

NOTICE

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2016 IL App (5th) 150233-U

NO. 5-15-0233

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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<i>In re</i> MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
KATHY E. PHILLIPS,	)	St. Clair County.
	)	
Plaintiff-Appellee,	)	
	)	
and	)	No. 07-D-562
	)	
WILLIAM H. PHILLIPS,	)	Honorable
	)	Julie K. Katz,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE CHAPMAN delivered the judgment of the court.  
Justices Stewart and Moore concurred in the judgment.

**ORDER**

¶ 1 *Held:* Former husband who filed a petition to terminate maintenance failed to prove that his former wife was cohabiting with a new partner where the evidence showed that they spent significant amounts of time together and shared travel expenses, but they maintained separate residences, did not commingle assets or accounts, and did not otherwise share expenses.

¶ 2 The respondent, William H. Phillips (Bill), appeals an order of the trial court denying his petition to terminate maintenance. He alleged that the petitioner, Kathy E. Phillips, was cohabiting with a new romantic partner. The trial court found that he failed

to meet his burden of proving this allegation. On appeal, Bill argues that this finding was contrary to the manifest weight of the evidence. We affirm.

¶ 3 Bill and Kathy's marriage was dissolved in December 2008 after 40 years of marriage. At that time, their two children were grown; however, they were guardians of their grandson, Kobi. According to Kathy, Kobi returned to live with his mother after the parties separated. At the time of the parties' dissolution, Kathy's retirement income was \$4,390 per month. Bill's income (which included his pension and income from a consulting business) was approximately \$23,870 per month. In the original dissolution order, Bill was ordered to pay Kathy \$1,400 per month from his pension fund, but was not ordered to pay any additional maintenance. Kathy appealed. Due to the significant disparity in the parties' incomes, this court amended the dissolution order to include an additional award of permanent maintenance in the amount of \$2,600 per month. See *In re Marriage of Phillips*, No. 5-09-0025 (May 26, 2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 4 On May 30, 2014, Bill filed a petition to terminate maintenance pursuant to section 510(c) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/510(c) (West 2014)). That statute provides that the obligation to pay maintenance terminates when the party receiving maintenance remarries or "cohabits with another person on a resident, continuing conjugal basis." 750 ILCS 5/510(c) (West 2014). Bill alleged that Kathy was cohabiting with a new partner, Don Naumann. Alternatively, Bill asked the court to modify maintenance, arguing that a substantial change of circumstances had occurred which would justify a reduction in maintenance.

After the parties conducted extensive discovery and engaged in various discovery disputes, Bill withdrew his alternative request to modify maintenance. The sole issue in this appeal is whether Bill proved that Kathy was cohabiting with Don.

¶ 5 The court held hearings on March 27 and April 29, 2015. The only witnesses to testify were Kathy and Bill. Kathy testified that she first met Don Naumann seven years earlier at a golf tournament. She testified that she occasionally played golf with him, but she stated that she most often played golf with female friends. Kathy further testified that she initially had a dating relationship with Don. She testified, however, that their romantic relationship was short-lived. She characterized their subsequent relationship as that of "good friends."

¶ 6 After the divorce, Kathy remained in the marital home in Belleville until it was sold in May 2010. At that time, she began renting a house in Waterloo, Illinois. Waterloo is a 20-minute drive from Belleville. Kathy testified that one reason she chose to move to Waterloo was to be further away from Bill. She noted that Don helped her find a house to rent in Waterloo because "he knew people [she] could contact" to find a rental house. Kathy testified that she continued to see her adult children and her grandchildren regularly after she moved to Waterloo. She further testified that Don also spent time with her family.

¶ 7 In 2010, Kathy began spending winters in Ruskin, Florida. She purchased a trailer in Ruskin, which is located two doors down from the trailer owned by Don. She further testified that her sister and Don's cousin own trailers in the same complex. Kathy testified that each winter she and Don drive to and from Florida together in Kathy's van.

She further testified that they shared use of the van in Florida, and she allowed Don to store his vehicle in the garage of her house in Waterloo during the first two or three years that they spent the winter in Florida. After that, she explained, Don put his vehicle in storage.

¶ 8 Kathy testified that she and Don always maintained separate residences, both in Florida and in Illinois. She testified that Don occasionally spent the night at her house while they were dating, but that once the dating relationship ended, he never spent the night. She testified, however, that Don often ate meals with her at her home and occasionally walked her two dogs. She further testified that she paid all her own bills, and that she and Don did not have any joint bank accounts.

