

NOTICE

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2016 IL App (4th) 150998-U

NO. 4-15-0998

FILED

August 30, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

In re: MARRIAGE OF)	Appeal from
CONNIE G. BLAIR,)	Circuit Court of
Petitioner-Appellee,)	Macon County
and)	No. 06D10
KENNETH D. BLAIR,)	
Respondent-Appellant.)	Honorable
)	Robert C. Bollinger,
)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* (1) By not raising the argument during trial, respondent, who filed a petition to terminate maintenance, forfeited his claim the trial court erroneously required proof of a "substantial change in circumstances."

(2) The trial court did not err in finding respondent's retirement was not a "substantial change of circumstances" sufficient to terminate maintenance.

(3) The trial court did not err in finding petitioner's relationship with another man was not a continuing, conjugal relationship.

¶ 2 In September 2015, the trial court denied the request of respondent, Kenneth D. Blair, to terminate his maintenance obligation to petitioner, Connie G. Blair. Kenneth appeals the decision, arguing the trial court erroneously (1) applied the statutory standard of a "substantial change in circumstances" (750 ILCS 5/510(a-5) (West 2014)) to his request to terminate maintenance instead of simply reexamining the maintenance award as the parties

stipulated when they divorced; (2) determined a substantial change of circumstances was not shown; and (3) determined Connie was not engaged in a continuing, conjugal relationship. We affirm.

¶ 3

I. BACKGROUND

¶ 4 After a 36-year marriage, the parties divorced in November 2006. At the time the dissolution order was entered, the parties had two emancipated children. Kenneth was ordered to pay Connie permanent maintenance, \$975 per month. The trial court ordered the following: "This maintenance is terminable upon statutory grounds and modifiable upon a change in circumstances."

¶ 5 While the dissolution of marriage proceedings were pending, the parties entered stipulations related to the maintenance award. One provided the following: "This maintenance is terminable upon statutory grounds and modifiable upon a change in circumstances. Further, the receipt of any monthly disability award or personal injury award would form the basis for a review of the maintenance award ***."

¶ 6 In May 2015, Kenneth filed a petition to terminate maintenance. In his petition, Kenneth asserted "there has been a substantial change in circumstances in that [Kenneth] has retired and is drawing Social Security benefits." Kenneth asserted he no longer had sufficient income to make the maintenance payments, and his retirement "constitutes a substantial change in circumstances justifying a modification in the order." We note Kenneth did not seek a reduction in his maintenance obligation, only the termination of that obligation.

¶ 7 Approximately two months later, Kenneth filed an amended petition to terminate maintenance. Kenneth reasserted his original claim and added a second count. In the new count,

Kenneth asserted "a substantial change in circumstances in that [Connie] has a continuing conjugal relationship with another person," Donald Wrisk.

¶ 8 At trial, in his opening statement, Kenneth's counsel stated Kenneth was no longer able to be gainfully employed and, because of his health, he is no longer able to maintain the income needed to pay Connie approximately \$975 per month. Kenneth asserted the \$975 maintenance was "terminable upon statutory grounds."

¶ 9 In his case in chief, Kenneth testified, at the time when the trial court ordered permanent maintenance, he was working full-time as a delivery driver at Lowe's. He delivered appliances, a physically taxing job. Kenneth decided to leave his position in August 2013. He suffered from blood-pressure issues that prevented him from passing the physical examination for his commercial driver's license (CDL). When he was 62 years old, Kenneth retired and began working part-time. Lowe's, however, did not work with Kenneth to keep him under a certain amount for the year, risking his Social Security benefits. Had Lowe's done so, Kenneth would have been able to work at that job until his next physical.

¶ 10 Regarding his health, Kenneth testified he was hospitalized in 2015, after he retired. He had "double pneumonia, bacterial pneumonia." During this hospitalization, Kenneth learned he had chronic obstructive pulmonary disease (COPD). Permanent damage resulted to Kenneth's lungs. Kenneth also had, for several years, suffered from high-blood pressure. He had three medications to treat his high-blood pressure. When he took the last physical for his CDL, Kenneth "just barely passed." He stated, "[I]t got to where I couldn't hardly pass the physical."

