Dating, Maintenance, and *Miller*

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WHERE DO YOU DRAW THE LINE BETWEEN AN INTIMATE DATING RELATIONSHIP and a *de facto* marriage? This question was recently decided by the second district appellate court in *In re Marriage of Miller*, which reversed the trial court's decision to terminate maintenance based upon a finding of "cohabitation."[1]

With this result, the second district significantly departed from prior appellate decisions. By holding that an intimate dating relationship did not rise to the level of a "*de facto* marriage," *Miller* brought much-needed clarity to a case law that, until then, seemed unable to harness an indefinite and ever-expanding concept of cohabitation.

The six-factor test for *de facto* marriage

While section 504 of the Illinois Marriage and Dissolution of Marriage Act governs awards of "maintenance," section 510 governs its termination. Section 510(c) provides that maintenance shall terminate under several circumstances, including "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*."[2]

1. *In re Marriage of Miller*, 2015 IL App (2d) 140530.
2. 750 ILCS 5/510(c) (emphasis added).

In a ground-breaking ruling, the second district in *Miller* found that an "intimate dating relationship" was not a *de facto* marriage that triggered termination of maintenance after divorce. The ruling is a step forward, the authors argue.

The policy behind the section 510 "cohabitation" provision is that, just as the maintenance payor should not be required to financially support the ex-spouse's new marriage (and new spouse), so too, maintenance should terminate 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."[3]

The problem with the cohabitation standard has been how to determine factually when an informal "husband and wife relationship" exists. In a series of cases beginning with the 1985 Illinois Supreme Court case *In re Marriage of Sappington* up to the fourth district's decision in *In re Marriage of Herrin* in 1994, Illinois courts generally focused on the financial entanglement (or lack thereof) between the receiving ex-spouse and his or her significant other.[4] Under that standard, courts generally ruled in favor of the maintenance payee, as long as they could show that they were not being financially supported by the significant other.

However, in *Herrin*, the fourth district shifted away from the primarily economic focus, introducing a six-factor test for determining whether two people are engaged in a "*de facto* marriage" or just a general "dating" relationship.[5]

In *Herrin,* the ex-wife and her boyfriend were in a serious, committed relationship with the possibility of marriage in the future. The boyfriend spent all day at the ex-wife's home before returning back to his own residence to sleep. The boyfriend's residence had no utilities and was used only for overnight purposes. The couple spent most holidays and vacations together.

Most significantly, the ex-wife and her boyfriend provided for each other financially, including paying bills and loaning money. The couple was aware that if they married, or if the boyfriend continually slept at the ex-wife's residence, the ex-wife's maintenance could terminate.

To assess whether the ex-wife's relationship with her boyfriend amounted to a "*de facto* marriage," the *Herrin* court analyzed six factors: (1) the length of the relationship; (2) the amount of time the receiving spouse and new partner spent together; (3) the nature of the activities they engaged in; (4) the interrelation of their personal affairs; (5) their vacationing together; and (6) their spending holidays together.[6] Applying the six factors to the facts of the case, the appellate court found that that a "*de facto* marriage" existed and affirmed the trial court's termination of maintenance.

The problem with the six-factor test

While the result in *Herrin* was justified, the establishment of the six-factor test created a much broader evidentiary standard for

3. *In re Marriage of Susan,* 367 Ill. App. 3d 926, 929 (2d Dist. 2006) (quoting *In re Marriage of Herrin,* 262 Ill. App. 3d 573 (4th Dist. 1994)).

4. See, *e.g.*, *In re Marriage of Lambin,* 245 Ill. App. 3d 797 (4th Dist. 1993) (no *de facto* marriage existed where the parties only saw each other twice during their four month relationship, owned no property together, and held no joint bank accounts); *In re Marriage of Leming*, 227 Ill. App. 3d 154 (5th Dist. 1992) (although the parties resided together for four months and were at one point engaged, the court did not terminate maintenance where the ex-wife and her boyfriend paid their own bills and their funds were never commingled).

