

Winter 2008

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Recommended Citation

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TERMINATING MAINTENANCE PAYMENTS WHEN AN EX-SPOUSE COHABITATES IN ILLINOIS: WHEN IS ENOUGH ENOUGH?

ALLAN L. KARNES*

I. INTRODUCTION

In many cases, the payor of maintenance does so with some degree of resentment. He or she would be very happy to have the maintenance obligation come to an end. The obligor spouse's resentment at making maintenance payments may grow if the recipient spouse is cohabitating, giving the obligor spouse the feeling of paying for the ex-spouse's "love nest." That the recipient of maintenance (or alimony as it is called in many jurisdictions) generally forfeits future payments upon remarriage is ingrained in American culture.

The concept has even served as a plotline in the 1993 romantic comedy, *Mr. Wonderful*.¹ In the film, the protagonist, played by Matt Dillon, gets the chance to fulfill a dream by buying an old bowling alley with some friends. But, the bank turns down his loan request because of the alimony payments he must make to his ex-wife (Anabella Sciorra). Dillon tries to find a new husband for his ex-wife, for when she marries again she loses her alimony rights. In Illinois, under Section 510(c) of the Illinois Marriage and Dissolution Act² [hereinafter IMDA], Dillon might have achieved his goal by just finding Anabella a man she was willing to live with.

Illinois is in the minority of states that statutorily terminate future support payments when the recipient spouse enters into another relationship short of marriage.³ In most states, the

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1. MR. WONDERFUL (Warner Brothers 1993).

2. 750 ILL. COMP. STAT. 5/510(c) (West 2007).

3. See Diane M. Allen, Annotation, *Divorced or Separated Spouses Living With Members of the Opposite Sex as Affecting Other Spouse's Obligation of Alimony or Support Under Separation Agreement*, 47 A.L.R. 4th 38 (1986, updated July 2005); Annotation, *Divorced Woman's Subsequent Sexual Relations of Misconduct as Warranting, Alone or With Other Circumstances,*

obligor spouse needs to show the cohabitation by the recipient spouse amounts to a substantial change in circumstances warranting a modification of the support obligation.⁴ Section 510(c) of IMDA [hereinafter § 510(c)] is as follows:

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.⁵

Despite the nearly thirty years that have passed since the IMDA was adopted in 1977, the Illinois Supreme Court has addressed the maintenance termination for cohabitation provision just twice. As a result, there still exists an amount of disagreement in the way the five districts of the Appellate Court of Illinois interpret the statute. This article will trace the evolution of the Illinois judiciary's interpretation of the § 510(c) cohabitation maintenance termination provision and describe the state of the current interpretation of the provision. This article will also discuss the differences in § 510(c) interpretation among the five districts of the Illinois Appellate Court and suggest action by the Illinois legislature to provide a consistent application of the statute throughout the state. First, Illinois' statute will be compared to some of the other jurisdictions with similar statutes.⁶

Modification of Alimony Decree, 98 A.L.R. 3d 453 (1980, updated November 2005).

4. See, e.g., *Myers v. Myers*, 560 N.E.2d 39 (Ind. 1990) (holding mere fact of cohabitation did not establish substantial change of circumstances); *Long v. Long*, 622 So. 2d 622 (Fla. Dist. Ct. App. 1993) (holding even if cohabitation did show a substantial change in circumstances, no evidence showing the change was permanent); *Herman v. Herman*, 977 S.W.2d 209 (Ark. 1998) (agreeing that ex-wife's cohabitation with a gainfully employed man did not change her financial circumstances such that alimony should be terminated); *Ruquist v. Ruquist*, 327 N.E.2d 742 (Mass. 1975) (affirming that ex-wife's move to the Virgin Islands with a man she went into business with and whom she intended to marry as soon as he was divorced sufficiently changed her circumstances to terminate the alimony).

5. 750 ILL. COMP. STAT. 5/510(c) (2007).

6. § 510(c) does not apply to maintenance in gross, which is more of a property settlement than a support payment and is thus unmodifiable. The Court in *In re Marriage of Michaelson*, 834 N.E.2d 539 (Ill. App.-1st 2005), relied on the 1985 Supreme Court decision *In re Marriage of Freeman*, 478 N.E.2d 326 (Ill. 1985) that held "maintenance in gross, like the pre-Act 'alimony in gross,' is in the nature of a property settlement and creates a vested interest in the recipient." *In re Michaelson*, 834 N.E.2d at 544. As a result, it is non-terminable under § 510(c) for conjugal cohabitation. *Id.* at 544-45.

A. *Other States with Similar Statutes*

The relevant language in § 510(c) is: “Unless otherwise agreed . . . the obligation to pay future maintenance is terminated . . . if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis.”⁷ No other state uses the same language as Illinois; some states with termination statutes do not call for automatic termination. For example, the California statute does not direct termination, but rather creates a presumption of a decreased need for support.

It states, “[e]xcept as otherwise agreed to by the parties in writing, there is a rebuttable presumption, affecting the burden of proof, of decreased need for support if the supported party is cohabiting with a person of the opposite sex.”⁸

Alabama’s statute is closer to Illinois’ in that it equates cohabitation to marriage; proof of either requires termination of alimony by the court. The Alabama statute reads:

Any decree of divorce providing for periodic payments of alimony shall be modified by the court to provide for the termination of such alimony upon petition of a party to the decree and proof that the spouse receiving such alimony has remarried or that such spouse is living openly or cohabiting with a member of the opposite sex⁹

Connecticut courts have the leeway to suspend, modify or terminate alimony payments upon a showing that the obligee spouse is cohabitating, but only if the courts finds the obligee spouse’s financial needs have changed. The statute states:

In an action for divorce, dissolution of marriage, legal separation or annulment brought by a husband or wife . . . the Superior Court may, in its discretion and upon notice and hearing, modify such judgment and suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party.¹⁰

Georgia also gives the court discretion concerning the appropriate remedy upon a showing of cohabitation, stating:

Subsequent to a final judgment of divorce awarding periodic payment of alimony for the support of a spouse, the voluntary cohabitation of such former spouse with a third party in a meretricious relationship shall also be grounds to modify provisions

7. 750 ILL. COMP. STAT. 5/510(c) (2007).

8. CAL. FAM. CODE § 4323(a)(1) (West 2006).

9. ALA. CODE § 30-2-55 (2006).

10. CONN. GEN. STAT. § 46b-86(b) (2006).

made for periodic payments of permanent alimony for the support of the former spouse.¹¹

The New York statute allows for termination of alimony if the obligee is habitually living with another man and holding herself out as his wife. It states:

The court in its discretion upon application of the husband on notice, upon proof that the wife is habitually living with another man and holding herself out as his wife, although not married to such man, may modify such final judgment and any orders made with respect thereto by annulling the provisions of such final judgment or orders or of both, directing payment of money for the support of such wife.¹²

B. *Terminating Maintenance (Alimony)*¹³ in Illinois Before the IMDA

Before the IMDA became effective in Illinois, the general rule was that a former spouse's alimony was not affected by his or her moral quality after the divorce.¹⁴ The statutory authority for modifying or terminating alimony was found in Section 18 of the Divorce Act.¹⁵ It provided that "the court may, on application, from time to time, terminate or make such alterations in the allowance of alimony and maintenance, and the care, education, custody and support of the children, as shall appear reasonable and proper."¹⁶ Appellate courts applying the prior law after 1977 noted that while the complained of cohabitation by the obligee spouse may have been immoral, the Divorce Act did not provide a legal basis for termination of maintenance or alimony.¹⁷

To show it was reasonable to terminate or change alimony payments, an obligor had to show changes in the circumstances of the parties that were so substantial relief was justified.¹⁸ A wife's alimony was not to be affected by the morality of her post-divorce conduct.¹⁹ The Fifth District Appellate Court in *In re Support of Halford*, made clear that Illinois was treading on new ground after the legislature "declared that certain post-dissolution behavior was grounds for termination of the obligation to pay future

11. GA. CODE ANN. § 19-6-19(b) (2006).

12. N.Y. DOM. REL. LAW § 248 (Consol. 2006).

13. Prior to IMDA in 1977, what is now maintenance under the current statutory scheme was referred to as alimony.

14. *Hall v. Hall*, 323 N.E.2d 541 (Ill. App.-5th 1975).

15. ILL. REV. STAT., ch. 40, par. 19.

16. ILL. REV. STAT., ch. 40, par. 19, as cited by *Elizer v. Elizer*, 344 N.E.2d 493, 496 (Ill. App.-5th 1976).

17. *Kowalski v. Kowalski*, 422 N.E.2d 83 (Ill. App.-1st 1981).

18. *Hall*, 323 N.E.2d at 544.

19. *Id.* (quoting *Cole v. Cole*, 31 N.E. 109, (Ill. 1892)); *Cooley v. Cooley*, 244 Ill. App. 488 (Ill. App.-1st 1927).

maintenance, § 510(b)²⁰ has made a break with past law. The previous rule in Illinois was that a wife's right to alimony was not affected by the moral quality of her post-divorce conduct."²¹

In summary, before IMDA became effective in 1977, the fact that the spouse receiving alimony had entered into a quasi-husband and wife relationship was not dispositive of the question whether alimony should be modified or terminated. It was, however, evidence of a change in circumstance, especially if the arrangement affected the obligee's financial need.

C. *The Early Decisions*

The Fifth District offered one of the first interpretations of § 510(c) in 1979.²² It recognized that the legislature wanted an obligation to pay maintenance to end when the payee spouse entered into a husband-wife relationship, whether the relationship was legally recognized or not. It pointed out, however, that the spouse receiving alimony should not be deprived of support payments based on a relationship that does not rise to the level of husband-wife.²³ A year later, the First District in *In re Marriage of Bramson* noted that § 510(c) was based on § 316(d) of the Uniform Marriage and Divorce Act.²⁴ The court stated that the provision terminating maintenance upon a showing the ex-spouse receiving the maintenance was residing with another person on a resident, continuing conjugal basis presumably was added to the Marriage and Dissolution of Marriage Act to avoid the injustice of *Atwater v. Atwater*, a 1974 First District case.²⁵

In *Atwater*, the alimony obligee did everything to hold herself out as married to Mr. Mattson, except to legally marry him.²⁶ She took his name, lived with him for over ten years, told friends, family and others they were married, and filed joint tax returns.²⁷ They even traveled to Las Vegas, obtained a marriage license and filled out a marriage certificate with the name of a fictitious justice of the peace.²⁸ The obligee did, however, inform her ex-husband that she was not remarried, but only living with Mr. Mattson.²⁹ The court found that since the ex-wife was at best in a common law marriage, which was statutorily banned in Illinois, there were

20. Pub. Act 85-1005 (1986) redesignated Section 510(b) as Section 510(c).

21. *In re Support of Halford*, 388 N.E.2d 1131, 1134 (Ill. App.-5th 1979).

22. *Id.*

23. *Id.* at 1134.

24. *In re Marriage of Bramson*, 404 N.E.2d 469 (Ill. App.-1st 1980).

25. *Id.*

26. *Atwater v. Atwater*, 309 N.E.2d 632 (Ill. App.-1st 1974).

27. *Id.* at 635.

