

Can I Date Without Losing My Maintenance?

Maintenance, formerly known as alimony, is an award of spousal support from one party to the other in a divorce proceeding. Unless the parties agree otherwise, pursuant to Section 510 of the Illinois Marriage and Dissolution of Marriage Act, the right to receive maintenance terminates upon the first to occur of the death of either party, the remarriage of the party receiving maintenance, or if the party receiving maintenance “*cohabits with another person on a resident, continuing conjugal basis.*”

However, the statute does not define what constitutes “cohabitation,” and as a result, this concept has been frequently litigated and continues to change as the caselaw evolves. So how can an attorney advise clients on this issue when it is such a gray area? To help answer this question, we use the case of our former client, Paula.

After being married for 23 years, Paula’s husband Ron told her that that he had reconnected with his high school prom date on Facebook and had filed for divorce. When Paula first came in to meet with us, she was devastated and wanted nothing but to try and work things out with Ron. She had been a stay-at-home wife and mother throughout the marriage, giving up her career in advertising when their oldest son was born, while Ron advanced his career to ultimately become the CEO of a large corporation. During the divorce process, Ron moved out of the marital residence and into a new home with his girlfriend. Paula was heartbroken, but this made her realize the divorce was really happening and she needed to start focusing on herself for the first time in her life. Over the next few months until the divorce was finalized, we saw Paula gradually transform into a confident, independent, and joyful person. By the time the divorce judgment was entered, Paula said she was the happiest she had ever been. She was ready to move onto the next phase of her life.

As part of the divorce judgment, Paula was awarded indefinite (formerly known as permanent) maintenance from Ron. Since Paula walked away from her career to take care of the family and household full-time during the marriage, her earning capacity was greatly diminished. The purpose of this award was that Paula could continue to receive financial support from Ron to approximate the standard of living that she enjoyed during the marriage.

About two years after her divorce, we received a call from Paula. She had a job that she loved, and had been exclusively dating her boyfriend, Mark, for the past year. Her daughter was getting married and she was debating whether she should bring Mark to the wedding. A few of her friends had told her she had to be careful about dating too seriously because she could lose her maintenance if it was determined she was “cohabiting.” One friend told her a story about someone who was followed by a private investigator her ex hired to track how many times her significant other spent the night.

Paula was frustrated and didn’t understand why Ron could move on with his life, but she had to be careful of every move she made. There were so many questions: Can she spend the night with Mark? Can she go on vacations, trips and spend holidays with Mark? Can she post pictures with him on social media? Can she meet his children and family? Can she and Mark go out with friends? Can’t they fall in love?

Paula's situation is quite common, as most people return to the dating world following divorce. However, Paula's is rightfully concerned, because once maintenance is terminated based on cohabitation, it can never be reinstated, even if the new relationship ends.

The rationale behind termination of maintenance when 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 so that he or she can continue to receive maintenance." *In re Marriage of Herrin*, 262 Ill. App. 3d 573, 577 (1994). To terminate maintenance, the spouse seeking termination of maintenance bears the burden of establishing a *de facto* ("in reality") marriage relationship. *In re Marriage of Thornton*, 373 Ill. App. 3d 200, 20 (2007).

In determining whether a *de facto* marriage relationship exists, the court has considered the following factors to be relevant in certain cases: (1) the length of the relationship, (2) the amount of time the former spouse and new partner spend together, (3) the nature of the activities in which they participate, (4) the interrelation of their personal affairs (including finances), and whether they (5) vacation and (6) spend holidays together. *In re Marriage of Herrin*, 262 Ill. App. 3d at 577.

However, in the 2015 Second District case *In re Marriage of Miller*, 2015 IL App (2d) 140530, the Court's focus shifted away from the "checklist" of factors. Here, for the first time, the Courts distinguished between an "intimate dating relationship" (which *does not* terminate maintenance) and a "de facto marriage" (which terminates maintenance), and stated that "each termination case turns on its own set of facts; just as no two relationships are alike, no two cases are alike. *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 40.

The Court further stated:

"Courts must also look to the totality of the circumstances to determine whether the new relationship functions practically and economically in a marriage-like way. *In re Marriage of Miller*, 2015 IL App (2d) 140530 at ¶ 50."

"While a consideration of the non-exhaustive 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." *Id.* at ¶ 68.

This concept of “intended permanence” has shifted the focus in recent cohabitation cases. Since *Miller*, there have been two (2) additional published cases which address cohabitation. The facts and results of *Miller*, *Walther* and *Churchill* are summarized below:

