North Dakota Law Review

Volume 47 | Number 4 Article 2

1970

# Recent Attorney General's Opinions

North Dakota Law Review

Follow this and additional works at: https://commons.und.edu/ndlr

Part of the Law Commons

## Recommended Citation

North Dakota Law Review (1970) "Recent Attorney General's Opinions," *North Dakota Law Review*: Vol. 47 : No. 4 , Article 2.
Available at: https://commons.und.edu/ndlr/vol47/iss4/2

This Note is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

# RECENT ATTORNEY GENERAL'S OPINIONS

Question:

"Under our laws shall property be assessed at the value of the time it is assessed or on the preceding (sic) 5 years average of its value?"

The subject appears to be governed by the provisions of Section 57-02-01 of the North Dakota Century Code, as amended, which provides in part:

"DEFINITIONS.—As used in this title, unless the context or subject matter otherwise requires:

1. through 3.***
4. 'True and full value' means the usual selling price at the place where the property to which the term is applied *shall be at the time of the assessment, that being the price at which it could be obtained at private sale,* and not at a forced public auction sale. In arriving at the true and full value, consideration may be given to the earning or productive capacity, if any, the market value, if any, and all other matters that affect the actual value of the property to be assessed.
5. through 10.***" (emphasis supplied)

Accordingly, it would appear that the assessment shall be at the value as of the time of assessment rather than by any other formula respecting time.

Unaware of any statute relating to the establishment of value by assessment which relates to a formula founded in averaging over a period of years, we can only conclude that property shall be assessed at the value of the time it is assessed rather than by averaging the preceding five year valuations of such property.

Question:

With regard to the application of section 43-23-05 of the 1969 Supplement to the North Dakota Century Code.

It is called to our attention, that portion of the above cited statute providing that:

> "REAL ESTATE LICENSE REQUIRED.—***No copartnership, association, or corporation shall be granted a license, unless every member or officer of such copartnership, association, or corporation actually engaged as a real estate broker, real estate salesman, or mortgage broker as defined herein, shall hold a license as a real estate broker, and unless every employee who acts as a real estate salesman or mortgage broker for such copartnership, association, or corporation shall hold a license as a real estate salesman or mortgage broker."

A situation exists whereby a licensed real estate salesman employed by a real estate corporation has requested to become licensed as a broker for the firm. It is indicated that the firm is presently managed by a licensed real estate broker who is a corporate officer in the firm. The salesman has indicated that he has no intentions of becoming an officer in the corporation. Technically, it appears that under these circumstances he will still be performing the functions of a salesman even though he has requested licensing as a broker. It is noted that a real estate salesman and broker are two distinctly different occupations.

The question is whether a licensed real estate broker can be employed by a licensed real estate corporation and act in the capacity as a broker without becoming an officer or stockholder in the corporation.

We would assume that in the usual instance the purpose of such a statutory provision is to assure professional ability, capacity and ethics in those operating or strongly influencing the operations of a professional firm and to prevent actual unlicensed practice of the profession, by individuals, employed by or in control of professional firms. There is nothing in the terminology or purpose of this statutory provision indicating in any manner that same was intended to apply to the converse of the situation described in the statute.

We do note that the statutory chapter does have separate definitions for "real estate broker" and "real estate salesman." From the facts you state it does seem possible to conclude that the functions that will be performed by this individual on behalf of the employer will be those described under subsection 2 of section 43-23-06 of the North Dakota Century Code. There is, however, nothing in Chapter 43-23 of the North Dakota Century Code prohibiting one individual from acting both as a real estate broker and as a real estate salesman. Also, we find nothing in the statute actually indicating that one real estate broker cannot work for or be employed by another real estate broker.

On such basis, it is our conclusion that a licensed real estate broker can be employed by a licensed real estate broker-corporation and act in the capacity of a broker without becoming an officer or stockholder in the corporation.

Question:

With regard to the legality of marriages between first cousins within the State of North Dakota where the parties to the marriage are related through adoption wherein one or the other of the first cousins was adopted into the family and no consanguine relationship exists.

The questions are:

"1. Would such a marriage be considered incestuous pursuant to the provisions of section 12-22-06 of the North Dakota Century Code?

2. If the relationship between the parties were known to the County Judge prior to application for marriage license, could the County Judge issue a marriage license to such individuals who are first cousins through adoption?

3. Assuming a marriage of first cousins by way of adoption did exist and your opinion would indicate that the marriage was not incestuous nor void or voidable or any combination of such circumstances would inheritance rights of either spouse or children of the parties be effective?"

