ILLINOIS CASE LAW TERMINATION OF MAINTENANCE DUE TO CONJUGAL COHABITATION

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Executive Summary:

Illinois statutory law regarding maintenance and what is called "resident, continuing, conjugal" cohabitation has been clarified effective January 1, 2016. It is now clear that where a party receiving maintenance cohabits with another person on a resident, continuing conjugal basis that by operation of law the maintenance terminates retroactive to the date that there is a court finding that cohabitation began. But there remain a host of questions that case law has fleshed out as to what constitutes "resident, continuing, conjugal cohabitation."

The rules that the case law sets forth are:

- ✓ The issue is whether there is a *de facto* marriage-like relationship.
- ✓ For a marriage-like relationship it is not necessary that sexual relations between the partners be proven. Indeed, an early Illinois Supreme Court case had ruled that even where the male partner was impotent, there could be a marriage-like relationship. *Sappington*.
- ✓ Financial support was the focus on early cases and again is quite important although not the sine qua non in more recent case law.
- ✓ While a six factor analysis may be used, the issue is the totality of the circumstances and not a check-list of any six-factor so called test.
- ✓ Prejudgment conjugal cohabitation disqualifies one from receiving maintenance.

Illinois statutory law provides:

> (c) Unless otherwise agreed by the parties in a written agreement set forth in the judgment or otherwise approved by the court, the obligation to pay future maintenance is terminated upon the death of either party, or the remarriage of the party receiving maintenance, or if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis.

Since of January 1, 2016 Illinois law also has provided:

> A payor's obligation to pay maintenance or unallocated maintenance terminates by operation of law on the date the recipient remarries or the date the court finds cohabitation began. The payor is entitled to reimbursement for all maintenance paid from that date forward.
>
> A party receiving maintenance must advise the payor of his or her intention to

marry at least 30 days before the remarriage, unless the decision is made within this time period. In that event, he or she must notify the other party within 72 hours of getting married.

This relatively short provision in §510 of the IMDMA [prior to the January 1, 2016 amendments] has been subject to a great deal of case law. The 2016 amendments essentially re-states the existing case law where it provides that, "A payor's obligation to pay maintenance or unallocated maintenance terminates by operation of law on the date the recipient remarries or the date the court finds cohabitation began. The payor is entitled to reimbursement for all maintenance paid from that date forward." As will be see the amendments clarify and probably expand somewhat on existing law regarding whether one was entitled to reimbursements for overpayments.

Now that it is clear that termination is retroactive to the date cohabitation had begun, the critical focus is on what constitutes resident, continuing conjugal basis. What we can see in reviewing the case law is that the focus is on:

✓ Resident: Actual co-residency is not required but if there is not actual cohabitation and there is no financial co-mingling it is far more difficult to prove the *de facto* marriage like relationship. The corrolary is that where there is residency, far less is required to be shown to establish a *de facto* conjugal relationship.

✓ Continuing: What is the length of the relationship? A short term relationship has a lesser chance of being determined to be continuing.

✓ Conjugal: As stated above, has nothing to do with sexual relations but everything to do with a marriage-like relationship.

Pre-Judgment Conjugal Cohabitation Cases:

We have two prejudgment conjugal cohabitation that are now quite dated. But they remain good law both going toward the fact that it does not matter whether the conjugal cohabitation is before the divorce and the fact that "continuing" does not necessarily mean a quite long time period.

***Klein* (1992) -- Prejudgment Conjugal Cohabitation Disqualifies One from Receiving Maintenance**

IRMO *Klein*, 231 Ill.App.3d 901 (4th Dist. 1992) held: "Wife's prejudgment conjugal cohabitation disqualifies her from an award of maintenance in the same manner as in post-judgment proceedings an award of maintenance may be terminated because of the wife's conjugal cohabitation."

