

---

## Alimony, Alimony Payin' Your Bills Rethinking the Termination of Maintenance for Cohabiting Under Illinois Law

Melanie B. Eck

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

 Part of the [Law Commons](#)

---

### Recommended Citation

Melanie B. Eck, *Alimony, Alimony Payin' Your Bills Rethinking the Termination of Maintenance for Cohabiting Under Illinois Law*, 70 DePaul L. Rev. 667 (2022)

Available at: <https://via.library.depaul.edu/law-review/vol70/iss4/2>

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# ALIMONY, ALIMONY PAYIN' YOUR BILLS<sup>†</sup>: RETHINKING THE TERMINATION OF MAINTENANCE FOR COHABITING UNDER ILLINOIS LAW

## I. INTRODUCTION

Illinois is one of few states that allows for the termination of maintenance (formerly known as alimony or spousal support) for cohabiting.<sup>1</sup> Under the Illinois Marriage and Dissolution of Marriage Act (“IMDMA”), an ex-spouse that is paying maintenance can terminate that obligation if she shows the recipient spouse “cohabits with another person on a resident, continuing conjugal basis.”<sup>2</sup> This “working definition” has evolved through Illinois caselaw on cohabitation. However, Illinois courts continue to grapple with the meaning of cohabitation and likewise pinball their applications of factors developed over the last few decades. Collectively, Illinois courts implement what is commonly known as the “*de facto* marriage test” for finding cohabitation. The factors for this test are found in virtually all dating relationships, such as vacationing together, eating meals together, and so forth.

Importantly, one of the purposes for awarding a spouse maintenance is to provide her with financial support until she can become self-supporting or to ameliorate her sacrifice in a long-term marriage where she devoted her time to domestic duties instead of obtaining education and marketable skills. For a long-term marriage, the homemaker spouse may be entitled to receive permanent maintenance of some amount per month based on the parties’ incomes and other factors under the statute. However, if the recipient spouse enters into a dating relationship, there is a risk that her maintenance can be terminated, even if the dating relationship is short-term and does not intend to lead to marriage. For recipient spouses that are without a fixed income and that are without any chance of entering the labor force, the termination of maintenance causes severe financial hardships.

For the reasons that follow in this Article, Section 510(c)’s provision for cohabitation as a maintenance terminating event must be abrogated; an exception for gray divorcees should be carved out; termina-

---

<sup>†</sup> *Living Loving Maid* by LED ZEPPELIN (1969).

1. Denise Erlich, *Grounds For Terminating Or Modifying Illinois Spousal Support*, ERLICH L. OFF., LLC, <https://erlichlegal.com/blog/modifying-illinois-spousal-support/> (last visited May 16 June 17, 2021); see also 750 ILL. COMP. STAT. 5/510(c) (2019).

2. 5/510(c).

tion of maintenance sought on cohabitation grounds should be reviewable; or alternatively, the Supreme Court of Illinois should establish a factor test that focuses on the financial positions of the payee and discard the current factors, found in all dating relationships, in order to prevent future inequity that follows by terminating maintenance for cohabiting.

This Article discusses the inequities caused when maintenance is terminated for cohabiting. Part I discusses dissolution proceedings in Illinois, followed by relevant statutory provisions for calculating the amount and duration of maintenance under the IMDMA. Then, the statutory provisions for terminating maintenance under the IMDMA are outlined, followed by statistics of divorce, marriage, and cohabitation rates in the United States. Next, a survey of Illinois case law on cohabitation and the ultimate development of the *de facto* marriage test is provided. Part I also provides relevant Illinois policy and its interplay with terminating maintenance under the IMDMA. Part II then provides an analysis on how the current operation of Section 510(c) leads to inequitable results that cause severe financial hardship, contravene Illinois policies, and pose future harm for particular groups of divorcees. Part II concludes by providing a menu of solutions to ameliorate the inequities caused by the current operation of Section 510(c). Part III illustrates the impact these solutions will have going forward. Finally, Part IV concludes.

## II. BACKGROUND

This Part proceeds in six sections. Section A discusses the general process for petitioning for a dissolution of marriage in Illinois. Section B describes maintenance under the IMDMA and how the amount and duration of maintenance awards are calculated. Section C provides the statutory ways for terminating maintenance. Section D illustrates statistical data for divorce, marriage, and cohabitation rates in the U.S. Section E presents a survey of Illinois case law discussing the factors used for determining cohabitation. Section F discusses relevant Illinois policy for issues regarding cohabitation.

### A. *Dissolution Proceedings in Illinois*

Dissolution proceedings in Illinois begin when a spouse files a petition for dissolution of marriage.<sup>3</sup> A petition for dissolution of mar-

---

3. Kevin O'Flaherty, *How To File for Divorce in Illinois — Illinois Petitions For Dissolution Of Marriage Explained*, O'FLAHERTY L., <https://www.oflaherty-law.com/learn-about-law/filing-a-petition-for-dissolution-of-marriage> (last visited May 16 June 17, 2021).

riage in Illinois must consistconsists of certain elements: grounds for dissolution, with irreconcilable differences being the only grounds for divorce in Illinois; if the parties have children, then the allocation of parental responsibilities, which consists of decision-making authority and parenting time (formerly known as custody and visitation, respectively) and child support; maintenance; and the disposition of property and debts.<sup>4</sup> In the event the parties' circumstances to a dissolution proceeding do not involve one of the above elements, the petition should still indicate so.<sup>5</sup> For instance, if no children were born out of the parties' marriage, then the petition must state that no children were born out of the parties' marriage.

Dissolution proceedings may involve either a contested or an uncontested divorce.<sup>6</sup> A joint simplified dissolution may be brought by parties for an uncontested divorce.<sup>7</sup> It is a quick divorce procedure (the prove-up may be the same day of the filing or soon after) that requires fewer forms and ultimately saves the parties money on attorneys' fees.<sup>8</sup> To qualify for this expedited dissolution, the parties must meet certain requirements, such as having no children born out of the marriage, waiving maintenance, and having no jointly-owned real property.<sup>9</sup> If the parties jointly own real property or have children, then a joint simplified dissolution is unavailable. However, a contested or uncontested divorce is possible depending on the circumstances of the parties' agreeableness.<sup>10</sup>

In either a contested or uncontested divorce, maintenance may be sought by the party who can show a need for spousal support.<sup>11</sup> In an uncontested divorce, the parties agree on nearly all issues brought under the petition, and any remaining issues can be reserved, such as the payment of any post-secondary education expenses.<sup>12</sup> Parties to an uncontested divorce that agree on maintenance may incorporate pro-

---

4. Illinois Legal Aid Online, *Divorce training for attorneys*, YOUTUBE (July 16, 2018), <https://www.youtube.com/watch?v=V7Bwkeu5WyI>.

5. *Id.*

6. *Id.*

7. *Joint Simplified Dissolution of Marriage Information and Instructions*, ILL. FIRST JUD. DIST. CLERK CIR. CT. COOK CTY., <http://www.cookcountyclerkofcourt.org/NewWebsite/Services/Filing-for-a-Joint-Simplified-Dissolution-of-Marri.aspx> (last visited May 16June 17, 2021).

8. *Joint simplified divorce with no children*, ILL. LEGAL AID ONLINE, <https://www.illinoislegalaid.org/legal-information/joint-simplified-divorce-no-children> (last visited May 16June 17, 2021).

9. *Id.*

10. *What is a contested or uncontested divorce?*, ILL. LEGAL AID ONLINE, <https://www.illinoislegalaid.org/legal-information/what-contested-or-uncontested-divorce> (last visited May 16June 17, 2021).

11. *Id.*

12. *Id.*

visions for such in their marital settlement agreement (“MSA”).<sup>13</sup> However, in a contested divorce, parties cannot come to an agreement on issues such as the disposition of property and debts, maintenance, or the allocation of parental responsibilities; therefore, the case ultimately goes to trial where the court makes the final determination as to any issues.<sup>14</sup> Where maintenance is an issue and being sought by one of the parties, the court may award a spouse maintenance if the court should find that maintenance is appropriate by analyzing factors set forth in the statute, as discussed more fully below.<sup>15</sup>

### *B. Maintenance Under the Illinois Marriage and Dissolution of Marriage Act*

Under the IMDMA, the court has the authority to grant a spouse an award of maintenance when appropriate.<sup>16</sup> When one spouse pays

13. *What Should Be Included in an Illinois Divorce Settlement?*, ANDERSON & ASSOCIATES, P.C. (Mar. 27, 2018), <https://www.andersonandassociatespc.com/schaumburg-divorce-lawyer/what-should-be-included-in-an-illinois-divorce-settlement>. See, e.g., SAMPLE MARITAL SETTLEMENT AGREEMENT, <http://www.divorce-lawyers-chicago.com/docs/sample-marital-settlement-agreement.pdf> (last visited May 16/June 17, 2021).

14. ILLINOIS LEGAL AID ONLINE, *supra* note 10.

15. *Id.*

16. 750 ILL. COMP. STAT. 5/504(a) (2019). In determining whether an award of maintenance is appropriate, the court considers multiple factors. 5/504(a)(1)–(14). These factors include:

- (1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance as well as all financial obligations imposed on the parties as a result of the dissolution of marriage;
- (2) the needs of each party;
- (3) the realistic present and future earning capacity of each party;
- (4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;
- (5) any impairment of the realistic present or future earning capacity of the party against whom maintenance is sought;
- (6) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment;
- (6.1) the effect of any parental responsibility arrangements and its effect on a party’s ability to seek or maintain employment;
- (7) the standard of living established during the marriage;
- (8) the duration of the marriage;
- (9) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and the needs of each of the parties;
- (10) all sources of public and private income including, without limitation, disability and retirement income;
- (11) the tax consequences to each party;
- (12) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;
- (13) any valid agreement of the parties; and
- (14) any other factor that the court expressly finds to be just and equitable.

the other spouse money on a continuing basis after the dissolution divorce, this is referred to as maintenance. The spouse paying maintenance is called the payor and the spouse receiving maintenance is called the payee. Maintenance provides the payee a financial means to support herself after the dissolution of her marriage.<sup>17</sup> Courts have reiterated that the policy behind maintenance is to provide financial support to the payee until she is financially independent in the future and “to enable a spouse who is disadvantaged through marriage to enjoy a standard of living commensurate with that during the marriage.”<sup>18</sup> In other words, the general goal behind awarding maintenance is to provide a payee spouse sufficient income until she can become self-supporting, or if she cannot become self-supporting, then to provide her a way to afford a lifestyle comparable to the one she enjoyed during the marriage when there was two pools of income or only her spouse’s income from which expenses were paid. Maintenance is not meant to function as a societal benefit where the state steps in to support the spouse. Unlike child support, where one of the goals of enforcing support orders is to reduce the risk of public charges, the underpinnings of maintenance are individually based.<sup>19</sup> If a spouse is in need of spousal support, and the other spouse has sufficient income and assets from which to pay, then she is going to be obligated to support her ex-spouse if a court decides so makes that finding.

### 1. *Calculating the Amount of Maintenance under the IMDMA*

After the court makes a finding that maintenance is appropriate, the amount and duration of maintenance is then calculated.<sup>20</sup> First, the amount of maintenance is determined by the court through its use of the IMDMA’s statutory guidelines if it is a guideline case.<sup>21</sup> Apply-

---

*Id.*

17. The court may also award temporary maintenance during the dissolution proceedings. 750 ILL. COMP. STAT. 5/501(a)(1) (2018). However, this Article focuses on maintenance paid to recipient spouses for a reviewable term (and indefinitely) after the dissolution of marriage.

18. *In re Marriage of Gurrulat*, 578 N.E.2d 1380, 1383 (Ill. App. Ct. 1991); *In re Marriage of Liszka*, 77 N.E.3d 1000, 1015 (Ill. App. Ct. 2016).

19. 750 ILL. COMP. STAT. 5/504(a)(1)–(14) (determining whether an individual is entitled to maintenance based on statutory factors); *Financial Aspects of Divorce*, Spring 2019, DePaul University College of Law.

20. 750 ILL. COMP. STAT. 5/504(b-1)(1)(A). Of note, the calculation of maintenance is typically done using programs, such as Family Law Software. The calculation itself is not as lofty of an issue, but practitioners still deal with issues of imputing income to either spouse, whether a spouse is truly reporting all her income, and so forth.

21. 5/504(b-1). The court may also order non-guideline maintenance if, for example, the application of the IMDMA’s guidelines amount to an award of maintenance and child support that exceeds 50% of the payor’s net income. *Id.*

ing the guidelines, the amount of maintenance is “calculated by taking 33 1/3% of the payor’s net annual income minus 25% of the payee’s net annual income.”<sup>22</sup> When added to the net income of the payee, this calculated amount cannot be “in excess of 40% of the combined net income of the parties.”<sup>23</sup> For example, if Spouse A has a net income of \$100,000 and Spouse B has a net income of \$30,000, the calculation of maintenance for these parties would be as follows:

$$\text{Maintenance} = (\$100,000 \times 33.33\%) - (\$30,000 \times 25\%)$$

$$\text{Maintenance} = \$33,330 - \$7,500$$

Maintenance = \$25,830 per year (or \$2,152.50 per month) Next, the calculated amount of maintenance (\$25,830) cannot exceed 40% of the parties’ combined net income (\$130,000) when added to Spouse B’s income. To illustrate:

$$\$100,000 + \$30,000 = \$130,000 \text{ (parties' combined net income)}$$

$$\$25,830 / \$130,000 = 19.86\% \text{ (maintenance as a percentage)}$$

Since the maintenance percentage is less than 40% of the parties’ combined income, it would not be reduced to the statutory limit.