We note at 52 Am Jur 2d, 917-918 Marriage Section 65 the statement that:

"Section 65. RELATIONSHIP BY MARRIAGE (AFFINITY) OR ADOPTION. Some state incest statutes extend their prohibition against marriage not only to persons related by blood, but also to persons related only by affinity, or in other words, by marriage. In the past the scope of the prohibited relationships by affinity was frequently almost coextensive with the prohibitions applicable to blood relatives, but affinity as a basis of incest prohibitions has been severely criticized, and many statutes today limit the prohibition against marriage of persons related by affinity to certain close relatives of the spouse, or else eliminate affinity completely as an obstacle to marriage. Furthermore, affinity statutes have, in some instances, been rendered of little value by the holding that the relation of

affinity between one spouse and the blood relatives of the other ceases as soon as a divorce has been granted or on the death of either spouse, at least when there is no living issue of such marriage.

Under existing affinity statutes, however, marriages have been held illegal when contracted by a woman and her father-in-law, a woman and her step-grandson, a man and his stepdaughter, a man and the widow of his uncle, and a man and his brother's widow.

As to whether persons related only by adoption, and not by marriage, may marry each other, the position of the courts is unclear. While it might seem that such a marriage, if the relationship by adoption was of a degree within which marriage is prohibited, would be barred in any event by the fact that legal adoption is ordinarily held to create all of the legal consequences, obligations, and incidents arising and growing out of the status of natural parent and child, it has been held that a couple unrelated by blood, but first cousins by adoption, are not barred from marrying by incest statutes that forbid the marriage of first cousins."

We note further at 41 Am Jur 2d, 516-517 Incest Section 7 the statement that:

"Section 7. RELATIONSHIP BY MARRIAGE. Relationship by consanguinity, or blood, is necessary to bring a person within the provisions of some statutes defining and punishing incest. Statutes extending to relatives by affinity, or marriage, the prohibition of incest are strictly construed in favor of the defendant. Under such statutes incest may be committed by a brother-in-law with a sister-in-law, and by a brother with a deceased brother's widow.

A man is related by affinity to all the blood relatives of his wife and vice versa. There is, however, no affinity between the blood relatives of one spouse and the blood relatives of the other.

Stepparents are related by affinity to their stepchildren, and sexual intercourse between them is incestuous under statutes including relationship by affinity, but not where the statutes are restricted to consanguinity.***"

We note also at 41 Am Jur 2d, 516 Incest Section 6 the following:

"***Sexual intercourse with an adopted child is not incestuous where the statute requires blood relationship for the crime

> of incest. An adopted child has been held not to be a "daughter" within an incest statute forbidding sexual relations between persons within the degrees within which marriages are declared to be incestuous and void, the marriage law providing that a father shall not marry his "daughter."

Section 14-11-13 of the North Dakota Century Code provides:

> "STATUS OF ADOPTED CHILD.—The child so adopted shall be deemed, as respects all legal consequences and incidents of the natural relation of parent and child, the child of such parent or parents by adoption the same as if he had been born to them in lawful wedlock."

Section 14-03-03 of the North Dakota Century Code provides in part:

> "VOID MARRIAGES.—The following marriages are incestuous and void:
>
> 5. Marriage between first cousins of the half as well as the whole blood. This section shall apply to illegitimate as well as legitimate children and relatives."

Section 12-22-06 of the North Dakota Century Code provides:

> " 'INCEST' DEFINED—PUNISHMENT.—Any person who intermarries, cohabits, or has sexual intercourse with another person related to him within a degree of consanguinity within which marriages by the laws of this state are declared incestuous and void, knowing such other person to be within said degree of relationship, is guilty of incest and shall be punished by imprisonment in the penitentiary for not less than one year nor more than ten years."

Looking to these statutes it would appear to us in the first instance that the criminal statute refers only to relatives by consanguinity and that the marriage statute refers to relatives by "the half or the whole blood," which to some extent at least would indicate that the legislative assembly did not by these enactments intend to include other relationships such as those established by marriage or legal decree. We note such cases as State of Mississippi vs. Lee; 17 So.2d 277 and the case cited in the annotation thereto People v. Kaiser 119 Cal 456, 51 P 702 (1897) where the courts decided very definitely that the word "daughter" in such situations did not mean, "adopted daughter," "step-daughter" or "daughter-in-law."

On the basis of these authorities it would thus be our opinion that a marriage between "cousins only related by way of an adop-

tion" is not prohibited by either sections 14-03-03 or 12-22-06 of the North Dakota Century Code. We find nothing in these statutes that would prevent a county judge from issuing a marriage license to persons who are cousins only related by way of adoption. While some confusion might arise in determining degrees of relationship for purposes for example of applying the laws of intestate succession in matters involving persons who are by reason of an adoption legally cousins, and who by reason of a marriage are also man and wife, we would assume that both the adoption proceeding and the marriage proceeding should properly be considered legal, valid and binding for the purpose of determining inheritance rights.

Question:

Requesting clarification of the power and authority of the State of North Dakota on Indian reservations in terms of protective services and licensing of foster homes.

