Buffalo Women's Law Journal

Volume 12

9-1-2003


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Expressions of Love

Since the dawn of time, suitors in virtually every part of the world have expressed their everlasting affection for those they love and desire to wed in a myriad of ways. For instance, great poets, such as John Keats and Christopher Marlowe, relied upon their eloquence to win over their beloveds. Marlowe’s alter ego and swain\(^2\), the Passionate Shepherd, endeavored to conquer the heart of his true love with the following words:

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Come live with me and be my love,
And we will all the pleasures prove,
That valleys, groves, hills and fields,
Woods or steepy mountains yields.

And we will sit upon the rocks,
Seeing the shepherds feed their flocks
By shallow rivers, to whose falls
Melodious birds sing madrigals.

And I will make thee beds of roses,
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1 Assistant Professor of Law, Zicklin School of Business, Baruch College/CUNY. J.D. 1994, Fordham University School of Law; B.A. 1991, Brooklyn College/CUNY. I would like to thank Melissa Glassman, Hope Glassman, Leo Glassman, and Harrison Glassman for their undying support and inspiration. I would also like to thank Alan C. Glassman, Esq., who inspired me to become a lawyer, and who made my career as a lawyer possible. Finally, I would like to thank the New York State Library and its staff for its invaluable research assistance.

2 An Old English term for a male admirer or suitor.
And a thousand fragrant posies,
A cap of flowers and a kirtle
Embroidered all with leaves of myrtle;

A gown made of the finest wool,
Which from our pretty lambs we pull;
Fair-lined slippers for the cold,
With buckles of the purest gold;

A belt of straw and ivy buds,
With coral clasps and amber studs;
And if these pleasures may thee move,
Come live with me and be my love.

The shepherd swains shall dance and sing
For thy delight each May morning;
If these delights thy mind may move,
Then live with me and be my love.  

In modern times, suitors have come to rely upon gifts and tokens as a means of expressing their love and commitment to those they intend to marry. In fact, during the twentieth century the engagement ring became a "common symbol of impending marriage."  

One learned jurist has noted that the:

[Engagement] ring is employed in rites of courtship and marriage in many cultures, primitive and sophisticated; in widely dispersed regions of the

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earth; persisting through the centuries, in fact millennia. In our culture, the ring generally is placed on one of the fingers, in others, it may be attached to other positions of the anatomy, at intermediate points from the top of the head to the tip of the toes. It is a universal symbol of deep seated sexual and social ramifications, a seminal area of research for behavioral scientists. Is it any wonder that it presents such complicated problems for mere lawyers?\(^5\)

However, like many things, love is fickle—and when it sours, inevitably, the issue of who is entitled to ownership of the engagement ring surfaces. One jurist, commenting on the mercurial nature of the relationship between two particular litigants, noted that while “the atmosphere was festive” following their engagement “and a marriage appeared on the horizon, during their journey of love to the altar, the primrose path of this blissful pair detoured to a dead-end.”\(^6\)

All too often “[i]n adjudicating the grievances of life and love . . . courts [and legislatures] have needed to address the disputed ownership of an engagement ring following a broken engagement.”\(^7\) New York is no exception.

II. INTRODUCTION

Lawsuits involving the return of engagement rings, as well as other gifts given in contemplation of marriage, have been plentiful in New York State over the past one hundred years. The

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\(^5\) Goldstein v. Rosenthal, 56 Misc. 2d 311 (Civil Ct., City of N.Y., Bronx County 1968).
\(^6\) Friedman v. Geller, 82 Misc. 2d 291, 292 (Civil Ct., City of N.Y., Kings County 1975).
law governing the status of ownership of such things\(^8\) has been in a constant state of flux over that same period of time.

Most recently, New York, like many other states, in an attempt to stabilize its rules concerning the return of gifts given in contemplation of marriage,\(^9\) has endeavored to implement an objective, no-fault approach to this issue. However, such effort has fallen short of the mark, and as a result, New York’s current law\(^{10}\) remains fraught with uncertainty. This uncertainty has lead to inconsistent and unpredictable results in the courts.

Ultimately, if New York State is to achieve the stability and predictability it so desires with respect to its law governing the return of gifts given in contemplation of marriage,\(^{11}\) then its Legislature\(^{12}\) must act to correct the deficiencies in its existing law.

### III. CASE STUDY

Nick and Nora met one summer’s eve. He had just ended a tempestuous relationship with another woman. Nora was a breath of fresh air. She was exciting, beautiful, determined, and ambitious. Sparks flew.

Things progressed quickly. Within weeks Nick and Nora were seeing each other exclusively. Within months they were living together.

That autumn, under a beautiful harvest moon, Nick gazed lovingly into Nora’s eyes and popped the question; he asked Nora to marry him. She eagerly accepted his proposal. The twenty thousand dollar engagement ring Nick presented to Nora was simply breathtaking.

Several days later, Nora presented Nick with an elegant gold watch as an engagement gift. Within weeks a summer wedding had been set. Time was short and there was much to do.

As couples often do, Nick and Nora registered for

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\(^8\) Following a broken engagement.

\(^9\) Where such marriage does not ensue.

\(^{10}\) See N.Y. Civ. RIGHTS LAW § 80-b (Consol. 2003).

\(^{11}\) Where such marriage does not ensue.

\(^{12}\) And not its courts.
engagement gifts at Tiffany's. Their gift list was long. Announcements were sent. The engagement gifts began to pile up in Nora's parent's attic.

Nick and Nora's parents were elated. Nick was settling down. Nora had found the man of her dreams. The excitement was tangible.

As is customary, Nora's parents agreed to pay for the wedding. They retained the services of a caterer, florist and photographer. Before they knew it, Nora's parents had spent twenty thousand dollars in anticipation of the big day.

As their wedding day drew closer, Nick became unsettled. He and Nora had grown distant. They had been fighting. Nick's fear of commitment had reared its ugly head once more. By springtime it was clear – Nick had to get out before it was too late. He did not care how.

Nick came clean on the eve of their wedding day. He told Nora that he did not want to marry her. She was enraged. They fought for hours. On the morning of their wedding day, Nora demanded that Nick leave their apartment.

The last time they saw each other, Nick asked Nora to return the engagement ring. After a brief pause, Nora chuckled, looked Nick in the eye and said, "Over my dead body! You broke my heart – you shattered my life. I'm keeping the ring."

The next morning, Nick called his attorney who promptly drafted a letter requesting that Nora return the engagement ring. Upon receiving the letter, Nora and her parents went to see their attorney.

Nora's father was livid. He had been unsuccessful in obtaining refunds from the florist, caterer and bandleader.

Nick received the first set of suit papers on June 1. Nora's suit sought the return of the gold watch she had given Nick. Shortly thereafter, Nick received the second set of suit papers. Nora's parents sought reimbursement of all deposit monies paid to the florist, caterer and bandleader from Nick.

Nick interposed a counterclaim against Nora based upon her failure to return the engagement ring.

Who will win each of these causes of action? The answer to this query hinges upon how we characterize the above
transactions. "How we see these acts will be crucial in determining" whether: (1) Nick will get the engagement ring back; (2) Nora will recover the gold watch; (3) Nora's parents will be entitled to reimbursement from Nick and; (4) whether those third parties who gave Nick and Nora engagement gifts will be entitled to their return.

IV. THE EVOLUTION OF HEART BALM LAWS AND THE STATUTORY BAR AGAINST COMMON LAW ACTIONS FOR BREACH OF CONTRACT TO MARRY

Early on in American jurisprudence, "women were able to recover damages when men promised marriage and then reneged; the action was known simply as 'breach of promise.'" These cases were primarily concerned with remedying the financial harms of a broken engagement; eventually, "the action was reconceptualized over time as one centering around emotional wounds."

"From the 1930's through the 1950's, a wave of antiheartbalm proposals swept the United States. Responding to charges that heartbalm actions enabled designing women to blackmail worthy men, legislators in many states passed statutes eliminating breach-of-promise and related actions."

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14 Id.
15 "'Heartbalm' statutes are also known as 'Heart Balm,' 'heart-balm' and 'Heart-Balm' statutes. The name is a sardonic reference to the broken heart that supposedly justified a breach of promise suit." Jeffrey D. Kobar, Heartbalm Statutes and Deceit Actions, 83 MICH. L. REV. 1770, 1797, n. 4 (1985).
16 Tushnet, supra note 4 at 2586.
17 Id. Tushnet notes that "'[b]y the beginning of the twentieth century, recoverable damages included the loss of the benefits a woman would have received from marriage, her loss of a chance to marry someone else, and the emotional harm she suffered from the broken engagement, giving rise to the popular name for the resultant lawsuits – heartbalm suits." Id.
18 Id. According to Tushnet:
Generally, it has been stated that:

The action for breach of promise to marry is a common law action combining elements of both tort and contract, in which the plaintiff sues the defendant for breaching an agreement between them to marry. The action has been severely, and almost uniformly, criticized as being anachronistic, contrary to modern notions of justice, and subject to abuse by blackmail. Beginning in 1935, many states enacted sweeping statutes colloquially called "heart balm" acts that abolished actions for breach of promise to marry and often abolished the related common law actions for alienation of affections, criminal conversation, and seduction as well.\(^{19}\)

As of 1985, twenty-two states and the District of Columbia

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19 Kobar, supra note 15 at 1770, 1771.
had enacted some form of heart balm legislation.\textsuperscript{20}

With respect to most heart balm laws, the issue arises as to whether such laws bar all suits "involving a marriage promise or whether they bar breach of promise to marry suits but allow other actions\textsuperscript{21} based on traditional common law and equity."\textsuperscript{22}

"After antiheartbalm statutes were passed, courts had to define their boundaries."\textsuperscript{23} Many courts found that "[w]hen a harm sprang, not from the loss of a particular person's love . . . but from gifts in anticipation of marriage, . . . antiheartbalm principles were not implicated."\textsuperscript{24} In leaving the door open to potential lawsuits for the recovery of gifts given in contemplation of marriage, these courts carved out a common law exception to their state's antiheartbalm laws.\textsuperscript{25}

Prior to 1965, New York courts declined to follow such approach and, thus, donors were not permitted to recover an

\textsuperscript{20} Id.; see ALA. CODE § 6-5-330 (1975); CAL. CIV. CODE § 43.5(d) (Deering 1971); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN. STAT. ANN. § 52-572(b) (Supp. 1984); FLA. STAT. § 771.01 (1983); IND. CODE § 34-4-4-1 (1976); ME. REV. STAT. ANN. tit. 14, § 854 (1964); MD. CTS. & JUD. PROC. CODE ANN. § 5-301 (1984); MASS. ANN. LAWS ch. 207, § 47A (Michie/Law. Co-op. 1981); MICH. COMP. LAWS ANN. § 600.2901 (West 1968); MONT. CODE ANN. § 27-1-602 (1983); NEV. REV. STAT. § 41.380 (1979); N.H. REV. STAT. ANN. § 508:11 (1983); N.J. STAT. ANN. § 2A:23-1 (West 1952); N.Y. CIV. RIGHTS LAW § 80 (a & b) (McKinney 1976); OHIO REV. CODE ANN. § 2305.29 (Baladin 1985); PA. STAT. ANN. tit. 48, § 171 (Purdon 1965); VT. STAT. ANN. tit. 15, § 1001 (Supp. 1984); VA. CODE § 8.01-220 (1984); W. VA. CODE § 56-3-2a (Supp. 1984); WIS. STAT. § 768.01 (1981-1982); WYO. STAT. ANN. § 1-23-101 (1977); D.C. CODE ANN. § 16-923 (1981).

