Voluntary Consent in Prenuptial Contracts in the USA

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Keywords
agreement, antenuptial, assent, coercive, coercion, consent, contract, deadline, duress, involuntary, premarital, prenuptial, ultimatum, undue influence, voluntary

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Introduction

In August 2003, I wrote an essay on the history of the acceptance of prenuptial and postnuptial contracts in the USA, which is posted at http://www.rbs2.com/dcontract.pdf . In August 2009, I wrote an essay on the history of the acceptance of waivers of alimony in prenuptial contracts in the USA, which is posted at http://www.rbs2.com/dwaiver.pdf . The essay on waivers mentions that a valid waiver of a legal right must be voluntary. This essay examines a few issues in the determination of voluntariness of assent to a prenuptial contract.

In reading hundreds of cases involving the enforcement of a prenuptial contract at divorce, I repeatedly saw mentions of a husband presenting a written prenuptial contract to his wife-to-be for the *first* time a few days before the wedding — sometimes even on the day of the wedding — and giving her an ultimatum: "Sign this prenuptial contract, or I will not marry you." There are at least three problems with such a formation of a prenuptial contract:

1. A prenuptial contract *should* be negotiated and discussed over a period of weeks — perhaps even months — with each party receiving legal advice from an independent attorney[1] who is knowledgeable about prenuptial contracts. Each party *should* be making suggestions and earnestly negotiating. When a prenuptial contract is drafted by the financially stronger party and presented as a contract of adhesion, such a contract is a ticking time bomb, waiting to explode at divorce, when the attorney for the financially weaker party will attack the validity of the contract.

2. The attorney for the financially weaker party may attack the validity of the prenuptial contract, alleging that the other party's ultimatum was coercive. Such an ultimatum is legally *not* coercive, as explained in detail later in this essay.

3. The attorney for the financially weaker party (typically the wife) may attack the validity of the prenuptial contract because the sudden appearance of the written contract a few days before the wedding was allegedly coercive. The deadline of a few days — sometimes only a few hours — provides little time to negotiate. Therefore, the wife has a practical choice between (1) signing the contract as drafted by husband or (2) canceling the wedding and being embarrassed in front of her friends and family. As explained in detail later in this essay, courts are divided on whether such conduct by husband will void the prenuptial agreement, but the majority view seems to be that such sudden appearance of the prenuptial contract is *not* coercive.

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[1] I personally prefer that the attorneys give legal advice to their client and provide written drafts of contracts that express the desires of their client, but the parties themselves should do their own negotiating and keep control of the situation.

While a prenuptial contract drafted by the financially stronger party and signed by the weaker party without any negotiations *may* be enforceable at divorce, such a process gives little assurance about the validity of the contract and its enforcement by a judge in a divorce court. Because there is no value to a prenuptial contract that is not enforceable at divorce, people should avoid a process that could create reasons to void the prenuptial contract.

This topic is interesting to me because of my interest in (1) prenuptial contracts, (2) philosophy of law: what facts will defeat voluntary consent, and (3) gender issues in law. Most cases of coercion or duress are egregious and the correct legal result is obvious,[2] but the issues of alleged duress in this essay are more subtle and intellectually interesting.

I prefer to write in gender-neutral language (e.g., "financially stronger party" instead of husband). It is an acknowledged fact that the financially stronger party desires a prenuptial contract to protect his/her assets from being divided equally with his/her spouse at divorce. Then at divorce, the attorney for the financially weaker party challenges the validity of the prenuptial contract, so that the weaker party can get assets or alimony that she/he agreed to waive in the contract. In looking at divorce cases in the USA, one may as well be realistic and recognize that the *husband* is nearly always the financially stronger party and, at divorce, the *wife* challenges the validity of the prenuptial contract that her husband desired.[3] Prof. Atwood counted 39 reported cases in the year 1992 that included a challenge to the validity of a prenuptial contract: in 33 of these cases (85%) the wife initiated the challenge.[4]

In the unusual case in which the wife has more assets than the husband — because the wife inherited from her wealthy parents, or because the wife has significantly greater earnings than her husband — then the usual roles of husband and wife will be reversed. The law, of course, is gender neutral, although judges might have a gender bias.

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2 For example, a criminal who points a pistol at the driver, and says "drive to Kansas City" has coerced the driver. The coercion is obvious and *un*interesting.

3 Charles W. Gamble. "The Antenuptial Contract," 26 UNIV. OF MIAMI LAW REVIEW 692, 724-725 (Summer 1972); Judith T. Younger, "Perspectives on Antenuptial Agreements: An Update," 8 JOURNAL AMERICAN ACADEMY OF MATRIMONIAL LAWYERS 1, 19 (Spring 1992); Barbara Ann Atwood, "Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act," 19 JOURNAL OF LEGISLATION 127, 129 (1993); Gail Frommer Brod, "Premarital Agreements and Gender Justice," 6 YALE JOURNAL LAW & FEMINISM 229, 241-243 (Summer 1994); Judith T. Younger, "Lovers' Contracts in the Courts: Forsaking the Minimum Decencies," 13 WILLIAM & MARY JOURNAL OF WOMEN & LAW 349, 420-423 (Winter 2007).

4 Barbara Ann Atwood, "Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act," 19 JOURNAL OF LEGISLATION 127, 133 in n.29 (1993).

I use the words "agreement" and "contract" as synonyms in this essay. Also, the words "prenuptial", "antenuptial", and "premarital" are synonyms. I personally prefer "prenuptial", while most judges seem to prefer "antenuptial".

disclaimer

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at http://www.rbs2.com/disclaim.htm .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook.* Because part of the audience for this essay is nonlawyers, I have included longer quotations from court cases than typical writing for attorneys.

Litigants or their attorneys should *not* rely on this essay for legal research, because I ignored cases in some states and this essay does not include any cases decided after July 2009.

I have omitted the cases involving a wife who was an immigrant with a weak command of the English language, as these cases present different issues from the three topics in this essay.

Ultimatum not coercive

In reading divorce cases, I have found many cases in which the husband-to-be presented a draft prenuptial contract to his future wife and said the equivalent of "if you do not sign, then I will not marry you." At divorce, the wife's attorney typically postures husband's statement as *coercion.* It is *not* technically coercion, because the husband has *no* legal duty to marry and the husband did *not* create wife's need to be married to him.[5] The ultimatum, standing alone, simply makes the prenuptial contract a condition precedent to the marriage.

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[5] There are two possible exceptions where the husband's demand *might* be coercive: (1) when the fiancé presents the prenuptial contract to the fiancée for the *first* time, only a few days prior to the scheduled wedding — so that if the fiancée refuses to sign, she faces the embarrassment of disinviting her friends and family from the canceled wedding, and (2) when the fiancé got his fiancée pregnant prior to marriage. See the discussion beginning at pages 10 and 22, below.

Rose, (Ind.App. 1988)

In July 1988, an intermediate appellate court in Indiana affirmed a trial court's decision to enforce a written prenuptial agreement. In this case, the wife said "she was marrying for love, not money, and she signed the agreement."[6]

> While David Rose did say that he would not marry Cheryl if she did not sign the antenuptial agreement, this does not reflect a coercive stance on David's part.

Rose v. Rose, 526 N.E.2d 231, 236 (Ind.App. 1988).

Spiegel, (Iowa 1996).

In September 1996, the Iowa Supreme Court carefully explained why husband's ultimatum did *not* constitute duress:

> Another essential element of duress is that the threat be wrongful or unlawful. *In re C.K.,* 315 N.W.2d 37, 43-44 (Iowa 1982). A.J.'s threat here, albeit unspoken, was he would not marry Sara if she did not sign the prenuptial agreement. We find this threat neither wrongful nor unlawful. *Liebelt v. Liebelt,* 118 Idaho 845, 801 P.2d 52, 55 (App. 1990) ("The threat of a refusal to marry is not wrongful in the eyes of the law."); *Lebeck v. Lebeck,* 118 N.M. 367, 881 P.2d 727, 734 (App. 1994) (husband's statement that he would not marry wife without prenuptial agreement was a lawful demand and would not support a claim of duress); *Gardner v. Gardner,* 190 Wis.2d 216, 527 N.W.2d 701, 706 (App. 1994) (insistence on a premarital agreement as a condition of marriage is not a "threat" and is not coercive); see *Howell,* 386 S.E.2d at 617-18 [(N.C.App. 1989)] (no duress even though husband-to-be threatened to cancel the wedding: "the cancellation of a proposed marriage would be a natural result of a failure of a party to execute a premarital agreement desired by the other party"); *Taylor,* 832 P.2d at 431 [(Okl.App. 1991)] (duress not shown by proof husband refused to marry wife unless she signed the agreement). For these reasons, Sara has failed to show she acted under duress in signing the prenuptial agreement.

In re Marriage of Spiegel, 553 N.W.2d 309, 318 (Iowa 1996).

Doig, (Fla.App. 2001)

In April 2001, an intermediate appellate court in Florida reversed a trial court's invalidation of a prenuptial agreement.

> In the final judgment of dissolution, the trial court invalidated the parties' prenuptial agreement based on the following four findings: (1) The Husband presented the agreement to the Wife ten days before the wedding, and the Wife was advised not to sign the agreement by a lawyer she consulted; (2) **....** ; (3) although the parties had discussed the possibility of an agreement a reasonable time before the wedding, the Wife was given no time to ask sufficient questions of the Husband or make her own investigation because the written agreement was presented to her after all the wedding and travel arrangements had been made; and, (4) the agreement unfairly limited the Wife's share of marital assets and was executed under duress given the circumstances set forth above.

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[6] *Rose,* 526 N.E.2d at 233.

Doig v. Doig, 787 So.2d 100, 102 (Fla.App. 2001).
The appellate court held that the first finding was supported by the record, but the three other findings were *not* supported. *Doig* at 102.

The appellate court in *Doig* concluded there was no duress by husband:

> The Wife also never testified that she had insufficient time to ask questions or make her own investigation regarding the agreement. Her testimony was essentially that, when asked by her counsel whether she signed the agreement freely and voluntarily, she answered, "No." When asked if she signed the agreement under duress, she answered, "Yes." The only testimony the Wife ever presented to explain why she signed the agreement or why she felt that she had no choice but to sign was that the Husband would not marry her unless she signed the agreement. It is undisputed that the Husband made it clear that without the agreement there would be no wedding. However, this ultimatum does not, in itself, constitute duress.

Doig, 787 So.2d at 102-103.

Barnes, (Ill.App. 2001)

In August 2001, an intermediate appellate court in Illinois affirmed a trial court's conclusion that a prenuptial contract was enforceable. Wife appealed and alleged duress, but she did not cite any facts that would prove duress.

> Sandra has the burden of proving that the Agreement was unenforceable. 750 ILCS 10/7 (West 1998). The only factual reference to coercion in her deposition testimony was her statement that the Agreement was a condition to marriage. We disagree with Sandra's assertion that conditioning marriage upon the execution of a premarital agreement constitutes coercion. Acts or threats cannot constitute duress unless they are legally or morally wrong. *In re Marriage of Spomer,* 123 Ill.App.3d 31, 35, 78 Ill.Dec. 605, 462 N.E.2d 724, 728 (1984).
>
> Both Edward and Sandra could have remained single. Nothing was legally or morally wrong with either of them conditioning marriage upon the execution of a premarital agreement. Their right to enter into such an agreement was codified by the Premarital Agreement Act. One party's agreement to marry is in and of itself sufficient consideration for financial concessions by the other party in the context of a premarital agreement. *In re Marriage of Sokolowski,* 232 Ill.App.3d 535, 542, 173 Ill.Dec. 701, 597 N.E.2d 675, 680 (1992).
>
> Sandra has admitted that she was totally self-sufficient and supporting herself at the time the Agreement was executed. She was free to elect to remain single rather than sign the Agreement. Her arguments on appeal offer only general statements of law without any reference to an actual disputed fact in the record. Her brief points to nothing in either her own testimony or the deposition of her attorney that contravened her verified statement in the Agreement that the document was executed as a "free and voluntary act, devoid of coercion or duress." The trial court was presented with an Agreement that Sandra Barnes not only admitted she signed, but which she contemporaneously attested under oath was executed free of duress and coercion, an oath taken before her own attorney, acting as a notary. Sandra has come forth with no evidence to create a genuine issue of material fact that would controvert the voluntary nature of the Agreement.

In re Marriage of Barnes, 755 N.E.2d 522, 527 (Ill.App. 2001).

Colello, (N.Y.A.D. 2004)

In July 2004, an intermediate appellate court in New York State reversed a trial court's decision that a wife's assent to a prenuptial contract was under duress.

> With respect to the third cause of action, alleging duress, we conclude that defendant's alleged threat to cancel the wedding if plaintiff refused to sign the agreement does not constitute duress. "As a matter of law, [the] exercise or threatened exercise of a legal right [does] not amount to duress" (*C & H Engrs. v. Klargester, Inc.,* 262 A.D.2d 984, 984, 692 N.Y.S.2d 269; see generally *Stewart M. Muller Constr. Co. v. New York Tel. Co.,* 40 N.Y.2d 955, 956, 390 N.Y.S.2d 817, 359 N.E.2d 328; *Niagara Frontier Transp. Auth. v. Patterson-Stevens, Inc.,* 237 A.D.2d 965, 966, 654 N.Y.S.2d 526).

