

Denver Law Review

Volume 74
Issue 4 *Symposium on Coercion - An
Interdisciplinary Examination of Coercion,
Exploitation, and the Law*

Article 5

January 1997

The Coercion of Women in Divorce Settlement Negotiations

Penelope Eileen Bryan

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Penelope Eileen Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 *Denv. U. L. Rev.* 931 (1997).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

THE COERCION OF WOMEN IN DIVORCE SETTLEMENT NEGOTIATIONS

PENELOPE EILEEN BRYAN*

This essay addresses contextual coercion (or, in Alan Wertheimer's terms, unfair background conditions¹) in divorce settlement negotiations. I argue that psychological, social, practical and legal impediments create a hostile environment in which many divorcing wives bargain. As a result of these unfair background conditions, many wives enter divorce settlement agreements that fail to provide them and their children with adequate financial support. Some wives seek relief from these unfair divorce settlements and move to have them vacated on grounds of coercion, duress, misrepresentation, and unconscionability. These contract doctrines, and the particular spin that family law places on them, generally fail to comprehend or to take seriously the disadvantages confronting many women in settlement negotiations. Rather, as written and as applied, these doctrines frequently confirm, rather than correct, unfair results.

Consider first the financial context in which divorcing wives must bargain.² Generally the wife and the children are dependent upon the husband.³ Until a court orders temporary support, husbands frequently refuse to provide child support and/or maintenance. The wife then has difficulty meeting her basic needs and those of her children. Unless the wife or her lawyer obtains an order for temporary support and the husband complies with that order, the wife's financial situation can become desperate, increasing her willingness to accept a poor settlement. On the streets, this tactic is called "starving her out."⁴

The wife's low or non-existent income also makes it difficult for her to pay attorneys' fees. Many wives proceed without lawyers⁵ or agree to joint representation by lawyers their husbands have chosen.⁶ A wife who seeks a lawyer sometimes cannot find one willing to represent her. Lawyers know that

* Associate Professor of Law, University of Denver College of Law. B.S., Rollins College, 1978; J.D., University of Florida, 1981; M.A. (Sociology), University of Florida, 1989.

1. Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV U. L. REV. 889, 901 (1997).

2. When I speak of women and their experiences, of course, I speak in statistical generalities that may not apply to all women.

3. Approximately fifty percent of American wives earn no income because they do not participate in the labor force. Most wives who do work outside the home earn substantially less income than their husbands. Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 449-50 (1992).

4. For description of a case where the husband employed this tactic, see Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177, 177-88 (1994).

5. See, e.g., *In re Marriage of Broday*, 628 N.E.2d 790 (Ill. App. Ct. 1993).

6. See *In re Marriage of Brandt*, 489 N.E.2d 902 (Ill. App. Ct. 1986).

wives frequently cannot pay their fees and that courts commonly refuse to order husbands to pay wives' legal fees. Many lawyers, particularly expensive lawyers, admit that they prefer to represent husbands because they know that husbands can pay their fees. Even when both spouses can afford attorneys, the wife is likely to hire the less expensive and less competent lawyer.⁷

The wife's inadequate financial resources frequently prevent her from conducting her case in a manner that protects her interests. In order for the wife to determine the extent and the value of the marital assets, expensive discovery must occur and valuation experts must be retained.⁸ Moreover, dependent persons generally perceive their benefactors as benevolent, and a wife's naive trust of her husband may encourage her to assume that she will not need her own lawyer and that her husband will treat her fairly at divorce.⁹ The roles each spouse played during the marriage and their respective spheres of authority within the marriage¹⁰ can exacerbate the problems created by the wife's financial dependency.

While some couples today exhibit egalitarian attitudes about marriage, the traditional division of labor within the family seems quite intractable. More wives than ever now participate in the workforce and share the burden of providing for the family. Yet husbands still exercise greater control over marital decisionmaking, particularly important financial decisions. When a husband has exercised authority over financial issues, the wife may accept his definition and valuation of the marital property rather than require verification by an expert, particularly if she lacks the resources to hire an expert. The wife also may lack the knowledge needed for successful financial negotiations. The husband may even conceal¹¹ or deliberately undervalue assets,¹² relying upon her ignorance.