¶ 11 Kenneth testified he never missed a maintenance payment. He was asking the court for relief from the maintenance obligation so he could stay on Social Security and live on

it. Kenneth testified he began working in 1962.

¶ 12 Regarding his financial status, Kenneth stated he drove a 1997 truck with approximately 200,000 miles on it. Kenneth resided in "an out building." The living space, probably a 14-foot by 24-foot area, contained three rooms. The rest of the building was garage space for his truck. Kenneth used the money from the initial division of marital property on that building, approximately \$30,000 to \$35,000. Kenneth owed no money on the residence. Kenneth had no money to buy a used vehicle should his truck break down.

¶ 13 Kenneth testified he and Connie adopted their grandchild, C.B., after their son was adjudicated an unfit parent. The adoption was final in February 2013. C.B. resided with Connie and visited Kenneth on the weekends and once during the week. If Connie became "mad about anything," she would not let Kenneth see him for a period of time. Kenneth testified, when he turns 66, C.B.'s share of Kenneth's Social Security would increase to \$1,029 per month. Kenneth's early retirement triggered an increase in Connie's income, as the Social Security payments for C.B. increased by \$529 per month.

¶ 14 Kenneth's financial affidavit shows Kenneth had a monthly net income of \$1,738.98, from Social Security and a small pension. His monthly living expenses, which included \$125 in property taxes, totaled \$1,717.50. This amount did not include a monthly payment on his \$3,000 credit-card debt. Kenneth's assets included the outbuilding in which he lived, valued at \$1,400, a 1997 GMC Sonoma, \$2,000 in a checking account, and \$3,000 in cash.

¶ 15 On cross-examination, Kenneth acknowledged if maintenance was terminated he would have approximately \$1,000 each month income over his expenses, noting "[i]f I don't have any breakdowns." Kenneth stated to pay for "any breakdowns," he would have to use his Visa,

on which he owed about \$3,000. Kenneth testified the \$2,000 in his checking account was a result of the Social Security deposit. Kenneth stated that is the amount from which he will pay his monthly expenses. He had \$3,000 in cash but stated if he had paid off his Visa, he would be broke. When asked if he could buy a truck with that cash, Kenneth said, "probably get something worse than I got now."

¶ 16 Regarding his health, Connie's counsel asked, "[Y]ou've never actually failed a physical, right?" Kenneth responded as follows: "I—a—this last time I had to—I had to wait an hour to try to get my pressure down. And they finally went ahead and passed me. But then I can't remember if I—I just went ahead and a—I can't recall exactly. The last two times I took a physical I had to wait there an hour so to [to] get it below 140, my pressure. And my eyes were getting bad also." Kenneth acknowledged he did not fail, but he stated he didn't think he could have passed another one. He stated, instead of the usual two-year period for physicals, he had to take one every year due to his high blood pressure. Kenneth had a valid CDL, but he could not drive without passing a physical as his physical card expired.

¶ 17 Kenneth also gave this testimony about his health:

"Q. And do you smoke cigarettes?

A. No.

Q. Are you sure?

A. I have smoked; yes.

Q. Okay. How recently?

A. I got cigarettes at home, but I got the e-cigarettes and I do the Nicorette gum also.

Q. So, do you ever just smoke regular cigarettes?

A. Yeah, I have.

Q. Recently?

A. Yeah.

Q. When was the last time?

A. A—yesterday.

* * *

Q. Now, if you have COPD do you think it's a good idea to be smoking?

A. Yeah. But my stress level is so high it's no wonder I'm not drinking also. But, yeah, I'm not—and I haven't inhaled a cigarette. I know I sound like Bill Clinton, but I haven't inhaled a cigarette since I've even touched one since the hospital. Otherwise, I probably wouldn't be here."

¶ 18 According to Kenneth, he chose to take an early retirement at age 62 after working 50 years. The following questions and answers occurred:

"Q. And that was a voluntary decision on your part, right?