\textsuperscript{21} Such as an action to recover an engagement gift or other gift given in contemplation of marriage where such marriage does not ensue.

\textsuperscript{22} Kobar, supra note 15 at 1772.

\textsuperscript{23} Tushnet, supra note 4 at 2591.

\textsuperscript{24} Id.

antenuptial gift. The theory behind the New York approach was that since the Legislature saw fit to bar all actions for breach of contract to marry, it was not necessary for a woman to return a gift given in contemplation of marriage, "even when they had themselves broken their engagements."

V. COMMON LAW THEORIES OF RECOVERY

How should "the act of giving an engagement ring" be characterized? "How we see this act will be crucial in determining when the ring should, and should not, have to be returned..." in the event a marriage does not ensue.

Historically, "[p]roperty disputes between engaged parties were originally settled through breach of promise to marry suits".

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27 Tushnet, supra note 4 at 2594.
28 Id. According to Tushnet, "[t]his construction elicited harsh criticism from legal observers: 'The weapon of the 'gold digger' under the old law was the action for breach of promise. Now, every deceiver... has a new weapon. It is the promise to marry.'" Id. (citing W.J. Brockelbank, The Nature of a Promise to Marry - A Study in Comparative Law (pt. 2), 41 ILL. L. REV. 199, 207-08 (1946); see also Goldstein v. Rosenthal, 288 N.Y.S.2d 503, 505 (Civ. Ct. 1968) ("Instead of suing for breach of promise, a resourceful young woman would simply persuade her swain to shower her with gifts in anticipation of a marriage which she herself would then reject. In trying to remedy an old abuse, the courts seemingly permitted a new one."); State Of N.Y. Law Revision Comm'n, Report Of The Law Revision Commission For 1947, No. 65, at 229-30 (1948) (arguing that rings and other property transferred in anticipation of marriage should be returned to the donor if the marriage did not occur); Robert Markewich, Take Back Your Ring, Sir!, B.BULL. (N.Y. County), Mar. 1949, at 23 (same); George Reiss, Note, The Heart Balm Act and Ante-Nuptial Gifts, 13 BROOK. L. REV. 174, 182 (1947) (same); Duane Anderson, Case Comment, Domestic Relations: Engagement Rings and the "Anti-Heart-Balm" Statute, 3 U. FLA L. REV. 377, 379 (1950) (same).
30 Id.
31 Brian L. Kruckenberg, "I Don't": Determining Ownership of the Engagement Ring When the Engagement Terminates, 37 WASHBURN L.J. 425, 428 (1998),
"This cause of action began in Europe over three hundred years ago, and it, like many legal traditions in Europe, made its way into the jurisprudence of American law." 32

A. THE CONTRACT APPROACH

A number of courts have elected to apply contract principles in cases involving disputes over the ownership of antenuptial gifts. 33 While it may be said that an engagement ring is "'consideration' – a thing of value given in exchange to create a contract," 34 fundamentally, it is legally disingenuous 35 to classify the transaction involving the exchange of the engagement ring as a contract. This is necessarily the case, since the validity of a contract hinges upon, amongst other things, a mutuality of exchange of consideration, and in the typical engagement scenario the recipient of the ring offers no consideration at all. 36

Other tribunals have concluded that while the giving of the ring does not, per se, create an ordinary, bilateral contract, 37 nevertheless the recipient of the ring "is agreeing to an option contract." 38 This approach suggests that the ring's benefactor is buying the right to marry his or her beloved, and that such right shall remain exclusive to him or her for the entire engagement interlude. 39

In contractual terms, "characterizing the ring exchange as an option contract" 40 suggests that a "jilted bride," 41 presumably

32 Id. at 426; citing Clark, § 1.1, at 1-2.
33 Where marriage does not ensue.
34 Grossman, supra note 13.
35 At least in most situations, and barring instances where the doctrine of promissory estoppel might apply.
36 Id.
37 That is, a contract in which each party exchanges a promise, as opposed to the actual performance or forbearance of an act.
38 Id.
39 Id.
40 Id.
the individual who extended the option, should not have to return the ring, since the groom-to-be\(^\text{42}\) "got what he paid for – the option to marry a particular woman." It follows that where the ring-giver does not exercise such option to marry,\(^\text{43}\) he should not be entitled to its return.\(^\text{44}\)

Alternatively, if it is the ring’s benefactor who has been jilted, then the ring-giver should be entitled to its return, as well as damages due to the recipient’s breach of contract.\(^\text{45}\)

Despite the application of contract principles by some judges in antenuptial gift cases, the majority of the bench has opted not to adjudicate such disputes in this manner.

**B. THE ENGAGEMENT RING AS A TOKEN**

Yet another, albeit sexist, theory relating to the return of an engagement ring\(^\text{46}\) is that the "ring is symbolic of ‘title’ to the bride -- a legal right in her, as if she were property -- being transferred from her father to her future husband."\(^\text{47}\)

As one commentator has noted:

That theory, offensive though it is, would imply a ring need never be given back -- and would, in that limited sense at least, ironically favor women’s interests. Transfers of symbolic tokens generally do not need to be returned, even if the underlying deal falls through.\(^\text{48}\)

Not surprisingly, modern day tribunals have avoided characterizing the exchange of an engagement ring as a symbolic

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\(^{41}\) *Id.* This assumes the bride-to-be was the recipient of the engagement ring.
\(^{42}\) This assumes the groom-to-be was the ring-giver.
\(^{43}\) As opposed to the ring’s recipient calling off the engagement.
\(^{45}\) *Id.*
\(^{46}\) Where marriage does not ensue.
\(^{48}\) *Id.*
transfer of title to the bride.

C. EQUITY

Still, another approach employed by the judiciary in this area is to recognize the right of recovery by the donor of a gift given in contemplation of marriage, in order to avoid injustice. For instance, in cases involving allegations of fraud, a number of courts have recognized that where a donee has obtained a gift given in contemplation of marriage through either deceptive, or fraudulent means, disallowing the recovery by the donor of such a gift would, in effect, reward the wrongdoer.49

Courts, in invoking their equitable powers, have sought to prevent "wrongdoing donees"50 from being unjustly enriched by returning to donors antenuptial gifts. The vehicle used most often by jurists subscribing to this theory is the equitable remedy of rescission.51 However, the use of rescission in the given context has met with mixed opinion.52

49 Id. Even in the absence of fraud or affirmative misconduct, in some instances, these same principles have been applied to a donee that the court has determined was at fault for the break up of the engagement.
50 That is, donees that the courts have determined were at fault for the break up of the engagement.
51 See Unger v. Hirsch, 180 Misc. 381 (City Ct. of N.Y., Bronx County 1943). In Unger, recovery of an engagement ring was permitted on the ground that the giving of the ring was closely associated with the contract to marry and that abandonment of this contract was equivalent to the rescission of any other contract and had the same consequences. Hence, the ring should be returned in order to place the parties in the status quo. N.Y. Law Rev. Comm., Report 237 (1947).
52 In fact, one legal commentator has noted:

This theory may be criticized on the ground that in most cases it is highly improbable that the parties intended the ring or other gift as consideration for the recipient’s promise to marry. Although there are cases where the transfer of valuable property is the actual inducement that leads the transferee to assent to the marriage, a different interpretation is required where the gift is an engagement ring. However the rescission theory is not untenable as a basis for the recovery of the ring or its value. Although the performance for which restitution is sought in the typical rescission case is a performance
It should be noted that the justification for awarding the equitable remedy of rescission, and the view that the engagement ring is a conditional gift, have a common basis.

In the context of unjust enrichment, tribunals have not concerned themselves with the issues of fault or wrongdoing, and they have ordered the recovery by the donor of an antenuptial gift on the grounds that it would be inequitable for the donee to retain the benefit of such gift after a breakup, since the donor has not himself/herself received any benefit in return.

D. THE GIFT APPROACH

Historically, the most prevalent approach taken by courts in attempting to resolve engagement ring disputes has been: (1) to view the giving of an engagement ring as a gift and; (2) to apply the laws governing gifts to such disputes.

Generally, a gift is “something voluntarily transferred by one person to another without compensation.” In simple terms, a gift may be distinguished from a contract in that in the former there is a unilateral exchange of consideration, whereas in the latter, rendered under the contract as part of an agreed exchange, restitution may also be given where the performance was rendered in reliance on the defendant’s promise yet not in consideration of a bargain made by him. Gribben, Quasi-Contract: Gifts; Effects of New York Anti-Heart Balm Statute, 29 CORNELL L.Q. 401 (1944).


54 “This basis, sufficient in itself to justify recovery, is to be found in the law of quasi-contracts. Where the gift is intimately associated with a prospective marriage which the donee has promised to enter into and the marriage is prevented without the donor’s fault, unjust enrichment of the donee should be prevented by permitting the donor to recover the gift he has made in reliance upon the promise of the other party.” N.Y. Law Rev. Comm., Report 238 (1947).

55 Id.

56 Id.

there is a bilateral exchange of consideration.  
Once we classify the engagement ring as a gift, we must then determine whether such gift is conditional or unconditional. The answer to that question will determine whether or not the donor is entitled to its return.

"Courts, by and large, have not adopted the unconditional gift approach, however. They have opted for the conditional gift approach instead."  
The engagement ring:

Is the article most commonly bestowed upon a betrothed . . . . The ring differs from other gifts in that it is given and worn to signify the engagement itself. The courts sometimes take the position that it is given as a pledge, that the absolute ownership does not pass until the marriage is accomplished, but the absolute ownership passes even though the marriage does not take place, if the failure is chargeable to the donor.  

According to the Restatement of the Law, Restitution:

A person who has conferred a benefit upon another, manifesting that he does not expect compensation therefor, is not entitled to restitution merely because his expectation that an existing relation will continue or that a future relation will come into existence is not realized, unless conferring of the benefit is conditioned thereon.

60 Id.
62 Restatement of the Law, Restitution § 58, American Law Institute (1937). According to comment a:

The rule stated in this Section is applicable to a husband or wife who makes gifts to the other spouse in the expectation that the relation will continue and to a man or woman who makes gifts to a person with
Hence, it would appear that the Restatement favors the view that an engagement ring is a conditional gift.\textsuperscript{63}

Nevertheless, the commentary to the Restatement of the Law, Restitution section 58, notes that a "gift may be conditional upon the continuation of a relation, and if conditional the donor is entitled to its return if the relation terminates or is not entered into. Likewise, as in the case of engagement and wedding gifts, justice may require the creation of a condition although the donor had no such condition in mind."\textsuperscript{64}

Seemingly, this opens the door to the possibility that an engagement ring may be treated as a conditional gift, thus entitling the donor to its return, provided that such condition "is stated in specific words or it may be inferred from the circumstances."\textsuperscript{65}

However, where such conditional language is not expressly stated, the commentary validates in rather blanket fashion that "[g]ifts made in the hope that a marriage or contract of marriage will result are not recoverable, in the absence of fraud."\textsuperscript{66}

\textsuperscript{63} Id.
\textsuperscript{64} Restatement of the Law, Restitution § 58, at comment b.
\textsuperscript{65} Id. at § 58.
\textsuperscript{66} Id. at § 58, comment c.

