Epidemic of Harsh Prenuptial Agreements Strikes Massachusetts

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By Jason V. Owens

New wave of prenups ignore state's "two-look" legal standard in favor of strict, unforgiving terms.

An epidemic of harsh, incredibly strict prenuptial agreements seems to be sweeping across Massachusetts, despite case law suggesting that such agreements are not enforceable under the state's law. Many of these stingy prenuptial agreements go beyond the usual protections of premarital assets and alimony waivers, by strictly limiting marital assets only those assets that both spouses specifically designate as "joint" during their marriage. Interestingly, many of the new wave of strict prenuptial agreements are being executed by couples younger than 40, often with both spouses believing the harsh terms are reasonable and desirable. As we have covered in our prior blogs on prenuptial agreements, there is no comprehensive statute in Massachusetts detailing the legal rules for how prenuptial agreements are enforced in the state. Instead, the law surrounding "prenups" is found in the state's appellate court decisions. What is striking about the recent wave of strict prenuptial agreements is the apparent disregard that attorneys preparing these agreements appear to have for the current law surrounding prenuptial agreements in Massachusetts, which generally seeks to prevent parties from leaving one spouse completely impoverished through the use of a prenuptial agreement.

As Attorney Lynch covered in his blog on the 2023 Rudnick v. Rudnick decision, in most instances, a Massachusetts Probate & Family Court judge will not evaluate the validity of a prenuptial agreement (sometimes called antenuptial agreements) until the parties are divorced – i.e. many years after the original prenuptial agreement was prepared and signed by the parties. In the intervening years, much can change, including the financial circumstances of the parties, the composition of the family (i.e. the birth of children), the health and career paths of the parties,

and the law surrounding prenuptial agreements itself, which may have evolved since the parties' signed their agreement.

How to Massachusetts Courts Determine the Validity of Prenuptial Agreements

When evaluating the validity of a prenuptial agreement, Massachusetts judges perform a "two-look test", in which they ask if the agreement was "fair and reasonable" at the time the agreement was executed before the marriage, and "conscionable" at the time of the divorce. In determining whether an agreement was fair and reasonable at the time of execution, courts will carefully scrutinize whether a party made full and accurate disclosure of their assets at the time of the agreement. Courts also examine the basic structure of the agreement and financial situations of the parties at the time of the marriage and ask: Were the terms of this agreement likely to leave one party severely impoverished in the event of a future divorce?

The "conscionability" test at the time of the divorce is often answered based on whether a prenuptial agreement would leave a spouse with the ability to retain at least *some* marital interests, whether those interests comprise at least some marital property, a right to seek alimony, or a combination of both. An agreement that strips a spouse of substantially all marital interests is contrary to public policy and is thus unenforceable. Other factors that can influence a finding of unconscionability can include provisions in which one party promised to share certain assets during the marriage, then failed to do so (this was a major issue in the Rudnick case that Attorney Lynch blogged about).

There can be significant variably between Probate & Family Court judges regarding the enforcement of prenuptial agreements. However, there are several factors that make it more likely that a prenuptial agreement being invalidated:

- A lengthy marriage (especially 20+ years)
- Substantial portion of assets earned during marriage (as opposed to premarital assets)
- More assets acquired by marital earnings (as opposed to inheritance or family gifts)
- No child support (which provides for at least some support)
- Waiver of alimony
- Inaccurate or ambiguous disclosure of assets by richer party at time of divorce
- Prenuptial terms suggesting certain assets would be shared during marriage
- Financial misconduct by richer party
- One party's health, employment or circumstances changed dramatically during marriage
- Extremely disproportionate division of assets
- Poorer party has limited employment prospects after divorce
- Poorer party would be left impoverish, lacking housing, etc. after divorce

Of these factors, the most important could be the length of the marriage and the objective level of poverty faced by the poorer party compared to the wealth retained by the richer party. However,

such cases are highly fact specific, and often turn on events that occurred during the marriage that the party's did not anticipate when they executed their prenuptial agreement.

Traditional Approaches to Navigating the Two-Look Test

Most experienced Massachusetts prenuptial agreement attorneys take a somewhat cautious approach to interpreting the state's two-look test. While it may be *possible* to pressure a would-be spouse into signing a one-sided prenuptial agreement, doing so creates risks for the party who would most benefit from the prenuptial agreement. If a court later determines that the prenuptial agreement was not fair and reasonable at the time it was executed or was not conscionable at the time of the divorce, it risks weaking the very prenuptial agreement that the party sought to benefit from. In some cases, a judge may choose to invalidate the prenuptial agreement altogether, leaving that party entirely unprotected.

To mitigate these risks, experienced attorneys prepare prenuptial agreements with an understanding of the levels of protection that Massachusetts law provides for the elements found within a prenuptial agreement. For example, Massachusetts law provides robust protection for the exclusion of premarital assets from the division of assets. In addition, the law tends to provide strong protection for the protection of inherited assets and gifts, including those received during the marriage. The law provides somewhat robust protection for waivers of alimony set forth in prenuptial agreements, although there are significant exceptions – since courts can view alimony as the "safety valve" when a prenuptial agreement severely limits one spouse's assets. Finally, the law is murky at best when it comes to excluding from division those assets that an asset earns or saves through ordinary employment and investment efforts during the marriage. (The latter often being viewed as the quintessential "marital assets".)