The parties in *Klein* were married in 1985. No children were born to the parties or adopted by them during their marriage. Judgment of dissolution of marriage was entered in January of 1991. During the hearing, the wife's lawyer conceded that the wife was currently cohabiting and the wife gave testimony on this issue. "She stated that the man she had been dating for approximately eight months sometimes stayed at her home for a week at a time. They had been sexually intimate. He currently stayed at her home regularly. He did not pay respondent a rental fee or for food he consumed while at respondent's home. Respondent explained she paid all expenses because it was her home and cooking for two people costs no more than cooking for one." In the

trial court, the husband argued that his wife waived any right to maintenance because she was cohabiting. The trier reasoned that although cohabitation after an award of maintenance could extinguish a party's right to maintenance, cohabitation before entry of judgment did not extinguish the right to maintenance. Trier awarded maintenance in the amount of $400 per month for 4 years and 4 months. Husband appealed. The appellate court reversed the award of maintenance.

The appellate court reversed the award of maintenance "for public policy reasons". The opinion focuses on the fact that section 510(c) of the IMDMA (the modification statute) provides for a termination of maintenance based upon the recipient's conjugal cohabitation, but that section 504 (the maintenance statute) does not mention cohabitation as a bar to the receipt of initial maintenance. The opinion stated:

> There should be no distinction between whether petitioner's obligation is terminated before it ripens or after maintenance is ordered. *** [I]f a party who seeks maintenance cohabits before maintenance is awarded, the award should be denied pursuant to section 510(c). (Citation omitted.)
>
> Although case law cited by petitioner addresses termination of maintenance when the recipient is found to be cohabiting, cohabiting should not be ignored in determining the propriety of an original maintenance award.

The reviewing court concluded that there was cohabitation sufficient to bar maintenance:

> because respondent's counsel conceded respondent was cohabiting, neither the trial court or this court had to evaluate whether respondent's relationship amounted to cohabiting which justifies denying her maintenance.

It was sound reasoning by the appellate court to incorporate the provision of §510, the provisions for termination of maintenance, into §504, which addresses the original award of maintenance. The apt conclusion was that a spouse who is cohabiting at the time of the initial divorce proceedings should not have maintenance any more than a *former* spouse who is cohabiting should continue to receive maintenance. But the *Klein* court's opinion begs the question of what statutory cohabitation (pursuant to §510(c)) is. As stated in *Klein*: "an important consideration is whether the relationship has materially affected the recipient spouse's need for support because the recipient receives support from her coresident or used maintenance money to support the co-resident."

Toole (1995) -- Prejudgment Conjugal Cohabitation through to Date of Testimony in Divorce Case Disqualified Wife from Maintenance

IRMO Toole, 273 Ill.App.3d 607 (2d Dist. 1995) held that the maintenance award to wife reversed because she was involved in an extramarital conjugal relationship during the divorce litigation.

The parties in *Toole* were married for 22 years before a divorce judgment was entered in June, 1994. The trial court ordered the husband to pay rehabilitative maintenance of $800 per month for 36 months to a wife who had been involved in an affair during the pendency of the divorce litigation. The appellate court reversed the maintenance award.

After the parties separated in February 1990, the wife and the two children lived with David Hughes, an unrelated adult male, in California. She testified that during a weekend break of the trial she moved out of Hughes' house.

The *Toole* court stated that it was not passing moral judgment on the wife's cohabitation with Hughes. The rationale for reversal of the maintenance award due to the conjugal relationship was:

(1) Section 510(c) of the IMDMA (the modification statute) states that "the obligation to pay future maintenance is terminated * * * if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis."

(2) *Toole* relied on *IRMO Klein*, 231 Ill.App.3d 901 (4th Dist. 1992), and quoted with approval: "'There should be no distinction between whether petitioner's obligation is terminated before it ripens or after maintenance is ordered.'"

The ruling of the majority opinion of the *Toole* court was:

> Thus, because [the wife] cohabited on a resident, continuing conjugal basis with Hughes, and [the wife] and [the husband] did not subsequently reconcile, [the husband's] obligation to pay all forms of maintenance, including rehabilitative maintenance, has been terminated.