The Restatement further states at comment c that:

Gifts made in anticipation of marriage are not ordinarily expressed to be conditional and, although there is an engagement to marry, if the marriage fails to occur without the fault of the donee, normally the gift cannot be recovered. If, however, the donee obtained the gift fraudulently or if the gift was made for a purpose that could be achieved only by the marriage, a donor who is not himself at fault is entitled to restitution if the marriage does not take place, even if the gift was of money . . . . If there is an engagement to marry and the donee, having received the gift without fraud, later wrongfully breaks the
Perhaps this inconsistency may be reconciled by viewing that portion of comment b, as a complement to comment c, to the extent that in a case of misconduct or fraud on the part of the donee, a court would be justified in implying a condition, even though the donor "had no such condition in mind . . . .", thus, allowing the donor to recover the ring.

1. THE CONDITIONAL GIFT APPROACH

In the absence of statutory authority, many courts have relied upon the conditional gift theory in actions seeking recovery of gifts given in contemplation of marriage. Courts, in following this approach, "consider engagement gifts to be conditioned upon the subsequent marriage of the parties." It follows that where a marriage does not take place, the condition precedent to retention of the gift given in contemplation of marriage has not been met, and therefore, it must returned by the donee to the donor. Alternatively stated, "this approach means the gift of the ring 'vests' with the would-be bride only when the condition -- the marriage -- occurs. Conversely, when the condition fails and the marriage doesn't happen, for whatever reason, the gift never 'vests.'"

While the conditional gift approach is the predominant approach utilized by the courts in resolving antenuptial gift cases, some members of the bench will not "imply a condition of marriage to a gift simply because it was given during the

promise of marriage, the donor is entitled to restitution if the gift is an engagement ring, a family heirloom or other similar thing intimately connected with the marriage, but not if the gift is one of money intended to be used by the donee before the marriage . . . .

67 Id. at § 58, comment b.
68 Id.
70 Id.
71 Id.
72 Grossman, supra note 13.
engagement period and will not order a return of the engagement gift unless expressly conditioned upon a marriage which did not ensue."

At least one court, in recognizing the fallacy of such view, has noted that "[a]n express condition of this type would rarely be found," and that such condition "is one to be inferred from the facts . . . " on a case by case basis.

Courts, in applying the conditional gift approach have, generally, followed three different paths in "fashioning a rule about ring return: no-fault, modified fault, and fault."

"Under a strict no-fault rule, the ring-giver is entitled to return of the ring -- or its equivalent value -- if the marriage never materializes. No questions asked."

While the recent trend has been for the judiciary to advocate or adopt no-fault principles, most courts continue to apply a modified fault, or strict fault analysis.

According to the modified fault rule, the donor is entitled to reclaim the ring, or other gift given in contemplation of marriage,

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73 Tomko, supra note 69.
75 Id.
76 In determining whether or not a gift was given in contemplation of marriage, the court may look at factors such as "the occasion of making the gift, the nature of the article give, [and] the donor's reason for making the gift." N.Y. Law Rev. Comm., Report 238 at 238 (1947).
77 Grossman, supra note 13.
78 Id. Grossman explains that this approach has been:

Criticized for making the decision to propose marriage - which might induce the fiancée into a more intimate relationship - costless to the fiancé. The result, critics say, is that the would-be bride may be hurt, while her fiancé may become engaged carelessly, without a sufficiently thoughtful commitment.

There is also some imbalance in a law that gives the ring-giver his ring back, but does nothing to compensate the putative bride or her family, who traditionally pay for weddings, for unrecoverable outlays to caterers, florists, dress designers, and the like.

79 Id.
so long as he or she did not break off the engagement -- "justifiably or not." 80

Finally, the third approach is the strict fault rule. As with modified fault, pursuant to this rule, the donor is entitled to the return of the engagement ring, or other gift given in contemplation of marriage, provided he or she did not break off the engagement. 81 However, "in this scheme, a determination of fault requires a more nuanced analysis, which examines not only who called off the engagement, but also whether that person was justified in doing so." 82

VI. THE STATUTORY APPROACH

The ability of a donor to recover an antenuptial gift is resolved via statute in a number of states. The State of New York enacted its first of such statutes in 1935. 83

80 Id. The author notes that:

This approach, too, holds appeal in that it erects a relatively bright line rule. But equating the decision to call off the wedding with "fault" is, at best, superficial. And at worst, it induces the parties into an endless game of chicken, where each, having lost interest in marriage, is compelled to behave worse and worse until the other party cannot stand it anymore and calls it quits.

81 Id.
82 Id. With respect to the strict fault rule, Grossman points out that:

[In]quiry inevitably enmeshes court in the complicated business of pinpointing the cause of a failed relationship. And who is to say when a broken engagement is justifiable?

Must such an action be based on something that makes the prospect of marriage unimaginable -- like finding out one's fiancée is pregnant with another man's child? Or can it be simply something that makes marriage seem less desirable, like learning that one's fiancée is a slob, or discovering that the parties don't like to eat the same thing for dinner?

The difficulty of drawing these arbitrary lines is what has pushed most courts in the last five years toward a no-fault approach - in a trend somewhat similar to the trend that prompted no-fault divorce. Id.

83 And enacted yet another in 1965 (Civil Rights Law § 80-b). The 1935 statute bars a donor from recovering an antenuptial gift. See infra § VIII. However, the
"In some states, statutes specifically regulating such matters order the return of engagements gifts where the marriage does not take place."\textsuperscript{84} However, "[o]ther states have 'heartbalm' statutes which bar rights of action for a breach of promise to marry and prevent an individual from suing for damages for loss of social status, prewedding expenses, and other losses occasioned by the failure of the promised marriage to occur."\textsuperscript{85} As noted above, such heartbalm statutes, generally, will not preclude the donor from recovering the gift given in contemplation of marriage.\textsuperscript{86}

\textbf{VII. THE LAW IN NEW YORK PRIOR TO 1935}

Prior to 1935, "upon the break-up of a betrothal, the donor, who had not been guilty of premarital wrongdoing, could initiate an action for the return of the engagement ring."\textsuperscript{87} The Appellate Division, First Department held that "the termination of the engagement by the defendant precluded her from retaining possession of the ring."\textsuperscript{88} This sentiment was not only expressed in uniform fashion by the State Courts, but was echoed in the opinions of inferior tribunals, as well. In fact, the Municipal Court, Borough of Queens (the predecessor of the current New York City Civil Court) noted that the issue of "[w]hether or not the lady may maintain her ring depends entirely upon the determination of the question as to whether the engagement was unjustifiably breached by her act."\textsuperscript{89} The \textit{Beck} Court noted that an engagement ring "is in the nature of a pledge for the contract of marriage."\textsuperscript{90}

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\textsuperscript{84} Tomko, \textit{supra} note 69 \textsection 2a.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.} However, New York's heartbalm statute, enacted in 1935, was construed by the courts as barring such actions.
\textsuperscript{87} Goldstein, 56 Misc. 2d at 312.
\textsuperscript{88} \textit{Id.} see \textit{Beck}, 237 A.D. 729, 730.
\textsuperscript{89} Beer v. Hart, 153 Misc. 277, 278 (Municipal Court of N.Y., Borough of Queens, Sixth Dist. 1934); \textit{citing} \textit{Beck}, 237 A.D. 729, 730.
\textsuperscript{90} \textit{Beck}, 237 A.D. 729 at 730.
\end{flushleft}
Until *Beck*, “it was settled -- at least in a case where no impediment existed to a marriage”\(^9^1\) -- that, if the recipient broke the ‘engagement’, she was required, upon demand, to return the ring on the theory that it constituted a conditional gift.”\(^9^2\) The *Beck* court simply reaffirmed the common law rule of law.\(^9^3\)

While the plaintiff was denied recovery of the engagement ring in *Beck* due to his premarital wrongdoing, before 1935 the New York courts were more than willing to restore the parties to the *status quo ante* where the engagement was canceled by mutual consent.\(^9^4\) In such cases, the courts found no difficulty in justifying the return of the ring to its donor, since it could not be said, “any so-called cancellation by mutual consent had the effect of abrogating the condition upon which the ring was held.”\(^9^5\)

**VIII. NEW YORK’S ANTI-HEART BALM LEGISLATION: 1935-1965**

In the years leading up to 1935, heart balm lawsuits and the litigants and attorneys who prosecuted such actions were roundly criticized in New York. By 1935, the public outcry to abolish such actions had reached a fevered pitch. In fact, the actions for breach of promise to marry, alienation of affections and criminal conversation had so fascinated the public that feminists, lawyers,

\(^9^1\) This language has been criticized; *see* Witkowski v. Blaskiewicz, 162 Misc. 2d 66 at 67.

\(^9^2\) *Lowe v. Quinn*, 27 N.Y.2d 397 (1971); *see* Jacobs v. Davis, 2 K.B. 532 (1917).

\(^9^3\) The *Beck* Court went on to state that “[s]uch a ring is a symbol hallowed by social usage. That it is a conditional gift seems inherent in its very purpose. Possession should be retained during the engagement, which it symbolizes, and is changed into firm ownership upon marriage. When the engagement fails, the symbol of its existence should be returned to him who gave it.” *Beck*, 237 A.D. 729 at 730.


\(^9^5\) *Id.* at 34.
journalists, housewives, and many others weighed in on the controversy.96

Reflecting upon the sentiment of many New Yorkers of the day, one jurist commented that prior to the enactment of Article 2-A of the Civil Practice Act, "breach of promise suits were used by avaricious young women to mulct young men who were both wealthy and rather susceptible to feminine wiles."97

At least one factor that led directly to the public outcry for the elimination of heart balm actions in New York State in 1935 was the growing resentment towards attorneys who prosecuted such matters and earned substantial income from them. By and large, society viewed these lawsuits as nothing more than legalized extortion and blackmail suits, which were being instigated by attorneys out to make a quick buck.

The public's growing discontent with these attorneys led the organized bar, and more specifically, the Association of the Bar of the City of New York to examine the value of heart balm lawsuits.98

96 See the 1935 Bill Jacket. A New York Daily News editorial printed in March of 1935, and entitled "Breach of Promise — Alienation of Affections — Criminal Conversation," expressed the sentiment of many New Yorkers at that time. According to the editorial's author:

It is hoped by a large number of people, including more reputable lawyers that the New York Legislature at this session will see fit to wipe out the cheap and dirty rackets described by the phrases printed as the title of this editorial.

97 Goldstein, 56 Misc. 2d 311 at 312.

98 On March 15, 1935, attorney Reese D. Alsop, a partner with the law firm of Hunt, Hill & Betts, wrote a letter to Governor Herbert H. Lehman. The letter outlined the efforts made by the Association of the Bar of the City of New York with regard to the abolition of heart balm litigation. Mr. Alsop wrote:

This year . . . may I appeal to you to use your good offices in aid of the passage of either the McNaboe-Byrnes measure (supra) or the Weisman Bills (supra).

The present effort to abolish the above causes of action — or, at least to amend the law so as to prevent their very prevalent use for blackmail — was initiated more than a year ago. A few of us — members of the Bar — who had recently represented defendants in suits for breach of promise of marriage, etc. (in settlement of which more than $300,000.00 had been paid, solely to avoid the publicity of trial)
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decided to do what we could to correct the situation. The result was a voluntary committee consisting of the following:


We studied the cases, obtained reports from lawyers abroad, and discussed our various experiences with such suits.

Last April - 1934 - I, as spokesman for the group, reported our unanimous conclusion to the Association of the Bar of the City of New York, in favor of the abolition of these actions as being little better than incitement to blackmail. The matter was referred to the Committee on Law Reform of the Association of the Bar of the City of New York, with which we were invited to cooperate for further consideration on the subject.

In the early part of last month, I, being alternate delegate from the Association of the Bar of the City of New York to the Convention of the New York State Bar Association, presented the subject to the convention, with the permission of Judge Thacher, our President, and with the permission of Judge Kenefick, President of the State Bar Association. The matter was referred to the State Bar Association's Executive Committee. Opinions favorable to our own conclusions being indicated - I think I may say - by the comments made to me by some of the members of that Committee.

