Rule 40. Marriage and Civil Union Divisions

(a) Creation. The chief judge of any judicial circuit may, by administrative order, establish a marriage and civil union division in any county in the circuit and specify the times and places at which those judges willing to perform marriage solemnizations and civil union certifications will normally be available to do so. A marriage and civil union fund may be established on a circuitwide basis rather than a county-by-county basis when the chief judge, along with the majority of circuit judges, determines that the circuit's judicial needs are best served by a circuitwide fund.

(b) Clerk—Fee. The chief judge may provide that the clerk of the circuit court or someone designated by the clerk shall attend each regular session of each marriage and civil union division to assist the judge assigned thereto. The chief judge may set a fee to be collected by the clerk in an amount not to exceed $10 for each marriage solemnization or civil union certification performed. No additional fee or gratuity will be solicited or accepted.

(c) Trust Account. The fees received shall be deposited in a federally insured or fully collateralized bank account in the name of the "Marriage and Civil Union Fund of the Circuit Court of ____________ County" or the "Marriage and Civil Union Fund of the __________ Circuit Court." The trustees of the account shall be three in number, consisting of the chief judge, the administrative secretary to the chief judge, and a resident circuit judge of the county. If there is no administrative secretary to the chief judge, or if there is no resident circuit judge of the county, the chief judge shall designate one or two fellow circuit judges as his or her co-trustees. Money in a marriage and civil union fund may be spent in furtherance of the administration of justice for the following items:

bank charges;

business meal costs when an agenda is prepared for the meeting;

courtroom and judicial office improvements;

electronic legal research services;

equipment-purchase, repair, and service;

judicial robes-purchase, repair, and cleaning;

jury room supplies and equipment;

legal publications;

membership dues for legal and judicial associations;

name plates for judges;

office supplies;

pictures, plaques, and frames for the courthouse;

public education/awareness program materials;

training courses approved by the judicial education committee;

training and professional education programs for nonjudicial employees of the judicial branch; and

travel for judicial business, not to exceed reimbursement levels consistent with the Supreme Court's travel reimbursement guidelines for judicial and nonjudicial members of the judicial

branch.

Payment of a reasonable per diem fee to the clerk, or person designated by the clerk, who attends the marriage and civil union division on a day other than a regular working day may be made from the fund.

(d) Reporting and Auditing Requirements.

(1) Funds with Balances Under $50,000 at the end of the State Fiscal Year. For marriage and civil union funds that reflect a balance under $50,000 at the end of each State Fiscal Year (June 30), the chief judge of the circuit shall file, quarterly in the next fiscal year, reports with the Administrative Director of the Illinois Courts. The reports shall be filed not later than the fifteenth of each October, January, April and July. The report shall contain (i) the name of the marriage and civil union fund; (ii) the quarter end date; (iii) the balance on hand at the beginning of the quarter; (iv) the total income, including a detailed list of any income other than marriage and civil union fees for the quarter; (v) the total expenses for the quarter with a detailed list including the name of the vendor paid, description of the goods or services purchased, and the amount of each expense, and (vi) such other information as deemed necessary by the Administrative Director. The report shall be in a format prescribed by the Administrative Office. These reports shall be prepared by the administrative secretary or the resident judge and approved by the chief circuit judge.

(2) Funds with Balances of $50,000 and over at the end of the State Fiscal Year. On an annual basis, and not later than September 30, the chief judge of the circuit shall file with the Administrative Director of the Illinois Courts a professional, independent audit conducted by an accredited audit firm for each marriage and civil union fund in his or her circuit reflecting a balance of $50,000 and over at the end of the prior State fiscal year. The content of the annual audit shall be consistent with the reporting requirements contained in paragraphs (d)(1)(i) through (d)(1)(vi) of this rule.

(3) Records relating to the revenue and expenses of the marriage and civil union funds shall be retained in either paper or electronic format for the current State Fiscal Year plus five (5) prior fiscal years.

