Office of the Attorney General
State of North Dakota

Opinion No. 85-41

Date Issued: November 1, 1985

Requested by: Lee A. Christofferson
Rolette County State's Attorney

--QUESTIONS PRESENTED--

I.

Whether a county register of deeds may refuse to file a Declaration of Land Patent document.

II.

Whether the Declaration of Land Patent enclosed with your inquiry is a valid document and, if so, the effect of such document on other parties holding interest to the real property (e.g. mortgagee, lienholder).

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that a county register of deeds may not refuse to file a Declaration of Land Patent unless it is not properly acknowledged or otherwise proved pursuant to N.D.C.C. § 47-19-03.

II.

It is my further opinion that the validity of the Declaration of Land Patent enclosed with your inquiry and its effect on other parties holding interest to the real property is a question to be determined only be reviewing all other documents in the chain of title and rendering an opinion on the effect of the Declaration of Land Patent. The Attorney General cannot provide such an opinion in regard to private real property.

--ANALYSES--

I.

Your questions concern the recording of a Declaration of Land Patent which is not a patent. The document in question is essentially an affidavit or sworn statement.

There are two chapters of the North Dakota Century Code that specifically relate to the recording of documents in the register of deeds offices in North Dakota counties. N.D.C.C. Ch. 11-18 governs the register of deeds. It specifies the register's duties and responsibilities in regard to the recording of documents. N.D.C.C. Ch. 47-19 concerns record title. It specifies the documents entitled to be recorded and the requirements for recording instruments in the register of deeds offices. To determine whether a Declaration of Land Patent may or must be filed in the office of the register of deeds, we must review these two chapters for the requirements contained therein.

N.D.C.C. § 47-19-01 states:

47-19-01. INSTRUMENTS ENTITLED TO RECORD.--ANY instrument affecting the title to or possession of real property may be recorded as provided in this chapter. [Emphasis supplied.]

N.D.C.C. § 11-18-09 provides the method by which the register of deeds is to accept instruments. N.D.C.C. § 11-18-11 specifies how the register of deeds is to record the document after being entered in the reception book. Both N.D.C.C. §§ 11-18-09 and 11-18-11 use the phrase (or its equivalent), 'affecting the title to or creating a lien upon real estate.'

The initial test for determining whether or not an instrument may be recorded is whether it affects the title to, the possession of, or creates a lien upon real property. The question of whether a document 'affects' title to real property is one which must be determined by the examining attorney on a case-by-case basis after review of the entire chain of title. The effect of any one document is determined by its relationship to other documents in the chain. An ordinary warranty deed, executed and recorded, can subsequently be determined by a court of law to have no effect on title to the tract in question. There is no way that a register of deeds can or should look at any document and make that determination prior to recording. That would surely be an abuse of power on the part of the register of deeds.

There are certain statutory instances in which a register of deeds may refuse to record a document. For example, N.D.C.C. § 11-18-02 requires a register of deeds to refuse to record certain documents which do not bear the county auditor's certificate. In addition, N.D.C.C. § 11-18-02.2 requires statements of full consideration to be filed prior to the recording of deeds. Finally, N.D.C.C. § 47-19-05 prohibits the recording of deeds if the grantee's post office address and street address (if applicable) are not included on the deed.

However, the Declaration of Land Patent is not one of the documents requiring the county auditor's certificate nor is it a deed as it does not purport to be a transfer of property. Therefore, the above statutes do not allow a register of deeds to refuse to record the Declaration of Land Patent.

There is a requirement for acknowledgement prior to the recording of certain documents. This authority is found in N.D.C.C. §§ 47-19-02, 47-19-03. A Declaration of Land Patent does not fall within the listed exceptions from the acknowledgement requirement in these statutes. Therefore, a Declaration of Land Patent, to be recorded, must be acknowledged or otherwise proved as specified in N.D.C.C. § 47-19-03. The copy of the Declaration of Land Patent which has been submitted to this office for review is an acknowledged document and, therefore, cannot be refused for recording based upon N.D.C.C. § 47-19-03.

These statutory requirements are not discretionary with the register of deeds. If an acknowledgement is required but missing, the register of deeds must refuse to record the instrument. If the instrument is a deed and the grantee's address is missing, the register of deeds must refuse to record the instrument. Only the acknowledgement (or alternative proof) requirement in N.D.C.C. § 47-19-03 is applicable to Declarations of Land Patent and hence those declarations can only be refused for recording if they are not acknowledged or otherwise proved pursuant to statute.

II.

The issue of whether or not the Declaration of Land Patent in question 'affects legal title' and the related question which you pose (that is, whether it has any legal effect and what that effect is) are questions to be determined on a case-by-case examination of title. (See, e.g., Liebfried Const., Inc. v. Peters, 373 N.W.2d 651 (Minn. App. 1985), where the court concluded that, based upon the facts presented, a 'notice of declaration' and a 'declaration of land patent' had no legal effect or meaning.) Every document in the chain of title, whether a standard customary deed, or a unique instrument not usually seen in North Dakota, may or may not have an effect on the title to the land in question. The effect of each document is often determined by a lawyer reviewing the abstract or courthouse records and rendering a title opinion. That determination is, as stated, only an opinion. If a question arises, a court of law will later determine what the effect of a particular document is on the chain of title. This will be done after review of the documents in question and the facts surrounding the transactions. This is something that cannot be done by the Attorney General, except in limited circumstances concerning title to state-owned land when the Attorney General represents the state and examines title to the state tract in question.

