

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 2053

JOHN J. MARTIN

VERSUS

MOLLY S. MARTIN

Judgment Rendered: June 8, 2012

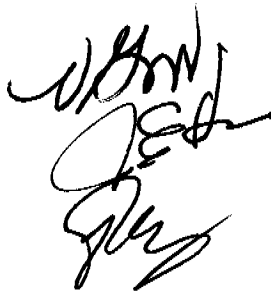
**Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche, Louisiana
Docket Number 112655**

Honorable Jerome J. Barbera, III, Judge Presiding

**Rebecca N. Robichaux Counsel for Plaintiff/Appellant,
Christopher J. Huddleston John J. Martin
Raceland, LA**

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Cut Off, LA Molly S. Martin**

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.



WHIPPLE, J.

Plaintiff appeals from the trial court's judgment denying his rule to terminate permanent spousal support. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff, John Martin, and defendant, Molly Martin, were divorced by judgment dated June 4, 2010. Subsequently, by judgment dated September 15, 2010, Mr. Martin was ordered to pay Mrs. Martin permanent spousal support in the amount of \$769.00 per month.

Approximately eight months later, Mr. Martin filed a Rule to Terminate Permanent Spousal Support, averring that Mrs. Martin was living in "open concubinage" and that she was therefore no longer entitled to receive permanent spousal support. Following a hearing on the rule, the trial court found that Mr. Martin had failed to prove by a preponderance of the evidence that Mrs. Martin was cohabiting with another "in the manner of married persons," as required by LSA-C.C. art. 115 for the extinguishment of the spousal support obligation. Thus, by judgment dated June 17, 2011, the trial court denied Mr. Martin's Rule to Terminate Permanent Spousal Support.

From this judgment, Mr. Martin appeals, contending that the trial court "improperly applied its findings of fact to the law" as set forth in LSA-C.C. art. 115, when it focused on whether Mrs. Martin's relationship was conducted "in the manner of married persons" as opposed to whether the sexual relationship was one "of some permanence."

DISCUSSION

Louisiana Civil Code article 115, which governs the extinguishment of spousal support provides that "[t]he obligation of spousal support is extinguished upon ... a judicial determination that the obligee has cohabited

with another person of either sex in the manner of married persons.” According to Revision Comment (e), the phrase “‘cohabited...in the manner of married persons’ means **to live together** in a **sexual relationship** of some permanence,” and “[i]t does not mean just acts of sexual intercourse.” [Emphasis added]. Almon v. Almon, 2005-1848 (La. App. 1st Cir. 9/15/06), 943 So. 2d 1113, 1116; Arnold v. Arnold, 2002-0819 (La. App. 1st Cir. 4/2/03), 843 So. 2d 1167, 1171. The determination of whether a party has “cohabited with another person of either sex in the manner of married persons” is a question of fact subject to the manifest error standard of review. See Almon, 943 So. 2d at 1115-1118.

In the instant case, Mrs. Martin testified that she began a relationship with Randy Duet following her divorce from Mr. Martin and that, at the time of the hearing, she had been dating Duet for approximately ten months. Mrs. Martin acknowledged that Duet “occasionally” spent the night at her house, but denied that he lived with her. She noted that Duet owned his own home, which is where he resided and paid for his utilities. When questioned by the trial court as to how often Duet spent the night at her house, Mrs. Martin estimated that Duet had spent the night at her house about three to four times per month throughout the ten-month relationship. She further testified that Duet did not keep clothes or any personal belongings at her house, and did not help her with household expenses or groceries.

Mr. Martin, on the other hand, testified that he passed by Mrs. Martin’s house “a lot,” approximately three to four times a week, to see if Duet was there. Mr. Martin further testified that when he saw Duet’s vehicle parked at Mrs. Martin’s home, he would take photographs of the vehicle, some of which were introduced into evidence. According to Mr. Martin, one

of Duet's vehicles was at Mrs. Martin's home "every time" he passed Mrs. Martin's home.

However, when further questioned by the trial court, Mr. Martin acknowledged that Duet's vehicle was not parked at Mrs. Martin's home every time he passed, but, rather, was there approximately half of the times that he passed her home. Moreover, Mr. Martin acknowledged that he usually passed by Mrs. Martin's home during the day, after he got off of work, and that he had only driven by her home during the night two to three times in the six months prior to the hearing, at times when he had gotten off of work at 4:30 a.m. Martin also admitted that Duet owned his own home.

Mrs. Martin's sister and her nephew's wife also testified at the hearing that Duet did not live with Mrs. Martin. Mrs. Martin's sister testified that she visited Mrs. Martin every day and frequently slept at Mrs. Martin's house, as often as two to three times a week during some weeks, and that Duet had never spent the night on the occasions when she stayed with Mrs. Martin. Mrs. Martin's nephew's wife, who lives next door to Mrs. Martin, also testified that she visits Mrs. Martin every day, and both women stated that Duet did not keep clothing or toiletries at Mrs. Martin's house.

Considering the foregoing and the record as a whole, we are unable to say the trial court was manifestly erroneous in finding that Mr. Martin had failed to establish that Mrs. Martin was "cohabit[ing] with another person...in the manner of married persons" as is required for the extinguishment of the spousal support obligation under LSA-C.C. art. 115. See Almon, 943 So. 2d at 1116-1118. Moreover, with regard to Mr. Martin's argument that the trial court should have focused on whether the *sexual relationship* was one "of some permanence," we note that *living together in a sexual relationship* "of some permanence" is **one** factor to be

considered by the court. Almon, 943 So. 2d at 1117. However, the record does not establish that Mrs. Martin and Duet actually lived together. The record shows that these individuals dated for ten months and that Duet occasionally spent the night at Mrs. Martin's home. On review, we are unable to say the trial court erred in concluding that these facts alone are not sufficient to establish that they were living together in a sexual relationship of some permanence, such that they cohabited in the manner of married persons.

CONCLUSION

For the above and foregoing reasons, the trial court's June 17, 2011 judgment denying Mr. Martin's Rule to Terminate Permanent Spousal Support is hereby affirmed. Costs of this appeal are assessed against John Martin.

AFFIRMED.