28. *Id.*

29. *Id.* at 636.

no grounds for them to terminate the alimony owed to the obligee.³⁰

Before the first Supreme Court case on § 510(c) in 1985, the appellate courts considered the statute seven times and interpreted different portions of the statute. The appellate courts looked for indications of a de facto husband-wife relationship within the structure of the statute.

1. Continuous Cohabitation

In *In re Support of Halford*, the Fifth District had no problem concluding that Mrs. Halford and her live-in paramour had cohabitated on a continuing resident basis.³¹ They had lived together for over three years, shared household chores and did not date other people.³² At issue in *Halford* was whether an admission of sexual relations between Mrs. Halford and Mr. Green of only three or four times over the three year period was sufficient to satisfy the continuous requirement of the conjugal portion of the relationship.³³ The court held it was sufficient, especially in light of other evidence indicating the two slept together and displayed affection toward each other.³⁴ The court reasoned that direct evidence of sexual relations will rarely be available, because of the private nature of the act; thus, circumstantial evidence indicating a sexual relationship over the period of cohabitation must be relied upon.³⁵

In *Schoenhard v. Schoenhard*,³⁶ the Second District concluded there was not a de facto husband-wife relationship as required by § 510(c) where Mrs. Schoenhard lived in a man's residence half of the time and the other half of the time lived with her parents. The court reasoned that living with a man half of the time did not make Mrs. Schoenhard a resident of the man's household on a continuous basis, although she performed household duties, took care of the man's children, and had sexual relations with him.³⁷

The appellate court came to similar conclusions in *In re Marriage of Bramson*³⁸ and *In re Marriage of Clark*.³⁹ In *Bramson*, Mrs. Bramson moved into a man's residence, but left after four and a half months to move in with a girlfriend after her ex-husband filed the petition to terminate maintenance.⁴⁰ The

30. *Id.* at 640.

31. *In re Support of Halford*, 388 N.E.2d 1131 (Ill. App.-5th 1979).

32. *Id.* at 1133.

33. *Id.* at 1135.

34. *Id.*

35. *Id.*

36. *Schoenhard v. Schoenhard*, 392 N.E.2d 764 (Ill. App.-2d 1979).

37. *Id.* at 768.

38. *In re Marriage of Bramson*, 404 N.E.2d 469. (Ill. App.-1st 1980).

39. *In re Marriage of Clark*, 444 N.E.2d 1369 (Ill. App.-3d 1983).

40. *In re Bramson*, 404 N.E.2d at 469.

Bramsons had a unique arrangement regarding their children whereby the children continued to live in the marital home and the parents rotated in and out of the marital home each year.⁴¹ In their off year, the parents lived in an apartment.⁴² The apartment was not retained after Mr. Bramson remarried, prompting Mrs. Bramson to move into Mr. Galprin's home (with permission from Mr. Bramson).⁴³ While living together, Mrs. Bramson and Mr. Galprin, shared expenses, slept together and did many things indicating they were a couple.⁴⁴ Mrs. Bramson intended the stay with Galprin to be temporary, because she intended to move back into the marital home when her off year was over.⁴⁵ The First District concluded that the cohabitation was not on a continuous basis and, as such, did not provide a basis for termination of maintenance under § 510(c).⁴⁶ The court added that "not every conjugal cohabitation justifies termination [of] maintenance."⁴⁷ In *Clark*, the Third District agreed with the circuit court's ruling that a man living with Mrs. Clark from October to January was not cohabitation on a continuous basis.⁴⁸ The *Bramson* court opined that what is important is not the morality of the conduct, but whether the relationship affects the recipient's need for support.⁴⁹

In *In re Marriage of Olson*,⁵⁰ the Third District characterized a sexual relationship between Mrs. Olson and Mr. McAllister as something short of a husband-wife relationship. The couple frequently spent the night together, took their meals together and went out socially.⁵¹ Occasionally, she did his laundry and he gave her small gifts.⁵² The relationship was ongoing at the time of the hearing. Both Mrs. Olson and Mr. McAllister maintained separate households, however, and they never commingled funds or property.⁵³ The court concluded the relationship between Olson and McAllister was more like a courting or dating relationship than a husband and wife relationship.⁵⁴

41. *Id.* at 470.

42. *Id.*

43. *Id.*

44. *Id.* at 471-72.

45. *Id.* at 471.

46. *Id.* at 470.

47. *Id.* at 473.

48. *In re Marriage of Clark*, 444 N.E.2d at 1370.

49. *In re Bramson*, 404 N.E.2d at 473.

50. *In re Marriage of Olson*, 424 N.E.2d 386 (Ill. App.-3d 1981).

51. *Id.* at 388.

52. *Id.*

53. *Id.*

54. *Id.* at 390.

2. Sexual Relations

The term "conjugal basis" was also interpreted in the pre-*Sappington* appellate court cases. The *Halford* court reasoned that the term cohabitating meant living together as husband and wife, but not necessarily involving sexual relations.⁵⁵ The inclusion of the phrase "conjugal basis" by the legislature, however, implies they intended the cohabitation to include sexual relations between the obligee spouse and his or her cohabitant.⁵⁶ Because of the non-public nature of sexual relations, inferences, such as the couple sharing a bedroom, may serve as a proxy for direct evidence of sexual relations.⁵⁷

Although separate residences were involved in the First District case of *In re Marriage of McGowan*,⁵⁸ the case turned on the court's interpretation of the term conjugal. Mrs. McGowan rented an apartment from a dentist who was an old friend of her family.⁵⁹ The dentist lived in a small apartment adjacent to respondent's apartment and often visited with her and used her bathroom.⁶⁰ They often ate meals together as well.⁶¹ There was no evidence that the ex-wife and dentist were anything other than family friends.⁶² The ex-husband urged the court to interpret conjugal relationships to include familiar relationships.⁶³ Without an interpretation of the term conjugal that included some type of sexual relations, the court concluded maintenance could be terminated if an ex-wife receiving alimony moved in with her sister.⁶⁴

The reasoning of *Halford* and *McGowan* was followed by the Third District in *In re Marriage of Cohenour*.⁶⁵ There was much evidence about Mrs. Cohenour and Mr. Escobedo living together in her residence, sharing expenses, and sharing household chores.⁶⁶ However, there was not a shred of evidence concerning sexual relations between the two. In fact, the evidence showed they slept in separate bedrooms and that no witness ever saw Mr. Escobedo other than fully clothed in the presence of Mrs. Cohenour, nor had anyone witnessed any improprieties between the couple.⁶⁷ The

55. *In re Support of Halford*, 388 N.E.2d 1131, 1135 (Ill. App.-5th 1979).

56. *Id.*

57. *Id.*

58. *In re Marriage of McGowan*, 405 N.E.2d 1156 (Ill. App.-1st 1980).

59. *Id.* at 1158.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1159.

64. *Id.* at 1161.

65. *In re Marriage of Cohenour*, 428 N.E.2d 195 (Ill. App.-3d 1981).

66. *Id.* at 195

67. *Id.*

only evidence that could have been attributed to a possible sexual relationship was that Mrs. Cohenour took birth control pills for a year into the relationship.⁶⁸ She testified, however, that she took the pills for a complexion problem.⁶⁹ Since the statute requires a sexual relationship and there was no evidence of one, the court upheld the denial of the petition in the Circuit Court.⁷⁰

By the time the Illinois Supreme Court took its first § 510(c) case, it was established that the statute required the recipient of maintenance to live with another person in one household for a substantial amount of time and to be engaged in a sexual relationship; in short, a *de facto* husband-wife relationship that affected the recipient's need for further support.

3. Sappington

In 1985, the Supreme Court of Illinois issued its first decision on § 510(c) in *In re Marriage of Sappington*.⁷¹ Mr. Sappington filed a petition to terminate maintenance under § 510(c) alleging Mrs. Sappington was cohabitating on a continuous conjugal basis with Mr. Montgomery.⁷² Mrs. Sappington and Mr. Montgomery resided together in the former marital home for at least two years and continued to reside there at the time of the hearing.⁷³ He moved in after the two attended several singles dances and danced together.⁷⁴ There was no formal arrangement for rent, but occasionally he gave Mrs. Sappington some cash when it was needed.⁷⁵ Mr. Montgomery paid part of the household bills, for the newspaper, and for the food he brought into the house.⁷⁶ Although he and Mrs. Sappington occupied separate bedrooms, he made household repairs, did yard work, and had free access to the house.⁷⁷ She cooked meals for them from time to time, and did some of his laundry.⁷⁸ They often went out socially and vacationed together.⁷⁹ They kept their financial affairs separate, but they stated they did not date or socialize with others and gave each other birthday and holiday gifts.⁸⁰ They both testified they never

68. *Id.* at 197.

69. *Id.*

70. *Id.* at 197-98.

71. *In re Marriage of Sappington*, 478 N.E.2d 376 (Ill. 1985).

72. *Id.* at 377.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 377-78.

80. *Id.* at 378.

slept in the same bed and had no sexual interest in each other.⁸¹ There was expert testimony that Mr. Montgomery was impotent.⁸²

The circuit court denied the petition and the Fourth District affirmed, holding that "parties living together on a conjugal basis as described in the statute necessarily includes a sexual relationship."⁸³ Justice Barry of the Fourth District strongly dissented, stating:

I would hold that when two parties, usually of the opposite sex, who are not closely related, reside together continuously for an extended period of time, pursuing life and functioning together, sharing financial and household responsibilities, in a warm, intimate, mutually supportive atmosphere, tantamount to that of husband and wife, then the relationship is presumed to be "[cohabitation] with another person on a resident, continuing conjugal basis," whether sexual conduct is evidenced or desired.⁸⁴

The Supreme Court held that while sexual relations may be a valid factor when determining whether a conjugal relationship exists, there can be conjugal relationships without sexual relations.⁸⁵ The Court distinguished the *Cohenour* case on the basis that the couple in *Cohenour* did not go out together or travel together like Mrs. Sappington and Mr. Montgomery did.⁸⁶ The Court characterized the situation in *Cohenour* as something far less than a husband-wife relationship. Mr. Montgomery, the Court asserted, took Mr. Sappington's place in the household and "that their relationship is more husband-wife like than would be a relationship between casual friends."⁸⁷

The Court approved the reasoning expressed in the *Bramson* case that the legislature had not intended to control public morals with § 510(c), but was instead concerned with whether the cohabitation materially affected the recipient spouse's need for further support because she was either being supported by the paramour or spending support on the paramour.⁸⁸ When people live together, the husband-wife relationship bears a relationship to the need for support.⁸⁹ The absence or existence of sexual relations has no bearing on the need for support.⁹⁰ The Court also addressed the burden of proof:

81. *Id.*

82. *Id.*

83. *In re Marriage of Sappington*, 462 N.E.2d 881, 883 (Ill. App.-4th 1984).

84. *Id.* at 888 (Barry, J., dissenting).

85. *In re Marriage of Sappington*, 478 N.E.2d 376, 379 (Ill. 1985).

86. *Id.* at 380.

87. *Id.*

88. *Id.* at 381.