¶ 9 Kathy was asked about her use of a credit card issued to Don. The bills for that card are sent to Kathy's address, and Kathy is authorized to use the card. Kathy explained that although the card was issued in Don's name, it is used exclusively by Kathy, and she pays all of the bills for the card. She testified that Don applied for the card for her to use because she wanted to purchase a new sewing machine and was unable to obtain credit in her own name "because of the divorce and the financial situation." Kathy was also asked about a \$500 check she wrote to Don in September 2013. She testified that she could not recall what the check was for, but stated that she assumed it was to repay him for money she owed him.

¶ 10 Kathy acknowledged that she allowed Don to receive mail at her house. She explained that he used her address as a mailing address because he rented out his apartment when he went to Florida each winter and needed a "stable address" from which

his mail could be forwarded. (We note that Bill submitted an exhibit showing that Don rented an apartment in Waterloo for a six-month period from April 2014 to October 2014. Kathy testified that she and Don wintered in Florida from October to April each year. She also testified that Don moved all of his possessions out of his apartment when he went to Florida for the winter. It is not clear whether Don entered into similar short-term leases in Illinois during the previous years as well.)

¶ 11 Finally, Kathy testified that in the spring of 2015, she returned from Florida before Don returned. (We note that the first hearing in this matter took place in March 2015, which is during the time frame both Don and Kathy normally spend in Florida.) She further testified that in April 2015, a few days before the second hearing date in this matter, she moved from her rental home in Waterloo back to Belleville.

¶ 12 Bill testified that on several occasions, he drove past Kathy's house and saw Don's vehicle parked in the driveway. He stated that this occurred both during the summer of 2009, while Kathy was living in the marital home, and later when she was renting a house in Waterloo. On one occasion, he took a photograph of Don's vehicle at Kathy's Waterloo house, which was entered into evidence. Bill testified that he drove past Kathy's house in Waterloo when he went to a golf course near Waterloo. He admitted that he had to drive out of his way in order to drive past her house. He testified that he saw Don's car almost every time he drove past Kathy's house. He acknowledged that this occurred once a month or less, and only during the summer months when he was playing golf.

¶ 13 Bill further testified that he saw Don with Kathy at various events involving their grandchildren—Kobi's tennis matches, Kobi's eighth grade graduation, and the high school graduation of their older grandson, Sage. Asked if Don and Kathy were affectionate at these events, Bill stated that Don appeared to be very "attentive" to Kathy. He also believed that they were holding hands at one of Kobi's tennis matches, but he admitted that he was not close enough to be certain. Bill acknowledged that he had seen Don's vehicle parked in Kathy's driveway "long before" he decided to file a petition to terminate maintenance.

¶ 14 On May 15, 2015, the court entered a detailed written order denying Bill's petition to terminate maintenance. The court first noted that this court has construed the statutory phrase "cohabits with another person on a resident, continuing conjugal basis" to mean that the former spouse receiving maintenance has entered into a *de facto* husband-and-wife relationship with a new partner. See *In re Marriage of Reeder*, 145 Ill. App. 3d 1013, 1016 (1986). The court emphasized that evidence of any "lesser involvement" is not sufficient to meet this standard. See *In re Marriage of Bramson*, 83 Ill. App. 3d 657, 663 (1980); *In re Marriage of Reeder*, 145 Ill. App. 3d at 1016. The court then considered whether the evidence presented by Bill in this case met this standard.

¶ 15 The court acknowledged the substantial evidence that Kathy and Don spent a great deal of time together—including taking vacations and attending family events together. The court found, however, that there was "no clear evidence" that Don and Kathy ever resided together. The court explained that the evidence in support of Bill's allegation that they shared a residence consisted of (1) exhibits showing that Don used Kathy's address

as a mailing address on his voter registration applications and on his driver's license, and (2) evidence that Bill saw Don's vehicle in the driveway when he drove past Kathy's home in Waterloo on his way to play golf. The court found that Kathy's explanation for Don's use of her address was reasonable. The court further found that the evidence regarding the presence of Don's vehicle in Kathy's driveway was insufficient to establish that he resided there with her. The court noted that Bill testified that he drove past Kathy's house infrequently, and he presented no evidence to refute Kathy's testimony that Don did not spend the night at her house at any time in the past several years. The court further noted that Don did not testify, no friends or family members testified, and Bill did not present evidence from a private investigator detailing how many times Don's vehicle was parked at Kathy's home overnight. The court pointed out that all of these were "common methods" of proving cohabitation. The court concluded that Bill failed to prove that Kathy and Don "had anything more than a dating relationship."

