

No. 1-14-3876

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> MARRIAGE OF)	Appeal from the
DENNIS B. GEORGE,)	Circuit Court of
)	Cook County
Petitioner-Appellant,)	
)	
v.)	No. 02 D 011839
)	
LILA R. GEORGE,)	Honorable
)	Mark Lopez,
Respondent-Appellee.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's order denying petitioner's request to terminate maintenance is affirmed where his ex-wife was not engaged in a *de facto* marriage.

¶ 2 Dennis George appeals from the circuit court's order denying his petition to terminate maintenance to his ex-wife, Lila George. In denying the petition, the circuit court found that Lila was not engaged in a *de facto* marriage. On appeal, Dennis argues that the circuit court's finding is against the manifest weight of the evidence. We affirm.

¶ 3 BACKGROUND

¶ 4 Dennis George and Lila George were married for 36 years. On January 29, 2004, a

judgment for dissolution of marriage was entered. The judgment incorporated a marital settlement agreement which provided in pertinent part that:

"Dennis shall pay Lila the amount of \$17,500.00 per month as for [sic] permanent maintenance.

Dennis' obligation to make permanent maintenance payments shall commence as of February 1, 2004 and continue monthly thereafter until the occurrence of a modification event as provided in 750 ILCS 510(a) and/or the occurrence of a termination event as provided in 750 ILCS 510(c)."

¶ 5 On March 19, 2013, Dennis filed a petition to terminate maintenance, alleging that Lila was cohabitating on a resident continuing conjugal basis with her boyfriend, Fred Chaimson. Lila responded to Dennis's petition, denying that she engaged in any conduct that would result in the termination of maintenance. The circuit court then held an evidentiary hearing on the matter.

¶ 6 Lila was the first witness called in Dennis's case-in-chief. Lila testified that she met Fred in sixth grade. She reconnected with Fred in early 2004 after finding his profile on an online Jewish dating service, called "J-Date." Lila characterized Fred as a very good friend who she cares deeply about. She may have described him as her soul mate at one point.

¶ 7 Lila testified that Fred sleeps over at her home most Saturday nights, and the two share a bed. No other men or women sleep overnight or share her bed. The two have a sexual relationship. Lila testified that she and Fred eat dinner alone approximately five times a month. Other times Lila dines out with groups of friends, which may include Fred.

¶ 8 Lila resides in a three bedroom condominium that she purchased ten years ago. Fred moved into a condominium in the same complex in 2009 or 2010. Lila's residence is on the first

floor of her building. Fred's is on the third floor of his building, five buildings away. There is an underground garage, and it is possible to walk from the entrance of Lila's building to the elevator that permits access to Fred's building. They each have keys to the other's residence. Sometimes, Fred takes Lila's garbage to the dumpster when exiting her apartment.

¶ 9 Lila testified that she and Fred often vacation together. Fred has accompanied her to New Orleans to visit family and for various family celebrations. The two often travel in tour groups or with friends. On these trips, they typically share a room and bed together. On at least one trip they had sexual relations. Lila also travels separately without Fred.

¶ 10 Lila testified that she and Fred have spent holidays and special occasions together. Lila has celebrated Fred's birthday with him virtually every year for the last nine or ten years, taking him out to dinner. Lila has celebrated some of her birthdays with Fred. She has also spent at least one Father's Day with Fred and his children. Lila also attended Fred's son's wedding, where he walked her down the aisle and sat with her at dinner.

¶ 11 Lila also testified that the two have exchanged gifts. Fred gave her a ring with three diamonds as a birthday present. Fred gave her a diamond necklace, which contained a diamond that belonged to his mother. Fred also bought her earrings on one of their vacations. Lila bought a bracelet and a friendship ring for Fred. She possibly bought him a few pairs of shirts and pants.

¶ 12 Next, Dennis called Fred as a witness. Fred testified that he started corresponding with Lila on J-Date in 2004 or 2005. Fred is still listed on online dating services; however, he testified that he does not know how to remove his profile from the websites. Fred described Lila as his friend, date, and significant other. He acknowledged that their relationship is exclusive, intimate, and romantic.

