

Overruled by N.D.A.G. 90-L-63

**OPINION
79-214**

June 5, 1979

Mr. Randy A. Deede
State's Attorney
Nelson County
P.O. Box 527
Lakota, ND 58344

Dear Mr. Deede:

This is in response to your letter of May 17, 1979, wherein you make inquiry of this office requesting an opinion relative to Section 11-18-03 of the North Dakota Century Code and the application of same to personal representative's deed of distribution under the probate code of North Dakota. You submit the following in your letter:

"Is a Personal Representative's Deed of Distribution under the Uniform Probate Code a Final Decree of Distribution within the meaning of North Dakota Century Code Section 11-18-03?"

If the Personal Representative's Deed of Distribution is a Final Decree of Distribution within the meaning of the foregoing statute, then it would be entitled to record without regard to taxes.

Initially we would note the provisions of Section 11-18-03 of the North Dakota Century Code, which provides in part:

11-18-03. INSTRUMENTS ENTITLED TO RECORD WITHOUT REGARD TO TAXES. - The following instruments may be recorded by the register of deeds without the auditor's certificate referred to in section 11-18-02:

* * *

3. A final decree of distribution or any order terminating joint tenancy 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 his office as may be necessary.

* * *

The foregoing statute has not been changed since the 1963 Session Laws of North Dakota, which is considerably prior to the enactment of the present Uniform Probate Code, which specifies methods of distribution and procedures required in the administration of estates of decedents. Perhaps of most significance in analyzing the issues raised by your letter is the fact that Section 11-18-03 (3), in referring to those decrees, orders and judgments, contemplates those instruments which do not transfer title to real property such as a deed but rather only evidence the title that has transferred upon death, subject only to the administration of the estate. Basic to this theory, of course, is the fact that the title to real property does not vest in the personal representative such as personal property does, but rather it vests at the instant of death in persons entitled thereto as devisees, heirs or surviving joint tenants. As such, those documents or instruments are not transferring title in and of themselves but rather are only evidence of the transfer of ownership by inheritance or survivorship. Noting also the provision of Section 11-18-02 of the North Dakota Century Code, setting forth the requirement of the auditor's certificate of transfer, it is noted that the same contemplates deeds or patents which transfer title to real estate, providing as follows, in part:

11-18-02. REGISTER OF DEEDS NOT TO RECORD CERTAIN INSTRUMENTS UNLESS THEY BEAR AUDITOR'S CERTIFICATE OF TRANSFER. - Except as otherwise provided in Section 11-18-03, the register of deeds shall refuse to receive or record any deed or patent unless there is entered thereon a certificate of the county auditor showing that a transfer of the lands described therein has been entered and that the delinquent taxes and special assessments or installments of special assessments against the land described in such instrument have been paid,
* * * .

(Emphasis supplied.)

Inasmuch as the personal representative's deed of distribution does not transfer the title to real estate, we do not believe such documents are contemplated by Section 11-18-02, having been excluded by the provisions of Section 11-18-03, as a "final decree of distribution", the personal representative's deed of distribution being merely a substitute document for the former final decree of distribution, furnishing evidence of a transfer rather than actually transferring title to real property.

Also in support of this position, we would note that Section 30.1-20-07 of the North Dakota Century Code, as amended, providing for distribution in kind and specifying the personal representative's deed of distribution, recognizes the distributee's title as established prior to the actual execution and delivery of the deed.

The same provides as follows:

30.1-20-07 (3-907). DISTRIBUTION IN KIND - EVIDENCE. - If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring, or releasing the assets to the distributee as evidence of the distributee's title to the property. (Emphasis supplied.)

Accordingly, it would be our position that a "personal representative's deed of distribution" is a substitute instrument for the former "final decree of distribution", both serving the identical purpose, i.e., establishing evidence of title having vested upon death of a person from whom title is derived, and as such are exempt from the requirement of the auditor's certificate of transfer specified by Section 11-18-02 of the North Dakota Century Code, and may be recorded pursuant to the provisions of Section 11-18-03 of the North Dakota Century Code, as an instrument entitled to record without regard to taxes.

We trust that the foregoing general observations, comments and expressions will adequately set forth the opinion of this office upon the matter submitted and that the same will be adequate for your purposes.

Sincerely,

ALLEN I. OLSON
Attorney General