¶ 16 The court went on to state that even if it were to find that Kathy and Don resided together, this would not be enough to support a finding that they were in a *de facto* husband-and-wife relationship. The court found that the evidence in this case showed that Kathy and Don "did not share finances." The court explained that "the only evidence of any alleged financial involvement" consisted of three exhibits. The first contained credit card statements reflecting the fact that Kathy used a credit card issued in Don's name. The court emphasized, however, that the card was used exclusively by Kathy, who paid the balance on the card. The second exhibit was a copy of a canceled check showing that Kathy paid Don \$500. The third exhibit was a set of credit card statements showing

that Kathy made two large purchases of groceries in July 2011 and October 2012. Bill's attorney argued that the inference to be drawn from these two purchases was that Kathy bought groceries for Don. The court emphasized that there was no other evidence of shared finances between Kathy and Don in spite of the fact that the parties produced numerous financial documents during discovery. The court concluded that Kathy and Don "maintained separate financial lives."

¶ 17 In light of these findings, the court concluded that Bill failed to prove that a *de facto* husband-and-wife relationship existed between Don and Kathy. It therefore determined that termination of maintenance was not warranted. The court denied Bill's petition. This appeal followed.

¶ 18 The Dissolution Act provides that, unless otherwise agreed, maintenance terminates when the party receiving it either remarries or "cohabits with another person on a resident, continuing conjugal basis." 750 ILCS 5/510(c) (West 2014). The rationale behind this provision is to eliminate "the inequity created when the ex-spouse receiving maintenance becomes involved in a husband-and-wife relationship but does not legally formalize it." *In re Marriage of Herrin*, 262 Ill. App. 3d 573, 577 (1994). Thus, maintenance will be terminated on the basis of cohabitation only if the evidence shows that a *de facto* husband-and-wife relationship exists. *Id.* at 576.

¶ 19 The party seeking to terminate maintenance has the burden of proving the existence of such a relationship. *In re Marriage of Bates*, 212 Ill. 2d 489, 524 (2004). To meet this burden, the party must prove the existence of something more than an intimate dating relationship. See *id.* (noting that the trial court in that case could rationally find



the existence of "a dating relationship not akin to marriage"); *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 52 (stating that an intimate dating relationship "is not a *de facto* marriage"); *In re Marriage of Nolen*, 200 Ill. App. 3d 1072, 1075 (1990) (emphasizing that "[a] 'lesser involvement' \*\*\* does not require termination of maintenance" (quoting *In re Marriage of Bramson*, 83 Ill. App. 3d at 662)). This is because the provision for the termination of maintenance upon cohabitation is not based on an attempt to regulate morals. Rather, it is based on the premise that a former spouse who enters into a *de facto* marriage should be treated the same as a former spouse who enters into a *de jure* marriage. *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 40.

¶ 20 Determining whether a husband-and-wife relationship exists requires courts to consider the totality of the circumstances. *Id.*; *In re Marriage of Herrin*, 262 Ill. App. 3d at 578. Each case will be based on its own unique set of facts because every relationship is different. *In re Marriage of Bates*, 212 Ill. 2d at 524; *In re Marriage of Sappington*, 106 Ill. 2d 456, 466 (1985).

¶ 21 Our supreme court has not adopted a specific test employing an enumerated set of factors. See *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 47. However, Illinois courts have discussed the types of factual circumstances that are relevant to the determination. In the *In re Marriage of Sappington* case, the supreme court considered whether the former spouse and her new partner went out together socially, whether they traveled together, and whether their relationship was sexual or affectionate to be relevant inquiries. *In re Marriage of Sappington*, 106 Ill. 2d at 466. The court also noted that, because an award of maintenance "is predicated upon a need for support" (*id.* at 467), the

extent to which the need for support is materially affected by the new relationship is likewise a relevant consideration (*id.* at 467-68 (quoting *In re Marriage of Bramson*, 83 Ill. App. 3d at 663)). The court further noted that when the party receiving maintenance and the new partner live in the same residence, another relevant consideration is whether one party makes regular payments to the other as rent. *Id.* at 466.

¶ 22 In *In re Marriage of Herrin*, the Fourth District stated that the trial court in that case "appropriately considered various factors," including (1) the length of the relationship; (2) the amount of time the parties spent together; (3) the nature of their activities together; (4) "the interrelation of their personal affairs"; (5) whether the parties take vacations together; and (6) whether they spend holidays together. *In re Marriage of Herrin*, 262 Ill. App. 3d at 577. The *Herrin* court also noted that the financial interactions between the former spouse and the new partner may be a relevant consideration. The court emphasized, however, that if the trial court finds that the recipient spouse has entered into a *de facto* husband-and-wife relationship, a demonstrated need for continued support will not defeat a petition to terminate maintenance. *In re Marriage of Herrin*, 262 Ill. App. 3d at 578.