Colello v. Colello, 780 N.Y.S.2d 450, 453 (N.Y.A.D. 2004),
appeal and reargument denied, 783 N.Y.S.2d 896 (N.Y.A.D. 2004).

Mallen, (Ga. 2005)

In November 2005, the Supreme Court of Georgia wrote:

> The duress Wife asserts was applied to compel her to execute the agreement was that the marriage would not occur in the absence of the prenuptial agreement and she would be left pregnant and unmarried. As was prefigured in the concurrence penned by then-Presiding Justice Sears in *Alexander v. Alexander,* supra, 279 Ga. at 118, 610 S.E.2d 48 [(Ga. 2005)], we conclude that insistence on a prenuptial agreement as a condition of marriage "does not rise to the level of duress required to void an otherwise valid contract." *Id.* See also *In re Marriage of Murphy,* 359 Ill.App.3d 289, 295 Ill.Dec. 831, 834 N.E.2d 56 (2005) (merely conditioning marriage upon the execution of an antenuptial agreement does not give rise to duress); *Doig v. Doig,* 787 So.2d 100, 102-103 (Fla.App. 2nd Dist. 2001) (ultimatum that without the agreement there would be no wedding does not, in itself, constitute duress); *Liebelt v. Liebelt,* 118 Idaho 845, 848, 801 P.2d 52 (1990) (refusal to proceed with the wedding unless the agreement was signed would not constitute duress).

Mallen v. Mallen, 622 S.E.2d 812, 815-816 (Ga. 2005).

Francavilla, (Fla.App. 2007)

In November 2007, an intermediate appellate court in Florida heard a case in which the parties negotiated a prenuptial contract for three or four months, but signed the contract on their wedding day. At divorce, the wife argued that the contract was invalid because of duress by husband. The trial court found no duress and the appellate court affirmed:

> The husband's ultimatum that he would not marry the wife without a prenuptial agreement does not constitute duress because there is nothing improper about taking such a position. See *Doig v. Doig,* 787 So.2d 100, 102 (Fla. 2d DCA 2001); *Eager v. Eager,* 696 So.2d 1235, 1236 (Fla. 3d DCA 1997)(where the court wrote that "[i]t is not a threat or duress for the proponent of the agreement to make it clear that there will be no marriage in the absence of the agreement.")

Francavilla v. Francavilla, 969 So.2d 522, 525 (Fla.App. 2007).

Shanks, (Iowa 2008)

In December 2008, the Iowa Supreme Court concluded that wife failed to establish either duress or undue influence:

> 1. *Duress.* There are two essential elements to a claim of duress in the execution of a contract: (1) one party issues a wrongful or unlawful threat and (2) the other party had no reasonable alternative to entering the contract. *Spiegel,* 553 N.W.2d at 318 (citing *Turner v. Low Rent Hous. Agency,* 387 N.W.2d 596, 598 (Iowa 1986); *In re C.K.,* 315 N.W.2d 37, 43-44 (Iowa 1982)). Here, Randall informed Teresa he would not get married again without a premarital agreement. We rejected the argument that such an ultimatum was wrongful or unlawful in *Spiegel.* Additionally, similar to the bride-to-be in *Spiegel,* Teresa had the reasonable alternative of cancelling the wedding in the face of such a threat. These facts fall far short of a showing of duress sufficient to support a finding that Teresa involuntarily executed the agreement.
>
> 2. *Undue influence.* We stated the standard for undue influence in *Spiegel:*
>
> > Undue influence is influence that deprives one person of his or her freedom of choice and substitutes the will of another in its place. "[M]ere importunity that does not go to the extent of controlling the will of the grantor does not establish undue influence." Freedom from undue influence is presumed.
>
> *Spiegel,* 553 N.W.2d at 318 (citations omitted). The district court found Randall's position as a lawyer, and his status as Teresa's fiancée and employer, put Randall in such a position of power over Teresa that she was willing to put her full faith in his judgment in drafting the agreement. Despite the potential for abuse inherent in the parties' complex relationship, we find the evidence presented was insufficient to establish undue influence. Although Teresa testified that Randall subtly encouraged her not to take the second draft to an attorney, the district court found this testimony incredible. We credit the district court's credibility determination and find Randall encouraged Teresa to seek the advice of counsel as to both drafts of the agreement. The facts presented here simply do not demonstrate the "improper or wrongful constraint, machination, or urgency of persuasion" required for a finding of undue influence. *Stetzel,* 174 N.W.2d at 443. We are not persuaded that Randall's will was substituted for Teresa's own judgment in deciding to sign the agreement. *Spiegel,* 553 N.W.2d at 319.
>
> Having found the premarital agreement was not a product of duress or undue influence, we conclude Teresa has failed to prove she executed the agreement involuntarily.

In re Marriage of Shanks, 758 N.W.2d 506, 512-513 (Iowa 2008).

Sudden appearance of prenuptial contract

As explained above, the ultimatum "Sign this contract or I will not marry you." is *not* coercive, when the ultimatum stands alone.

However, this ultimatum *together with* the sudden and abrupt appearance of written prenuptial contract a few days before a scheduled wedding *may* be coercion by the party presenting the contract. I say *may,* because, as explained below, courts are divided on this issue.

In such a situation, the parties agreed to marry each other, and then the husband suddenly gives an ultimatum "Sign this contract or I will not marry you." In such a context, the husband's ultimatum could be seen as a unilateral attempt to change the parties' previous agreement.

The deadline of a few days — sometimes only a few hours — provides little time to negotiate. If the wife signs the prenuptial contract as initially presented by husband, she is signing a contract of adhesion.[7] Such adhesion contracts can be valid, but the lack of bargaining is a signal for heightened scrutiny by a judge who must decide on the enforcement of the contract.

Further, with a deadline of only a few days, the wife has little time to find an independent attorney to advise her about the legal rights that she is waiving in the prenuptial contract. Without such legal advice, the wife is *not* making a knowledgeable waiver of legal rights, and such a waiver *may* be unenforceable at divorce.

Somewhat surprisingly, judges in divorce cases ignore the adhesion contract and lack of a knowing waiver of legal rights and instead focus on the issue of coercion. The wife has a practical choice between (1) signing the contract as drafted by husband or (2) canceling the wedding and being embarrassed in front of her friends and family. Being embarrassed is *not* a concern in discussion of coercion in contracts between merchants. However, in divorce cases in the USA, embarrassment has been a concern to a *few* judges in divorce courts.

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[7] Friedrich Kessler, "Contracts of Adhesion — Some Thoughts About Freedom of Contract," 43 COLUMBIA LAW REVIEW 629 (1943).

coercive

The following cases have found a short deadline for signing a prenuptial contract to be coercive:

Lutgert, (Fla.App. 1976)

In October 1976, an intermediate appellate court in Florida voided a prenuptial contract because husband presented prenuptial contract 24 hours before scheduled wedding. The facts of this case include:

> They kept company for approximately a year and became engaged some four weeks prior to their marriage herein at 12:30 in the early morning hours of Friday, April 30, 1965.
>
> ....
>
> The following day, Thursday, April 29, is the critical date concerning the execution of the antenuptial agreement. That afternoon the parties met again at the jewelers to finalize the sizing of the wedding rings. While they were being readied the husband took the antenuptial agreement out of his pocket and for the first time presented it to appellant and asked her to sign it. She objected, saying that it indicated lack of trust on his part and that she didn't want the marriage to start out on such a weak footing. He made light of that suggestion, proclaiming that the agreement was of no consequence anyway since they wouldn't we getting a divorce. He joked about being married for some 80 years, getting married at their age. The wife still objected; so the husband called his Chicago lawyers, Cummings and Wyman, while still at the jewelers and apparently some conversation ensued between the lawyers and the wife after the husband put her on the telephone. While the evidence is conflicting as to whether this phone conversation resulted in any change in the wording of the agreement (the husband contends it did), the documentary evidence itself irrefutably demonstrates that the document was in fact drawn up and finally drafted the preceding Monday, April 26, and was not changed in any respect thereafter.
>
> As a further insight into the events leading up to the agreement herein, it is agreed that the subject of an antenuptial agreement had been brought up on more than one occasion for perhaps up to a year before the marriage herein. The husband testified that he wanted such an agreement because his father had advised it and because he had had extreme difficulty during his first divorce. No specific agreement nor draft thereof was made, however, until the instant agreement was prepared on April 26 of that eventful week in 1965 as aforesaid. The wife insists that she consistently objected to such an agreement, whatever its terms, and the sole testimony in rebuttal of this is the husband's statement that 'there was no refutation of any willingness to sign such an agreement.'
>
> In any case, following the aforementioned phone call, the wife finally agreed reluctantly to sign the agreement after the husband insisted that the wedding would otherwise be called off. She contends that she signed the agreement then and there at the jewelers; but we can accept the husband's version that it wasn't signed until just before the wedding that night (i.e., about 12:30 a.m. on Friday [30 April 1965]) when the minute hand of the clock was on the rise 'for luck,' as several of the witnesses testified. Two witnesses corroborated the husband's version that the agreement was indeed signed at the airport shortly before the wedding, one Williams, the husband's nephew, who also was a notary public and who appears to have taken the acknowledgment of the parties, and one of the husband's attorneys who was a member of

> the aforementioned Cummings and Wyman firm. Each additionally testified that he did not hear the wife voice any objections to the agreement as she executed it.

Lutgert v. Lutgert, 338 So.2d 1111, 1113-1114 (Fla.App. 1976).

The appellate court found "undue influence" or "overreaching" by husband:

> There is ample conclusive evidence of such circumstances in this case. To begin with, the husband sprang the agreement upon her and demanded its execution within twenty four hours of the wedding; and it has been said that a woman ought not be 'too much hurried' into such an agreement.[footnote cites *In re Estate of Maag,* 119 Neb. 237, 228 N.W. 537, 541 (1930).] Passage had been booked for a honeymoon cruise to Europe; rings had been bought; a trousseau had been bought; all invitations to family and friends had been given; all arrangements otherwise had been made; an ultimatum had been delivered by the husband: 'No agreement, no wedding'; and, obviously, there arose a sudden stark awareness of the potential immediate loss of a future life of enormous grandeur.

Lutgert v. Lutgert, 338 So.2d 1111, 1116 (Fla.App. 1976).

other cases

- *Matter of Marriage of Norris,* 624 P.2d 636, 638-640 (Or.App. 1981) (Parties from Oregon traveled to Reno, Nevada to be married. Husband first presented wife with prenuptial contract in motel room on day of wedding. Trial court refused to enforce contract and appellate court affirmed.)

- *Fletcher v. Fletcher,* 628 N.E.2d 1343, 1348 (Ohio 1994) ("The presentation of an agreement a very short time before the wedding ceremony will create a presumption of overreaching or coercion if, in contrast to this case, the postponement of the wedding would cause significant hardship, embarrassment or emotional stress.").

In April 1995, an intermediate appellate court in Florida held a prenuptial contract was invalid, in part because it was presented to wife for the first time two days before the scheduled wedding and signed on the day before the wedding.

> ... the timing of the signing of the document indicates that Gayle's signature was the product of duress. Two days before the wedding Gayle was presented with a document, the actual terms of which were previously unknown to her and which contained no information about Philip's finances. She had only one day to seek counsel from her own attorney, to make an independent evaluation of the contract, or to cancel her wedding. The only rational conclusion is that her signature was the product of unwarranted compulsion, and the document should have been set aside on that basis. *Lutgert v. Lutgert,* 338 So.2d 1111 (Fla. 2d DCA 1976).

Hjortaas v. McCabe, 656 So.2d 168, 170 (Fla.App. 1995), *review denied,* 662 So.2d 342 (Fla. 1995). Also see *Bakos v. Bakos,* 950 So.2d 1257, 1259 (Fla.App. 2007) (followed *Lutgert*).

Another Florida case shows the distinction between alleged involuntary consent to a prenuptial contract in probate court, as distinguished from divorce court. The day before a scheduled wedding in 1981, husband wrote a manuscript prenuptial contract, and had his bride type it and sign it the same day. After husband's death, the wife challenged the validity of the agreement.

The trial court found that wife offered no facts that would indicate overreaching or undue influence by husband, and dismissed wife's case. An intermediate appellate court applied *Lutgert,* reversed the trial court, and ordered a new trial. *In re Estate of Edsell,* 447 So.2d 263 (Fla.App. 1983). The Florida Supreme Court quashed the order of the appellate court below, because the *Lutgert* presumption of undue influence does *not* apply to contracts in probate court, where one party to the contract is dead. *Evered v. Edsell,* 464 So.2d 1197 (Fla. 1985). The reasoning of the Florida Supreme Court is not clear, but a dissenting judge in the appellate court below noted that, unlike divorce court, in probate court: "In most cases the only witness to circumstances surrounding execution of the antenuptial agreement is the other party whose lips are sealed by death." *Edsell,* 447 So.2d at 266 (Ferguson, J., dissenting).

Delaware seems to be unique in that it had a statute requiring prenuptial contracts to be signed at least ten days before the wedding. 13 Delaware Code § 301 "authorizes antenuptial contracts, if executed in the presence of two witnesses at least 10 days before the marriage, and acknowledged before any officer authorized to take acknowledgments." *Hill v. Hill,* 269 A.2d 212, 213 (Del. 1970). This statute was abolished in the year 1995 and replaced with the Uniform Premarital Agreement Act.

not coercive

On the other hand, some judges have ruled that embarrassment of canceling a wedding is *not* sufficient to find coercion. Although not stated in the judicial opinions, one could imagine that the bride-to-be could sue her fiancé in small claims court to recover the financial costs of canceling the wedding (e.g., loss of nonrefundable deposits, cost of perishable items no longer needed, etc.).

