

LD2142

132nd Maine Legislature, Second Regular Session

Good afternoon. My name is Andrea Najarian. I am a Family Law Magistrate in Portland and Bridgton District Courts. I am here in my capacity as Chairperson of the Subcommittee created by FLAC to study the need for a spousal support formula in Maine.

The proposal before you is not something that was thrown together on the fly. FLAC authorized the formation of the Subcommittee to study the topic in 2019. My understanding is that an invitation went out to the Family Law Section at that time, inviting anyone who was interested to serve on the Subcommittee. Almost 20 family law attorneys from around the State accepted. At the first meeting, out of curiosity, we had a show of hands as to who was already in support of a spousal support formula for Maine. Almost all were in favor, but not all, and those minority voting members were invaluable to the discussion. For over a year, the Subcommittee studied the question, looking at other states, and debating the pros and cons. At the conclusion of that work, we voted again. Every single member voted in favor of having a spousal support formula of some kind.

The Subcommittee then continued working, trying to draft a proposed formula for FLAC to consider. It ultimately approved a structure of presumptions similar to those in the bill before you now. This structure is based generally upon a structure proposed by the Family Section of the American Law Institute ('ALI'), which consisted of family law judges and practitioners from all over the country who spent 10 years

developing the structure. So when you think of all the hours the ALI spent on the subject and all the hours the Subcommittee spent on the subject, you can't say that the structure is ill-considered. The Subcommittee did not make recommendations on the exact percentages and numbers to use. Instead, it asked FLAC to give the go-ahead on the concept before the Subcommittee delved into the details.

FLAC spent the next several years analyzing the issue itself. It is honestly a very complex topic. Over the course of these years, once or twice, FLAC asked the Subcommittee to analyze a couple alternate proposals, and also FLAC members presented to the Family Law Section at least twice. Ultimately, in April of last year, FLAC met in-person for the day and slogged through each and every decision point of a formula. At the end of the meeting, with only one dissenting vote, it approved the bill that is now before you.

There are three problems that this bill is trying to fix.

The first problem is a lack of consistency in outcomes. The current statute creates a presumption in favor of spousal support when there is a substantial difference in the parties' incomes and the parties have been married at least 10 years. But it provides absolutely no guidance as to what the amount of spousal support should be. As a consequence, spousal support awards vary greatly. Some judges are liberal in their awards. Some are conservative. So here's the problem: because of this, two cases with similar facts could receive very different results. This is not ideal for a system of justice. But it is not the judges' fault - the problem stems from a lack of guidance in the statute.

The second problem flows from the first: because there is a lack of predictability as to what a judge may order for spousal support, the issue of spousal support is particularly difficult to settle. In my experience, the cases that have the most difficulty settling are those with the issue of spousal support. In fact, all of the family lawyers on the Subcommittee held the same opinion. Contrary to what I think some people in opposition today may say, the Subcommittee's view was that a formula would increase parties' ability to settle cases.

The third problem, and maybe the most serious problem, is that the lack of guidance in the current statute essentially makes spousal support unavailable to self-represented litigants. A few years ago, I saw a statistic that about 75% of the parties in family matters in Maine have no lawyer. Either they can't afford or a lawyer or they choose not to have one. It's a big group. In cases where the parties have been married 10 years or more and have substantially different incomes, the magistrate needs to ask the lower income parent in the case if they are seeking spousal support. In my experience, the lower income parent almost always asks, quite naturally, "Well, what would it be?" I have to shrug my shoulders and say, "I don't know." Except for twice in my 15 years as a magistrate, the lower income parent has simply said, "No, just forget about it." Currently, there is no way to give a self-represented party even a ballpark notion of what a spousal support award might be. Currently, to determine what spousal support might be, a party must conduct discovery, which is a time-consuming and potentially complicated process beyond the capabilities of most self-represented parties. And why would a self-represented party take on that giant task if the party hadn't the slightest notion what the outcome might be. So, the bottom line is

that, as a practical matter, spousal support is not available to self-represented litigants. That's unfair.

You may hear people speaking in opposition today say that the proposal was not submitted to the Family Law section for comment. I'm not sure what that means exactly since there is no required comment period as there is in rule making. I will say, however, that the Family Law Section has been involved in this project from Day 1. The Subcommittee that UNANIMOUSLY concluded that Maine needed a spousal support formula consisted of Section members from all across the State. This same Subcommittee also approved the general framework of the formula as a series of presumptions. The specific numbers in the formula were admittedly developed by the members of FLAC, but many members of FLAC are also members of the Family Law Section. The Section was heard. But the Section is divided. And FLAC worked through the issues and made thoughtful decisions knowing the proposal could never please everyone.

You may hear people speaking in opposition today say that the proposal ignores existing statutory factors used to determine spousal support. That is simply not true. The requires the court to consider those paragraph 5 factors or any other fact to determine whether application of the formula would be unfair.

You may hear people speaking in opposition today say that the proposal ignores the tax ramifications of a spousal support award. That also is not true. The tax ramifications of spousal support MUST be taken into account. The person who pays spousal support pays taxes on that amount. The person who receives spousal support does not have to pay taxes on the amount. So, one way to look at it is that the payor is

paying more, because of the tax burden, than the actual spousal support amount and the payee is receiving more, because of the tax benefit, than the actual spousal support amount. Currently, the way attorneys address this issue is by conducting expensive discovery or by using expensive tax software. That is all fine, but it is NOT AVAILABLE to the self-represented litigant. So, to make spousal support available to the self-represented party, the spousal support formula has to be based upon gross incomes and the tax consequences of an award have to be taken into account another way. FLAC has done that by reducing its proposed multiplier by 25%. The reasoning is that the vast majority of parties are not taxed higher than the 25% tax bracket. So if the preferred multiplier is reduced by 25%, that should account for the average tax burden. This is not an unheard-of concept; it is my understanding that this is what practitioners in Massachusetts are doing.

Finally, you may hear people speaking in opposition today say that the formula is unfair to the person who would pay spousal support. Admittedly there is no formula that is going to work in every single case. That is why the formula has to be in the form of a rebuttable presumption. But I do believe that FLAC's proposal will achieve an appropriate result in a majority of cases. For example, recently I was asked to grant a divorce based upon the parties' agreement that included spousal support. The lower income parent was also the primary residential parent and earned about \$50,000. The non-primary residential parent earned about \$300,000. The parties had agreed to guidelines child support essentially and to \$60,000/year in spousal support. Both sides were represented by attorneys, and I believe one of those attorneys will be speaking in opposition today. Applying the FLAC formula to this case results in a

spousal support amount of about \$50,000/year. So, the results of the FLAC formula were in the ballpark and, in fact, would have been more favorable to the person paying spousal support than the agreement was. And applying the formula took 60 seconds and no discovery. This is just one case admittedly; it is not scientific; but it is telling.

I am confident that FLAC's proposal is well-considered. I am also confident that FLAC will monitor any spousal support law that is passed and will be able to propose any adjustments that may be appropriate as time goes by.

Thank for the opportunity to speak in support of this important proposal.