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November 17, 2008

The Honorable John E. Baldacci, Governor
State of Maine
State House Station #1
Augusta, ME 04333-0001

Dear Governor Baldacci:

You have asked whether a vacancy has been created by operation of law on the Androscoggin County Board of County Commissioners as the result of Commissioner Helen Poulin moving out of the district from which she was elected, even though she remains in the county. Ms. Poulin asserts that she intends to return to the district that elected her, and that therefore no vacancy has occurred.

CONCLUSION

While Maine courts have not addressed the issue directly, we believe that a court would conclude that a vacancy occurs when a county commissioner changes residence to another electoral division, even when he or she continues to reside in the county. The determination of whether a county commissioner has changed his or her residence to another electoral division or district is a fact-based one. Based on the facts made available to us and our interpretation of applicable statutes and case law, we believe that a court would likely conclude that Commissioner Poulin has vacated her office by removing herself from the district she was elected to represent.

FACTS

Helen Poulin represents District 3 on the Androscoggin Board of County Commissioners. According to an affidavit, dated September 22, 2008, and provided to your office by Ms. Poulin, she and her husband listed their home at 170 Ferry Road in Lewiston ("Lewiston home") for sale in July 2007. Poulin Affidavit ¶¶ 2, 10-11. Although the Poulins signed an agreement to purchase another house in Lewiston in July 2008, prior to the sale of their Lewiston home, that purchase was never effectuated. *Id.* ¶¶ 12-13. Upon the sale of their Lewiston home, the Poulins then purchased a home at 100 Vickery Road in Auburn ("Auburn home"). *Id.* ¶¶ 14-15. Ms. Poulin further states in her affidavit that she intends to return to Lewiston and that her Auburn home is on the market. *Id.* ¶15.

DISCUSSION

A. Whether a Vacancy is Created When a County Commissioner Moves from The Electoral District While Continuing to Reside in the County.

The qualifications of members of a board of county commissioners are specified in 30-A M.R.S.A. § 61 (“section 61”), which requires that “[e]ach of the commissioners of a county must represent one of the commissioner districts established by law for the commissioner’s county.” In addition, section 61(1) states: “Members of each board of commissioners must be residents of the commissioner district which they represent and shall be elected by the voters of that district.” These districts are subject to reapportionment every ten years “to establish as nearly as practicable equally populated districts.” 30-A M.R.S.A. § 65.

Thus a board of commissioners is made up of three to five members,¹ each of whom represents the distinct interests of one district and is required to be a resident of that district. Also relevant is Title 21-A M.R.S.A. § 333 (“section 333”), which establishes the following residence requirement for all county officers:

A candidate for any county office must be a resident of and a voter in the electoral division he seeks to represent on the date established for filing primary petitions in the year he seeks election. He must maintain a voting residence in that electoral division during his term of office.

In the case of Ms. Poulin, an argument has been advanced on her behalf that the requirement that she reside in the district from which she was elected does not continue for the duration of the commissioner’s four year term. This argument is contradicted by the plain language of section 61 and that of section 333. In construing the language of a statute, the court looks first to the statute’s plain language; absent ambiguity, the inquiry ends with the text of the statute. *Pennings v. Pennings*, 2002 ME 3, 786 A.2d 622 (2002). In this instance, section 61(1) clearly and simply requires that commissioners must be residents of the commissioner district which they represent. This is not a temporal requirement that applies only at the moment of election, but one which by its terms applies to the “members” of each of the county commissioner boards. Section 333 expressly requires that a county officer must maintain a voting residence in her electoral division for her term of office.

We have found only one Law Court decision addressing whether a vacancy was created by removal of the incumbent office holder from the district, and it is consistent with this conclusion. In *State ex rel. Deering v. Harmon*, 115 Me. 268 (1916), the Law Court held that a judge for the municipal court of Saco had abandoned his position by moving to Bangor and renting out his house in Saco, and that this abandonment of his office created a vacancy that the Governor and Council lawfully filled by a new appointment. While the statute governing the appointment expressly required that he “reside during the continuance in said office in said city of Saco,” the Court’s discussion of residence does not focus on that specific language as the basis of its holding.