The review court rejected the wife's argument that her moving out of Hughes' residence during the course of the trial cured the maintenance problem since, under the authority of *Klein*, "maintenance should not be awarded where the party * * * is either cohabiting, *or has cohabited* on a conjugal basis with another party since the inception of the marriage absent a subsequent reconciliation."

Post-Judgment Conjugal Cohabitation Cases:

Elenewski (2005) -- Date of Termination of _Unallocated_ Maintenance Was Not Retroactive to Wife's Remarriage / Dictum Suggesting that Maintenance Does Not Automatically Terminate on Date of Conjugal Cohabitation

*IRMO **Elenewski***, 357 Ill. App. 3d 504 (Fourth Dist., 2005).

A July 2000 award for unallocated maintenance provided that it "shall be reviewable" upon the wife's remarriage, her living on a conjugal basis with another man, or expiration of 72 consecutive months of payments. In August 2003, the former husband filed a petition to terminate his unallocated maintenance payments alleging conjugal cohabitation prior to April of 2002. The ex-wife admitted the living arrangement from May of 2002 and in the ex-husband later learned that his ex-wife had remarried in June of 2002. The ex-husband filed a second petition to retroactively modify the unallocated maintenance payments retroactive to the date of the ex-wife's remarriage. In June of 2004, the trial court entered its order providing that the ex-wife had a "vested right in the unallocated support of $3,500 up to the date the ex-husband filed his original petition. The husband appealed and the appellate court affirmed.

The language of the decision is instructive:

> If this case involved only termination of maintenance on the basis of continuing conjugal cohabitation, we would have little difficulty affirming the trial court's order that termination was effective only as to installments accruing after notice of the filing of the motion for modification or termination. We have held that, despite the language of section 510(c), maintenance may be terminated on the basis of continuing conjugal cohabitation only upon the filing of a petition to terminate. *** This case, however, also involved a remarriage, on June 27, 2002. The trial court did not use that date here because of the language in the order of October 3, 2000, that "the amount of support shall be reviewable" upon Loretta's remarriage, et cetera. The trial court concluded that language fit within the provision of section 510(c) that maintenance be terminated as of the date of remarriage "[u]nless otherwise agreed by the parties in a written agreement set forth in the judgment or otherwise approved by the court." 750 ILCS 5/510(c). The order of October 3, 2000, was prepared by Loretta's attorney, was approved by John's attorney, and appears to be a written agreement between the parties as referred to in section 510(c). A further complication is in this case in that John is not simply seeking to terminate an award of maintenance but an unallocated award of both maintenance and child support. Child support clearly cannot be reduced prior to the filing of the motion for modification.

The appellate court then stated that, "When child support and maintenance are unallocated, we lose the certainty of a specific amount of child support. That is done for the benefit of the payor, who is thereby allowed to deduct child support. One of the fundamental aspects of child support is that modifications cannot be retroactive. The recipient of child support is entitled to believe the ordered payments are definite until a court tells her otherwise." While the court mentioned the fact that it did not condone the ex-wife's conduct as to her failure to notify her ex-husband as to her remarriage, under the facts of the case maintenance was determined to be properly terminated as of the date of the filing of the ex-husband's petition.

Thornton (2007) – Conjugal Cohabitation – Date of Termination is Not Retroactive / Possibility of Award of Permanent Maintenance Even Though Petition Filed After Expiration of Three Year Term

IRMO Thornton, (Third Dist., 2007)
This case represents a remarkable "about-face" by the Third District Illinois appellate court – in an opinion I had previously criticized. In this case, the ex-wife appealed the trial court's order granting the **oral request** of her former spouse to terminate his obligation to pay maintenance. The appellate court stated:

> In the original opinion issued in this appeal, we affirmed the trial court on all three issues. *In re Marriage of Thornton*, No. 3-05-0722 (August 9, 2006). We now vacate that Opinion and, for the reasons that follow, we reaffirm our decision in *Snow* [also a Third District decision] reverse the trial court's order finding the obligation to pay maintenance had abated, and remand the matter for consideration of respondent's requests for extended, increased and permanent maintenance and petitioner's responsibility of compliance with the other debts and obligations he had pursuant to the judgment of dissolution and its included marital settlement

agreement.