At the stated meeting of the Association of the Bar (N.Y.C.) on February 13th of this year, the Report of the Committee on Law Reform was presented and approved (I am enclosing two copies of this Report); thereupon, appropriate measures were introduced in the Legislature.

The McNaboe-Byrnes measure is modeled on the Nicholson Bill - copy of which was sent to Albany by Mr. John G. Jackson, Chairman of the Committee on Law Reform - recently passed (as I am advised by the newspapers) in the Indiana State Legislature. The McNaboe-Byrnes measure has our entire approval. It wipes the slate clean.

Mr. Weisman's Bills are strictly in accord with recommendations of the Committee on Law Reform which are not quite so sweeping. Mr. Weisman's measures propose to abolish completely only the action for criminal conversation (viz., actions for damages against a paramour for a spouse's adultery) - See Weisman Bill No. 1849 - Int. 1681 - This action was abolished in England in 1857. Next, they propose to limit actions for alienation of affections to suits against intermeddling family
New York State Senator John McNaboe sponsored the controversial Senate bill.99 Assemblyman Byrnes sponsored the

or one in loco parentis (Weisman measure No. 1849 – Int. 1681); next, they propose to limit recovery of damages in actions for breach of promise of marriage to expenses paid or incurred in contemplation of the marriage (see Weisman measure No. 1848 – Int. 1680); and, finally, I understand there is another measure designed to bring actions for damages for breach of promise of marriage within the statute of frauds; that is, to limit such actions to cases where the promise is in writing.

We believe the Weisman Bills will largely, if not entirely, cure the present evils and if you feel their passage can be more readily obtained, may we appeal to you to support them.

In conclusion, may I say that it is the unanimous opinion of our group that very few people, whether laymen or lawyers, have any conception of the extent to which blackmail is practise under the cloak of these suits as they now exist. We believe their continued existence is a disgrace to the Bar and tends to bring the Bar into serious disrepute. Those cases in which justifiable resort to these forms of action is had are so few as, in our opinion, not to warrant their continued existence. These actions are a serious threat not only against the erring man – frequently, if not always, quite innocent – but they also jeopardize the happiness and [sic] wellbeing of his entire, innocent family: all for the benefit of unscrupulous persons and their usually equally unscrupulous counsel.

Any assistance that you can render to bring about an amendment of the law to cure these evils will be greatly appreciated.


99 S. 1508, 74th Cong. (1935) was introduced on February 25, 1935. The corresponding Assembly bill bore Assembly Bill No. 1819, Int. 1651. After lengthy and controversial debates, which were closely scrutinized by the public, the McNaboe bill was passed by the New York State Senate on March 18, 1935. Thereafter, on March 19, the McNaboe bill was delivered to the New York State Assembly for its consideration. The Assembly passed the bill on March 20, 1935, without amendments, by a margin of 134 to 6, and it was then sent to Governor Lehman for his approval.

100 According to a New York Times column published on March 21, 1935, and dated March 20, 1935:

Without a murmur of debate the Assembly sent to the Governor today the McNaboe bill, outlawing suits for breach of promise, alienation of affections, seduction and criminal conversation. The Senate had heard many harsh words in a long series of debates before it passed the bill yesterday, but the Lower House sped the measure through by a vote of
same bill in the New York State Assembly. A similar, albeit watered down approach to the McNaboe bill, was contemporaneously introduced in the New York State Assembly by Assemblyman Weisman.

Prior to the enactment of New York’s 1935 anti-heart balm legislation, it was the opinion of the New York State Legislature that heart balm lawsuits had been “subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely among the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment ...”

Following the passage of the McNaboe bill, but prior to its having been signed into law by Governor Herbert Lehman, the New York newspaper, The Daily News, commented that the:

[B]ill’s victory is a warning to women not to trust to promises, but to performances. An engagement is only an option, so to speak. Not all options are taken up. Plenty of them are abandoned, without

134 to 6 . . . . Such swift passage of the measure by the Assembly came as a surprise in the face of the Senate storm over the bill. However, the Assembly has sent to the Senate for approval the two Weisman bills, which strike at the “legal heart-balm racket,” but are not as broad in their terms as the McNaboe bill.

*Assembly Votes Ban on Heart Balm Suits*, N.Y. TIMES, Mar. 21, 1935.

Assemblyman Weisman introduced two bills on the subject, the first relating to breach of promise actions, and the second, relating to suits for alienation of affections. The bills were designated Assembly No. 1848, Int. 1680 and Assembly No. 1849, Int. 1681, respectively. The lone McNaboe bill sought to bar all heart balm related actions, whereas:

The Weisman bill on breach of promise would permit suits if promises to marry were made in writing, but would limit damages to sums actually spent for preparations made in contemplation of marriage. The other Weisman measure, on suits for alienation of affections, would bar any such claim except by fathers, mothers, brothers or sister, and thus “triangle” suits would be barred. N.Y. TIMES, Mar. 21, 1935.

S. 1508, 74th Cong. (1935).
any punitive damages having to be paid. The McNaboe bill puts these marriage options on the same legal footing as other options, and properly so, we think. So if this bill becomes law, any girl in New York State will be wise not to consider herself married until she has the circlet on the fourth finger of her left hand.\(^\text{103}\)

On March 29, 1935, New York adopted Article 2-A of the Civil Practice Act, which became more appropriately known as the anti-heart balm statute\(^\text{104}\). Article 2-A abolished all causes of

\(^{103}\) McNaboe Heart Balm Bill Passes, DAILY NEWS, Mar. 21, 1935.

\(^{104}\) General Laws of the State of New York, Regular Session of 1935, Chapter 263, Sec. 1, at 216-17 (West).

Effective March 30, 1935, the Civil Practice Act was amended by inserting therein a new article, identified as Article 2A. Article 2A provided the following:

The remedies heretofore provided by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry, having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies. Consequently, in the public interest, the necessity for the enactment of this article is hereby declared as a matter of legislative determination.

§ 61-b. Certain causes of action hereafter accruing abolished.
The rights of action heretofore existing to recover sums of money as damage for the alienation of affections, criminal conversation, seduction, or breach of contract to marry are hereby abolished.

1. All cause of action to recover a sum of money as damages for the alienation of affections, criminal conversation, seduction and
breach of contract to marry, which have heretofore accrued, must be commenced within sixty days after this article takes effect.

2. All actions to recover a sum of money for a breach of a presently existing contract to marry must be commenced within sixty days after the cause of action has accrued.

3. All such actions not so commenced shall be thereafter completely and forever barred for lapse of time.

§ 61-d. Legal effect of certain acts hereafter occurring.
No act hereafter done within this state shall operate to give rise, either within or without this state, to any of the rights of action abolished by this article. No contract to marry, hereafter made or entered into in this state shall operate to give rise, either within or without this state, to any cause or right of action for the breach thereof.

§ 61-e. Certain actions and proceedings with respect to causes of action abolished or barred by this article prohibited.
It shall hereafter be unlawful for any person, either as a party or attorney, or an agent or other person in behalf of either, to file or serve, cause to be filed or served or threaten to file or serve, or to threaten to cause to be filed or served, any process or pleading, in any court of the state, setting forth or seeking to recover a sum of money upon any cause of action abolished or barred by this article, whether such cause or action arose within or without the state.

§ 61-f. Certain contracts void as against public policy.
All contracts and instruments of every kind, name, nature or description, which may hereafter be executed within this state in payment, satisfaction, settlement or compromise of any claim or cause of action abolished or barred by this article, whether such claim or cause of action arose within or without this state, are hereby declared to be contrary to the public policy of this state and absolutely void. It shall be unlawful to cause, induce or procure any person to execute such a contract or instrument; or cause, induce or procure any person to give, pay, transfer or deliver any money or thing of value in payment, satisfaction, settlement or compromise of any such claim or cause of action; or to receive, take or accept any such money or thing of value as such payment, satisfaction, settlement or compromise. It shall be unlawful to commence or cause to be commenced, either as party or attorney, or as agent or otherwise in behalf of either, in any court of this state, any proceeding or action seeking to enforce or recover upon any such contract or instrument, knowing it to be such, whether the same shall have been executed within or without this state; provided, however, that this section shall not apply to the payment, satisfaction, settlement or compromise of any causes of action which are not abolished or barred by this article, or any contracts or instruments
action to recover sums of money as damage for breach of contract to marry,\textsuperscript{105} and provided that no contract to marry will operate to give rise to any cause or right of action for breach thereof.\textsuperscript{106} The

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\textbf{heretofore executed, or to the bona fide holder in due course of any negotiable instrument which may be hereafter executed.}

\textbf{§ 61-g. Penalties for violation.}

Any person who shall violate any of the provisions of this article shall be guilty of a felony which shall be punishable by a fine of not less than one thousand dollars nor more than five thousand dollars, or by imprisonment for a term of not less than one year nor more than five years, or by both such fine and imprisonment, in the discretion of the court.

\textbf{§ 61-h. Construction of article.}

This article shall be liberally construed to effectuate the objects and purposes thereof and the public policy of the state as hereby declared. If any clause, sentence or paragraph or part of this article shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence or paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered. If the application of this article, or any part thereof, to any person or circumstances shall be adjudged by such court to be invalid or ineffectual for any reason, such judgment shall not affect the application of such article or part to any other person or circumstances.

\textbf{§ 61-i. Inconsistent laws superseded.}

This article shall supersede all acts and parts of acts, inconsistent with this article, to the extent of such inconsistency, but in all other respects shall be deemed supplemental to such acts and parts of acts. Nothing contained in this article shall be construed as a repeal of any provisions of the penal law or the code of criminal procedure or of any other law of this state relating to criminal or quasi-criminal actions or proceedings.

In 1962, §§ 61-a through 61-i of Article 2-A of the Civil Practice Act were modified when the Civil Practice Act was abolished and the Civil Practice Law and Rules was implemented by the New York State Legislature. These former sections of law were re-designated §§ 80 through 85 of the New York Civil Rights Law.


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purpose and intent of the anti-heart balm statute was clearly set forth in section 61-a of the Civil Practice Act.\(^{107}\)

Upon signing the McNaboe bill into law, Governor Lehman issued a memo expressing his support for the measure.\(^{108}\)

Not long after the enactment of Article 2-A, courts of the day began to hear cases involving section 61 of the Civil Practice Act. While given the opportunity to limit the scope of section 61\(^{109}\), the judiciary declined to do so and, instead, construed section 61 as barring actions for the recovery of "breach of promise to marry, [as well as] suits to recover specific real or personal property given in contemplation of marriage."\(^{110}\)

As noted previously, prior to 1935, the court had allowed for the recovery of an engagement ring or its value based upon the

\(^{107}\) The remedies heretofore provided by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry, having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies. Consequently, in the public interest, the necessity for the enactment of this article is hereby declared as a matter of legislative determination. N.Y. Civ. Prac. Act, § 61-a (1935).

\(^{108}\) According to the Governor:

I am glad to sign this bill which abolishes the right to bring court actions to recover sums of money as damages for alienation of affection, seduction and breach of contract to marry. The public is well acquainted with the many abuses that have arisen in the prosecution or threats of prosecutions of this type of action. For years these actions have been used to extract large sums of money without proper justification. I wish to point out, of course, that this bill does not in any way curtail or eliminate the provisions of the penal law. 1935 Bill jacket at 17.