## 2. *Calculating the Duration of Maintenance Under the IMDMA*

After the amount of maintenance is calculated, the next step is calculating the duration of maintenance, which is likewise derived through the IMDMA’s guidelines.<sup>24</sup> Under the guidelines, the duration of maintenance is calculated by multiplying the number of years of marriage, which is the time between the date of marriage and the date of filing the petition for dissolution, by a factor provided in the statute.<sup>25</sup> For example, if Spouse A and Spouse B from the prior example were married for 16 years, then the duration of maintenance payments is calculated as follows:

22. 5/504 (b-1)(1)(A).

23. *Id.*

24. 5/504(b-1)(1)(B) (“The duration of an award [of maintenance] shall be calculated by multiplying the length of the marriage at the time the action was commenced by whichever of the following factors applies: less than 5 years (.20); 5 years or more but less than 6 years (.24); 6 years or more but less than 7 years (.28); 7 years or more but less than 8 years (.32); 8 years or more but less than 9 years (.36); 9 years or more but less than 10 years (.40); 10 years or more but less than 11 years (.44); 11 years or more but less than 12 years (.48); 12 years or more but less than 13 years (.52); 13 years or more but less than 14 years (.56); 14 years or more but less than 15 years (.60); 15 years or more but less than 16 years (.64); 16 years or more but less than 17 years (.68); 17 years or more but less than 18 years (.72); 18 years or more but less than 19 years (.76); 19 years or more but less than 20 years (.80). For a marriage of 20 or more years, the court, in its discretion, shall order maintenance for a period equal to the length of the marriage or for an indefinite term.”).

25. *Id.*

16 (years of marriage) x 0.68 (statutory factor) = 10.9 years (or 130.8 months)

Therefore, Spouse A's monthly payments of \$2,152.50 to Spouse B would be ordered for 130.8 months.<sup>26</sup> Under the IMDMA's guidelines, it is possible for a spouse to receive maintenance payments indefinitely.<sup>27</sup> However, unless both parties expressly agree otherwise, a payee spouse receiving indefinite maintenance payments is at risk of future maintenance termination.<sup>28</sup>

---

26. Effective on June 1, 2018, Public Act 100-0520 codified amendments to Section 504. See H.B. 2537, 100th Gen. Assemb. (Ill. 2017). The Act amended the IMDMA to allow a person to choose whether he or she wants to continue using his or her former spouse's name or his or her maiden name under 5/413(c); to increase the income cap under 5/504(b-1)(1) guidelines; to remove the previous duration multipliers of maintenance under 5/504(b-1)(1)(B); and to give the court the discretion whether to credit payor spouses with payments made to payee spouses for temporary maintenance during dissolution of marriage proceedings under 5/504(b-1)(1.5). *Id.*; see also Stephanie L. Tang, 2017-2018 Survey of Illinois Law: Family Law, 43 S. ILL. U. L.J. 845, 855-57 (2019). Prior to the 2018 amendments, the Section 504 duration multipliers incentivized parties seeking maintenance to wait until enough time has passed for the next multiplier to apply. *Id.* at 856. For instance, a spouse in a fourteen-year marriage that filed under the former maintenance statute would be able to receive eight years and five months of maintenance payments. *Id.* However, if a spouse waits one more year, so he or she would be in a fifteen-year marriage, then he or she would be able to receive twelve years of maintenance payments. *Id.* Public Act 100-0520 reduced the incentive for spouses to wait to file for dissolution of marriage through altering the duration multipliers. H.B. 2537, 100th Gen. Assemb. (Ill. 2017). Now, under the current section 504, a spouse in a 14-year marriage would only receive one year and two months more of maintenance payments if he or she waited one more year to file. Tang, *supra* note 26, at 856-57.

27. 750 ILL. COMP. STAT. 5/504(b-1)(1)(B) ("For a marriage of 20 or more years, the court, in its discretion, shall order maintenance for a period equal to the length of the marriage or for an indefinite term."). Relevantly, "[i]f a court grants maintenance for an indefinite term, the court shall not designate a termination date. Indefinite maintenance shall continue until modification or termination under Section 510." 5/504(b-4.5)(2). In addition to indefinite maintenance, a spouse may also receive fixed-term maintenance or reviewable maintenance. 5/504(b-4.5)(1), (3). If the court grants fixed-term maintenance, then the payment of maintenance is barred after the period during which maintenance is to be paid ends. 5/504(b-4.5)(1). Reviewable maintenance, on the other hand, is granted for a specific period subject to review when that period ends. 5/504(b-4.5)(3). The court, upon review, "may extend maintenance for further review, extend maintenance for a fixed non-modifiable term, extend maintenance for an indefinite term, or permanently terminate maintenance . . ." 5/504(b-8); see 5/504(b-4.5)(3). The court may not make a finding under subdivision (b-8) if maintenance is terminated under Section 510. 5/504(b-4.5)(3). Under the IMDMA, only indefinite maintenance and reviewable maintenance (which may be extended indefinitely) are terminable under Section 510. 5/504(b-4.5)(2)-(3). Fixed-term maintenance, on the other hand, is not expressly terminable under Section 510 because after the set period of maintenance ends, maintenance automatically terminates. 5/504(b-4.5)(1).

28. 5/510(c).

*C. Cohabitation of Payee Spouse as Grounds for Terminating Maintenance*

Under the IMDMA, a payor spouse's obligation to pay future maintenance to the payee spouse can be terminated by three ways expressly outlined under Section 510(c). For each terminating event, unless the parties stipulate in writing to the contrary, a payor's maintenance obligation is terminated if: (1) either party dies, (2) the payee spouse remarries, or (3) the payee spouse "cohabits with another person on a resident, continuing conjugal basis."<sup>29</sup> The third terminating event is the subject of this Comment.

If maintenance is terminated based on a payee's cohabiting, then the payor spouse's obligation to pay future maintenance ends on the date the court finds that the cohabitation began, and the payor spouse is entitled for reimbursement of any maintenance payments paid after that date.<sup>30</sup> For instance, if the payor spouse can prove that the payee began cohabiting within the meaning of Section 510(c) on October 1, 2019, and the payor spouse made ten maintenance payments since that date, the payor spouse may be reimbursed for those ten months.

The IMDMA does not define "resident, continuing conjugal basis."<sup>31</sup> Therefore, Illinois case law has developed factors used by the courts to determine whether a payee spouse is cohabiting within the meaning of Section 510(c).<sup>32</sup> These factors include: (1) length of the relationship; (2) amount of time the couple spends together; (3) nature of the activities the couple engages in; (4) the interrelationship of the couple's personal affairs; (5) whether the couple vacationed together; and (6) whether the couple spent holidays together.<sup>33</sup> Each case is fact-dependent. When courts apply the factors, the factors used and their respective weight vary, so a court's decision after applying the factors likewise varies from case to case. Collectively, the courts' inquiry is ultimately whether a payee spouse's relationship rises to the level of a *de facto* marriage.<sup>34</sup> A *de facto* marriage is understood to

29. *Id.*

30. *Id.*

31. See generally 5/510; see also 5/510(c).

32. See, e.g., *In re Marriage of Walther*, 110 N.E.3d 221, 227 (Ill. App. Ct. 2018); *In re Marriage of Herrin*, 634 N.E.2d 1168, 1171 (Ill. App. Ct. 1994); *In re Marriage of Miller*, 40 N.E.3d 206, 220 (Ill. App. Ct. 2015); *In re Marriage of Thornton*, 867 N.E.2d 102, 109–110 (Ill. App. Ct. 2007); *In re Marriage of Snow*, 750 N.E.2d 1268, 1270 (Ill. App. Ct. 2001); *In re Marriage of Susan*, 856 N.E.2d 1167, 1171 (Ill. App. Ct. 2006); *In re Marriage of Sunday*, 820 N.E.2d 636, 640 (Ill. App. Ct. 2004); *In re Marriage of Weisbruch*, 710 N.E.2d 439, 442–443 (Ill. App. Ct. 1999); *In re Marriage of Sappington*, 478 N.E.2d 376, 379–82 (Ill. 1985).

33. *Herrin*, 634 N.E.2d at 1171.

34. Yet, the unpredictability of the courts' findings of a *de facto* marriage slashes the ease with which practitioners can apply precedent to their clients' cases.

mean that the couple is living together as husband and wife and finding that this type of relationship exists requires looking at the payee spouse's behavior after the judgment of dissolution is entered.

However, prior to the 1977 amendments to the IMDMA that inserted grounds for terminating maintenance for cohabiting, courts and matrimonial lawyers did not deal with cohabitation issues that arise under the current version of Section 510. Previously, the law in Illinois supported the proposition that a former spouse's right to maintenance was "not affected by the moral quality of her post-divorce conduct."<sup>35</sup> However, shortly after the 1977 amendments, courts had to determine the legislature's intent behind the type of conduct that would qualify as cohabitation.<sup>36</sup> For example, the court in *In re Support of Halford* stated:

Our task in this case is to determine what conduct was intended by the legislature to be grounds for termination . . . We believe that it was the intention of our legislature to provide for the termination of an ex-spouse's obligation to pay future maintenance whenever the spouse receiving maintenance has entered into a husband-wife relationship with another, whether this be by legal or other means.<sup>37</sup>

#### *D. Divorce, Marriage, and Cohabitation Rates and Statistics for Divorcees*

Recent data trends of marriage and divorce rates in the U.S. mark a significant change from past years.<sup>38</sup> This shift includes the divorce rate of individuals aged 50 and older, otherwise known as "gray divorce."<sup>39</sup> From 1990 to 2015, the number of divorces for people aged 50 and older has increased more than 109%.<sup>40</sup> While the divorce rate for this age range has significantly increased, the marriage rate for

35. *Hall v. Hall*, 323 N.E.2d 541, 544 (Ill. App. Ct. 1975).

36. See generally *In re Support of Halford*, 388 N.E.2d 1131 (Ill. App. Ct. 1979).

37. *Id.* at 1134. The court in *Halford* continued to state that the "statute contemplates acts of sexual intercourse as part of the full or de facto husband-wife relationship . . ." *Id.* Additionally, the court defined "conjugal basis" to mean the implication of the assertion of conjugal rights defined as "the right which husband and wife have to each other's society, comfort and affection" and "the right of sexual intercourse between husband and wife." *Id.* (quoting BLACK'S LAW DICTIONARY 374 (4th ed. rev. 1968) & WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 480 (1971)).

38. Renee Stepler, *Led by Baby Boomers, divorce rates climb for America's 50+ population*, tbl.1, PEW RES. CTR. (Mar. 9, 2017), <https://www.pewresearch.org/fact-tank/2017/03/09/led-by-baby-boomers-divorce-rates-climb-for-americas-50-population/>; I-Fen Lin et al., *Marital Biography, Social Security Receipt, and Poverty*, 39 RES. ON AGING 86, 89 (2016).

39. Stepler, *supra* note 38; Lin et al., *supra* note 38, at 87.

40. Stepler, *supra* note 38.

younger individuals aged 18 to 34 has plummeted.<sup>41</sup> For instance, compared to 59% of young adults who were married in 1978, only 29% of young adults were married in 2018.<sup>42</sup>

Along with these changes for divorce and marriage rates, cohabitation rates have likewise experienced a substantial shift.<sup>43</sup> As of 2016, cohabitation rates among adults have risen 29% since 2007.<sup>44</sup> In other words, of the 18 million cohabiting relationships in 2016, people aged 50 and older account for about 23% of cohabiters—increasing by 75% since 2007.<sup>45</sup> Similarly, cohabiting relationships among young adults aged 18 to 34 have increased by 1.7 million.<sup>46</sup> In fact, young adults in this age range are more likely to be cohabiting than marrying, and the majority has never been married at all.<sup>47</sup> In contrast, a majority of cohabiters aged 50 and older are divorced.<sup>48</sup> This number is significant because prior research on the economic well-being of adults based on varying marital biographies has disregarded gray divorce.<sup>49</sup> Since 1990, gray divorce has doubled and is more prevalent among individuals who remarry, who are less educated, and who have fewer economic resources.<sup>50</sup> Though the future consequences of gray divorce are unclear, scholars see it as likely that gray divorce poses alarming financial repercussions for individuals who have been out of, or have

---

41. Press Release, U.S. Census Bureau, U.S. Census Bureau Releases 2018 Families and Living Arrangements Tables (Nov. 14, 2018), <https://www.census.gov/newsroom/press-releases/2018/families.html>.

42. *Id.*

43. Renee Stepler, *Number of U.S. adults cohabitating with a partner continues to rise, especially among those 50 and older*, PEW RES. CTR. (Apr. 6, 2017), <https://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older/>.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at tbl.2 (“[M]ajorities of cohabiters younger than 50 have never been married, including nearly all cohabiters ages 18 to 24 (97%) and 85% of those 25 to 34. About half (52%) of cohabiters ages 35 to 49 have never been married . . .”).