In an ancient case, 120 years ago, the Pennsylvania Supreme Court found no coercion when husband presented wife with a prenuptial contract a few days before the wedding. *Appeal of Neely,* 16 A. 883 (Pa. 1889) ("Mr. Neely was a keen, shrewd, firm, business man, and told her, 'If you don't sign it there will be no wedding.' **....** ... she was not coerced — she did not sign under legal duress.").[8]

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[8] *De La Cuesta v. Insurance Co. of North America,* 20 A. 505, 506 (Pa. 1890) ("In *Neely's Appeal,* 124 Pa. St. 406, 16 Atl. Rep. 883, there was an attempt to set aside an antenuptial contract on the ground of duress. After the marriage day had been fixed, the guests invited, and the caterer engaged, the husband produced an antenuptial contract which he requested his intended wife to sign. She protested by her tears. His reply was: 'No contract, no wedding.' We held there was no duress.").

DeLorean, (N.J.Super.Ch. 1986)

In a famous divorce case involving John DeLorean, who was a senior executive at General Motors, a trial court in New Jersey in April 1986 found no coercion:

> First, that there was no fraud or duress in the execution of the agreement or, to put it another way, that both parties signed voluntarily. The wife alleges she did not sign voluntarily because her husband presented the agreement to her only a few hours before the marriage ceremony was performed and threatened to cancel the marriage if she did not sign. In essence she asserts that she had no choice but to sign. While she did not have independent counsel of her own choosing, she did acknowledge that before she signed she did privately consult with an attorney selected by her husband who advised her not to sign the agreement. Yet, for whatever reasons, she rejected the attorney's advice and signed.
>
> While her decision may not have been wise, it appears that she had sufficient time to consider the consequences of signing the agreement and, indeed, although she initially refused to sign it, after conferring with her intended spouse and an attorney, she reconsidered and decided to sign it. Concededly, the husband was 25-years older and a high powered senior executive with General Motors Corporation, but she was not a "babe in the woods." She was 23-years old with some business experience in the modeling and entertainment industry; she had experienced an earlier marriage and the problems wrought by a divorce; and she had advice from an attorney who, although not of her own choosing, did apparently give her competent advice and recommended that she not sign. While it may have been embarrassing to cancel the wedding only a few hours before it was to take place, she certainly was not compelled to go through with the ceremony. There was no fraud or misrepresentation committed by the husband. He made it perfectly clear that he did not want her to receive any portion of the marital assets that were in his name. At no time did she ever make an effort to void the agreement and, of course, it was never voided. Under these circumstances the court is satisfied that the wife entered into the agreement voluntarily and without any fraud or duress being exerted upon her.

DeLorean v. DeLorean, 511 A.2d 1257, 1259 (N.J.Super.Ch. 1986).

Howell v. Landry, (N.C.App. 1989)

In December 1989, an intermediate appellate court in North Carolina rejected wife's claim of duress, when the written prenuptial contract was first shown to her one day before the scheduled wedding, and the night before they were scheduled to fly from North Carolina to Las Vegas:

> The parties had agreed to be married in Las Vegas, and the wife made the arrangements to travel to Las Vegas for marriage on New Years Day. At 8:00 p.m. on the evening before the parties were to leave for Las Vegas to be married on the next day, the husband presented to the wife a premarital agreement which had been prepared by his attorney, without the knowledge of the wife. The husband told the wife that "if the agreement was not signed, they would not get married." **....**
>
> The wife primarily argues that the presentation of the premarital agreement to her on the day before the wedding, combined with the threat that the marriage would not take place unless the document was executed, amounted to duress and undue influence. We disagree.

> The mere shortness of the time interval between the presentation of the premarital agreement and the date of the wedding is insufficient alone to permit a finding of duress or undue influence. See 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY, § 4.10[2][c]. Some states, but not North Carolina, require that premarital agreements be executed at least a minimum amount of time prior to the marriage. See Delaware Code, Title 13, § 301 (at least ten days before the marriage); Minnesota Stat.Ann. § 519.11 (prior to day of marriage). The shortness of the time interval when combined with the threat to call off the marriage if the agreement is not executed is likewise insufficient per se to invalidate the agreement. 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY, § 4.10[2][c] at 4-85.
>
> ....
>
> Having determined the absence of facts giving rise to per se duress or undue influence, we now must determine if the totality of the circumstances surrounding the execution of the premarital agreement supports a conclusion of duress or undue influence. We find no such evidence. In fact, the evidence is to the contrary. The wife, aware that she should not sign the agreement without the advice of an attorney, proceeded in any event to execute the agreement. Neither party was obligated to be married. See *DeLorean v. DeLorean,* 211 N.J.Super.[sic][9] 432, 511 A.2d 1257, 1259 (1986) ("While it may have been embarrassing to cancel the wedding only a few hours before it was to take place, she certainly was not compelled to go through with the ceremony."). We cannot presume from the findings that the wife had insufficient time to seek advice of an attorney had she decided to do so. The premarital agreement was presented to the wife at 8:00 p.m. on the night before the parties were to leave for Las Vegas. The findings are not specific as to the time the parties were to be married on the next day. The wife had read the agreement which was not lengthy and in fact made some adjustments in the agreement before signing. The husband did not threaten to terminate the wife's employment with Gray, Inc. [a firm owned by husband] if she had refused to execute the agreement. There is no finding that the failure to execute the premarital agreement would have resulted in any loss of funds which may have been expended by the wife in preparation for the wedding.
>
> Accordingly, we determine the wife has not met her burden of proof, and the findings are insufficient to support the trial court's conclusion that the premarital agreement was executed under duress and undue influence. Therefore, the order declaring the premarital agreement void for the reasons of duress and undue influence is reversed.

Howell v. Landry, 386 S.E.2d 610, 617-618 (N.C.App. 1989).

The essence of the holding seems to be in one sentence: "Furthermore, the wife was not compelled by financial or other considerations to marry the next day, and she could have put off the marriage in order to discuss the agreement with an attorney." *Howell,* 386 S.E.2d at 615. I am perplexed when the court mentions "financial ... considerations", because the expenses of a canceled wedding are *not* recoverable in court, as explained below, beginning at page 21.

[9] The judge omitted the "Ch." in the name of the court, mistakenly representing this judicial opinion from an intermediate appellate court.

Howell had been followed by courts in several other states, e.g., *In re Marriage of Spiegel,* 553 N.W.2d 309, 318 (Iowa 1996); *DeMatteo v. DeMatteo,* 762 N.E.2d 797, 807, n.20 (Mass. 2002); *In re Yannalfo,* 794 A.2d 795, 797 (N.H. 2002) ("Here, as in *Howell,* the threat that the marriage would not take place, standing by itself, is insufficient to support a finding of duress."); *Friezo v. Friezo,* 914 A.2d 533, 552 (Conn. 2007).

Liebelt, (Idaho App. 1990)

In November 1990, an intermediate appellate court in Idaho held that a prenuptial contract signed by Carol and Ken two days before the wedding was the product of voluntary consent by wife, and the appellate court reversed both a magistrate's findings and the trial court's findings:

> We first examine Ken's contention that the magistrate erred in holding that Carol did not enter into the prenuptial agreement freely. We conclude that the magistrate, in so holding, must have determined that Carol prevailed on the affirmative defense of duress. To be voidable on the grounds of duress, an agreement must not only be obtained by means of pressure brought to bear, but the agreement itself must be unjust, unconscionable, or illegal; the defense of duress cannot be predicated upon demands which are lawful, or the threat to do that which the demanding party has a legal right to do. Generally, the demand by one party must be wrongful or unlawful, and the other party must have no means of immediate relief from the actual or threatened duress other than by compliance with the demand. The affirmative defense of duress may be established only by clear and convincing proof. [citations to Idaho cases in this paragraph omitted by Standler].
>
> In this case, the findings of fact which support the magistrate's conclusion that Carol felt compelled to sign the document was Ken's insistence on the agreement as a prerequisite to marriage. Refusal to proceed with the marriage was clearly within Ken's rights. The threat of a refusal to marry is not wrongful in the eyes of the law. In fact, such a threat received from a proposed marriage partner should put the potential spouse on notice that the agreement was of a serious nature and should be dealt with in a serious manner. The record shows that Ken repeatedly requested that Carol obtain independent legal counsel.[footnote omitted] Furthermore, the record indicates that Carol participated in changes made in the draft agreement. Accordingly, based on the magistrate's findings of fact and the evidence contained in the record, we cannot conclude that Carol was incapacitated by duress when she signed the prenuptial agreement.

Liebelt v. Liebelt, 801 P.2d 52, 55 (Idaho App. 1990).

Volk, (Ohio App. 1991)

In October 1991, an intermediate appellate court in Ohio issued an unreported opinion that rejected wife's position that "she was coerced, by threat of cancellation of the wedding, to enter into the agreement despite her lawyer's advice." In this case, wife first saw the written contract two weeks before the wedding.

> Although [wife] alleges she was told by [husband's attorney] that there would be no wedding unless she signed the agreement, [the attorney] denies making such statement. In any event, we agree with the trial court, and with other jurisdictions, which held that "[t]he mere threat of the embarrassment and humiliation which could occur if a party would have to cancel a

> publicly-announced wedding does not constitute duress so as to void the effect of the antenuptial agreement even when the occurrence of the marriage is made contingent upon the execution of the antenuptial agreement." See, e.g., *DeLorean v. DeLorean* (N.J.Super.[sic][10] 1986), 511 A.2d 1257; *Howell v. Landry* (1989), 96 N.C.App. 611; *Hengel v. Hengel* (1985), 122 Wisc.2d 737; and *Barnhill v. Barnhill* (Ala.Civ.App. 1980), 386 So.2d 749

Volk v. Volk, Not Reported in N.E.2d, 1991 WL 221795 (Ohio App. 1991).

Spiegel, (Iowa 1996).

In September 1996, the Iowa Supreme Court held there was no duress in the signing of a prenuptial contract, because the wife had a reasonable alternative to signing: she could have canceled the wedding.

> An essential element of duress is the victim had no reasonable alternative to entering into the contract. [citation omitted, Restatement Second of Contracts § 175(1)] Here, Sara had a reasonable alternative — she could have canceled the wedding. Although she may have suffered embarrassment in doing so, we do not think social embarrassment from the cancellation of wedding plans, even on the eve of the wedding, renders that choice unreasonable. See *Howell v. Landry,* 96 N.C.App. 516, 386 S.E.2d 610, 618 (1989) (holding no duress where wife presented with prenuptial agreement on eve of wedding, noting she was not obligated to go through with the ceremony).

In re Marriage of Spiegel, 553 N.W.2d 309, 318 (Iowa 1996).

Husband first presented the written prenuptial contract to wife five days before the scheduled wedding.[11] The Iowa Supreme Court said there was nothing illegal about the short deadline, but the court rebuked husband:

> Neither do we admire the timing utilized in presenting Sara with the dilemma of canceling a wedding or submitting to the agreement. Pressure put on Sara, and its timing, may be criticized as unkind, but cannot be deemed illegal. See *In re Marriage of Sell,* 451 N.W.2d 28, 30 (Iowa App. 1989) (husband's unilateral decision to seek preparation of a prenuptial agreement, and his decision to escort his soon-to-be wife to his attorney's office and "surprise" her with this agreement less than two weeks before their wedding day not deemed unfair).

In re Marriage of Spiegel, 553 N.W.2d 309, 317 (Iowa 1996).

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[10] The judge omitted the "Ch." in the name of the court, mistakenly representing this judicial opinion from an intermediate appellate court.

[11] *Spiegel,* 553 N.W.2d at 312.

Bonds, (Cal. 2000)

In August 2000, the California Supreme Court decided a divorce case involving baseball player Barry Bonds:

> The trial court determined that there had been no coercion. It declared that Sun [i.e., Wife] had not been subjected to any threats, that she had not been forced to sign the agreement, and that she never expressed any reluctance to sign the agreement. It found that the temporal proximity of the wedding to the signing of the agreement was not coercive, because under the particular circumstances of the case, including the small number of guests and the informality of the wedding arrangements, little embarrassment would have followed from postponement of the wedding. It found that the presentation of the agreement did not come as a surprise to Sun, noting that she was aware of Barry's [i.e., Husband's] desire to "protect his present property and future earnings," and that she had been aware for at least a week before the parties signed the formal premarital agreement that one was planned.
>
> These findings are supported by substantial evidence. **....** In view of these circumstances, the evidence supported the inference, drawn by the trial court, that the coercive force of the normal desire to avoid social embarrassment or humiliation was diminished or absent. **....**

In re Marriage of Bonds, 5 P.3d 815, 834-835 (Cal. 2000)

The California Supreme Court in *Bonds* cited cases from other jurisdictions:

> See, for example, *In re Marriage of Spiegel,* [(Iowa 1996)], 553 N.W.2d 309, 317-318 (voluntariness depends in part upon an intentional relinquishment of a known right; the proximity of the wedding, a threat not to wed without an agreement, and embarrassment over the potential cancellation of the wedding do not constitute duress or undue influence, particularly because the party attacking the agreement was intelligent and educated and had the advice of independent counsel); *Lebeck v. Lebeck* (1994) 118 N.M. 367, 881 P.2d 727, 732-734 (shortness of time between agreement and wedding and desire of woman to marry to legitimize a child are not alone enough to establish involuntariness; wife failed to carry burden of proof of involuntariness in that she was 34 years of age, worked as a professional, had independent counsel, and understood the agreement, and the "threat" not to marry without the agreement does not constitute duress but is a legitimate objective); *Fick v. Fick* (1993) 109 Nev. 458, 851 P.2d 445, 449 (voluntariness depends upon the opportunity to consult independent counsel, the absence of coercion, the business acumen of the parties, the parties' awareness of each other's assets, and the parties' understanding regarding the rights being forfeited); *Lee v. Lee* (1991) 35 Ark.App. 192, 816 S.W.2d 625, 627-628 (although the wedding was soon to occur, there was no pressure to sign the agreement; husband's desire to maintain separate property had been discussed in advance; assets were disclosed, and the failure of the party challenging the agreement to read it before signing was no excuse); *Tiryakian v. Tiryakian* (1988) 91 N.C.App. 128, 370 S.E.2d 852, 854 (premarital agreement was involuntary because of proximity of wedding and because there was no disclosure of assets, no knowledge of the effect of the agreement, and no independent counsel).