\(^{109}\) By preserving the right of a donor to recover gifts given in contemplation (where marriage does not ensue).

\(^{110}\) Gaden v. Gaden, 29 N.Y.2d 80, 85 (N.Y. 1971); see Andie, 32 N.Y.S.2d 429; see also Josephson, 266 A.D. 992.
theory of mutual rescission of the contract to marry. However, after the first crop of cases were decided following the enactment of article 2A, it was clear that the New York Courts deemed all such actions "in contravention" of the Civil Practice Act.

Judges and legal commentators alike criticized this result. In fact one such commentator exclaimed that whereas "[t]he weapon of the 'gold digger' under the old law was the action for breach of promise. Now, every deceiver . . . has a new weapon. It is the promise to marry." The dissent in Andie, also noted that to deny recovery to the donor of a gift given in contemplation of marriage supports the unjust enrichment of the defendant.

"Instead of suing for breach of promise, a resourceful young woman would simply persuade her swain to shower her with gifts in anticipation of marriage, which she herself would then reject."

This criticism continued for more than a decade, when, in 1947, the New York State Law Revision Commission, in an attempt to rectify the broad construction of New York's anti-heart balm law, proposed an amendment to the existing law. In

112 Id. at 485.
115 See Goldstein, 56 Misc. 2d at 312.
116 Id. at 505.
117 Specifically, with respect to the bar of actions to recover gifts given in contemplation of marriage.
118 The bill was introduced in the New York State Assembly on January 9, 1947 and was subsequently approved by the Assembly. N.Y. Law Rev. Comm.,
addition to submitting such amendment, the Law Revision Commission also submitted to the New York State Legislature a twenty-three page report[120] recommending enactment of the amendment.[121]

Report 237 at 227 (1947); N.Y. Legis. Doc., 1947, No. 65(J); Sen. Int. No. 116, Pr. No. 116, Assem. Int. No. 120, Pr. No. 120.
The Senate bill, Int. 116, Pr. 116, was introduced by State Senator Young and was subsequently approved by the Senate.

Assemblyman Malcolm Wilson, then Chairman of the Assembly Codes Committee sponsored the Assembly bill. As an aside, Assemblyman Wilson later served as Lieutenant Governor of New York State for fifteen years under Governor Nelson A. Rockefeller. During his tenure as Lieutenant Governor, Wilson saw Governor Rockefeller sign into law Civil Rights Law § 80-b. Upon Governor Rockefeller’s resignation in 1973, Malcolm Wilson was appointed Governor of the State of New York. He served as Governor until 1974, at which time he was defeated in the New York State gubernatorial race by Hugh Carey.

Yet another point of interest concerning Assemblyman Wilson’s 1947 bill relates to a letter Wilson sent to Governor Dewey’s chief counsel, Charles D. Breitel, on March 18, 1947. In the letter, Assemblyman Wilson gently reminded Mr. Breitel, that his bill was “await[ing] action by the Governor.” Veto jacket, 1947, Assembly Int. 120, Veto No. Memo # 46. In 1966, Governor Nelson A. Rockefeller appointed Charles D. Breitel Judge of the New York State Court of Appeals. Thereafter, Breitel served as the Chief Judge of the New York Court of Appeals from 1973 to 1979.

The proposed amendment was to be inserted into Article 2-A of the Civil Practice Act and designated as § 61-j and § 2. The proposed amendment read as follows:

§ 61-j. This article shall not be deemed to prevent a court in a proper case from granting restitution for property or money transferred in contemplation of the performance of an agreement to marry which is not performed.


According to the Law Revision Commission:

This is an amendment recommended by the Law Revision Commission . . . Article 2-A of the Civil Practice Act, which outlaws actions to recover damages for breach of contract to marry, has been interpreted to bar actions for restitution where property or money has been transferred in contemplation of marriage. The purpose of this bill is to enable the courts, in a proper case, to grant restitution. Id. at 227.
Ultimately, however, Governor John Dewey successfully vetoed the amendment proposed by the New York State Law Revision Commission.\textsuperscript{122}

Following the enactment of section 61, and prior to New York’s repeal of the bar on actions seeking to recover gifts given in contemplation of marriage, at least one court in New York refused to construe section 61 in such a liberal fashion.\textsuperscript{123}

The \textit{Unger} court held that section 61-b of the Civil Practice Act did not bar an action by a donor to recover an engagement ring where the parties had mutually consented to abandon their engagement.\textsuperscript{124} While the court acknowledged that “since the enactment of section 61-b of the Civil Practice Act, it has been determined that where the contract of marriage was breached, the

Furthermore, with respect to Article 2-A of the Civil Rights Law, the Commission stated that:

The aim of the Act was to do away with excessive claims for damages coercive by their very nature and, all too frequently, fraudulent in character. Denial of recovery of property transferred in contemplation of marriage is not necessary to the accomplishment of this object, and it has the undesirable result of placing it within the power of a recipient to renounce a promise and yet retain property bestowed in anticipation of performance. \textit{Id.} at 229.

In an effort to illustrate the inequity of Article 2-A, the Commission referred to the lower court’s decision in the case of Morris v. Baird, 54 N.Y.S.2d 779 (N.Y. Sup. Ct., Nassau County 1945). In quoting the opinion of Justice Lockwood, the Commission stated that:

If judicial construction of the statute is further extended to bar this action, then the statute, which was designed to prevent unjust enrichment of unscrupulous persons and to avoid perpetuations of frauds, would become an instrument to accomplish just that purpose, and would deprive the court of its inequitable power to afford redress to one who has been deprived of the property by fraud and deceit.

Such a shocking result could not have been the intention of the Legislature in enacting Article 2A, Civil Practice Act, nor will the best interests of the People of the State be served thereby.

\textsuperscript{122} Governor Dewey vetoed the bill on March 25, 1947, and the New York State Legislature failed to override such veto. Accordingly, § 61-j was never incorporated into Article 2-A of the Civil Practice Act. \textit{N.Y. Civ. Practice Act} art. 2A.

\textsuperscript{123} \textit{See Unger}, 180 Misc. 381.

\textsuperscript{124} \textit{Id.}
donor cannot recover the ring, and that such action was barred as one for damages, based upon a breach of contract to marry. . . .”\textsuperscript{125} in a surprising twist, the \textit{Unger} court boldly concluded “[t]he instant action is not one based either on the contract to marry, or on a breach thereof. Consequently, the complaint states a cause of action which is not barred by section 61-b of the Civil Practice Act.”\textsuperscript{126}

Other courts of the era were, however, not as daring as the \textit{Unger} court.\textsuperscript{127} In \textit{Herbst}, plaintiff, as assignee of his brother, sued to recover a ring or the monetary value thereof. Plaintiff’s assignor maintained that the ring was given to the defendant “neither as a gift nor as an engagement ring, but for the purpose of showing her parents her future wedding ring.” The defendant, however, contended that the ring was given in contemplation of marriage, and accordingly, the plaintiff’s assignee’s action was barred as a matter of law.\textsuperscript{128} The court summarily dismissed the case, holding that since the action was based upon a promise of marriage, the suit could not be maintained.\textsuperscript{129}

It is evident from the decision of at least one lower court at the time that there was considerable uneasiness amongst jurists, as well as legislators, regarding the application of section 61 of the Civil Practice Act.\textsuperscript{130} In \textit{Grishen}, the plaintiff sued to “recover an engagement ring or its value, claiming a failure of consideration as the result of a mutual rescission of the contract to marry which was the consideration for the gift.”\textsuperscript{131}

Reflecting upon the court’s decision in the \textit{Andie} case, the \textit{Grishen} court noted that \textit{Andie} “was the test suit establishing a precedent against the restoration of the \textit{status quo} of decent people, who for reasons of incompatibility wish to terminate a marriage

\textsuperscript{125} \textit{Id.} at 382, see also \textit{Andie}, 32 N.Y.S.2d 429.
\textsuperscript{126} \textit{Id.} at 383.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} See \textit{Grishen}, 80 N.Y.S. 2d 484.
\textsuperscript{131} \textit{Id.}
contract.” The Grishen court acknowledged that plaintiff’s “position” in Andie, “did not particularly lend itself to the conscience of the court.” More specifically, it seemed uncomfortable with the fact that plaintiff was denied recovery even though he “sought to recover from a paramour with whom he had been living in illicit relations.”

Though the Grishen court seemed poised to ignore the restrictions imposed by section 61 of the Civil Practice Act, it resigned itself to the inevitable and acknowledged that there “seems to be no doubt... that the law, as presently construed by our appellate courts, would bar this type of action.”

By 1951, it was abundantly clear that the New York State Judiciary was unwilling to narrow the application of section 61 of the Civil Practice Act and that legislative action would be necessary to effect change.

In Nosonowitz, the court acknowledged that prior to the enactment of section 61, “a donor could recover an engagement ring after a mutual cancellation or rescission of the contract to marry.” The Nosonowitz court also noted that section 61 would appear only to bar claims by the unscrupulous and not claims of “an honest person seeking restoration of property after a... breach or a mutual cancellation of the engagement to marry.” However, the court went on to acknowledge that the “weight of authorities now sustains a broader interpretation of the spirit and the public policy of the statute... so as to prohibit all types and

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132 Id. at 485.
133 Id.
134 Presumably as a result of the enactment of § 61 of the Civil Practice Act.
135 Id.
136 As well as cases such as Andie, 32 N.Y.S.2d 429.
137 And, in fact did not reach the merits of the case, since the law of the case had been determined below.
138 Grishen v. Domagalski, 80 N.Y.S.2d 484 (N.Y. City Ct. 1948).
139 Specifically, with regard to the return of gifts given in contemplation of marriage.
141 Id.
142 Id. at 838.
forms of action growing out of or arising out of an agreement to marry irrespective of the grounds alleged for the recovery."

IX. NEW YORK'S MODIFIED ANTI-HEART BALM LEGISLATION FROM 1965 TO THE PRESENT: THE COMMON LAW REVISITED?

Finally, amidst the criticisms of jurists and legislators alike, in 1965 the New York State Legislature enacted New York Civil Rights Law section 80-b. The amendment took more than twenty years to pass following the enactment of the anti-heart balm law, succeeding a few years before no-fault divorce laws began to sweep the nation. The measure was sponsored in the New York State Senate by Senator Paul P. Bookson.

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143 Id.
144 McKinney's 1965 Session Law of New York, Chapters 1 to 1074, Chapter 333, p. 488 (West):
The People of the State of New York, represented in Senate and Assembly, do enact as follows:
§ 2. Such law is hereby amended by adding thereto a new section, to be section eighty-b, to read as follows:
§ 80-b. Nothing in this article contained shall be construed to bar a right of action for the recovery of a chattel, the return of money for securities, or the value thereof at the time of such transfer, or the rescission of a deed to real property when the sole consideration for the transfer of the chattel, money or securities or real property was a contemplated marriage which has not occurred, and the court may, if in its discretion justice so requires, (1) award the defendant a lien upon the chattel, securities or real property for monies expended in connection therewith or improvements thereto, (2) deny judgment for the recovery of the chattel or securities or for rescission of the deed and award money damages in lieu thereof.
§ 3. This act shall take effect September first, nineteen hundred sixty-five.
145 Tushnet, supra note 4 at 2596.
146 The bill was introduced in the Senate on March 9, 1965 under Senate Int. 2587, Pr. 2706, 5037. The corresponding Assembly was designated bill number No. 6774, Int. No.232 and was sponsored by Assemblyman Noah Goldstein. After both houses of the Legislature approved the measure, Governor Nelson A. Rockefeller signed Chapter 333 into law on June 7, 1965. Thereafter, Civil Rights Law § 80-b became effective on September 1, 1965.
Rather suddenly, New York Civil Rights Law section 80-b reversed the direction of the existing law by allowing the donor of an antenuptial gift to recover such gift\textsuperscript{147} from a donee upon the dissolution of their engagement. Despite such reversal, section 80-b did not lift the 1935 bar against actions for breach of contract to marry, alienation of affection or criminal conversation.