<i>Case Name:</i>	<i>In re Marriage of Miller</i>	<i>In re Marriage of Walther</i>	<i>In re Marriage of Churchill</i>
<i>Trial Court:</i>	Yes Cohabitation	No Cohabitation	No Cohabitation
<i>Appellate Court:</i>	No Cohabitation	Yes Cohabitation	No Cohabitation
<i>Facts about Party's Relationship with Significant Other:</i>	<ul style="list-style-type: none"> • Monogamous relationship for ~6 years; • Had joint health club membership labeled “significant others;” • Spent ~70% of their weekends at the other’s residence; • Boyfriend worked from Ex’s home; • Played golf most weekends together; • Went on 14 trips together, spent several holidays, birthday parties and special events for each other and their families including graduations and baby showers; • Ex visited boyfriend’s daughter at college; • Were “in a relationship” on Facebook along with many pictures and comments which showed them as a couple; • Discussed marriage; • Did not comingle finances and did not assist each other with housing costs; • Did not name the other as beneficiary to any financial accounts; • Neither received mail at the other’s residence; • Each generally paid for his or her own means, travel expenses and entertainment. 	<ul style="list-style-type: none"> • Monogamous relationship for ~2 years; • Ex slept at boyfriend’s house every night for nearly a year, shared bedroom; • Ex’s daughter lived at boyfriend’s and shared a room with his daughter for ~6 months; • Ex maintained an apartment of her own where she received bills, registered her license and the like, but it was sparsely furnished; • Ex did not have key to house, but had unfettered access to boyfriend’s home; • Ex stored clothes at boyfriend’s, washed her clothes there, cooked for boyfriend’s family, purchased groceries for boyfriend’s family; • Took overnight trips, attended concerts and spent all many major holidays together; • Ex referred to herself, boyfriend and both sets of children as “family” on Facebook. 	<ul style="list-style-type: none"> • Monogamous relationship for 8-12 months; • Kept belongings at other’s residence; • Boyfriend assisted Ex in moving furniture and did some household chores for Ex like taking out garbage, mowing the lawn and putting up a shelf for Ex’s child; • Each washed clothes as the other’s residence but did not wash clothes for each other; • Boyfriend visited Ex in hospital; • Boyfriend participated in activities with Ex’s 2 children, including tutoring her child in Spanish, helping them with homework, attending sporting events, however, “did not assume a role as a father;” • Ex accepted packages at her home addressed to “Amy Fogle” (boyfriend’s last name); • Did not live together; • Spent “several nights per month” together; • Boyfriend maintained permanent residence in Texas; • Ex and boyfriend bought each other rings and other gifts, bought gifts for children; • Did not have a key or unfettered access to other’s residence, did not cook and did not clean for one each other; • Did not comingle finances, neither in the other’s estate plan, did not own joint property.

What is apparent from the recent cases cited above is that the concept and parameters of “cohabitation” continue to develop over time as dating relationships evolve in society generally. In the earlier lineage of cases, a vacation or an overnight at a significant other’s house may have been a much stronger indicator of a “de facto” marriage. Now, we see that even if you are “in a relationship” on Facebook, spend time with the other’s children or exchange rings, it may not give rise to a “cohabitation claim.” The most recent case, *Churchill*, seems to recognize this liberalization, stating that vacationing and spending holidays together are reflective of “the initial bloom of the relationship” and that exchanging gifts with each other and children is “normal dating behavior.” *In re Marriage of Churchill*, 2019 IL App (3d) 180208, ¶18.

That said, most clients would rather be safe than sorry when it comes to risking their maintenance payments. Based on our experience and the current caselaw, we have created a top ten list to keep in mind when dating while you are receiving maintenance. While this is not an exhaustive list and doesn’t cover every scenario, it is a good place to start.

1. **Finances.** Keep your finances completely separate. Don’t open a joint bank account, don’t add the other person as a signer on your credit card, don’t purchase any assets together and don’t share a gym or other club membership.
2. **Residence.** Don’t move in together. Don’t house hunt together. Don’t pay any expenses for the other person’s residence. Don’t share keys to your residences or cars.
3. **Loans.** This one comes up often, especially if the ex-spouse isn’t paying maintenance and the new significant other wants to help. If this must be done, make sure to document by noting “loan due to non-payment of maintenance.” Have it paid back as soon as possible. Don’t co-sign on a loan for the other person.
4. **Estate planning.** Don’t include the other person in your estate plan, as the beneficiary of your life insurance, retirement plans, etc. Don’t make the other person your healthcare power of attorney.
5. **Holidays.** It is likely in a dating relationship, you will spend at least some holidays together. One thing we tell clients is not to send out a joint holiday card as we have seen those used as evidence in cohabitation hearings before.
6. **Vacations.** It is also likely to go on vacation with your significant other. It is important to keep expenses separate. Buy your own plane ticket and if you are reimbursing the other person for any expenses, keep track of the reimbursement, either in the check memo section or the notes section if an online transfer (i.e. “reimbursement for 50% of hotel”).
7. **Communication.** Be careful what you put in writing. This includes, emails, text messages, communication apps and even handwritten cards. Assume anything you put in writing can be used as evidence.

8. ***Social Media.*** There is no benefit to posting anything regarding your relationship on Facebook, Instagram, or any other social media platform. Be cognizant of what you post as it may give the other party a window into your personal life that should remain closed.
9. ***Together Time.*** A party paying maintenance may hire a private investigator to try and obtain proof of cohabitation, such as tracking how many nights one person sleeps at the other's home, the types of activities that the couple partakes in and anything else that shows how much time is spent together. There is no set rule for how much time spent, just keep in mind the more time together, the greater the factor in favor of cohabitation.
10. ***When it Doubt, Reach Out.*** Whenever you have a concern as to whether something could be used against you in a cohabitation claim, do not hesitate to contact your attorney. Not only will this provide clarity, but may reduce the likelihood of inadvertently taking action contrary to your interests.