5. *In re Marriage of Herrin*, 262 Ill. App. 3d 573 (4th Dist. 1994).

6. *Id.* at 577.

TAKEAWAYS >>

• Section 510(c) of the Illinois Marriage and Dissolution of Marriage Act provides that maintenance shall terminate under several circumstances, including "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.*"

• In determining whether maintenance should be terminated as a result of cohabitation, Illinois courts have traditionally analyzed six factors: (1) the length of the relationship; (2) the amount of time the receiving spouse and new partner spent together; (3) the nature of the activities they engaged in; (4) the interrelation of their personal affairs; (5) their vacationing together; and (6) their spending holidays together.

• In *In re Marriage of Miller*, the second district broke new ground by not relying on the traditional six factors and instead, holding that courts must look at the totality of the circumstance to determine whether the new relationship also functions practically and economically in a marriage-like way.

SINCE *SNOW*, IT HAS BECOME NEARLY IMPOSSIBLE FOR RECIPIENTS OF MAINTENANCE (USUALLY WOMEN) TO KNOW THE LEVEL OF RELATIONSHIP THEY CAN ENTER INTO WITHOUT JEOPARDIZING MAINTENANCE.

terminating maintenance. Notably, none of those factors focused specifically on financial entanglement; instead, they invited the court to scrutinize a myriad of other aspects of the relationship.

In practice, the six-factor test encouraged courts to search for indicia that a "*de facto* marriage" exists, without necessarily addressing how much weight to give any one factor individually or all six together. As a result, over time the six-factor test has made it more likely that a court would find cohabitation and terminate maintenance, because at least one or more of the factors applies virtually to every dating relationship.

For example, in *In re Marriage of Snow*, the third district affirmed the trial court's termination of maintenance after applying the six-factor test and finding a "*de facto* marriage."[7] In *Snow*, the ex-wife had allowed a former neighbor to live with her for a year and a half. The neighbor testified that he paid rent and contributed to half the utilities and to household chores.

The ex-wife and neighbor were sexually involved and occasionally socialized together with the ex-wife's friends. However, neither paid for the other's personal expenses, commingled funds, or had plans to enter into a serious, committed relationship.

Notwithstanding this lack of financial entanglement and long-term commitment, the trial court found that under the six-factor test (herein adopted as the six *Snow* factors), the relationship *was* a "*de facto* marriage," warranting termination of maintenance. Affirming, the third district court made it clear that financial entanglement was no longer a predicate to a finding of cohabitation.

Since *Snow*, it has become nearly impossible for recipients of maintenance (usually women) to know the level of relationship they can enter into without jeopardizing maintenance. How often can you spend the night with your new partner? Can you go on vacation together? Spend holidays together? What about buying gifts or paying for meals?

Moreover, the much broader and less definite standard created by the six-factor *Snow* test produces not only greater uncertainty, but also significant inequality between ex-spouses. While the payor ex-spouse has the freedom to enter into new relationships yet avoid potential legal or financial entanglements simply by not marrying, the recipient ex-spouse is left questioning whether *any* romantic relationship might result in a financially devastating termination of maintenance.

In effect, the *Snow* test blurs any meaningful distinction between "intimate dating relationships" and "*de facto* marriages." For practitioners, this means advising payee ex-spouses that entering into *any* monogamous relationship could result in the termination of maintenance.

The new approach under *Miller*

The second district's *Miller* case provides a more realistic approach to the legislature's intent in providing for cohabitation as a terminating factor to maintenance.

Facts of *Miller*. Lorena and Jeffrey Miller divorced in 2007 after 25 years of marriage. As part of the judgment, Lorena was awarded permanent maintenance. At the time of the pending dissolution, both parties had started dating. Jeffrey remarried immediately following the divorce, while Lorena entered into an exclusive dating relationship with Michael. Lorena and Michael's relationship lasted for six years, ending in 2013.

