

**OPINION
72-332**

November 8, 1972 (OPINION)

Mr. H. L. Thorndal
President
Bank of North Dakota
700 East Main Street
Bismarck, ND 58501

Dear Mr. Thorndal:

This is in response to your letter of October 2, 1972, wherein you make inquiry of this office for an opinion regarding the status of persons 18 years to bind self and his or her upon a real estate mortgage. You submit the following questions in your letter of inquiry:

"What is the capacity of a nonadult under the present North Dakota law to bind self and his or her real estate in making a real estate loan? The Code now states, 'all persons 18 years of age and over are adults.' A subsidiary question would be, must mortgage of real estate executed to a lender by a person under 18 years of age be made and executed by the guardian of his or her estate; would it be binding? Otherwise stated, does every competent person over 18 years of age have the capacity to mortgage his or her property without appointment of a guardian or other supervision.

"Another subsidiary question of interest is whether, and if so to what extent, the marriage of a minor girl dispenses with need for formal guardianship, assuming that a guardian of her estate would be needed, preliminary to a valid mortgage of her property before marriage."

We would initially note that the law is currently as stated in your letter of inquiry with regard to the classification of "adults". The same is found in section 14-10-02 of the North Dakota Century Code, as amended, which provides as follows:

" 'ADULTS' DEFINED. All persons eighteen years of age and over are adults."

Conversely, section 14-10-01 of the North Dakota Century Code, as amended, provides for the definition of "minors" as follows:

" 'MINORS' DEFINED. Minors are persons under eighteen years of age. * * * "

This change of classification by age was the result of chapter 145 of the 1971 Session Laws. This resulted in extending rights of persons under the age of twenty-one years who were eighteen years of age or older, as defined by the statute, in those instances where the designation of "adult" and "minor" were used throughout the laws of this state. We would note that in certain instances classification by a specific number of years, i.e., "twenty-one years of age", was

made. In such cases it would appear that the change effected by Chapter 245 of the 1971 Session Laws relating to definition of adult and minor would not change the application of such statutes. In instances where the statutes relate solely to "adult" and "minor", however, it would appear that the change would apply and be effective.

Nothing that your question relates to rights and capacity of 18 years olds to contract or convey real estate by mortgage, we note that section 14-10-09 of the North Dakota Century Code imposes the restriction upon minor's to contract relating to real property. The same provides as follows:

"MINOR'S DISABILITY TO DELEGATE POWER AND TO CONTRACT RELATING TO REAL PROPERTY. A minor cannot give a delegation of power. A person under the age of eighteen may not make a contract relating to real property or any interest therein, nor relating to any personal property not in his immediate possession or control."

Since the immediately foregoing statute restricts both "minors" and persons under the age of eighteen years of age, it appears clear that your specific question, "must mortgage of real estate executed to a lender by a person under 18 years of age be made and executed by the guardian of his or her estate; would it be binding?", must be answered in the affirmative to the extent that such a mortgage would necessarily need to be executed by the guardian of such person's estate. Further, and with regard to the question of whether such mortgage would be binding, we would note that the guardian would necessarily need to be appointed by the court having jurisdiction of the estate of such minor and that requirements relating to the execution of mortgages of property under guardianship would need to be complied with in order to obtain the necessary special authorization required for such guardian to mortgage real property of the guardianship estate. (See chapter 30-14 of the North Dakota Century Code). Otherwise stated in your question, "does every competent person over 18 years of age have the capacity to mortgage his or her property without appointment of a guardian or other supervision", we would be of the opinion that such person, being by statute defined as an "adult", would have the capacity to enter into and execute a mortgage of real property belonging to him and that such mortgage would be binding upon such person.

We would note, however, that section 14-10-11 of the North Dakota Century Code, relating to minor's contracts and disaffirmation thereof, provides in part as follows:

"If the contract is made by the minor while he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received or paying its equivalent with interest."
(emphasis supplied)

While the above provision does not appear to be consistent with the definition of "minor" and "adult" as hereinbefore mentioned, it may serve as a basis for legal question as to whether a person over the age of eighteen years and under the age of twenty-one years may

disaffirm such a contract, the same appearing to be especially applicable to an agreed rate of interest as opposed to the legal rate of interest.

With regard to your question as to whether, and if so to what extent, the marriage of a minor girl dispenses with need for formal guardianship, we would note the provisions of section 30-10-21 of the North Dakota Century Code which provides as follows:

"MARRIAGE OF MINOR TERMINATES GUARDIANSHIP OF PERSON. The marriage of a minor ward terminates the guardianship of his person but does not terminate the guardianship of his estate."
(emphasis supplied)

Since the requisite of guardianship of the estate of a minor exists and would be a requisite to a valid execution of mortgage of real property owned by the minor or the guardianship estate, we can only conclude that marriage would not affect the requirements under guardianship law insofar as the same relates to the guardianship of the estate. Accordingly, the marriage of a minor girl does not dispense with the need for formal guardianship to validate a mortgage of real estate in which she or her estate holds an interest.

We trust that the foregoing will adequately set forth our opinion upon the matters presented and that the same will be of interest and assistance to you.

Sincerely yours,

Helgi Johanneson

Attorney General