¶ 23 The "ultimate question" is whether the party receiving maintenance "has entered into a *de facto* marriage." *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 50. In answering this question, courts "should look for signs of mutual commitment and permanence." *Id.* However, courts must also look beyond the "emotional and social components of a relationship" and consider "whether the new relationship functions practically and economically in a marriage-like way." *Id.*

¶ 24 The existence of a *de facto* husband-and-wife relationship is a question of fact. Thus, a trial court's finding on that question will not be reversed unless it is contrary to the manifest weight of the evidence. *In re Marriage of Reeder*, 145 Ill. App. 3d at 1018. We will not reverse the court's ruling merely because a different conclusion is possible, and we will not substitute our judgment for that of the trial court as trier of fact. *Id.* at 1021. Instead, we will find the court's decision to be contrary to the manifest weight of the evidence only where "the opposite conclusion is clearly evident" or the decision is "unreasonable, arbitrary, or not based on the evidence." *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 40.

¶ 25 Applying these principles to the instant case, we believe the record supports the trial court's conclusion that Bill failed to meet his burden of proving that Kathy was involved in a *de facto* marriage with Don. On appeal, Bill devotes a significant portion of his brief to highlighting ways in which he contends Kathy's life and her relationships with members of her family changed after she became involved with Don. We need not address these arguments. Although Kathy has asserted that she dated Don briefly and that their relationship subsequently was that of "good friends," the court appeared to believe that she was involved in a romantic relationship with him. As we noted previously, the trial court found that Bill failed to prove that they "had *anything more than a dating relationship*." (Emphasis added.) As we have explained at length, however, the mere existence of a romantic relationship does not warrant the termination of maintenance. See *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 52; *In re Marriage of Bramson*, 83 Ill. App. 3d at 662. Here, the court found that Bill failed to

prove that Kathy and Don shared a residence or commingled their finances, and we believe that these findings are supported by the record.

¶ 26 The evidence that Don and Kathy owned separate trailers in Ruskin, Florida, where they spent half the year, was undisputed. In addition, Kathy testified that they always maintained separate residences in Illinois as well. In answers to interrogatories, Kathy specifically denied that Don performed household chores or contributed to household expenses at her house in Waterloo. She also stated that he never spent the night or took showers there. This evidence was not contradicted.

¶ 27 Bill, however, points to other evidence which, he contends, raises an inference that Don was residing with Kathy in Illinois. Kathy admitted in answers to interrogatories that Don did most or all of his laundry at her house and ate approximately 50% of his meals there. She also admitted, both in her responses to interrogatories and in her testimony, that Don received most of his mail at her house with her permission. Bill also presented documents showing that Don used Kathy's address in his voter registration application and on his driver's license. In addition, Bill points to the evidence that Don leased an apartment in Waterloo for six months from April to October of 2014. He complains that this apartment was the only address for Don provided to him by Kathy during discovery.

¶ 28 We are not persuaded that this evidence renders the court's findings against the manifest weight of the evidence. We first note that the trial court explicitly found Kathy's explanation for why she allowed Don to receive mail at her address to be reasonable. This is a credibility determination. Ordinarily, we will not overturn a trial

court's credibility determination because the trial court is in a better position to make that determination than is this court. See *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 41; *In re Marriage of Reeder*, 145 Ill. App. 3d at 1021. We further note that although Bill complains that Kathy did not supply him with any addresses for Don other than the apartment he rented from April to October of 2014, he never requested this information. The relevant interrogatory asked, "State your understanding of the residential address of Donald Naumann." The question clearly called for Kathy to provide what was then Don's *current* address.

¶ 29 Moreover, we simply do not believe this evidence is sufficient to prove that Kathy and Don shared a residence. We reiterate that it was Bill who had the burden of proof. *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 40. We also reiterate that we may not reverse the trial court's determination merely because it might be possible to draw different inferences from the evidence or reach a different conclusion from the one reached by the trial court. *In re Marriage of Reeder*, 145 Ill. App. 3d at 1021.

¶ 30 Bill, however, points to Don's voter registration applications and driver's license. Bill argues that these constitute "sworn statements" that Don physically resided with Kathy. He argues that the court therefore should have presumed that Don resided in Kathy's home and would have admitted as such if called to testify. We are not persuaded. Assuming Don's use of a mailing address that was not his physical residence when registering to vote and renewing his driver's license was improper, the evidence otherwise showed that Don and Kathy maintained separate households. We find that the evidence supports the court's finding that Don and Kathy did not share a household.