89. *Id.*

90. *Id.*

Therefore, once an ex-spouse paying maintenance has demonstrated that a husband-and-wife relationship does exist, it should be incumbent upon the maintenance recipient to demonstrate that the relationship in which he or she is engaged is not the type of relationship which was intended by the legislature to justify the termination of the obligation to pay maintenance.⁹¹

Since the *Sappington* decision, two issues have dominated the attention of the courts in § 510(c) cohabitation cases. First, how should the courts evaluate the facts in each case to determine whether a de facto husband-wife relationship exists to such an extent that a termination of maintenance payments under the language of § 510(c) “cohabits with another person on a resident, continuing conjugal basis,” should be ordered? Second, if termination of maintenance for cohabitation under § 510(c) is called for, what is the proper date of the termination? Each of these issues is explored below.⁹²

Before looking at how the courts have determined when a de facto husband-wife relationship exists for the purposes of a § 510(c) cohabitation action, a preliminary issue deserves some attention. Three appellate court cases have addressed who is an eligible “another person” with whom an ex-spouse receiving maintenance could cohabit with on a continuous residential conjugal basis subjecting that ex-spouse to an order terminating maintenance § 510(c). The Third District, in a case decided two months before *Sappington*, held that a de facto husband-wife relationship could exist between an ex-spouse and another person who was married to someone else.⁹³ The fact that a legal marriage between the cohabitants was not possible at the time of the hearing was not a barrier to the court finding the ex-spouse receiving maintenance was cohabitating with another person on a resident, continuing conjugal basis.⁹⁴ The court indicated that all the husband seeking termination of maintenance under § 510(c) had to show was a de facto husband-wife relationship, not an “ideal marriage,” or a “traditional marriage.”⁹⁵

91. *Id.*

92. *In re Marriage of De Bates*, 819 N.E.2d 714 (Ill. 2004) is the only other Supreme Court case to consider a petition for termination of maintenance under § 510(c). The main issues in the case concerned the admissibility of parental alienation syndrome and whether the Illinois Marriage and Dissolution Act § 506 violated a parent’s due process in that it precluded cross-examination of her child’s court appointed representative. The Supreme Court cited its previous decision in *Sappington* and added nothing new in agreeing with the ruling in the appellate court that there was no *de facto* husband-wife relationship. *Id.* at 723.

93. *In re Marriage of Rooft*, 460 N.E.2d 784 (Ill. App.-3d 1984).

94. *Id.* at 786.

95. *Id.* at 787.

Fifteen years later the Second District was faced with a variation of the same issue—the legal impossibility of marriage between the cohabitants. The maintenance receiving ex-wife in *In re Marriage of Weisbruch*⁹⁶ was living with another woman. The court cited *Roofe* for the proposition that the prospect of legal consummation by marriage is not necessary, and then added that it makes no difference to the paying spouse whether the relationship is one that is sanctioned by society.⁹⁷ The issue is whether the maintenance is being used to support someone else or whether the ex-spouse is being supported by someone else.⁹⁸ The court also noted that Illinois does not recognize common law marriages, but that some continuous, residential, conjugal cohabitations might qualify as common law marriages if Illinois offered legal recognition.⁹⁹

The maintenance paying ex-husband in *In re Marriage of Antonich* tried to use his own cohabitation with his ex-wife to terminate maintenance payments under § 501(c).¹⁰⁰ The Antoniches were divorced in January of 1984 and he was ordered to pay maintenance.¹⁰¹ In May of that year, they began living together again, but, six months later, she moved out and Mr. Antonich filed a petition to terminate maintenance payments under § 510(c).¹⁰² The Second District agreed with the trial court that “cohabitation with another person” as used in § 510(c) meant someone other than the ex-spouse who was paying maintenance.¹⁰³ To hold otherwise, the court asserted would be against the public policy of reconciling the parties to a broken marriage.¹⁰⁴

II. DETERMINING WHEN A DE FACTO HUSBAND-WIFE RELATIONSHIP EXISTS

The Supreme Court in *Sappington* made it clear that each case will have its own set of unique facts that must be examined because no two personal relationships are alike.¹⁰⁵ The courts looked to the facts that would lead a reasonable observer to believe they were married.¹⁰⁶ By 1994, the Fourth District in *In re Marriage of Herrin*,¹⁰⁷ listed six factors (hereinafter the *Herrin* factors) to be examined when testing the relationship:

96. *In re Marriage of Weisbruch*, 710 N.E.2d 439 (Ill. App.-2d 1999).

97. *Id.* at 444.

98. *Id.*

99. *Id.*

100. *In re Marriage of Antonich*, 499 N.E.2d 654, 656 (Ill. App.-2d 1986).

101. *Id.* at 655.

102. *Id.* at 656.

103. *Id.* at 655-56.

104. *Id.* at 657.

105. *In re Marriage of Sappington*, 478 N.E.2d 376, 380 (Ill. 1985).

106. *Roesch v. Roesch*, 516 N.E.2d 1001, 1005 (Ill. App.-5th 1987).

107. 634 N.E.2d 1168 (Ill. App.-4th 1994).

1. The length of the relationship.
2. The amount of time the couple spent together.
3. The nature of the activities the couple engaged in.
4. The interrelationship of the couple's personal affairs.
5. Whether the couple vacationed together.
6. Whether the couple spent holidays together.¹⁰⁸

When examining the *Herrin* factors, the court should look at the totality of the circumstances.¹⁰⁹ *Sappington* also established that the overriding question should be whether the cohabitation materially affected the recipient spouse's need for support.¹¹⁰ A reviewing court should reverse a trial court's decision in a § 510(c) cohabitation action only when the decision is against the manifest weight of the evidence.¹¹¹

A. *The Length of the Relationship*

The first factor relates to the § 510(c) requirement that the residential conjugal relationship be on a continual basis. In fairness to the recipient spouse, if maintenance is terminated due to a short-term infatuation, he or she has no one else to look to for support. The Illinois courts of review have long asserted that the cohabitation maintenance termination provision of § 510(c) is not an attempt to control public morals,¹¹² but rather an attempt to avoid the injustice of requiring a maintenance paying spouse to continue to make the payments even though the recipient spouse is in a relationship that could be considered a common law marriage if Illinois recognized it as such.¹¹³ If that is the case, then some reasonable period of time that can indicate a willingness of the receiving spouse to look to another for support should be required.

The Second District called the length of the relationship factor a proxy that assists the courts to determine if the relationship at issue is a substitute for a marital relationship, when it decided a residential relationship of four months was not long enough to be considered a factor in favor of a de facto

108. *Id.* at 1171.

109. *Id.*

110. *In re Marriage of Sappington*, 478 N.E.2d 376, 381 (Ill. 1985).

111. *Herrin*, 634 N.E.2d at 1170-71 (citing *In re Marriage of Caradonna*, 553 N.E. 2d 1161, 1164 (Ill. App. -2d 1990)); *In re Marriage of Lambdin*, 613 N.E.2d 1381, 1386 (Ill. App. -4th 1993).

112. *Sappington*, 478 N.E.2d at 381 (citing *In re Marriage of Bramson*, 404 N.E.2d 469 (Ill. App. -1st 1980).

113. *In re Marriage of Bramson*, 404 N.E.2d 469 (Ill. App.-1st 1980).

husband-wife relationship.¹¹⁴ That holding was consistent with *In re Marriage of Bramson*¹¹⁵ (a little over four months was not long enough), *In re Marriage of Clark*¹¹⁶ (roughly four months was not long enough) and *In re Marriage of Leming*¹¹⁷ (four months was not long enough). *In re Marriage of Caradonna*¹¹⁸ represents the longest residential conjugal relationship that was held to be temporary in nature (six months). The court was influenced by the fact that the relationship had been terminated by the time of the hearing.¹¹⁹ In fact, in all of the cases above, the period of cohabitation had ended by the time of the hearing.¹²⁰ Whether the cohabitation is ongoing at the time of the hearing seems to be given a great deal of weight when the length of the relationship is relatively short.

In *In re Marriage of Roofe*,¹²¹ the ex-wife had only cohabitated for six weeks, but at the time of the hearing there was no indication the cohabitation was going to end. In fact, Mrs. Roofe had rented out her previous residence and moved all of her furniture and personal effects into her cohabitant's home.¹²² The Third District found that Mrs. Roofe and her cohabitant intended to live with each other for an indefinite period of time.¹²³ At the opposite extreme is *In re Marriage of Snow*.¹²⁴ Although the 18 month period of cohabitation had ended more than two months before the petition to terminate maintenance was filed, the Third District affirmed the trial court's finding that Mrs. Snow had engaged in a continuing conjugal relationship with another person.¹²⁵

Ending the period of cohabitation as a result of the action is usually not successful in convincing a court the cohabitation is not of the type intended by the legislature to terminate maintenance payments. *In re Marriage of Johnson*¹²⁶ is an example when that tactic seemed to be successful. There, the Fourth District found that when the ex-wife vacated her paramour's residence upon receiving notice of the petition to terminate maintenance it was

114. *In re Marriage of Sunday*, 820 N.E.2d 636, 640-41 (Ill. App.-2d 2004) (citing *In re Marriage of Weisbruch*, 710 N.E.2d 439, 443 (Ill. App.-2d 1999)).

115. *In re Bramson*, 404 N.E.2d at 473.

116. *In re Marriage of Clark*, 444 N.E.2d 1369, 1370 (Ill. App.-3d 1983).

117. *In re Marriage of Leming*, 590 N.E.2d 1027, 1032 (Ill. App.-5th 1992).

118. *In re Marriage of Caradonna*, 553 N.E.2d 1161 (Ill. App.-2d 1990).

119. *Id.* at 1165.

120. *Id.*; *In re Marriage of Leming*, 590 N.E.2d at 1030.

121. *In re Marriage of Roofe*, 460 N.E.2d 784 (Ill. App.-3d 1984).

122. *Id.* at 785.

123. *Id.*

124. *In re Marriage of Snow*, 750 N.E.2d 1268 (Ill. App.-3d 2001).

125. *Id.* at 1270-71.

126. *In re Marriage of Johnson*, 574 N.E.2d 855 (Ill. App.-4th 1991).

evidence of the tentative nature of the relationship.¹²⁷ Moving out of the cohabitation residence during the hearing and testifying she was no longer going to live with Mr. Hughes did not stop the Second District in *In re Marriage of Toole*¹²⁸ from finding a continuous, residential, conjugal cohabitation. Mrs. Toole, however, had lived with Mr. Hughes for over three years and they exhibited many of the other indices of a de facto husband and wife relationship.¹²⁹ Likewise, the Fourth District was not swayed when Mrs. Stanley's cohabitant moved out upon the advice of her attorney in *In re Marriage of Stanley*.¹³⁰

B. *The Amount of Time the Couple Spent Together*

This factor is often subsumed by the nature of the activities the couple engaged in factor in the description of the couple's relationship by the appellate courts. This factor is obviously intended to be used to examine whether the couple spends time with each other like a married couple would. For example, married people tend to see each other every morning, every evening and during the day on the weekends. It is not unusual for married people to pursue different interests, however. The husband or wife may play golf, tennis, volunteer, join clubs, exercise or run separately. The question the court should answer under this factor is does this couple spend time together like a married couple would, instead of does this couple spend all their time together?