In *Thornton,* the ex-wife had testified that she had allowed the petitioner's brother to move in "out of the goodness of her heart" because "he did not have a place to stay [and] was in essence, homeless." She testified that the brother stayed and slept in the basement and that they led separate lives. She denied that there was at any time any romance or conjugal relationship between them. The appellate court stated in a significant decision:

> The instant case does, however, directly raise the issue of whether a spouse who has been ordered by the court to pay maintenance can cease such payments unilaterally without benefit of a petition and a determination that there had, in fact, been "conjugal cohabitation." We believe, contrary to the decision in *Gray*, that such unilateral action is contrary to the Illinois Marriage and Dissolution of Marriage Act and flies in the face of extensive and long-standing family case law.

The Third District appellate court explained:

> That is, section 510(a) allows modification only as to installments accruing after the due notice provided by the filing of a motion. By contrast, section 510(c) provides that the obligation to make future maintenance payments is automatically terminated when one of these three particular events occurs. See 750 ILCS 5/510(c) (West 2002). Logic compels us to conclude that section 510(c) creates an exception to section 510(a)'s limitation of relief to installments after the filing of the motion or petition, **but does not establish an exemption from the obligation to file a petition in order to conform the court's order to present circumstances**... It can thus be seen that any modification or enforcement of the judgment of dissolution entered in the State of Illinois must be initiated by the filing of a petition and notice.

Application of Conjugal Cohabitation Factors to Case: The appellate court in this case noted the six factors as recited in several cases including the 2006 *Susan* decision. It noted that there was no evidence as to any of these factors and consequently, no evidence that there ever was a *de facto* husband and wife relationship. The appellate court found no evidence of a resident, continuing conjugal relationship.

Timeliness of Wife's Petition for Additional Maintenance: The next question was the timeliness of the ex-wife's petition because the underlying MSA (incorporated into the divorce judgment) was one in which the ex-husband was ordered in March 2001 to maintenance of $275 per month 30 months (through to September 2003). In 2004, the ex-wife filed a petition alleging a complete failure to pay any of the maintenance payments and seeking payment of the previously required past maintenance and extended, increased and permanent maintenance. At hearing, the court found the arrearage and the ex-husband apparently made an oral motion to find that maintenance terminated by operation of law due to a conjugal relationship. The appellate court noted that therefore there was no petition to invoke the court's power to consider termination of maintenance on the basis of conjugal cohabitation.

As to the filing after the 30 month period, the critical language of the underlying MSA had stated, "The maintenance shall be reviewed at the end of this period, to determine whether it should continue and, if so, to what extent." Because of this language, the appellate court found that the

trial court had jurisdiction to consider the ex-wife's petition for permanent maintenance.

Susan (2006) -- Termination of Maintenance -- _De Facto_ Married Relationship Found to Constitute Resident, Continuing Conjugal Basis Despite Separate Finances and Property -- Distinction Between _De Facto_ Marriage and Need

IRMO Susan, 367 Ill. App. 3d 926 (Second Dist., 2006)
In 2000 dissolution of marriage proceedings the husband was required to pay monthly maintenance to his wife. The ex-husband petitioned to terminate maintenance in April 2005, alleging that his former wife was residing on a continuing conjugal basis with her boyfriend. The appellate court noted that there are six factors the court may consider when determining if a relationship is a *de facto* marriage: courts look to the totality of the circumstances and consider the following factors: "(1) the length of the relationship; (2) the amount of time the couple spends together; (3) the nature of activities engaged in; (4) the interrelation of their personal affairs; (5) whether they vacation together; and (6) whether they spend holidays together." *In re Marriage of Sunday*, 354 Ill. App. 3d 184, 189 (2004).

The testimony and evidence at trial showed that ex-wife and her boyfriend had been together for over three years at the time of the hearing, and the evidence demonstrated that they spent nearly every night together during their relationship. The evidence also showed that the two took many trips together and spent virtually all holidays together. However, the evidence indicated that ex-wife and her boyfriend did not commingle funds or provide each other with monetary support. They also completely maintained separate residences, bank accounts, and expenses.