(e) Excess Funds to County Treasurer. The trustees for all marriage and civil union funds shall pay into the county general fund or other judicial-related county funds such amounts as in their judgment may be appropriate.

Effective April 1, 1974; amended January 7, 2002, effective March 1, 2002; amended October 29, 2004, effective January 1, 2005; amended May 24, 2006, effective immediately; amended December 6, 2006, effective January 1, 2007; amended December 17, 2007, effective January 1, 2008; amended May 26, 2011, effective immediately; amended October 1, 2014, eff. immediately.

JUSTICE FREEMAN, dissenting:

I would quickly join the court in adopting the March 1, 2002, amendments to Supreme Court Rule 40 (134 Ill. 2d R. 40), which increase auditing and spending accountability, but for my

fundamental constitutional concern with certain parts of the rule itself. Notwithstanding the amendments, the collection and disbursement of marriage fees is simply beyond this court's constitutional authority. So, while I commend the efforts taken today by my colleagues, I must dissent because the provisions amended are themselves invalid under the separation of powers doctrine.

Although there is no question that the Illinois Constitution provides this court with the authority to create, within the circuit courts, marriage divisions such as those provided for in Rule 40(a), our Constitution gives to the General Assembly-not this court-the power to set and control the deposit and disbursement of fees. The Constitution states that "[f]ees may be collected as provided by *law and by ordinance* and shall be deposited upon receipt with the treasury of the unit." (Emphasis added.) Ill. Const. 1970, art. VII, §9. The phrase "by law," as used in our Constitution, means the General Assembly's entire lawmaking process and encompasses the "normal legislative manner." *Quinn v. Donnewald*, 107 Ill. 2d 179, 186-87 (1985). This court has recognized that the normal legislative manner consists of the vote of a majority of both houses of the General Assembly, with presentment to the Governor for his or her action, bills that successfully passed each house of the legislature. *Quinn*, 107 Ill. 2d at 186-87. In defining the phrase "by law," this court specifically relied on the drafters' meaning of the phrase as was recorded at the Constitutional Convention. *Quinn*, 107 Ill. 2d at 186. In particular, the court noted the remarks of Delegate Wayne W. Whalen, who stated that

> " '[t]he reason for the addition of the words "by law" was to point out to you that it was not the intent of the Committee of the Whole or the Substantive Committee that the General Assembly could act in any other way than the law-making process. As you know, the General Assembly can act by rule, it can act by resolution; that was not the intent. The intent was to use the entire law-making process as set out in the constitution, so to clarify this ambiguity we added the term "by law" ***.' " *Quinn*, 107 Ill. 2d at 186, quoting 3 Record of Proceedings, Sixth Illinois Constitutional Convention 2180 (statements of Delegate Whalen).

Delegate Whalen's construction of the phrase is faithful to its commonly understood legal meaning-Black's Law Dictionary notes that the phrase "provided by law" when used in a constitution or statute generally means "prescribed or provided by some statute" (Black's Law Dictionary 1102 (5th ed. 1979)), and his construction was understood by the delegates to be the meaning of the phrase throughout the entire constitutional document. See 4 Record of Proceedings, Sixth Illinois Constitutional Convention 3416 (comments of Delegate Netsch, stating "the Style and Drafting Committee has adopted a practice *** whereby the expression 'by law' refers only to laws enacted by the General Assembly"); see also 4 Record of Proceedings, Sixth Illinois Constitutional Convention 2629 (comments of Delegate Nudelman). In short, the constitutional provision "as provided by law" means "as by provided by statute." In other words, the Constitution means to exclude, as the source of fee provisions, any rulemaking authority, judicial or otherwise.

Any doubt about this construction is dispelled by the fact that the Constitution provided, in juxtaposition, that fees might also be collected by municipal ordinances. An "ordinance" is defined as "a local rule enacted by a unit of government pursuant to authority delegated by the

State." *City of Peoria v. Toft*, 215 Ill. App. 3d 440, 443 (1991). In light of the phrase "by law or ordinance," the Constitution demands that fees be enacted through the legislative process, on a statewide basis or on a local government basis, as opposed to any judicial rulemaking process.