A. Yes. It was. That's enough as far as I'm concerned.

Q. Okay.

A. And I was tired of giving her all of my money anyway.

Q. So, part of the reason to take an early retirement [at] age 62 is 'cause you were just tired of giving Connie money anyway?

A. Not necessarily, but I have worked 50 years and that's enough. You know, I just wanted a few years of peace or try to get a few years of peace 'cause the last ten years have been nothing but, you know, crap. That's probably why my blood pressure is so high. And she keeps me from seeing the boy and everything else.

Q. Okay.

A. She uses him for a club."

¶ 19 Kenneth acknowledged he took a substantial reduction in his Social Security benefits to retire early. He left his part-time job because Lowe's was giving him too many hours and because of his health. Kenneth did not believe, given his blood pressure and his lungs, he'd be able to obtain part-time employment.

¶ 20 Regarding his living situation, Kenneth testified the outbuilding in which he lived was "a garage." Kenneth did not have a house payment, but he paid about \$1,600 each year in property taxes. Kenneth signed over the property to his daughter because "[s]he's going to get it anyway" and it was convenient. Kenneth paid the real-estate taxes because he was "not gonna stick her with it." He did not pay child support, stating there was no room for it, given he made \$12 an hour. Kenneth testified he would be happy to raise C.B. himself. He paid for school items, including clothing, for C.B. He also paid for "[a]nything to do with [C.B.'s] expenses [as] she makes me pay half." Except for one time, Kenneth paid for C.B.'s dental expenses.

¶ 21 Connie's financial affidavit establishes she had a monthly income of \$3,491.07. This included the \$975 she received in maintenance each month, as well as a \$225 pension that would end in July 2017. Connie's monthly expenses totaled \$3,491.16. These included \$600 for groceries, \$400 in credit-card payments, and \$150 for household maintenance and repairs. Connie's assets included her residence, valued at \$150,000, on which she owed about \$68,500, and a car, on which she owed approximately \$1,700. Connie also had credit-card debt exceeding \$13,000.

¶ 22 Connie testified Wrisk helped her purchase her home, a modular home with three bedrooms. In November 2008, Connie bought the home on a contract with Wrisk. The purchase price was \$95,000. Connie did not make a down payment. The terms included an interest rate of 3%. Later, the agreement was amended to zero interest. The contract also had provisions that if Connie or Wrisk died during the pendency of the contract, it would be considered paid in full. The home was new when she purchased it. It had a value of approximately \$150,000 in December 2010. Before moving into her home, Connie resided in an apartment. The apartment had two bedrooms and two bathrooms. Since C.B.'s birth, C.B. lived with Kenneth and Connie off and on. Since 2006, C.B. resided with Connie. Connie wanted to find somewhere other than the apartment to live with C.B. Connie attempted to borrow money for the house, but she was unsuccessful until Wrisk offered to help her.

¶ 23 Connie testified she began receiving Social Security disability in 2007. Connie got married when she was 15 years old. She earned her General Educational Development and took computer classes. She worked as a computer operator at St. Mary's Hospital. She also worked at Caterpillar, Firestone, and ADM. Her last job was at Walmart, in the claim's

department. Connie was unable to work at the time of her testimony.

¶ 24 Connie stated C.B. was 12 years old and in the seventh grade. His expenses increased as he aged. C.B. played basketball. Kenneth did not pay child support. They agreed to go "half and half" on C.B.'s expenses. Kenneth paid the dental bills but "stopped paying everything last year."

¶ 25 According to Connie, one of her pension payments would end in July 2017 because she had not paid much into it. Regarding her credit-card debt, Connie testified she used the credit cards for clothes and groceries, things for the house, and birthday and Christmas gifts for C.B. Connie shopped at Goodwill for herself.