48. *Id.* at tbl.3 (“Among cohabiters ages 50 and older, a majority (57%) are in their 50s. Another three-in-ten are in their 60s, while one-in-ten are in their 70s. Just 3% of cohabiters ages 50 and older are in their 80s or older.”); *see also* Lin et al., *supra* note 38, at 95 (For individuals aged 50 and older “who are in a cohabiting union, roughly 6 in 10 are divorced . . . Divorced individuals are more often . . . cohabiting than remarried if their divorce occurred after age 50 . . .”).

49. Lin et al., *supra* note 38, at 89.

50. *Id.* at 91; *see also id.* at 98 (“Cohabiters tend to be less educated than marrieds and remarrieds after divorce.”); *id.* at 105 (“Gray divorced women . . . receive smaller Social Security benefits, on average, than all other single women and men. They also confront exceptionally high poverty levels at roughly 27%. By comparison, gray divorced men’s poverty is 50% lower.”).

never been in, the labor force, such as stay-at-home wives and individuals who have fewer economic resources.<sup>51</sup>

*E. Illinois Courts' Treatment of the De Facto Marriage Test under Section 510(c)*

Illinois courts vary in their applications of the test to find whether a former spouse “cohabits with another person on a resident, continuing conjugal basis.”<sup>52</sup> The tests range from courts finding cohabitation when a couple’s relationship involves dating aspects that do not affect the payee spouse’s need for financial support to courts finding cohabitation in cases where no dating aspects are found, but a shift in the payee’s financial circumstances is shown. Further, in finding cohabitation, some courts apply a totality of the circumstances test, and other courts instead focus on certain factors.

*1. The Six-Factor Cohabitation Test Established by In re Marriage of Herrin*

In *In re Marriage of Herrin*, the Illinois appellate court developed a six-factor test for determining whether a payee spouse’s relationship with another person amounted to cohabitation.<sup>53</sup> In *Herrin*, the payee ex-wife and her boyfriend “saw each other every day for over 2 ½ years, spent most evenings together, engaged in sexual relations, took vacations and spent holidays together.”<sup>54</sup> The boyfriend “spent the night at [the ex-wife’s] residence every other weekend (when the children stayed with the [ex-husband]), ate most of his meals there, gave [the ex-wife’s] phone number to his clients so they could reach him there, used the [ex-wife’s] car as much as 90% of the time, and borrowed money from [the ex-wife] to pay his child support.”<sup>55</sup> Lastly, the ex-wife “took out loans to pay for [her boyfriend’s] van and computer . . . [and the ex-wife and her boyfriend] discussed marriage, but decided against it for financial reasons.”<sup>56</sup> The court ultimately affirmed the trial court’s decision granting the payor spouse’s petition to

---

51. *Id.* at 91. Gender roles illustrate the economic disparities between men and women. *Id.* (“Women are economically disadvantaged compared with men and this gender disparity widens with age. Despite rising female labor force participation in recent decades, a majority of women receive Social Security through spousal . . . benefits rather than on the basis of their own contributions.”).

52. 750 ILL. COMP. STAT. 5/510(c) (2019).

53. 634 N.E.2d 1168, 1171 (Ill. App. Ct. 1994).

54. *Id.*

55. *Id.*

56. *Id.*

terminate his maintenance obligation because his ex-wife and her boyfriend were engaged in a resident, continuing conjugal relationship.<sup>57</sup>

Prior to *Herrin*, a primary factor that Illinois courts used for finding cohabitation was whether cohabitation materially affects the payee spouse's need for financial support.<sup>58</sup> For example, the court in *In re Marriage of Sappington* stated that "an important consideration . . . is whether the cohabitation has materially affected the [payee] spouse's need for support."<sup>59</sup> Therefore, relying on *Sappington*,<sup>60</sup> the ex-wife in *Herrin* argued that her relationship with her boyfriend was not a *de facto* marriage because the evidence was insufficient to show that her relationship "materially affected her need for support."<sup>61</sup> The *Herrin* court refuted the ex-wife's claim and "found that a demonstrated need for support cannot be controlling and in itself does not defeat a petition to terminate maintenance when . . . all other factors demonstrate a resident, continuing, conjugal relationship exists."<sup>62</sup> The *Herrin* court ultimately found that while trial courts may "consider the financial interaction between the interested parties, that factor is not controlling . . ."<sup>63</sup>

Thus, the court in *Herrin* established the following factors to determine whether the nature of the relationship between the payee ex-wife and her boyfriend amounted to a *de facto* marriage: "(1) its length; (2) the amount of time [the payee ex-wife and her boyfriend] 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."<sup>64</sup> The court further stated that courts should also use the totality of the circumstances test.<sup>65</sup>

---

57. *Id.* at 1172.

58. See *In re Marriage of Frasco*, 638 N.E.2d 655, 660 (Ill. App. Ct. 1994).

59. 478 N.E.2d 376, 381 (Ill. App. Ct. 1985); see also *In re Marriage of Bramson*, 404 N.E.2d 469, 473 (Ill. App. Ct. 1980); *In re Marriage of Arvin*, 540 N.E.2d 919 (Ill. App. Ct. 1989); *In re Marriage of Caradonna*, 553 N.E.2d 1161 (Ill. App. Ct. 1990); *In re Marriage of Johnson*, 574 N.E.2d 855 (Ill. App. Ct. 1991); *In re Marriage of Klein*, 596 N.E.2d 1214 (Ill. App. Ct. 1992); *Reeder v. Reeder*, 495 N.E.2d 1383 (Ill. App. Ct. 1986).

60. 478 N.E.2d at 381 (quoting *Bramson*, 404 N.E.2d at 473) ("[T]he legislative intent does not appear to be an attempt to control public morals . . . Rather, an important consideration, divorced from the morality of conduct, is whether the cohabitation has materially affected the recipient spouse's need for support because she either received support from her co-resident or used maintenance monies to support him.").

61. *Herrin*, 634 N.E.2d at 1171.

62. *Id.* at 1172.

63. *Id.*

64. *Id.* at 1171.

65. *Id.*

## 2. In re Marriage of Weisbruch

Five years following the *Herrin* decision, another Illinois appellate court in *In re Marriage of Weisbruch* implemented a different set of factors to determine whether an ex-wife's non-romantic, same-sex relationship constituted cohabitation within the meaning of Section 510(c).<sup>66</sup> In *Weisbruch*, the ex-wife and her friend bought a home and titled it in joint tenancy, divided household expenses, shared a joint account, co-signed loans for each other, listed each other as co-owners on their cars, named each other in their wills, and named each other as primary beneficiaries of their life insurance policies.<sup>67</sup> The court ultimately concluded that the ex-wife's relationship was more than a casual friendship due to their financial arrangements.<sup>68</sup>

The ex-wife argued that the evidence was insufficient to show that her relationship constituted cohabitation.<sup>69</sup> Namely, the ex-wife pointed to the lack of a sexual relationship; the ex-wife slept in a separate bedroom most of the time and the lack of public affection.<sup>70</sup> Contrary to the court in *Herrin* that found a financial need for support is not determinative, the court in *Weisbruch* relied heavily on the financial implications of the relationship at issue because they are the "most relevant to determining the need for maintenance . . ."—the court stated.<sup>71</sup> The *Weisbruch* court noted that the purpose of Section 510(c) is to prevent the injustice of requiring the payor spouse to continue paying maintenance to the payee spouse who then "uses the money to support someone else or is receiving support from someone else."<sup>72</sup> This purpose for terminating maintenance was commonly articulated by courts pre-*Herrin* that focused primarily on the financial need of the payee spouse. The *Weisbruch* court, however, did not follow *Herrin*'s line of reasoning (dating relationship factors), and instead reverted back to the line of reasoning articulated in cases like *Sappington* (financial intermingling).

The payee spouse in *Weisbruch* was still in need of financial support; however, the *Weisbruch* court ultimately terminated her maintenance.<sup>73</sup> In doing so, the court recognized the inconsistencies of its

---

66. *In re Marriage of Weisbruch*, 710 N.E.2d 439, 445 (Ill. App. Ct. 1999) (Illinois Second District Appellate Court); 750 ILL. COMP. STAT. 5/510(c).

67. *Weisbruch*, 710 N.E.2d at 441.

68. *Id.* at 445.

69. *Id.*

70. *Id.*

71. *Id.* at 443.

72. *Id.* at 444.

73. *See Weisbruch*, 710 N.E.2d at 444.

holding and the holding in *Sappington*.<sup>74</sup> Both *Weisbruch* and *Sappington* recognized that the payee spouse's "needs are not being completely met by his or her new partner[.]"<sup>75</sup> but the court still terminated maintenance anyway. The *Weisbruch* court explained that the reason for these inconsistencies is that Section 510(c) does not allow maintenance payments to be reduced on a proportional basis.<sup>76</sup> In other words, cohabitation exists, or it does not. If it does, then a payee spouse's maintenance is terminated regardless of her financial needs. Finally, the court reaffirmed its position that "if the receiving spouse remarries or cohabits, maintenance is terminated even if the new partner's contributions are less than the former spouse's maintenance obligations. The same is true even if the receiving spouse is in fact supporting the new partner."<sup>77</sup>

Notably, the *Weisbruch* court did not cite to or mention the factors established in *Herrin*. The ultimate inquiry is to determine whether a couple's cohabiting rises to the level of a *de facto* marriage.<sup>78</sup> However, the *Weisbruch* case involved a same-sex relationship.<sup>79</sup> The ex-wife in *Weisbruch* argued that her relationship could never be conjugal or a *de facto* marriage because of Illinois's policy against same-sex marriages at the time.<sup>80</sup> The court concluded by stating the lack of a sexual relationship does not prevent a relationship from being conjugal and cited to *Halford* for the proposition that maintenance can be terminated "whenever the receiving spouse has entered into a husband-wife relationship with another, *whether this be by legal or other means*."<sup>81</sup>

### 3. In re Marriage of Snow

Two years after the *Weisbruch* court departed from the factors set forth in *Herrin*, the court in *In re Marriage of Snow* applied the *Herrin* six-factor test and found the existence of a *de facto* marriage.<sup>82</sup> In *Snow*, the ex-wife lived with a former neighbor for a year and a half.<sup>83</sup> The neighbor paid rent, paid half of the utilities, and contributed to

---

74. *Id.*; *In re Marriage of Sappington*, 478 N.E.2d 376, 381 (Ill. 1985).

75. *Weisbruch*, 710 N.E.2d at 444; *Sappington*, 478 N.E.2d at 381–82.

76. *Weisbruch*, 710 N.E.2d at 444.

77. *Id.*

78. *Id.*

79. *Id.* Prior to the Supreme Court's *Obergefell* decision in 2015 that legalized same-sex marriage, same-sex marriage was illegal in Illinois. See generally *Obergefell v. Hodges*, 576 U.S. 644 (2015).

80. *Weisbruch*, 710 N.E.2d at 443.

81. *Id.* (emphasis added).

82. 750 N.E.2d 1268, 1270–71 (Ill. App. Ct. 2001) (Illinois Third District Appellate Court).

83. *Id.* at 1270.

household chores.<sup>84</sup> The ex-wife and the neighbor had sexual relations and mingled with the ex-wife's friends.<sup>85</sup> Yet, they did not pay for each other's personal expenses, commingle funds, or plan to enter into a serious, committed relationship.<sup>86</sup> The court determined their relationship rose to the level of a *de facto* marriage under the six-factor test notwithstanding the relationship's lack of financial intertwinement.<sup>87</sup> The court established that financial intertwinement was not a necessary condition in order to find cohabitation.<sup>88</sup> Thus, the *Snow* decision reaffirmed that courts should apply the six factors from *Herrin*, including that financial intertwinement was not necessary for finding cohabitation.

#### 4. In re Marriage of Miller

The appellate court's decision in *In re Marriage of Miller* narrowed the *Herrin/Snow* six-factor test.<sup>89</sup> There, after the dissolution of her twenty-five-year marriage, the ex-wife was awarded permanent maintenance.<sup>90</sup> Shortly thereafter, the ex-wife began exclusively dating her boyfriend, which lasted for six years.<sup>91</sup> The ex-husband, on the other hand, had remarried immediately after the divorce.<sup>92</sup> The ex-wife's boyfriend stayed with her Thursday through Sunday, and they were members of the same golf course.<sup>93</sup> The couple vacationed and spent holidays together, but they never commingled their finances and always paid for expenses and meals separately.<sup>94</sup> The couple's romantic connection eventually dwindled.<sup>95</sup> They stopped spending weekends together and the boyfriend terminated his golf course membership.<sup>96</sup> By the time the ex-husband filed his petition to terminate his maintenance obligation, the couple's relationship resembled that of a friendly companionship.<sup>97</sup>

---

84. *Id.* at 1269.

85. *Id.* at 1270.

86. *Id.*

87. *Id.* at 1271.

88. Leon I. Finkel & Katelyn A. Blanchard, *Dating, Maintenance, and Miller*, 104 ILL. BAR J. 34, 36 (2016).

89. Tang, *supra* note 26, at 868.

90. *In re Marriage of Miller*, 40 N.E.3d 206, 212 (Ill. App. Ct. 2015) (Illinois Second District Appellate Court).

91. *Id.* at 213.

92. *Id.*

93. *Id.* at 222.

94. *Id.*

95. *Id.* at 215.

96. *Miller*, 40 N.E.3d at 215.

