption of the layman.

In Re Graham, 30 Pa. D&C 531, a justice of the peace who prepared inheritance tax returns, in addition to other documents, was held to have engaged in the practice of law. The court concluded:

> In reaching our conclusions in this case we are not reflecting upon the character of Mr. Graham, nor upon the quality of the service performed for his clients. With the practice of law, as with that of medicine, it is possible for one to familiarize himself with the simpler processes of either profession and render satisfactory service to his clients, at least temporarily. But here a principle is involved. It is the policy of the State to permit no one to practice either profession until after having satisfied a State board of his

> competency. The operation of the rule is for the protection of the public, and when violations are brought to our attention we have no choice of action."

In reaching this decision we want to make it clear that we fully recognize the fact that nonresident attorneys have satisfied the qualifications for admission into the practice of law in their respective state, and consequently, their professional qualifications and presumed to be unquestionable. However, admission into the practice of law in this state is limited to those who have been duly admitted by the Supreme Court and to those who qualify pursuant to the rules of the court.

In addition, we feel that we should clearly point out that this opinion does not preclude an individual from representing himself or from preparing legal documents for his personal requirements. Although it is generally considered unwise for an individual to represent himself or prepare his personal legal documents unless he is knowledgeable in the law, such practice of law is not considered to be the illegal practice of law within the purview of this opinion.

It is our opinion that a person engaging in the preparation of estate tax returns, regardless of whether they are submitted to the county court or to the tax commissioner for final approval, must be a person qualified to understand and interpret not only the estate tax law and regulations, but that person must be qualified to interpret the law of wills, trusts, probate, and property. Consequently, it is our opinion that any person engaging in the preparation of estate tax returns must be licensed to engage in the practice of law in this state, or duly admitted to practice in the county court pursuant to the interpretation of Section 27-11-27 of the North Dakota Century Code. We believe that the preparation of estate tax returns come within the purview of the Cain decision in that the instrument must be framed from a mass of facts, taken from documents clearly determining legal rights, to bring about the desired legal result.

HELGI JOHANNESON

Attorney General