¶ 26 Connie testified she missed only one payment to Wrisk, but she had later made that payment. Connie paid the real-estate taxes and insurance for her residence, as well as the utilities and upkeep. Wrisk did not jointly own the house. He resided 25 to 30 minutes away. They saw each other about every other weekend and "once in a while during the week." Connie went to Wrisk's house when C.B. was at Kenneth's. Wrisk occasionally went to Connie's house. Connie testified Wrisk would visit "once or twice a week" after work if she "baked a pie, or had him for dinner, or something like that." Typically, Wrisk did not spend the night. When Wrisk stayed over, Wrisk slept in Connie's bed and she slept on the couch. The two did not sleep together at her house.

¶ 27 According to Connie, she and Wrisk did not share a joint account. The two did not pool their money together for any reason. They owned no assets jointly. Connie did not keep clothing at Wrisk's house, and he kept nothing at her house. Because of Connie's religious beliefs, the two did not have a sexual relationship. Connie called the relationship one of

companionship. They had gone on three vacations. Twice they visited Wrisk's sister in San Antonio, Texas. The other time, they went to Wrisk's property in Colorado. Connie had known Wrisk since 2007.

¶ 28 Connie testified losing maintenance would be devastating. Maintenance provided for her and C.B.'s living expenses. Connie did not believe, without the maintenance payments, she could keep her house and C.B. could continue in the same lifestyle.

¶ 29 On cross-examination, Connie denied Wrisk spent money on landscaping. Connie testified she did the landscaping. Connie testified she had a six- or seven-room house, which had about 1,800 square feet of living space. There were televisions in each room, except for in C.B.'s bathroom. Connie had a 401k worth \$5,400. Kenneth was awarded half, but he did not take it. Connie said, "[h]e can get his [share] any time he wants it." Kenneth had told Connie to keep that money.

¶ 30 In closing argument, Kenneth argued his retirement was legitimate. After paying maintenance, Kenneth lived on \$750 per month. Kenneth, who had worked 50 years, believed he was entitled to retire. Kenneth argued relevant factors included age, health, motives, and the timing of the application for relief from maintenance. Kenneth emphasized he retired but did not seek to terminate maintenance until two years later. Maintenance, according to Kenneth, made him very poor. In contrast, Kenneth points to Connie's situation. Connie had \$3,500 in living expenses. She went on free vacations and created a list of expenses to make it look like she was broke. Connie was, essentially, given \$55,000 when Wrisk helped her buy her house. Kenneth, however, lives on \$7,000 per year. Kenneth has COPD and high blood pressure, legitimate reasons for not working.

¶ 31 In contrast, Connie emphasized Kenneth had not shown a substantial change in circumstances because he did not show what he was earning before he retired. Connie further argued it would be unfair to allow Kenneth to earn a windfall by walking off a job to buy his own peace.

¶ 32 In rebuttal, Kenneth emphasized Connie had 4.6 times more in expenses than Kenneth. Kenneth had no money and used credit cards to make ends meet. He argued "maintenance is terminable upon statutory grounds." Kenneth also argued the \$400 per month car payment and house payments and \$150 for repairs not being done are fluff. He further emphasized the extra \$529 Connie received for C.B. upon Kenneth's retirement.

¶ 33 In September 2015, the trial court denied Kenneth's request to terminate maintenance. The court found Kenneth "was quite evasive in his testimony on cross-examination." The court observed Kenneth's "answers were not entirely consistent" and Kenneth's demeanor and manner caused the court "to question [Kenneth's] overall credibility as a witness" and "his motive for terminating his employment and decision to take early retirement." In particular, the court emphasized Kenneth's statement "he had worked long enough and had put up with enough 'crap' and no longer wanted to keep paying [Connie] maintenance." Kenneth did not fail a physical and maintained his CDL, allowing him to work as a delivery driver. The court concluded Kenneth's decision to retire had more to do with his desire to stop paying Connie maintenance than with any health reasons. The court further emphasized Kenneth did not pursue alternate employment to replace his lost income and there was no evidence Kenneth had any medically imposed work restrictions. The court observed, if maintenance was terminated, Kenneth would receive approximately \$1,000 per month in income above living expenses.