Bonds, 5 P.3d at 815, n.10.

DeMatteo, (Mass. 2002)

In February 2002, the Massachusetts Supreme Court reviewed cases and concluded:

> Other courts have held that the lack of negotiations or insufficient notice, standing alone, is seldom enough to invalidate an antenuptial agreement. See, e.g., *Liebelt v. Liebelt,* 118 Idaho 845, 848, 801 P.2d 52 (Ct.App. 1990); *Howell v. Landry,* 96 N.C.App. 516, 528, 386 S.E.2d 610 (1989). Courts generally have treated such a claim as one of duress, and have found such a defense inapplicable where, as here, the party contesting the agreement had notice of the agreement. See, e.g., *Rose v. Rose,* 526 N.E.2d 231, 235-236 (Ind.Ct.App. 1988) (parties discussed necessity of agreement several times before wedding, and husband told wife he would not marry her if she did not sign agreement); *Matter of the Marriage of Adams,* 240 Kan. 315, 319-320, 729 P.2d 1151 (1986) (husband approached wife morning of wedding and asked her to sign agreement; agreement was identical to one wife reviewed with her attorney); *Taylor v. Taylor,* 832 P.2d 429, 431 (Okla.Ct.App. 1991) (wife in possession of the agreement for three months prior to its execution); *Shepherd v. Shepherd,* 876 P.2d 429, 432 (Utah Ct.App. 1994) (parties discussed agreement for months prior to marriage and each had opportunity to review and make changes to it).

DeMatteo v. DeMatteo, 762 N.E.2d 797, 807, n.20 (Mass. 2002).

Yannalfo, (N.H. 2002)

In April 2002, the New Hampshire Supreme Court reversed a trial court's determination that a prenuptial contract was invalid because of duress. The relevant facts of the case:

> A day or so before the wedding, the [husband] presented the [wife] with an antenuptial agreement for her signature. **....** After the [husband] told the [wife] that he would not marry her unless she executed the agreement, she took it to work the next day and signed it before a notary public. At the time, the [wife] felt that the agreement was fair.

In re Yannalfo, 794 A.2d 795, 796 (N.H. 2002).

The New Hampshire Supreme Court briefly discussed the law:

> Although the language used by the trial court is somewhat ambiguous, we will assume for purposes of the appeal that the trial court found duress. Accordingly, we consider whether the circumstances surrounding the execution of the antenuptial agreement support that finding. The [wife] was presented with the antenuptial agreement approximately one day before her wedding. This fact alone, however, is insufficient to support a finding of duress. See *Howell v. Landry,* 96 N.C.App. 516, 386 S.E.2d 610, 617 (1989). In *Howell,* the court concluded that an antenuptial agreement was valid although the agreement was presented to the wife the night before the wedding and there was a threat that the marriage would not take place. See id. In addition, the court declined to presume that the wife had insufficient time to obtain legal advice based only on the fact she was given the agreement on the eve of the wedding. See id. at 618. In the instant case, aside from the fact that the agreement was presented to the [wife] one day before the wedding, there are no other facts or circumstances supporting a finding of duress. Here, as in *Howell,* the threat that the marriage would not take place, standing by itself, is insufficient to support a finding of duress. Additionally, in the case before us, the trial court presumed that the [wife] had no time to have an attorney review the agreement. As did the court in *Howell,* however, we decline to presume on the evidence presented that the [wife] had insufficient time to consult with an attorney had she decided to do so.

> **....** ... the [wife] fully understood the legal significance and the consequences of the agreement. She testified that when she signed the agreement, she understood that she was giving up her rights to the [husband's] $70,000 down payment. Also evidencing the [wife's] understanding of the agreement is her testimony that, at the time of the agreement's execution, she felt that its terms were fair because it was the [husband's] money. Moreover, there is no issue of a failure to disclose assets. Therefore, we hold that there was insufficient evidence to support the trial court's conclusion that the antenuptial agreement was executed under duress.

In re Yannalfo, 794 A.2d 795, 797-798 (N.H. 2002).

I am a bit surprised that the judges on the New Hampshire Supreme Court, each of whom had probably practiced law at some earlier time before being appointed to the bench, would not "presume ... insufficient time to consult with an attorney". It is common knowledge that a person without a previously established attorney-client relationship can not find an attorney, sign an attorney-client engagement letter, and have the attorney carefully review the prenuptial contract, all in a few hours. Good attorneys, like good physicians, are busy people who don't accept new clients who suddenly appear in the middle of the day. Review of a contract should not be an emergency.

A different result from *Yannalfo* was reached by the same court 17 months later in *In re Estate of Hollett,* 834 A.2d 348, 351-352 (N.H. 2003). Prof. Younger has argued that the holdings of *Yannalfo* and *Hollett* are in conflict.[12]

VanHeusden, (Mich.App. 2005)

In an unreported case decided in March 2005, an intermediate appellate court in Michigan affirmed a trial court:

> To establish the defense of duress, a plaintiff must show that she was illegally compelled or coerced to act by fear of serious injury to her person. *Farm Credit Services of Michigan's Heartland, PCA, v Weldon,* 232 Mich.App 662, 681; 591 N.W.2d 438 (1998). Here, plaintiff has not established that she signed the contract under duress. She alleged that her duress arose from the stress of a 350-person wedding the day following the signing. However, she offered no evidence that when she signed, she feared injury to her person, reputation, or fortune or even that the marriage was contingent on the signing. Further, she was represented by counsel and had five days to review the agreement. In signing the Premarital Agreement, plaintiff acknowledged that she fully understood its contents and that she had signed freely and willingly.

Vanheusden v. Vanheusden, Not Reported in N.W.2d, 2005 WL 562824 at *1 (Mich.App. 2005) (per curiam).

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[12] Judith T. Younger, "Lovers' Contracts in the Courts: Forsaking the Minimum Decencies," 13 WILLIAM & MARY JOURNAL OF WOMEN & LAW 349, 370-373 (Winter 2007).

No recovery of wedding expenses

It is an interesting question whether one can recover expenses of a canceled wedding, such as nonrefundable deposits, expenses of perishable commodities, etc. Such cases are relevant to this essay, because *if* a fiancée has no legal way of recovering expenses of a canceled wedding, *then* the law should be consistent and not consider as coercion or duress any alleged threat to cancel the wedding. In both issues, there would be no justifiable reliance on promises to marry.

There are few reported cases on this topic, probably because the attorney's fees for trial and appeal would probably greatly exceed the wedding expenses that *might* be recovered, assuming that it is legally possible to recover such expenses. As shown by two cases below, the expenses of a canceled wedding are *not* recoverable, because of the Heart-Balm statutes. In other states, judicial abolishment of cause of action for breach of a promise to marry would provide a similar bar to such recovery.

Victoria Ferraro and Surinder Singh met in 1982 and, after dating for approximately six months, scheduled a wedding for October 1983. Miss Ferraro "in reliance upon this agreement to marry each other, she paid non-refundable deposits for the wedding music, photographer, reception hall and a custom-made wedding dress."[13] Mr. Singh returned to his native India in December 1982, and in March 1983 he married a woman in India. Ferraro then sued Singh for reimbursement of the cost of her wedding expenses. The trial court dismissed her claim on preliminary objections and the appellate court affirmed. The intermediate appellate court in Pennsylvania quoted a Connecticut case:

> In our view, the [Heart-Balm] Act was designed to do away with excessive claims for damages, claims coercive by their very nature and, all too frequently, fraudulent in character; the purpose was to prevent the recovery of damages based upon confused feelings, sentimental bruises, blighted affections, wounded pride, mental anguish and social humiliation; for impairment of health, *for expenditures made in anticipation of the wedding,* for the deprivation of other opportunities to marry and for the loss of the pecuniary and social advantages which the marriage offered. [italics added by the Pennsylvania court]

Piccininni v. Hajus, 429 A.2d 886, 888 (Conn. 1980), quoted with approval in *Ferraro v. Singh,* 495 A.2d 946, 949 (Pa.Super. 1985). Writing in 1985, the court in *Ferraro* adds:

> Additionally, our research has not disclosed a single case in this country where damages of this type were awarded. Together with the wording of the statute and the policy considerations mentioned above, this leads to the firm conclusion that it would be misguided for us to break new ground and allow this claim.

Ferraro, 495 A.2d at 949.

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13 *Ferraro,* 495 A.2d at 947.

In Feb 1987, Gina Bruno and John Guerra were engaged to be married. The night before the scheduled wedding 28 Nov 1987, Guerra canceled the wedding. The bride's father then sued the groom for recovery of the expenses of the wedding. The trial judge ruled that the claim was barred by the Heart-Balm statute. *Bruno v. Guerra,* 549 N.Y.S.2d 925 (N.Y.Sup. 1990). There is no reported appellate opinion in this case.

On 31 Aug 2009, I did a quick search of Westlaw for cases in all fifty states, and I found only one case that suggested that expenses of a canceled wedding were recoverable, and that suggestion was in a terse dictum by the Utah Supreme Court. On 24 July 1993, Scott Brown proposed marriage to a Ranay Jackson. A wedding was scheduled for 10:00 on 11 Nov of that same year. Brown canceled the wedding just a few hours before it was scheduled to occur. Jackson later learned that Brown was already married during his relationship with her, which adds an element of fraud to the wedding cancellation case. Jackson then sued Brown. In deciding an interlocutory appeal, the Utah Supreme Court said in obiter dictum:

> ... any economic losses suffered because of Jackson's reasonable reliance upon Brown's promise to marry her (such as normal expenses attendant to a wedding) may be recoverable under a theory of reasonable reliance or breach of contract.

Jackson v. Brown, 904 P.2d 685, 687 (Utah 1995).

This case seems to suggest that the expenses can be recovered under a theory of promissory estoppel, but it is only a suggestion in dictum.

Because a fiancée has no legal right to recover the expenses of a canceled wedding, I suggest that an alleged threat to cancel the wedding has no coercive effect on agreeing to a prenuptial contract. The law should be consistent in both situations that there is no legal obligation to be married, despite any prior promises.

Bride pregnant

One can imagine two people who are in love, but not yet married, having sexual intercourse. The woman becomes pregnant. If she desires to keep the child (i.e., no abortion and no adoption at birth), then the pregnant woman may want to be married to the father of the child, for any of three reasons:

1. an unmarried mother would have a financial struggle to earn enough money to cover her own living expenses,[14] so she might be strongly motivated to marry and become a full-time homemaker.
2. an unmarried pregnant woman may desire marriage to legitimize her child, thus removing social stigma from her child and herself.
3. an unmarried pregnant woman could be feeling emotionally vulnerable or frightened.

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[14] This is true, even with the assumption that the father is paying child support. And it is well known that many fathers are deadbeat dads who can not, or will not, pay child support.

For these reasons, an unmarried pregnant woman may strongly desire marriage, which would serve to weaken the woman's opposition to unfair terms in a prenuptial contract that favors the father of her child.

My legal research has found only one old case on this topic — in the year 1911 — and a number of modern cases on this topic after the year 1975. I suggest that the prevalence of modern cases may come from three developments: (1) increasing population of the USA, so there are more reported cases, (2) increasing popularity of prenuptial contracts, and (3) weakening of the taboo against premarital intercourse, so there may be more pregnant brides.

An American Law Reports annotation in the year 1935 cites two cases in which a pregnant bride signed a prenuptial contract that limited the husband's duty to support his wife.[15] In each of these cases, the court held the contract was void as against public policy, because the contract purported to alter the husband's statutory duty to support his wife.[16] Therefore, the courts did not reach the issue of whether the bride's pregnancy constituted duress that would make the contract voidable.

coercive

Slingerland, (Minn. 1911)

In the late 1880s, a wealthy 67 y old widower had "illicit sexual relations" with a 23 y old woman for several years. She became pregnant and she begged him to marry her. In May 1890 she signed a prenuptial contract desired by husband, without any disclosure about his wealth and without any independent legal advice. After 20 years of marriage, wife sued husband to set aside the contract. The trial court voided the contract and the Minnesota Supreme Court affirmed:

> A wealthy and successful man of mature years, a man of great influence and will power, induces a young girl to enter into illicit relations with him, which continue for several years. She becomes pregnant, and is naturally anxious for a marriage, so anxious in all probability as to make her forget the financial side and be willing to sign anything to gain the desired result. She knows he is rich, but does not know the extent of his wealth. He takes her to the office of his personal counsel, a lawyer of the highest standing, and of impressive appearance, who has prepared a contract for her to sign. She is informed of its import, and knows that she is giving up her rights in her prospective husband's estate after his death. She has no lawyer or friend to advise her. She is not informed as to the nature or extent of the rights she surrenders in return for the promise to pay her $5,000. She is under a nervous strain, very desirous for the marriage, and knows that it is necessary to sign the contract in order to attain this desire. These facts, without actual misrepresentations, urgings, or duress, are sufficient, in our opinion, to justify a conclusion that plaintiff's execution of the contract was not her own free act, but in reality the act of defendant done by her pursuant to his will.