What is surprising about this case is the complete lack of financial support by the boyfriend as well as maintaining two separate residences. The ex-wife maintained that "[m]aintenance is predicated upon a need for support by the spouse who is to receive maintenance" and, thus, "the most important question that arises in all termination of maintenance cases" is "whether the relationship has materially affected the recipient spouse's need for support." However, the appellate court rejected this argument and noted that, "The import of the fourth factor [the interrelation of their personal affairs] is not whether the new *de facto* spouse financially supports the recipient, but rather whether their personal affairs, including financial matters, are commingled as those of a married couple would typically be." The court in *Susan* states that commingling of funds is merely an indicator of a married relationship.

The court also notes a distinction between a proceeding under Section 510(a) and Section 510(c). A proceeding under (a) allows for modification *or* termination, while a proceeding under (c) only allows modification. Thus, need is a consideration under subpart (a) but not subpart (c):

> Further, though it is true that "[m]aintenance is predicated upon a need for support by the spouse who is to receive maintenance" (*Sappington*, 106 Ill. 2d at 467), section 510(c) makes no reference to any of the factors underlying an award of maintenance. Section 510(a), on the other hand, explicitly incorporates the factors to be considered in awarding maintenance. 750 ILCS 5/510(a--5) (West 2004) ("the court shall consider the applicable factors set forth in [section 504(a)]" of the Act, which lays out the factors to be considered in awarding maintenance). Thus, the rationale underlying an award of maintenance, including the recipient spouse's need for support, is expressly made relevant in a proceeding under section 510(a), but not in one under section 510(c).

Comment: My review of the original *Thornton* decision stated, "*Thornton* and *Susan* are difficult to reconcile with one another. The [original] *Thornton* focuses upon the financial aspect of the relationship with the case stating, "we also place great significance in this type of financial interrelation." *Susan* de-emphasized the financial relationship. While it states that the fourth factor does not focus simply on financial matters but on "whether their personal affairs, including financial matters, are commingled." As a practical matter, it is very difficult to give advice to an individual who is paying maintenance and it is believed that the former spouse is engaging in a resident, continuing, conjugal relationship. Keep in mind that this is one of the few areas where the case law supports what might be considered as "self-help", i.e., stopping making payments toward maintenance if it is believed that this will not suggest to maintenance receiving spouse that a petition to find that maintenance should have terminated. One issue in these self-help cases is proving when the relationship stopped. Potential advice is to have the client in situations such as this create a separate account with the funds for maintenance in it so that if the court finds that there is no conjugal cohabitation, that the maintenance paying former spouse is in a position to comply with the order. Keep in mind also that if the maintenance paying former spouse loses, then each missed payment is a judgment and entitled to 9% interest.

***Miller* – Cohabitation Not Shown Where Separate Residences, Separate Finances, etc**. *IRMO Miller*, 2015 IL App (2d) 140530

The former husband petitioned the trial court pursuant to section 510(c) of the IMDMA for the termination of maintenance payments to petitioner, Lorena K. Miller. In reaching its determination, the trial court considered Facebook pictures and posts written by the two of them but it did not consider posts written by third parties. The court stated that the posts were relevant to its consideration of how the former wife and her significant other presented their relationship to others. The court also allowed the former husband to submit several financial documents over Lorena's hearsay objection. The appellate court affirmed finding that it was not improper for the court to consider the Facebook posts. Likewise, her argument concerning the financial documents failed.