In 2011, Lorena purchased a town home for herself on a local golf course, where she was able to obtain joint membership with Michael. Each week, Michael would arrive at Lorena's home late Thursday night, either sleeping in her room or in one of the guest bedrooms, and stay through the weekend. The pair would play golf together or with friends most weekends. During the rest of the

7. *In re Marriage of Snow*, 322 Ill. App. 3d 953 (3d Dist. 2001).

ISBA RESOURCES >>

- ISBA Free CLE, *Get Ready – It's Coming: Major Changes to Family Law Effective January 1, 2016* (Dec. 4, 2015), http://onlinecle.isba.org/store/seminar/seminar.php?seminar=51850.
- P. Andre Katz & Erin B. Bodendorfer, *The New and Improved Illinois Marriage and Dissolution of Marriage Act*, 103 Ill. B.J. 30 (Nov. 2015), http://www.isba.org/ibj/2015/11/newandimprovedillinoismarriageanddi.
- Jeffrey L. Hirsch, *Solving for the X & Y: The Illinois Spousal Maintenance Guidelines*, 103 Ill. B.J. 32 (Sept. 2015), http://www.isba.org/ibj/2015/09/solvingxyillinoisspousalmaintenance.
- Brian A. Schroeder, *The New Illinois Maintenance Law: Retroactive or Prospective?*, 103 Ill. B.J. 32 (Jan. 2015), http://www.isba.org/ibj/2015/01/newillinoisspousalmaintenancelawret.

week, Michael stayed at his own home. Lorena never attended the weekly concerts by Michael's band; Michael never attended Lorena's church.

Indeed, while the pair presented themselves as a couple publicly, Lorena and Michael's lives were so separate that either could have ended the relationship simply by canceling the golf membership and walking away. The pair never commingled their finances during the relationship: although they vacationed and spent holidays together, Michael and Lorena each paid separately for meals, travel expenses, and entertainment.

Importantly, Michael never contributed to Lorena's housing costs (or household chores), and neither kept a key to the other's home. And when Michael brought up the subject of marriage, Lorena told him she was not looking for marriage and advised Michael not to bring up marriage again.

Indeed, by fall 2011, the romantic connection between the two was fading; their relationship became more of a friendly companionship. From 2011 to 2013 the parties continued to share the golf course membership and take trips together, but in the fall of 2013, Michael terminated his golf membership with Lorena and they stopped spending weekends together.

In February 2013, Jeffrey petitioned the trial court to terminate maintenance based on Lorena and Michael's alleged cohabitation. Applying the *Snow* factors, the trial court found that Lorena and Michael had been in a long-term exclusive relationship; the pair spent significant amounts of time together, including most weekends; they traveled, golfed, dined out, and spent holidays together; and, although they did not commingle finances, they shared a golf membership. Based on these findings, the trial court deemed their relationship a "*de facto* marriage" and terminated Lorena's maintenance.

'Intimate dating,' not defacto marriage. Reversing the trial court, the appellate court found that the evidence clearly showed a companionship and exclusive intimacy, but not a deeper level of commitment, permanence, and financial partnership. Although Lorena and Michael spent significant time together and shared friends, vacations, holidays, and a golf membership, there was no evidence that they intended to make the relationship permanent, to commingle finances, or to share a home or household duties**.** In short, the pair were clearly involved in an "intimate dating relationship" but not a "*de facto* marriage."

In reaching its conclusion, the appellate court expressly warned against overbroad application of the *Snow* factors: "[C]ourts should be mindful that the circumstances of an intimate dating relationship are also likely to involve facts that fit into each of the six [*Snow*] factors, [but] those facts in their totality must attain a certain gravitas to establish a *de facto* marriage."[8]

The appellate court also criticized the *Snow* factors, both for failing to focus on the specific practical and financial aspects of a relationship and for failing to encapsulate the relationship as a whole: "[T]he factors miss a key emotional factor that is likely present in any *de facto* marriage: intended permanence and/or mutual commitment to the relationship."[9] Rather than relying on a six-factor test, the court found, judges must look at the totality of the circumstance to determine whether the new relationship also functions practically and economically in a marriage-like way.