The Fifth District in *In re Marriage of Reeder*,¹³¹ noted that Mrs. Reeder spent her time and slept in the basement while her purported paramour stayed in the upstairs portion of the house with his mother and son as part of their decision not to terminate maintenance payments under § 501(c).¹³² Likewise, that a couple took several trips together, dated on a regular basis and often stayed overnight at the woman's apartment was not reflective of the amount of time a married couple would spend with each other.¹³³ That another couple only occasionally slept in the same bed and seldom ate together played a part in the Second District's

127. *Id.* at 859. Overall in *Johnson*, the evidence supporting a continuous cohabitation was conflicting. The fact that Mrs. Johnson did a lot to establish she did not cohabit after receiving the notice was noted by the court, but it was certainly not the sole fact considered in its decision not to terminate the maintenance under § 510(c). *Id.*

128. *In re Marriage of Toole*, 635 N.E.2d 456 (Ill. App.-2d 1995).

129. *Id.* at 459-60.

130. *In re Marriage of Stanley*, 479 N.E.2d 1152, 1162 (Ill. App.-4th 1985).

131. *In re Marriage of Reeder*, 495 N.E.2d 1383 (Ill. App.-5th 1986).

132. *Id.* at 1386.

133. *Roesch v. Roesch*, 516 N.E.2d 1001, 1003 (Ill. App.-5th 1987).

decision that the couple was not cohabitating on a continuous conjugal basis.¹³⁴

*In re Marriage of Herrin*¹³⁵ is an example of a court specifically referring to the amount of time the couple spent together when deciding to terminate maintenance payments. "In the present case, petitioner and Badger saw each other every day for over 2 ½ years . . ." ¹³⁶ The Fourth District disagreed with a trial court's depiction of the couple's relationship as a dating relationship, citing as one of its reasons the fact that the couple were constant companions.¹³⁷ The amount of time a couple spends together can be discounted, as an example from the Second District illustrates. In *In re Marriage of Sunday*,¹³⁸ the ex-husband was harassing the ex-wife and that harassment inflated the number of times per week the ex-wife's friend stayed the night.¹³⁹ The Second District reasonably found that the harassment should result in the amount of time factor having little weight.¹⁴⁰

C. *The Nature of the Activities In Which the Couple Engaged*

The third factor attempts to compare what the couple at issue do together with those activities a normal married couple would engage in. Do they eat their meals together? Go to the store together? Go out together to ballgames, church, movies and the like? Do they share a bedroom and engage in sexual relations? Although both *Sappington* and *Weisbruch* established that a couple can have a conjugal relationship without sex, the presence of sexual relations is evidence of a husband-wife type relationship.

The courts generally do a very good job of describing the activities in which the couples engage. "Respondent and Borski have spent most evenings together . . . either at Borski's or respondent's house . . . share meals together . . . have visited family together, and have attended the wedding of a family member."¹⁴¹ Another example is "Montgomery has free access to the entire house . . . mow[s] the lawn and rake[s] the leaves . . . patch[ed] the roof and has fixed a leaky faucet."¹⁴² The court also noted that Montgomery ate his meals there and Mrs. Sappington

134. *In re Marriage of Arvin*, 540 N.E.2d 919, 923 (Ill. App.-2d 1989).

135. *In re Marriage of Herrin*, 634 N.E.2d 1168 (Ill. App.-4th 1994).

136. *Id.* at 1171.

137. *In re Marriage of Frasco*, 638 N.E.2d 655, 660 (Ill. App.-4th 1994).

138. *In re Marriage of Sunday*, 820 N.E.2d 636 (Ill. App.-2d 2004).

139. *Id.* at 641.

140. *Id.* at 642.

141. *In re Marriage of Susan*, 856 N.E.2d 1167, 1170 (Ill. App.-2d 2006) (finding a *de facto* husband-wife relationship).

142. *In re Marriage of Sappington*, 478 N.E.2d 376, 377-78 (Ill. 1985) (finding a *de facto* husband-wife relationship).

cooked at the home and did some of his laundry.¹⁴³ Furthermore, the couple went out socially, went to church and out to eat afterwards, and they did not date or socialize other than with each other.¹⁴⁴

Some fact patterns clearly establish a non husband-wife relationship. "They occasionally went out together socially and occasionally slept in the same room. Judith testified that she and Hamilton seldom ate together and she never did his laundry."¹⁴⁵ Likewise, in another case, that the couple had taken several trips together, dated on a regular basis and that his car was seen overnight at her residence was not enough to establish a de facto husband-wife relationship.¹⁴⁶

Like the other factors, looking at the activities alone can appear misleading. For example, no de facto husband-wife relationship was found although Mr. Cox bought groceries, took his meals with Mrs. Clark, and worked with her to keep the residence clean and maintained.¹⁴⁷ She did his laundry and cooked his meals.¹⁴⁸ The Christmas gifts to her children were from "Mom and Larry."¹⁴⁹

D. The Interrelationship of the Couple's Personal Affairs

Just how intertwined are the couple's financial affairs? As the old saying goes – What is mine is yours and what is yours is mine. As anyone who has tried to untangle a divorcing couple's finances and property can tell you, most married couples' personal affairs are intricately bound together. An extensive intermingling of funds and property by the couple at issue should be viewed as a strong indication of a de facto husband-wife relationship.

Until recently this factor seemed to be weighted heavily by the courts when deciding whether a de facto husband-wife relationship existed, relying on the Supreme Court's language in *Sappington*. "[I]t is the husband-and-wife relationship which bears upon the need for support, not the absence or presence of sexual intercourse."¹⁵⁰ The court went on to state:

Moreover, the legislative intent does not appear to be an attempt to

143. *Id.*

144. *Id.*

145. *In re Marriage of Arvin*, 540 N.E.2d 919, 921 (Ill. App.-2d 1989).

146. *Roesch v. Roesch*, 516 N.E.2d 1001, 1003 (Ill. App.-5th 1987) (finding the couple also took separate trips, maintained separate households, and dated other people).

147. *In re Marriage of Clark*, 444 N.E.2d 1369, 1370 (Ill. App.-3d 1983) (holding not a *de facto* husband-wife relationship due to the short duration of the relationship).

148. *Id.*

149. *Id.*

150. *In re Sappington*, 478 N.E.2d 376, 381 (Ill. 1985).

control public morals Rather, an important consideration, divorced from the morality of conduct, is whether the cohabitation has materially affected the recipient spouse's need for support because she either received support from her co-resident or used maintenance monies to support him.¹⁵¹

The Second District later took issue with *Sappington* in *Weisbruch*, finding the reasoning was internally inconsistent in that the receiving spouse's needs were not being totally met by her new partner, but maintenance was terminated.¹⁵² Interpreting *Sappington* as holding the most important factor is whether the relationship affects the need for support, the *Weisbruch* Court, determined the question should not be whether all of an ex-spouse's needs were being met in the new relationship, but whether the new partners have looked to each other for support.¹⁵³

In fact, the two opinions are consistent. In both *Sappington* and *Weisbruch*, the cohabitants were in long-term exclusive resident relationships. In *Weisbruch*, there was extensive intermingling of personal affairs, with a joint checking account, a division of all household expenses, co-signed loans, joint ownership of autos, and the designation of one of the women as primary beneficiary of the other's will and retirement benefits. They were both the primary beneficiary of each other's life insurance policies. Although each had some separate assets and credit cards, their personal affairs were as intermingled as are most married couples.¹⁵⁴ In *Sappington*, the degree of intermingling of assets was not as intense. They had separate bank accounts and were not named in each other's wills.¹⁵⁵ They did, however, share the costs of operating the household, such as utilities, food and the newspaper.¹⁵⁶ The evidence was conflicted about whether Mr. Montgomery paid rent, but it was clear he contributed to the household as needed. All the other indicators of a de facto husband-wife relationship were present in *Sappington*, however. They spent almost all of their time together, the relationship was long-term in nature, they participated in the type of activities that married couples do, they vacationed together and spent holidays together.¹⁵⁷ When the Supreme Court indicated the issue should be whether the cohabitation materially affected the recipient spouse's need for support, they could have easily used the

151. *Id.* (quoting *In re Marriage of Bramson*, 404 N.E.2d 469, 473 (Ill. App.-1st 1980)).

152. *In re Marriage of Weisbruch*, 710 N.E.2d 439, 444 (Ill. App.-2d 1999).

153. *Id.*

154. *Id.* at 441.

155. *In re Sappington*, 478 N.E.2d 376, 378 (Ill. 1985).

156. *Id.* at 377.

157. *Id.*

Weisbruch language (whether the new partners have looked to each other for support) and not changed the outcome. The two decisions are asking the same question. Is the relationship so much like that of a marriage that it should be treated as one for the purposes of terminating maintenance under § 510(c)?

One purpose of examining the interrelationship of the couple's personal affairs should be to distinguish the relationship at issue from couples that are dating. Couples who date often spend significant amounts of time together. They might participate in the types of activities that married people do, their relationship could be long-term, they could vacation and spend holidays together, but they usually do not significantly mix their property and finances.¹⁵⁸

Another purpose of examining the interrelationship of the couple's personal affairs is to determine if the couple at issue is merely sharing expenses and living space. In that case, the couple will have some intermingling of personal affairs (housing costs, utilities, repairs and possibly food and the like) and possibly even some joint ownership of property (a new couch or television), but unlike a married couple, they will lead more separate lives. They are more likely to spend more time apart and to have more separate social lives. Common sense must prevail, however. Roommates are usually friends as well, so it is not unusual for roommates to spend time together, take trips together and spend holidays together (especially if one or both do not live near family).¹⁵⁹

158. For examples of a dating relationship, see *In re Marriage of Johnson*, 574 N.E.2d 855 (Ill. App.-4th 1991) (holding a dating relationship when ex-wife often stayed the night at boyfriend's apartment, he often drove her car for her, they spent time together, but no intermingling of assets or finances); *In re Marriage of Arvin*, 540 N.E.2d 919 (Ill. App.-2d 1989) (holding a dating relationship when cohabitation lasted over a year, but limited sharing of expenses, no intermingled assets, occasional socializing and sharing beds.); *Rosche v. Rosche*, 516 N.E.2d 1001 (Ill. App.-5th 1987) (holding a dating relationship when couple dated on a regular basis, took trips together, and friend's car observed overnight at her residence, but no intermingling of assets or finances); *In re Marriage of Olson*, 424 N.E.2d 286 (Ill. App.-3d 1981) (holding a dating relationship when there was a sexual relationship during which the ex-wife often stayed the night with her boyfriend, made dinner, did the dishes, did some laundry, drove his car, and acted affectionately toward the man in public, but there was no sharing of finances or assets).

