ILLINOIS STATE BAR ASSOCIATION

JUNE 2023 VOL 66 NO 12

Family Law

The newsletter of the Illinois State Bar Association's Section on Family Law

Chair's Column: My Swan Song

BY STEPHANIE L. TANG

When ISBA Past President Dennis Orsey first appointed me as secretary of the Family Law Section Council in 2020, I was a new mom to a five-month-old baby boy in my personal life, and an associate attorney hungry to prove myself in family law to my colleagues and clients in my professional life. In the past three years, my son turned three, I was promoted to partner of my firm, then made this crazy leap to leave the city I had called home for over 30 years to teach family law in Texas. And it really did feel crazy. I had worked tirelessly on hundreds of cases for years to build my reputation and make partner, to get on the CLE speaker circuit, to become a leader of organizations and nonprofit boards, and to attend so many networking events that my elevator pitch haunted me in my sleep. Why would I give that up to start all over again and land myself right back to being a "nobody" with the imposter syndrome I was just starting to overcome?

Continued on next page

How 'Resident, Continuing, and Conjugal' Must It Be?

BY RON A. COHEN

750 ILCS 5/510(c) terminates the obligation to pay future maintenance "if the party receiving maintenance cohabits with another person on a resident, continuing, conjugal basis."

By cohabitating, are you really married even though you didn't even know it? Should Illinois recognize common law marriage so that we may put an end to the ongoing murk surrounding the question of cohabitation? What type of relationship is it? Does it make a difference how money gets handled?

Some of the factors to be considered are:

How long have the parties been together? One night. One month. One year. Five years. See *In Re Marriage of Sunday354 Ill. App. 3d 184 (2d Distr. 2004).* Need the new relationship be a "substitute" for the prior marital relationship? Isn't it really about the intention of the parties? Does it require the intention of both

Continued on page 3

Chair's Column: My Swan Song

CONTINUED FROM PAGE 1

I would be lying if I said there haven't been days when doubts about this seemingly crazy decision crept their way back in my head over this past year. The split of identities and feeling like an imposter in both has weighed heavily on me at times. "Not academic enough" to be an "academic" but no longer feeling like I fit in private practice.

I start my last column with all this emotion not to garner sympathy or pity, but to help others realize it is ok not to be ok, especially early on in your career or during times of transition. A year later, I'm still struggling with imposter syndrome, and I don't think that will ever completely go away. But there are 3 pieces of advice I hope to pass onto younger attorneys or those contemplating a career pivot that have helped dispel my doubts during this transition:

1. *Be kind to yourself.* I had such high expectations for myself going into teaching my first course. I didn't want to make any mistakes, was terrified of correcting students, and didn't want to admit when I didn't know the answer to a student's question. Every time any of those things happened, the imposter syndrome and panic kicked in. But I took a step back and started owning one small accomplishment at a time, even if it was something as minor as writing and teaching one lesson plan. I took a page out of my private practice book and started a "happy e-mails" folder where I filter kind e-mails from students to read when I need that extra boost of confidence.
2. *Own your value.* Value is not solely defined by how much revenue you generate or how others view you. You also have to believe in yourself. Don't wait for others to validate your work and spend each day waiting for external validation. Don't sit around passively and hope you'll be handed a job, a raise, or a promotion if you never ask for one. You'll find that after a while, you're solely performing actions in hopes of being recognized without building your inner confidence and fighting for yourself. Know what you're worth and fight for what you deserve.
3. *Find a mentor and remember to thank them.* I wouldn't have any of the confidence I have today if it weren't for my mentors who have helped me along the way. I found out it's okay to admit what I don't know, and my mentors have helped me grow and not just become better at my jobs, but become a better person and advocate as well.