Based on these legal realities, many experienced attorneys preparing Massachusetts prenuptial agreements emphasize protecting premarital assets along with inherited assets and family gifts, step more carefully when limiting or waiving alimony, and approach restrictions on the division of ordinarily income/savings acquired during the marriage with caution, since overreach in the latter category can jeopardize the validity of the overall instrument. (This does not mean that parties cannot agree to treat ordinary employment income/savings earned during the marriage as separate property for the purposes of asset division. But it is important for clients to understand the risks and make these choices with open eyes.)

What has changed in recent years, particularly in the post-Covid era, is the sheer number of Massachusetts prenuptial agreement now in circulation that appear to disregard the state's two-look test entirely. These agreements often include ironclad alimony waivers and classify each and every asset acquired by either spouse – at any time and from any source – as that spouse's separate property, to be retained solely by that spouse in the event of a divorce. Under the terms of these agreements, the "marital estate" consists *only* of those specific assets that the parties both deliberately choose to place in a joint account or in their joint names (and sometimes even then, the agreement provides the parties' shall own the asset in proportion to the amount they contributed to its acquisition from their separation funds). In reality, this gives one party veto power over the marital estate. Even in a 20+ year marriage.

Many of these increasingly common prenuptial agreements appear to fail the Massachusetts two-look test on their face.

Strict Prenuptial Agreements Make Logical Sense When Spouses Have Similar Earnings

Many new marriages involve soon-to-be spouses who earn equal or nearly equal incomes. These 20- or 30-something year-old workers may have comparable 401k and investment assets, similar W2 wages, and can each envision independent earnings and careers. For these younger couples, the notion of mom staying at home while dad spends his day at his office is seriously outdated – as are notions of alimony and splitting assets that one or both spouses did not directly earn. In many instances, they will be right.

To the extent that these spouses remain on comparable career trajectories, each remaining employed, contributing to their respective 401k and making choices based on their individual employment needs, then their prenuptial agreement is unlikely to be a major factor in a divorce. Indeed, a judge is unlikely to challenge the validity of a prenuptial agreement if both spouses appear to be left in a strong, relatively equal financial positions after a divorce – regardless of the specific language in the prenup itself. (Of course, the same folks would likely have a simple divorce even *without* a prenuptial agreement, under this fact pattern. Alimony is only ordered in cases involving a substantial disparity in incomes between the spouses, and little asset equalization is needed in a divorce involving spouses who have relatively equal retirement savings.)

Of course, the problem is that life does not always go smoothly. Marriage is a long-term commitment, and significant life events can impact careers, mental and physical health, and family composition over decades. Fifteen years into a marriage, one spouse may have made serious financial or professional sacrifices on behalf of the family – or to advance the personal or professional path of the other spouse. One spouse can become disabled. A child can be born with autism. A spouse can make promises that he or she does not live up to. Misfortunate strikes. Things can happen that can make alimony or the division of assets an important source of protection against the unexpected.

Simply put, there are many scenarios that can unfold in which Spouse A very much wants to enforce the terms of the *incredibly stingy* prenuptial agreement that the parties execute *years ago*, while Spouse B feels that enforcement of said prenuptial agreement would be manifestly unfair and destroy his or her life. Based on current Massachusetts law, both Spouse A and Spouse B could be facing a confusing situation. Spouse A could be seeking to enforce unconscionable prenuptial agreement that a judge could easily reject. Meanwhile, Spouse B could be facing financial ruin through a prenuptial agreement that he or she needs a judge to reject before life can proceed. The only thing that's clear is that these folks have a serious legal fight on their hands.

Why Are Unconscionable Prenuptial Agreements Against Public Policy in Massachusetts?

It is often said that marriage is a social contract. In our individualistic society, people tend to assume that the social contract underpinning marriage is limited to the spouses themselves. But this is not true. The marital social contract is also *societal*. Married individuals receive substantial government benefits including significantly lower income tax rates, the gift tax exclusion, Social Security survivorship benefits, elective share inheritance rights, and a variety of other statutory rights.

In exchange for this laundry list of financial benefits and goodies, there is a legal obligation for married people to look after each other in the face of hardship. This is why Massachusetts law carves out an exception to permanent waivers of alimony when a recipient spouse is going to become a public ward. When you sign up for those excellent public benefits that come with getting married, you sign up for some responsibilities too. Namely, you are responsible for not leaving your spouse destitute after a long-term marriage, *regardless* of what your prenuptial agreements say.

It is Worth Executing a Unconscionable Prenuptial Agreement in Massachusetts?

It is difficult to predict how Massachusetts appellate courts will rule in the years and decades to come. It may be that executing a harsh prenuptial agreement that is inconsistent with the two-look test now proves to be a relatively low-risk gamble in the future. For example, we may see case law come down that reinforces the notion that even if a prenuptial agreement is unconscionable, Probate & Family Court judges should only make the minimum modifications necessary to bring the agreement into conscionability. In such a scenario, litigants and attorneys who erred on the side of very strict terms will have only lost little in the bargain. (Of course, those who feel the sting of those harsh terms will have lost a lot, either way.)

However, there is also a non-zero chance that either a Massachusetts appellate court – or the individual Probate & Family Court ruling in a particular case – will rule that a prenuptial agreement that permanently waives alimony and deliberately eliminates any shared marital assets (beyond those the parties voluntarily create after getting married) is so violative of public policy that it should be simply set aside and ignored. If this proves to be the case and *all prenuptial protection is lost*, then the party most in need of protection from the prenuptial agreement will feel some serious buyer's remorse. Is that a risk worth taking?

Bottom line: The law – in this case, the two-look test – *means something*. Ignore it completely at your own peril.

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