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[15] E.W.H., "Duty of husband to support wife as affected by antenuptial contract," 98 A.L.R. 533, 534 (1935).

[16] See, e.g., Standler, Waiver of Alimony in the USA, http://www.rbs2.com/dwaiver.pdf (2009).

Slingerland v. Slingerland, 132 N.W. 326, 328 (Minn. 1911).
Cited in *In re Estate of Kinney,* 733 N.W.2d 118, 123 (Minn. 2007).

The result in *Slingerland* is correct because there was no financial disclosure by the husband. However, the remarks about wife's pregnancy are of *un*certain validity outside of Minnesota.

I think *Slingerland* is best understood as mixing gender stereotypes and morality with law. *Slingerland* twice mentions[17] the word *illicit* to describe what the court apparently viewed as the scandalous seduction of an innocent young unmarried woman by an elderly man. In 1911, premarital sexual intercourse was taboo. Such a taboo vanished in the late 1960s with the easy availability of oral contraceptives and the so-called sexual revolution. In 1911, there was a moral expectation that a man who got a woman pregnant[18] would marry her. With the availability of abortion and adoptions at birth, as well as decreasing stigma against unmarried mothers, this expectation became less forceful sometime after 1973.

My search of Westlaw on 3 Sep 2009 found only one case outside of Minnesota that cited *Slingerland,* and that cite was in a dissenting opinion in a case where the bride was *not* pregnant.[19] Several cases involving pregnant brides outside Minnesota since 1975 have cited cases from other states, but have not cited *Slingerland,* which casts doubt on the correctness of the reasoning in *Slingerland.*

Williams, (Ala. 1992)

In a case from Alabama, a 24 y old woman discovered that she was pregnant "out of wedlock" in April 1984. The father of her unborn child said he would marry her only if she signed the prenuptial contract. She signed the contract and they were married on the following day, on 15 June 1984. The parties were married for almost seven years, then the husband filed for divorce. The trial court granted husband's summary judgment motion on the validity of the prenuptial contract, and the intermediate appellate court affirmed. In December 1992, the Alabama Supreme Court reversed the lower courts:

> The testimony in this case creates genuine issues of material fact as to (1) whether the father's conditioning the marriage on the pregnant mother's signing the antenuptial agreement, joined with the mother's moral objection to abortion and the importance of legitimacy in a

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[17] *Slingerland* 132 N.W. at 327, 328.

[18] The phrase "a man got a woman pregnant" is also loaded with gender stereotypes and morality. Actually — unless the man rapes her or unless there was fraud about contraception — there was mutual consent to intercourse. The man and woman are therefore equally responsible for any accidental pregnancy.

[19] *Williamson v. First National Bank of Williamson,* 164 S.E. 777, 784 (W.Va. 1931) (Hatcher, J., dissenting).

> small town, created a coercive atmosphere in which the mother had no viable alternative to accepting the father's condition for marriage, i.e., signing the agreement, and (2) whether there was a full disclosure of the value of the husband's estate.

Ex parte Williams, 617 So.2d 1032, 1035 (Ala. 1992).

Note that this judicial opinion did *not* decide the issue, but only remanded for trial. The following year, an intermediate appellate court in Alabama rejected a different wife's argument that her pregnancy made her assent *in*voluntary, as explained at page 31, below.

Conn.Super. 1993-97

In December 1993, a trial court in Connecticut invalidated a prenuptial agreement because wife signed it under duress:

> The parties had planned to be married on Labor Day, 1987, but in the early part of 1987, the wife told the husband she was pregnant. Knowing this, the parties agreed to advance the wedding date to Memorial Day, May 30, 1987.
>
> ....
>
> In April, 1987, the husband asked his attorney, Donald A. Hendrie, Jr., to draft this prenuptial agreement, it was sent to him about a month later. The husband testified that he gave the agreement to his wife in May, 1987, about ten days prior to the wedding date, suggesting she have her own lawyer review it with her. The wife testified that she did not know any lawyer and did not see one. She and her family were busy getting ready for the wedding. They had invited about 150 guests.
>
> ....

[On 29 May, the day before the wedding, Husband and wife went to the office of Attorney Hendrie (husband's attorney). Hendrie referred wife to Attorney Meyer, Meyer talked with her for 15 minutes, but Meyer refused to represent her on such short notice.]

> The wife returned with the agreement unsigned to Attorney Hendrie's office and told her husband what had happened at Attorney Meyer's office. The wife testified that they went into a hallway outside Attorney Hendrie's office and the husband told her the wedding would be canceled unless she signed the agreement that morning. The wife immediately returned to Attorney Meyer's office and signed the agreement before his secretary and paralegal clerk, who acknowledged her signature. She then returned the signed agreement to her husband. It is undisputed that the husband's attorney prepared this 18 page prenuptial agreement and that the wife was not represented by an attorney when she signed it. The wife testified she did not know what the agreement meant. She vaguely recalled reading some of it.
>
> ....
>
> The court found the wife's testimony credible and responsive. She had no previous experience with legal matters nor with a lawyer. She was under extreme emotional stress after her husband told her the marriage would be canceled unless she signed the prenuptial agreement that morning. She was about four months pregnant at that time. The court further

> finds the husband's threat to cancel the wedding was the pervading cause for her signing it. She did not sign this agreement voluntarily.
>
> It is elementary contract law that a person must freely and voluntarily consent to signing such an agreement to be bound by it. *McCarthy v. Taniska,* 84 Conn. 377, 381 (1911). The wife signed this agreement under duress, therefore, the court holds it to be invalid and unenforceable. *Lownds v. Lownds,* 41 Conn.Supp. 100, at page 108 (1988). A contract is not valid if one party is put in fear by the other party for the purpose of obtaining an advantage. *McCarthy v. Taniska,* supra. Under the circumstances existing at the time this agreement was signed, the wife would have signed anything the husband wanted in order to have the marriage take place the next day.

Persichilli v. Persichilli, Not Reported in A.2d, 1993 WL 547304 at *1-*3 (Conn.Super. 1993). The judge ignores that it is also elementary contract law that a mentally competent adult is legally bound by a contract that she signs, even if she did not read it before signing.[20] The remark in *Persichilli* that "wife would have signed anything" is reminiscent of *Slingerland,*[21] a case decided in Minnesota in 1911. Notice that the court does not cite any case(s) to support its conclusion that her signature was *in*voluntary. The three citations offered by the court are for legal rules that every lawyer knows well.

In September 1997, a trial court in Connecticut concluded that there was duress from the facts that (1) wife was pregnant when she signed the prenuptial contract and (2) husband insisted on the contract. The trial court cited no cases to support its conclusion.

> Some weeks before the marriage, a prenuptial agreement was shown to the plaintiff. The plaintiff was four months pregnant at the time, which fact is recited in the agreement. The agreement in evidence (defendant's exhibit 5) is unexecuted. The parties have testified that it was signed on a date very close to the marriage date. The plaintiff has testified that she saw

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[20] *Batter Bldg. Materials Co. v. Kirschner,* 110 A.2d 464, 468 (Conn. 1954) ("Nor is a party allowed, in the absence of accident, fraud, mistake or unfair dealing, to escape his contractual obligations by saying, as each of the plaintiffs does here, that he did not read what was expressly incorporated as specific provisions of the contract into which he entered. See *Dinini v. Mechanics' Savings Bank,* 85 Conn. 225, 228, 82 A. 580; *West v. Suda,* 69 Conn. 60, 62, 36 A. 1015."), quoted with approval in *E & F Const. Co., Inc. v. Rissil Const. Associates, Inc.,* 435 A.2d 343, 345 (Conn. 1980); • *Friezo v. Friezo,* 914 A.2d 533, 554-555 (Conn. 2007) ("The trial court's conclusion that the plaintiff had insufficient time to digest and understand the disclosure on the day she signed the agreement is also unsupportable because it is the party's responsibility to delay the signing of an agreement that is not understood. See, e.g., *Simeone v. Simeone,* supra, 525 Pa. at 400, 581 A.2d 162 ("[c]ontracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains"); *Standard Venetian Blind Co. v. American Empire Ins. Co.,* 503 Pa. 300, 305, 469 A.2d 563 (1983) (failure to read contract does not warrant "avoidance, modification or nullification" of its provisions)."); • *Barclays Business Credit, Inc. v. Freyer,* Not Reported in A.2d, 1997 WL 255248 at *4 (Conn.Super. 1997) ("... defendant's assertion that he did not read the contract is not an excuse. He manifested his assent to the contract by signing it. See 1 RESTATEMENT (SECOND), CONTRACTS § 23, comment (b) (1981) ("Thus where an offer is contained in a writing either the offeror or the offeree may, without reading the writing, manifest assent to it and bind himself without knowing its terms"); ....").

[21] *Slingerland* is quoted at page 23, above.

> the agreement only once, that the defendant indicated to her that signing the agreement was a condition of the marriage, that the defendant had had the agreement prepared and that there was not a full disclosure of the parties' assets.
>
> In view of the plaintiff's pregnancy and the defendant's insistence that the agreement be signed before a marriage, the court finds that the plaintiff signed the agreement under duress. An antenuptial agreement is a contract and must, as is true of any other contract, comply with ordinary principles of contract law. *McHugh v. McHugh,* 181 Conn. 482, 486, 436 A.2d 8 (1980). Having found that the plaintiff signed the agreement under duress, the agreement is invalid and of no legal force and effect.

Munson v. Munson, Not Reported in A.2d, 1997 WL 585754 at *4-*5 (Conn.Super. 1997).

Between *Persichilli* and *Munson,* another court in the same state reached a different conclusion on similar facts.

> This court has considered defense counsel's argument that because defendant was pregnant when the agreement was signed, because the wedding invitations had already been sent out, because defendant did not want to end up a single mother, and because she was unrepresented, the agreement should be held invalid. This argument, while strong, is not compelling. [Wife] clearly stated [husband] never indicated he wouldn't marry her if she refused to sign the agreement.

Borkowski v. Borkowski, Not Reported in A.2d, 1994 WL 728835 (Conn.Super. 1994).

In *Persichilli* and *Munson* the husband insisted on the contract, while in *Borkowski* the husband did not insist on the contract. Is this a significance difference, given that husband has the legal right to make an ultimatum[22] about the contract? I conclude that *Persichilli* and *Munson* were wrongly decided, especially given their lack of citations to cases from other states in those decisions.[23]

West Virginia statute before 2001

West Virginia had a statute that prohibited pregnant brides from signing prenuptial contracts:

> Under W.Va.Code, 48-2-1(b) [1984] the only statutory grounds for voiding a prenuptial agreement are that either of the parties is a minor at the time the agreement is entered into or that the female party to the agreement is pregnant at the time the agreement is entered into.

Gant v. Gant, 329 S.E.2d 106, 112 (W.Va. 1985).

This statute was apparently abolished in the year 2001 and replaced with West Virginia Code § 48-1-203, which does not mention pregnancy.

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[22] See the discussion beginning at page 5, above.

[23] This *may* be an example of inadequate legal research by attorneys who specialize in family law. Such attorneys tend to research cases only from their state, because cases from other states have no precedential effect, and also because divorce statutes differ from state to state, making it difficult to compare cases from other states.

not coercive

Dawley, (Cal. 1976)

In June 1976, the California Supreme Court decided one of the earliest prenuptial cases involving a pregnant bride and also involving modern no-fault divorce statutes. The court stated the facts:

> Betty Johnson, a tenured elementary school teacher, and James Dawley, an engineer, met in 1961 and maintained an intimate relationship until March of 1964. On May 11, 1964, Betty went to James' residence to pick up her belongings, but following a long and emotional discussion they agreed to resume their relationship. Two weeks later Betty discovered that she was pregnant.
>
> Betty told James that she feared a nonmarital pregnancy would result in her losing her teaching job. An acrimonious exchange ensued, during which Betty claims James refused to help her, and James claims she threatened him with a paternity suit accompanied by publicity intended to imperil James' employment. Finally, both agreed to a temporary marriage as a solution to their dilemma.

In re Marriage of Dawley, 551 P.2d 323, 325-326 (Cal. 1976).