Moreover, despite egalitarian attitudes, wives still retain primary responsibility for homemaking and child-rearing.¹³ The wife's acceptance of this role is secured through her socialization as a caregiver and through the validation

7. Bryan, *supra* note 4.

8. Cases challenging settlement agreements provide many examples of wives and/or their attorneys failing to conduct any discovery at all. *See, e.g., In re Marriage of Broday*, 628 N.E.2d at 795.

9. *Id.*

10. Sex role ideologies prescribe spheres of influence and appropriate behavior for marital partners. Currently these ideologies range from egalitarian/modern to traditional. Modern beliefs about sex roles prescribe equality between spouses. Egalitarian couples share decision-making and family roles. Traditional sex role ideology, however, contemplates a marital partnership in which husbands dominate and each spouse has distinct roles. Husbands are the primary providers, while wives nurture and attend to relationships within the family. These separate roles impart primary authority over important financial issues to the husband, and primary influence over decisions relating to children and family care to the wife. *See* Bryan, *supra* note 3.

11. *See, e.g., In re Marriage of Frederick*, 451 N.E.2d 612 (Ill. App. Ct. 1991); *Bellow v. Bellow*, 352 N.E.2d 427 (Ill. App. Ct. 1976).

12. *See In re Marriage of Brandt*, 489 N.E.2d 902 (Ill. App. Ct. 1986).

13. VICTOR FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 72 (1988). Fuchs concludes that women's disproportionate responsibility for child care provides the most powerful explanation of the difference in men and women's earnings. *Id.* at 62. Although the gap between men and women's wages closed by 7% between 1980 and 1986, Fuchs explains that the improvement largely was due to the increased percentage of women workers who were born after 1946 and had fewer children. *Id.* at 65-66.

she receives from her husband and children, and from society, for behaving in conformity with unspoken expectations of self-sacrifice and service. The importance the wife places on her care-giving role encourages her to place greater value on having custody of the children than does the husband. A loss of custody not only would unacceptably alter her relationship with the children but also would violate her sense of self. A divorcing mother, then, may be inclined to accept an unfair financial agreement if her husband threatens a custody dispute.¹⁴ The wife's meager financial resources may make her fear of losing custody all the more salient, for she may know that she cannot, and that he can, hire attorneys and experts.

Many psychological factors predispose wives more than husbands to accept unfair settlement offers. For instance, wives suffer more from depression than do husbands; wives generally have less status than their husbands; women use less assertive (and less effective) conflict resolution styles than do men; women have lower self-esteem than men; women expect less than men do; and women fear achieving, particularly when their achievement generates disapproval from the men upon whom they have been dependent. Each of these factors causes wives significant problems in divorce negotiations.¹⁵

Many wives suffer abuse from their husbands.¹⁶ Typically a batterer exercises control over every aspect of his victim's life; her beliefs, her values, and her body as well as her access to family, friends, employment, and money.¹⁷ The problems created by this extensive control are enhanced by other common characteristics of abused spouses: risk aversion, guilt grounded in traditional beliefs about family responsibilities, low self-esteem, low expectations, depression, and passivity.¹⁸ When these factors are coupled with the terror experienced by many battered spouses at the mere mention of their tormentors, the extreme disadvantage of abused spouses in divorce negotiations becomes clear. An abused spouse may want to obtain her divorce without making any requests for property or maintenance that will ruffle his feathers—trading, in essence, her life for their assets.

Divorce laws contribute to these inequitable background conditions. As the wife exits the marriage in which her care-giving and self-sacrifices were endorsed and encouraged, law recasts her experiences in terms of a masculine market ideology—an ideology that comprehends the world through lenses of autonomy, self-interest, formal equality and individualism. The sacrifices she made in the market in order to fulfill her caregiving obligations, the expendi-

14. Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984).

15. See Bryan, *supra* note 3, at 457-81 (1992).

16. Estimates of the frequency of wife beating range from one-third to one half of all marriages. M. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 31 (1980); Laurie Woods, *Litigation on Behalf of Battered Women*, 7 WOMEN'S RTS. L. REP. 39, 41 (1981).

17. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2120-32 (1993).