¶ 13 Fred testified that that he started dating Lila after her divorce. He was "heavily dating" Lila for three or four years before he moved into the Coromandel Complex. Fred testified that he did not move in with Lila because he enjoys having his own time and watching sports, and he didn't want to enter into a situation where he had to depend on someone else. According to Fred, their garage doors are about 125 yards apart.

¶ 14 He and Lila began dating exclusively sometime in 2005; however, they have never had a conversation in which they agreed not to sleep with other people. Since moving to the condominium complex, Fred sees Lila most days. Approximately two years ago, Fred started regularly sleeping at Lila's residence on Friday and Saturday nights. On those occasions, he brings his sleep apnea mask and a change of clothes. Fred also testified that he and Lila regularly go out with friends. Friends of Lila's have become friends of Fred's and vice-versa. The two also go out with Fred's sister and her husband. Fred explained that when they travel together they share a room and bed.

¶ 15 In addition to the holidays Lila described, Fred testified that he has spent six or seven Thanksgivings with Lila. Fred has celebrated two or three Hanukkahs and Passovers with Lila and her children. The two have also celebrated New Year's Eve together for the past eight years.

¶ 16 Dennis's next witness was Robert Kiehn, a private investigator. Kiehn's employees had conducted surveillance of Lila. The court sustained objections to all questions directed to Kiehn concerning what his employees observed on hearsay grounds. The court granted Dennis leave to amend the witness list to name three of Kiehn's employees and allowed Lila the opportunity to depose the additional witnesses. When the trial resumed, Dennis withdrew the additional witnesses and the testimony of Kiehn was stricken by agreement of the parties.

¶ 17 Dennis testified that he met Fred for the first time at the hospital after the birth of his grandchild, about five years ago. Fred and Lila were in the waiting room when he arrived at the hospital. Fred came up to him and introduced himself as a friend of Lila's. After Dennis testified, he rested his case, and Lila made a motion for a directed finding, which was denied.

¶ 18 Lila's first witness was Fred who testified that his and Lila's finances and assets are not intermingled. He is the sole owner of his residence and pays all the associated expenses himself. Fred and Lila do not share any of the following: bank accounts, credit cards, power of attorney, burial plots, assets, or personal property. Lila does not have signatory power over any of Fred's accounts. Lila is not the beneficiary of any of his annuities, nor is Lila included in his will.

¶ 19 In addition, Fred does not pay any of Lila's expenses. When they go on vacation, each pays their own way. When they go out to dinner they split the cost or alternate paying. Fred never contributed toward the care of Lila's parents. He has never loaned Lila money, nor vice-versa.

¶ 20 Further, Fred keeps no clothing at Lila's residence. His residence is completely furnished with a bedroom and an office. He has his own computer and has never used Lila's, nor does he take business calls at her residence. Fred testified that he sleeps alone in his residence five nights a week. He goes to the doctor by himself, purchases clothes by himself, and purchased a car that Lila did not help him pick out. He has never co-hosted a party with Lila. Also, Fred engages in social activities without Lila, namely "business and guy things." He also typically sees his children, without Lila, once a week.

¶ 21 Fred has never asked Lila to marry him. When asked why he does not reside in the same residence as Lila, Fred described it as a "lifestyle choice." He stated that he enjoys his

independence, and wants to be able to do what he wants to do. If he wants to go out and play golf he does not want to have to answer to a wife. He does not want to have to explain to a wife why he is giving money to his grandchildren. In addition, Fred is thinking of retiring but has yet to discuss his plans with Lila.

¶ 22 Lila's testimony corroborated Fred's as to a lack of shared finances or assets. Lila is the sole owner of her residence and pays all the associated expenses herself. She and Fred share no bank accounts, credit cards, power of attorney, assets, or personal property. Fred is not the beneficiary of her life insurance, nor is he included in her will. Fred does not pay any of her expenses, nor does she pay any of his. Lila has never loaned Fred money, or vice-versa. She goes to the doctor by herself, purchases clothes by herself, and purchased a car that Fred did not help her pick out. Lila has her own computer, which Fred does not use. She has never spent the night at Fred's residence. And she has her own burial plot.