97. *Id.*

The trial court, applying the *Herrin/Snow* test, found that the ex-wife and her former boyfriend had entered into a long-term, exclusive relationship where they spent a significant amount of time together; they traveled, golfed, dined out, and spent holidays together.<sup>98</sup> The court noted that although the couple did not commingle finances, they shared a golf membership.<sup>99</sup> Thus, the trial court found their relationship rose to the level of a *de facto* marriage and terminated the ex-wife's maintenance.<sup>100</sup> On appeal, the appellate court reversed the trial court's decision.<sup>101</sup> The appellate court found that the couple's relationship established companionship and exclusive intimacy, but it lacked a deep level of commitment, permanence, and financial partnership.<sup>102</sup> The appellate court reasoned that there was no evidence that the couple intended to make their relationship permanent, to commingle finances, or to share a home or household duties.<sup>103</sup> Therefore, the couple was in an intimate dating relationship but not a *de facto* marriage.<sup>104</sup> However, in so holding, the *Miller* court stated the *Herrin/Snow* six-factor test was not enough—the totality of the circumstances should be the inquiry.<sup>105</sup> After the *Miller* decision, Illinois courts were uncertain under what circumstances a party's relationship would constitute cohabiting under Section 510(c).<sup>106</sup> This uncertainty paved the way for the court's decision in *In re Marriage of Walther*.<sup>107</sup>

## 5. *In re Marriage of Walther*

In *Walther*, the appellate court reversed the trial court's holding that held the payee's relationship did not amount to cohabitation.<sup>108</sup> The parties in *Walther* expressly provided for the repercussions of the payee spouses' cohabitation in their MSA.<sup>109</sup> The agreement stated that “[payor’s] maintenance obligation would terminate if ‘[payee] cohabits with another person on a resident, continuing conjugal basis in accordance with Section 510(c) . . .’”<sup>110</sup> Applying the *Herrin/Snow*

---

98. *Id.* at 222.

99. *Id.* “Happy learned how to putt. Uh-oh.” *Happy Gilmore* (1996).

100. *Id.*

101. *Id.* at 224.

102. *Miller*, 40 N.E.3d at 227.

103. *Id.* at 228.

104. *Id.*

105. *Id.* at 227.

106. Tang, *supra* note 26, at 868; *see also Miller*, 40 N.E.3d at 206; 750 ILL. COMP. STAT. 5/510(c).

107. *In re Marriage of Walther*, 110 N.E.3d 221 (Ill. App. Ct. 2018).

108. *Id.* at 227.

109. *Id.* at 224.

110. *Id.*

factors, the *Walther* court stated that the payee spouse shared a bedroom with her boyfriend and regularly had sex with him; kept clothing at her boyfriend's house; regularly bought the boyfriend's groceries and prepared his meals; freely entered and left the house; spent all major holidays with the boyfriend; and moved her daughter to her boyfriend's house.<sup>111</sup> The trial court held that the payee spouse's relationship did not amount to cohabitation.<sup>112</sup> The appellate court reversed the trial court's decision under these facts and remanded with directions only to determine the date upon which the payor spouse's obligation to pay future maintenance terminated.<sup>113</sup> The appellate court in *Walther*, ultimately followed *Miller's* lead and applied the totality of the circumstances test, but it also applied the *Herrin/Snow* six-factor test.<sup>114</sup>

The dissenting opinion, written by Justice Robert Carter, illustrates how fact-specific the cohabitation analysis is.<sup>115</sup> He expressed that the majority erred by not giving enough deference to the trial court as to the factual and credibility determinations in the case.<sup>116</sup> Justice Carter reiterated that the payee spouse's relationship lasted only eleven months, and she testified that she did not intend for her relationship to be permanent.<sup>117</sup> Also, Justice Carter noted the little evidence that was presented to determine how long the payee spouse spent with her boyfriend during the relationship, including what daily activities they engaged in.<sup>118</sup> Further, Justice Carter emphasized that the payee spouse and her boyfriend did not share any financial accounts and received all statements for their accounts at their own addresses.<sup>119</sup> Applying the totality of the circumstances test, Justice Carter stated he would affirm the trial court's ruling—denying the payor's petition to terminate maintenance.<sup>120</sup>

---

111. *Id.* at 224–25.

112. *Id.* at 226.

113. *Walther*, 110 N.E.3d at 229.

114. *Id.*

115. *Id.* (Carter, J., dissenting).

116. *Id.*

117. *Id.* at 230.

118. *Id.*

119. *Walther*, 110 N.E.3d at 231.

120. *Id.*

*F. Relevant Illinois Policy and the Interplay of Section 510(c)*

*1. Recently Articulated Illinois Policy Against Common-Law Marriage*

Common-law marriage has been expressly prohibited in Illinois for over a century.<sup>121</sup> Therefore, individuals who cohabit and are not formally married have no conjugal rights akin to married couples under the IMDMA.<sup>122</sup> For instance, cohabiters cannot seek maintenance under Section 504 or property disposition under Section 503.<sup>123</sup> The Illinois policy against common-law marriages has been articulated more recently in *Brewer v. Blumenthal*.<sup>124</sup> In *Brewer*, a same-sex couple cohabited for over twenty-six years.<sup>125</sup> The parties exchanged rings, presented themselves to their families and friends as a committed couple, had three children that shared the same last name, commingled their assets, jointly purchased a home, and had a joint bank account.<sup>126</sup> Upon the termination of their relationship, both parties brought common-law claims.<sup>127</sup> Blumenthal moved for partition of the couple's home, and Brewer brought a counter-claim for a constructive trust for the parties' jointly owned home to prevent unjust enrichment from the time and money she invested during their long-term relationship.<sup>128</sup> Brewer also sought a constructive trust over Blumenthal's income and sought restitution for funds that Blumenthal withdrew from their joint account for her medical practice.<sup>129</sup> Brewer's counterclaim acknowledged that the couple's relationship was "identical in every essential way to that of a married couple."<sup>130</sup>

To the surprise of many, the Supreme Court of Illinois ultimately dismissed Brewer's common-law claims.<sup>131</sup> The court held that the issue in the case was "intimately related and dependent on [the parties'] marriage-like relationship . . ."<sup>132</sup> However, the court acknowledged that common-law claims may include available remedies to a party

---

121. 750 ILL. COMP. STAT. 5/214 (1977) ("Common law marriages contracted in this State after June 30, 1905 are invalid."); 12 ILL. PRAC., FAM. L. 750 5/214 (2021 ed.) (Westlaw database updated Feb. 2021) [hereinafter 12 ILL. PRAC. FAM. L. 750 5/214].

122. 12 ILL. PRAC. FAM. L. 750 5/214, *supra* note 121 ("The IMDMA generally applies to legally married couples only.").

123. *Id.*

124. 69 N.E.3d 834, 851 (Ill. 2016).

125. *Id.* at 869.

126. *Blumenthal v. Brewer*, 24 N.E.3d 168, 171 (Ill. App. Ct. 2014).

127. *Id.* at 169.

128. *Brewer*, 69 N.E.3d at 840–41.

129. *Id.* at 841.

130. *Id.* at 840.

131. *Id.* at 860.

132. *Id.* at 855.

that has cohabited with another if there is an “independent economic basis apart from the parties’ relationship.”<sup>133</sup> The court concluded that refusing to recognize common-law claims based on marriage-like relationships supports the well-settled policy of the IMDMA that gives “the state a strong continuing interest in the institution of marriage and the ability to prevent marriage from becoming in effect a private contract terminable at will, by disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.”<sup>134</sup> Further, the court’s holding reaffirmed the policy against allowing substantial amounts of litigation involving the intimate details of the parties’ living arrangements.<sup>135</sup>

Presently, the factors illustrated by *Brewer* are the same or substantially similar to the factors used to decide whether a *de facto* marriage exists for determining whether a payee spouse’s post-divorce relationship amounts to cohabitation. The Supreme Court of Illinois held that since common-law marriages are prohibited in Illinois, the parties’ common-law claims in *Brewer* must be dismissed.<sup>136</sup> Further, the Court stated subsequent common-law claims brought by parties that cohabit should likewise be dismissed to prevent litigation involving the intimate details of the parties’ relationship.<sup>137</sup> When a court analyzes a payee spouse’s post-divorce relationship, it focuses on the factors articulated in *Brewer*. If a court finds a payee’s relationship amounts to cohabitation, it in effect determines that while common-law marriages are not recognized in Illinois for common-law claims, the presence of the same factors operate to terminate the payee’s maintenance. Under the same or substantially similar factors, Illinois courts come to opposite conclusions.

## 2. *Interplay of Illinois Policy and the Operation of Section 510(c)’s Termination of Maintenance*

The policy articulated by the Supreme Court of Illinois in *Brewer* against litigating over the intimate details of a parties’ living arrange-

133. *Id.* at 856.

134. *Brewer*, 69 N.E.3d at 858 (citing *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979)).

135. *Id.*; *Hewitt*, 394 N.E.2d at 1207. The Illinois supreme court in *Brewer* reaffirmed its holding in *Hewitt* as good law; therefore, it incorporated the policy behind the decision in *Hewitt* in their decision in *Brewer*. See also Stefanie L. Ferrari, *Cohabitation in Illinois: The Need for Legislative Intervention*, 93 CHI.-KENT L. REV. 561, 591 (2018).

136. *Brewer*, 69 N.E.3d at 858–59.

137. *Id.* at 851 (The Supreme Court also stated, “judicially recognizing mutual property rights between knowingly unmarried cohabitants—where the claim is based upon or intimately related to the cohabitation of the parties—would effectively reinstate common-law marriage and violate the public policy of this state since 1905, when the legislature abolished common-law marriage.”) (emphasis added).

ments or relationships is relevant when looking at how the payor spouse seeking termination of maintenance builds their case against the payee spouse. Further, the policy behind the IMDMA's provision for maintenance awards and its calculation guidelines is also relevant to the operation of Section 510(c).

a. The Parties' Use of Private Investigators to Prove Cohabitation

When a payor spouse seeks to terminate her maintenance obligation, she has to prove that the payee spouse is cohabiting on a resident, continuing conjugal basis.<sup>138</sup> Therefore, parties' seeking redress under Section 510(c) can typically hire private investigators to build their case against the payee spouse.<sup>139</sup> A private investigator helps the payor amount gather information facts concerning the payee spouse's post-divorce relationship that she can use to prove whether a *de facto* marriage exists. Private investigators can be professionally licensed in Illinois as a private detective agency, and their expertise can range from a national to international scale.<sup>140</sup> They involve trained professionals that use surveillance technology to gather information for purposes of terminating maintenance and avoid detection doing so.<sup>141</sup> Some of the equipment and services employed by these detective agencies can include mobile surveillance, high-definition low-light video cameras, fingerprinting, drone surveillance, DNA testing, email tracing, internet usage, cell phone data, and computer usage, to name a few.<sup>142</sup> Private investigators can search through the payee spouses' garbage to find evidence of the relationship by locating "receipts, phone records, banking and credit card statements, letters, discarded suspicious items, etc."<sup>143</sup>

The evidence gathered by private investigators has been used by courts for determining whether a payee's relationship amounts to cohabitation. In *In re Marriage of Bates*, the payor employed a private investigator to obtain evidence of the payee's relationship in order to provide the court with information with which it can use to to termi-

138. 750 ILL. COMP. STAT. 5/510(c).

139. Janice Boback, *'Til Divorce Do Us Part: Termination of Spousal Maintenance or Alimony Due to Cohabitation*, ANDERSON & BOBACK (Oct. 17, 2020), <https://illinoislawforyou.com/spousal-support/termination-of-maintenance-alimony-due-to-cohabitation/>.

140. PRIVATE INVESTIGATOR CHICAGO, <http://privateinvestigatorchicago.com/2012/> (last visited June 17, 2021).

141. *Id.*

142. *Id.*; *Cohabitation Investigation*, ICS (Feb. 20, 2013), [https://www.icsworld.com/Private\\_Investigation\\_Case\\_Types/Cohabitation\\_Investigation.aspx](https://www.icsworld.com/Private_Investigation_Case_Types/Cohabitation_Investigation.aspx) (last visited May 16 June 17, 2021).

143. Kimberly Faber, *What a Private Investigator Cannot Do*, LAWGICAL (Aug. 10, 2011), <https://www.pinow.com/articles/456/what-a-private-investigator-cannot-do>.

nate her the payee's maintenance for cohabiting.<sup>144</sup> The evidence gathered was used at trial in addition to the private investigator's testimony.<sup>145</sup> In *Bates*, the private investigator testified that he observed the couple "kissing and hugging on several occasions[.]" and that he saw the boyfriend "enter [the payee's] home several times, but did not see him leave."<sup>146</sup> Further, the private investigator saw the couple about town and observed that "[t]he two went on walks, went to movies, dined out together, and spent some nights together . . ."<sup>147</sup> The evidence gathered by the private investigator, which was intimate information about the couple's dating relationship, was the subject of lengthy litigation.<sup>148</sup>

#### b. The IMDMA's Policy for Awarding Maintenance

Courts have terminated maintenance even after acknowledging that the payee spouse was not financially independent and could not enjoy the same or similar standard of living.<sup>149</sup> However, the policy behind the IMDMA's provision for awarding maintenance is to provide the recipient spouse with the financial means until she becomes self-supporting or to exact the same or similar standard of living enjoyed during the parties' marriage.<sup>150</sup> This policy becomes important when longer term marriages are at issue. A court has the authority, after first making a finding that maintenance is appropriate, to award a recipient spouse permanent maintenance for marriages lasting twenty years or longer.<sup>151</sup> In *In re Marriage of Kerber*, the parties were married for thirty years and four children were born out of the marriage, all emancipated at the time of the case.<sup>152</sup> The wife was "[fifty] years old, ha[d] a high-school education, and [had no] specialized skills for working outside of the home."<sup>153</sup> At the time When the parties were married, the wife worked as a dental assistant.<sup>154</sup> After becoming pregnant, the wife quit her job and stayed home to raise the chil-

---

144. 819 N.E.2d 714, 723 (Ill. 2004).