In further support of its holding, the *Miller* court distinguished *Sappington* and its progeny, *In re Marriage of Weisbruch,* and *In re Marriage of Susan*, all of which had found *de facto* marriages.[10] In *Sappington*, for example, although the former wife's new partner was impotent, they had lived together in a single-family home for over two years, with no plans to cancel the arrangement, sharing responsibilities and supporting each other emotionally and financially.

Similarly, in *Weisbruch,* the former wife purchased a home with her new partner, shared expenses equally, pooled their resources for the future, and relied on each other for support – thus it was irrelevant that the two claimed there was no physical intimacy between them.

MILLER IS A WAY FOR COURTS FACING COHABITATION CLAIMS TO RE-FOCUS ON THE TOTALITY OF THE CIRCUMSTANCES AND DISTINGUISH BETWEEN INTIMATE DATING RELATIONSHIPS AND *DE FACTO* MARRIAGES.

And in *Susan*, although the ex-spouse and new partner couple maintained two households and kept their finances separate, over a three-year period they had spent nearly every night together, had unlimited access to each other's homes, and also vacationed together, spent holidays together, and even co-signed holiday cards. Thus in all three cases, the totality of the circumstances pointed to a *de facto* marriage, not just "intimate dating," and thus supported the finding of cohabitation.

But as the *Miller* court noted, a strict application of the *Snow* analysis would not have been enough to determine whether the relationships amounted to a *de facto* marriage. The six *Snow* factors, by themselves, cannot distinguish an "intimate dating relationship" from a "*de facto* marriage." Drawing that line requires determining whether the facts in each category together reach a level substantially similar to marital behavior.

In other words, "intimate dating relationships" may reflect aspects of all six factors, yet lack the deeper level of

8. *In re Marriage of Miller,* 2015 IL App (2d) 140530, ¶ 46.
9. *Id.* ¶ 48.
10. See *In re Marriage of Sappington*, 106 Ill. 2d 456 (1985); *In re Marriage of Weisbruch*, 304 Ill. App. 3d 99 (2d Dist. 1999); *In re Marriage of Susan*, 367 Ill. App. 3d 926 (2d Dist. 2006).

commitment, intended permanence, and financial partnership that comes with "*de facto* marriages." Unlike the couple in *Miller*, the couples in *Sappington* and *Weisbruch* clearly had established "*de facto* marriages": sharing joint households, commingling funds and goods, and providing mutual financial support.

The *Miller* court further distinguished *Herrin*, noting that unlike the couple in that case, none of the evidence suggested that Lorena and Michael had altered their behavior to hide the true nature of their relationship for purposes of preserving maintenance. Indeed, courts in termination proceedings should not assume that couples are concealing their true relationship, and instead should focus on the facts at hand:

> Just as the termination of maintenance is permanent and irrevocable, a new relationship prompting the termination of maintenance must evince a permanence based on mutual commitment, as manifested by…a combination of the length of the relationship, an intertwining of significant assets that would be difficult to undo, and/or verbal testimony of commitment….[11]

Miller recognizes that a maintenance recipient should be allowed to make the conscious decision to engage in an intimate, exclusive dating relationship without allowing it to elevate to a "*de facto* marriage" that would result in termination of her maintenance. By the same token, courts should not assume that a party making that conscious decision is concealing the true nature of the relationship.

The *Miller* standard – a step forward

The second district's *Miller* decision marks a significant departure – and step forward –from the cases decided after *Herrin* and *Snow*. Although well-intentioned, the six-factor test invited a mechanistic application that amplified disparate facts and details present in every relationship, while distracting from the necessarily more nuanced assessment of the relationship as a whole.

Miller provides a significant precedent for courts facing cohabitation claims to refocus on the totality of the circumstances and distinguish between intimate dating relationships and *de facto* marriages – and thus, perhaps, provide a little more leeway for maintenance recipients who re-enter the dating game.

11. *Miller*, 2015 IL App (2d) 140530, ¶ 67.