¶ 23 Lila considers Fred a "longtime, very important friend whom she has known through junior high, high school, and reunions, who has always been kind and fair." She has known Fred for 60-62 years and they socialize with their friends in the community. When asked if she wanted to live with Fred, Lila answered no. She explained, "I'm an A-type person, and he's a double-E-type person." Lila also testified that she does not "exclusively go out with anybody," although she does not date anyone other than Fred. She testified that Fred has never proposed marriage to her and she has no plans to marry. The last time she had sexual relations with anyone other than Fred, was when she was married.

¶ 24 On December 1, 2014, the trial court issued a written order denying Dennis's petition to terminate maintenance. The trial court found Lila and Fred's testimony to be credible. The court

further found that George established that Lila and Fred had an exclusive dating relationship; however, George failed to meet his burden in establishing that the parties are cohabitating or that Lila and Fred are in a *de facto* marriage. The court indicated that it drew an inference that Dennis failed to call Kiehn's employees because their testimony would be adverse to his interests. Further, the court found that a reasonably prudent person would have produced the witnesses, if Dennis believed their testimony would be favorable to him, and that Dennis offered no reasonable excuse or explanation for his failure to call the subordinates to testify. Dennis timely filed this appeal.

¶ 25 ANALYSIS

¶ 26 On appeal, Dennis contends the trial court's finding that Lila and Fred are not engaged in a *de facto* marriage is against the manifest weight of the evidence. Dennis also contends the trial court abused its discretion by drawing an inference that he failed to call certain witnesses because their testimony would be adverse to him.

¶ 27 Dennis first argues the trial court's finding that Lila and Fred are not engaged in a *de facto* marriage is against the manifest weight of the evidence.

¶ 28 Section 510(c) of the Illinois Marriage and Dissolution of Marriage Act provides, in pertinent part, that "the obligation to pay future maintenance is terminated *** if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis." 750 ILCS 5/510(c) (West 2012). The purpose of section 510(c) is not to control public morals. *In re Marriage of Sappington*, 106 Ill. 2d 456, 467 (1985). Rather, "[t]he rationale behind termination of maintenance when resident, continuing, conjugal cohabitation exists is [to prevent] the inequity created when the ex-spouse receiving maintenance becomes involved in a

husband-and-wife relationship but does not legally formalize it, with the result that he or she can continue to receive maintenance." *In re Marriage of Herrin*, 262 Ill. App. 3d 573, 577 (1994).

The party seeking termination of maintenance bears the burden of establishing that the former spouse is involved in a *de facto* husband-and-wife relationship with a third party. *In re Marriage of Susan*, 367 Ill. App. 3d 926, 929 (2006).

¶ 29 To determine whether a *de facto* marriage exists, courts typically 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. See *Herrin*, 262 Ill. App. 3d at 577. However, the six factors are not a checklist, nor do they encompass all the factors that a court may consider in determining whether a *de facto* marriage exists. See *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 50 ("the six-factor analysis is merely a nonexhaustive list of factors that may be considered."). However, "[t]he test the court should employ *** is the totality of the circumstances." *Herrin*, 262 Ill. App. 3d at 577.

¶ 30 We will not disturb a trial court's finding of a *de facto* husband-and-wife relationship unless that finding is contrary to the manifest weight of the evidence. *Susan*, 367 Ill. App. 3d at 929-30. A trial court's decision is against the manifest weight of the evidence if the opposite conclusion is clearly evident or if the decision is unreasonable, arbitrary, or not based on the evidence. *In re Marriage of Nord*, 402 Ill. App. 3d 288, 294 (2010). Each *de facto* marriage case rests on its own facts, as "[n]o two cases in this area will be alike because no two personal relationships are alike." *Sappington*, 106 Ill. 2d at 466.

