

No. 1-12-0028

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> MARRIAGE OF GERELYN PACIOLLA,)	Appeal from the
n/k/a GERELYN WOZNIAK,)	Circuit Court of
)	Cook County.
Petitioner-Appellee,)	
)	
and)	No. 06 D3 30794
)	
JACK PACIOLLA,)	Honorable
)	Samuel J. Betar,
Respondent-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Quinn and Connors concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court's order denying a finding of cohabitation and not terminating maintenance payments on that basis was against the manifest weight of the evidence. Reversed and remanded.
- ¶ 2 Respondent Jack Paciolla appeals from orders of the circuit court granting an extension of maintenance to his ex-wife, Gerelyn Paciolla (n/k/a Gerelyn Wozniak), and denying his motion to reconsider. On appeal, Paciolla contends that the trial court should have found that Wozniak had entered into a continuing conjugal relationship and terminated maintenance on that basis. He

further contends that the trial court improperly relied upon an unpublished order as precedent. For the reasons that follow, we reverse and remand.

¶ 3 Paciollo and Wozniak divorced in 2007. As part of the judgment for dissolution of marriage, Paciollo was to pay Wozniak maintenance of \$1,800 per month for 60 months starting from August 2006. The judgment specified that maintenance would terminate upon death of either party, Wozniak's remarriage, or "cohabitation by the Wife with another person on a resident continuing conjugal basis." Further, maintenance would terminate at the end of 60 months unless Wozniak filed a petition for continuation.

¶ 4 In April 2011, Wozniak filed a petition for continuation or extension of maintenance. Paciollo filed a response, asserting, among other things, that "Gerelyn currently has a significant other who helps support Gerelyn and accompanies her on vacations." In his response, Paciollo asked the court to deny Wozniak's petition and enter an order forever terminating his maintenance obligation.

¶ 5 Following a hearing, the trial court granted Wozniak's petition. In doing so, the court indicated that it had considered "all factors" under the two sections of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/101 *et seq.* (West 2010)) dealing with maintenance and with modification and termination of provisions for maintenance, as well as three Illinois Appellate Court cases, one of which was an unpublished Rule 23 order. The court found that Paciollo had proved five of six factors established in the case law for determining whether an ex-spouse is engaged in a continuing conjugal relationship with a third party, a circumstance that would warrant termination of maintenance. However, the court found that Paciollo had not proved that Wozniak's financial affairs were interrelated with those of Charles Cino.

¶ 6 Citing to the unpublished order, the trial court noted that "terminating maintenance based on cohabitation is meant to relieve the injustice from one ex-spouse receiving support from

another person while still receiving maintenance from their ex-spouse." The trial court stated that the legislative goal in providing maintenance is to attempt to have the recipient enjoy the standard of living he or she enjoyed during the marriage, and that the purpose of maintenance is economic parity. The trial court noted Wozniak's testimony that she was living hand to mouth, found that Paciolla had significantly more income than Wozniak, and concluded, "Here I found no interrelation of financial affairs between Gerelyn Wozniak and Charles Cino, and for that reason I am granting a continuation of maintenance and denying a finding of cohabitation." Paciolla filed a motion to reconsider, which was denied by the trial court.

¶ 7 On appeal, Paciolla contends that the trial court should have found, as a matter of law, that Wozniak entered into a continuing conjugal relationship and terminated maintenance on that basis. He asserts that our review should be *de novo* because the trial court erred in its application of existing law by failing, once it had found five of the six relevant factors to exist, to find that Wozniak cohabited with Cino. According to Paciolla's argument, the trial court improperly applied the legislative purpose for granting maintenance -- economic parity -- when it should have focused on the specific events that trigger termination of maintenance under the Act -- death, remarriage, or cohabitation.

¶ 8 As an initial matter, we address Wozniak's argument that because Paciolla did not file a petition for termination of maintenance in the trial court, he should have been barred from making such a request. It is true this court has held that maintenance may be terminated on the basis of a continuing conjugal cohabitation only upon the filing of a petition to terminate. *In re Marriage of Elenewski*, 357 Ill. App. 3d 504, 506 (2005). However, we have also held that where the trial court has initial jurisdiction to consider the issue of maintenance, as when one ex-spouse files a petition for maintenance, a resulting judgment addressing termination of maintenance is not void, but merely voidable. *In re Marriage of Thornton*, 373 Ill. App. 3d 200, 207-08 (2007). Here, Wozniak filed a petition for continuation or extension of maintenance.

Accordingly, the trial court had jurisdiction to consider any issues pertaining to maintenance, including its termination, and we may address the issue on appeal. *Thornton*, 373 Ill. App. 3d at 208.

¶ 9 Under section 510(c) of the Act, unless otherwise agreed by the parties, a maintenance award is terminated upon the death of either party, the recipient's remarriage, or "if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis." 750 ILCS 5/510(c) (West 2010). The rationale behind terminating maintenance based on cohabitation is to remedy the inequity created when the recipient of maintenance becomes involved in, but does not formalize, a husband-wife relationship, so that he or she can continue to receive maintenance from the ex-spouse. *In re Marriage of Sunday*, 354 Ill. App. 3d 184, 189 (2004).