159. Examples of roommates or two people occupying the same space, but not on a conjugal basis include *In re Marriage of Nolen*, 558 N.E.2d 781 (Ill. App.-5th 1990) (holding ex-wife was a live in housekeeper); *In re Marriage of Reeder*, 495 N.E.2d 1383 (Ill. App.-5th 1986) (finding no conjugal relationship where ex-wife occupied the basement, had no hand in the housekeeping duties in the portion of the household she did not occupy, and paid rent, despite a sexual relationship between the couple); *In re Marriage of Cohenour*, 428 N.E.2d 195 (Ill. App.-3d 1981) (finding no conjugal relationship where couple lived in the same household, shared expenses and chores, but no evidence of a

In 1994, the Fourth District issued two opinions that undermined the weight afforded the interrelationship of the couple's personal affairs factor by the Supreme Court in *Sappington*. First, in *In re Marriage of Frasco*,¹⁶⁰ the trial court's decision that Mrs. Frasco and Mr. Longanecker were more like roommates sharing expenses, that she had moved into Mr. Longanecker's house because she was financially insecure, and that the relationship had not affected her need for support was overturned.¹⁶¹ Mrs. Frasco met Mr. Longanecker at a wedding and moved into his house when her sister and brother-in-law were about to sell the home she occupied with them and her disabled daughter.¹⁶² The two agreed to deposit like amounts into a joint checking account they opened under the name of Drawbridge Associates (the house was on Drawbridge Street).¹⁶³ All household bills were then paid out of the joint account; however, they each maintained separate bank accounts and paid for their separate expenses.¹⁶⁴ Mrs. Frasco, for a time, added Mr. Longanecker's name to a \$17,000 certificate of deposit she had from a previous marital settlement.¹⁶⁵ She testified she added his name to the CD to enable him to provide for her disabled daughter if anything happened to her.¹⁶⁶ By the time of the hearing, the value of the certificate of deposit was down to \$5,000.¹⁶⁷ She used the balance of the funds to support herself and her daughter after Mr. Frasco quit making the maintenance payments, she lost her part time job, and her only source of support was a monthly social security check of between \$288 and \$643.¹⁶⁸ Mrs. Frasco and Mr. Longanecker shared the household chores, however, they slept in separate bedrooms and had no sexual relations.¹⁶⁹ They did share their time, however, going out socially and were affectionate with each other.¹⁷⁰ Mr. Longanecker called Mrs. Frasco his close friend and spent holidays with Mrs. Frasco's family, and the two took trips

romantic relationship); *In re Marriage of McGowan*, 405 N.E.2d 1156 (Ill. App.-1st 1980) (finding a landlord-tenant type of relationship where ex-wife occupied an apartment over a longtime family friend's dental office although the two did take some trips together, often ate meals together, he often used the bathroom in the apartment, and his living space in the building was just a one room sleeping space with no bathroom).

160. *In re Marriage of Frasco*, 638 N.E.2d 655 (Ill. App.-4th 1994).

161. *Id.* at 658.

162. *Id.* at 657.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 658.

168. *Id.*

169. *Id.* at 657.

170. *Id.* at 658.

together.¹⁷¹ They were both in their sixties.¹⁷² Mr. Longanecker eventually moved out because of the ex-husband's constant surveillance of the house and constant legal harassment.¹⁷³ After that time, Mrs. Frasco paid him \$725 per month rent and was responsible for all of the household expenses.¹⁷⁴ He continued to come to the house most days, did what physical work needed to be done around the house, but did not spend another night at the house.¹⁷⁵

These facts need to be put into context. Mrs. Frasco originally filed for dissolution of marriage in 1987, at which time she moved in with her sister and brother-in-law. The dissolution of marriage was finally entered in August 1990. Mrs. Frasco was awarded \$49,000 in marital property, over \$5,600 in attorney fees and maintenance of \$2,000 per month until May of 1991, then \$1500 per month thereafter. By late 1991 Mr. Frasco had failed to comply with the marital property and attorney fees awards and Mrs. Frasco filed a petition for judgment on the property and attorney fees as well as a petition to show cause. Those were entered in December 1991. Also in November 1991, Mr. Frasco filed a petition to modify the maintenance award based on a substantial change in circumstances. In February 1992, he filed a motion to stay the maintenance payments alleging Mrs. Frasco was cohabitating with a man on a resident, continuing, conjugal basis. The motion was denied, but Mr. Frasco quit paying maintenance in April 1992. As of March 1993, Mr. Frasco had yet to satisfy the property award.¹⁷⁶ It was clear Mr. Frasco was responsible for the dire financial situation Mrs. Frasco found herself in. She was living with her sister and brother-in-law. When they wanted to sell the house and buy a condo, Mrs. Frasco agreed to share household costs with Mr. Longanecker.

In overruling the trial court, the Fourth District felt that a shown need for support should not be controlling when all of the other factors indicate an ongoing conjugal relationship.¹⁷⁷ It is true that Mrs. Frasco and Mr. Longanecker relationship was not of a temporary nature, they spent substantial amounts of time together, they did the types of activities married people do, they vacationed together and spent holidays together. The only factor that could be construed against a de facto husband-wife relationship was the interrelationship of their personal affairs. The joint checking account might be employed by roommates, and

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 657-58.

176. *Id.* at 657.

177. *Id.* at 660.

temporarily adding his name to her CD might have been a lay person's attempt to provide some security for her disabled daughter. Although not noted by the court, at no time did Mrs. Frasco gain an interest in the home she shared with Mr. Longanecker, although she paid half of the expenses or rent. Overall, however, Mrs. Frasco and Mr. Longanecker probably did have the type of de facto husband-wife relationship the legislature intended to trigger the termination of maintenance provision for cohabitation in § 510(c). The court made note of the fact that § 510(c) does not contain an analysis of need and that such an analysis would not be appropriate had the ex-wife remarried or died.¹⁷⁸

It is troubling that the Fourth District ignored the fact that Mr. Frasco had the resources to out litigate Mrs. Frasco and did not hesitate to use the courts. He refused to comply with the marital property award for at least three years and he refused to pay the ordered alimony beginning in 1992.¹⁷⁹ In addition, he kept the house in question under constant surveillance.¹⁸⁰ The Second District in *Sunday* gave little weight to the number of times an ex-wife's friend stayed overnight because of the harassment directed at her by her ex-husband.¹⁸¹ The Fourth District might have discounted at least some of the evidence (which the trial court apparently did) indicating Mr. Longanecker and Mrs. Frasco had entered into a de facto husband-wife relationship due to the stressful environment Mrs. Frasco was forced to endure. In addition, the Fourth District ignored the finding by the trial court that the couple's economic relationship (the joint household account) was like that commonly entered into by roommates.¹⁸² Other than the temporary addition of Mr. Longanecker's name to her CD, the joint household account was the only intermingling of funds by the couple. It would be uncommon for a married couple to deposit specified amounts into a joint housing fund, then to keep all other assets and finances separate. That Mrs. Frasco's CD went from \$17,000 to \$5,000 over the period in question indicates she met her own obligations.

Three months later in *In re Marriage of Herrin*,¹⁸³ the importance of the interrelationship of the couple's personal affairs factor was further downgraded. Mrs. Herrin had a long-lived sexual relationship with Mr. Badger.¹⁸⁴ They saw each other every

178. *Id.* at 660.

179. *Id.* at 658-59.

180. Mr. Frasco had non-marital property worth over \$1,400,000 and annual income of over \$130,000. *Id.* at 662.

181. *In re Marriage of Sunday*, 820 N.E.2d 636 (Ill. App.-2d 2004).

182. *In re Frasco*, 638 N.E.2d at 658.

183. *In re Marriage of Herrin*, 634 N.E.2d 1168 (Ill. App.-4th 1994).

184. *Id.* at 1169.

day, ate together, (Mrs. Herrin bought the groceries), took trips together and generally spent each evening together until around 10:30 p.m.¹⁸⁵ They agreed they were in love and had discussed marriage, but decided against it because she would lose her right to the maintenance payments.¹⁸⁶ They also realized that if Mr. Badger slept at Mrs. Herrin's residence on a regular basis, she could lose her right to the maintenance payments.¹⁸⁷ As a result, Mr. Badger spent almost every night at a house he owned, however, there was no gas, heat or water at that residence.¹⁸⁸ Mrs. Herrin often contributed funds to Mr. Badger's obligations; she borrowed money to pay off his van and computer, and advanced him money to make his child support payments.¹⁸⁹ Although there was some testimony indicating Mrs. Herrin expected repayment, there was little evidence of Mr. Badger making repayment to her.¹⁹⁰ The trial court terminated the maintenance payments based on their de facto husband-wife relationship.¹⁹¹ The trial court specifically found that if they allowed Mr. Badger and Mrs. Herrin to avoid the provisions of § 510(c) by him sleeping in a house with no utilities they would "exalt form over substance."¹⁹² It is clear that the relationship between Mrs. Herrin and Mr. Badger was the type of de facto husband-wife relationship the legislature had intended to trigger maintenance termination under § 510(c).

Mrs. Herrin filed a motion to reconsider and a motion to reopen the evidence with the trial court.¹⁹³ She argued that since the trial court heard no evidence concerning the financial condition of the parties the court could not have made a determination the cohabitation materially affected the need for maintenance.¹⁹⁴ Those motions were denied.¹⁹⁵ Her appeal to the Fourth District included the trial court's rulings on those post-trial motions. The Fourth District affirmed the trial court. Mrs. Herrin argued on appeal that since the underlying purpose for maintenance is need, a husband-wife relationship should not be

185. *Id.* at 1170.

186. *Id.* at 1169.

187. *Id.*

188. *Id.*

189. *Id.* at 1170.

190. *Id.*

191. *Id.*

192. *Id.* at 1170.

193. *Id.*

194. *Id.*

195. *Id.* at 1170. In response to those motions, the trial court found that Mrs. Herrin supported Mr. Badger and that he attempted to reciprocate. It also ruled that a determination of need for support, while a factor to be considered when examining the relationship at issue, is not a prerequisite to terminating maintenance under § 510(c). *Id.*

found unless the cohabitation materially affected the need for support.¹⁹⁶ The court cited *Frasco* for the proposition that need for support is not controlling and does not in itself defeat a petition to terminate maintenance under § 510(c) when all other factors demonstrate a resident, continuing conjugal relationship.¹⁹⁷ The Fourth District then went a step beyond *Frasco* when it held that while the trial court can consider the financial interaction between the interested parties, that factor is not controlling if the trial court finds that, based on the totality of the circumstances, the required relationship exists.¹⁹⁸ If that is the case, the trial court need not make a finding on the maintenance recipient's need for support.¹⁹⁹ The court then attempted to limit the Supreme Court's pronouncement in *Sappington* that, "an important consideration, divorced from the morality of conduct, is whether the cohabitation has materially affected the recipient spouse's need for support because she either received support from her co-resident or used maintenance monies to support him,"²⁰⁰ to simply "a factor for the court to consider in determining whether the required relationship exists."²⁰¹

The *Herrin* court used the phrases "demonstrated need for support," "the financial interaction between the interested parties," "financial need of the recipient," and "interrelation of their affairs" interchangeably.²⁰² This court was the first to articulate the six factors to be analyzed when determining if a de facto husband-wife relationship exists.²⁰³ It appears the Fourth District intended that the interrelationship of the couple's personal affairs factor be a proxy for the determination if the cohabitation materially affected the recipient spouse's need for support, but it also appears the court intended to accord it no more weight than any other factor.

The Fourth District did not need to distance itself from the importance given the need for support by the Supreme Court in *Sappington* in *Herrin*. They could have used the *Sappington* language "[W]hether the cohabitation has materially affected the recipient spouse's need for support because she either received support from her co-resident or used maintenance monies to

196. *Id.* at 1171

197. *Id.* at 1172.

198. *Id.*

199. *Id.* Mrs. Herrin was prepared to show her monthly expenses were \$8,276, her annual income with no maintenance was \$7,898, and her ex-husband's annual income was \$715,438. *Id.*

200. *Id.* (quoting *In re Marriage of Sappington*, 478 N.E.2d 376, 381 (Ill. 1985)).

201. *Id.* at 1172.