¹ All of Maine’s counties have three commissioners, except for York which has five. 30-A M.R.S.A. §66-A.

All the authorities seem to be in accord that the incumbent of an office may abandon it by removing from the state, county, or other district to which the officer's residence is restricted by the law of his office. The doctrine is thus stated...: If the law requires an officer to reside in the county or district in which he holds his office, and during his term he ceases to reside in such county or district, his violation of the law operates as an abandonment of his office and creates a vacancy therein. However, a merely temporary removal or absence for a limited time from the county or district to which the law restricts his residence, with no intention of abandoning his office, or ceasing to discharge the duties thereof, will not result in terminating his title.

Id. at 275 (citation omitted). *See also Dorf v. Skolnick*, 371 A.2d 1094, 1101 (Md. 1977) (“The cases generally hold that when residence is a prerequisite to a given office then a change of residence vacates that office, absent a legislative expression to the contrary.”)

In *Harmon*, the Law Court was careful to distinguish abandonment of office that results from moving out of the electoral district from the type of abandonment that can occur when an officeholder fails to carry out the responsibilities of that office. In the case of Ms. Poulin, it has not been suggested that she has failed to carry out any responsibility of her office; rather, she engaged in voluntary acts, *i.e.*, selling her home in the district that elected her and purchasing a home in a different district, that render her unqualified to continue to hold office.

It has also been argued on behalf of Ms. Poulin that a vacancy in the office of county commissioner occurs only when a commissioner moves out of the county. This suggestion is based on the language in 30-A M.R.S.A. § 63 (“section 63”), which provides:

When no choice is effected or a vacancy happens in the office of county commissioner by death, resignation, *removal from the county*, permanent incapacity or for any other reason, the Governor shall appoint a person to fill the vacancy.

(emphasis added).

However, the general statute in Title 21-A governing vacancies in county offices, among others, provides in pertinent part:

A vacancy in any federal, state or county office, in the office of an election official, or in any political committee occurs when the incumbent dies, resigns, becomes disqualified or *changes his residence to an electoral division other than that from which he was elected* or when the person elected fails to qualify.

21-A M.R.S.A. § 361 (“section 361”) (emphasis added).

The language in section 63 (“removal from the county”) does not negate the requirements of section 61 or that of sections 333 and 361. The section 63 language survives from the time when commissioners were each elected by the voters of the entire county, before districts were created. It was not until 1969 that the Legislature began to divide each county into three or more districts, with each district described by statute and represented by one commissioner. That process continued on a county by county basis until 1975 when all were divided. The language in section 63 providing that removal from the county constitutes a vacancy in the office of a county commissioner, as well as the “for any other reason” provision enacted in 1963, were both enacted before the counties were divided into commissioner districts, and neither phrase was amended during that process.

Androscoggin County was divided into three districts in 1973, pursuant to a statute which concluded with this language:

Members of the board of commissioners shall be residents of the Commissioner District which they represent and shall be elected by the voters of the county.

P.L. 1973, c. 544, § 1. This language was amended in 1977 to provide that the Androscoggin County Commissioners “shall be elected by the qualified voters of that district.” P.L. 1977, c. 219, § 1. That language has been retained since, and now appears in 30-A M.R.S.A. § 61(1).

One of the fundamental principles of statutory construction requires that consideration be given to the whole statutory scheme for which the section at issue forms a part so that a harmonious result, presumably giving effect to legislative intent, can be achieved. *Sylvester v. Benjamin*, 2001 ME 51, 767 A.2d 297 (2001). The language in section 63 referring to removal from the county does not override the other provisions because it predates the formation of commissioner districts within each county. The several relevant statutes in Titles 30-A and 21-A clearly intend that each of the three members of the board of county commissioners reside in and represent the members of one district. If commissioners, who serve four year terms, are able to leave the district from which they were elected and in which they were required to reside at election, so long as they remain in the county, it would be inconsistent with this statutory scheme.

