

April 14, 2004

RE: Official Attorney General Opinion

Last month, the Attorney General sent you a copy of an official opinion that was recently published regarding the solemnization of marriages. Continuing national media coverage from states outside of Indiana has raised additional legal questions regarding the duties and responsibilities of clerks in issuing marriage licenses. In response to the questions from Representative Richardson, the Office of the Indiana Attorney General has published another official opinion that specifically addresses the statutory duties in issuing marriage licenses in Indiana.

Again, we are providing you with a copy of this opinion, as it may be useful to you in carrying out your statutory responsibilities as a county official.

Sincerely,

Gregory F. Zoeller  
Chief Counsel  
Advisory Services

Enclosure 2004-4

April 29, 2004

**OFFICIAL OPINION 2004-4**

The Honorable Kathy Richardson  
Indiana House of Representatives  
Third Floor, State House  
Indianapolis, Indiana 46204

Re: Official Duties

Dear Representative Richardson:

This letter is in response to your request for an opinion regarding the following question:

Pursuant to Title 31, article 11 of the Indiana Code, individuals must obtain a marriage license from the clerk of the circuit court in the county of residence of either of the individuals seeking the license. What are the requirements of a clerk of court in the performance of this duty and what may result if a clerk of court knowingly disregards state law regarding the issuance of marriage licenses?

**ANALYSIS**

Pursuant to Article 6, section 2 of the Indiana Constitution, each county elects a clerk of the circuit court.<sup>1</sup> While the office was created by the Constitution, the duties and authority of the clerk are prescribed by statute.<sup>2</sup> A constitutional officer may have his or her duties increased

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<sup>1</sup> “There shall be elected, in each county by the voters thereof, at the time of holding general elections, a Clerk of the Circuit Court, Auditor, Recorder, Treasurer, Sheriff, Coroner and Surveyor, who shall severally, hold their offices for four years; and no person shall be eligible to the office of Clerk, Auditor, Record, Treasurer, Sheriff, or Coroner more than eight years in any period of twelve years.” IND. CONST. art. VI, § 2.

<sup>2</sup> State v. Market, 302 N.E.2d. 528, 533-34 (Ind. App. 1973).

or diminished by statute, but the officer “has only such power as is enumerated within the four corners of the statutory enactment defining his duties, and he has no residual common law rights or powers.”<sup>3</sup>

Clerks of the circuit court derive their power solely from statute and may exercise only those powers delegated by the legislature.<sup>4</sup> As a public officer, the clerk’s execution of statutory duties is an exercise of the sovereign power of the state.<sup>5</sup> The clerk of the circuit court takes an oath to faithfully support the Constitutions of the United States and the State of Indiana and to faithfully discharge the duties of the office.<sup>6</sup> A clerk must execute a bond conditioned upon the faithful discharge of the duties of the office.<sup>7</sup> The performance of the state’s sovereign power by the clerk is for the public’s benefit and the office may not be used in order to further the official’s own private interests which may be in conflict with the public interest.<sup>8</sup> If a statute directs a public officer to perform duties in a specific manner, the officer’s actions in direct violation of the law are void.<sup>9</sup> Public officers may not bind the State to illegal actions if the performance of such actions violates the law.<sup>10</sup>

State laws governing marriage in Indiana at Indiana Code title 31, article 11 require individuals who intend to marry to apply for a marriage license from the clerk of the circuit court of the county of residence of either of the individuals or, if the individuals are not residents of Indiana, from the clerk of the circuit court in the county where the marriage is to be solemnized.<sup>11</sup> The law vests the clerk of the circuit court with the statutory duty to issue marriage licenses to individuals who apply for the license and who have the authority to marry each other under the state’s laws governing marriage.<sup>12</sup> The clerk’s duties under Article 11 include verifying statutorily required information contained on the application for marriage, witnessing the signatures on a consent to marriage, recording the application for a marriage license, distributing information concerning communicable diseases, and recording marriage certificates after the solemnization of a marriage.<sup>13</sup> The clerk also issues licenses as authorized by the circuit or superior court of the county.<sup>14</sup> Additionally, a clerk of the circuit court may solemnize marriages.<sup>15</sup>

The clerk is instructed by statute to refuse to issue the marriage license if the applicants for licensure do not have a right to marry under state law, if either applicant has been adjudged

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<sup>3</sup> *Id*; see also *Monts v. State*, 496 N.E.2d 37, 39 (Ind. 1986).

<sup>4</sup> *State ex rel. Young v. Niblack*, 99 N.E.2d 839, 841 (Ind. 1951); see generally IND. CODE ch. 33-17-1.

<sup>5</sup> *Union Township of Montgomery Co. v. Hays*, 207 N.E.2d 223, 224 (Ind. App. 1965).

<sup>6</sup> IND. CONST. art 15, § 4; IND. CODE § 5-4-1-1.

<sup>7</sup> IND. CODE § 33-17-1-3.

<sup>8</sup> *Mosby v. Bd. of Comm’rs of Vanderburgh Co.*, 186 N.E.2d 18, 20 (Ind. App. 1963); *Indiana Ethics Comm’n v. Nelson*, 656 N.E.2d 1172, 1175 (Ind. Ct. App. 1995).

<sup>9</sup> *Campbell v. Brackett*, 90 N.E. 777, 778 (Ind. App. 1910).

<sup>10</sup> *State ex rel. Socialist Labor Party v. State Election Bd.*, 241 N.E.2d 69, 75 (Ind. 1968) (*citing Julian v. State*, 39 N.E. 923 (Ind. 1895)).