18. For various discussions of these problems, see LENORE WALKER, THE BATTERED WOMAN (1979); LENORE WALKER, THE BATTERED WOMAN SYNDROME (1984); Fischer, *supra* note 17, at 2118, 2165-71.

tures she made of herself, are incomprehensible in a world framed by these concepts.¹⁹ The fiction of formal equality obscures her compromised position in the labor market, her continuing care-giving responsibilities, her prior investment in the family, and her need of assistance. Her continued financial dependency is discounted by an individualism that respects her husband's ability to leave, unencumbered by continuing responsibilities to her. The brutality of the transition from family to law and the market stuns and confuses many wives, leaving them ill-equipped to fend for themselves during divorce negotiations.

A closer examination of the substantive law and its operation clarifies this point. First, custody decisions are governed by the best interests of the child standard. A typical statute lists ten or twelve factors that should be taken into account in determining what custody/visitation arrangement best serves a child's interest. At first blush, this standard appears friendly to a parent who has invested substantial time in child care. The indeterminacy and the politicization of the standard, however, threaten rather than support a caring mother.

The "best interests of the child" standard is so indeterminate as to be no standard at all. Many have noted the lack of guidance the standard gives to negotiating parties, the wide discretion it creates for trial court judges, and the advantage it provides to the wealthier spouse, usually the husband, who can hire the better credentialed and more persuasive experts.²⁰ Moreover, during the past decade, fathers' groups have employed the rhetoric of formal equality to press for legislation expressing a preference for joint custody and a presumption that divorced children benefit from substantial and continued contact with both parents.

An indeterminate standard grounded in formal equality does not reward a mother who has invested substantially more time in the children than the father. The mother's lack of a solid legal entitlement weakens her position in custody negotiations and makes her reluctant to push for fairness in financial negotiations for fear of provoking a custody contest.²¹

Spousal maintenance law creates a similar problem. As with child custody statutes, maintenance statutes typically list numerous factors a court should

19. Martha Fineman argues that egalitarian ideology has helped to neuter motherhood by devaluing and making invisible the caretaking function that mothers typically perform. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 68 (1995).

20. See, e.g., MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991); David N. Bolocofsky, *Use and Abuse of Mental Health Experts in Child Custody Determinations*, 7 *BEHAV. SCI. & L.* 203 (1991) (stating that in a survey of lawyers, judges, and mental health professionals, over 70% thought the "best interests of the child" standard was unclear); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 *MICH. L. REV.* 477 (1984); Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 *CARDOZO L. REV.* 1523, 1533 (1994); Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *LAW & CONTEMP. PROBS.* 226 (1975).

21. Perversely, the worse the father's performance as a parent during the marriage, the more the mother may desire custody in order to protect the children, and the more vulnerable she may become to financial manipulation.

consider in determining whether and how much spousal maintenance to award. The indeterminacy of the statutes and the inconsistency in judicial opinions weaken a wife's ability to negotiate for maintenance. She cannot, for instance, realistically threaten to go to trial and obtain a maintenance award if her husband balks during negotiations.²²

The rhetoric of formal equality that pervades divorce law further weakens a wife's claim for maintenance.²³ Thinking of women as equivalent to men suggests that they are able to care for themselves as men do. Moreover, it implies that they can behave as men do and compete successfully in the job market. This formal and gendered idea of equality ignores the fact that women generally receive less pay than men for the same or equally valuable work;²⁴ that women have more difficulty than men in securing suitable employment;²⁵ that motherhood inevitably constrains women's marketplace participation²⁶ especially when women must parent alone after divorce;²⁷ that spousal maintenance may be necessary for women to begin to achieve actual equality with men; and that society continues to demand that women fulfill the bulk of our collective responsibility for caregiving.

Belying women's worlds, equality rhetoric supports the perception that

22. See *In re Marriage of Flynn*, 597 N.E.2d 709 (Ill. App. Ct. 1992) (describing a 67-year-old wife with poor health who agreed to waive her maintenance rights primarily because she believed it was the best she could do under the circumstances). Only between 10% and 17% of all divorcing wives receive any spousal maintenance whatever. See BUREAU OF THE CENSUS, CHILD SUPPORT AND ALIMONY: 1987, CURRENT POPULATION REPORTS, SERIES P-23, NO. 167. (1990) (stating that in a 1988 Census survey 17% of the divorced women reported that their divorce decree entitled them to spousal maintenance); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 167 (1985); Terry J. Arendell, *Women and the Economics of Divorce in the Contemporary United States*, 13 SIGNS 121, 133 (1987); Claire L'Heureux-Dube, *Economic Consequences of Divorce: A View From Canada*, 31 HOUS. L. REV. 451, 485 (1994) (stating that in Canada during 1990 only 16% of women requested spousal maintenance upon divorce and only 19% of custodial mothers requested spousal maintenance). Custodial mothers with dependent children receive maintenance less than one-third of the time. E.g., Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *DIVORCE REFORM AT THE CROSSROADS* 84 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (stating that in New York in 1984 only 24% of divorced mothers with custody were awarded spousal maintenance); E. MACCOBY & R. MNOOKIN, *DIVIDING THE CHILD* 123 (1992) (stating that a California study found that alimony was awarded in 30% of cases in which the divorcing couple had at least one child under the age of 16). Even when wives do obtain maintenance, the awards are small and for short durations.