202. *Id.* at 1171-72.

203. *Id.* at 1171.

support him,”²⁰⁴ to uphold the trial court’s decision. The trial court found that Mrs. Herrin supported Mr. Badger and that he attempted to reciprocate.²⁰⁵ Likewise, the query posed by the Second District in *Weisbruch*, “whether the new partners have looked to each other for support,”²⁰⁶ could have been employed by the *Herrin* court to uphold the trial court. It is obvious that Mr. Badger was looking for support from Mrs. Herrin and she to him, at least to the limited extent he could provide any support.

1. *The Interrelationship of the Couple’s Personal Affairs Factor After Frasco and Herrin*

The Third District in *In re Marriage of Snow*²⁰⁷ recited the *Herrin* factors, but in summarizing the evidence did not even mention any intermingling of funds or whether the ex-wife or her boyfriend were supporting one another or whether they were looking to each other for support when it affirmed the trial court’s termination of maintenance for cohabitation under 510(c).²⁰⁸ There was no co-mingling of funds, joint credit cards, or sharing of personal expenses. There was evidence of sharing the costs associated with the house and meals.²⁰⁹ The trial and appellate courts could have thought Mrs. Snow was using maintenance monies to support her co resident, but such was not indicated in the opinion.

Three years later, the Second District in *In re Marriage of Sunday*²¹⁰ analyzed the relationship at issue using the *Herrin* factors, but in noting there was no intermingling of funds or sharing of expenses, indicated it was clear the interrelationship of a couple’s personal affairs factor is “very significant in determining the existence of a conjugal relationship.”²¹¹ The *Sunday* court looked to the *Sappington*, *Weisbruch*, *Toole*, *Arvin* and *Herrin* decisions as examples of when either a lack of significant intermingling of personal affairs or the existence of significant

204. *In re Marriage of Sappington*, 478 N.E.2d 376, 381 (Ill. 1985).

205. *In re Marriage of Herrin*, 634 N.E.2d 1168, 1170 (Ill. App.-4th 1994).

206. *In re Marriage of Weisbruch*, 710 N.E.2d 439, 444 (Ill. App.-4th 1999).

207. *In re Marriage of Snow*, 750 N.E.2d 1268 (Ill. App.-2d 2001).

208. Here, Dawn and Jaime lived together for a year and a half. They socialized together frequently and engaged in such dating activities as dinners, movies, and drinks. Although Dawn testified that they did not have a sexual relationship, we defer to the trial court’s finding that Jaime’s account of their sexual relationship was more credible. They exchanged Christmas and birthday presents. They split household chores, and they socialized with Dawn’s friends. Based upon the totality of the circumstances, we find that the trial court’s finding of a *de facto* husband-wife relationship between Dawn and Jaime was not against the manifest weight of the evidence. *Id.* at 1270-71.

209. *Id.* at 1269-70.

210. *In re Marriage of Sunday*, 820 N.E.2d 636 (Ill. App.-2d 2004).

211. *Id.* at 642. The facts in *In re Sunday* included a harassing ex-husband who lived across the street from Mrs. Sunday.

intermingling of personal affairs had a notable effect on the outcome of the case.²¹²

Then in 2006, the Second District issued an opinion illustrating how little protection the *Herrin* factor analysis can afford an ex-spouse receiving maintenance if the factors are given even weights. In *In re Marriage of Susan*,²¹³ maintenance was terminated under § 510(c) despite separate residences and no intermingling of assets.

Mrs. Susan moved to Michigan shortly after she and Mr. Susan were divorced in 2000.²¹⁴ Two years later, she began seeing Mr. Borski on an exclusive basis.²¹⁵ He lived in the same Michigan town about five miles from Mrs. Susan's residence.²¹⁶ Mrs. Susan and Mr. Borski initially had a sexual relationship, but at the time of trial, they had not had sex for two years.²¹⁷ One or two days per week, Mrs. Susan had dinner at Mr. Borski's house; likewise, two or three evenings per week, she spent the evening at Mr. Borski's house watching television.²¹⁸ She often spent the night at Mrs. Borski's house and he often spent nights at her residence.²¹⁹ He had a key to her house, but she did not have a key to his house.²²⁰ On occasion, they went fishing, to a casino, and out to dinner together.²²¹ They also went on several trips together, sharing a room.²²² They typically spent holidays together as well.²²³

On the other hand, both Mrs. Susan and Mr. Borski owned their separate residences and neither had a financial interest in the other's home.²²⁴ They were each responsible for all of their household expenses and Mr. Borski never paid any of Mrs. Susan's bills or other expenses.²²⁵ They each had their own bank accounts and neither had an interest in the other's accounts.²²⁶ They owned no personal property together and they did not keep clothing at each other's residences.²²⁷

In affirming the trial court's termination of maintenance under § 510(c), the Second District analyzed the facts using the *Herrin* factors. It noted that the only factor that did not support

212. *Id.* at 642-43.

213. *In re Marriage of Susan*, 856 N.E.2d 1167 (Ill. App.-2d 2006).

214. *Id.* at 1169.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 1169-70.

224. *Id.* at 1170.

225. *Id.*

226. *Id.*

227. *Id.*

the trial court's decision to terminate maintenance was that there was no intermingling of funds or monetary support flowing between the couple.²²⁸ The Court cited the *Sunday* decision for the proposition that a finding of a de facto marriage rests on the consideration of the *Herrin* factors and that no one factor is controlling,²²⁹ but chose to ignore its statement in *Sunday* that the interrelationship of the couple's personal affairs is "very significant in determining the existence of a conjugal relationship."²³⁰

Mrs. Susan argued that since she and Mr. Borski had not intermingled assets or finances and that their financial lives were totally separate, a finding that they were de facto husband and wife should not be possible.²³¹ Her need for support had not been affected by her relationship with Mr. Borski, so her right to the maintenance awarded to her by the court that dissolved the marriage should not be terminated.²³² The Second District rejected her argument, and insisted that the recipient spouse's need for support is not a factor in deciding whether a de facto marriage exists.²³³ The court maintained that a showing of a need for support would be relevant under a § 510(a)²³⁴ modification of maintenance action for a change of circumstances, but not under § 510(c).²³⁵ Since the need for support is irrelevant for the other two conditions requiring the termination of maintenance under § 510(c) (death and remarriage), it is also irrelevant for the purposes of a de facto marriage.²³⁶

The Second District expressed agreement with the reasoning in *In re Frasco* that the need for support should not be controlling.²³⁷ It distinguished several other appellate court cases²³⁸ that have cited the continuing need for support as an important factor in determining whether a de facto husband-wife relationship existed.²³⁹ In all of those cases, the court maintained, the need for continuing maintenance was just an additional justification for a finding that was based on other relevant

228. *Id.* at 1171.

229. *Id.*

230. *In re Marriage of Sunday*, 820 N.E.2d 636, 642 (Ill. App.-2d 2004).

231. *In re Marriage of Susan*, 856 N.E.2d 1167, 1170 (Ill. App.-2d 2006).

232. *Id.* at 1171.

233. *Id.*

234. 750 ILL. COMP. STAT. 5/510(a) (West 2006).

235. *In re Susan*, 856 N.E.2d at 1172.

236. *Id.* at 1172

237. *Id.* at 1174.

238. *In re Marriage of Bramson*, 404 N.E.2d 469, 472 (Ill. App.-1st 1980); *In re Marriage of Reeder*, 495 N.E.2d 1383 (Ill. App.-3d 1986); *In re Marriage of Arvin*, 540 N.E.2d 919, 923 (Ill. App.-2d 1989); *In re Marriage of Caradonna*, 553 N.E. 2d 1161 (Ill. App.-2d 1990).

239. *In re Susan*, 856 N.E.2d at 1173-74.

factors.²⁴⁰ The *Susan* court also characterized the *Sappington* case as ambiguous about whether need is a factor that should be considered. The *Sappington* Court, the Second District stated, first decided the couple in question were in a de facto husband-wife relationship based on the nature of their relationship, then referred to the need for support and quoted *Bramson* for the proposition that an important consideration is whether the cohabitation materially affected the recipient's need for support because she either was being supported by her partner or was spending maintenance monies to support her partner.²⁴¹ The Second District concluded that since *Sappington* was ambiguous, it would look to the plain language of the act.²⁴²

The *Weisbruch* reasoning that the purpose of the act is to prevent the paying spouse from continuing to pay maintenance when the ex-spouse is using the money to support someone else or is being supported by someone else was also criticized.²⁴³ The Second District argued the language from *Weisbruch* misstates the purpose of the act, which is to remedy the inequity of a maintenance-receiving spouse avoiding termination of maintenance by not legally marrying.²⁴⁴ As a result, the Second District made it quite clear that the interrelationship of the couple's personal affairs factor should be given no more weight than any other factor.

What the Second District failed to give any weight to, however, was the fact that Mrs. Susan and Mr. Borski were not in a resident relationship. The plain language of § 510(c) requires that the couple in question "cohabitate . . . on a resident conjugal basis."²⁴⁵ They clearly did not. The Court spent a lot of time determining that the couple spent holidays and vacations together, ate together and slept at each other's homes frequently, but not exclusively, and generally maintained a close relationship.²⁴⁶ They spent no time at all discussing the fact they did not live together and that each of them independently maintained separate households with no intermingling of funds or assets.

The *Susan* decision illustrates a fundamental problem with an equal weighting of the *Herrin* factors that is being endorsed by the Second, Third, and Fourth Districts. The equal rating of the factors simply does not reflect reality. It defies logic that a couple

240. *Id.* at 1175.

241. *Id.* 1175-76.

242. *Id.* at 1176.

243. *Id.* at 1176-77.

244. *Id.* (citing *In re Marriage of Sunday*, 820 N.E.2d 636 (Ill. App.-2d 2004) and *In re Marriage of Reeder*, 495 N.E.2d 1383 (Ill. App.-2d 1986) for the purpose of the statute).

245. 750 ILL. COMP. STAT. 5/510(c) (2006).

246. *In re Marriage of Susan*, 856 N.E.2d 1167, 1170 (Ill. App.-2d 2006).

vacationing together or spending the holidays together (as many single couples do) should be able to negate the fact that the couple has no intermingling of their personal affairs.

*In re Marriage of Thornton*²⁴⁷ is an illustration of a judicial failure that eventually was righted. Rosiemary and Wade Thornton were divorced in 2001 and he was ordered to pay maintenance of \$275 per month for 30 months and \$374 per month on a second mortgage until the debt was fully paid.²⁴⁸ Shortly before the final dissolution, Rosiemary allowed Wade's homeless brother to move into the basement.²⁴⁹ Wade made none of the payments as ordered and she filed a petition for indirect civil contempt in 2004, asking for the back maintenance and the second mortgage payments.²⁵⁰ The trial court entered a finding that Wade still owed \$8,250 in back maintenance, but reserved that finding after Wade orally claimed that maintenance had terminated since Rosiemary was in a conjugal relationship with another person.²⁵¹ At a later evidentiary hearing on Wade's oral claim, two witnesses testified they had seen Wade's brother at the marital home, had seen his car in the driveway or had received phone calls from him originating from Rosiemary's home.²⁵² Rosiemary admitted that she allowed her brother-in-law to live in her basement, but explained that she had done so out of the goodness of her heart because he was homeless.²⁵³ She denied any romance and maintained they led separate lives.²⁵⁴ That testimony was undisputed. The trial court entered an order abating all maintenance under § 510(c) with no finding of fact or reasons for the abatement.²⁵⁵

In 2006, the Third District upheld the trial court's decision, holding that there was an evidentiary basis for the trial court's holding and that the trial court's finding was not against the manifest weight of the evidence.²⁵⁶ A petition for rehearing was

247. *In re Marriage of Thornton*, 867 N.E.2d 102 (Ill. App.-3d 2007).