Kenneth had a total of \$5,000 available to him. His credit-card debt was significantly less than Connie's. Kenneth had no mortgage or house payment. The trial court noted Kenneth labeled his living quarters as a "garage," but his residence included a kitchen, living area, bedroom, bathroom, and space for his vehicle.

¶ 34 As to his argument regarding conjugal cohabitation, the trial court found Kenneth failed to meet his burden of showing Connie was involved in a continuing, conjugal relationship. The court acknowledged Connie and Wrisk's relationship was lengthy, but it noted the two were not engaged. The court emphasized the two did not share a residence and did not keep personal property at the other's residence. The court found Connie credible and not evasive. The court concluded while some evidence supported a finding of a conjugal relationship, the evidence fell well short of establishing a *de facto* marriage.

¶ 35 Kenneth filed a motion to reconsider. In his motion, Kenneth emphasized the monthly increase of \$529 to Connie's income because of his decision to retire. Kenneth argued the trial court overlooked the fact that the "pay status" on Kenneth's pension began when he retired, giving Connie an additional \$186 per month she was not otherwise receiving. In addition, when considering these increases and adding the decrease of \$250 in Connie's monthly expenses since 2006, Connie's income had increased by \$965 since maintenance was ordered. Kenneth also questioned the trial court's credibility finding by pointing to the facts that showed Kenneth (1) did not seek relief from maintenance when he retired, but approximately two years later; (2) admitted smoking a cigarette the day before trial; (3) admitted to having \$3,000 cash on hand; and (4) admitted not failing a physical.

¶ 36 In response, Connie emphasized Kenneth raised new arguments and presented

evidence for the first time after the judgment. Connie further maintained the trial court's factual findings were not against the manifest weight of the evidence.

¶ 37 The trial court agreed with Connie, finding "[Kenneth] is attempting to raise new arguments with citation to additional facts not previously presented as evidence or argued during the hearing on the underlying petition." The court found no error in its determinations at trial and denied Kenneth's motion to reconsider.

¶ 38 This appeal followed.

¶ 39 II. ANALYSIS

¶ 40 A. Kenneth Forfeited the Claim He Need Not Prove a Substantial Change in Circumstances Before Maintenance Is Terminated.

¶ 41 Kenneth first argues the trial court erred in requiring proof of a substantial change of circumstances before it would rule in Kenneth's favor. Kenneth maintains the parties, by stipulation, agreed during the 2006 dissolution proceedings to the following: "The receipt of any monthly disability award or personal injury recovery would form the basis for a review of the maintenance award ***." Kenneth states Connie, in 2007, began receiving Social Security disability. This fact, coupled with the above language, according to Kenneth, authorizes the trial court to reconsider and reweigh the maintenance award without a finding of a substantial change of circumstances.

¶ 42 Connie argues Kenneth failed to raise this argument before the trial court. Connie points to the petitions to terminate maintenance, in which Kenneth did not argue the stipulation supported a review of the maintenance order but argued a "substantial change of circumstances" supported termination. Connie points to Kenneth's argument during closing argument in which he cited case law for the proposition Illinois law requires proof of a substantial change in

circumstances before maintenance may be modified.

¶ 43 We agree with Connie. By failing to raise the issue before the trial court, the issue is forfeited from review on appeal *American National Bank & Trust Co. v. City of Chicago*, 192 Ill. 2d 274, 279, 735 N.E.2d 551, 554 (2000). Here, the trial court heard and considered evidence on the issue of whether Kenneth's retirement or Connie's relationship with Wrisk constituted a substantial change of circumstances to justify termination of the maintenance award. This is the test Kenneth proposed from the beginning, when he filed the original petition, and through the course of the trial. It is unfair to Connie and inconsistent with Illinois law to allow Kenneth to now say that was the improper test. Kenneth forfeited this argument. See also *Haudrich v. Howmedica Inc.*, 169 Ill. 2d 525, 536, 662 N.E.2d 1248, 1253 (1996).