¶ 31 In this case, the trial court found that Dennis had established that Lila had an exclusive

dating relationship; however, the court found that Dennis failed to meet his burden in establishing that the parties were engaged in a *de facto* marriage. Despite Dennis's insistence, the trial court did not rely solely, or even primarily, on a lack of financial intermingling among the parties. The court's decision also gave considerable weight to the fact that the parties maintain "completely separate residences."

¶ 32 We agree with the trial court that Lila and Fred's relationship lacks a deeper level of commitment and permanence necessary to transform an exclusive dating relationship into a *de facto* marriage. See *In re Marriage of Miller*, 2015 IL App (2d) 140530. *Miller* dealt with a similar scenario: a six-plus-year relationship, where the couple in question did not commingle finances, and while maintaining separate residences during the week, slept together during the weekend. *Id.* at ¶¶ 12, 16. In addition, the couple vacationed together, spent holidays together, socialized together, held themselves out as a couple, and for some time had a sexual relationship. *Id.* at ¶¶ 13-17. The *Miller* court addressed the difficulty of distinguishing between an intimate dating relationship and a *de facto* marriage in circumstances such as these. The court explained that the six *Herrin* factors are insufficient to encapsulate the totality of the circumstances in all cases, stating:

"The six factors focus greatly on the emotional and social components of a relationship as opposed to practical and financial aspects that life partners share. In point of fact, only factor four, the "interrelation of personal affairs," arguably encompasses the more practical components of a marriage-like relationship. And, even though the six factors focus on the emotional components of a potential *de facto* marriage, we believe that the factors miss a

key emotional factor that is likely present in any *de facto marriage*: intended permanence and/or mutual commitment to the relationship." *Id.* at ¶ 48.

The court further stated that:

"where cohabitation must be "resident," [cases where each member of the couple maintains a separate household] 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." *Id.* at ¶ 64.

¶ 33 The *Miller* court found that the couple shared no more than an intimate dating relationship. *Id.* at ¶ 51. As to commitment and permanence, the court noted a lack of evidence supporting a conclusion that there was ever an intention to make the arrangement permanent. *Id.* at ¶ 62. In fact, the recipient spouse had told the paramour early in the relationship that marriage was not the type of relationship she was looking for. *Id.* As to partnership, the court focused on financial factors. *Id.* at ¶ 63. There was no evidence to support the idea that, should one partner fall upon hard financial times, the other would step in to maintain their respective lifestyles. *Id.* According to the court, "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 [their shared golf membership] and walk away." *Id.* at ¶ 69.

¶ 34 Like *Miller*, in addition to a lack of shared finances and a lack of a shared residence, the evidence relating to Lila and Fred's relationship does not demonstrate a deeper level of commitment, partnership, and intended permanence that would justify a finding of *de facto* marriage. Fred testified that he has never asked Lila to marry him. When asked why he does not

reside in the same residence as Lila, Fred described it as a "lifestyle choice." He stated that he enjoys his independence, and wants to be able to do what he wants to do. He does not want to answer to a wife if he wants to play golf, watch sports, or give money to his grandchildren. The two have never had a conversation in which they agreed not to sleep with anyone else. Further, Fred is thinking of retiring but has yet to discuss his plans with Lila. Lila described Fred as "a longtime, very important friend to me who I've known since junior high, high schools, and reunions." When asked if she wanted to live with Fred, Lila answered no." Lila also testified that she does not "exclusively go out with anybody," although she does not date anyone other than Fred. She testified that Fred has never proposed marriage to her and she has no plans to marry.

¶ 35 According to their testimony, Lila and Fred do not live together as a married couple because neither of them desires that level of commitment. Each enjoys their independence. Their lives are so neatly separate that, should either wish to end the relationship, all they would need to do is exchange their spare-keys to each other's condominiums.¹ The trial court found both Lila and Fred's testimony to be credible, which included testimony that neither wants to live with the other. As a general rule, we will not disturb a trial court's credibility determinations. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002).

