

N.D.A.G. Letter to Mack (Nov. 18, 1987)

November 18, 1987

Mr. Galen Mack
Assistant Pierce County
State's Attorney
P.O. Box 196
Rugby, ND 58368

Dear Mr. Mack:

Thank you for your letter of August 17, 1987. You ask me to comment upon the opinion you gave in a letter to the Pierce County Register of Deeds. That letter discusses whether a document entitled "Deed of Trust and Assignment of Rents" and signed by Howard Slaubaugh may be recorded without containing a statement of consideration. I apologize for the delay in responding to you.

The title of a document alone should not dictate which statutory requirements are applicable to that document. If the document by its terms is a conveyance or deed, the rules applicable to deeds would govern. If the document is security for an indebtedness, the rules applicable to mortgages would govern. Recording requirements for all instruments are set forth in N.D.C.C. ch. 47-19. Additional requirements to record deeds are found in N.D.C.C. ch. 11-18 and additional requirements to record mortgages are found in N.D.C.C. ch. 35-03. The terms of any particular document must be examined before determining which recording requirements apply.

Your letter to the Pierce County Register of Deeds quotes the following language from the document in question:

"Witnesseth: That Trustor irrevocably GRANTS, TRANSFERS, AND ASSIGNS TO TRUSTEE IN TRUST, WITH POWER OF SALE, that real property. . ."

From this quote you conclude that the document is a deed for purposes of recording. However, the standard form North Dakota mortgage found in N.D.C.C. § 35-03-05 includes the words "grant, bargain, sell and convey" and includes the granting of a power of sale.

It is a requirement of N.D.C.C. § 11-18-02.2(1) and (2) that all deeds presented for recordation contain one of four kinds of statements of consideration. Whether the Slaubaugh deed of trust requires a statement of consideration turns on the definition of "deed."

For the purposes of N.D.C.C. § 11-18-02.2, a "deed" is an instrument "whereby any real

property or interest therein shall be granted, conveyed, or otherwise transferred to the grantee, purchaser, or other person . . ." N.D.C.C. § 11-18-02.2(5).

If the document in question falls within N.D.C.C. § 11-18-02.2's definition of "deed" I agree with your opinion that it requires a statement of consideration and, not having one, may not be recorded. If any of the exemptions of N.D.C.C. § 11-18-02.2(6) apply the statement would not indicate the consideration paid but rather the exemption claimed. One of these exemptions includes transactions in which "the grantor and grantee are of the same family . . ." N.D.C.C. § 11-18-02.2(6)(c). This document may be entitled to this exemption, but is without the certification of the exemption.

If this document is not a "deed" within N.D.C.C. § 11-18-02.2, but rather a mortgage, it still may not be recorded if it fails to satisfy N.D.C.C. § 35-03-04. This statute says no mortgage "shall be received for record by the register of deeds unless it contains the post office address of the mortgagee and an adequate statement as to amount of indebtedness secured and terms of interest." The required inclusions serve the same purpose as the statement of consideration for deeds, since they disclose the consideration supporting the transaction as well as other information, amount and the terms of the encumbrance. The document in question does not comply with N.D.C.C. § 35-03-05.

Other than N.D.C.C. §§ 11-18-02.2 and 35-03-04, I have not reviewed statutes which may affect the propriety of recording this document. However, other recording requirements are applicable and should be met before the document is recorded.

Sincerely,

Nicholas J. Spaeth

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