248. *Id.* at 104.

249. *Id.* at 105.

250. *Id.* at 104.

251. *Id.* Mr. Thornton had filed for bankruptcy in the interim and had the debts he was allocated in the dissolution agreement discharged. As a result, the creditors were pursuing Mrs. Thornton. She also asked for relief from those debts. The trial court made no finding on that issue or on the issue of the second mortgage payments Mr. Thornton failed to pay as ordered. She also asked the court to order her ex-husband to issue a quitclaim deed to the marital home, as he had been ordered to do so. The trial court, again, issued no finding on those prayers. *Id.*

252. *Id.* at 105.

253. *Id.*

254. *Id.*

255. *Id.* at 105.

256. *In re Marriage of Thornton*, No. 3-05-0722, 2006 Ill. App. Ct. LEXIS 700, *vacated and withdrawn by In re Marriage of Thornton*, 867 N.E.2d 102

granted in October 2006 and the original Third District decision was withdrawn in 2007.²⁵⁷

Justice McDade, who vigorously dissented in the withdrawn decision, wrote for the majority in the replacement decision,²⁵⁸ that there was no evidence relating to any of the six *Herrin* factors and, as a result, no evidence of a de facto husband and wife relationship between Rosiemary and Wade's brother.²⁵⁹ There was no evidence concerning the amount of time (if any) Rosiemary and her brother-in-law spent together, whether there was any intermingling of personal or financial affairs, the nature (if any) of the activities they engaged in together and whether they vacationed or spent holidays together.²⁶⁰ The trial court's order abating the maintenance was reversed and the trial court was directed to compel Wade to pay Rosiemary the amount the trial court determined she was owed before Wade's oral claim she was cohabitating.²⁶¹

E. Vacations and Holidays

The final two *Herrin* factors, whether the couple vacationed together and whether the couple spent holidays together,²⁶² could easily be subsumed under the third factor (the nature of the activities the couple engaged in).²⁶³ It is true that married people do vacation together and spend holidays together, but dating couples do so as well. According to the Travel Industry Association, a national, non-profit organization representing the travel industry, 67% of all romantic trips were taken by married couples.²⁶⁴ That, by implication, means that one-third of all romantic trips were taken by unmarried people.

The same can be said for spending holidays together. By and large married people do spend holidays together; visiting parents, grandparents, and other members of the couple's families. It is not unusual for dating couples to spend holidays together, however. Most readers can probably recall taking home a girl or boyfriend for a holiday meal to meet the parents or family. This situation would be especially likely if one or both of the couple's

(Ill. App.-3d 2007).

257. *Id.*

258. *In re Marriage of Thornton*, 867 N.E.2d 102 (Ill. App.-3d 2007).

259. *Id.* at 110.

260. *Id.*

261. *Id.* at 111.

262. *In re Marriage of Herrin*, 634 N.E.2d 1168, 1171 (Ill. App.-4th 1994).

263. *Id.*

264. Press Release, Travel Industry Association, *Valentines News: Romantic Travel Popular with Americans* (Feb. 13, 2002), <http://www.tia.org/pressmed/ia/pressrec.asp?Item=172>.

families do not live close by.

If the *Herrin* factors are given equal weight, and a dating couple went on a vacation and spent Christmas, Thanksgiving, and the Fourth of July together, a court could easily find two of the six factors in favor of a de facto husband-wife relationship. In addition, if the couple had been dating for two years and generally saw each other on a daily basis, a court could find four of the six factors favor a de facto husband-wife relationship. An ex-spouse might be successful in a petition to terminate maintenance under § 510(c), although the couple did not partake of the type of activities married people do, such as going to church, helping each other with chores, or going to the store together; nor did they mix assets or funds.

III. PROPER DATE FOR TERMINATION

If a termination of maintenance under § 510(c) is warranted, when should the termination be effective? Logically, there are three choices: the date the de facto husband-wife relationship came into being, the date the petition to terminate was filed or the non-moving party receives notice, and the date of the court finding of a de facto husband-wife relationship.

Traditionally, Illinois courts have used the date of the petition or the date of notice of the petition as the proper date of termination of maintenance payments, should conditions warrant they be terminated. For example, in *Kowalski v. Kowalski*²⁶⁵ the First District stated:

Further, with regard to the abatement issue, we note that the court has no power to modify past due installments of alimony (citations omitted). The petition for modification or termination was filed in July, 1979 and would only apply to payments owed from that date on, as affected by defendant's conduct on or after the effective date of the Marriage Act.²⁶⁶

In *In re Marriage of Kessler*,²⁶⁷ Mr. Kessler argued that since the obligation to pay maintenance automatically terminates if the obligee spouse dies or remarries under § 510(c), termination under § 510(c) for conjugal cohabitation should automatically terminate as well.²⁶⁸ The First District disagreed, relying on the language in Section 510(a) of the IMDA²⁶⁹ [hereinafter § 510(a)] that allows modification of maintenance or support only for installments coming due after the filing of a motion for modification. The court

265. 422 N.E.2d 83 (Ill. App. -1st 1981).

266. *Id.* at 86.

267. 441 N.E.2d 1221 (Ill. App.-1st 1982).

268. *Id.* at 1229.

269. 750 ILL. COMP. STAT. 5/510(a) (West 2007).

reasoned that the parties may not unilaterally reduce payments based on a change in circumstances and since a court has no power to modify past due installments, only post petition payments may be modified.²⁷⁰

In *In re Marriage of Hawking*,²⁷¹ the First District gave effect to a 1986 amendment of § 510(a) complying with a federal mandate on child support, that required no modification of child support for any installment coming due before the date the non-moving party received notice of the filing of a motion.²⁷² Although the federal mandate related only to child support payments, the court concluded that after the amendment the earliest date that maintenance could be terminated under § 510(c) is the date the non-moving party received due notice of the motion for modification.²⁷³ The Fourth District adopted the *Hawking* rule in *In re Marriage of Frasco*.²⁷⁴ In *Frasco*, the ex-husband argued he should be able to negate a contempt order for non payment of a property settlement obligation with a setoff for maintenance monies he had already paid to his ex-wife for the period beginning with the date she began cohabitating to the date of the petition for termination.²⁷⁵ The Fourth District reasoned that the law in Illinois is clear that past due support installments are vested in the obligee and that since the amendment of § 510(a), retroactive modification may be ordered no earlier than the date the non-movant receives due notice.²⁷⁶

The relative certainty concerning the proper date of termination of maintenance payments for conjugal cohabitation was upset by the Second District in *In re Marriage of Gray* in 2000.²⁷⁷ The *Gray* court held that since the other two triggering events in § 510(c), death and remarriage, cause automatic terminations of maintenance payments, conjugal cohabitation should cause an automatic termination of maintenance as well.²⁷⁸ The court pointed out that § 510(c) contains no requirement of a petition; it simply sets out three conditions that terminate

270. *In re Kessler*, 441 N.E.2d at 1229.

271. 608 N.E.2d 327 (Ill. App.-1st 1992).

272. Section 510(a) before the 1986 amendment by Pub. Act 85-002 (1986) read: "the provisions of any judgment respecting maintenance or support may be modified only as to installments accruing subsequent to the filing of the motion for modification with due notice of the moving party." After the amendment, § 510(a) reads "the provisions of any judgment respecting maintenance or support may be modified only as to installments accruing subsequent to due notice by the moving party of the filing of the motion for modification." *In re Hawking* 608 N.E.2d at 330.

273. *In re Hawking* 608 N.E.2d at 331.

274. *In re Marriage of Frasco*, 638 N.E.2d 655 (Ill. App.-4th 1994).

275. *Id.* at 661.

276. *Id.*

277. 731 N.E.2d 942 (Ill. App.-2d 2000).

278. *Id.* at 944-47.

maintenance obligations if they occur.²⁷⁹ On the other hand, § 510(a) requires that a motion be made before modifying maintenance or support payments and that they may only be modified after notice and a showing of substantial change in circumstances. The two sections should not be read together: § 510(a) describes modifying maintenance and support payments, while § 510(c) provides three events that terminate maintenance payments. The Second District found *Kessler* non-binding, and refused to be bound by the *Frasco* and *Hawking* decisions.²⁸⁰

The *Gray* court's literal reading of the statute may be accurate, but it ignores difficulties inherent in its holding. First, unlike remarriage and death, both of which occur on a date certain and generate a public record, it is often unclear when conjugal cohabitation begins. The court reasoned that the legislature intended conjugal cohabitation to be treated the same way as death and remarriage, and if the parties disagree as to when the continuous conjugal cohabitation began, they could petition a court to determine the relevant date.²⁸¹ Second, since maintenance payees are usually in an inferior financial position relative to the maintenance payors, payees are likely to be unduly burdened by unilateral termination of maintenance payments by the payor. The court felt it was more of an undue hardship for the payor to continue paying maintenance when the payee knows that maintenance terminates upon conjugal cohabitation.²⁸² Finally, automatic termination under § 510(c) may invite a vindictive payor to cease payment although the payee is in a relationship that does not rise to the level of a continuing conjugal cohabitation. The court contended there are remedies available to the payee if the payor unlawfully terminates maintenance payments, and if the court were to hold that payments terminate as of the date of petition, an unscrupulous payee would be encouraged to hide the terminating cohabitation.²⁸³ The following year, the Third District followed the lead of the Second District in *In re Marriage of Snow*,²⁸⁴ with scant discussion, despite Mrs. Snow's argument that the *Gray* case failed to follow well settled Illinois law.²⁸⁵

The Fourth District followed its eleven year-old decision in *Frasco* and rejected the *Gray* and *Snow* decisions from the Second and Third Districts in *In re Marriage of Elenewski*.²⁸⁶ Mr.

279. *Id.*

280. *Id.* at 945-46.

281. *Id.*

282. *Id.*

283. *Id.*

284. 750 N.E.2d 1268 (Ill. App.-3d 2001).

285. *Id.* at 1271.

286. 828 N.E.2d 895 (Ill. App.-4th 2005).