23. See generally FINEMAN, *supra* note 20 (noting that the use of "rule" or formal equality rhetoric in divorce reform has compromised the position of many women on economic and custody issues).

24. Terry J. Arendell, *Women and the Economics of Divorce in the Contemporary United States*, 13 SIGNS 121, 129-30 (1987).

25. Qualified women also have more difficulty than qualified men in achieving deserved promotion. See WEITZMAN, *supra* note 22, at 323-56.

26. FINEMAN, *supra* note 19, at 25-27, nn.23-24. As Professor Fineman notes: "[A] primary focus now is on women as economic actors, a role that requires a degree of independence that is difficult, if not impossible, to reconcile with the demands of 'traditional motherhood.'" FINEMAN, *supra* note 19, at 68. See also Arendell, *supra* note 24, at 124-25, 128-29; Mary Corcoran et al., *The Economic Fortunes of Women and Children: Lessons from the Panel Study of Income Dynamics*, 10 SIGNS 232, 234 (1984).

27. See generally FINEMAN, *supra* note 20, at 5; WEITZMAN, *supra* note 22, at 355-56 (stating that the presence of children in the divorced woman's household depresses her opportunities for economic betterment).

women need only small amounts of short-term maintenance or none at all. Furthermore, the idea that spouses (husbands) have the right to leave their marriages unencumbered by obligations to their prior spouses (wives) finds expression in the law's current preference for a "clean break" at divorce.

The "clean break" rationale favors the use of property distribution, rather than maintenance, to achieve financial equity between spouses.²⁸ Marital property in most states is subject to equitable distribution. Again we encounter statutory indeterminacy, and the predictable result is that wives generally receive fewer marital assets than husbands.²⁹ Moreover, even if marital assets were equally divided, equality once again would mask inequity.

Under current definitions of marital property,³⁰ most divorcing couples have little property to distribute. The marital property of a couple married for many years generally consists only of equity in a marital home.³¹ In addition, today's more expansive definition of marital property stops short of embracing a spouse's enhanced earning capacity.³² A spouse's enhanced earning capacity, however, frequently is the most valuable financial resource in a marriage. Excluding it from marital property, particularly when maintenance is disfavored and infrequent, skews the distribution at divorce.³³ Consequently, under current distribution laws, a wife, at the extreme, may be entitled to half of the value of limited assets. Formal equality again masks inequity.

Representation by an attorney does little to level this uneven playing field. Like judges and legislators, lawyers are steeped in the ideologies of law, the market, and patriarchy that ignore the positions of women and undervalue the caregiving work women perform in the family.³⁴ In addition, many lawyers are incompetent or they incompetently represent some clients. Many attorneys dabble in divorce cases only when more desirable cases are lacking. Some unimpressive solo practitioners "specialize" in divorces because desirable clients go elsewhere, and the steady stream of divorce clients pays the bills. Only within the past two decades, as attorneys began to recognize the financial

28. See, e.g., *In re Marriage of Flynn*, 597 N.E.2d 709 (Ill. App. Ct. 1992).

29. See, e.g., WEITZMAN, *supra* note 22, at 106-07; KAREN WINNER, *DIVORCED FROM JUSTICE: THE ABUSE OF WOMEN AND CHILDREN BY DIVORCE LAWYERS AND JUDGES* 41-42 (1996).