For these reasons, we believe that a court would likely conclude that a vacancy occurs in the office of county commissioner if a commissioner changes his or her residence to an electoral division other than that from which they were elected. That conclusion is consistent with the language in section 61 (Title 30-A) and sections 333 and 361 of Title 21-A, each of which applies here.

B. How to Determine Whether an Office Holder Has Changed His or Her Residence to Another Electoral District.

In deciding what test to apply to determine whether an incumbent of a county office has “change[d] [her] residence to another electoral division other than that from which [she] was elected,” thereby creating a vacancy pursuant to 21-A M.R.S.A. § 361, a court would look first to

the plain language of the statute and the definitions in Title 21-A. The word “residence” is defined in 21-A M.R.S.A. § 1(40) as follows:

“Residence” means that place where the person has established a fixed and principal home to which the person, whenever temporarily absent, intends to return.

The identical language appears in 21-A M.R.S.A. § 112, defining voting residence:

Voting residence is governed by the following provisions.

1. Residence. The residence of a person is that place where the person has established a fixed and principal home to which the person, whenever temporarily absent, intends to return.

“Voting residence” is also the phrase used in 21-A M.R.S.A. § 333 in describing a county office holder’s obligation to maintain such a residence in the electoral division during the entire term of office.

The Law Court has concluded that the above quoted definition of residence is equivalent to the common law definition of domicile. *Poirier v. City of Saco*, 529 A.2d 329 (Me. 1987). Based on review of the legislative history of the vacancy provision in 21-A M.R.S.A. § 361, it appears that domicile is, indeed, the concept that the Legislature intended to incorporate in declaring when a vacancy occurs. When 21-A M.R.S.A. § 361 was first enacted, the definitions included in that statutory scheme provided that “resident” and “residence” “refer to domicile.” R.S. 1954, c. 3-A, §§ 1 & 183, enacted by P.L. 1961, c. 360, § 1.

Several prior opinions of this office have addressed the residency requirement in Maine’s Constitution for members of the House of Representatives, and have concluded that the definition of voting residence is the appropriate standard to apply. *See Op. Me. Att’y Gen.* 79-111 (Dec. 18, 1979), at 2, citing opinions of September 12, 1978, September 1, 1978 and February 1, 1978 (“the establishment of a bona fide residence sufficient to entitle a person to vote in a particular district is sufficient to qualify the person to represent that district in the House of Representatives”).

We have found two Maine Law Court cases that directly address compliance with residency qualifications for elective office. In *Poirier v. City of Saco*, 529 A.2d 329 (Me. 1987), the court upheld a determination that Poirier was ineligible to serve as a city councilor for Ward 3 because he was not a “qualified voter” of that ward. At the time Poirier was elected, he owned a house in Ward 3, which he was in the process of renovating and to which he intended to move as soon as renovations were complete. He had owned that house for forty years, and had lived there for twenty-five years until he and his wife divorced. At the time of his election and for the previous few years, however, he was living in a cabin located in Ward 2 on property on which he operated a small sawmill and lumber business. He had been registered to vote in Ward 2 but had changed his registration address to the house in Ward 3 when he decided to run for city council. He was scheduled to take office as a Ward 3 city councilor in December 1985, but the

renovations on his Ward 3 house were not scheduled to be complete until the fall of 1986, approximately nine months after he was scheduled to be sworn into office. 529 A.2d at 330.

Quoting the definition of voting residence in 21-A M.R.S.A. § 112(1), the court held that Poirier's "intent to move to [the Ward 3 house] in the future did not establish Ward 3 as 'that place in which his habitation is fixed, and to which, whenever he is absent, he has the intention to return.'" 529 A.2d at 330.