Husband insisted on a prenuptial contract, which wife signed. They were married on 13 June 1964. The child was born in January 1965 and wife resumed her job teaching in September 1965. The parties separated in July 1972. Husband filed for divorce in April 1973. Wife then claimed she did not voluntarily sign the prenuptial agreement, because husband exerted "undue influence". The trial court rejected wife's argument and the California Supreme Court affirmed:

> Betty points out that even in the absence of a confidential relationship, a contract may be tainted by undue influence if one party takes 'a grossly oppressive and unfair advantage of another's necessities or distress.' (Civ.Code, § 1575.) We appreciate that Betty was compelled to enter into the antenuptial agreement by her unplanned pregnancy and her fear that she would lose her job, but James, threatened with a paternity suit and likely loss of his position, was in no position to take advantage of her distress. Perhaps reflecting this rough equality of bargaining power, the Dawleys' antenuptial agreement was in no way 'oppressive or unfair.' Both James and Betty secured their earnings and property acquired with those earnings as separate property, and James agreed to support both Betty and her daughter during the period when Betty would not be working. [footnote omitted]
>
> We therefore conclude that substantial evidence supports the trial court's finding that the agreement was not procured by undue influence.

In re Marriage of Dawley, 551 P.2d 323, 331-332 (Cal. 1976).

Baumgartner, (Ohio App. 1989)

In July 1989, an intermediate appellate court in Ohio reviewed a series of appeals in a complicated divorce case. The appellate court quoted the trial court:

> The trial court found that the antenuptial agreement between Mr. and Mrs. Baumgartner was invalid and stated:
>
> > The first test set forth in *Gross* has not been met because the plaintiff [Mrs. Baumgartner] did not enter into the agreement voluntarily because she was pregnant and due to deliver the child momentarily without benefit of marriage, and she had been advised by her legal counsel that the antenuptial agreement as to the portion relating to the divorce and separation provision may not be legally enforceable. * * *
> >
> > ....
> >
> > The antenuptial agreement entered into by a party about to deliver a child where the other party to the agreement is the father to the child, and who has been advised by independent counsel that the provision of the agreement relating to award of a specific sum in the event of a divorce or separation is not binding on the parties will not be enforceible [sic] as to that provision because the agreement is not entered into freely nor did the wife understand the legal consequence of that specific provision.

Baumgartner v. Baumgartner, Not Reported in N.E.2d, 1989 WL 80947 at*7-*8 (Ohio App. 1989).

The appellate court explained why the trial court was wrong about pregnancy being coercive:

> The trial court further found that "the *only* (emphasis added) reason that she signed the agreement was because she was pregnant, and that she wanted her baby to have the defendant's last name, and the defendant made it clear that if the plaintiff did not sign the agreement, the defendant would not marry her." We find that this statement is supported by the testimony, but also find that it is totally irrelevant to whether an antenuptial agreement is valid. A party's statement that he will not marry, and thereby not give his child his name, unless the other party signs an antenuptial agreement is not fraud, duress, coercion or overreaching.
>
> Fraud is defined as "some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury." Black's Law Dictionary (5 Ed. 1979) 594. Duress is defined as "A condition where one is induced by wrongful act or threat of another to make a contract under circumstances which deprive him of exercise of his free will." Id. at 452. Coercion is defined as "where one party is constrained by subjugation to [an]other to do what his free will would refuse." Id. at 234. Overreaching, as used by the Supreme Court of Ohio in *Gross,* [464 N.E.2d 500 (Ohio 1984)] is when "one party by artifice or cunning, or by a significant disparity to understanding the nature of the transaction, [seeks] to outwit or cheat the other." *Gross* at 105.
>
> Mr. Baumgartner's promise to marry Mrs. Baumgartner and legitimize their unborn child if she signed the agreement is nothing more than his consideration for the agreement. Mrs. Baumgartner certainly still had the option not to sign the agreement and, therefore, not to marry Mr. Baumgartner. If all antenuptial agreements failed because one party refused to

> marry the other if the agreement wasn't signed, then virtually all antenuptial agreements would be unenforceable.

Baumgartner v. Baumgartner, Not Reported in N.E.2d, 1989 WL 80947 at *10-*11(Ohio App. 1989).

The appellate court found that the prenuptial contract was enforceable.

Hamilton, (Pa.Super. 1991)

In May 1991, an intermediate appellate court in Pennsylvania rejected wife's claim that she signed a prenuptial contract *in*voluntarily.

> Chris Hamilton and Jill Hamilton were married on January 28, 1989. Jill was then eighteen (18) years of age and unemployed. She was also three months pregnant.
>
> ....
>
> A child, Chelsea, was born July 18, 1989. On April 9, 1990, however, Chris and Jill separated.

[A domestic relations officer recommended no spousal support, in accordance with the prenuptial agreement. Wife requested a hearing before a judge, who awarded wife $300/month in spousal support, because the judge "without specific reason, held that the antenuptial waiver of spousal support was unenforceable."]

> Although the trial court has not stated specifically its reasons for refusing to enforce the provisions of the antenuptial agreement, the arguments made by the parties in this Court assume that the basis therefor was duress.
>
> The record is clear that there was neither force nor threat of force used to induce Jill to sign the antenuptial agreement in this case. She was told, however, that without the agreement there would be no wedding. It is also true that she was pregnant, unemployed, and probably frightened. Nevertheless, she was represented by counsel, who was available to advise and did, in fact, advise her not to sign the agreement. Jill rejected this advice and signed the agreement. It seems clear, therefore, that she did not sign the agreement under duress. Where a party has been free to consult counsel before signing an agreement, the courts have uniformly rejected duress as a defense to the agreement. [citations to three Pennsylvania cases omitted]

Hamilton v. Hamilton, 591 A.2d 720, 721-722 (Pa.Super. 1991).

The appellate court reversed the award of spousal support. The court explained the rejection of old cases preventing a wife from waiving alimony or alimony pendente lite in a prenuptial agreement:

> Such decisions rested upon a belief that spouses are of unequal status and that women are not knowledgeable enough to understand the nature of contracts that they enter. Society has advanced, however, to the point where women are no longer regarded as the "weaker" party in marriage, or in society generally. Indeed, the stereotype that women serve as homemakers while men work as breadwinners is no longer viable. Quite often today both spouses are income earners. Nor is there viability in the presumption that women are uninformed,

> uneducated, and readily subjected to unfair advantage in marital agreements. Indeed, women nowadays quite often have substantial education, financial awareness, income, and assets.

Hamilton v. Hamilton, 591 A.2d 720, 722 (Pa.Super. 1991).

While I agree with the court, and I enthusiastically agree that the wife should have the legal right to waive both alimony and alimony pendente lite, the facts of this particular case were that the wife was 18 y old and unemployed at the time of the marriage. It's a reasonable guess that she *may* have been a recent high school graduate who had never been employed full time. At separation just 15 months after marriage, she could not have earned a college degree. Therefore, her earning potential would be small, especially considering that she was the primary caretaker of her infant daughter, for whom the father paid $200/month in child support. In short, this is a harsh result, although the appellate court properly applied the law. Wife did not appeal.

Kilborn, (Ala.Civ.App. 1993)

In Oct 1993, an intermediate appellate court in Alabama affirmed a trial court's determination that a pregnant bride had made a voluntary consent to the prenuptial contract:

> The record reflects that the wife was 17 years old when she first started living with the husband. Approximately three years later she became pregnant. The parties planned to marry in June 1989. The wife was three months' pregnant at the time. The husband informed the wife that she would have to sign an antenuptial agreement prior to the wedding date. The wife contacted an attorney to discuss the agreement. The wife signed the agreement, but on the advice of her attorney, did so with the following qualification "due to duress and being pregnant." The husband would not accept the conditional signature. He refused to go through with the June 1989 wedding.
>
> The husband informed the wife that he still wanted to marry her but that she would have to sign the antenuptial agreement. In October 1989 the wife contacted another attorney to discuss the agreement. She testified that the attorney advised her not to sign the agreement. She testified that she signed the agreement because she did not want her child to be born out of wedlock. Attached to the agreement was an exhibit listing the husband's assets and his anticipated inheritance. The parties were married in November 1989, and their child was born shortly thereafter. The wife was 20 years old.
>
> The wife asserts that the antenuptial agreement is invalid because she did not sign it voluntarily. She insists that she signed the agreement under coercive circumstances.
>
> We have thoroughly reviewed the record and find that the husband met his burden. The evidence was sufficient to show that the wife voluntarily signed the agreement, with competent, independent advice and full disclosure. We find no error in the trial court's judgment. That judgment is affirmed.

Kilborn v. Kilborn, 628 So.2d 884, 885 (Ala.Civ.App. 1993).

Lebeck, (N.M.App. 1994)

A couple lived together for three years prior to marrying. "In 1979, after living together for a year, the couple had a child. About two and a half years later, Husband and Wife decided to get married. Some days prior to the wedding, Husband asked Wife if she would sign a prenuptial agreement."[24] In 1989, after eight years of marriage, husband filed for divorce.

> In the present case, Wife claims that she signed the agreement as a result of undue influence, coercion, overreaching, and misrepresentations exerted by Husband. She offers as proof of this claim the fact that she wanted to marry to "legitimize" her daughter, so when Husband presented her with the agreement he had drafted several days prior to the wedding and told her he would not marry her without such an agreement being in place, she felt she had to sign it.

Lebeck v. Lebeck, 881 P.2d 727, 734 (N.M.App. 1994).
The appellate court affirmed the trial court's enforcement of the prenuptial contract. Although wife in *Lebeck* was *not* pregnant when she signed the prenuptial contract — in fact the word "pregnant" does not appear in *Lebeck* — this case is often cited in cases where the wife was pregnant at signing of the prenuptial contract. For that reason, I have included *Lebeck* in this essay.

There is an earlier case in Florida with similar facts to *Lebeck.* About 7 or 8 months after his child was born, a father proposed marriage to the mother. The father's reasons included: "I wanted to be a father to my child and to give him a family life.... Give him my name and in order to do it I feel we should make a trial at being married." The trial court found, and the appellate court affirmed, that the prenuptial contract was signed voluntarily by wife, although she was "anxious to legitimize the child". *Margulies v. Margulies,* 491 So.2d 581, 583 (Fla.App. 1986).

Osorno, (Tex.App. 2002)

In February 2002, an intermediate appellate court affirmed a trial court's finding no coercion when husband insisted that 40 y old pregnant woman sign the prenuptial contract.

> Gloria was forty years old when she met Henry in February 1992. In August, Gloria discovered she was pregnant. According to her, Henry wanted her to have an abortion, which she refused for religious reasons. In September, Henry agreed to marry her if she signed a premarital agreement. Both Henry and Gloria signed an Agreement in Contemplation of Marriage on October 9, 1992, and were married the following day.
>
> ....
>
> For duress to be a contract defense, it must consist of a threat to do something the threatening party has no legal right to do. See *Brown v. Aztec Rig Equip., Inc.,* 921 S.W.2d 835, 845 (Tex.App.-Houston [14th Dist.] 1996, writ denied). In this case, aside from his

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24 *Lebeck,* 881 P.2d at 730.

> moral duties, Henry had no legal duty to marry Gloria. His threat to do something he had the legal right to do is insufficient to invalidate the premarital agreement. Gloria was faced with difficult choices, but we cannot find her decision to sign the agreement was involuntary. See *In re Marriage of Dawley,* 17 Cal.3d 342, 131 Cal.Rptr. 3, 551 P.2d 323, 331 (1976) (refusing to set aside premarital agreement signed under pressure of unplanned pregnancy). We overrule Gloria's first point of error.

Osorno v. Osorno, 76 S.W.3d 509, 510-511 (Tex.App. 2002).

Herrera, (Fla.App. 2005)

In February 2005, an intermediate appellate court in Florida heard a case involving a pregnant woman who signed a prenuptial contract. The facts are simple:

> The former wife, a Registered Nurse, met the former husband, an emergency room doctor, while working at Baptist Hospital. The parties were engaged in 1993. On February 11, 1994, while the former wife was pregnant with the parties' first child, the parties executed a prenuptial agreement and were subsequently married on February 19, 1994. During the marriage, the former wife stayed home and cared for the parties' three minor children.
>
> On April 15, 2002, the parties separated, and on September 23, 2002, the former husband filed a Petition for Dissolution of Marriage.

Herrera v. Herrera, 895 So.2d 1171, 1173 (Fla.App. 2005).

This is the only mention of *pregnant* or *pregnancy* in this judicial opinion. At divorce, wife contested the validity of the prenuptial contract, arguing that she was under duress. The trial court rejected wife's argument. The appellate court tersely affirmed, without mentioning that she was pregnant at the time she signed the contract:

> On cross-appeal, the former wife raises three issues. We find that all of them lack merit. First, the former wife's contention that the pre-nuptial agreement should be set aside because it was a product of duress is unsubstantiated by the record. The trial court's decision to uphold the agreement is supported by competent, substantial evidence. A review of the record shows that the wife was represented by counsel of her choice and that the former wife's counsel actively participated in the negotiations of the agreement. Next, we find that the former wife's contention ....

Herrera v. Herrera, 895 So.2d 1171, 1175 (Fla.App. 2005).