145. *Id.* at 722.

146. *Id.* at 723. Of note, the boyfriend's intangibility (or invisibility capabilities) has never been determined.

147. *In re Marriage of Miller*, 40 N.E.3d 206, 224 (Ill. App. Ct. 2015).

148. *Bates*, 819 N.E.2d at 723.

149. See *In re Marriage of Sappington*, 478 N.E.2d 376, 381 (Ill. 1985); *In re Marriage of Weisbruch*, 710 N.E.2d 439, 445 (Ill. App. Ct. 1999).

150. IL H.R. Tran. 2001 Reg. Sess. No. 64 (Statement by Rep. Hamos).

151. 750 ILL. COMP. STAT. 5/504.

152. 574 N.E.2d 830, 831 (Ill. App. Ct. 1991).

153. *Id.*

154. *Id.*

dren.<sup>155</sup> The wife did not resume employment until after the parties separated in 1989.<sup>156</sup> The husband, at the time of the parties' divorce, was 53 years old, and earned about \$34,668 as an assistant administrator for the Illinois Secretary of State.<sup>157</sup> The trial court entered an order requiring the husband to pay the wife "\$600 per month in rehabilitative maintenance for one year 'at which time the court [would] review the rehabilitative maintenance award.'"<sup>158</sup>

The appellate court reversed and held the wife should have been awarded permanent maintenance.<sup>159</sup>

Applying the statutory factors, the appellate court noted that the parties' circumstances illustrate "the classic case for the award of permanent maintenance."<sup>160</sup> The court stated that the wife had limited resources to independently meet her needs; she only has a high school education, and the time that would be required for her to obtain education or training to seek employment at someplace other than a fast-food restaurant will be significant.<sup>161</sup> The marriage involved a division of labor, where the wife stayed at home to raise all four children over their thirty-year marriage, which enabled the husband to gain marketable skills that allow him to earn his present salary.<sup>162</sup> The wife was attempting to enter the workforce very late in life with limited skills.<sup>163</sup> The appellate court continued:

Marriage is a partnership, not only morally but financially. Spouses are coequals, and homemaker services must be recognized as significant when the economic incidents of divorce are determined. Petitioner should not be penalized for having performed her assignment under the agreed-upon division of labor within the family. It is inequitable upon dissolution to saddle petitioner with the burden of her reduced earning potential and to allow respondent to continue in the advantageous position he reached through their joint efforts.<sup>164</sup>

Other courts in Illinois have taken a similar outlook on a spouse's sacrifice during a marriage to raise children as forgoing obtaining marketable skills.<sup>165</sup>

---

155. *Id.*

156. *Id.*

157. *Id.*

158. *Kerber*, 574 N.E.2d at 833.

159. *Id.* at 833.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Kerber*, 574 N.E.2d at 832 (quoting *In re Marriage of Hart*, 551 N.E.2d 737, 745 (Ill. App. Ct. 1990) (Steigmann, J., specially concurring)).

165. *See, e.g., In re Marriage of Carpenter*, 677 N.E.2d 463, 467 (Ill. App. Ct. 1997) (reversing award of rehabilitative maintenance and awarding permanent maintenance for twenty-seven-

In addition to forgoing education and employment during a marriage to raise children and perform domestic duties, the likelihood for spouses to earn a reliable income post-divorce is low, according to sociologists in this field.<sup>166</sup> Professor Susan Brown, Co-Director of the National Center for Family & Marriage Research, has indicated that studies show individuals that split up after age 50 should expect their “wealth to drop by about 50%[.]”<sup>167</sup> This is not surprising, considering the family’s resources are being divided, she states.<sup>168</sup> However, incomes for women aged fifty and older provide a stark economic future.<sup>169</sup> They collapse after a gray divorce, and researchers that have looked at standard of living found that “when women divorce after age 50, standard of living plunges [by] 45%. That’s about double the decline found in previous research on younger divorced women.”<sup>170</sup> Brown further states that the standard of living for older men drops by 21% after a divorce, and previous studies “have found a small or negligible effect of divorce on younger men’s incomes.”<sup>171</sup>

Further, older individuals who divorce do not see an appreciable recovery in wealth or in standard of living.<sup>172</sup> Brown states, “Late in their careers, older Americans simply don’t have time to undo the financial destruction that a divorce causes. Women who spent years at home caring for children find it difficult to re-enter the workforce.”<sup>173</sup> Brown and I-Fen Lin’s research suggests that by 2030, the estimated number of Americans divorcing aged 50 or older each year is

---

year marriage where wife “devoted her time to domestic duties, foregoing any education, training, employment, or career opportunities[.]” which severely limited wife’s earning potential and employment opportunities); *In re Marriage of Veile*, 43 N.E.3d 1196 (Ill. App. Ct. 2015) (reversed award of \$650 a month with possible termination in five years where parties had a 28-year marriage; remanded for determination of proper amount of permanent maintenance); *In re Marriage of Heroy*, 895 N.E.2d 1025 (Ill. App. Ct. 2008) (upholding permanent maintenance of \$35,000 per month for 26-year marriage where wife forgone full-time employment to raise her two children).

166. Ben Steverman, *Divorce Destroys Finances of Americans Over 50, Studies Show*, BLOOMBERG (July 19, 2019, 7:01 AM), <https://www.bloomberg.com/news/articles/2019-07-19/divorce-destroys-finances-of-americans-over-50-studies-show> (quoting Susan Brown, Sociology Professor at Bowling Green State University, Co-Director of the National Center for Family & Marriage Research).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. Steverman, *supra* note 166 (quoting Professor Brown).

173. *Id.*

828,000.<sup>174</sup> This estimate is derived from the baby boomer generation's likelihood for divorce and the U.S. population aging.<sup>175</sup>

Additionally, according to one study, "people who [have] gone through a gray divorce report higher levels of depression than those whose spouses died."<sup>176</sup> Research suggests that the best way for gray divorcees to recover from divorce is to "find a new spouse or partner."<sup>177</sup> Depression levels return to earlier levels four years after a gray divorce, and "remarrying or re-partnering will end depression almost immediately."<sup>178</sup>

Notably, some factors that the court considers for awarding the duration and amount of maintenance involve the factors at issue for gray divorcees: the income and property of each party; the needs of the party; the realistic present and future earning capacity of each party; the standard of living established during the marriage; the age, health, station, etc.<sup>179</sup> While research suggests that finding a new partner after a gray divorce will ameliorate depression, under Section 510(c), maintenance is terminated for cohabitation.<sup>180</sup>

### c. Ex-Spouses Receiving Child Support and Maintenance

Maintenance payments are calculated before child support in Illinois.<sup>181</sup> Therefore, maintenance is a deduction in determining net income for child support.<sup>182</sup> To determine child support in Illinois, maintenance paid is deducted from the maintenance payor's gross income and included in the recipient's gross income.<sup>183</sup> Thus, the maintenance guidelines lower child support awards whenever maintenance

174. *Id.* at tbl.3.

175. *Id.*

176. *Id.* (citing I-Fen Lin et al., *Depressive Symptoms Following Later-life Marital Dissolution and Subsequent Repartnering*, 60 J. HEALTH SOC. BEHAV. 153 (2019)).

177. *Id.*

178. Steverman, *supra* note 166 (quoting Professor Brown).

179. 750 ILL. COMP. STAT. 5/504(a).

180. 5/510(c).

181. Kevin O'Flaherty, *Illinois Child Support 2019*, O'FLAHERTY L. (Nov. 16, 2020), <https://www.oflaherty-law.com/learn-about-law/illinois-child-support-2019>.

182. *Id.*; 505(a)(3)(F)(II).

183. O'Flaherty, *supra* note 181; 505(a)(3)(F)(II). The treatment of maintenance as a deduction is applicable for child support calculations, not for tax purposes. Notably, the Tax Cuts and Jobs Act of 2017 removed the tax deduction for payors and tax liability for payees for divorces entered into after December 31, 2018. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (to be codified in scattered sections of 26 U.S.C.). See also I.R.S. PUB. 5307, <https://www.irs.gov/forms-pubs/clarification-changes-to-deduction-for-certain-alimony-payments-effective-in-2019> (last updated Mar. 24, 2021) ("Beginning Jan. 1, 2019, alimony or separate maintenance payments are not deductible from the income of the payer spouse, or includable in the income of the receiving spouse, if made under a divorce or separation agreement executed after Dec. 31, 2018.").

is awarded. In other words, if a spouse receives maintenance, then her overall income increases.<sup>184</sup> Likewise, if a spouse pays maintenance to the same person that will receive child support, his overall income decreases.<sup>185</sup>

To illustrate: Spouse A has an income of \$100,000. Spouse B has an income of \$0.<sup>186</sup> If Spouse A pays \$50,000 (for the sake of simplicity) in maintenance to Spouse B, then Spouse A's income becomes \$50,000, and Spouse B's "income" becomes \$50,000.<sup>187</sup> Now, each Spouse has an income of \$50,000.<sup>188</sup> When you take both spouses' income of \$50,000 and enter it in the child support calculation that considers both spouse's incomes, the recipient Spouse B is not getting as much in child support because she already earns \$50,000 from maintenance.<sup>189</sup> Likewise, Spouse A will not pay as much in child support because his new income is \$50,000.<sup>190</sup> The effect of calculating maintenance before child support is essentially lowering one person's income and raising the other.<sup>191</sup>

If Spouse B's maintenance is terminated, then the recipient's child support is affected. All things being equal, if Spouse B, the person who had \$50,000 of maintenance, now receives nothing, then Spouse B's income is now \$0.<sup>192</sup> Likewise, Spouse A, the person that was paying maintenance, now has \$100,000 in income.<sup>193</sup> This results in an increase of child support being paid to Spouse B (setting aside other factors, such as Spouse A's overnights with the children).<sup>194</sup> When Spouse B's maintenance is terminated, then her income only consists of child support payments, and the child support recipient must then go back to court seeking an increase in the support award.

Admittedly, child support payments indirectly support the obligee (parent receiving child support). Take the case of *In re Keon C.*,<sup>195</sup> where the court upheld an obligor's (parent paying child support)

184. O'Flaherty, *supra* note 181; 505(a)(3)(F)(II).

185. *Id.*

186. Conversation with Mario R. Ventrelli, Adjunct Professor of Law at DePaul University College of Law, Partner at Ventrelli Simon, LLC (Mar. 27, 2020) [hereinafter March Conversation with Professor Mario R. Ventrelli].

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. March Conversation with Professor Mario R. Ventrelli, *supra* note 186.

192. *Id.*

193. *Id.*

194. *Id.*

195. 800 N.E.2d 1257 (Ill. App. Ct. 2003).

monthly child support award of \$8,500.<sup>196</sup> The obligee earned a net monthly income of \$731.64, which was nominal compared to the obligor's \$58,404.<sup>197</sup> The court determined that the child support award of \$8,500 was proper, even though this amount exceeded the monthly expenses for the obligee's entire household.<sup>198</sup> Since this case involved parentage and was not a dissolution case,<sup>199</sup> maintenance was not on the table.<sup>200</sup> Thus, the court held that the obligor's monthly child support payments, albeit *ersatz* maintenance,<sup>201</sup> were proper.<sup>202</sup> Implicit in the court's holding is that the excessive child support award would be indirectly used by the custodial parent for expenses such as rent, water, and other necessities that support the parent and the child's standard of living.

However, Illinois courts do not allow a parent's direct personal use of child support. In cases involving the deviation of child support guidelines for affluent parents, the courts have recognized the improper practice of intending a portion of child support for a spouse's personal use. In *In re Marriage of Scafuri*, the court held that the trial court's excessive child support award and five-year reservation of maintenance was improper.<sup>203</sup> The court stated that if maintenance was warranted, then the trial court should have ordered it instead of implicitly including maintenance in an excessive child support award of \$31,250 each for the wife and three children.<sup>204</sup> Although the court did not determine whether the trial court intended to, it stated that to award any portion of the child support award as *ersatz* maintenance for the wife is an improper practice.<sup>205</sup> The court continued that "[c]hild support is for the support of the children, and maintenance is

---

196. *Id.* at 1264.

197. *Id.* at 1261.

198. *Id.* at 1262.

199. *Id.*

200. Maintenance is only a possible option only if the parties were married in cases where the parties were married. Parentage cases, on the other hand, involve unmarried individuals who have children together. See 750 ILL. COMP. STAT. 5/504(a).

201. *Ersatz*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/ersatz> (defining "ersatz" as "being a usually artificial and inferior substitute or imitation") (last visited June 17, 2021); see also *In re Marriage of Scafuri*, 561 N.E.2d 402, 407 (Ill. App. Ct. 1990) (noting that any intended portion of a child support award to be *ersatz* maintenance is an improper practice and stating that "[c]hild support is for the support of the children, and maintenance is for the support of the spouse. While the two concepts are related, one should not be substituted for the other.").

202. *Keon C.*, 800 N.E.2d at 1262.

203. *Scafuri*, 561 N.E.2d at 402.