The Bookson and Goldstein bills\textsuperscript{148} were not without their critics, however. The Association of the Bar of the City of New York\textsuperscript{149}, in a memo dated May 19, 1965, expressed its reservations concerning the bills.\textsuperscript{150}

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In his memorandum in support of the bill, Senator Bookson directly addressed the measures previously taken by the New York State Courts (after 1935) to insure that § 61 of the Civil Practice Act (and later § 80 of the Civil Rights Law) bar actions for the recovery of antenuptial gifts where marriage does not ensue, in addition to barring actions for breach of contract to marry, alienation of affection and criminal conversation.

Section 80 of the civil rights law [formerly § 61 of the Civil Practice Act] abolishes rights of action for alienation of affection and for breach of contract to marry, etc. The statute as thus worded has been construed to outlaw actions to recover engagement rings or other real or personal. \textit{We do not believe that this was the intent of the legislature since an engagement ring does not necessarily constitute a contract to marry.}

\textit{Permitting the donee of gifts made in contemplation of a marriage which does not take place to retain same is inequitable and appears to be beyond the intent of present section 80.} (Emphasis added). 1965 Bill Jacket, Chapter 333, pg. 2.

\textsuperscript{147} Or the value thereof.
\textsuperscript{148} See note 147.
\textsuperscript{149} The body whose actions led to the introduction of the McNaboe-Byrnes bills some thirty years prior.
\textsuperscript{150} In advocating a fault based approach to the issue at hand, Alvin H. Schulman, Chairman of the Association's Committee on State Legislation stated:

\begin{quote}
The purpose of the bill is remove whatever impediment may exist to the recovery of gifts obviously made in contemplation of marriage, where the marriage has not occurred. This aim is an excellent one. The statutory bar to actions for breach of promise does not, in terms,
It should be noted that a minor amendment to New York Civil Rights Law section 80-b was enacted by the New York State Legislature in 1970.\textsuperscript{151}

bar a recovery of gifts made in contemplation of marriage, but some judges have so interpreted it. . . .

However, the proposed bill goes too far. It does not confine its operation to cases in which the proposed defendant in an action to recover the gift is the person who broke the engagement. There would appear to be no just reason why an innocent and wronged party, whose engagement was broken against his or her wishes, should be required to return gifts made in contemplation of marriage. Although the bill provides that the action of the court is “in its discretion” if “justice so requires” we do not deem this phrase sufficient protection for the wronged party. A court might, if in its discretion “justice so requires”, base the exercise of that discretion upon the size of the gift or other factors not involved in the termination of the engagement. A statute permitting a suit for the recovery of gifts made in contemplation of marriage, where the marriage has not occurred, should be premised upon a requirement that the proof establish the wrongful termination of an engagement or the wrongful prevention of the occurrence of a marriage by the defendant. Such a statute should also provide that the word “wrongful” be interpreted to include a situation in which the defendant in a suit to recover a gift was incapable of marriage, for example, by reason of a legal impediment to the marriage, such as the existence of a legal spouse.


\textsuperscript{151} The amendment was introduced in the New York State Assembly on January 7, 1970 by Assemblyman Thorp as A.266. Governor Nelson A. Rockefeller signed the amendment into law on April 24, 1970. According to the sponsor’s memorandum accompanying the bill, A.266:

- Corrects a typographical error in section 80-b of the Civil Rights Law by changing the word “for” to “or” on line 6, page 1 of the bill.
- The section should clearly use the word “or” throughout as it does on page 1, lines 8 and 11 and on page 2, line 2.
- While the proposed typographical correction appears to be trivial the inaccurate use of the word “for” instead of “or” created an ambiguity and has, in at least one instance, resulted in litigation. 1970 Bill Jacket.

Interestingly, this error was noted by New York State Attorney General Louis J. Lefkowitz five years earlier. Following receipt of the Senate bill in 1965, Lefkowitz issued a memo to the Governor finding “no legal objection to th[e] bill,” and noting that “[l]ine 8 should read ‘money or securities’ . . . .” Despite
After the dramatic shift in New York's law governing the return of antenuptial gifts, the courts found a "strong presumption of law that any gifts made during an engagement period are given solely in consideration of marriage, and are recoverable if the marriage does not materialize."\textsuperscript{152} The rule was defended on the ground that it upheld "the overwhelming public policy against public trials of heart-wounding tribulations of formerly engaged parties."\textsuperscript{153}

X. **No-Fault Based Recovery Under New York Civil Rights Law § 80-B: The Gaden Case**

One commentator has noted that:

In dealing with fault as related to broken engagements, American courts have borrowed no-fault concepts from divorce law.\textsuperscript{154} Before the mid-twentieth century, most states would not allow a divorce unless one party could prove some impropriety on the part of their spouse.\textsuperscript{155} However, as the disposition toward marriage and divorce began transforming, many states advocated a change in legislation and began to phase out fault-

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\textsuperscript{152} 107 YALE L.J. 2583 at 2596-97 (quoting Friedman v. Geller, 368 N.Y.S.2d 980, 981 (Civ. Ct. 1975)).

\textsuperscript{153} Id. at 2597 (quoting Friedman, 368 N.Y.S.2d 980, 982).


\textsuperscript{155} Id.; see Elrod, infra note 156, § 9.011, at 9-3.
Discussing the preference for no-fault divorces, Professor Linda Henry Elrod noted:

Divorce reforms in many states placed comprehensive jurisdiction over family law matters in family courts and moved to eliminate fault from the law of divorce. The goal of no-fault divorce was to eliminate from the courtroom the detailing of all the "horribles" either spouse had committed during the marriage, especially if the divorce was mutually agreeable. Id.

In 1969, California adopted "irreconcilable differences" as the first no-fault grounds for divorce in any state. Id. However, at the present time there are some signs that indicate that fault-based divorce may be beginning to make a comeback in state legislatures. Peter N. Swisher, Reassessing Fault Factors in No-Fault Divorce, 31 FAM.L.Q. 269, 272 (1997). In fact, commentators have noted that the "no-fault divorce revolution over the past thirty years has developed some very serious shortcomings," including inadequate economic support for "women and children of divorce," psychological problems for children which perpetuate beyond the divorce proceedings, and damage to America's fiscal environment. Id. at 271-74. Swisher notes that alarmingly high divorce rates have many states, namely Michigan, reexamining current no-fault divorce statutes. Id. at 272-73 n.18. "Though none of the bills [in the state legislatures] are yet near passage, the issue has caught fire among feminists, religious groups, men's advocates, lawyers, and the Americans whose first marriage--up to half--is projected to end in divorce." Id. (citing John Leland, Tightening the Knot: Convinced that Single-parent Families are Bad for Everyone, Some Lawmakers Want to End No-fault Divorce, Newsweek, Feb. 19, 1996, at 72.

Also reflecting this trend is Louisiana, which requires a couple choosing a covenant marriage to prove fault before obtaining a divorce. Terry Carter, 'She Done Me Wrong,' A.B.A. J., Oct. 1997, at 24. The Louisiana law, which strongly promotes and supports the traditional notions of commitment in marriage, describes the covenant marriage as follows:

§ 272. Covenant marriage; intent; conditions to create.

A covenant marriage is a marriage entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship. Parties to a covenant marriage have received counseling emphasizing the nature and purposes of marriage and the responsibilities thereto. Only when there has been a complete and total breach of the marital covenant commitment may the non-breaching
party seek a declaration that the marriage is no longer legally recognized.

A man and woman may contract a covenant marriage by declaring their intent to do so on their application for a marriage license, as provided in R.S. 9:224(C), and executing a declaration of intent to contract a covenant marriage, as provided in R.S. 9:273. The application for a marriage license and the declaration of intent shall be filed with the official who issues the marriage license.

1997 La. Sess. Law Serv. 273 (West). See also 1997 La. Sess. Law Serv. 224, 273-75 (West) for a more complete description of the requirements and the "declaration of intent" of the covenant marriage.

With the covenant marriage comes the limitation of divorce. The intent of the legislature to dissuade divorce and promote the subsistence of the marriage institution is obvious in the following law, which states in part:

§ 307. Divorce or separation from bed and board in a covenant marriage; exclusive grounds.

A. Notwithstanding any other law to the contrary and subsequent to the parties obtaining counseling, a spouse to a covenant marriage may obtain a judgment of divorce only upon proof of any of the following:
(1) The other spouse has committed adultery.
(2) The other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor.
(3) The other spouse has abandoned the matrimonial domicile for a period of one year and constantly refuses to return.
(4) The other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses.
(5) The spouses have been living separate and apart continuously without reconciliation for a period of two years.
(6)(a) The spouses have been living separate and apart continuously without reconciliation for a period of one year from the date the judgment of separation from bed and board was signed.
(b) If there is a minor child or children of the marriage, the spouses have been living separate and apart continuously without reconciliation for a period of one year and six months from the date the judgment of separation from bed and board was signed; however, if abuse of a child of the marriage or a child of one of the spouses is the basis for which the judgment of separation from bed and board was obtained, then a judgment of divorce may be obtained if the spouses have been living separate and apart continuously without reconciliation for a period of one year from the date the judgment of separation from bed and board was signed.

In *Gaden*, the Court of Appeals held that fault was irrelevant under Civil Rights Law section 80-b, which contemplates situations where one party has directly transferred property to another as well as situations where the transfer was made by a third party to both of the parties. The Court rejected the view that section 80-b merely removed the impediment to such actions that had developed as a result of its previous interpretation of the heart balm statute and restored the common-law right of recovery in which fault was considered relevant to the controversy.\(^{157}\)

The Court maintained that just as the question of fault or guilt has become largely irrelevant to modern divorce proceedings, so should it also be deemed irrelevant to the breaking of the engagement. The purpose of section 80-b was to return the parties to the position they were in prior to their becoming engaged, without rewarding or punishing either party for the fact that the marriage failed to materialize.\(^{158}\)


\(^{158}\) *Id.* The parties in *Gaden* were married in 1953 and divorced in May of 1960. In July of 1960, they resumed living together with the expectation that they would ultimately remarry. They continued to live together, without remarrying, until the spring of 1962, when plaintiff and the couple's daughter moved away. Prior to that, defendant entered a contract to purchase premises in Islip. In conjunction with this transaction, it was necessary for the defendant to obtain a mortgage commitment for $25,000. At closing, title to the property was vested, at the request of the defendant, in the names of "Elmer Gaden Jr. and Dorothy J. Gaden, his wife." The bond and mortgage given to the bank for the loan extended was executed by both parties, and the difference in cash ($13,000) required to close the deal was furnished by the defendant. Subsequently, title to a vacant lot contiguous to the purchased premises was similarly acquired in both names for $5,000, $300 of which was advanced by defendant; the balance was obtained by a loan from his father. In June 1962, after plaintiff had moved out of the premises, both parties signed a promissory note for the $5,200 loan used for the purchase of this second parcel of land. In December 1967, plaintiff, as tenant in common, commenced an action for part of both parcels. Defendant counterclaimed for the imposition of a constructive trust and for rescission, based on a claim that the creation of the tenancy in common was a gift conditioned on remarriage of the parties.
Prior to 1935, much was made over the issue of premarital wrongdoing and/or fault. But times change, and people change – by 1971, six years following the enactment of section 80-b, the New York State Court of Appeals consciously and quite deliberately moved away from a fault based analysis and, adopted a no-fault based approach.

