

OFFICE OF POLICY AND LEGAL ANALYSIS
Bill Analysis

To: Joint Standing Committee on Judiciary

From: Peggy Reinsch, Legislative Analyst

LD 124 An Act to Clarify the Law Concerning the Priority of Appointment of Personal Representatives under the Maine Uniform Probate Code

Public Hearing Date: February 4, 2021

SUMMARY

This bill provides that in the absence of a will, heirs of a decedent have priority over the surviving domestic partner of the decedent for the purpose of appointment of a personal representative under the Maine Uniform Probate Code.

TESTIMONY

Proponents

- Sen. Cyrway, sponsor (written testimony)
- Judge Lyman Holmes, Probate Judge, Washington County (written testimony only)
 - Contacted by a constituent whose father had passed away and woman who had lived with him for just a few days before his death was appointed the personal representative; the family negotiated a payment of \$10,000 to remove her as personal representative
 - She was appointed the personal representative because she was considered the domestic partner of the decedent, which has priority over heirs
 - Would be okay to keep in current order if change to "registered domestic partner"
 - Attorney recommended this change
 - An unregistered domestic partner is not a legal heir to an estate and they should not be given priority status over those persons who are legal heirs to the estate

Opponents

- Alysia Melnick, Equality Maine (written testimony)
- Leo Delicata, Legal Services for the Elderly (written testimony)
- Mary Bonauto, GLAD (written testimony)
- Andrea Mancuso, Maine Coalition to End Domestic Violence (written testimony only)
- John Bowker (written testimony only)
 - Bill would have a negative impact on Mainers in domestic partnerships
 - Domestic partners have been recognized in Maine since 2004 – defined in Probate Code
 - Bill would prioritize non-chosen family members above chosen family members
 - Adults may make the choice to marry, but may also make a choice to share a home and share finances without getting married

- The priority order in current law is particularly important for LGBTQ people, who are often estranged from their families due to a lack of acceptance of their sexual orientation or gender identity
- There are any number of non-marital families who should not have a family member foisted into a role of personal representative rather than the surviving partner
- Same concept came up in 128th Legislature when a bill was introduced to alter the priority order for determining who can act as a surrogate for an incapacitated adult, including the decision to withhold or withdraw life-sustaining treatment – that bill, like this one, proposed moving domestic partners down the priority list beneath parents and siblings; a majority of this committee and the Legislature rejected that bill
- All this would be avoided if the will appointed the domestic partner as the personal representative
- We don't agree that there is a sufficient reason to make the change proposed by the bill
- It should be noted that an heir has the right to object to the appointment of personal representative in a formal probate proceeding
- And a domestic partner has the right to renounce their right to be appointed personal representative
- As a general rule the Probate Code gives spouses the highest preference to act as agents for the other spouse. This is not only because spouses have a unique level of understanding and appreciation for the other spouse's qualities but because the relationship of marriage has always been highly valued as a fundamental building block of society.
- As our culture continues to evolve, relationships functionally equivalent to marriage have also developed; Domestic partnerships are an example of one that has been accepted and given a legal status
- The definition of that relationship is clearly one that some adults have adopted as their primary life choice or after they divorce or suffer the death of their spouse.
- Prior to the recognition of marriage equality, it was the only legally recognized relationship for LGBTQ+ individuals.
- Today, especially for older adults, marriage may not be financially realistic given the various penalties that affect social security benefits and other pension or revenue related issues. If they develop a relationship with someone with whom they can be "...domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare" this will qualify as a domestic partnership and will give them a measure of legal protection.
- Some domestic partnerships like marriages have their challenges. Adult children or others may not be accepting of their parent's choices as they age and may have different expectations about how property still owned or controlled by their parents will become part of their inheritance.
- The drafters of the Probate Code understood those realities and so one of the themes that runs through the Code is respect for the right of a person with capacity to make decisions that they believe are reasonable about themselves or their property. It that way it recognizes that a person's autonomy has the highest value and should always be honored.
- The Code offers help and provides guidance when a person doesn't have the capacity to make their own decisions or if they die with or without a will. It's designed to allow a person's values and preferences to become known so that these vital personal indicators may guide how decisions about their lives or property should be made.
- The priority systems in the code are designed to bring those who have the closest understanding of a person's world view into the decision-making role.
- In the case of a deceased spouse or domestic partner, as in the bill, the priority ladder expects that a surviving spouse or surviving domestic partner by definition will have an

intimate view of what that person would want and would have that person's best interests at heart