204. *Id.* at 407.

205. *Id.*

for the support of the spouse. While the two concepts are related, *one should not be substituted for the other.*"<sup>206</sup>

### III. ANALYSIS

The current operation of Section 510(c) and its companion case law poses severe risks for future termination of payee spouses' maintenance. Illinois courts have inconsistently applied the factors for finding cohabitation, on top of applying factors that serve zero purpose for determining whether a payee's financial position has changed. Setting aside income-producing assets that are subject to market fluctuations anyway, for many recipient spouses divorcing after a long-term marriage, for many payees, if not most, maintenance is the only fixed income they receive. Terminating it for the wrong reasons, under the wrong factors, and for the wrong group of divorcees severely undercuts many policies in Illinois, including the purpose behind awarding maintenance in the first place. The termination of maintenance causes financial hardship, and this hardship considerably increases when focusing on individuals aged fifty and older.

This Part proceeds in four sections. First, Section A discusses the inequities that follow from a court incorrectly applying a Section 510(c) analysis, the economic hardships gray divorcees will undergo if their maintenance is improperly terminated, and why cohabitation agreements are insufficient to protect against future maintenance termination. Section B illustrates how the operation of Section 510(c) contravenes Illinois policy against common-law marriage and IMDMA's policy for awarding maintenance. Third, Section C discusses the risks of turning child support awards into *ersatz* maintenance when maintenance is terminated. Lastly, Section D provides a menu of options for ameliorating the inequitable repercussions of successful Section 510(c) findings.

#### A. *The Inequity of Terminating Maintenance Based on Cohabitation Under Illinois Law*

Section 510(c) of IMDMA provides payor spouses unjust recourse to terminate their maintenance payment obligations based on a payee spouse's cohabitation.<sup>207</sup> However, the idea of cohabitation under Illinois divorce law is just that—an idea—one which courts have continuously grappled with and have capriciously applied during a Section 510(c) analysis. The ultimate goal when applying Section 510(c) is to

---

206. *Id.* (emphasis added).

207. 750 ILL. COMP. STAT. 5/510(c).

determine whether a payee spouse's cohabitation is resulting in double-pocketed income from the payor spouse and post-divorce partner, thus causing inequity to the payor spouse.<sup>208</sup> However, Illinois case law on cohabitation shows that courts are still unsure of the proper test to find cohabitation and are likewise misguided in their application of arbitrary factors that fail to show any meaningful financial connection between a payee spouse and a post-divorce partner.<sup>209</sup> Instead, courts incorrectly look to factors that are found in virtually all dating relationships, such as vacationing together and eating meals together.<sup>210</sup>

The *Herrin* six-factor test developed a broad evidentiary standard that left courts uncertain about how much weight they should afford to each factor, either individually or collectively.<sup>211</sup> Importantly, these factors did not concentrate on a relationship's financial intertwining.<sup>212</sup> Instead, courts were left analyzing aspects of a relationship that apply to practically all dating relationships.<sup>213</sup> Therefore, when courts utilized the six-factor test to find whether a *de facto* marriage exists, the broad scope of the test left courts more likely to find cohabitation, thus terminating maintenance.<sup>214</sup> Further, the *Herrin* six-factor test with the gloss of *Snow* prevented payee spouses from knowing what type of relationship they can enter into without risking future maintenance payments.<sup>215</sup> For instance, could a payee spouse and her new partner spend a lot of time together?<sup>216</sup> How much time is too much?<sup>217</sup> Could they vacation or spend holidays together?<sup>218</sup> Could they buy one another gifts or pay for each other's meals without these

---

208. The inequity results to the payor spouse because maintenance awards are ultimately determined based on the needs of the payee spouse at the time of dissolution proceedings. Thus, a payee spouse stands to earn more from a payor spouse's higher payment obligations. However, once a payee spouse is cohabiting with a post-divorce partner that is contributing to the payee spouse's financial obligations—the payor spouse's maintenance payments are not adjusted, or decreased, to reflect the change in financial position of the payee spouse.

209. Tang, *supra* note 26, at 868; Finkel & Blanchard, *supra* note 88, at 35–36; see also *In re Marriage of Herrin*, 634 N.E.2d 1168, 1171 (Ill. App. Ct. 1994); *In re Marriage of Weisbruch*, 710 N.E.2d 439, 445 (Ill. App. Ct. 1999); *In re Marriage of Snow*, 750 N.E.2d 1268 (Ill. App. Ct. 2001); *In re Marriage of Miller*, 40 N.E.3d 206 (Ill. App. Ct. 2015); *In re Marriage of Walther*, 110 N.E.3d 221 (Ill. App. Ct. 2018).

210. Tang, *supra* note 26, at 868–69.

211. *Id.* at 868.

212. Finkel & Blanchard, *supra* note 88, at 36.

213. Tang, *supra* note 26, at 868.

214. Finkel & Blanchard, *supra* note 88, at 36.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

actions constituting cohabitation?<sup>219</sup> These aspects, found in nearly every dating relationship, were often identified by the courts as aspects of a *de facto* marriage.<sup>220</sup> This broad standard of the six-factor test also created notable inequities between former spouses.<sup>221</sup> The payor ex-spouse was free to enter into any kind of dating relationship without the fear of legal consequences, but the payee ex-spouse was often left unguided about what type of dating relationship she could enter into and often feared maintenance termination.<sup>222</sup> After *Snow*, any distinction between an intimate dating relationship and a *de facto* marriage was blurred.<sup>223</sup>

A survey of these cases illustrates that the law surrounding the operation of Section 510(c) is unclear and inconsistent, resulting in inequitable decisions. Not only does the case law in this area severely undercut the ease with which practitioners can advise their clients, these court decisions also contradict firmly held Illinois policy. Moreover, when a court finds cohabitation exists based on the factors outlined previously, the level of inequity experienced by the payee spouse is greater than that of the payor spouse. Of course, the payor spouse's perspective is worth exploring.<sup>224</sup> One could argue that requiring a payor spouse to remain in the workforce to afford making maintenance payments is just as inequitable as terminating maintenance to a spouse that needs financial support. The inequity in this situation can be based on a payor spouse's plan of future retirement. If a payor spouse retires at a point in time at which a court determines is "premature," then the payor spouse risks litigating against a future imputation claim by the payee spouse. Imputation occurs when a payor, or obligor in a child support context, becomes voluntarily unemployed or underemployed based on the circumstances of each case.<sup>225</sup> Typically,

---

219. *Id.*

220. Finkel & Blanchard, *supra* note 88, at 36.

221. *Id.*

222. *Id.*

223. *Id.*

224. Conversation with Mario R. Ventrelli, Adjunct Professor of Law at DePaul University College of Law, Partner at Ventrelli Simon LLC (Feb. 2, 2020) [hereinafter February Conversation with Professor Mario R. Ventrelli]. Many thanks also to Professor Ventrelli for illustrating the importance of understanding both parties' perspectives.

225. Kevin O'Flaherty, *How is Illinois Child Support Calculated When One Parent is Unemployed or Underemployed?*, O'FLAHERTY L. (Nov. 16, 2020), <https://www.oflaherty-law.com/learn-about-law/how-is-illinois-child-support-calculated-when-one-parent-is-unemployed-or-underemployed> ("If the unemployment or underemployment is involuntary and the parent has made and continues to make good faith efforts to seek employment, the parent's actual income will be used to calculate child support . . . On the other hand, if a parent's unemployment or underemployment is voluntary, due to a lack of effort to find a job, a motivation to evade child support, or passing up on potential business opportunities, the court will use the unemployed or

the argument goes: payor quits a higher paying job and accepts a lower paying job (if at all) for the single goal of reducing her income, thus reducing the amount of maintenance (or child support) based on the decreased salary, or evading her support obligation altogether.

This perspective, and the repercussions of this type of situation, is important when determining the level of the inequities facing payor and payee spouses during any Section 510(c) analysis.<sup>226</sup> However, the fact a payor spouse has the ability to quit an occupation and obtain one with a comparable base salary supports the idea that payors do not share the same risk when ordered to pay maintenance or other payment obligations. It is the payee, on the other hand, that *needs* financial support. The payee is not in a situation where they she makes too much money. The payee, by the very fact they areshe is the *payee*, cannot simply change jobs—it is likely she is not currently part of the labor force.<sup>227</sup> Instead, the payee finds herself in the precarious situation of either having her maintenance terminated or receiving a reduced maintenance amount when a payor successfully quits or retires from a previous job. A payor does not face these challenges. Setting aside the imputation argument, when a court incorrectly applies a Section 510(c) analysis, the payee is harmed.

Imagine a situation where a couple is married for over twenty-five years. The IMDMA allows a payee spouse to receive indefinite maintenance payments for a statutorily defined term of marriage.<sup>228</sup> This term is at least twenty years.<sup>229</sup> The amount of maintenance is determined based on the net income of the parties with a focus on the needs of the payee spouse.<sup>230</sup> Therefore, a payee spouse may be awarded, for example, in excess of \$5,000 a month indefinitely. This source of income may be the only reliable financial means to the payee spouse, while the payor spouse is still currently receiving income from employment.

This is in stark contrast to the payee spouse that sacrificed obtaining marketable skills during the marriage and is therefore unlikely to be

---

underemployed parent's potential income to calculate child support, rather than his or her actual income.”).

226. IL H.R. Tran. 2001 Reg. Sess. No. 64. (Statement of Rep. Hamos: “[I]t could be a firefighter, let’s say, who had to pay maintenance. He has an injury on the job. He is now disabled. He can’t, you know, he’s living on disability. He no longer has the same income he had before. He would be able to come in, show a substantial change in circumstances and point to that as one of the factors.”).

227. See Part II.F and accompanying notes and text.

228. 750 ILL. COMP. STAT. 5/504(b-1)(1)(B); see also Part II and accompanying notes and text.

229. 5/504(b-1)(1)(B); see also Part II and accompanying notes and text.

230. 5/504(b-1)(1)(A).

able to join the labor force after twenty or more years of static marital duties.<sup>231</sup> Furthermore, when the payor spouse suspects the payee spouse is cohabiting, she has the financial capabilities to hire private investigators to gather evidence that cohabitation exists.<sup>232</sup> As the case law illustrates, Illinois courts are willing to terminate a payee spouse's maintenance based on the existence of her spending time with a post-divorce partner under the guise that the payee spouse is double pocketing income. Therefore, the payee spouse is left empty-handed after dedicating twenty or more years in the marriage. Is this equitable? The answer is "no." The inquiry in Illinois when courts undertake a Section 510(c) analysis should solely be the change of financial positions of the payee and payor. A payee normally provides financial statements to refute claims of cohabitation by showing she is not receiving "double income" from the payor and post-divorce partner. A payor that is also trying to modify her maintenance payments based on a substantial change in circumstances already has to support their modification claim with financial documentation. Why then, would it be so difficult to solely base a cohabitation inquiry on the financial aspects of the payee or payor? Do the courts truly need to know whether a payee is vacationing or enjoying "too many" nights out dining with someone? Indeed, basing a Section 510(c) analysis solely on the financial aspects of the payee and payor spouse would eliminate the unsavory task of digging through the most intimate details of the parties' lives and prevent the courts from being bogged down by this process—the policy expressly articulated in *Brewer*.

---

231. See also IL H.R. Tran. 2001 Reg. Sess. No. 64. (Statement of Rep. Hamos: "[I]f there is a 30-year marriage and the woman has been a homemaker during that entire period and has very few skills with which she is able to go out and get a job, that is, in fact, the most typical situation in which maintenance is still awarded.").

232. See, e.g., *Cohabitation Investigation*, ICS (Feb. 20, 2013), [https://www.icsworld.com/Private\\_Investigation\\_Case\\_Types/Cohabitation\\_Investigation.aspx](https://www.icsworld.com/Private_Investigation_Case_Types/Cohabitation_Investigation.aspx) (last visited May 16 June 17, 2021) (international private investigation services provider offering the following for cohabitation investigation: "Asset Investigation, Property Inventory, Conflict of Activity, Cohabitation Reports, Background Investigations, Polygraph Examination Lie Detection, Semen Testing, Bodily Fluid Testing, DNA for Hair and Skin, Covert Pregnancy Testing - Paternity Investigations, Surface Drug Testing, Surveillance, Photos of Unknown Subjects, Communications Activity, Computer Usage, Internet Usage, Email Tracing, Identity Verification, Covert and Undercover Assignments . . ."); *Alimony Termination In The Event of Cohabitation*, HERITAGE INVESTIGATIONS & SURVEILLANCE, <http://privateinvestigatorchicago.com/2012/alimony-elimination/> (last visited May 16 June 17, 2021) ("Our private investigators are trained to gather the facts and look for evidence one step at a time . . . Demonstrate the major components of cohabitation including; spending nights together, sharing keys to house or garage door opener, shopping together, attending family functions together, etc.").