On that final note, onto my traditional "final chair column thank yous":

There are so many incredible mentors I want to thank for helping me who I never got the chance to thank in person before I left practice, but I'll focus on the ones who were there from the very beginning:

- To Justice Debra Walker, Judge Holly Clemons, Pam Kuzniar, Sally Kolb, Tom Field, John Kay, Olga Allen, Eva Kogut, Bryan Wilson, and Nancy Chausow Shafer: Thank you for taking a chance on me when I was a helpless law student/baby attorney, for actually responding to one of the hundreds of letters and e-mails I sent to seemingly every family law attorney in Chicago, for providing me opportunities to write articles and speak at CLEs as the youngest attorney on a panel of much more qualified experts, and for showing me by example what exceptional advocacy, kindness, and professionalism looks like.
- To the 65 attorneys and judges of the 2022-2023 Family Law Section Council: Thank you for trusting me to be your chair through drafting and debating dozens of legislative bills and proposed Supreme Court Rules, planning multiple full-day

Family Law

This is the newsletter of the ISBA's Section on Family Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are $30 per year. To subscribe, visit www.isba.org/sections or call 217-525-1760.

OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
Matthew A. Kirsh
Sally K. Kolb

PUBLICATIONS MANAGER
Sara Anderson
sanderson@isba.org

CLEs in Chicago and New Orleans, reporting case law updates, preparing the quadrennial report, creating the Family Law Toolkit, and writing uniform state forms. Family Law became the largest section council this year and I'm so proud of what our manpower achieved.

- To the 27 subcommittee chairs I coerced into serving this year: Thank you for being an integral part of our section council's success, for answering my late-night emails, and for all of your hard work.
- To our *ex officio,* Susan Rogaliner: Thank you for teaching me all of your tricks for wrangling the chaos of the big egos—**cough** loveable personalities—of the group.
- To our incoming chair and vice chair, Wes Gozia and Jessica Patchik: Thank you for our group text, for encouraging me to stay on as chair from over a thousand miles away, and being the best right-hand mates I could ask for.
- Looking to the future, thank you to all the Texas attorneys and judges who have taken time out of their busy schedules to provide me with resources, guest lecture for my classes, and offer invaluable advice to my students.
- To the amazing Baylor Law faculty, especially Professors Jaeger, Kincaid, and Asbridge: Thank you for being the best support system and for the immense amount of time you've taken to help me this past year.
- To the law students who had me as a professor in my first year of teaching: Thank you all for the grace you've shown me as I've stumbled my way through my courses. I am sorry that at times, I was not the professor you deserved, but I promise you I will keep trying to learn, develop new teaching techniques, and to grow from your feedback to become the best professor I can be for Baylor.
- Most importantly, to my husband, Mark, and son, Connor: You are my past, present, and future, and your love is what fuels me forward every day. Thank you for everything. ■

How 'Resident, Continuing, and Conjugal' Must It Be?

CONTINUED FROM PAGE 1

parties or only the intention of one party?

How long have the parties been together? Are they leading separate lives under the same roof? Have they blended all of their stuff and their family relationships with each other?

What do they do together? Do they have breakfast and dinner together? Do they share their favorite foods? Who pays for dinner out on Saturday nights? Do they split the tab? Do they throw their dirty laundry into the same bin?

Do they commingle their personal affairs? Ah! Commingling.

How about vacations? Who pays? Separate rooms?

Holidays? Are the families commingled?

Finances? Economics? Who is named in the will? What about retirement plans? Who is the beneficiary of the life insurance policy?

Hopefully, I have asked more questions than I have answered.

Many of these questions are answered by *In Re Marriage of Thornton 373 Ill. App 3d 200 (3d Dist. 2007)*. Many of these questions are not. See *In Re Marriage of Miller 2015 IL App (2d) 140530.* Is the factor analysis used in Thornton really enough? Is an intimate dating relationship different from a common law marriage? Must each and every factor in *Thornton* rise to the level of a marital relationship? I paid last time, it's your turn. I did the dishes last night, it's your turn. I don't really want to spend time with your family versus I don't like spending time with your family. In the event of a disagreement, what are your options? Pick up your marbles and go home? Or, are you already home with nowhere else to go?

Is the existence of the *Thornton* factors sufficient or must they be significant? Significance. Weight. Depth. Seriousness. Emotional commitment. Intended permanence. The intention of both parties or only one. What if the maintenance recipient does not possess the intention but the other person does?

