

OPINION
67-180

January 25, 1967 (OPINION)

Mr. Larry Kraft

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Burleigh County

RE: Register of Deeds - Recording of Deed - Witness of Signature

This is in reply to your request for an opinion of this office with regard to whether a non-acknowledged warranty deed may be recorded where the signature of the conveyor is witnessed by two subscribing witness and the procedure for so doing.

2 Patton on TITLES, Second Ed., pages 184 and 185, section 360, informs us:

A number of states allow an instrument to be authenticated, either by an acknowledgement of the grantor, or by the affidavit of a subscribing witness. Several states provide that the alternative proof shall be in the form of a certificate by any officer authorized to take acknowledgements, setting out evidence taken by him as to the execution of the instrument. Some statutes limit this method to specified instances where an acknowledgement cannot be procured.

In most states both affidavits and certificates in lieu of acknowledgements are so seldom encountered that the provisions regarding them need be considered only when an examiner has for examination a record in which they occur."

Sections 47-1903, 47-1922 and 47-1924 of the North Dakota Revised Code of 1943 are listed in the footnotes to the above as examples of where the alternative proof methods are available. Iowa statutes are cited as authority for the proposition that the alternative method is available only where an acknowledgement cannot be procured in some states.

In *Messersmith v. Smith*, 60 N.W.2d. 276, at page 281, the Supreme Court of the State of North Dakota informs us in part:

Before a deed to real property can be recorded its execution must be established in one of the ways prescribed by section 47-1903 N.D.R.C. 1943. * * *."

(The above case involved a certificate of acknowledgement in due and proper form upon the deed in question, however, such deed had never in fact been acknowledged.)

Section 47-19-03 of the North Dakota Century Code provides:

47-19-03. PREREQUISITES TO RECORDING INSTRUMENTS. Before an instrument can be recorded, unless it belongs to a class

provided for in section 47-19-02 or 47-19-40, its execution must be established:

1. If executed by an individual, by acknowledgement by the person executing the same;
2. If executed by a corporation, by execution and acknowledgement by the person or persons authorized to execute instruments under sections 10-07-01 and 10-07-02;
3. By proof by a subscribing witness as is provided by section 47-19-22;
4. By proof of the handwriting of the person executing an instrument and of a subscribing witness thereto as is prescribed by sections 47-19-23 and 47-19-24 and filing of the original instrument in the proper office there to remain for public inspection."

Section 47-19-22 of the North Dakota Century Code provides:

47-19-22. KNOWLEDGE REQUIRED BY OFFICER OF SUBSCRIBING WITNESS IN TAKING PROOF. If proof of the execution of an instrument is made by a subscribing witness, such witness must be known personally to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness or must be proved to be such by the oath of a credible witness. The subscribing witness must prove that the person whose name is subscribed to the instrument as a party is the person described in it, that such person executed it, and that the witness subscribed his name thereto as a witness."

Generally speaking, in the context to which your letter relates it would appear that sections 47-19-13 and 47-19-14 of the North Dakota Century Code governs as to the officers that can take the proof referred to in section 47-19-22.

The aforementioned sections provide as follows:

47-19-13. ACKNOWLEDGEMENT AND PROOF - PERSONS AUTHORIZED TO MAKE - STATE-WIDE JURISDICTION. The proof or acknowledgment of an instrument of an instrument may be made at any place within this state before a judge, or the clerk, of the Supreme Court, or a notary public."

47-19-14. ACKNOWLEDGEMENT AND PROOF - LIMITED TO DISTRICT OF OFFICER. The proof or acknowledgement of an instrument may be made in this state within the judicial district, county, subdivision, or city for which the officer was elected or appointed, before:

1. A judge or clerk of a court of record;
2. A mayor of a city;
3. A register of deeds;

4. A county justice;
5. A United States commissioner;
6. A county auditor; or
7. A township or village clerk or a city auditor."

You might note also in this regard the statement of our Supreme Court in *McGilvra v. Minneapolis, St. P. & S.S.M. Ry. Co.*, 35 N.D. 275, 159 N.W. 854, in determining that the rules of proof herein considered are not applicable to the district court, at page 856 of the *Northwestern Reporter* that:

It is clear to us that sections 5569, 5571 and 5572 of the *Compiled Laws of 1913* were merely intended to be applicable to proof before the registers of deeds when unacknowledged instruments were sought to be recorded, and that in other instances the general rules as to proof will apply."

In conclusion, while it would perhaps be simpler in many instances to record warranty deeds bearing a standard form of acknowledgement of the signature of the grantor, in view of the above we believe it clear that under the above statutory provisions that proof of execution can be made by subscribing witness before any of the officers designated in the quoted statutes, thus entitling the instrument to record.

HELGI JOHANNESON

Attorney General