Elenewski was ordered to pay unallocated child support and maintenance of \$3,500 per month to his ex-wife in 2000.²⁸⁷ In May of 2002, Mrs. Elenewski and another man bought a home together and began cohabitating.²⁸⁸ In August 2003, Mr. Elenewski filed a petition to terminate the maintenance payments and unilaterally reduced his monthly payments to Mrs. Elenewski to \$1,226, the amount he thought he was obligated to her for child support.²⁸⁹ He later discovered his ex-wife had remarried in June 2002 and filed a second petition to retroactively terminate the maintenance portion of the payments to the date of the remarriage.²⁹⁰ The trial court determined that Mr. Elenewski actually owed \$2,182 per month for child support and terminated the maintenance portion of the unallocated support award as of the date of the first petition filed by Mr. Elenewski, August 2003.²⁹¹ The Fourth District affirmed the trial court, finding the original order stated “the amount of the support shall be reviewable upon Loretta’s remarriage, Loretta living on a conjugal basis with another man, or the expiration of 72 months,” overrode the § 510(c) provision.²⁹² The court reasoned the order showed that the parties anticipated that a court would need to determine the amount of child support Mr. Elenewski would owe should Mrs. Elenewski remarry or live with another man on a conjugal basis.²⁹³ Had the case involved only the termination of maintenance, the court restated its rule that despite the language of § 510(c), maintenance may be terminated for conjugal cohabitation only upon the filing of a petition to terminate, because unlike death or remarriage, there is no certain date that conjugal cohabitation can be found to exist.²⁹⁴

The Third District later clarified its *Snow* holding in *In re Marriage of Thornton*.²⁹⁵ At issue was whether a petition was necessary for the termination of maintenance for conjugal cohabitation under § 510(c). The *Gray* court made clear its position that although a petition was required for modification of maintenance under § 510(a), none was required if any of the three conditions specified in § 510(c) occurred.²⁹⁶ In *Snow*, a petition had been filed and the Third District relied on *Gray* in reversing the trial court’s decision that maintenance should be terminated as of the date of the petition rather than the date of

287. *Id.* at 896.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 896-97.

294. *Id.* at 897.

295. 867 N.E.2d 102 (Ill. App.-3d 2007).

296. *In re Marriage of Gray*, 731 N.E.2d 942, 945-46 (Ill. App.-2d 2000).

cohabitation.²⁹⁷ Unlike the facts in *Snow*, in *Thornton*, Mr. Thornton had not filed a petition for termination.²⁹⁸ The parties were in court on Mrs. Thornton's petition for payment of unpaid maintenance and other alleged debts owed by Mr. Thornton to her.²⁹⁹ Mr. Thornton orally made his allegation of a conjugal cohabitation during the hearing on her petition.³⁰⁰ At a hearing on the alleged cohabitation, the trial court determined Mrs. Thornton was conjugally cohabitating and abated in full all maintenance due.³⁰¹ The *Thornton* court made clear it agreed with the *Gray* rule that the date of cohabitation should be the date of maintenance termination under § 510(c).³⁰² They also made clear they did not agree with the *Gray* holding that no petition was necessary to terminate maintenance under § 510(c).³⁰³ The Third District only adopted the *Gray* holding in *Snow* to the extent it dealt with the triggering event for terminating maintenance under § 510(c).³⁰⁴ The *Thornton* court conceded there was no express requirement of a petition in § 510(c), but looked to § 511 wherein petitions are required for any modification or enforcement of a dissolution or legal separation, and concluded a petition is required to terminate maintenance under § 510(c) for conjugal cohabitation.³⁰⁵

IV. CONCLUSION AND LEGISLATIVE SUGGESTIONS

It has been thirty years since the Illinois Marriage and Dissolution Act added § 510(c). Prior to the IMDA, the fact that an alimony recipient was involved in a quasi-marriage did not necessarily terminate his/her right to receive alimony, although the relationship could serve as a basis for a change in conditions warranting modification or termination of alimony.³⁰⁶ For nearly twenty years, Illinois courts logically examined the facts and circumstances surrounding each case and made decisions based on the totality of the circumstances in recognition that each relationship is unique and warranted close examination to determine whether the couple in question had formed a de facto husband-wife relationship.

In the only major Supreme Court case on § 510(c), the Court agreed with the First District's reasoning that the legislature had

297. *In re Marriage of Snow*, 750 N.E.2d 1268, 1271 (Ill. App.-3d 2001).

298. *In re Marriage of Thornton*, 867 N.E.2d 102, 104 (Ill. App.-3d 2007).

299. *Id.*

300. *Id.*

301. *Id.* at 105.

302. *Id.* at 106.

303. *Id.* at 108

304. *Id.*

305. *Id.*

306. See discussion, *supra* notes 14-21.

not intended to control public morals with § 510(c), but rather to free the paying ex-spouse if the relationship at issue materially affected the recipient's need for support.³⁰⁷ Over the years, two issues became clear: (1) Sex was not required³⁰⁸ and (2) same sex couples would be treated the same as heterosexual couples.³⁰⁹

By 1994, the Fourth District enumerated six factors to be considered when testing the relationship.³¹⁰ Referred to here as the *Herrin* factors they are as follows:

1. The length of the relationship.
2. The amount of time the couple spent together.
3. The nature of the activities the couple engaged in.
4. The interrelationship of the couple's personal affairs.
5. Whether the couple vacationed together.
6. Whether the couple spent holidays together.³¹¹

The fourth factor, the interrelationship of the couple's personal affairs, traditionally was given more weight than the other factors, due to the Supreme Court's language in *Sappington* that the issue for § 510(c) maintenance termination cases was whether the relationship under study affected the ex-spouses need for support. In effect, although a couple may have a long-term relationship, spend a lot of time together, engage in activities in which married couples normally engage, take vacations together and spend holidays together, if they do not intermingle assets and share finances, the relationship looks more like a serious dating relationship than a *de facto* marriage.

By 1994, the Fourth District discounted the importance of the interrelationship of the couple's personal affairs to simply "a factor for the court to consider in determining whether the required relationship exists."³¹² The Second and Third Districts have adopted the view that the six *Herrin* factors should be weighted evenly as part of a determination based on the totality of the circumstance of whether a *de facto* husband-wife relationship exists.³¹³ As a result, a relationship that could be deemed a

307. *In re Marriage of Sappington*, 478 N.E.2d 376, 381 (Ill. 1985).

308. *Id.*

309. *In re Marriage of Weisbruch*, 710 N.E.2d 439 (Ill. App.-2d 1999).

310. *In re Marriage of Herrin*, 634 N.E.2d 1168 (Ill. App.-4th 1994).

311. *Id.* at 1171.

312. *In re Marriage of Herrin*, 634 N.E.2d 1168, 1172 (Ill. App.-4th 1994).

313. *In re Marriage of Snow*, 750 N.E.2d 1268 (Ill. App.-3d 2001) (reciting the *Herrin* factors but finding a *de facto* husband-wife relationship despite no commingling of funds, joint accounts, or sharing of personal expenses). It should be noted the *Snow* court did not specify that all factors are to be

serious dating relationship in the First and Fifth Districts could trip a termination of maintenance payments under § 510(c) in the Second, Third and Fourth Districts.

The Illinois legislature should provide guidance. By downplaying the importance of the interrelationship of the couple's personal affairs factor, the Second, Third, and Fourth Districts have lowered the hurdle for maintenance obligors who want to terminate their obligation under § 510(c) for conjugal cohabitation. The *Susan* case³¹⁴ is an illustration of a serious dating relationship being cast as a conjugal cohabitation, resulting in the termination of Mrs. Susan's maintenance. The couple maintained separate residences and kept all assets and finances separate.³¹⁵

Some districts of the Appellate Court of Illinois seem intent on making termination of maintenance for conjugal cohabitation under § 510(c) more available to maintenance obligors than it previously was, at a time when at least one commentator is questioning the social wisdom of terminating maintenance or alimony upon the recipient's remarriage.³¹⁶ The legislature should act to recognize the interrelationship of the couple's personal affairs as the primary factor in determining whether a couple's relationship has risen to the level of a *de facto* husband-wife relationship. Doing so would provide uniformity to how § 510(c) is interpreted throughout the state of Illinois and provide maintenance recipients a brighter line they around which they can structure their dating relationships. As stated by the First District in 1980,³¹⁷ and quoted by the Supreme Court in *Sappington*, "the legislative intent does not appear to be an attempt to control public morals."³¹⁸ Maintenance recipients should be able to have adult relationships.

A maintenance obligor's obligation does not change, no matter what type of relationship he or she decides to enter into. The statute does not allow a termination of maintenance if a couple chooses to defer marriage until maintenance terminates under the original order. Likewise, a couple should be able to structure their relationship in a manner to not trigger a termination of

weighted evenly, but by finding a *de facto* husband-wife relationship without significant intermingling of personal affairs implied an even weighting of the *Herrin* factors. See *In re Marriage of Susan*, 856 N.E.2d 1167 (Ill. App.-2d 2006) (finding a *de facto* husband-wife relationship despite no intermingling of assets or funds).

314. *In re Marriage of Susan*, 856 N.E.2d 1167 (Ill. App.-2d 2006).

315. *Id.*

316. Cynthia Lee Starnes, *One More Time: Alimony, Intuition, and the Remarriage-Termination Rule*, 81 IND. L.J. 971 (Summer 2006); Cynthia Lee Starnes, *Mothers, Myths, and the Law of Divorce: One More Feminist Case for Partnership*, 13 WM. & MARY J. OF WOMEN & L. 203 (Fall 2006).

317. *In re Marriage of Bramson*, 404 N.E.2d 469, 473 (Ill. App.-1st 1980).

318. *In re Marriage of Sappington*, 478 N.E.2d 376, 381 (Ill. 1985).

maintenance. Not intermingling finances and assets should be a reliable planning tool. Terminating maintenance under § 510(c) for conjugal cohabitation should only occur if a true de facto husband-wife relationship is found, for the maintenance recipient has no legal rights for support from her cohabitant should the relationship end, unlike she might in a true marriage.

A. *Timing of Termination*

From the enactment of § 510(c) until 2000, maintenance terminations for conjugal cohabitation were effective either as of the date of the petition or the date the maintenance recipient received notice of the petition.³¹⁹ The Second and Third Districts now terminate maintenance payments under § 510(c) as of the date of the de facto husband-wife relationship.³²⁰ The Fourth District, in 2005, reaffirmed its earlier decisions that termination should occur as of the date of the petition.³²¹ In addition, the *Gray* case appears to allow the maintenance obligor to terminate payment without a petition.³²²

The legislature should make clear that a petition is required for § 510(c) actions and that maintenance payments may only be terminated under § 510(c) as of the date of notice of the petition, not the date the de facto husband-wife relationship began. These obligor-obligee relationships are often chaotic and allowing unilateral termination by the obligor would only add to the chaos. These changes would level the playing field throughout the state. In addition such changes would: (1) guarantee maintenance recipients, who are generally financially inferior to the maintenance obligors, would not be required to repay maintenance payments received before being noticed of the § 510(c) action; (2) prevent maintenance obligors from seeking setoffs for maintenance payments made against other unpaid obligations to the obligee; and (3) free the courts from the difficult challenge of deciding exactly when a conjugal cohabitation began.

319. *Kowalski v. Kowalski*, 422 N.E.2d 83 (Ill. App.-1st 1981); *In re Marriage of Kessler*, 441 N.E.2d 1221 (Ill. App.-1st 1982); *In re Marriage of Hawkins*, 608 N.E.2d 327 (Ill. App.-1st 1992).

320. *In re Marriage of Gray*, 731 N.E.2d 942 (Ill. App.-2d 2000); *In re Marriage of Snow*, 750 N.E.2d 1268 (Ill. App.-3d 2001); *In re Marriage of Thornton*, 867 N.E.2d 102 (Ill. App.-3d 2007).

321. *In re Marriage of Elenewski*, 828 N.E.2d 895 (Ill. App.-4th 2005).

322. N.E.2d 942, 944-47 (Ill. App.-2d 2000).