What about coitus? Must the parties actually engage? Not necessarily. See *In Re Marriage of Sappington 106 Ill. 2d 456.*

What if the maintenance recipient really needs the money? What if the maintenance recipient really needs the money to support the other person? See *Bramson v. Bramson 83 Ill. App. 3d 657 (1st Distr. 1980).* The relationship needs to be "continual." What if the relationship is on again, off again? Can you stack? Should need be a factor? Not according to many courts. See *In Re Marriage of Susan 367 Ill. App. 3d 926 (2d Distr. 2006).*

Fact specificity is paramount in termination cases. Some courts such as *Susan,* only look at cohabitation (whatever that is). Other courts look at the totality of the circumstances. See *In Re Marriage of Herrin 262 Ill. App. 3d 573 (4th Distr. 1994)*. It seems to me that the totality of the circumstances is more equitable. For example. What if three people are living together. Does the third person sever the cohabitation?

Conclusion

"No two relationships are alike and no two cases are alike when it comes to cohabitation." I*n Re Marriage of Churchill. 2022 Il App (3d) 210026.*

As articulated by the court in *In Re Marriage of Aspan 2021 IL App (3d) 190144,* to determine whether there is a de facto husband and wife relationship, use of the 6-factor test set forth in *In Re Marriage of Herrin 262 Ill. App. 3d 573 (4th Distr. 1994)* would be a good place to start. ■

In re Marriage of Bostrom: Is It Something or Nothing?

BY HON. ARNOLD F. BLOCKMAN (RET.)

In *In re Marriage of Bostrom*, 2022 IL App (1st) 200967, on January 25, 2023, leave to app. den., the parties in 2012 entered into a marital settlement agreement requiring Husband to pay permanent maintenance of $1,750 per month. The parties were married in 1985 and had four children. At the time of the dissolution there was one minor child, two children in college, and a 23-year-old child not in college. As part of the property settlement, the wife also received one-half of the marital portion of husband's Illinois Municipal Retirement Fund (IMRF) pension when he retired. In 2018 the husband filed a petition to modify seeking to terminate maintenance alleging as a substantial change of circumstances that he had retired and that wife's income had increased, both from her employment income and from what she was receiving from his pension. The trial court conducted a hearing on the petition to modify. At the hearing the husband was 63 years of age and had retired in May of 2018. The wife was 59 years old at the time of the hearing, and her employment income as a teacher increased from $65,000 per year at the time of dissolution to $100,000. She also had been receiving, upon her husband's retirement, $4,209 per month for her share of husband's pension for a total annual income of approximately $150,000 per year. Wife had not remarried. The husband had remarried in 2013, and his new wife had inherited $750,000, part of which was used as a down payment on a $575,000 house he purchased with his new wife. In addition, the wife placed $550,000 of the inherited money into a joint investment account with him, which was used to pay a number of miscellaneous expenses including a boat, a snowmobile, and a timeshare in Florida. At the time of the hearing the balance in the joint investment account was $470,000. His new wife was also employed full-time. The trial court found a substantial change of circumstances based on her increase in employment income and her income from his pension, but refused to terminate maintenance, reducing the monthly award to zero, because "Sandra's circumstances could change in the future." ¶ 30.

The appellate court majority opinion found error in the trial court considering the pension income as a substantial change since the pension income was part of her original property settlement, but found that her increased employment income alone was a substantial change. The opinion also found there was no abuse of discretion in reducing the maintenance award to zero because the original award she received was contemplated by the MSA and was designed solely to supplement her marital income to continue her marital lifestyle, so the trial court was correct in focusing only on her marital lifestyle needs and not on husband's increased assets because of his remarriage and his wife's inheritance. The dissent agreed with the majority analysis of the substantial change based solely on her increased employment income, but found the trial court abused its discretion in reducing the award to zero because the trial court did not consider the husband's present income and asset situation, including his access to and use of the wife's $750,000 inheritance. The dissent would have reversed and remanded the case to the trial court to reexamine its zero maintenance modification in light of both parties income and assets.

