

LETTER OPINION
94-L-45

February 25, 1994

Mr. F. C. Rohrich
Emmons County State's Attorney
P.O. Box 657
Linton, ND 58552-0657

Dear Mr. Rohrich:

Thank you for your letter inquiring whether the state's attorney has a duty to prepare a sheriff's deed and whether the board of county commissioners has the authority to pay the fees and expenses of the attorney for the petitioner in a proceeding seeking the appointment of a guardian or a conservator, especially in those cases seeking the appointment of a guardian or a conservator for a poor or indigent person.

The sheriff is required to issue a sheriff's deed to the purchaser, the purchaser's assignee, or a person who redeems real property sold in connection with an execution of judgment or a foreclosure of a mortgage or land contract. N.D.C.C. ?? 28-23-13, 28-24-13, 32-19-09. The sheriff is also required to issue a sheriff's deed to the county in certain circumstances involving the sale of real property in connection with the foreclosure of tax liens. N.D.C.C. ? 32-31-06. You specifically ask whether preparation of a sheriff's deed is a duty of the state's attorney.

Although a state's attorney has no statutory duty to prepare a sheriff's deed, a state's attorney must give written advice without fee, if needed, to county officers, N.D.C.C. ? 11-10-02, "on matters relating to the duties of their respective offices." N.D.C.C. ? 11-16-01(9). Since the sheriff is a county officer, a state's attorney must give written advice about preparation of a sheriff's deed when necessary.

It is my understanding that the general practice is for the purchaser or redeemer of the property to have the deed prepared and present it to the sheriff to execute. The execution of a sheriff's deed is merely a ministerial act required to complete a formal transfer of legal title in connection with an execution sale. State ex rel. Forest Lake State Bank v. Herman, 161 N.W. 1017, 1019 (N.D. 1917).

You also ask whether the board of county commissioners has the authority to pay the fees and expenses of the attorney for the petitioner in a proceeding

seeking the appointment of a guardian or a conservator, especially in those cases seeking the appointment of a guardian or a conservator for a poor or indigent person.

Counties have only those powers expressly conferred upon them by the Legislature, or those necessarily implied from the powers expressly granted. Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924); N.D. Const. art. VII, ? 2. The statutes addressing the appointment of guardians for minors and incapacitated persons are N.D.C.C. chs. 30.1-27 and 30.1-28, respectively. The appointment of a conservator for the protection of property of certain persons, including minors, is addressed by N.D.C.C. ch. 30.1-29. The following statutes in the foregoing three chapters address petitioning for the appointment of a guardian or conservator:

30.1-27-07 (5-207). Court appointment of guardian of minor--procedure.--1. Notice of the time and place of hearing of a petition for the appointment of a guardian of a minor is to be given by the petitioner . . .

30.1-28-03 (5-303). Procedure for court appointment of a guardian of an incapacitated person.

1. Any person interested in the welfare of an allegedly incapacitated person may petition for the appointment of a guardian. No filing fee under this or any other section may be required when a petition for guardianship of an incapacitated person is filed by a member of the individual treatment plan team for the alleged incapacitated person or by any state employee in the performance of official duties.

30.1-29-04 (5-404). Original petition for appointment or protective order.--1. The person to be protected, any person who is interested in his estate, affairs, or welfare including his parent, guardian, or custodian, or any person who would be adversely affected by lack of effective management of his property and affairs may petition for the appointment of a conservator or for other appropriate protective order.

In addition, the state's attorney may be called upon in certain circumstances under N.D.C.C. ?? 50-25.2-07 and 12.1-04-08 to petition or assist in petitioning the court for appointment of a guardian or conservator. N.D.C.C. ? 50-25.2-07 provides, in relevant part:

50-25.2-07. Refusal or inability to accept adult protective services--Department [of Human Services] alternatives. If a vulnerable adult who is subject to abuse or neglect is unable to consent and accept, or the caregiver refuses, adult protective services determined by the department or the department's designee to be necessary under this chapter [50-25.2 on vulnerable adult protection services], the department or the department's designee may pursue any administrative, legal, and other

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remedies authorized by law which are necessary and appropriate under the circumstances to protect the vulnerable adult and prevent further abuse or neglect. The state's attorney of the county in which the vulnerable adult resides or is located shall assist the department or the department's designee, upon request, in pursuing an appropriate remedy. Available remedies include seeking:

1. The appointment of a guardian under chapter 30.1-28 or a conservator under chapter 30.1-29;

....

If a criminal defendant has been determined to be unfit to proceed, N.D.C.C. ? 12.1-04-08 provides that the court may make a referral for services including appointment of a guardian or conservator upon petition by the state's attorney. N.D.C.C. ? 12.1-04-08 provides for determination of incapacity of a criminal defendant by a county court "following petition by the state's attorney, for the appointment of a guardian or conservator pursuant to chapter 30.1-28 or 30.1-29."

Upon review of all of the foregoing statutes relating to petitioning for appointment of a guardian or conservator, specific cost savings for certain petitioners are provided only in N.D.C.C. ?? 30.1-28-03, 50-25.2-07, and 12.1-04-08. N.D.C.C. ? 30.1-28-03 provides that no filing fee may be required when a petition is filed by a member of the individual treatment plan team or by any state employee in the performance of official duties. N.D.C.C. ? 50-25.2-07 provides that the state's attorney shall assist the Department of Human Services, or its designee, in seeking the appointment of a guardian or a conservator for a vulnerable adult. N.D.C.C. ? 12.1-04-08 indicates that the state's attorney shall, under certain circumstances, petition for appointment of a guardian or conservator for a criminal defendant unfit to proceed. No statute grants the board of county commissioners authority to pay the fees and expenses of the attorney for the petitioner.

Therefore, it is my opinion that the board of county commissioners does not have the authority to pay the fees and expenses of the attorney for the petitioner in a proceeding seeking the appointment of a guardian or a conservator, even in those cases seeking the appointment of a guardian or a conservator for a poor or indigent person.

Sincerely,

Heidi Heitkamp

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ATTORNEY GENERAL

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