

OPINION NO. 69-051**Syllabus:**

1. A probate court may not require the evidence of an I.Q. test or other similar test to prove mental capacity as a prerequisite to the issuance of a marriage license.

2. A probate court may not refuse to issue a marriage license on the ground of a present inability to support a family.

3. A probate court may not refuse to issue a marriage license for the reason that there is money due for child support of a previous marriage.

To: Roy H. Huffer, Jr., Pickaway County Pros. Atty., Circleville, Ohio
By: Paul W. Brown, Attorney General, May 27, 1969

I have before me your request for my opinion on the following questions:

"1. May the Probate Court require the evidence of an I.Q. test or other similar test to prove mental capacity as a prerequisite to issuing a marriage license? If so, may the court require the applicant to furnish the evidence?"

"2. May the court refuse to issue a marriage license to persons who already have more than one child being supported by the government and may the court require evidence of some reasonable present ability to support under the clause, 'no legal impediment to their marriage'."

"3. May the court require those persons previously married to prove an arrearage for child support of a previous marriage as a prerequisite for a license?"

The right to marry is a basic and sacred right long recognized and regulated by the laws of civilized nations. The most

recent decision in this area affirming this right was the U.S. Supreme Court landmark case of Loving v. Virginia, 388 U.S. 1 (1967), 18 L. Ed. 2d, 1010, 87 S. Ct. 1817, wherein the anti-miscegenation laws of Virginia were declared unconstitutional as being repugnant to the Fourteenth Amendment. This right is subject to regulation by the state, but only in certain cases where one of the license applicants is under a "legal disability." See, for example, State v. Wilcox, 26 Ohio N.P. (n.s.) 343, regarding the prohibition against the marriage of a juvenile.

The "legal disabilities" involved in your first question are set forth in Title 31, Revised Code, specifically in Section 3101.06, which provides as follows:

"No marriage license shall be granted when either of the applicants is a habitual drunkard, imbecile or insane person, is under the influence of an intoxicating liquor or narcotic drug, or is infected with syphilis in a form that is communicable or likely to become communicable."

You have asked whether a probate court may require the evidence of an I.Q. test or other similar test as a prerequisite to the issuance of a marriage license. I believe the reply must be in the negative and may be answered forthrightly by referring to the powers of the court to issue or deny a marriage license based on the results of certain tests as authorized in Chapter 3101, Revised Code. The only examination required by the Revised Code as a prerequisite to the issuance of a marriage license is found in Section 3101.05, Revised Code, which requires that a serological test be given to determine the existence or nonexistence of syphilis. Nowhere in the statutes do I find authority for any other type of prerequisite test.

I do not deny the court's jurisdiction to inquire of an individual's competency to marry in a proceeding properly before the court; however, I must conclude that an I.Q. or other similar test is not contemplated by the Revised Code and may not be required prior to the issuance of a marriage license.

Regarding your second question, the term "no legal impediment to their marriage", found in the marriage certificate, anticipates only those impediments referred to in Section 3101.01, Revised Code, concerning minors and persons with a living spouse, and Section 3101.06, supra.

The answer to your third question, likewise, can be answered by again utilizing the authority of Sections 3101.01 and 3101.06, supra. Obviously, the impediments listed in these two sections do not include the situation where there is money due for child support of a previous marriage.

Therefore, it is my opinion and you are hereby advised:

1. A probate court may not require the evidence of an I.Q. test or other similar test to prove mental capacity as a prerequisite to the issuance of a marriage license.
2. A probate court may not refuse to issue a marriage license on the ground of a present inability to support a family.

3. A probate court may not refuse to issue a marriage license for the reason that there is money due for child support of a previous marriage.