In reflecting the sentiment of the times, the Gaden Court acknowledged that “[i]n truth, in most broken engagements there is no real fault as such – one or both of the parties merely changes his mind about the desirability of the other as a marriage partner,” and that, particularly in an age of no-fault divorce, placing blame for the end of an engagement is inappropriate.

As in many other jurisdictions, the no-fault approach, as implemented by the Gaden Court, has come to dominate the landscape of New York case law.

In Leshowitz, the plaintiff merely demonstrated that he gave an engagement ring to the defendant in contemplation of their marriage. In affirming the lower court's decision in favor of the plaintiff, the court made no mention as to the cause of termination of the engagement between plaintiff and defendant.

In Mancuso, the plaintiff had contributed virtually all of the funds toward the purchase of a piece of real estate. This property was then given to the defendant as a gift in contemplation of marriage. The court held that “[s]ince the marriage never took place, the conveyance of the property to the plaintiff would satisfy

After a trial, Special Term found that §80-b of the Civil Rights Law was applicable and directed plaintiff to deliver to the defendant a deed of her interest in the parcels, provided she would be released from liability on the bond and note that were used to buy the parcels.

159 See Goldstein, 56 Misc. 2d at 312.
160 With the exception of Lowe and its progeny. Lowe, 27 N.Y.2d 397.
161 See Gaden, 29 N.Y.2d 80.
162 Id. at 88; Kobar, supra note 15 at 2597 n.68.
163 Id.
164 Id.; see Leshowitz v. Conklin, 245 A.D.2d 343 (2d Dept. 1997).
165 Id.
166 Id.; see Mancuso v. Russo, 132 A.D.2d 533 (2d Dept. 1987).
167 Mancuso, 517 N.Y.S.2d at 539.
the clear purpose of section 80-b [and] ... return the parties to the position they were in prior to becoming engaged, without rewarding or punishing either party for the fact that the marriage failed to materialize.”

Since *Gaden*, at least one court has explicitly acknowledged that “fault for the breakup of the engagement” is a non-issue. In *Gagliardo*, the court acknowledged that the issue of fault is “wholly irrelevant” with respect to plaintiff’s ability to recover possession of an engagement ring that he conceded gave in contemplation of marriage.

**XI. THE LOWE ANOMOLY**

Despite the *Gaden* Court’s advocacy of a no-fault based approach to the return of antenuptial gifts, approximately five months earlier the very same court, in *Lowe*, held that plaintiff, a

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168 Id.
170 Id.
171 Id.
172 Plaintiff, a married man, sued for the return of a diamond “engagement” ring that he gave the defendant on her promise to marry him when and if he became free. He had been living apart from his wife for several years and they contemplated a divorce. About a month after receiving the ring, the defendant told the plaintiff that she had “second thoughts” about the matter and had decided against getting married. When he requested the return of the ring, she suggested that he “talk to [her] lawyer.” He brought an action to recover the ring or, in the alternative, $60,000, its asserted value.

The Lowe Court noted that an engagement ring is in the nature of a pledge for the contract of marriage and, under the common law, it was settled that where no impediment existed to a marriage, if the recipient broke the engagement, she was required on demand to return the ring, on the theory that it constituted a conditional gift.

The Court concluded in *Lowe* that a different result was compelled where one of the parties is married, because an agreement to marry under such circumstances is void as against public policy, and it is not saved or rendered valid by the fact that the married individual contemplated divorce and that the agreement was conditioned on procurement of the divorce. Based on such reasoning, it held that a plaintiff may not recover the engagement ring or any other property he may have given the woman.
married man, was not entitled to the return of a diamond engagement ring, which he gave the defendant upon her promise to wed him when he obtained a divorce and was free to marry.\textsuperscript{173}

This decision resurrected the common law restriction placed upon the "married donor"\textsuperscript{174} that was acknowledged by the \textit{Beck} court thirty-eight years earlier.\textsuperscript{175}

One legal scholar has commented that the \textit{Lowe} court acted "in a moment of moral hyperactivity, [and] imposed the questionable qualification on section 80-b that if the engagement was against public policy because the fiancée knew the object of his affections was a married woman, she was entitled to the loot of a $60,000 diamond ring, regardless of who broke the illicit engagement."\textsuperscript{176}

As in \textit{Beck}, the \textit{Lowe} court drew a moral line in the sand, holding that where one of the parties is married at the time of engagement, the agreement to marry is void as against public policy. The court also noted that such agreement to marry was not rendered valid merely because: (1) the married plaintiff contemplated divorce and; (2) the agreement to marry was conditioned upon his procurement of a divorce.\textsuperscript{177}

In a scathing dissent, the minority in \textit{Lowe} noted that they were called upon to determine whether a married man, awaiting the dissolution of a prior marriage, might maintain an action to recover an engagement ring given in contemplation of a subsequent marriage to one fully aware of his present incapacity to

\footnotesize{The Court also pointed out that §80-b of the Civil Rights Law had to be read in connection with §80-a, which effected the abolition of actions for breach of promise to marry. Section 80-b was added to make it clear that a man not under any impediment to marry was entitled to the return of articles that he gave the woman, even though breach of promise suits had been abolished as against public policy. This statute, however, did not alter the settled principle denying a right of recovery where either of the parties to the proposed marriage is already married. \textit{Lowe}, 27 N.Y.2d 397 at 399-402.}

\textsuperscript{173} \textit{Id.}

\textsuperscript{174} To reacquire an antenuptial gift upon the termination of an engagement.

\textsuperscript{175} \textit{See Lowe}, 27 N.Y.2d 397; \textit{see Jacobs}, 2 K.B. 532.

\textsuperscript{176} \textit{Brandes}, \textit{supra} note 157.

\textsuperscript{177} \textit{See Lowe}, 27 N.Y.2d 397; \textit{see Jacobs}, 2 K.B. 532.
contract a second marriage. 178

According to the dissenting justices, while the court had yet to construe section 80-b of the Civil Rights Law provision, it was apparent that the section upon which the plaintiff, in part, relied, does not create a new cause of action, 179 but merely removes the impediment which, for a time, had prevented a man from suing for the return of a ring which he allegedly delivered to a defendant as a pledge or token of a mutual agreement to marry. 180

The Lowe dissenters further maintained that an engagement ring “is in the nature of a pledge for the contract of marriage,” 181 and under the common law it was settled that where the donee broke the engagement she was required, upon demand, to return the ring to her suitor on the theory that it constituted a conditional gift. 182

Finally, the Lowe dissent concluded that:

The plaintiff’s action in restitution was not brought to enforce an illegal contract or to further an illegal relation. The agreement to marry was at an end and the action simply attempts to prevent the defendant’s unjust enrichment. The illegal contract to marry relates only indirectly and remotely to the relief sought, it is a thing of the past and is collateral. The plaintiff vis-à-vis the defendant is guilty of no wrongdoing; he simply seeks the return of what is rightfully his. The court would not be sanctioning the illegal act of a married man in becoming engaged to a third party. That engagement is at an end and the return of the ring would in no way revive or foster the former plan. Indeed, it only points the way to the restoration of the status quo ante. As it stands, by allowing the

178 Id.
179 See Goldstein, 56 Misc. 2d at 312.
180 See Josephson, 266 A.D. 992.
181 See Beck, 237 A.D. 729, 730.
182 See Wilson v. Riggs, 243 A.D. 33, 34.
defendant to retain the ring the court is placing its imprimatur upon her unjust conduct in retaining the ring or even, subject to the plaintiff's proof -- of her unconscionable act of inducing the gift without any intention of consummating the marriage.\textsuperscript{183}

\section*{XII. Lowe's Progeny}

The restriction placed upon the application of section 80-b by the Lowe court remains in place to this day.\textsuperscript{184} In Raji, the court held that the rights ordinarily bestowed upon the donor of a gift given in contemplation of marriage pursuant to section 80-b do not apply where plaintiff was married at the time the gifts were made.\textsuperscript{185} Likewise, the court noted that it was irrelevant that plaintiff's divorce action was pending at the time the gifts in question were bestowed upon the defendant.\textsuperscript{186}

In Leemon, the court found that while a party may maintain an action to recover property transferred in contemplation of a marriage that did not occur, where the party is already married when the property is given in contemplation of marriage, recovery is barred.\textsuperscript{187}

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\textsuperscript{183} See Lowe, 27 N.Y.2d 397, 405.
\textsuperscript{186} Id.
\textsuperscript{187} Id.; see Tomko at § 12; see also In re Uris' Estate, 188 Misc. 772 (N.Y. Sur. Ct., New York County 1946). In Uris:

The alleged donee of jewelry, claimed to have been given as betrothal gifts and later returned, could not recover damages for their alleged conversion by the donor's executors and widow, held the court in saying that the gifts were given at a time when the donor had a living wife, and therefore at a time when the engagement between the donee and the deceased was immoral and unlawful. It was said by the court to follow, therefore, that the donee, having parted with the fruits of the unlawful bargain, could not now resort to the courts to get back the property. The court explained that the alleged donee's claim to the property must fail, as a matter of law, for public policy reasons connected with the preservation of the family unit.
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However, in *Friedman v. Geller* the New York City Civil Court issued perhaps the most cogent and scathing criticism of the *Lowe* decision to date. Though *Friedman* was not an "impediment to marry" case, the court took umbrage with the holding in *Lowe*, finding it to be "anachronistic." Furthermore, Judge DeMatteo found that:

The holding of the majority . . . appears inconsistent with the era of the new public policy established by the Legislature in section 80-b and the court in *Gaden*. *Lowe* fell victim to an inequitable fate induced by the adherence of the majority to the common-law rule of public policy which proscribed an illegal marriage contract from being enforced. *Lowe* was being chastised by the court for being a married man at the time he extended a gift of a ring to the donee.

Nineteen years later, in *Witkowski*, another Civil Court Judge criticized the *Lowe* decision. Judge Weinstein acknowledged that pursuant to *Lowe*, ordinarily, he would be powerless to render an award in favor of the plaintiff, since the plaintiff was "under an impediment to marry the defendant. However, due to his uneasiness with the *Lowe* Court's arbitrary denial of relief to the "married" plaintiff, he refused to follow the *Lowe* decision. In finding the defendant liable to the plaintiff for the value of a diamond engagement ring, Judge Weinstein expressed his belief that neither fault, nor morality may be considered in applying section 80-b of the Civil Rights Law.

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188 See infra note 6.
189 *Id.* at 294.
190 See supra ¶ X.
191 *Friedman*, 82 Misc. 2d 291 at 294.
192 A former New York State Legislator.
194 *Id.*, (citing *Gaden*, 29 N.Y.2d at 88).
In *Shoenfeld v. Fontek*, another example of a case involving an impediment to marriage, the Supreme Court sought to distinguish the present facts from those presented in *Lowe*. While the *Schoenfeld* court acknowledged that "[w]here both parties are aware at the time they agree to marry that one of them is still bound by a prior undissolved marriage, the [Lowe] bar . . . is operative . . .," it went on to state that even though:

The language employed by the majority opinion in *Lowe* is broad enough to encompass the instant case, this court is of the opinion that it is not intended to bar an action for the return of property by an innocent party, not aware of the other's disability to contract a marriage at the time of the "engagement". To so construe the holding would, in this court's opinion, allow it to be used as a cloak for fraud.