- This is not the only place the probate code has afforded domestic partners a status likened to a spouse and a priority over that it assigns to heirs. A domestic partner has priority to serve as a guardian, conservator, health care surrogate and custodian of a deceased's remains.
- While the duties of a personal representative or conservator do not involve the responsibilities or decisions that protect the lives of vulnerable people, they are still similar fiduciary positions that require a high degree of care in managing the property of another. In both instances knowing how another would act is important.
- The Probate Code adopted here less than two years ago took many hours of work and discussion by this Committee, PATLAC and many interested parties.
- Disrupting this thoughtfully crafted system by changing priority positions should be done with care and with a strong and articulated reason for adopting a different public policy. In this instance, for this bill, we are unable to see a reason to change.
- This re-ordering is in tension with a cardinal principle of the Maine Probate Code to assign responsibilities and distribute property in accord with what the decedent would have wanted.
- The principle supports the current prioritization because that prioritization assumes that the relationship between a domestic partner and decedent is chosen, interdependent, familiar and familial, and that appointing the surviving domestic partner as the personal representative will effectuate the decedent's wishes in the most cases.
- Second, the job of personal representative is well suited for a surviving domestic partner. A Personal Representative sorts through the decedent's affairs, belongings and memories, whether by inventorying their estate, paying their bills, or notifying heirs who might receive some portion of the estate, among other things. While this can be emotionally raw for someone close to the decedent, it is also an opportunity for healing during the grieving process.
- An example of how devastating it would be for a domestic partner to be displaced, even under the best of circumstances. In the event that the heir was distant, estranged from, or even hostile to the decedent, elevating the heir over the partner would complicate the job and unnecessarily wound the surviving partner.
- Finally, this change would impact a significant percentage of Maine households. Demographic research shows nearly a tenth of all Maine households report that they are cohabitating, unmarried couples, a statistic that has been consistent over a recent five-year period. According to 2019 U.S. Census Bureau data, almost 52,000 of Maine's estimated 574,000 households are categorized as cohabitating couples. Opposite-sex couples outnumber same-sex couples in these households by a margin of approximately twenty-eight to one.
- Although people can and do have issues with estate administration, there is no compelling reason for the State to disrespect those chosen families – those persons who meet the definition of “domestic partner” in the Code – of so many of our residents.
- Our concerns with this proposal are centered around the need to respect the life choices that survivors make and the ways that prioritizing marriage as the ultimate way of being fails to acknowledge the lived experience of many domestic violence survivors in our state
- Most of Maine's intimate partners who qualify as domestic partners under Maine's probate definition, but who are not “registered,” are opposite sex couples.
- Numbered in the population of domestic partners are survivors of domestic abuse and violence. Survivors who have been subjected to abuse or violence from an intimate partner may choose not to put legal constructs around future relationships – even those relationships that are positive and even those that are long term.

- This is yet another way that an abuser’s conduct continues to impact survivors for many years after separation.
- This decision of survivors not to re-marry or formalize a relationship within the registered domestic partnership construct is certainly an understandable choice and one that we hope state policy will continue reflect respect for.
- Further de-prioritizing long-term domestic partners in the line of who is able to attend to their loved one’s estate, despite their qualitative similarity to a spouse or a registered domestic partner, sends a message to all which unnecessarily promotes a social narrative that marriage is a privileged status.
- Those survivors who separate from a spouse as a result of domestic abuse and violence often must leave other pieces of their lives behind in doing so, including common friends, family of their spouse with whom they may have long term and impactful connections, and other community supports. There are also often serious financial implications.
- These are hard realities that our state policies cannot easily cure. Added to that, the decisions of married survivors to end their marriages are often fraught with internalized and oppressive beliefs that they have somehow failed to succeed in a way that is expected of them – and this sense of self blame ultimately traps many survivors in marriages with abusive partners.
- Perpetuating the idea that marriage should be the end goal of how to structure one’s adult relationship puts pressure on married survivors to “make it work” when they have no control over the choices made by the person who is harming them.
- This is something that our state policies can and should reflect an awareness of and be appropriately responsive to.
- The current list for prioritization of appointment of personal representative has been in place for many years.
- We question the practical need to modify it and encourage you to sincerely consider the policy implications associated with the proposed change.

Neither for nor against

- David Backer
- Kathleen Ayers, Register Kennebec County, Maine Association of Registers of Probate (written testimony only)
 - PATLAC has not discussed, so cannot provide position
 - This was a bad experience by heirs dealing with a domestic partner; likely that an equal number of bad experiences had by domestic partners dealing with heirs
 - A domestic partner who is not fulfilling the fiduciary duties of a personal representative can be removed, even face personal liability
 - Under Title 18-C, a Registered Domestic Partner is treated exactly the same as a spouse
 - Register as a registered domestic partner by filing a one-page form with DHHS – officially documented by the State
 - "Long-term arrangement" – some ambiguity, but not uncommon for legal concepts; not aware of any problems in applying the definition

POTENTIAL ISSUES OR TECHNICAL PROBLEMS:

- Is "long term arrangement" too ambiguous

BACKGROUND

- Definitions in the Probate Code:

18-C MRSA §1-201. Definitions

14. Domestic partner. "Domestic partner" means one of 2 unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare.

23. Heirs. "Heirs," except as provided in section 2-711, means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

54. Spouse. "Spouse" means an individual who is lawfully married and includes registered domestic partners and individuals who are in a legal union that was validly formed in any state or jurisdiction and that provides substantially the same rights, benefits and responsibilities as a marriage.

- "Domestic partner" listed in priority before adult children in the Probate Code for §5-309 – who may be guardian of an adult
§5-410 – who may be a conservator
- Law Court has accepted same definition of "domestic partner" contained in PFA statutory definition of "family or household member" that is used in Domestic Violence Assault (17-A §207-A), Domestic Violence Aggravated Assault (17-A §208-E), Domestic Violence Elevated Aggravated Assault (17-A §208-E) and Domestic Violence Elevated Aggravated Assault on Pregnant Person (17-A §208-F)

FISCAL IMPACT:

Not determined as of February 21, 2021