¶ 44 B. The Trial Court Did Not Err in Finding Kenneth's Retirement Was Not a Substantial Change of Circumstances Justifying Termination of Kenneth's Maintenance Obligation.

¶ 45 Kenneth begins his argument by pointing to a number of ways he demonstrated a substantial change in circumstances. Kenneth points to multiple changes in Connie's income as a result of his retirement, including the \$529 increase in Social Security for C.B. and Connie's \$199 monthly share of Kenneth's pension. Kenneth further points to Connie's receipt of \$1,065 in Social Security disability beginning in 2007 and the reduced housing costs to Connie as a result of her agreement with Wrisk. Kenneth also points to Connie's increased wealth since the dissolution of the marriage. Kenneth urges this court to find these circumstances, alone or in the aggregate, support termination of his maintenance obligation.

¶ 46 Unfortunately, each of these arguments is not properly before this court. None were raised to the trial court as proof of a substantial change of circumstances. Beginning with

his original petition and through trial, Kenneth asserted only two situations to be substantial changes of circumstances warranting an end to his maintenance obligation: (1) his retirement; and (2) Connie and Wrisk's relationship. Kenneth's petitions and his theory at trial were that his decision to retire was legitimately based on health reasons and his financial situation was worse than Connie's. He did not assert the above changes as a reason to seek termination. Our task upon review of an order granting or denying a petition to terminate maintenance is to review the order to determine whether the trial court abused its discretion. See *In re Marriage of Pedersen*, 237 Ill. App. 3d 952, 956, 605 N.E.2d 629, 632 (1992). Such a task cannot be completed when the trial court was not provided the opportunity to use its discretion on the matter. Kenneth forfeited this argument. *American National Bank*, 192 Ill. 2d at 279, 735 N.E.2d at 554.

¶ 47 In this section of his appellate brief, Kenneth also challenges conclusions key to the trial court's decision to deny him relief on his argument his retirement was a substantial change in circumstances justifying the end of his maintenance obligation. Kenneth argues the trial court erroneously concluded (1) he lacked credibility, (2) his retirement was in bad faith, and (3) the substantial difference in the financial situations of the parties did not support allowing termination. We review the trial court's decision and will reverse only if there has been an abuse of discretion. *Pedersen*, 237 Ill. App. 3d at 956, 605 N.E.2d at 632.

¶ 48 Section 510 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/510 (West 2014)) governs petitions to terminate an award of maintenance. Section a-5 permits the termination of maintenance upon proof "of a substantial change in circumstances" and provides the following factors a trial court should consider when deciding on such a petition, as well as factors listed in section 504(a) of the Act:

"(1) any change in the employment status of either party and whether the change has been made in good faith;

(2) the efforts, if any, made by the party receiving maintenance to become self-supporting, and the reasonableness of the efforts where they are appropriate;

(3) any impairment of the present and future earning capacity of either party;

(4) the tax consequences of the maintenance payments upon the respective economic circumstances of the parties;

(5) the duration of the maintenance payments previously paid (and remaining to be paid) relative to the length of the marriage;

(6) the property, including retirement benefits, awarded to each party under the judgment *** and the present status of the property;

(7) the increase or decrease in each party's income since the prior judgment or order from which a review, modification, or termination is being sought;

(8) the property acquired and currently owned by each party after the entry of the judgment ***; and

(9) any other factor that the court expressly finds to be just and equitable." 750 ILCS 5/510(a-5) (West 2014).

Section 504(a) directs the trial court to consider "all relevant factors," such as "the income and property of each party," "the needs of each party," each party's earning capacity, the time necessary for "the party seeking maintenance to acquire appropriate" employment, and the length of the marriage. 750 ILCS 5/504(a) (West 2014).

¶ 49 The party seeking the termination of maintenance bears the burden of showing a substantial change in circumstances. See *In re Marriage of Hucker*, 259 Ill. App. 3d 551, 555, 631 N.E.2d 299, 302 (1994). This court will not disturb the judgment of the trial court unless the court abused its discretion or the factual predicate for the judgment was against the manifest weight of the evidence. *In re Marriage of Bates*, 212 Ill. 2d 489, 523, 819 N.E.2d 714, 733 (2004).