Mallen, (Ga. 2005)

In November 2005, the Supreme Court of Georgia affirmed a trial court's enforcement of a prenuptial contract, when the wife was pregnant at the time she signed the contract. The facts of this case include:

> At issue in this appeal from a judgment and decree of divorce is the trial court's decision to enforce a prenuptial agreement between the parties. Catherine (Wife) and Peter (Husband) Mallen had lived together unmarried for about four years when Wife got pregnant in 1985. While she was at a clinic to terminate the pregnancy, Husband called to ask her not to have the abortion and to marry him, to both of which requests she agreed. A few days later, nine or ten days before their planned wedding, Husband asked Wife to sign a prenuptial agreement prepared by his attorney. Wife contends Husband told her the agreement was just a formality

> and he would always take care of her. She took the agreement to an attorney whom she claims Husband paid, who advised her that he did not have time to fully examine it in the days remaining before the wedding. Wife did not consult another attorney or postpone the wedding, but spoke and met with Husband and his counsel about the agreement more than once. She agreed to sign it after a life insurance benefit was increased and the alimony provisions were modified to provide for increases for each year of marriage. The agreement provided that in the event of a divorce, Wife would receive a basic alimony amount to be adjusted for the number of years of marriage, and assets would belong to whomever owned the property originally or received it during the marriage. At the time the agreement was executed, Wife had a high school education and was working as a restaurant hostess, while Husband had a college degree and owned and operated a business. Wife had a net worth of approximately $10,000 and Husband's net worth at the time of the agreement's execution was at least $8,500,000.

Mallen v. Mallen, 622 S.E.2d 812, 814 (Ga. 2005).

The Georgia Supreme Court rejected wife's allegation of duress:

> The duress Wife asserts was applied to compel her to execute the agreement was that the marriage would not occur in the absence of the prenuptial agreement and she would be left pregnant and unmarried. **....** Nothing in the record of this case suggests that Wife's free will was overcome by the "threat" of not going through with the wedding. In fact, Wife exercised her free will and declined to sign the agreement in the form it was presented to her, acquiescing only when changes were made improving her position in the event of divorce or Husband's death. The fact of Wife's pregnancy does not make Husband's insistence on the agreement rise to the level of duress. She had already demonstrated her willingness to terminate the pregnancy, so she cannot credibly claim the pregnancy put such pressure on her as to overcome her will.

Mallen v. Mallen, 622 S.E.2d 812, 815-816 (Ga. 2005).

It is interesting how wife's willingness to have an abortion simply removed her pregnancy as a factor in determining the voluntariness of her assent to the prenuptial contract.

Biliouris, (Mass.App.Ct. 2006)

In August 2006, an intermediate appellate court in Massachusetts affirmed a trial court's determination that there was neither duress nor coercion in wife's signing of a prenuptial contract. The appellate court gave the facts of the case:

> At the time the parties began their dating relationship in mid-1991, the husband, a physician, was thirty-one years of age and the wife, a home economics teacher, was thirty-five years of age. The wife had three children by an earlier marriage. In late September or early October, 1992, the wife learned that she was pregnant and shortly thereafter informed the husband of the pregnancy. Upon receipt of the news, the husband told the wife that he would not marry her unless she signed an antenuptial agreement (agreement). Thereafter, the husband's attorney prepared an agreement that the husband presented to the wife.FN1 The wife sought the assistance of counsel who, upon review of the draft agreement, advised the wife not to sign it.
>
> **FN1.** The husband testified that he raised the subject of an antenuptial agreement shortly after learning of the wife's pregnancy and that he presented the wife with the draft agreement approximately two months prior to the parties' wedding on January 2, 1993. The wife testified that the husband broached the subject of an antenuptial agreement in

November, 1992, but that she did not see the agreement until approximately one week before the parties' wedding.

On December 31, 1992, the wife met at a restaurant with the husband and his attorney to discuss the agreement,FN2 and immediately thereafter went to a bank where, in the presence of a notary, the parties executed the agreement. On the same date, the parties also signed the exhibits pages listing the parties' assets that were attached to the agreement.

FN2. It is undisputed that the wife, who at times was crying at the meeting, stated initially that she did not wish to sign the agreement. The husband testified that there were no negotiations concerning the terms of the agreement.

Biliouris v. Biliouris, 852 N.E.2d 687, 689 (Mass.App.Ct. 2006).

The appellate court then held that wife did sign voluntarily:

Even were we to assume that the wife was presented with a draft of the antenuptial agreement only one week prior to the parties' wedding (as she claims, see note 1, supra), she still had sufficient time to review it, and did in fact seek the advice of independent counsel as to its terms. As we have stated, the wife rejected counsel's opinion that she should not sign the agreement. The wife also acknowledged at trial that prior to executing the agreement and in response to a question posed by the notary, she informed the notary that her signing of the agreement was her "free act and deed." While the wife's pregnancy coupled with the husband's insistence that there would be no marriage unless she signed the antenuptial agreement presented the wife with a difficult choice, those factors cannot be said, in the circumstances presented here, to have divested the wife of her free will and judgment.

Other jurisdictions have reached the same result on somewhat similar facts. See, e.g., *Kilborn v. Kilborn,* 628 So.2d 884, 885 (Ala.Civ.App. 1993) (no error in the trial judge's determination that an antenuptial agreement was valid and enforceable and not the product of coercion where the wife, though pregnant, signed the agreement after full disclosure and against the advice of counsel); *Hamilton v. Hamilton,* 404 Pa.Super. 533, 537, 591 A.2d 720 (1991) (antenuptial agreement not signed under duress where the wife, although "pregnant, unemployed, and probably frightened," was represented by counsel and signed the agreement against his advice).[FN13] To the extent the wife appeared to suggest at oral argument that duress or coercion may have resulted in this case from the prospect of her being a single mother and the economic circumstances that may flow therefrom, the husband testified that he informed the wife that even if she did not sign the agreement he would act as a father to the child and would support the child financially. In any event, even if the husband did not make that statement, a court may enter an order for the support of a child born out of wedlock pursuant to G.L. c. 209C, § 9. [footnote omitted]

FN13. For additional cases upholding, against claims of coercion, duress, or undue influence, a trial judge's determination that an antenuptial agreement executed by a woman who was pregnant was valid, see *In re Marriage of Dawley,* 17 Cal.3d 342, 355, 131 Cal.Rptr. 3, 551 P.2d 323 (1976); *Herrera v. Herrera,* 895 So.2d 1171, 1173, 1175 (Fla.App. 2005); *Mallen v. Mallen,* 280 Ga. 43, 45-46, 622 S.E.2d 812 (2005); *Osorno v. Osorno,* 76 S.W.3d 509, 511 (Tex.App. 2002) (reasoning that because duress consists of a threat to do something a party has no legal right to do, and because the father had no legal duty to marry the pregnant mother, "[h]is threat to do something he had the legal right to do is insufficient to invalidate the premarital agreement"). Other appellate cases we have located in our research, in which courts have found coercion or duress (or that

> genuine issues of material fact existed as to whether there was coercion) in circumstances where, among other factors, an antenuptial agreement was executed by a pregnant woman, are distinguishable from the case at bar. In *Holler v. Holler,* 364 S.C. 256, 266-268, 612 S.E.2d 469 (Ct.App. 2005), the court, in concluding that the wife, who was from the Ukraine, did not enter into the premarital agreement freely and voluntarily, noted that not only was the wife pregnant at the time she executed the premarital agreement, but her visa was about to expire (thus requiring her to leave the United States unless she married), she could not understand the agreement, and she had no money of her own to retain or consult with an attorney or a translator. In *Williams v. Williams,* 617 So.2d 1032, 1035 (Ala. 1992), the court held that summary judgment was inappropriate as the testimony in the case created genuine issues of material fact as to whether, among other things, the "the father's conditioning the marriage on the pregnant mother's signing the antenuptial agreement, joined with the mother's moral objection to abortion and the importance of legitimacy in a small town, created a coercive atmosphere in which the mother had no viable alternative to accepting the father's condition for marriage, i.e., signing the agreement."

Biliouris v. Biliouris, 852 N.E.2d 687, 693-694 (Mass.App.Ct. 2006).

The wife in *Biliouris* seems ambivalent: she wanted to be married, but not on the terms demanded by her husband. That is a difficult decision for her. But once she signed the prenuptial contract, she was legally bound by her promises in that contract.

Francavilla, (Fla.App. 2007)

A Florida case in November 2007 considered the fact that the bride was seven-months pregnant when she signed a prenuptial contract on the day of her wedding. Both the trial court and appellate court found no duress. However, the appellate court refused to give its reasons. *Francavilla v. Francavilla*, 969 So.2d 522, 525 (Fla.App. 2007) ("Other facts softened the coercive effect of the pregnancy on the wife, but we see no reason to air them in a public document.").

Explanation

People who are unfamiliar with commercial contracts — including some attorneys who specialize only in family law[25] — may be dismayed by the harshness of some rules of contract law.

As shown above, an demand by a husband to sign a prenuptial contract before a wedding does *not* defeat voluntary consent by the wife. The first presentation of the prenuptial contract a day or two before a scheduled wedding does generally *not* defeat voluntary consent by the wife to the contract, although a few cases have found involuntary consent. Pregnancy of the wife does

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[25] It is a fact that there are more than twenty cases in Westlaw where an attorney alleged duress in the signing of a prenuptial contract, but where the court found no duress. These cases in Westlaw represent the tip of the iceberg, because only a tiny fraction of trial court opinions in state courts are included in Westlaw.

generally *not* defeat voluntary consent by the wife, although a few cases have found involuntary consent. These legal results may seem wrong to people who are not familiar with contract law.

People, including lawyers for some wives, make allegations of coercion, duress, or undue influence apparently without understanding the technical definitions of these three terms in law. Although any one of these terms can defeat voluntary consent, they are *not* synonyms.

definitions

1. coercion

When a person who is the target of some threat is forced to do some act that he/she would not normally do, that the person has been coerced. The coercive act is generally a threat to commit a criminal act.[26] For example, a criminal who points a pistol at the driver, and says "drive to Kansas City" has coerced the driver.

The basic concept of coercion is that (1) the coercer creates some peril, which the victim can not reasonably avoid, and then (2) the coercer demands that the victim "consent" to something in order to remove the peril. If the victim "consents", her consent is *not* voluntary, because she had no reasonable alternative.

Coercion requires that threat/harm must come from coercer. It is not coercion either to refuse to help someone or to put conditions on the help, provided that the person refusing or making conditions did not cause the victim's predicament. For example, if a poor student applies for educational loan from bank, the bank's harsh or abusive conditions are *not* coercion, because the bank caused neither student's poverty nor student's need for money.

The coercive act is a usually a tort or crime (e.g., extortion, threat) — but sometimes a morally wrong act can be coercive.[27]

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[26] Model Penal Code § 212.5 defines criminal coercion as a threat to:

a. commit any criminal offense
b. accuse anyone of criminal offense
c. expose any secret tending to subject any person to hatred, contempt, or ridicule or to impair his credit or business repute
d. take or withhold action as an official with the purpose of unlawfully restricting another's freedom of action to his detriment.

[27] *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co.,* 584 P.2d 15, 22 (Alaska 1978) (Coercive act "may be satisfied where the alleged wrongdoer's conduct is criminal or tortious but an act or threat may also be considered wrongful if it is wrongful in the moral sense. RESTATEMENT OF CONTRACTS, § 492, comment (g); *Gerber v. First National Bank of Lincolnwood,* ... 332 N.E.2d 615, 618 (Ill.App. 1975); *Fowler v. Mumford,* ... 102 A.2d 535, 538 (Del.Supr. 1954).");
quoted with approval in *Northern Fabrication Co., Inc. v. UNOCAL,* 980 P.2d 958, 961 (Alaska 1999).

2. duress

Duress is wrongful physical compulsion, or wrongful threat of physical compulsion, that compels a victim to assent against his/her will. Such *in*voluntary consent can occur in the context of either (1) assent to a contract or (2) participation in a criminal act.

Modern requirement is to consider the will of the specific victim, not to require "ordinary firmness" or courage or braveness. Person of weak or cowardly nature are the ones who most need the protection of law Restatement (Second) of Contracts § 175, comment *c*.

The RESTATEMENT SECOND OF CONTRACTS § 175 defines *duress* as assent to a contract that "is induced by an improper threat by the other party that leaves the victim no reasonable alternative." A threat is improper if the threatened act is either a crime or a tort.[28] It is essential to note that an improper threat alone does *not* constitute duress: "a threat, even if improper, does not amount to duress if the victim has a reasonable alternative to succumbing and fails to take advantage of it."[29] The contract is voidable at the demand of the victim.[30] However, the victim of duress has the option of ratifying the contract after the duress is removed.

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28 RESTATEMENT (SECOND) OF CONTRACTS, § 176 (1981).

29 RESTATEMENT (SECOND) OF CONTRACTS, p. 476, comment *b* to § 175 (1981).

30 RESTATEMENT (SECOND) OF CONTRACTS, § 175(2) and comment *d* (1981).

In other contexts that are irrelevant to this essay, duress can be a defense to any criminal act except intentional homicide.[31]

The distinction between *coercion* and *duress* is that coercion is what the perpetrator does, while duress is the effect of coercion on the victim. In practice, the two words are used as synonyms and often appear together in phrases such as "coercion or duress".

3. undue influence

Undue influence is "a milder form of pressure than duress."[32] Because of undue influence, the victim is persuaded to assent to a contract to which the victim would not ordinarily have assented. The person who asserted undue influence is generally either in some fiduciary relationship[33] with the victim, or has some authority or control ("domination"[34]) over the victim. Confidential knowledge, authority, or control is exploited to alter the victim's consent.

In re Null's Estate, 153 A. 137, 139-140 (Pa. 1930) contains a long discussion of undue influence and confidential relationships in the context of an alleged gift.