As previously discussed, in *State ex rel. Deering v. Harmon*, 115 Me. 268 (1916), the Law Court determined that a vacancy had been created in the office of municipal judge when the incumbent moved from his home in Saco to the Bangor area to take a new job in Piscataquis County. The judge had taken a job in Piscataquis County and had "closed his law office, ceased housekeeping in Saco, and with his wife (there being no children) went to the township in Piscataquis County where his new employment required him to be." A few months later, he and his wife went to live at a hotel in Bangor, where he "continued to live except when away on business." 115 Me. at 273. He continued to own their house in Saco, however, and rented it to a relative. Based on these facts, the court concluded that the judge had ceased to reside in Saco.

To demonstrate domicile or bona fide voting residence, one must have a fixed place of habitation within the electoral district. Moreover, as this office has noted in a prior opinion, "although intent is an aspect of the test of residence, it clearly does not suffice alone." *Op. Me. Att'y Gen.* 79-211 (Dec. 18, 1979), at 4, n. 5. "One's intention to locate at a particular place does not become effective to establish his residence there until he is physically present at such place." *Id.* (citations omitted).² Cases from other jurisdictions addressing these questions have likewise concluded that intent to reside in a particular district is not enough to establish residency for purposes of voting or holding office if the person does not have an actual home in that district.³

C. Applying the Test to Determine Whether a Vacancy Has Occurred in the Office of Androscoggin County Commissioner for District 3.

In determining whether a change in voting residence has occurred, courts look at the particular facts and circumstances involved, including all of the indicators listed in 21-A

² For this reason, a member of the Maine Legislature whose House district had changed configuration due to redistricting such that his house was now outside the district was advised that to maintain eligibility to serve as a Representative of that district, he would have to change his residence by "physically moving to the new district." *Op. Me. Att'y Gen.* (Feb. 1, 1978).

³ See, e.g., *Krajicek v. Gale*, 677 N.W.2d 488 (Neb. 2004) (district representative deemed to have vacated his office when he physically moved with his family to house outside the district; intent to return to the district and to purchase house where aunt and uncle lived was not sufficient, given that he was not bodily present at the address in the district); *Young v. Stevens*, 968 So.2d 1260 (Miss. 2007) (court rejected claim of residency in Humphreys County by a candidate for county supervisor who actually resided in Hinds County; notwithstanding candidate's "strong ties" to Humphreys County, he did not physically reside in that county and had no fixed home there); and *Manchin v. White*, 318 S.E.2d 470, 483 (W.Va. 1984) (even though state senate candidate had substantial links to community which he sought to represent and considered that district to be his permanent place of residence, it was not sufficient to establish residency when the evidence showed that he maintained and occupied a dwelling place with his wife and family outside the district).

M.R.S.A. §112(1). Our knowledge of the facts pertinent to determining Ms. Poulin's residency is limited, and we cannot predict with certainty how a court would analyze those facts or what additional facts might come to light if this matter were to be fully explored in an evidentiary hearing. Applying the domicile or voting residence test described above to these facts, however, suggests that Ms. Poulin is not currently a resident of the county commissioner district she was elected to represent.

Ms. Poulin has acknowledged in her affidavit that she and her husband sold their Lewiston home last summer and purchased the Auburn home where they have resided for the past few months. Ms. Poulin does not claim to have any other "fixed and principal home" at this point within the city of Lewiston, the electoral district which she was elected to represent. This is not a situation, therefore, where an office holder owns or rents two dwellings and considers one to be her principal home. Ms. Poulin has only one place to reside, currently, and it is located outside her electoral district.

Ms. Poulin still considers herself to be a resident of Lewiston, and notes in her affidavit that she is registered to vote in Lewiston, and has two cars (hers and her husband's), a boat and a boat trailer registered in Lewiston. Poulin Affidavit, ¶¶ 6-9. Review of available records,⁴ however, shows that the address listed on her voter registration and her vehicle registration is the 170 Ferry Road address which Ms. Poulin and her husband no longer own, where they no longer reside, and in which they have no legal right to reside. The address on Ms. Poulin's driver's license is the post office box in Auburn, which she mentions in paragraph 5 of her affidavit.