The State of North Dakota provides protective services for abused and neglected children under chapter 50-25 of the North Dakota Century Code and further corrective measures under the authority of the Juvenile Court Act under chapter 27-20. The licensing and supervision of foster homes is discharged under chapter 50-11. It is recognized that there may be other statutes, interpretations and decisions which may also have a bearing on this question. The first question is:

"Does the authority of the State of North Dakota as defined in terms of protective services and enforcement of licensing functions apply to situations involving Indian children who live on Indian reservations within the state?"

Licensing of foster homes includes inspection of the home, evaluating the home in terms of established standards, and participating in enforcement of compliance with standards.
The second question is:

"Specifically, can the Public Welfare Board legally enforce this licensing function on the Indian Reservation?"

We are enclosing herewith xerox copy of letter of this office of date January 16, 1967, to the State Plumbing Inspector, with regard to State Plumbing Board activities on Indian Reservations, xerox copy of letter of this office of date November 27, 1968, to the special assistant attorney general for the State Electrical Board, with regard to State Electrical Board activities on Indian Reservations and xerox copy of letter of this office of date February 5, 1969, to the assistant attorney general for the State Electrical

Board, with regard to State Electrical Board activities on Indian Reservations.

While, we do, of course, recognize many distinctions between the activities of your department in supervision of foster homes, and the functions of the State electrical and plumbing boards, we should mention that the basic authority relied upon, in regard to electrical and plumbing board functions, was In Re. Whiteshield 124 N.W. 2d 694 (1963) in which the Supreme Court of this State determined that the juvenile division of the State district court did not have jurisdiction to terminate parental rights of an Indian family on the Indian reservation.

It would thus be our opinion that your department does not have authority to enforce licensing functions with regard to foster homes caring for Indian children who live on Indian reservations within the State. We would thus further assume that the offense defined in section 50-11-10 of the 1969 Supplement to the North Dakota Century Code, would in effect, in regard to these situations, be an offense by a non-Indian, or Indian, involving other Indians; i.e., the children cared for by these foster homes; and thus the State courts would not have jurisdiction of such offenses. As stated by our Supreme Court in In Re. Whiteshield 124 N.W. 2d 694 at page 695 of the N.W. 2d reporter:

> "In recent cases decided prior to the 1958 amendment of Section 203 of the North Dakota Constitution, Chapter 430 of the Session Laws of 1959, and the effective date of Chapter 242 of the Session Laws of 1963, dealing with jurisdiction over civil causes arising on Indian country, it was held that North Dakota courts had no jurisdiction over a person alleged to have committed a crime under the State's laws against one who is an Indian allegedly committed on an Indian reservation. State v. Kuntz, 66 N.W. 2d 531, (N.D. 1954), and State vs. Lohnes, 69 N.W. 2d 508, (N.D. 1955).***"

We are familiar with the Federal law embodied in 25 U.S.C.A. 231, which provides:

> "ENFORCEMENT OF STATE LAWS AFFECTING HEALTH AND EDUCATION; ENTRY OF STATE EMPLOYEES ON INDIAN LANDS.—The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or (2) to enforce the penalties of State compulsory school attendance laws against Indian children, and parents, or other persons in loco parentis except that this subparagraph

> (2) shall not apply to Indians of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such appilcation."

While this statutory provision may well embody a Federal consent to the State's accepting jurisdiction, for these purposes on Indian reservations the State of North Dakota has not consented to acceptance of such jurisdiction except in accordance with the terms of chapter 27-19 of the 1969 Supplement to the North Dakota Century Code; and, of course, this Federal statute does not constitute compliance with the terms of this State statute.

We are also familiar with the Federal law embodied in 25 U.S.C.A. 452 which provides:

> "CONTRACTS FOR EDUCATION, MEDICAL ATTENTION, RELIEF AND SOCIAL WELFARE OF INDIANS.—The Secretary of the Interior is authorized, in his discretion, to enter a contract or contracts with any State or Territory, or political subdivision thereof, or with any State university, college or school, or with any appropriate State or private corporation, agency, or institution, for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State or Territory, through the agencies of the State or Territory or of the corporations and organizations herein before named, and to expend under such contract or contracts, moneys appropriated by Congress for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State or Territory."

While such statutory provisions could possibly be of assistance to State agencies wishing to participate in Federal functions in these fields on Indian reservations, it seems doubtful that it could be extended to the point of allowing actual enforcement of the State Foster home licensing statutes, in the usual sense, where the State has not acquired full jurisdiction in the area involved.

It is thus our opinion that the Public Welfare Board cannot legally enforce the licensing function prescribed in chapter 50-11 of the North Dakota Century Code, as amended to date, insofar as it concerns foster care homes either operated by Indians or caring for Indians on the Indian Reservations.