

February, 2023

“Case law factors for Termination of Maintenance based on cohabitation.”

When we last left off on the previous blog, our fictional client, Sam Sunshine, was still recovering from passing out when we explained the statutory guidelines factors for amount and duration of maintenance. Sam is convinced, his ex-wife, Susie Sunshine is “shacking up” with her boyfriend, Biff Muscles. Sam works very hard as an accountant, including overtime during the tax season. Biff doesn’t appear to even have a job, other than as a “Tik Tok Influencer!” Susie and Biff post on Facebook all the time about their dinner dates, vacations, hiking trips, Peloton workouts, rock climbing and all aspect of their new romance. Even though Biff supposedly has his own apartment, Sam has it on good intel that Susie basically moved Sam out of the former marital residence and moved Biff in as Sam’s replacement.

Maintenance termination events are governed under 750 ILCS 5/510(c) which states in pertinent part.

(c) Unless otherwise agreed by the parties in a written agreement set forth in the judgment or otherwise approved by the court, the obligation to pay future maintenance is terminated upon the death of either party, or the remarriage of the party receiving maintenance, or if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis. An obligor's obligation to pay maintenance or unallocated maintenance terminates by operation of law on the date the obligee remarries or the date the court finds cohabitation began. The obligor is entitled to reimbursement for all maintenance paid from that date forward.

So what constitutes “cohabitation with another person on a resident, continuing conjugal basis?”

The leading case on this concept is Marriage of Miller 2015 IL App (2d) 140350. A couple of overnights, is not enough. Some vacations, not enough. Spending some money on each other, not enough. The Miller court reviewed prior case law and provided numerous examples of what would be evidence of a “*de facto* marriage” which is what needs to be proven to show “cohabitation with another person on a resident, continuing conjugal basis” versus intimate dating relationship.

Intimate dating relationship does not terminate maintenance, “cohabitation with another person on a resident, continuing conjugal basis” does.

Prior to Miller, the gold standard for determining “cohabitation with another person on a resident, continuing conjugal basis” was Marriage of Susan 367 Ill. App. 3d. 926 (2006) which provided a 6-part test:

“...The party seeking the termination of maintenance has the burden of establishing that the receiving spouse is cohabiting with another. Id. At 929. In determining whether the petitioner has met his or her burden, a court looks to the totality of the circumstances and considers the following nonexhaustive list of factors: (1) the length of the relationship; (2) the amount of time spent together; (3) the nature of activities engaged in; (4) the interrelation of personal affairs (including finances); (5) whether they vacation together; and (6) whether they spend holidays together. Id. Each termination case turns on its own set of facts; just as no two relationships are alike, no two cases are alike.”

Miller rejected the 6-part test suggesting much more is needed to show a *de facto* marriage. Miller stated:

“...we disagree that the six factors are sufficient to encapsulate the totality of the circumstances in all cases. The six factors focus greatly on the emotional and social components of a relationship as opposed to practical and financial aspects that life parents share...”

In its final analysis Miller had this to say about the totality of circumstances having to be on the table to prove “cohabitation with another person on a resident, continuing conjugal basis”

“...Just as the termination of maintenance is permanent and irrevocable, a new relationship prompting the termination of maintenance must evince a permanence based on mutual commitment, as manifested by, for example, a combination of the length of the relationship, an intertwining of significant assets that would be difficult to undo, and/or verbal testimony of commitment (which would likely be the most difficult to prove). See, e.g., Weisbruch, 304 Ill.App.3d at 105 (where the relationship has achieved a permanence

sufficient for the trial court to conclude that it has become a de factor marriage, equitable principles warrant the termination of maintenance.)

While a consideration of the nonexhaustive list of six common-law factors is helpful to any termination analysis, courts should not take a checklist approach wherein they merely note the presence of certain facts that fit into each category. Courts should be aware that many of the six factors can be present in an intimate dating relationship as well as a de factor marriage. As such, courts should consider the totality of the circumstances and look for a deeper level of commitment, intended permanence, and, unless otherwise explained, financial or material partnership in order to determine that the former spouse and her new partner are involved in a de facto marriage.”

What I have seen in court (and much to the chagrin of our fictional client, Sam Sunshine) these cases are really hard to prove. Spending time together, even a lot of time, is not enough. In addition to spending lots of time together, there needs to be some kind permanent commitment, some kind of financial component such as sharing rent or utility payments, the parties own property together, are in business together, own a timeshare together, hold themselves out the community as much akin to husband and wife (if not even going so far as to using those exact words).

To put together one of these petitions and put on a trial on this issue no stone can be left unturned. Facebook, other social media, observations by third parties, financial records, all are in play and should be carefully reviewed in setting a course for a case seeking to terminate maintenance based on cohabitation with another person on a resident, continuing conjugal basis.