¶ 10 A party seeking termination of maintenance based on the existence of a resident, continuing, conjugal relationship must show that his or her ex-spouse is involved in a *de facto* husband and wife relationship with a third party. *In re Marriage of Snow*, 322 Ill. App. 3d 953, 956 (2001). Courts will examine this issue by considering the totality of the circumstances, and in particular, the following factors: (1) the length of the relationship; (2) the amount of time the couple spends together; (3) the nature of activities engaged in; (4) the interrelation of their personal affairs; (5) whether they vacation together; and (6) whether they spend holidays together. *Snow*, 322 Ill. App. 3d at 956; *In re Marriage of Herrin*, 262 Ill. App. 3d 573, 577 (1994). On review, we give great deference to the trial court's factual findings. *Snow*, 322 Ill. App. 3d at 956. However, we will reverse a trial court's finding concerning the existence of a *de facto* relationship if the finding is contrary to the manifest weight of the evidence. *Snow*, 322 Ill. App. 3d at 956. A finding is against the manifest weight of the evidence where the opposite conclusion is clearly evident, or where the finding is unreasonable, arbitrary, and not based on any of the evidence. *In re Marriage of Nord*, 402 Ill. App. 3d 288, 294 (2010).

¶ 11 We find particularly instructive the decision in *In re Marriage of Susan*, 367 Ill. App. 3d 926 (2006). In *Susan*, as here, the only factor that weighed against a finding of a *de facto* marriage was the fourth factor, the interrelation of financial affairs. *Susan*, 367 Ill. App. 3d at 930. The recipient of maintenance in *Susan* argued on appeal that the fourth factor should be dispositive because maintenance is predicated upon a need for support, and thus, the most important question in deciding whether to terminate maintenance should be whether the new relationship materially affected the recipient's need for support. *Susan*, 367 Ill. App. 3d at 930.

¶ 12 While acknowledging that maintenance is predicated upon a need for support, the *Susan* court disagreed with the recipient's conclusion that this principle dictated that the need for support was a factor in determining whether a *de facto* marriage exists. *Susan*, 367 Ill. App. 3d at 930. Indeed, the court explicitly held that "need is simply irrelevant to the determination of whether a *de facto* marriage exists." *Susan*, 367 Ill. App. 3d at 937. The *Susan* court stressed that a finding of a *de facto* marriage rests on consideration of the six factors set out above, with no one factor controlling. *Susan*, 367 Ill. App. 3d at 930. The court explained that a distinction exists between consideration of the fourth factor, *i.e.*, interrelation of financial affairs, and consideration of a recipient's financial needs, as "[t]he import of the fourth factor is not whether the new *de facto* spouse financially supports the recipient, but rather whether their personal affairs, including financial matters, are commingled as those of a married couple would typically be." *Susan*, 367 Ill. App. 3d at 931. The court further explained that where the asserted ground for termination of maintenance is the existence of a *de facto* marriage, "the goal is not to determine whether the relationship leaves the recipient financially secure, but rather to determine whether the relationship leaves the recipient effectively married." *Susan*, 367 Ill. App. 3d at 931.

¶ 13 Here, as in *Susan*, all the factors, save for the fourth, supported a finding of a *de facto* marriage. The trial court granted continuation of maintenance due to the non-existence of the fourth factor, reasoning that the absence of this factor controlled because the purpose of

providing maintenance is to attempt to have the recipient enjoy the standard of living enjoyed during marriage, because Wozniak was "living hand to mouth," and because Paciolla had significantly more income than Wozniak. However, the trial court was mistaken in equating the fourth factor with a determination of financial need, as well as in giving that single factor dispositive weight. As explained in *Susan*, a recipient's financial need is irrelevant to determining whether a *de facto* marriage exists, and no one factor is controlling in making that determination. *Susan*, 367 Ill. App. 3d at 930, 937. Looking at the totality of the circumstances, in light of all six factors, the trial court's finding that there was no cohabitation is against the manifest weight of the evidence. The trial court's finding was not based on the evidence, but rather, on a well-meant but mistaken goal of economic parity between the parties. Moreover, given that there is no dispute that five of the six factors weigh in favor of finding a *de facto* marriage, that conclusion is clearly evident. Accordingly, we reverse the judgment of the trial court and remand for the trial court to determine when Wozniak began to cohabit with Cino and to terminate her payments as of that date. See *Snow*, 322 Ill. App. 3d at 957 (remanding for determination of date of commencement of cohabitation); *In re Marriage of Frasco*, 265 Ill. App. 3d 171, 179 (1994) (same).

¶ 14 Given our disposition, we need not address Paciolla's contention that the trial court erred by relying upon an unpublished order as legal precedent.

¶ 15 For the reasons explained above, we reverse the judgment of the circuit court of Cook County and remand with directions.

¶ 16 Reversed and remanded.