### 1. *Gray Divorcees Undergo Severe Financial Hardship Upon Maintenance Termination*

The inequity undergone by payee spouses is heightened when focusing on the financial repercussions of gray divorcees whose maintenance is terminated. Individuals aged fifty and older who divorce are less financially stable.<sup>233</sup> Gray divorced women, in particular, “are the most economically disadvantaged group” and are likely to live in poverty since the Social Security benefits they receive are insufficient to offset their financial hardships.<sup>234</sup> Additionally, if courts terminate maintenance payments, gray divorcees will undergo grave financial hardship due to their financial incapability to plan or to afford long-term care, such as nursing facilities, and will experience difficulty when establishing an estate plan.<sup>235</sup>

Particularly for gray divorcees, cohabitation in later life has its benefits, such as not living alone and pooling humble resources when necessary.<sup>236</sup> Unlike marriage, couples that cohabit are not liable for each other’s medical expenses and do not have any rightful claims to each other’s financial assets. Furthermore, cohabiters do not have to worry about securing the transfer of their assets to their kin, and they can remain financially autonomous. Likewise, they can receive Social Security and pension benefits that would otherwise terminate upon remarriage. For gray divorcees, the fear of forgoing maintenance payments will prevent older individuals from entering into post-divorce relationships. Considering that the baby boomer generation accounts for about seventy-two million Americans and the divorce rates amongst this age group continue to rise as the stigma of divorce lessens, the execution of Section 510(c) will negatively affect the social, physical, and economic well-being of our elders.<sup>237</sup> Can we afford to stand idly by while our older generation lives and dies alone for fear

---

233. Lin et al., *supra* note 38, at 91. And many fail to comprehend the meaning of “pleadings.”  
234. *Id.* at 106.

235. See Neale Godfrey, *Show Me the Money: How to Protect Yourself in Gray Divorce*, KIPLINGER (Sept. 10, 2019), <https://www.kiplinger.com/article/retirement/T065-C032-S014-show-me-the-money-protect-yourself-in-gray-divorce.html>; Brent Bohan, *Gray Divorce*, MCKINLEY IRVIN, <https://www.mckinleyirvin.com/resources/gray-divorce/> (last visited May 16 June 17, 2021); Scott Hanson, *The True Cost of Gray Divorce*, KIPLINGER (Sept. 25, 2017), <https://www.kiplinger.com/article/retirement/T065-C032-S014-the-true-cost-of-gray-divorce.html>; *Special Considerations for Gray Divorces*, HG.ORG, <https://www.hg.org/legal-articles/special-considerations-for-gray-divorces-37438> (last visited May 16 June 17, 2021).

236. Paula Span, *More Older Couples Are ‘Shacking Up’*, N.Y. TIMES (May 8, 2017), <https://www.nytimes.com/2017/05/08/health/older-americans-unmarried-couples.html>.

237. Richard Fry, *Millennials overtake Baby Boomers as America’s largest generation*, PEW RES. CTR. (Apr. 28, 2020), <https://www.pewresearch.org/fact-tank/2018/03/01/millennials-overtake-baby-boomers/>.

of falling into poverty? Notably, men and women these days aged 65 are expected to live, on average, until 84.0 and 86.5, respectively.<sup>238</sup> With high numbers of people getting divorced around age fifty, there is roughly thirty-four to thirty-six years of potential solitude to account for.

Importantly, an incorrect application of the *Herrin/Snow* factor test will result in termination of a gray divorcee's maintenance. Since the percentage of divorcing individuals aged fifty and older continues to increase, this in turn creates a substantial risk for future poverty rates to increase amongst this age group. Further, although age discrimination in the workplace is illegal, older women and men are less desirable from a hiring standpoint. Thus, in addition to the years of forgone education and obtaining marketable skills, gray divorcees are at bat against numerous factors that impede the likelihood of new future income.

Also, with Social Security drying up, there are arguably far fewer financial resources available for older individuals who divorce and are thus left empty-handed. Not only are gray divorcees unable to cohabit for fear of maintenance termination; they are also adjusting to a post-divorce life that consists of a thinning social circle as divorce forces friends and family members to choose a side. These individuals are also dealing with a shrinking social circle as the passing of time naturally leaves individuals in solitude. Divorce amongst this age group has also been shown to negatively impact individuals' mental stability. Thus, though it might be obvious, an older individual that divorces and cohabits with a partner shortly thereafter stands to receive the natural benefits of companionship, assuming she is not solely after another's financial accomplishments.

Considering that gray payee spouses already undergo devastating economic disadvantages after marital dissolution, courts' misapplication of the *de facto* marriage test will likely cause further severe economic hardships.<sup>239</sup> These payments are often the only reliable source of income for some payee spouses,<sup>240</sup> and for gray payee spouses,

238. *Retirement Benefits*, SOC. SEC. ADMIN. <https://www.ssa.gov/benefits/retirement/planner/otherthings.html?tl=1> (last visited May 16 June 17, 2021).

239. Lin et al., *supra* note 38, at 90; *see also id.* at 105 (“[I]t is gray divorced women who are left behind when a marital dissolution occurs in late life. Divorce timing matters for women: Early divorced women enjoy a 30% lower poverty rate than gray divorced women. Either early divorce is less financially devastating than gray divorce or early divorced women are able to recoup divorce-related financial losses over time.”).

240. *How Gray Divorce Affects Spousal Maintenance*, CALABRESE ASSOCIATES (Aug. 14, 2020), <https://www.dupagefamilylaw.com/naperville-attorney/how-gray-divorce-affects-spousal-maintenance> (last visited May 16 June 17, 2021).

maintenance payments help offset the economic disadvantages caused during and after the marriage.<sup>241</sup>

## 2. *Cohabitation Agreements are Not Remedies for Section 510(c) Termination*

Recent Illinois decisions have shown that pre- and post-nuptial agreements are not ironclad.<sup>242</sup> Courts have refrained from enforcing these agreements between divorcing parties when they unfairly represent the needs of the parties.<sup>243</sup> Though these agreements may have provided some financial means to the payee that might offset future termination of maintenance payments, it is not enough to rely on them, especially when pre-nuptial agreements are executed twenty years prior to a dissolution proceeding. During those twenty years, the parties' financial positions change, for better or worse. Therefore, more focus is given to the financial status during the time of dissolution proceedings (in other words, a snapshot is taken on the day the judgment for dissolution of marriage is entered),<sup>244</sup> and courts confound this idea when they terminate maintenance in situations where less than one year has passed since dissolution and the payee's needs have not changed. The defining line for these courts, however, is whether the payee spouse is in a *de facto* marriage post-divorce—a principle which directly contradicts Illinois policy.<sup>245</sup> This policy is explored in the following section.

Additionally, sometimes a party might agree on adding a provision in the parties' MSA that states "*cohabitation will not be a terminating event.*"<sup>246</sup> Depending on the parties themselves, this might be a possible solution. However, and though it might be too obvious to state, usually divorce involves animosity between the parties. Thus, if a future payor reads a similar provision in their MSA, naturally he or she might be taken aback. Why would someone agree to pay maintenance

---

241. Lin et al., *supra* note 38, at 98 ("27% of gray divorce women [are] poor . . . [while] [j]ust 11% of gray divorce men are in poverty. Gray divorce women are much more disadvantaged than other unmarried women. The percentage of gray divorce women living in poverty is higher than that for early divorce women (19%) . . ."); *see id.* at 105–06 ("Nearly all gray divorcées were married at least 10 years, meaning they are eligible for spousal benefits. Yet, the Social Security benefits received by gray divorced women are insufficient to keep them out of poverty. Gray divorced women are the most economically disadvantaged group . . .").

242. *See In re Marriage of Woodrum*, 115 N.E.3d 1021 (Ill. App. Ct. 2018); *In re Marriage of Kranzler*, 116 N.E.3d 346 (Ill. App. Ct. 2018).

243. *See Tang, supra* note 26, at 883–84; *Woodrum*, 115 N.E.3d at 1052; *Kranzler*, 116 N.E.3d at 366–67.

244. Financial Aspects of Divorce, Spring 2019, DePaul University College of Law.

245. *See* discussion *supra* Part III.B.

246. February Conversation with Professor Mario R. Ventrelli.

to someone who is *already* planning on entering into a post-dissolution relationship?<sup>247</sup> A payor is most likely not going to agree with the idea of giving *any* money to the payee, even if that money is not going to support the post-dissolution relationship.

*B. Terminating Maintenance Payments under Section 510(c) Defies Illinois Policy*

*1. Section 510(c) Perpetuates Financial Dependence and Ignores the Payee Spouse's Standard of Living*

The role maintenance plays in Illinois is undercut by the operation of Section 510(c). Though maintenance payments are not presumed as a cure-all, or even required to provide the payee spouse sufficient funds to exact an equal standard of living after marital dissolution, terminating maintenance for the wrong reasons contravenes the policy behind awarding maintenance in the first place. The 2003 amendments to the IMDMA added various factors for a court to determine whether an order for maintenance may be modified or terminated.<sup>248</sup> The proponent of the bill, Illinois State Representative Julie E. Hamos stated during House floor debates that “Maintenance is intended to help rehabilitate an ex[-]spouse . . . and is also intended to create the same lifestyle to which that spouse had become accustomed . . .”<sup>249</sup>

Courts have terminated maintenance even after they acknowledged that the payee spouse was not financially independent and not enjoying the same or similar standard of living.<sup>250</sup> Courts, however, are apt to find maintenance termination is proper when a payee spouse is commingling funds or is obtaining financial support from her partner.<sup>251</sup> A payee spouse’s financial independence, for the court’s purposes, does not mean *independence* per se. For the courts, it is enough to terminate maintenance under circumstances where the payee spouse is receiving financial support *independent of the payor spouse*. This practice breeds dependence. Upon termination of maintenance payments, a payee spouse is then incentivized to sponge off their partner.

---

247. *Id.*

248. Pub. Act 93-353, S. 363 (amending 750 ILL. COMP. STAT. 5/510) (2003) (modification or termination of a maintenance order may only be changed upon a substantial change in circumstances). S.B. 117-92, Reg. Sess. No. 64 (2001) is the same bill (later S.B. 363) that was passed in the Senate and subsequently introduced during the 2003 House floor debate before ultimately passing. IL H.R. Tran. 2001 Reg. Sess. No. 64.

249. IL H.R. Tran. 2001 Reg. Sess. No. 64 (Statement by Rep. Hamos).

250. Tang, *supra* note 26, at 860.

251. *Id.* at 860 n.136, 868.

On the flip side, it is not the same *dependence* for a payee spouse to receive payments from a payor spouse she had been married to. Oftentimes, one partner—the breadwinner—remains in the workforce, while the other—the homemaker—stays at home and performs household duties and childrearing tasks.<sup>252</sup> This situation is not the same as a payee spouse dating a post-divorce partner for a few months, vacationing together, eating meals together, and so forth. The former accounts for the time, energy, and sacrifice that the latter feigns to convey. Therefore, the payee spouse, without reliable income in the form of maintenance payments from the payor, is economically disadvantaged and judicially encouraged to seek financial stability from a post-divorce partner. The policy behind maintenance is to aid spouses to get back on their feet post-divorce—not saddle up the next partner.

## 2. *Section 510(c) Contradicts Illinois Policy Against Litigating Over Intimate Details of Parties' Relationships*

The policy articulated in *Brewer v. Blumenthal* that courts should not be overtaken by the minute, intimate details of dating relationships is also threatened by the Section 510(c) analysis.<sup>253</sup> The inquiry to find whether cohabitation exists is whether a couple's relationship rises to the level of a *de facto* marriage. Courts implementing the *de facto* marriage test ultimately hear and weigh evidence on the length of relationships post-divorce, the amount of time the couple spends together, the nature of activities they engage in, the interrelation of their personal affairs, vacations and holiday plans spent together, and

---

252. See Aliya Hamid Rao, *Even Breadwinning Wives Don't Get Equality at Home*, THE ATLANTIC (May 12, 2019), <https://www.theatlantic.com/family/archive/2019/05/breadwinning-wives-gender-inequality/589237/>; see also Kim Parker & Renee Stepler, *Americans see men as the financial providers, even as women's contributions grow*, tbl.1, PEW RES. CTR. (Sept. 20, 2017), <https://www.pewresearch.org/fact-tank/2017/09/20/americans-see-men-as-the-financial-providers-even-as-womens-contributions-grow/>.

253. See *Blumenthal v. Brewer*, 69 N.E.3d 834 (Ill. 2016) (affirming the decision in *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) that “effectuate[d] the policy established by the legislature to prevent knowingly unmarried cohabitants from evading the statutory abolition of common-law marriage under [the IMDMA] . . .”); Ferrari, *supra* note 134, at 568 (noting the court in *Spafford v. Coats*, 455 N.E.2d 241, 242 (Ill. App. Ct. 1983) that affirmed public policy in *Hewitt*, stated: “[T]he real and underlying concern of the supreme court in *Hewitt* was that judicial recognition of mutual property rights between knowingly unmarried cohabitants—where the claim is based upon or intimately related to the cohabitation of the parties—would in effect grant to unmarried cohabitants substantially the same marital rights enjoyed by married persons, resurrect the doctrine of common law marriage, and contravene the public policy enunciated by the Illinois legislature to strengthen and preserve the integrity of marriage.”). One might question whether disincentivizing cohabitation through means of terminating maintenance prevents payee spouses and his or her post-divorce partner's relationship from rising to the level of marriage.

so forth. Additionally, the payor spouse will introduce evidence typically obtained by a private investigator. By researching public records, checking social media accounts, setting up surveillance, and even examining garbage, a private investigator may obtain evidence for a cohabitation case that includes video and photo evidence of the couples leaving and entering the residence if someone stays overnight, and photos from social media accounts of the couples spending holidays and vacations together.<sup>254</sup> This type of evidence forces parties to litigate over the intimate details of a post-divorce couple's relationship.