The critical portion of the appellate court's decision, however, stated:

> However, the trial court's overall finding that Lorena cohabited with Michael so as to have a de facto marriage, as opposed to an intimate dating relationship, was against the manifest weight of the evidence. The six-factor analysis that the trial court applied is insufficient to distinguish an intimate dating relationship from a de facto marriage if unaccompanied by an understanding that the facts falling into each category must achieve a gravitas akin to marital behavior. The common-law standard of a de facto marriage is codified more precisely as cohabitation (with its three elements being resident, continuing, and conjugal). Therefore, while mindful that each case will present unique circumstances, we note that here the absence of certain traditional components of a marital relationship, such as intended permanence and mutual commitment (speaking to the continuing and conjugal elements), a shared day-to-day existence (speaking to the conjugal and residential elements), and the shared use and maintenance of material resources (speaking to the residential element), created a significant hurdle for Jeffrey. The trial court did not adequately consider the gravity (or lack thereof) of facts that fell into each of the six categories, nor did it adequately consider the absence of certain traditional

> components of a marital relationship. Though we defer to the trial court's assessment of the underlying facts, those facts do not establish a de facto marriage as required to permanently terminate maintenance. We thus reverse and remand.

The appellate court in this case departed from the critical *Susan* analysis:

> We agree with the main holding in *Susan*, i.e., that a court should not consider the receiving spouse's financial need in determining whether she has entered into a de facto marriage, but, with regret, we must depart from *Susan*'s subtler points. That is, we must distance ourselves from *Susan* to the extent that it embraces the six-factor analysis as the preeminent test to determine a de facto marriage. As we have discussed (supra ¶¶ 45-47), the six-factor analysis is but a helpful tool, and a look at its history shows that its originators never intended for it to be the test for a de facto marriage. The six-factor analysis is insufficient to distinguish an intimate dating relationship from a de facto marriage if left unaccompanied by an understanding that the facts falling into each category must achieve a gravitas akin to marital behavior.

Applying the facts to the case the appellate court stated:

> [T]he evidence clearly shows companionship and exclusive intimacy. However, a deeper level of commitment, permanence, and financial or material partnership are absent from Lorena and Michael's relationship such that it cannot reasonably be elevated beyond an intimate dating relationship. It is not a de facto marriage. As to commitment and permanence, Lorena and Michael discussed marriage early in the relationship, and Lorena told Michael that it was not the sort of relationship that she was looking for. Granted, Lorena and Michael enjoyed a lengthy dating relationship (though still shorter than the 15-year friendship in *Bates*), but there is no evidence supporting a conclusion that there was ever an intention to make the arrangement permanent. Unlike in *Susan*, the parties did not spend nearly every night together or have virtually free access to one another's homes. Lorena and Michael posted publicly on Facebook that they were "in a relationship," they represented themselves as a couple to their friends, they hosted at least one Thanksgiving holiday, and they willingly shared a golf club membership rate under the club-imposed label "significant others." It would be unreasonable to rely upon the golf club label of "significant others" to establish a marriage-like relationship, because "significant others" was the only label under which they could receive the financially advantageous joint rate that they sought. In any case, these signs of commitment are of a level shared by couples in intimate dating relationships. While such signs of commitment are not inconsistent with a marriage-like relationship, they are insufficient, without more, to establish one.
>
> As to partnership, Lorena and Michael never commingled any significant finances or resources. Each paid for his or her own expenses when traveling or dining out. No evidence supported the idea that, should one party fall upon hard financial times, the other would step in to keep their respective lifestyles relatively even.

The appellate court then stated, "We acknowledge that a couple can cohabit even where each member of the couple maintains a separate household." But this was a critical part of the rationale for the appellate court:

> However, where the cohabitation must be "resident," these cases are the exception, and, in general, the absence of a shared residence and of shared housing resources, or, at least, of a shared day-to-day existence, is a significant hurdle for a petitioner to overcome. In *Susan* and *Herrin*, despite separate residences, the new couple spent nearly every day together, *not*, as here, just three days per week 70% of the time (for a yearly average of two out of seven days)[1]. *Susan*, 367 Ill. App. 3d at 930 (the couple spent nearly every night together despite maintaining separate residences); *Herrin,* 262 Ill. App. 3d at 577-78 (the new partner stayed at the former wife's residence until bedtime, when he returned to his own residence). [Emphasis supplied.]

An interesting aspect of the decision stated: "It is not surprising that two divorcees who were represented by counsel would be aware of a relatively common principle in divorce law. It would be more surprising if they were not."