¶ 36 George argues that the trial court misapplied the law because neither a shared residence, nor shared finances are necessary to establish a *de facto* marriage, citing, *inter alia*, *Herrin* and *Susan*. We agree that neither of these factors alone is controlling. See *Herrin*, 262 Ill. App. 3d at 578 ("[w]hile the trial court can consider the financial interaction between the interested parties,

¹ The trial court found no evidence in the record that either person actually used the keys to gain access to the other's property.

that factor is not controlling"); see also *Susan*, 367 Ill. App. 3d at 931 (stating that no one factor is individually controlling). However, the cases relied upon by Dennis to support his argument did not involve both lack of a shared residence and lack of shared finances, as is the case here. Furthermore, none of the other cases that George cites convinces us that the trial court misapplied the law. See *In re Marriage of Sunday*, 354 Ill. App. 3d 184 (2004); *Snow v. Snow*, 322 Ill. App. 3d 953 (2001); *In re Marriage of Stanley*, 133 Ill. App. 3d 963 (1985).

¶ 37 Accordingly, we affirm the trial court's finding that the evidence established Lila's relationship with Fred lacks a deeper level of commitment and intended permanence, in addition to a lack of a shared residence and shared finances, that is more akin to a dating relationship than it is to a *de facto* marriage and therefore, its finding is not against the manifest weight of the evidence. See *In re Marriage of Bates*, 212 Ill. 2d 489, 524 (2004) (affirming a finding of no *de facto* marriage because the couple "enjoyed a dating relationship not akin to marriage.").²

¶ 38 Lastly, Dennis contends the trial court abused its discretion by drawing an adverse inference because he failed to call Kiehn's employees.

¶ 39 Dennis asserts that after Kiehn testified, Dennis sought to amend his witness list to add three of Kiehn's subordinates. The court ordered Kiehn's employees to present themselves for deposition to Lila's lawyer, prior to recommencing the trial. When the trial resumed, Dennis decided not to call the three subordinates and the parties agreed to strike Kiehn's testimony. In the trial court's written order denying Dennis' petition, the trial court recited these events and explained that "Dennis provided no explanation for his decision not to call the additional

² In *Bates*, our Supreme Court affirmed a finding of no *de facto* marriage despite the recipient-spouse's admittance that the couple plans on getting married someday. *Bates*, 212 Ill. 2d at 505.

witnesses." "[T]he witnesses in question were under the control of Dennis and could have been produced *** [and] were not equally available to Lila as they were hired by Dennis and under his control, that a reasonably prudent person, under the same or similar circumstances, would have produced the witnesses, if Dennis believed their testimony would be favorable to him."

¶ 40 Dennis contends that this inference was an abuse of discretion. He asserts that he did not call the subordinates because their testimony would have been cumulative and that the trial court was so informed when the trial resumed. He also argues that Lila could have called Kiehn and his employees to testify, but chose not to, and in fact agreed to strike Kiehn's testimony.

¶ 41 We agree with Dennis that the trial court erred in drawing an inference adverse to Dennis because he decided not to call Kiehn's subordinates as witnesses at trial. Dennis' stated reason not to call Kiehn or Kiehn's subordinates was provided to the trial court: their evidence would be cumulative. Lila agreed and made nothing further of the Dennis' decision to drop the issue. Further, Lila was provided access to depose the witnesses before the trial recommenced, Lila agreed to strike Kiehn's testimony and there does not appear to be any question of Lila's ability to produce these witnesses had she decided to do so.

¶ 42 However, we find any error in drawing the adverse inference to be harmless. See *Johnson v. Owens-Corning Fiberglass Corp.*, 233 Ill. App. 3d 425, 437 (1992). Although the inference should not have been taken, doing so was harmless error because the credible evidence established that Lila was not in a *de facto* marriage and Dennis has not provided a plausible argument that the inference drawn by the trial court defeats the sufficiency of this evidence. See *Id.*

¶ 43 CONCLUSION

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¶ 44 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 45 Affirmed.