Pursuant to this constitutional grant of authority, our General Assembly has set out an extensive fee schedule in the Clerks of Courts Act (705 ILCS 105/0.01 *et seq.* (West 1998)), which is arranged according to county population. See 705 ILCS 105/27.1 (West 1998) (pertaining to counties of 180,000 or less); 705 ILCS 105/27.1a (West 1998) (pertaining to counties over 180,000, but not more than 650,000); 705 ILCS 105/27.2 (West 1998) (pertaining to counties over 650,000, but less than 3 million); 705 ILCS 105/27.2a (West 1998) (pertaining to counties of 3 million or more). The Act sets a $10 fee for all in-court marriages in counties having populations of not more than 650,000. See 705 ILCS 105/27.1(b)(3), 27.1a(a-1) (West 1998). The legislature has not expressly provided a fee amount for in-court marriages performed in counties having populations greater than 650,000. In these counties, the legislature has provided that "[a]ny fees not covered in this Section shall be set by rule or administrative order of the Circuit Court with the approval of the Administrative Office of the Illinois Courts." 705 ILCS 105/27.2(r), 27.2a(r) (West 1998). Thus, we, as a court, have been given authority by the legislature to set a fee for in-court marriages performed in counties having populations of over 650,000. Rule 40(b), which provides for a $10 marriage fee, is only constitutional in those counties where the legislature has not expressly provided for an in-court marriage fee.

This court's authority to direct the deposit and disbursement of the fees collected by the clerks of the circuit courts is also governed by our Constitution. Section 9(a) states:

> "Compensation of officers and employees and the office expenses of units of local government shall not be paid from fees collected. Fees may be collected as provided by law and by ordinance and shall be deposited upon receipt with the treasurer of the unit. Fees shall not be based upon funds disbursed or collected, nor upon the levy or extension of taxes." Ill. Const. 1970, art. VII, §9(a).

In order to implement this constitutional ban on fee offices within units of local government and the judicial system, the General Assembly enacted the Fee Deposit Act in 1972. *Kaden v. Kagann*, 260 Ill. App. 3d 256, 265 (1994). Section 2 of the Fee Deposit Act mandates

> "All elected or appointed officials of units of local government, and clerks of the circuit courts, authorized by law to collect fees which collection is not prohibited by Section 9 of Article VII of the Constitution, shall deposit all such collected fees upon receipt with the county treasurer or treasurer of such other unit of local government, as the case may be, except as otherwise provided by law; and except that such officials may maintain overpayments, tax redemptions, trust funds and special funds as provided for by law or local ordinance." 50 ILCS 315/2 (West 1998).

Section 2 of the Fee Deposit Act requires that, except as "provided by law" to the contrary, monies collected by the clerks of the circuit court cannot be deposited with any entity other than the county treasurer. As noted above, the phrase "provided by law" means a statute-not judicial rulemaking. Furthermore, section 2's reference to "trust funds" does not mean trust funds provided by judicial rule, but rather those "provided for by law or local ordinance." The trust

fund established in Rule 40(c) does not fall within the ambit of this exception. Indeed, my research has not revealed the "law or local ordinance" by which the in-court marriage fees collected under Rule 40 may be excepted from deposit with the county treasurer and, instead, placed in a trust fund. The General Assembly, by way of the Fee Deposit Act, has expressly directed that all fees collected by the clerks of the circuit court be deposited with the treasurer of the county in which the court sits. To the extent that this court, through Rule 40, directs otherwise, it would appear that this court is improperly acting in an area wholly reserved, by constitutional fiat, to our legislature.