Most recently, in *Marshall*, the *Lowe* exception was visited yet again. While acknowledging that "an engagement ring 'is in the nature of a pledge for the contract of marriage' and,

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196 Id. at 489.
198 The facts established were that "[s]ometime in 1996, the Plaintiff separated from his wife, non-party Ellen Grant Marshall, who thereafter commenced an action for divorce against the Plaintiff in 1997. The Plaintiff subsequently met Defendant and started living together on or about April 30, 2000, despite the undisputed married status of the Plaintiff. During their time together, the Plaintiff gave the Defendant "engagement" rings and a diamond bracelet upon her promise to wed him when and if he became free. The Plaintiff and Defendant were engaged to be married on August 27, 2001 in Hawaiii and tickets had allegedly been purchased for that trip . . . . Although the Marshalls entered into a stipulation in open court settling the ground for the divorce and certain of the ancillary issues on October 2, 2000, the judgment of divorce was held on abeyance pending the final resolution of equitable distribution. No judgment of divorce has ever been granted or entered on that matrimonial matter as of this writing." Id.
upon the breaking of the engagement, the recipient is required, "upon demand, to return the ring on the theory that it constituted a conditional gift," the court nevertheless denied plaintiff recovery on the grounds that with respect to "an agreement to marry, where one of the parties is already married, is void as against public policy and no recovery may be had of any engagement ring or other property given to the unmarried party in its contemplation." The court further noted that "[s]uch an agreement it is not saved or rendered valid by the fact that the married individual contemplated divorce".

### XIII. The Right of Third Parties Who Have Bestowed Gifts Upon the Engaged Couple

Several states have recognized the rights of a third-party donor who has given an engagement gift to seek its return upon the breakup of the engaged couple. Others states have explicitly denied recovery to such third-parties.

Presently, New York State recognizes the right of a third-party donor to recover a gift given in contemplation of marriage, where a marriage does not ensue.

However, there is one significant limitation on the right of a third-party donor to recover an antenuptial gift in New York. More specifically, if the third-party donor gives an antenuptial gift directly to the donee, then such donor will be entitled to its return where the marriage does not ensue. Where the donor gives money or other valuable consideration to a third-party on behalf

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199 *Id.*

200 *See Tomko at § 26; see Wagener v. Papie, 242 Ill. App. 3d 354, 609 N.E.2d 951, 182 Ill. Dec. 417 (Ill. App. 1 Dist. 1993); see McCormick v. Monette, 1 La. App. 186 (1924); see Grossman v. Greenstein, 161 Md. 71, 155 A. 190 (1931).*

201 *See Tomko at § 26(b).*

202 *See Bruno, 549 N.Y.S.2d 925. More specifically, the Court noted that "another person such as a parent of either party should be able to sue to recover gifts given by that party. " *Id.* at 926.*

203 *Id.*

204 Which is intended to be a gift to the donees.
of the intended donee, then such donor will not be entitled to the return of such antenuptial gift where a marriage does not take place.

XIV. **OUR CASE STUDY REVISITED**

Returning to the dilemma faced by Nick and Nora, *supra*, under New York law today, Nora will be entitled to the return of the gold watch, since it was given to Nick in contemplation of their upcoming marriage. Likewise, Nick will be entitled to the return of the engagement ring under that same theory.

Based upon the facts presented, Nora's parents will not be entitled to recover the deposit monies they paid toward Nick and Nora's wedding, since these monies were paid directly to third-party contractors, and not directly to Nick and Nora. While this distinction appears irrelevant, form, and not substance, is most significant.

Turning to the rights of those third-parties who gave engagement gifts directly to Nick and Nora, it would appear that they will be entitled to the return of such gifts.

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205 Such as monies paid in advance of the marriage to caterers, photographers and bandleaders.

206 This appears consistent with existing New York State law, since ordering the recipient caterer/photographer/bandleader to return such consideration to the third-party donor would, necessarily, nullify the recipient's contract rights. One solution to this problem would be to order the intended donee(s) to return the monetary equivalent of such consideration to the third-party donor. However, the inherent problem with this approach is that the donee(s) would be guaranteed an out of pocket loss, since the donee(s) never had possession of the consideration given to the recipient caterer/photographer/bandleader.

207 Accordingly, the better approach would be for the third-party donor to give the consideration at issue directly to the donee(s), with the understanding that it be used to pay caterers/photographers/bandleaders/etc.

208 Since the donative intent existed in the minds of Nora's parents at the time such monies were spent.

209 *See Bruno*, 549 N.Y.S.2d 925. To conclude otherwise would serve to nullify such contractors' existing contract rights. *See supra* note 205.

210 Other than Nick and Nora's parents.

211 Or the monetary equivalent of the same. *See Bruno*, 549 N.Y.S.2d 925.
XVI. CONCLUSION

The law in the State of New York concerning the return of gifts given in contemplation of marriage underwent numerous changes during the twentieth century. Presently, Civil Rights Law section 80-b provides that the donor of a gift given in contemplation of marriage may recover such gift where marriage does not ensue, regardless of who terminated the engagement, and regardless of who was at fault for the termination of the engagement.

The State of New York, in adopting a no-fault based approach to the return of antenuptial gifts, has, for the most part, been successful in thwarting many of the grave abuses that were perpetrated under the common law and, subsequently, under the Civil Practice Act. 212

212 As noted by the court in Goldstein, 288 N.Y.S.2d at 312.

In 1935 the Legislature enacted article 2-a of the Civil Practice Act. The article sought to abolish causes of action for, among other things, breach of contract to marry. Prior to that year, such “breach of promise” suits were used by avaricious young women to mulct young men who were both wealthy and rather susceptible to feminine wiles. The Legislature found that such actions had been “subjected to grave abuses, causing extreme annoyance, embarrassment and pecuniary damage to many persons, wholly innocent and free of any wrongdoing, who were merely among the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment.” Under section 61-h of the Civil Practice Act . . . , apparently to obey the legislative direction to construe the statute liberally, the courts held that the statute not only barred the action for breach of promise to marry against which it was directed, but also actions to recover money, real property, or jewelry delivered in anticipation of a marriage that did not occur. (citation omitted). . . .

Instead of suing for breach of promise, a resourceful young woman would simply persuade her swain to shower her with gifts in anticipation of marriage which she herself would then reject. In trying to remedy an old abuse, the courts seemingly permitted a new one. An analogous arrangement existed among certain Indian tribes, as
In short, the present statute, though imperfect, has virtually eliminated the need for courts to entertain disputes involving affairs of the heart.

However, despite the many successes of Civil Rights Law section 80-b, the statute is not without its flaws. Ambiguities still exist as to the very purpose and application of the statute. More specifically, some courts have viewed section 80-b as merely removing the prior statutory impediment to actions at common law allowing for the recovery of antenuptial gifts. Most courts, however, have opined that the present statute replaces not only the prior statute, but also the common law with respect to the return of gifts given in contemplation of marriage.

While the New York State Court of Appeals attempted to clarify the scope of the present statute, as well as the intent of the New York State Legislature, some believe that the Court of Appeals overstepped its bounds by converting Civil Rights Law section 80-b into a no-fault based statute, despite the fact that the statute makes no reference to the fault of either the donor, or the donee.

Moreover, the New York State Court of Appeals created greater confusion by rendering inconsistent holdings in the first two cases it heard following the enactment of section 80-b. In

described by Francis Parkman, in "The Jesuits in North America in the Seventeenth Century." Enterprising Indian maids would enter into connubial agreements with young braves which were to last a day, a week, or more, the ultimate object being matrimony. "The seal of the compact was merely the acceptance of a gift of wampum made by the suitor to the object of his desire or whim. These gifts were never returned on the dissolution of the connection, and as an attractive and enterprising damsel might, and often did, make twenty such marriages before her final establishment, she thus collected wealth of wampum with which to adorn herself for the village dances."

This state of law was sought to be avoided by judicial legerdemain (citation omitted) and more directly criticized by learned commentators (citation omitted).

Finally, in 1965, section 80-b was added to the Civil Rights Law to provide that nothing in the statute shall be construed to bar a right of action to recover property transferred solely in consideration of a contemplated marriage that has not occurred.
Lowe, the Court, rather moralistically, carved out an anomalous exception to Civil Rights Law section 80-b and denied recovery to a donor on the basis that he was aware that the donee was married at the time he gave her an engagement ring. The Lowe Court has been severely criticized by several of its own members, jurists presiding over inferior tribunals within the state, and legal commentators and experts alike.

Yet another issue that remains unsettled is the right of the third-party donor to recover an antenuptial gift. Civil Rights Law section 80-b is silent in this regard, and while the Bruno Court held that a third-party donor may be entitled to recover an antenuptial gift, it should be noted that Bruno, as a non-appellate level decision, has limited authority.

Accordingly, it is imperative that the New York State Legislature revisit the issue of the recovery of antenuptial gifts where marriage does not ensue. It is urged that the Legislature put to rest the Lowe exception, that it decide once and for all whether the New York statute is a no-fault based statute or not, and that it state whether or not third party donors have standing to recover.

One commentator has noted that:

"It may be surprising to some that ex-fiancés actually sue one another over engagement rings. But disappointment and hurt feelings often propel people into vengeful acts. To a jilted would-be bride, keeping the ring may be a small satisfaction. To a would-be groom who has been jilted, losing the ring, as well as the bride, may seem to add insult to injury."

"Marriage is in every view the most important institution of human society, it involves the most valued interests of every class; awakens the thoughts and engages the care of nearly every individual; and how it may be entered into, or how dissolved, or what is the collateral effect of a dissolution, is a matter of almost

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constant legal inquiry and litigation.\textsuperscript{214}

The State of New York is no exception in this regard. In fact, during the twentieth century lawsuits seeking the return of engagement rings were commonplace, and the law governing such cases was ever changing.

In 1965, New York, like many other states, attempted to implement an objective, no-fault solution to this predicament.\textsuperscript{215} However, the present law is plagued by ambiguity, and the New York courts have been unwilling to implement the statute uniformly.\textsuperscript{216}

If New York State is to achieve its goal of having a truly objective, no-fault based solution to the present question, then it is incumbent upon the New York State Legislature to rectify the confusion it caused when it enacted Civil Rights law section 80-b.\textsuperscript{217}

\textsuperscript{214} See Brian L. Kruckenberg, "I Don't": Determining Ownership of the Engagement Ring When the Engagement Terminates, 37 WASHBURN L.J. at 425 (1998); citing Michael Grossberg, Governing the Heart: Law and the Family in Nineteenth-Century America 31 (1985); citing Joel P. Bishop, Commentaries on the Law of Marriage and Divorce (1852).

\textsuperscript{215} Via the enactment of Civil Rights Law § 80-b.

\textsuperscript{216} Perhaps the most stunning example of this is reflected in the holding in Lowe, 27 N.Y.2d 397.

\textsuperscript{217} The author maintains that the New York State Legislature should amend the present § 80-b. Such amendment must specify that it supplants the common law, and that it creates a separate, statutory right, allowing a donor to seek the return of an antenuptial gift where marriage does not ensue. Moreover, the amendment must specify that the statute is to be applied objectively, and that fault, either of the donor, or of the donee (in either effectuating, or causing a break up), will not be considered. Next, the statute must address the Lowe decision. In this regard, the Legislature must state that antenuptial gifts are conditional gifts, and as such, shall be returned to the donor where such condition (i.e., the marriage) has not occurred, regardless of whether an impediment to such marriage existed. Finally, the statute should acknowledge the rights of third-party donors to recover antenuptial gifts where the marriage of the donees does not ensue.