Although Ms. Poulin claims to be living in Auburn only temporarily, she has not indicated any plan to move back to Lewiston until the Auburn home is sold, and it is obviously difficult to predict when that might occur. The Poulins' Lewiston home was on the market for approximately one year before it sold. Significantly, Ms. Poulin's own words reveal that her intention to move back to Lewiston is contingent upon the sale of the Auburn house: "Once we were able to sell our Vickery Road house we could be in a position to move back to Lewiston." Poulin Affidavit, ¶15.

We believe a court would assess Ms. Poulin's intentions based on her actions, not just her statements, and would likely consider that the act of buying a home in Auburn after selling her home in Lewiston was not consistent with an intention to stay in Auburn only temporarily. Moreover, at the time Mr. and Ms. Poulin purchased the Auburn house, Ms. Poulin appears to have believed that she could remain a county commissioner as long as she continued to reside in Androscoggin County, and thus a permanent move to the Auburn home would not affect her ability to continue as a commissioner. It was only after your office suggested in correspondence that section 361 required continued residency in her electoral district that Ms. Poulin expressed an intention to remain in Auburn only temporarily.

Even if a court were to find that Ms. Poulin intends to return to Lewiston, she has no home there where she can reside, and thus has no place to establish a voting residence. This is not a situation where she is staying temporarily outside District 3, while retaining a dwelling in

⁴ These include Bureau of Motor Vehicle records and voter registration records checked during this past month.

Lewiston to which she intends to return. She claims no specific place in Lewiston to which she is able to return at this point.⁵ And as indicated in the cases discussed above, a mere intention to return to one's electoral district is not enough to establish residency there. *See, e.g., Young v. Stevens*, 968 So.2d at 1264 (determination of residency "is not satisfied with a simple declaration that one intends to be a resident of a particular county when the overwhelming proof shows that he actually resides elsewhere").

Counsel for Ms. Poulin has argued, in a letter dated October 2, 2008, that under 21-A M.R.S.A. § 112(2), Ms. Poulin cannot be deemed to have "changed [her] residence" to one outside District 3 because although she has moved to Auburn, she does not intend to remain there.⁶ We believe this argument is unavailing. Subsection 2 of section 112 has to be read in concert with subsection 1, which establishes the basic requirement that voting residence is "that place where the person has established a fixed and principal home to which the person, whenever temporarily absent, intends to return." If a person has two dwellings and moves from one to the other, the act of removal alone under subsection 2 does not change their voting residence unless it is coupled with an intent to remain in the other place. "A person can have only one [voting] residence [i.e., domicile] at any given time," even though that person may have more than one dwelling. *Id.* §112(2). Ms. Poulin has only one dwelling, and she cannot retain a voting residence in a city where she no longer has a "fixed and principal home."

For all of the above reasons, we believe a court faced with this question would likely conclude that Ms. Poulin changed her residence from Lewiston to Auburn last summer and that, as a result, she vacated the position of county commissioner for District 3.

If you have further questions regarding this matter, please let me know.

Sincerely,



G. Steven Rowe
Attorney General

GSR/rht

⁵ Commissioner Poulin's situation is unlike that of the State Representative who was "staying temporarily at a house outside of [her] legislative district" but who retained ownership of a house and voting residence in her legislative district, and was thus advised by this office that she appeared to have "retained sufficient attributes of residence within [her] electoral district to qualify as a resident." *Op. Me. Att'y Gen.* (Oct. 13, 1976) at 2.

⁶ 21-A M.R.S.A. § 112(2) provides as follows:

2. Change. A change of residence is made only by the act of removal, joined with the intent to remain in another place. A person can have only one residence at any given time.