The appellate court concluded:

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

Again, applying the facts to the law, the appellate court then wrapped up:

> Here, Lorena and Michael's lives were so neatly separate that, should either wish to end the relationship, all they would need to do is cancel the golf club membership and walk away. Lorena and Michael were not living as a husband and wife would live. They were not residing with one another, they maintained separate households, neither had keys to the other's house or car, neither kept goods at the other's home or did household chores (beyond occasional doggy duty), each paid for his or her own travel and entertainment, they kept separate finances, neither named the other as a beneficiary on any financial document or insurance policy, there is no evidence to suggest that they looked to one another for financial support, and there is no evidence to suggest that they intended to live life as partners.

Accordingly, what we see with the Second District's decision is a focus on the financial intertwining of the couple as a critical factor in the analysis but clearly not the *sine qua non*. In effect, this analysis of the rejection of a list of six factors and an emphasis on the totality of the circumstances represents a return to earlier case law that had focused on the financial support issue.

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[1]The ratio in this case the appellate court found was 2/7 which is 28.5% of the time spent together.

Snow (2001) – Conjugal Cohabitation Factors / Maintenance Termination Retroactive to Date Conjugal Relationship Began

IRMO Snow, 322 Ill.App. 3d 953 (3d Dist. 2001), holds that maintenance termination on account of recipient's cohabitation should be retroactive to the time the conjugal cohabitation began and not when the petition to terminate maintenance is filed.

In the 1998 divorce judgment William was ordered to pay maintenance. In May 1999 the ex-husband filed a petition to terminate maintenance. He alleged that Dawn had been engaged in a continuing conjugal relationship with Jaime between August 1997 and February 1999. The trial court found that a continuing conjugal relationship existed between Dawn and Jaime. Maintenance was terminated retroactive to the time William filed his petition. Dawn appealed the termination of maintenance and William cross-appealed urging that maintenance should have been terminated retroactive to the time the conjugal cohabitation began. The appellate court denied the wife's appeal, thus affirming the termination of maintenance, and ruled that the termination of maintenance should have been retroactive to the time the conjugal cohabitation began, and not when the petition to terminate maintenance was filed.

The testimony of Dawn and Jaime as to the nature of the relationship between them was somewhat at variance, but the trial court found Jaime's testimony more credible than Dawn's. Jaime testified that Dawn invited him to move into her home into her son's old room; Dawn told Jaime he did not need to initially pay rent, but that in March 1998 he would have to pay her $300 per month; they had an agreement to, and did, split the cost of utilities and groceries; Jaime maintained the lawn and the pool; in March 1998 Jaime began paying rent; Jaime and Dawn had sexual relations three to four times a week during the year-and-a-half they lived together and on one occasion he secretly videotaped them having sexual relations without Dawn's consent. In Dawn's testimony she denied that they had sexual relations except for one time when they had too much to drink; they exchanged Christmas and birthday presents; they socialized two or three times for dinner, a movie or drinks.

The *Snow* court summarized the Illinois law as to what qualifies under §510(c) of the IMDMA for being cohabitation "with another person on a resident, continuing conjugal basis."

To prove a continuing, conjugal relationship, an ex-spouse must show that the former spouse is involved in a de facto husband and wife relationship. *In re Marriage of Leming*, 227 Ill.App.3d 154 (1992) [GDR 94-77]. To determine if such a relationship exists, courts have examined the following factors:

(1) the length of the relationship;
(2) the amount of time the couple spends together;
(3) the nature of activities engaged in;
(4) the interrelation of their personal affairs;
(5) whether they vacation together; and
(6) whether they spend holidays together. *In re the Marriage of Herrin*, 262 Ill.App.3d 573 (1994). [GDR 94-77]

As to the time of termination of maintenance on account of a conjugal relationship, the *Snow* court (Third District) agreed with the case of *In re Marriage of Gray*, 314 Ill.App.3d 249 (2nd

Dist. 2000), which held that the triggering period for termination of maintenance is the time the conjugal cohabitation began and not when the petition to terminate maintenance is filed.

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