

Drafting a Prenup for a Bride-to-be who is Pregnant

By Jessica Berger

Many of us are familiar with the English wedding rhyme that describes what a bride should wear on her wedding day for good luck:

Something old,
Something new,
Something borrowed,
Something blue,
And a silver sixpence in her shoe.

As cohabitation before marriage continues to rise, now, more than ever, a bride's something new may be her pregnancy.

In fact, nearly 20 percent of women experienced a pregnancy in the first year of their premarital cohabitation.

Under Illinois law, parties must freely enter into a prenuptial agreement.

Although Illinois law is silent on whether a pregnancy impacts the notion of freely entering a prenuptial agreement, this topic has been analyzed in other states.

More importantly, at times in these other states, prenuptial agreements that were signed while women were pregnant were later determined to be invalid due to factors that created duress or coercion.

Thus, just as duress and coercion are defenses to the enforcement of a traditional contract, both are also defenses to the enforcement of a prenuptial agreement.

Pregnancy by itself does not constitute duress or coercion; instead, courts have determined the existence of duress or coercion on a case-by-case basis.

Recently, a West Virginia court reasoned that, despite a pregnancy, neither duress nor coercion existed when a prenuptial agreement was signed since both parties were middle-age, both parties were married before, both parties were represented by independent counsel and the wife was highly educated.

A prenuptial agreement was found to be valid and enforceable, regardless of pregnancy, when the husband threatened to cancel the wedding because the agreement was written in French, the wife's native language.

In *Holler v. Holler*, the court was presented a similar set of fact; yet, the court concluded that the wife did not enter into a prenuptial agreement freely and voluntarily.

The *Holler* court noted that the prenuptial agreement was only provided to the wife to review in English while the wife's native language was Ukrainian, the wife's visa was about to expire, and that she had no money of her own to consult with a translator.

The *Holler* court further reasoned that because the wife was "pregnant with husband's child, she sought to insure his continued support and to remain in the United States."

A prenuptial agreement was determined to be invalid due to coercion and duress in *Ex parte Williams*.

The Alabama Supreme Court took into account the wife's moral objection to abortion, the importance of a baby's legitimacy in her hometown and her desire to maintain credibility within her community.

One court found coercion when a woman was pregnant and the prenuptial agreement was signed one day before the wedding. Consequently, provisions in the prenuptial agreement that related to alimony were declared invalid.

In *Biliouris v. Biliouris*, a prenuptial agreement was held valid, in spite of the wife's pregnancy, because the wife had sufficient time to review the agreement, the wife was represented by counsel (although wife rejected counsel's opinion that she should not sign the agreement), and the wife informed the notary that signing the agreement was her "free act and deed."

Accordingly, extra precautions should be taken when drafting a prenuptial agreement for a client that is expecting a baby.

These precautions include the following:

- Determine if the pregnant party has either moral or religious objections to abortion.
- Ascertain if the pregnant party would face either severe hardships or consequences from her family and community if she did not enter into the marriage.
- Assist the pregnant party in finding competent counsel if she does not already have competent counsel.
- Confirm that the pregnant party understands the prenuptial agreement, and take appropriate measures such as hiring a translator if English is not the pregnant party's native language.
- Disclose the pregnancy within the text of the prenuptial agreement.
- State within the text of the prenuptial agreement that the parties want to enter the prenuptial agreement even if the individual is pregnant.

- State within the text of the prenuptial agreement that despite the pregnancy, the parties are entering into the prenuptial agreement of their own free will.
- State within the text of the prenuptial agreement that the prenuptial agreement remains in effect even if there is a miscarriage, still-birth or death of the baby shortly after the child's birth.
- Coordinate the signing of the prenuptial agreement with an adequate amount of time before the wedding.
- Remember, just as with other Illinois prenuptial agreements, do not include provisions limiting child support, relating to a child's custody or scheduling parenting time.
- Refer to the Illinois Premarital Agreement Act to confirm that no other issues exist.