Since the payor spouse is the primary earner of the marriage pre-dissolution, she has the financial capabilities of hiring private investigators. The payee spouse, on the other hand, by the very fact they are the recipient spouse, does not have the same economic advantage. Therefore, it is unlikely that a payee spouse has the financial capability to determine whether the payor spouse is hiding income or obtains a higher paying job, or to determine any significant changes to the payor's financial position. Interestingly, a payee spouse would never need to hire a private investigator to determine the relationship status of the payor spouse. Payor spouses are free to date and re-marry without any legal ramifications, unlike the payee spouse.

Further, the *de facto* marriage test does not align with the public policy established in *Hewitt* and *Blumenthal*—this inquiry establishes the opposite. *Brewer* dealt with expressly prohibiting the recognition of common-law claims dependent on the parties' intimate relationship. However, Illinois courts are using the factors, recently articulated in *Brewer*, as a sword and shield for finding cohabitation.

While cohabiter litigants are shown the door if the court finds their claims are based on their marriage-like relationship, the same courts are terminating maintenance using the same or substantially similar factors for determining whether a *de facto* marriage exists. Through this analysis, Illinois courts galvanize the recognition of common-law marriage only to terminate payee spouse's maintenance payments under a *de facto* marriage test. Courts have expressly recognized the inconsistencies of this practice, yet they continue to do so.

---

254. *Terminating Alimony (Spousal Support) Due to Cohabitation*, GOODMAN L. FIRM (Jan. 30, 2019), <https://goodmandivorce.com/divorce/terminating-alimony-spousal-support-due-cohabitation/>.

C. *Maintenance Termination Under Section 510(c) Risks Turning Child Support Awards into Ersatz Maintenance*

Terminating maintenance payments to a payee spouse that is also receiving child support risks turning child support payments into *ersatz* maintenance. Since maintenance payments are included in the parties' income for child support calculations,<sup>255</sup> it is presumed that the payee spouse will use the child support payments for the child only. However, there is no device or practice implemented by any courts in Illinois that monitor the payee spouse's use of child support payments. Therefore, upon the termination of a payee spouse's maintenance, it is likely that she will ameliorate financial strain by drawing funds from the child support pot. Under Section 510(c), the capriciousness of the courts' applications of the *de facto* test—and maintenance termination generally—severely undercuts the intended effect of the IMDMA's purpose of safeguarding child support awards.

Furthermore, once a payee's maintenance is terminated, she is then forced to go to court and file to increase her child support award.<sup>256</sup> Since her income becomes significantly lower upon her maintenance termination, the payor spouse might end up paying just as much to her anyway, except now the payee is improperly using child support for her direct personal use.

As previously stated, child support awards may be indirectly used by the custodial parent. For example, an obligee receiving \$8,500 per month in child support might use it to pay rent and keep the water running for that parent's benefit, but also for the benefit of the child. However, a court's incorrect application of the *de facto* test, resulting in maintenance termination under Section 510(c), can undercut the IMDMA's preventative measures for child support awards. For older couples, child support is not a typical issue since child support payments end upon emancipation, unless other factors, such as disability, are present. However, a shrewd matrimonial lawyer would recommend that assets should be transferred into an irrevocable trust (or other type of trust) naming the child or children as beneficiaries. This issue, however, is prevalent for payee spouses that are currently receiving child support.

---

255. 750 ILL. COMP. STAT. 5/505(a)(3)(A) (stating "'Gross income' includes maintenance treated as taxable income for federal income tax purposes to the payee and received pursuant to a court order in the pending proceedings or any other proceedings and shall be included in the payee's gross income for purposes of calculating the parent's child support obligation.").

256. See generally 5/510 (terminating or modifying maintenance, support, educational expenses, and property disposition).

D. *Menu of Solutions for Ameliorating the Repercussions of Section 510(c)*

For these reasons, the Illinois legislature must modify the IMDMA to abrogate a Section 510(c) maintenance termination when sought on a cohabitation basis. Alternatively, Section 510(c) should be modified to incorporate a provision where termination of maintenance based on cohabitation should be reviewable. This will offset economic hardships if a payee's maintenance payments are terminated under Section 510(c). Further, a provision under Section 510(c) should be carved out for individuals aged fifty and older who are getting divorced. The provision should provide for mandatory reviewable maintenance if termination is sought based on cohabitation. There is no risk here for due process or equal protection claims because receiving maintenance is not a fundamental right.

As an alternative to the Illinois legislature's intervention, the Illinois Supreme Court should eliminate the *Herrin/Snow* six-factor test and factors that focus on the intimate details of a dating relationship, and instead establish a test that requires a sole focus on a post-divorce couple's financial intertwinement. If a payor spouse seeks maintenance termination in a cohabitation case, the parties should be required to file an accounting with the court. This approach traces the financial aspects to a post-divorce couple's relationship without wasting time and money arguing whether a few vacations or dinners out together constitutes a committed relationship that rises to the level of a *de facto* marriage.

These changes will ameliorate the injustice of terminating someone's maintenance payments just because the court finds one or two aspects of their relationship might mirror that of a married couple's. However, this focus is misplaced. Vacationing amongst couples is too common. What is not common is when two people name each other as beneficiaries on a trust or buy a home and title it in joint tenancy. These factors are more suggestive of a change of financial circumstances.<sup>257</sup>

## IVII. IMPACT

### A. *Abrogating Section 510(c)'s Provision for Terminating Maintenance for Cohabiting*

If the provision for terminating maintenance for cohabiting under Section 510(c) is abrogated, then no inequity will follow when courts

---

257. See generally *In re Marriage of Weisbruch*, 710 N.E.2d 439 (Ill. App. Ct. 1999).

incorrectly apply the *Herrin/Snow* test. As illustrated by the survey of cases for finding cohabitation, Illinois courts have pinballed their applications of the factors. These factors mirror those found in virtually all dating relationships and they serve no purpose for finding whether a payee spouse's financial position has changed. Using the current factors, it is more likely a payee's maintenance will be terminated. If maintenance is the payee's only form of income, then this will cause financial hardship for the payee going forward. Additionally, if the payee spouse is also receiving child support, then by terminating her maintenance, the payee spouse will seek more in child support in order to use that as a source of income. There is no system in place in Illinois that monitors a parent's use of child support. Therefore, the risk of terminating maintenance under improper circumstances also increases the risk of turning child support into *ersatz* maintenance. These repercussions can be ameliorated if cohabitation is no longer grounds for terminating maintenance in Illinois.

The statute still provides other ways for the termination of a payor spouse's maintenance obligation: death by either party and remarriage by the payee spouse. Further, the parties are still afforded the ability to stipulate on other maintenance terminating events outlined in their MSA. Illinois' deeply rooted policy for marriage is likely served by eliminating the cohabitation means of maintenance termination.<sup>258</sup> If a couple is free to cohabit and spend time together in their relationship, a future marriage is more likely. If the payee spouse remarries, maintenance terminates regardless. The current Section 510(c) impedes future remarriage.

If Section 510(c)'s provision for terminating maintenance is abrogated, then the IMDMA's policy for awarding maintenance is better served. The policy for maintenance is to provide the payee spouse the financial means to become self-supporting or to ameliorate the payee's forgone marketable skills during the marriage. It is likely that a payee spouse cannot obtain meaningful employment post-dissolution for these reasons. A payee's post-dissolution relationship should not operate to terminate her maintenance. If a payee is living with her partner, then terminating her maintenance will first establish a financial dependence on the current partner and this dependence might increase, which can cause strain on the relationship. However, if Illinois aims to provide payee spouses a financial means to obtain future economic independence, then the focus should be on the payee's fi-

---

258. See generally *Obergefell v. Hodges*, 576 U.S. 644 (2015) (noting that the right to marry is deeply rooted in this Nation's history and tradition).

nancial situation. If cohabitation is no longer a way to terminate maintenance, then the payee will be able to cohabit with someone she may marry in the future, while receiving an income that can allow her to afford ordinary living expenses.

*B. Carving Out an Exception for Gray Divorcees Under Section 510(c)*

Alternatively, Section 510(c) should be amended to carve out an exception for individuals who are aged fifty and older. As data shows, individuals aged fifty and older are divorcing more frequently and there is no reason for this trend to slow or stop.<sup>259</sup> Cohabitation rates are likewise increasing, of which gray divorcees make up a significant portion. Research indicates that gray divorcees, as a group, experience economic disparity and hardship post-divorce, and they also undergo severe levels of depression.<sup>260</sup> Research has also indicated that gray divorcees that cohabit and enter into new relationships, which they are doing anyway, ameliorate their depression and slightly help their economic situations if they pool resources when necessary.<sup>261</sup>

However, the current Section 510(c) poses severe financial consequences on these gray divorcees. If they partner up with someone post-divorce, then their maintenance is likely going to be terminated. If they remain alone, they suffer from depression and difficulty with aging. For these reasons, an exception should be carved out for Section 510(c) that expressly requires maintenance to be reviewable if the payor is seeking termination for the payee's cohabiting. This would allow the court to review the parties' situations, and to determine whether an adjustment of maintenance is appropriate. Maintenance for gray divorcees should be allowed to be modified on a proportional basis. Carving out an exception for this age group does not pose constitutional issues because receiving maintenance is not a fundamental right. Further, preventing the automatic termination of the payee's maintenance allows to address future financial needs for long-term care expenses, such as nursing homes or medical expenses.

*C. Maintenance as Reviewable if Termination is Sought on Cohabitation Grounds*

If a payor is seeking to terminate maintenance on cohabitation grounds, then the court should not automatically terminate if cohabi-

---

259. See Part I.D and accompanying notes and text.

260. *Id.*

261. *Id.*

tation is determined. If the current *Herrin/Snow* factors remain in use, then finding cohabitation should only be the first step. The second step should be reviewing the award of maintenance and adjusting the award proportional to a financial change in the payee's circumstances. Modification of maintenance is already possible under the IMDMA; therefore, the same steps to modify an award of maintenance should be taken when termination is sought for cohabiting. This will prevent terminating maintenance when all aspects of the couple's relationship can be found to amount to cohabiting, but the financial needs of the spouse have not changed. If the payee is still living on maintenance as her only form of income, then it would better serve Illinois policy to require the parties to file an accounting with the court to show that she is not receiving double income from her ex-spouse and post-divorce partner. Likewise, this process will stave payor's attempt of maintenance termination for the sake of punishing the payee spouse for her cohabiting. If the payee shows that she is not financially supporting her partner or is not also receiving financial support from her new partner, then ordering a payor to continue paying maintenance is not inequitable—it supports the IMDMA's policy for both parties.

#### D. *Establishing a New Test for Finding Cohabitation*

An alternative to Illinois legislative action is for the Supreme Court of Illinois to weigh in on the inequities caused by the current test and establish a new set of factors for determining cohabitation. The current *Herrin/Snow* factors are too broad and can be applied too easily because virtually all relationships will involve the current factors in use. Instead, the courts should use a factor test that focuses solely on the financial positions of the payees. The factors could include, for example, whether the couple is sharing a joint checking or savings account; whether they own jointly own property; whether they have named each other as beneficiaries for life insurance, etc. These factors mirror those found in *Brewer* and *Weisbruch*. However, the test should not be to determine whether the couple is in a *de facto* marriage. The test should determine whether the payee's need for financial support has significantly changed. The *de facto* marriage-type relationship should not be the inquiry—it confounds Illinois' policy against common-law marriage.<sup>262</sup> Further, with financially centered factors, the courts will not be bogged down by litigating over intimate details of the payee's relationship. Instead, the courts will hear and weigh evidence regarding financial issues, a practice that is already

---

262. See Part I.F.1 and accompanying notes and text.

commonplace and necessary in domestic relations in Illinois. This will ultimately save the parties time and money and will better serve Illinois' judicial economy.

#### IV. CONCLUSION

Section 510(c) contravenes Illinois reasons for awarding maintenance in the first place. By terminating a payee's maintenance based on cohabitation, Illinois courts are encouraging financial dependence. Where older individuals' only stable financial income is in the form of maintenance payments, the Illinois legislature should carve out an exception under Section 510(c) that allows judges, if they find cohabitation, to instead make the maintenance obligations reviewable after some time when the parties can provide financial documentation that their circumstances have not changed.

Alternatively, the Illinois Supreme Court should determine that factors occurring in virtually all dating relationships are not the proper focus. Instead, courts should look at the financial intertwinement of the parties. This will ameliorate the inequities when a payee is merely engaged in a dating relationship, yet the court incorrectly finds a *de facto* marriage exists. Since the underpinnings of Illinois policy is to encourage marriage, legislative and judicial action must take place in order to address the realities of today in that people are increasingly cohabiting. With a significant increase in the numbers of divorced and cohabiting seniors, and with no indication of this trend slowing, Illinois runs the serious risk of incorrectly terminating maintenance payments on a large scale with grievous consequences.

*Melanie B. Eck*‡

---

‡ Melanie B. Eck, J.D., DePaul University College of Law, 2020; Executive Editor of Volume 69 of the DEPAUL LAW REVIEW; B.A., English, University of Illinois Urbana-Champaign, 2014; proud member of the National Investigative Committee of Aerial Phenomenon. I owe many thanks to the editing teams of Volumes 69 and 70 of the DePaul Law Review, Professor Mario R. Ventrelli, Katlynn M. Dee, Quinn Melanie Fonger, and my family for their unwavering support and guidance.