¶ 50 Kenneth's first two challenges to the decision are challenges to the factual predicate of the judgment. We thus will not disturb the trial court's conclusions Kenneth lacked credibility and acted in bad faith unless those conclusions are against the manifest weight of the evidence. See *id.*

¶ 51 Kenneth first contends the trial court wrongly determined he lacked credibility. Kenneth maintains his answers show he was truthful to a fault, in that he admitted to having \$3,000 in cash and to having smoked despite having COPD. Kenneth maintains the questions regarding his CDL and the requisite physical were consistent and truthful.

¶ 52 The assessment of the credibility of witnesses is not an undertaking this court will make on review simply because a different conclusion could be made from the evidence. See *In re Marriage of Pfeiffer*, 237 Ill. App. 3d 510, 513, 604 N.E.2d 1069, 1071 (1992). The trial court sits in the best position for making this determination, as it had the opportunity to view the

witnesses' demeanor and conduct. *In re Marriage of Manker*, 375 Ill. App. 3d 465, 477, 874 N.E.2d 880, 890 (2007); *Snow v. Snow*, 322 Ill. App. 3d 953, 956, 750 N.E.2d 1268, 1270 (2001).

¶ 53 Here, the record does not establish the trial court's ruling is against the manifest weight of the evidence. The court specifically questioned Kenneth's credibility upon noting his demeanor and evasiveness. We must defer to the court's conclusion on Kenneth's demeanor, as we were unable to view Kenneth's testimony and nothing in the record proves the conclusion was against the manifest weight of the evidence. *Id.* As to Kenneth's evasiveness, there is testimony supporting this conclusion. Kenneth's testimony regarding cigarette usage, despite his COPD diagnosis, was contradictory. We note we agree with Kenneth's assessment that his testimony regarding his CDL and his physical was consistent, but we do not believe the trial court found otherwise. While the record supports the conclusion Kenneth was consistent or truthful in other areas, such evidence does not establish the court's credibility determination to be erroneous.

¶ 54 Kenneth next contends the finding of "bad faith" is unsupported by the record. Kenneth challenges the finding, maintaining he did not immediately seek the termination of his maintenance obligation upon his August 2013 retirement, but waited two years before filing the petition. Kenneth further maintains the conclusion is undermined by the fact he did not seek termination of his obligation in 2007, when Connie began receiving Social Security disability. Kenneth also finds error in the trial court's conclusion there was no evidence his employment was restricted by a doctor, maintaining the financial burden of bringing in a doctor to testify is too high for an individual earning \$1,700 a month.

¶ 55 We find the trial court's decision Kenneth acted in bad faith is not against the

manifest weight of the evidence. Despite the time span between Kenneth's decision to retire and to seek termination of maintenance, Kenneth's testimony may fairly be interpreted as showing his maintenance obligation was a factor, if not the main factor, in his decision. He plainly asserted he had endured "ten years *** [of] crap," and he was "tired of giving [Connie] all of [his] money anyway." When asked if his tiring of giving Connie his money was the reason for his petition, Kenneth began by stating, "[n]ot necessarily."

¶ 56 We find unconvincing, as proof of good faith, Kenneth's decision not to petition for the termination of the maintenance in 2007, when Connie began collecting Social Security disability. We are hesitant to attribute this fact as a "decision" knowingly made by Kenneth in "good faith" in 2007, as Kenneth's own counsel was not apparently aware of this fact until the motion to reconsider was filed.

¶ 57 We further find no error in the trial court's basing its "bad faith" decision in part on the absence of evidence Kenneth's employment was restricted by a physician. This finding is supported by the record. It is not disputed Kenneth had limiting health problems. But the record shows Kenneth did not testify a physician told him he was restricted from working, nor did he offer any evidence of such a restriction.