¶ 31 We also agree with the trial court that Bill did not demonstrate that Don and Kathy share finances. Bill emphasizes the evidence that Kathy was authorized to use a credit card issued to Don and her admission that they shared travel expenses to and from Florida and shared use of Kathy's vehicle while in Florida. We acknowledge that each of these facts could lend *some* support to a finding of shared finances. However, viewing the evidence in its entirety, we agree with the trial court that Don and Kathy's finances were not commingled on anything even approaching the level that is typical in a marriage. As we noted earlier, the critical question was whether Kathy's relationship with Don "functions practically and economically" as a marriage. *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 50. This required the court to consider the extent to which they utilize "a partnership approach to the acquisition, use, and preservation of material resources and income." *Id.* ¶ 55. Here, there is no evidence that Don and Kathy jointly owned any assets and or jointly maintained a household. We do not believe the evidence just discussed is sufficient to require a finding that a *de facto* marriage existed.

¶ 32 Bill further argues that the court improperly "chastised" him and drew an "adverse inference" against him for failing to call Don as a witness. As noted earlier, the court pointed out that various types of evidence were common in cases in which a former spouse alleged cohabitation, including the testimony of the new partner. Bill argues that drawing an adverse inference from his failure to call Don was improper because Don was likely to be biased in Kathy's favor. See *Shvartsman v. Septran, Inc.*, 304 Ill. App. 3d 900, 903-04 (1999) (finding that a trial court abused its discretion by instructing a jury that it could infer that the testimony of a "missing witness" would have been unfavorable

to a party who did not call that witness where the witness was likely to have been biased in favor of the adverse party). We set forth the relevant portion of the court's order earlier in this decision. We do not interpret the court's statements as an indication that the court drew any inferences. Rather, the court simply noted that there were several types of evidence that are typically presented in cases where a former spouse seeks the termination of maintenance on the basis of cohabitation.

¶ 33 Finally, Bill argues that the burden shifted to Kathy to disprove cohabitation once he came forward with evidence indicating that she was cohabiting with Don. In support of this position, Bill cites *In re Marriage of Sappington*. We find the *In re Marriage of Sappington* case distinguishable and are not persuaded.

¶ 34 There, the former wife and her new partner lived in the same home. *In re Marriage of Sappington*, 106 Ill. 2d at 459-60. Each "handle[d] their own limited business affairs," and they did not have any joint bank accounts. *Id.* at 461. However, they both contributed to household expenses, such as food, utilities, and newspaper delivery. *Id.* at 460. In addition, they both shared in the responsibility for household chores and maintenance. *Id.* They denied having a sexual relationship, however, and the former wife asserted that her new partner was impotent. *Id.* at 461.

¶ 35 On appeal, the Illinois Supreme Court stated, "The fact that the [former wife] and [her new partner] cohabit on a resident, continuing basis is not in dispute." *Id.* at 462; see also *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 54 (explaining that in *In re Marriage of Sappington*, "[t]he former wife and her new partner were certainly companions who had joined forces in maintaining a household" (citing *In re Marriage of*

*Sappington*, 106 Ill. 2d at 459-61)). The issue there was whether the relationship was "conjugal" in spite of the couple's lack of sexual relations. This required the court to determine whether that term necessarily included a sexual component. *In re Marriage of Sappington*, 106 Ill. 2d at 462.

¶ 36 The court concluded that sex is not a necessary component of a conjugal relationship. In reaching this conclusion, the court noted that the purpose of the statute "could easily be defeated" if parties could avoid its application simply by asserting that a partner is impotent or denying any sexual relationship. *Id.* at 464. The court further noted that "when two people live together, \*\*\* it is the husband-and-wife-like relationship which bears the rational relationship to the need for [maintenance], not the absence or presence of sexual intercourse." *Id.* at 467. It was in this context that the court stated,

"once an ex-spouse paying maintenance has demonstrated that a husband-and-wife-like relationship does exist, it should be incumbent [*sic*] 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." *Id.*

There, as discussed, the former husband demonstrated that the new couple was involved in a husband-and-wife-like relationship, and the couple sought to counter this evidence with an assertion that the new partner was impotent. Here, by contrast, the court found that Bill failed to establish the existence of a husband-and-wife relationship in the first



place. We have already concluded that this finding was supported by the evidence. We do not believe *In re Marriage of Sappington* requires a different result.

¶ 37 We conclude that the anecdotal evidence presented by Bill was insufficient to establish the existence of a *de facto* husband-and-wife relationship, which is required to prove cohabitation.

¶ 38 For the foregoing reasons, we affirm the trial court's order denying Bill's petition to terminate maintenance.

¶ 39 Affirmed.