Our Constitution is silent as to the disposition or disbursement of fees. Our appellate court has recognized that the drafters of the 1970 Constitution, in contemplating the inclusion of a provision in the Constitution that would direct the disposition of fees, believed the issue was a matter for the General Assembly. *Kaden*, 260 Ill. App. 3d at 261 (acknowledging that it was "clear from this debate *** the drafters intended that the General Assembly determine where such fees should be deposited"). I would point out the comments of Delegate Fay: "I must respectfully urge the defeat of this proposed amendment, and the reason I do so is because *** the legislature could take care of this matter, and I think that we should let them do so rather than engraft this in the constitution where it is not needed." 4 Record of Proceedings, Sixth Illinois Constitutional Convention 2632-33 (statements of Delegate Fay). These statements led the appellate court to conclude that the Constitution left the matter of fee disbursement to the authority of our legislative branch of government and that neither the state nor the counties have a constitutional right to fees collected by the circuit court clerks. *Kaden*, 260 Ill. App. 3d at 260-61.

In the absence of an express constitutional provision on a subject, the legislature is free to act. *County of Stark v. County of Henry*, 326 Ill. 535, 538 (1927). The General Assembly has comprehensively provided for the disbursement of clerks' fees in the Clerks of Courts Act. Section 27.5 of that Act states that

> "All *fees*, fines, costs, additional penalties, bail balances assessed or forfeited, and any other amount paid by a person to the circuit clerk *that equals an amount less than $55*, except restitution under Section 5-5-6 of the Unified Code of Corrections, reimbursement for the costs of an emergency response as provided under Section 5-5-3 of the Unified Code of Corrections, any fees collected for attending a traffic safety program under paragraph (c) of Supreme Court Rule 529, any fee collected on behalf of a State's Attorney under Section 4-2002 of the Counties Code or a sheriff under Section 4-5001 of the Counties Code, or any cost imposed under Section 124A-5 of the Code of Criminal Procedure of 1963, for convictions, orders of supervision, or any other disposition for a violation of Chapters 3, 4, 6, 11, and 12 of the Illinois Vehicle Code, or a similar provision of a local ordinance, and any violation of the Child Passenger Protection Act, or a similar provision of a local ordinance, *shall be disbursed within 60 days after receipt by the circuit clerk as follows*: 47% shall be disbursed to the entity authorized by law to receive the fine imposed in the case; 12% shall be disbursed to the State Treasurer; and 41% shall be disbursed to the county's general corporate fund. Of the 12% disbursed to the State Treasurer, 1/6 shall be deposited by the

> State Treasurer into the Violent Crime Victims Assistance Fund, 1/2 shall be deposited into the Traffic and Criminal Conviction Surcharge Fund, and 1/3 shall be deposited into the Drivers Education Fund. For fiscal years 1992 and 1993, amounts deposited into the Violent Crime Victims Assistance Fund, the Traffic and Criminal Conviction Surcharge Fund, or the Drivers Education Fund shall not exceed 110% of the amounts deposited into those funds in fiscal year 1991. Any amount that exceeds the 110% limit shall be distributed as follows: 50% shall be disbursed to the county's general corporate fund and 50% shall be disbursed to the entity authorized by law to receive the fine imposed in the case. Not later than March 1 of each year the circuit clerk shall submit a report of the amount of funds remitted to the State Treasurer under this Section during the preceding year based upon independent verification of fines and fees. All counties shall be subject to this Section, except that counties with a population under 2,000,000 may, by ordinance, elect not to be subject to this Section. For offenses subject to this Section, judges shall impose one total sum of money payable for violations. The circuit clerk may add on no additional amounts except for amounts that are required by Sections 27.3a and 27.3c of this Act, unless those amounts are specifically waived by the judge. With respect to money collected by the circuit clerk as a result of forfeiture of bail, ex parte judgment or guilty plea pursuant to Supreme Court Rule 529, the circuit clerk shall first deduct and pay amounts required by Sections 27.3a and 27.3c of this Act. This Section is a denial and limitation of home rule powers and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution." (Emphases added.) 705 ILCS 105/27.5 (West 1998).