30. Nearly every state defines as marital all property acquired by either spouse during the marriage with the exception of property obtained by gift or through inheritance. J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 CAL. L. REV. 1091, 1094 (1992) (reviewing *DIVORCE REFORM AT THE CROSSROADS* (Stephen D. Sugarman & Herma Hill Kay eds., 1990)). During the past several decades most jurisdictions have expanded their definition of marital property to encompass property titled solely in one spouse's name, Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2314 (1994), pension and retirement plans, *id.* at 2318, goodwill of businesses, William A. Reppy, Jr., *Major Events in the Evolution of American Property Law and Their Impact to Equitable Distribution States*, 23 FAM. L.Q. 163, 183-84 (1989), and, in a few jurisdictions, increased value of separate assets, for example, COLO. REV. STAT. § 14-10-113(4) (1996). Under extreme circumstances a few states allow judges to award the separate property of one spouse to the other spouse upon divorce. Robert J. Levy, *An Introduction to Divorce—Property Issues*, 23 FAM. L.Q. 147, 156 (1989).

31. WEITZMAN, *supra* note 22, at 66, 78-79.

32. Arendell, *supra* note 24, at 131-32.

33. WEITZMAN, *supra* note 22, at 66, 78-79.

34. See, e.g., PHYLLIS CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* 198-208 (1987) (describing lawyers' gender bias against women in custody disputes).

potential of divorce law, have high quality law firms specializing in divorce become common. These firms, however, generally handle only a few wealthy clients, and many of these clients are husbands.³⁵

The wife's inadequate financial resources encourage attorneys to forego needed discovery,³⁶ to invest inadequate time in case preparation,³⁷ to neglect their clients' cases,³⁸ and ultimately to encourage their women clients to accept poor agreements.³⁹ The wife frequently cannot resist her attorney's pressure to settle.⁴⁰ Put simply, the context of divorce practice far too frequently invites the wife's attorney to compromise the wife's interests during settlement negotiations and to encourage the wife to accept a poor deal.

If the wife enters an unfair settlement, judicial oversight could, but does not, provide relief. At the final hearing most jurisdictions impose a duty on the judge to review a divorce agreement for fairness or lack of unconscionability.⁴¹ Currently, however, for many reasons,⁴² judges pay only cursory attention to the actual provisions of divorce agreements.⁴³ Since judges routinely fail in this task, the only option available to a wife who has entered an unfair agreement is to petition the court to set aside or vacate the agreement.

Many wives lack the financial and emotional resources needed to bring such a challenge. Those who do must confront hostile judges and insensitive legal doctrine. Because the context in which divorce settlements are negotiated is tilted against most wives, courts should listen sympathetically to women's

35. I know a wealthy lawyer who lives in a town of about 75,000 and who recently filed for divorce. Before choosing his lawyer, he interviewed every law firm in his area known to specialize in divorce. During the interviews he provided enough facts about his finances and the marriage to assure that none of these firms could represent his wife without a conflict of interest. He is not the first wealthy man I have known to employ this tactic.

36. In many cases where the wife's attempts to vacate a prior divorce judgment that incorporated a property settlement agreement, the lack of discovery by the wife's lawyer is apparent. One must assume either that all of these lawyers are incompetent, and/or that their clients lacked the resources with which to pursue discovery.

37. Bryan, *supra* note 4, at 177-88 (recalling the story of a lawyer's failure to conduct discovery, leading to an inequitable settlement).

38. See WINNER, *supra* note 29, at 71-92.

39. In *Beattie v. Beattie*, 368 N.E.2d 178, 179-80 (Ill. App. Ct. 1977), for example, the husband and wife met with the husband's attorney the day before final hearing. The husband's attorney called an attorney to represent the wife. That attorney came to the husband's attorney's office the same afternoon and met with his client, the husband, and the husband's attorney. While there he reviewed with the wife a divorce agreement that already had been prepared. At no time prior to walking to the courthouse with her the next day did the wife's attorney talk privately with her. *Id.*

40. WINNER, *supra* note 29, at 91 (1996).

41. Sally Burnett Sharp, *Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C. L. REV. 319, 322 & n.14 (1991).

42. Judicial frustration with the costs of litigation, Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlement*, 46 STAN. L. REV. 1339, 1350 (1994); judicial deference to family privacy, see, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965); and judicial distaste for divorce cases, see, for example, James Delaney, *How to Bring Legal Sanity to Domestic Relations*, 2 FAM. ADVOCATE 20, 20 (1980); Linda K. Girdner, *Adjudication and Mediation: A Comparison of Custody Decision-Making Processes Involving Third Persons*, 8 J. DIVORCE, Spring/Summer 1985, at 33, encourage judges to uphold questionably procured or unfair settlement agreements.

43. Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1145 (1988).

complaints of duress and coercion and should look with great suspicion upon agreements with unfair provisions. In fact, many courts do maintain that the freedom of the parties to contract should be restricted in divorce because of the important public policies at stake. The state, say the courts, should guard against unconscionability in the substance⁴⁴ and against fraud, duress, and undue influence in the making⁴⁵ of divorce agreements.

Despite this lofty rhetoric, courts are very reluctant to set aside divorce agreements.⁴⁶ Some of this reluctance can be explained by the failure of masculine legal standards, imbedded as they are in liberal, market, and patriarchal ideology, to capture the experience of women.

The law of the State of Illinois provides an example of how courts address petitions to set aside or vacate property settlements. In support of the State's policy of favoring settlement of divorce disputes, the Illinois courts have created a presumption in favor of the validity of settlement agreements.⁴⁷ An Illinois statute specifies that a court cannot set aside or vacate a divorce settlement unless the court finds the agreement unconscionable.⁴⁸ In making this determination, the courts employ a concept of unconscionability taken directly from Illinois commercial law.⁴⁹ An unconscionable agreement must be extremely one-sided or oppressive, an agreement "which no man, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other."⁵⁰ The courts use a two part test to determine unconscionability. They inquire into (1) the conditions under which the agreement was made, and (2) the resulting economic circumstances of the parties.⁵¹ Claims of duress, coercion, and fraud fall under the first prong of the unconscionability test. These claims must be proved by clear and convincing evidence,⁵² and the evidence must establish an absence of mean-

44. See, e.g., *McIntosh v. McIntosh*, 328 S.E.2d 600, 602 (N.C. Ct. App. 1985) (stating that courts throw a "cloak of protection" around agreements negotiated between husband and wife to ensure their fairness).

45. Sharp, *supra* note 41, at 327 n.42.

46. *Id.* at 329 n.50.

47. See *In re Marriage of Riedy*, 474 N.E.2d 28, 30 (Ill. App. Ct. 1985); *Bickson v. Bickson*, 183 N.E.2d 16 (Ill. App. Ct. 1962).

48. The Illinois Marriage and Dissolution of Marriage Act provides:

The terms of the agreement, except those providing for the support, custody and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable.

750 Ill. Comp. Stat. 5/502(b) (West 1993).

49. See *In re Marriage of Foster*, 451 N.E.2d 915 (Ill. App. Ct. 1983).

50. See, e.g., *In re Marriage of Gurin*, 571 N.E.2d 857, 864 (Ill. App. Ct. 1991); *In re Marriage of Kloster*, 469 N.E.2d 381, 385 (Ill. App. Ct. 1984).

51. See *In re Marriage of Foster*, 451 N.E.2d 915, 918 (Ill. App. Ct. 1983).

52. See *In re Marriage of Broday*, 628 N.E.2d 790 (Ill. App. Ct. 1993) (stating that a claim of fraud requires clear and convincing evidence that the defendant intentionally misstated or concealed a material fact which he had a duty to disclose and upon which the plaintiff detrimentally relied); *In re Marriage of Carlson*, 428 N.E.2d 1005 (Ill. App. Ct. 1981) (stating that evidence of coercion, fraud, or duress must be clear and convincing); *Beattie v. Beattie*, 368 N.E.2d 178 (Ill. App. Ct. 1977) (stating that a party seeking set aside must prove by clear and convincing evidence that the agreement was entered into as a result of coercion, fraud, duress, or is contrary to public policy or morals).

ingful choice. As should be obvious, the unconscionability standard is difficult to satisfy and it anticipates none of the problems wives commonly encounter in negotiating divorce agreements. Unsurprisingly, wives' claims of unconscionability usually fail.