The case presents an interesting question of whether it is something or nothing as far as its value as precedent for a practitioner involved in a modification case. In order to reach a conclusion, two aspects of the opinion need to be closely analyzed. The first danger involves the majority opinion's contemplation analysis. The majority opinion is infused with the concept that a substantial change "must not have been contemplated when permanent maintenance was ordered" citing *In re Marriage of Bernay*, 2017 IL App (2d) 106583. ¶ 42. The opinion goes on to state that, "The type of maintenance contemplated by the MSA in this case, was clearly designed to supplement Sandra's employment income so that she could continue her marital lifestyle." ¶56. *Bernay*, supra, held that a modification proceeding was properly dismissed because husband's retirement was contemplated in the original award. The problem is that *Bernay* and the entire contemplation defense is no longer good law in light of the recent amendment to section 510(a-5), effective May 13, 2022, abolishing the entire contemplation defense in modification cases, except in certain limited circumstances not present here. The new amendment was brought to the attention of the court, but the majority opinion simply did not address the issue. The entire contemplation analysis that the maintenance award was contemplated solely to supplement her marital lifestyle is clearly contrary to the present language of section 510(a-5). It is the writer's opinion that the use of this opinion to support a contemplation defense in a modification case would clearly not be a good idea and would be contrary to the now clear reading of the amended section.

The majority opinion also pointed to nothing in the record justifying its conclusion that the "purpose" of the original maintenance order was to supplement wife's income for lifestyle or needs purposes. Indeed, nothing in the record existed as to why the parties agreed to a permanent maintenance award. The concept was simply speculated upon by the court to elevate the so-called "lifestyle needs issue" before everything else, including, as noted below, properly adjudicating and considering all assets and income of both parties.

The same argument can be made in

regard to the majority opinion's analysis affirming the trial court's zero modification of maintenance award for a number of reasons. First, section 510(a-5) is clear that once a substantial change has been found, the court must consider both the original factors for an award of maintenance under section 504(a) and the additional modification factors enumerated in section 510(c-5). Two of the factors to be considered under 510(c-5)(7) and (8) are the increase in income and property owned by both parties since the original order. Second, the reduction of the maintenance award to zero is at odds with common sense and the statute.

In *In re Marriage of Folley*, 2021 IL App (3d) 180427 the court recognized that when payors have sufficient income and assets to pay permanent maintenance after a long marriage with substantial homemaker contributions, as in this case, reducing the maintenance award to zero is an error. Third, a modification to zero is effectively an indefinite reservation of maintenance in contravention to a number of cases. *In re Marriage of Wojcik*, 362 Ill. App. 3d 144168 (2005); *In re Marriage of Bothe*, 309 Ill. App. 3d 352, 357 (1999) and *In re Marriage of Scafuri*, 203 Ill. App. 3d 385, 396 (1990). Fourth, it creates an unfair evidentiary burden for the party whose maintenance award is reduced to zero because that party would be placed with the burden of proving a substantial change if, in fact, his or her circumstances change. Finally, section 504(a) is about the "entitlement to maintenance." Hence, if you are entitled to it, you get it. The paragraph says it also applies to modification proceedings under section 510 (a-5). That reference cannot mean that the judge in the modification proceeding can take a de novo look at whether the maintenance recipient is entitled to further maintenance under the current facts, notwithstanding in this case an agreement by the parties that she was entitled to "permanent" maintenance at the time of dissolution.

The conclusion is that *Bostrom* is only a little something and good precedent for the obvious proposition that the receipt of property or income awarded in an original judgment or MSA by a maintenance recipient is not a substantial change of circumstances. It is, however, clearly nothing and not appropriate precedent for arguing the contemplation defense in a modification proceeding or arguing on behalf of a zero maintenance award in a modification proceeding. The practitioner should be quite careful and limited in his or her use of this case with a clear understanding of the distorted reasoning of the court.

Special thanks to Michael DiDomenico, the attorney for the wife in this case, for his review of this paper and his helpful comments. His conclusion was that the Supreme Court should have granted leave to appeal, particularly to address the zero maintenance award issue since there is now a conflict between the first and third districts on the propriety of a zero maintenance award. ■