The comprehensive treatment could not more strongly demonstrate the legislature's intention that *all* fees covered by the law, except those the legislature wanted to exempt, were to be disbursed in the manner described. In fact, the reference to our Rule 529 shows that when the General Assembly wanted to refer to monies collected by way of this court's rules, it expressly so provided. Moreover, the fact that the General Assembly specifically referred to this section as a "denial and limitation" on the home rule power provides further proof of the intention that the General Assembly *itself* solely provide for the disbursement of fees collected by the clerks of our courts. The disbursement provisions contained in Rule 40 are at odds with the statutory provisions mandated by our legislature. Because our Constitution intends for this matter to be left to the legislature and not this court, I believe that the conflict must be resolved in favor of the legislature.

In sum, the Constitution mandates that fees must be collected by statute (or ordinance) and not by judicial rule. The legislature has expressly provided for the collection of fees in the Clerks of Courts Act and has further provided that any fees not covered specifically in that Act shall be set by rule or administrative order of the circuit court with the approval of the Administrative Office of the Illinois Courts. So it is by legislative enactment that the court may, by rule, set those fees not otherwise provided by law. Our Constitution also mandates that fees collected be deposited with the treasurer of the unit. There is no complementary constitutional provision which mandates the manner in which fees collected by clerks of the courts shall be disbursed; rather the matter is left to legislative authority. The General Assembly has implemented the

constitutional mandate regarding fee deposits through enactment of the Fee Deposit Act and has provided for fee disbursements through enactment of the Clerks of Courts Act. Neither of these pieces of legislation grant to this court any authority whatsoever to direct either the deposit or disposition of fees.

Other observations support this conclusion. I refer specifically to the duty given by the legislature to the county boards to provide for court facilities. See 55 ILCS 5/5-1106 (West 1998). Section 5-1106 of the Counties Code mandates that the county board of each county provide reasonable and necessary expenses for the use of, *inter alios*, judges and clerks of the courts. The Code further mandates each county board to provide for proper rooms and offices for the accommodation of the circuit court of the county and to provide "suitable furnishings for such rooms and offices. *** The court rooms and furnishings thereof shall meet with reasonable minimum standards prescribed by the Supreme Court of Illinois. Such standards shall be substantially the same as those generally accepted in court rooms as to general furnishings, arrangement of bench, tables and chairs, cleanliness, convenience to litigants, decorations, lighting and other such matters relating to the physical appearance of the court room." 55 ILCS 5/5-1106 (West 1998). These mandates from the General Assembly are in harmony with the fee deposit and disbursement system established by the legislature-the fees revert directly to the county, which is charged with the responsibility of providing the upkeep of its courts.

The only conclusion that can be reached in light of the foregoing is that this court simply lacks the authority to create marriage trust funds in the manner prescribed in Rule 40. The Illinois Attorney General reached the same conclusion in 1977, when he issued an opinion finding that Rule 40 was inoperative insofar as it authorized deposits and disbursements of fees in contravention of statute. See 1977 Ill. Att'y Gen. Op. 159. Again, the fact that the amendments are well-intended and commendable must be separated from the fact that the collection and disbursement provisions of Rule 40 violate the separation of powers doctrine. This is no small concern. We, as an institution charged with the solemn authority to measure the constitutionality of legislative acts, must also be diligent to circumscribe our conduct to what is constitutionally permissive. Unfortunately, that has not occurred with respect to Rule 40. For these reasons, I respectfully dissent.

Committee Comment

(May 24, 2006)

Rule 40 provides that marriage funds may be expended to support judicial "training courses approved by the judicial education committee." Under this provision, marriage funds may be expended for only those judicial education programs which have been approved for the award of continuing judicial education credit, pursuant to the Supreme Court's Comprehensive Judicial Education Plan for Illinois Judges. The role of the Illinois Judicial Conference Committee on Education, under Rule 40, is limited to review and recommendation to the Supreme Court regarding the award of judicial education credit. The authority to expend marriage funds for those courses approved by the Court for the award of judicial education credit rests with the chief circuit judges.