Consider one court's insensitivity to a mother's fear of losing custody. In August of 1994, Yolanda left her husband, Jeffrey, after nearly twenty years of marriage.⁵³ She took their three youngest sons with her to the couple's summer home. The older two boys stayed with their father in Bolingbrook, Illinois. Jeffrey worked as a hospital administrator, earning approximately \$150,000 per year. Yolanda had not worked outside the home during the marriage. The court soon ordered Jeffrey to pay to Yolanda \$ 2,400 per month for unallocated family support.⁵⁴

Sometime within the first year after separation, Yolanda decided to move to Wixom, Michigan with the three youngest sons. On August 28, 1995, Jeffrey filed an emergency petition requesting the court to enjoin Yolanda from permanently removing the boys to Michigan. A hearing was scheduled for three days later. On the date of the hearing, Jeffrey, his lawyer, Yolanda, and her attorney appeared at the court. For two hours they all negotiated in the hallway outside the courtroom. Apparently, no discovery had been conducted prior to negotiations. At her attorney's urging, Yolanda orally agreed to accept what appears to be between seventeen and twenty-three percent of the marital assets⁵⁵ and three years of minimal and non-modifiable rehabilitative spousal maintenance,⁵⁶ in return for custody of her three youngest sons.⁵⁷ Rather than argue the merits of Jeffrey's emergency petition at the hearing, Jeffrey, Yolanda, and their lawyers presented the terms of an oral settlement agreement to the trial court. On the basis of the testimony, the judge agreed to enter judgment on October 5, 1995.

On October 5, Yolanda appeared in court with her new lawyer, Mr. Holden. Mr. Holden requested a continuance, but the court declined and entered judgment. On November 5, Yolanda filed a motion to vacate the judgment, arguing, among other things, that she suffered from duress during negotiations because of her extreme fear of losing her children.⁵⁸ Yolanda's fear seems credible because she already had lost her two older sons to Jeffrey, the court might have disapproved of her removal of the three youngest sons to Michigan, she had only three days notice of the emergency hearing, and she had minimal financial resources with which to fight Jeffrey. Moreover, the unfair financial terms to which she agreed themselves suggest that her fear impaired her ability to exercise her free will—she felt she had no other choice.⁵⁹ The

53. *In re Marriage of Steadman*, 670 N.E.2d 1146, 1148 (Ill. Ct. App. 1996).

54. *Id.* at 1148.

55. *Id.* at 1149.

56. *Id.* at 1151-52.

57. *Id.*

58. *Id.*

59. At the settlement hearing, Yolanda testified as follows:

MR. KOZLOWSKI [Counsel for Wife]: And that's the agreement we worked out today in the hall, and we will reduce it to writing with the joint custody [agreement], and you're satisfied with that?

trial court, however, denied Yolanda's motion to vacate and the appellate court affirmed. In addressing Yolanda's duress argument the appellate court stated:

Wife bears the burden of showing duress by presenting clear and convincing evidence that she was bereft of the quality of mind necessary to make a contract. While wife's fear that she may lose custody of her children no doubt caused her anxiety, we do not recognize this as a factor impairing her ability to exercise her free will and make a meaningful choice when the record reflects that she agreed to negotiations, took part in the negotiations and then presented the substance of these negotiations, under oath, to the trial court. Many spouses may experience anxiety when appearing in court because of a petition to dissolve a marriage and this anxiety is no doubt heightened when one fears she may lose custody of her children; however, this factor, without more, does not clearly and convincingly demonstrate that one lacked the ability to make a voluntary decision.⁶⁰

CONCLUSION

Unfair background conditions and insensitive legal standards create the coercive context in which wives bargain at divorce. Understandably, many wives agree to inequitable divorce settlements. If a wife challenges an unfair settlement she confronts a policy favoring settlement, a presumption in favor of the agreement's validity, a hostile legal standard, and a heightened burden of proof. Employing these standards, courts usually refuse wives' petitions to vacate unfair settlements, leaving wives financially devastated and embittered.

Commercial contract doctrine should not govern the validity of divorce agreements. Alternatively, legal standards should be developed that anticipate the common problems wives face during divorce negotiations. Moreover, judges should receive education on the harsh realities of divorcing wives and should not hesitate to vacate inequitable divorce agreements.

THE WITNESS [Wife]: I have no choice.

THE COURT: Well, ma'am, I want you to understand that you do have a choice. We can sit down right now and have a formal hearing and the parties can present evidence on both sides and call any witnesses that you want and the Court will make a decision.

THE WITNESS: Okay.

THE COURT: The question I have is, is this your agreement?

THE WITNESS: At this time, yes, sir.

Id. at 1149 (alteration in original).

60. *Id.* at 1151-52 (citations omitted).