While you have included a copy of a Declaration of Land Patent in your request for an opinion, I cannot determine that Declaration's effect on the chain of title to the tract which it concerns without reviewing all other documents in that chain of title. If I were to review all documents in the chain of title and render an opinion on the effect of the Declaration of Land Patent in question, I would be issuing private legal advice to the parties concerned with that particular tract. The Attorney General and members of his staff cannot render legal advice or assistance to private businesses or members of the general public. I can, however, offer the following general discussion and observations.

A Declaration of Land Patent is similar to an affidavit. Many affidavits are recorded with the register of deeds some of which are specifically provided for by statute. (For example, N.D.C.C. §§ 47-19-11 and 47-19-12 providing for the recording of an affidavit of identity correcting variations in the spelling of a name; an affidavit of marketable title under N.D.C.C. Ch. 47-19.1; and an affidavit of mineral ownership under N.D.C.C. Ch. 38-18.1.) Other affidavits are also commonly recorded for many reasons. Ultimately, these may or may not have an effect on the chain of title but that will be determined when an attorney renders a title opinion.

I note that the copy of a Declaration of Land Patent included with your inquiry includes a statement: 'If this Declaration of Land Patent is not challenged in a court of law within sixty (60) days from the date of filing, then the above described property shall become mine as an allodial freehold, and then this land patent shall be updated in my name, subject to the limitations stated herein.' There is no statutory basis for the 60-day notice provision included in this Declaration. In two other instances the North Dakota Legislature has seen fit to provide a statutory basis for recording a notice of interest in real property. These instances are found at N.D.C.C. Ch. 47-19.1, the Marketable Record Title Act, and N.D.C.C. Ch. 38-18.1, concerning termination of severed mineral interests. Both chapters provide a method by which persons may use record title to give notice to others of their intention to claim a certain interest in real property. There is no such statutory authority for the 60-day notice included in the Declaration of Land Patent at issue here.

It is theoretically possible for a person to file a Declaration of Land Patent intended to provide the notice authorized by N.D.C.C. Ch. 47-19.1, the Marketable Record Title Act, with the Patent as the root deed. If the Declaration otherwise conformed to the requirements of N.D.C.C. Ch. 47-19.1, it would apparently have the intended effect of an Affidavit of Marketable Title. Again, the consequence of such a filing would be determined by an examining attorney rendering a title opinion.

The effect of recording instruments is set forth in N.D.C.C. § 47-19-19:

47-19-19. EFFECT OF RECORDING.--The record of any instrument shall be notice of the contents of the instrument, as it appears of record, as to all persons. [Emphasis supplied.]

North Dakota's recording statutes are notice statutes and are intended to put subsequent purchasers or encumbrancers on notice of what has preceded them in the chain of title.

The purpose of the recording statutes is to give notice of and to protect rights, as against subsequent purchasers or encumbrancers, not to create rights not possessed, either of record or in fact. [Emphasis supplied.] Magnuson v. Breher, 69 N.D. 197, 284 N.W. 853, 855 (1939), citing Eynon v. Thompson, 48 N.D. 309, 184 N.W. 878 (1921).

In addition, the Supreme Court of North Dakota, in First National Bank of Dickinson v. Big Ben Land Company, 164 N.W. 322 (N.D. 1917), the Court stated:

By statute the recording of deeds and mortgages and instruments affecting title to real property is constructive notice to all purchasers and incumbrancers subsequent to the recording. It is not a notice to a prior purchaser. . . . Id.

As a statute resulting in notice to subsequent purchasers, the recording of a document would not be notice to a person appearing prior in the chain of title.

Your letter indicated some concerns of creditors and purchasers, once they were aware that the Declaration was on the record, that they may be dealing with militant farmer groups. While I sympathize with their concerns, it is not a matter which legally affects the responsibilities of a register of deeds. It is an indication of factual circumstances surrounding a particular transaction between creditor and farmer which must be taken into consideration, as other factual circumstances are, in determining whether or not to foreclose. Each attorney representing the creditor, the title insurance company, and the ultimate purchaser will have to determine the effect of the Declaration of Land Patent document on the title to each tract in question.

Finally, please note that the 1985 Legislative Assembly enacted an amendment of N.D.C.C. § 47-19.1-09 concerning persons who file slanderous notice of marketable record title. That section states:

47-19.1-09. SLANDEROUS NOTICE--PENALTY. No person shall use the privilege of filing notices under this chapter or recording any instrument affecting title to real property for the purpose of slandering the title to real estate or to harass the owner of the real estate and in any action brought for the purpose of quieting title to real estate, if the court shall find that any person has filed a claim for the purpose of slandering title to such real estate or to harass the owner of the real estate, the court shall award the plaintiff all the costs of such action, including attorney fees to be fixed and allowed to the plaintiff by the court, and all damages that plaintiff may have sustained as the result of such notice of claim having been filed for record or the instrument having been recorded. [Emphasis supplied.]

--EFFECT--

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 questions presented are decided by the courts.

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Attorney General

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