<sup>11</sup> IND. CODE § 31-11-4-3.

<sup>12</sup> IND. CODE § 31-11-4-2.

<sup>13</sup> IND. CODE ch. 31-11-2, -4, 5-2.

<sup>14</sup> IND. CODE § 31-11-1-6.

<sup>15</sup> IND. CODE § 31-11-6-1.

mentally incompetent, or if either applicant is under the influence of alcohol or narcotic drugs.<sup>16</sup> Upon request from those applicants who have been refused a license, the clerk may certify the refusal to the circuit court and notify the applicants of the submission to the court.<sup>17</sup> Pursuant to statute, applicants who have been refused a marriage license by the clerk are entitled to a hearing before the circuit court regarding whether a marriage license should be issued.<sup>18</sup> The court makes the final determination concerning the issuance of the license, and the clerk must comply with the court's order.<sup>19</sup>

Notably, the statutes do not provide the clerks with discretion as to whether to issue a marriage license. If an applicant fulfills the statutory prerequisites, or if the court orders the clerk to issue a license, the clerk must issue the marriage license. Conversely, if an applicant does not fulfill all of the statutory requirements, or seeks a license to solemnize a marriage prohibited by statute, the clerk has no discretion to issue the license.

More particularly, the clerk – whether relying on advice of counsel or independent of counsel – does not have the authority to determine the constitutionality of any statute providing for or prohibiting the issuance of marriage licenses. Thus, a clerk may not decide to ignore particular statutory prohibitions, for example the prohibition against issuing licenses to same-sex couples, simply because the clerk believes that this prohibition is either ill-advised or, in the clerk's opinion, unconstitutional. Nor may a clerk decide not to issue any licenses to any couples simply because the clerk believes it unfair or unconstitutional to issue marriage licenses to opposite-sex couples but not same-sex couples. The statutes dictate the clerks' duties and clerks are not free to deviate from those duties based on their personal views of the law.

The State of Indiana may seek an injunction and penalties against a clerk who issues marriage licenses that are not authorized by statute. For example, in 1938, the state took action against the clerk of the Lake County circuit court as a result of the improper issuance of marriage licenses by the clerk.<sup>20</sup> The laws of the state at the time required marriage licenses be obtained and issued in the county where the female applicant resided.<sup>21</sup> The clerk, contrary to statutory requirements at the time, had issued several thousand marriage licenses to women who were not residents of Lake County. After the clerk refused to issue licenses only in compliance with the law, the State sought and received a temporary injunction and a penalty provided by statute for violation of the law. The Indiana Supreme Court, upholding the trial court's injunction, noted a court may enjoin a public officer who is acting in breach of trust, unlawfully, or without authority.<sup>22</sup>

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<sup>16</sup> IND. CODE § 31-11-4-2, -11.

<sup>17</sup> IND. CODE § 31-11-4-12.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Sweigart v. State*, 12 N.E.2d 134 (Ind. 1938).

<sup>21</sup> *Id.* at 136-37. (Act of 1939, ch. 100 § 1, p. 513 revised the requirement and allowed for a license to be issued by a clerk in the county where either of the applicants reside.)

<sup>22</sup> *Id.* at 137.

Current Indiana law imposes criminal penalties for actions associated with obtaining and issuing unauthorized marriage licenses.<sup>23</sup> A clerk of the circuit court may be charged with a Class B misdemeanor if the clerk, or a deputy of the clerk, issues a marriage license “knowing that the information concerning the physical condition of the applicant is false.”<sup>24</sup> Additionally, a clerk who solemnizes a marriage in violation of Article 11 commits a Class C infraction, or a Class B misdemeanor if the individuals are prohibited from marrying under Indiana Code chapter 31-11-1.<sup>25</sup> Finally, the failure to comply with a statutory duty may be prosecuted under the official misconduct provision of Indiana Code section 35-44-1-2. That subsection provides that a public servant who knowingly or intentionally performs an act he or she is forbidden by law to perform commits a Class A misdemeanor.

County officers may be impeached, resulting in suspension or removal from office, for the commission of any misdemeanor in office.<sup>26</sup> Furthermore, a clerk who refuses to issue marriage licenses at all may be subject to an impeachment or removal action for refusing to perform official duties.<sup>27</sup> Additionally, there is the possibility of immediate judicial action in the form of the issuance of a temporary restraining order, followed by a preliminary injunction or an order of mandate, when public officials do not act in accordance with their statutory duties.

### CONCLUSION

Clerks of the county circuit courts are public officials whose duties include the issuance of marriage licenses. Public officials must perform their duties in accordance with their given statutory authority and in compliance with state statutes. The act of issuing a marriage license is prescribed by statute and the clerk of the circuit court must carry out the act as required by statute to be performed. Clerks have no authority to undertake their own evaluations of the constitutionality of these statutes. And they may neither issue licenses that are not authorized by statute nor refuse to issue marriage licenses altogether.

Sincerely,

Stephen Carter  
Attorney General

Rebecca Walker  
Deputy Attorney General

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<sup>23</sup> IND. CODE ch. 31-11-11.

<sup>24</sup> IND. CODE § 31-11-11-4.

<sup>25</sup> IND. CODE § 31-11-11-5, -7

<sup>26</sup> IND. CODE § 5-8-1-1; IND. CONST. art VI, § 8

<sup>27</sup> IND. CODE § 5-8-1-35; *Beesley v. State*, 37 N.E.2d 540 (Ind. 1941).