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31 • *Shannon v. U.S.,* 76 F.2d 490, 493 (10thCir. 1935) ("Coercion which will excuse the commission of a criminal act must be immediate and of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. One who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrine of coercion and is not entitled to an instruction submitting that question to the jury."). This statement in *Shannon* was called "the classic definition of duress or coercion", *U.S. v. Atencio,* 586 F.2d 744, 746 (9thCir. 1978) and "a definitive statement of the elements of a duress defense", *U.S. v. May,* 727 F.2d 764, 765 (8thCir. 1984).

• *U.S. v. Helem,* 186 F.3d 449, 456 (4thCir. 1999) (Quoting district court: "The term coercion and duress, coercion and duress are interchangeable. Coercion or duress exists when an individual is subject to actual or threatened force of such a nature as to induce a well-founded fear of impending death or serious bodily harm from which there is no reasonable opportunity to escape."), *cert. den.,* 528 U.S. 1053 (1999).

• *U.S. v. Dowd,* 417 F.3d 1080, 1087 (9thCir. 2005) ("The district court's jury instruction, modeled after the interpretation of [18 U.S.C.] § 2261(a)(2) by the Fourth and Sixth Circuits, properly defined the elements of coercion or duress, which we shall refer to simply as 'coercion.' See *Helem,* 186 F.3d at 456-57; *Baggett,* 251 F.3d at 1096 [(6thCir. 2001) ("We agree with the standard articulated by our sister circuit in *Helem,* ....")]. Applying that definition here, ..."), *cert. den.,* 546 U.S. 1069 (2005).

32 RESTATEMENT (SECOND) OF CONTRACTS, p. 474 (1981).

33 RESTATEMENT (SECOND) OF CONTRACTS, comment *a* to § 177, see also § 173 (1981).

34 RESTATEMENT (SECOND) OF CONTRACTS, § 177(1) (1981).

same rules for prenuptial and commercial contracts?

Some state supreme courts have explicitly held that prenuptial contracts are subject to the rules of ordinary (i.e., commercial) contract law.[35] In these states, one would expect judges to use the rules of commercial contract law in deciding cases involving alleged *in*voluntary consent to prenuptial contracts.

However, in many states in the USA, judges continue to give prenuptial contracts more scrutiny for fairness than in a commercial contract case. I am surprised that judges in these states (1) paternalistically void prenuptial contracts that contain substantive terms that are allegedly unfair to the wife, but (2) judges in these states apply commercial contract rules for duress in a prenuptial contract, which effectively ignores alleged unfairness in the assent to the prenuptial contract. In my opinion, it is *in*consistent for judges to be concerned about alleged unfairness in substantive terms of the prenuptial contract, but ignore alleged unfairness in the assent to the prenuptial contract.

application to prenuptial contracts

1. ultimatum *not* duress

In the context of prenuptial contracts, a husband's ultimatum to sign or cancel the wedding is *neither* duress *nor* undue influence, because the husband has the legal right to refuse to be married. If there is doubt, the parties should not be married, because incompatible people are likely to have a miserable marriage and then divorce.

As a general statement of contract law, a party has the legal right to insist on agreement to specific terms in a contract.[36] If the other party chooses not to agree, then there is no contract. There is no legal duty either to negotiate or to compromise. Refusal to either negotiate or compromise may be unpleasant — or even unreasonable — but it is part of a person's freedom.

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[35] See, e.g., *McHugh v. McHugh,* 436 A.2d 8, 11 (Conn. 1980) ("An antenuptial agreement is a type of contract and must, therefore, comply with ordinary principles of contract law."); *Northern Trust Co. v. King,* 6 So.2d 539, 540 (Fla. 1942) ("The law is settled that in our search for the intent of the parties in this kind of cases [antenuptial agreement] we are guided by substantially the same rules as when construing other contracts."; *Herpich v. Estate of Herpich,* 994 So.2d 1195, 1197 (Fla.App. 2008) ("The same principles that control the construction of other contracts apply to the interpretation of a prenuptial agreement."); *Simeone v. Simeone,* 581 A.2d 162, 165 (Pa. 1990) ("Prenuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts."); *Porreco v. Porreco,* 811 A.2d 566, 570 (Pa. 2002) ("[In *Simeone,*] we placed prenuptial agreements on the same general footing as other contracts, to be enforced pursuant to the well-settled principles of contract law.").

[36] RESTATEMENT (SECOND) OF CONTRACTS, p. 482, first two sentences of comment *a* to § 176 (1981).

In the context of negotiations between two businessmen, threats or ultimatums are legally acceptable as part of the bargaining process, because duress requires a threat of a wrongful or unlawful act, and refusal to do business is neither wrongful nor unlawful.

- *Hellenic Lines, Ltd. v. Louis Dreyfus Corp.,* 372 F.2d 753, 758 (2dCir. 1967) ("It is evident that Dreyfus merely exercised its business judgment in a difficult situation." Court found no duress, because "Dreyfus had plainly not lost capacity to exercise its judgment.");

- *Business Incentives Co., Inc. v. Sony Corp. of America,* 397 F.Supp. 63, 69 (S.D.N.Y. 1975) ("Mere hard bargaining positions, if lawful, and the press of financial circumstances, not caused by the defendant, will not be deemed duress."). Quoted with approval in: *Chouinard v. Chouinard,* 568 F.2d 430, 434 (5thCir. 1978); *Weinraub v. International Banknote Co., Inc.,* 422 F.Supp. 856, 859 (S.D.N.Y. 1976); *Mazurkiewicz v. New York City Health and Hospitals Corp.,* 585 F.Supp.2d 491, 500 (S.D.N.Y. 2008).

- *D.C. Taylor, Co. v. Dynamit Nobel of America, Inc.,* 558 F.Supp. 875, 878-879 (N.D.Ill. 1982) ("Long hours of negotiating and a 'take-it-or-leave-it' position amount to hard bargaining, not duress.");

A New York State case said:

> A mere threat by one party to a contract to breach it by not delivering required items, indeed, financial or business pressure of all kinds, even if exerted in the context of unequal bargaining power, does not constitute economic duress. (*Austin Instrument v. Loral Corp.,* 29 N.Y.2d 124, 130, 324 N.Y.S.2d 22, 272 N.E.2d 533 [(N.Y. 1971)]; *Bethlehem Steel v. Solow,* 63 A.D.2d 611, 405 N.Y.S.2d 80 [(N.Y.A.D. 1978)]). "It must also appear that the threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate" (*Austin Instrument v. Loral Corp.,* supra, 29 N.Y.2d at 130-131, 324 N.Y.S.2d 22, 272 N.E.2d 533). In any event, defendants are estopped from asserting economic duress by reason of their failure to assert it for more than two years, while benefitting from the lease transaction they had agreed to guarantee (*Bank Leumi Trust Co. v. D'Evori Intl.,* 163 A.D.2d 26, 558 N.Y.S.2d 909).

Orix Credit Alliance, Inc. v. Hanover, 582 N.Y.S.2d 153, 154 (N.Y.A.D. 1992).
Orix was quoted with approval in: *DuFort v. Aetna Life Ins. Co.,* 818 F.Supp. 578, 582 (S.D.N.Y. 1993); *Zipper v. Sun Co., Inc.,* 947 F.Supp. 62, 71 (E.D.N.Y. 1996).

- *Boud v. SDNCO, Inc.,* 54 P.3d 1131, 1138, 2002 UT 83, ¶25 (Utah 2002) ("... the mere loss of a potential bargain does not leave a plaintiff with 'no reasonable alternative.' ");

- *Happ v. Corning, Inc.,* 466 F.3d 41, 44 (1stCir. 2006) ("Happ's claim of duress fails at the first of these hurdles. Physical duress is almost always wrongful but much commercial bargaining involves economic pressure; 'absent an improper threat, the driving of a hard bargain is not duress.' 7 J. Perillo, CORBIN ON CONTRACTS § 28.3, at 47 (rev'd ed. 2002). Whether or not pressure existed, Corning's insistence on the undertaking was not unlawful or wrongful within the meaning of the duress doctrine.").

The attorney for a wife might argue the parties to a prenuptial contract are in a confidential relationship with each other, which *might* distinguish the commercial cases from the prenuptial cases. But there is nothing wrongful or unlawful about refusal to marry someone, so a threat of "sign or I will not marry you" is *not* duress. Maybe *if* it could be proven that the fiancé was the only man on the planet who would consider marrying the bride, then his ultimatum *might* constitute duress, because then there would be no reasonable alternative.

2. sudden appearance *not* duress

The presentation of a written prenuptial contract for the first time a few days before a scheduled wedding is an awful thing for a fiancé to do to his bride. But such surprise presentation is not *un*lawful, so it is not duress.[37] It is understandable that the bride does not want to cancel the wedding, and be embarrassed in front of her family and friends, but contract law does not consider such embarrassment. The bride has a reasonable alternative to accepting the prenuptial agreement: she can cancel the wedding, so this scenario is *not* duress.

Any fiancé who would suddenly present a written prenuptial contract a few days before a wedding is not the kind of man who behaves reasonably toward his wife. In such cases, the fiancée *should* cancel the wedding and spare herself an unhappy marriage and divorce. My conclusion may appear too simplistic or overly broad, but another attorney has said something similar: "... if you are engaged to someone who does have a problem with making a disclosure or review of the agreement by an independent attorney the warning bells should be sounding."[38] I agree: the bride should hear warning bells, *not* wedding bells.

3. pregnancy *not* duress

The last scenario presented above — pregnancy of the bride — is the most troubling. I suggest the moral outrage comes from the vernacular phrase "he got her pregnant", which suggests that the fiancé *caused* her pregnancy. Such causation sounds like the fiancé is a coercer who created some peril. But this view is a mistake. With the exception of rape or fraud about contraception, the man does *not* get the woman pregnant — any pregnancy is the result of *mutual* consent to sexual intercourse, so both parties are equally responsible. Furthermore, the availability of abortion or adoption at birth gives the woman reasonable alternatives to being a single mother, although she may find these alternatives *un*palatable or *un*acceptable.

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[37] Indeed, as shown above, beginning at page 21, there is no justifiable reliance on a promise to marry. Cancellation of the wedding is always legally possible.

[38] Aaron D. Weems, "The Essentials of the Pennsylvania Prenuptial Agreement," http://pafamilylaw.foxrothschild.com/articles/prenuptial-agreements/ (28 April 2009).

The issue of pregnancy as a factor in coercion is even more difficult than the alleged duress of presenting a prenuptial contract with an ultimatum, a few days before a wedding. With a few exceptions, judges appear *not* to consider pregnancy as a special consideration in the analysis of coercion. I am troubled by the superficial or *in*adequate legal analysis in reported judicial opinions on the topic of pregnancy as coercion. However, I agree with the rule in the majority of jurisdictions that pregnancy is *not* relevant to voluntary consent to a prenuptial contract, because there is nothing wrongful or unlawful about an unmarried woman being pregnant.

I wonder if the superficial analysis in reported judicial opinions is a result of *in*adequate legal research by family law attorneys. Blackletter duress law that requires the coercive act to be either a crime or a tort, and an unmarried woman being pregnant is neither. An attorney who wants to argue that pregnancy of the bride constitutes duress should focus on the few duress cases that hold that a *morally wrong* act can be coercive.[39] The wife's attorney will probably need to call expert witnesses from clergy and psychologists to testify about the moral wrongness of the father of the unborn child refusing to marry the pregnant bride unless she signs a prenuptial contract. I suspect this "morally wrong" argument will be doomed to failure. The only reported case that I have found that mentions the social stigma of being an unmarried mother is the Alabama Supreme Court opinion in *Ex parte Williams,* 617 So.2d 1032, 1035 (Ala. 1992), which was quoted above at page 24.

Conclusion

While a prenuptial contract drafted by the financially stronger party and signed by the weaker party without any negotiations *may* be enforceable at divorce, such a process gives little assurance about the validity of the contract and its enforcement by a judge in a divorce court. Because there is no value to a prenuptial contract that is not enforceable at divorce, people should avoid a process that could create reasons to void the prenuptial contract.

Instead of arguing over the law of coercion, I take the position that there is *no good reason* for the husband to delay presenting a prenuptial contract until a few days before a wedding. I urge that *every* prenuptial contract *should* be negotiated and discussed over a period of weeks — perhaps even months — with each party receiving legal advice from an independent attorney who is knowledgeable about prenuptial contracts. Each party *should* be making suggestions and earnestly negotiating. Such earnest negotiations will avoid *many* later problems (e.g., contract of adhesion, and allegations of: unknowing waiver, involuntary waiver, coercion, duress, undue influence, etc.).

Furthermore, any fiancé who would suddenly present a written prenuptial contract a few days before a wedding is not the kind of man who behaves reasonably toward his wife. In such cases, the fiancée *should* cancel the wedding and spare herself an unhappy marriage and divorce.

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[39] See footnote on page 37 for a few major cases on an immoral act as coercive.

The fact that a bride may be *un*sophisticated — or *un*caring — about both contracts and law does not justify making new rules of contract law to protect her from a bad decision that she later regrets. As a mentally competent person, a woman has the freedom to sign contracts and be legally bound by her assent to the contract. The consequence of equal legal rights for women means that women sometimes need to make difficult or unpleasant choices, just like men.

The lesson of this essay is simple: a person who does not want to honor all of the promises in a prenuptial contract should *not* sign the contract. It really is that simple.

This document is at **www.rbs2.com/dcontract3.pdf**
My most recent search for court cases on this topic was in September 2009.
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