¶ 58 Also regarding "bad faith," Kenneth argues the trial court placed too much emphasis on this factor and failed to take into account other factors in its decision. Specifically, Kenneth points to the "earning capacity of either party," "the property *** awarded to each party," the "property acquired and currently owned," and "any other factor *** just and equitable." The trial court, when issuing its decision, addressed the financial circumstances of the parties in its 12-page decision. The court was aware of the differences, but it found

particularly troubling the fact the termination of maintenance would result in a \$1,000 monthly surplus to Kenneth, but a \$1,000 monthly deficit for Connie. The court was also aware Kenneth paid no child support for C.B. In addition, given that Kenneth's argument *at trial* was that his retirement alone was a "substantial change in circumstances" and the court believed the retirement not to be in "good faith", the finding of "bad faith" carries greater weight. We find the record establishes no error in the weight the court placed on these factors.

¶ 59 Given the trial court's findings, the decision to deny Kenneth's request to find his retirement was a substantial change of circumstances justifying maintenance is not an abuse of discretion. The record shows Kenneth presented evidence showing his retirement led to a \$529 increase in Connie's monthly income. Such an increase does not support eliminating \$975 from Connie's monthly budget for her and C.B., given the trial court's assessment of Connie as credible and the fact her income and expenses were virtually the same. The increase, however, may have supported a modification of maintenance in light of the differences in the financial circumstances of the parties. Kenneth, however, did not seek a modification. He sought only an end to the full obligation.

¶ 60 C. The Trial Court Did Not Err in Finding No Evidence
 Showing a Continuing, Conjugal Relationship.

¶ 61 Kenneth last argues the evidence shows a continuing, conjugal relationship between Connie and Wrisk. Kenneth maintains the truth of Connie's claim she and Wrisk did not maintain a sexual relationship "is at best doubtful." Kenneth points to the substantial gift Connie received when Wrisk sold her a house substantially below its value and the contract to forgive the remaining debt should he die first. Kenneth further emphasizes the vacations the two shared, the length of their relationship, and the fact the two share a bed at times. Kenneth argues

the trial court's finding "is not supported by the evidence."

¶ 62 Each case in which the termination of maintenance is sought based on an allegation of conjugal cohabitation is unique. *Bates*, 212 Ill. 2d at 524, 819 N.E.2d at 733. A conjugal relationship is equated to a husband-and-wife-like relationship, whether or not a sexual relationship exists. *In re Marriage of Sappington*, 106 Ill. 2d 456, 467, 478 N.E.2d 376, 381 (1985). In determining whether a conjugal relationship exists, a trial court must look at the totality of the circumstances. *In re Marriage of Herrin*, 262 Ill. App. 3d 573, 577, 634 N.E.2d 1168, 1171 (1994). Factors to be considered include (1) the length of the relationship, (2) the time the former spouse and the paramour spend together, (3) the nature of the activities the two engage in, (4) the interrelation of their personal affairs, (5) whether the two vacation together, and (6) whether they spend holidays together. *Id.* The burden of establishing the former spouse is involved in a continuing, conjugal relationship falls on the party who seeks termination of maintenance. *Bates*, 212 Ill. 2d at 524, 819 N.E.2d at 733. This court will not overturn a trial court's finding regarding the existence of a conjugal relationship unless the finding is contrary to the manifest weight of the evidence. *Herrin*, 262 Ill. App. 3d at 576, 634 N.E.2d at 1170-71.

¶ 63 In addition to the evidence emphasized by Kenneth, the record also establishes Connie is current on the monthly payments to Wrisk for her home. Connie takes care of all the expenses related to her home, including utilities, maintenance, and repairs. Connie and Wrisk do not maintain joint accounts. They do not live together and maintain residences approximately 30 minutes apart. Personal property is not kept in each other's homes. Connie and Wrisk do not see each other every day. There is no evidence they spend holidays together. Given these facts, the trial court's decision finding no continuing, conjugal relationship between Connie and Wrisk is

not against the manifest weight of the evidence.

¶ 64

III. CONCLUSION

¶ 65

We affirm the trial court's judgment.

¶ 66

Affirmed.