

What is the Current State of the Law on Prenuptial Agreements in Massachusetts?

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Attorney Owens reviews the current state of prenuptial law in Massachusetts.

Since the 1980s, Massachusetts has steadily moved towards enforcing [prenuptial agreements](#) with stricter terms. Although prenuptial agreement terms including blanket waivers of alimony and asset division provisions that leave one spouse with little or no assets have been historically disfavored, our appellate caselaw has moved steadily towards enforcing prenuptial agreements as contracts, even as Massachusetts courts have retained the authority to decline enforcement of especially harsh prenuptial agreements.

A Brief History of Prenuptial Agreements in Massachusetts

Way back in 1955, the Massachusetts Supreme Judicial Court, in [Kovler v. Vagenheim \(1955\)](#), ruled a court could enforce a prenuptial agreement between a husband and the *brothers* of the wife, whereby the brothers, in consideration of the husband's marrying their sister, promised to indemnify the husband for any support and maintenance that he might be obliged to pay for his wife and child. In [Osborne v. Osborne \(1981\)](#), Massachusetts followed a national move towards enforcing prenuptial agreements in which spouses could agree to waive or limit their respective interests in property and alimony before getting married.

In 2002, the SJC entered its opinion in the landmark case, [DeMatteo v. DeMatteo \(2002\)](#), which established the basic framework through which prenuptial agreements continue to be reviewed and enforced in Massachusetts. Under DeMatteo and the cases that followed, Massachusetts courts employ a “two look” test in determining whether a prenuptial agreement is enforceable. Such an agreement “must be both (1) fair and reasonable at the time of execution (the “first look”), and (2) conscionable at the time of enforcement (the “second look”).”

Austin v. Austin (2005): The “First Look” Test

In DeMatteo, the SJC held that under the “first look” test, “**an agreement will be valid unless its terms essentially vitiate the very status of marriage.**” This standard seemed to set a high bar for parties seeking to challenge the enforceability of a prenuptial agreement under the “first look” test, which examines whether the agreement was fair and reasonable at the time of execution.

A few years later, in its decision in Austin v. Austin (2005), the SJC took the exceedingly rare step of overruling a Massachusetts Appeals Court decision from the previous year, in which the Appeals Court had expressed skepticism towards the enforceability of a prenuptial agreement that called for the permanent waiver of alimony rights. The Appeals Court had found that a prenuptial agreement containing a permanent waiver of alimony failed the “first look” test, requiring a prenuptial agreement to be fair and reasonable at the time of execution. The SJC reversed the Appeals Court in Austin, finding that alimony waivers in prenuptial agreements were generally enforceable.

In Austin, the SJC specifically held that a permanent waiver of alimony contained in a prenuptial agreement is generally valid at the time of execution (i.e., the “first look”), where a “[d]isparity of income that has the potential to leave one spouse in an essentially different lifestyle is not a valid basis for determining that the agreement was invalid at its execution.” In Austin, the SJC focused squarely on the wife’s access to legal counsel and her knowing and voluntary waiver in the preparation and execution of the prenuptial agreement in question:

Here there is no evidence of the husband's taking unfair advantage of the wife at the time the agreement was executed. The wife's attorney drafted the agreement, after he had advised her not to sign an agreement prepared by the husband's attorney. Furthermore, as discussed, the judge found that the wife was fully aware of her rights and knowledgeable about alimony, property division, and child support. The agreement provided that the wife's separate premarital property would remain hers and not be incorporated into marital assets.

The Austin Court referenced its holding in Dematteo ruling, noting that “[w]here there is no evidence that either party engaged in fraud, failed to disclose assets fully and fairly, or in some other way took unfair advantage of the confidential and emotional relationship of the other when the agreement was executed, an agreement will be valid unless its terms essentially vitiate the very status of marriage.”

In Austin, the wife was characterized as “a woman, in her fifties, with a high school education, low potential earning capacity, and a child to raise ...” Despite the economic challenges faced by the wife, the SJC determined that the wife was not “stripped of substantially all marital interests” by the prenuptial agreement, noting that a “provision of the agreement that created support for the wife based on, among other things, length of marriage”, while another provision ensured that “the wife's separate premarital property would remain hers and not be incorporated into marital assets”. The Court found that a “[d]isparity of income that has the potential to leave one spouse in an essentially different lifestyle is not a valid basis for determining that the agreement was invalid at its execution.”

In short, the Austin decision set a high bar for spouses seeking to challenge a prenuptial agreement because the agreement was not “fair and reasonable” at the time of execution under the “first look” test. In its ruling, the Austin Court affirmed the core principle, first set out in DeMatteo, that under

the “first look” test, “*an agreement will be valid unless its terms essentially vitiate the very status of marriage.*”

In addition to the guidance provided in [Austin](#), other cases have analyzed the impact each party's representation by an attorney can have on the "first look" test. The [Austin](#) decision reinforced that when evaluating whether a prenuptial agreement was “fair and reasonable” at the time of execution, a court must examine whether each party made sufficient disclosure of their assets at the time of the marriage and whether each party was “fully aware of [their] rights and knowledgeable about alimony [and] property division” at the time the agreement was entered.

Subsequent decisions focused on the “first look” test have commented on the importance of each party having legal representation during the prenuptial agreement negotiation. Although a prenuptial agreement may be enforceable even if a party executed the agreement without the assistance of an attorney, a party's representation by legal counsel can have a significant impact on the "first look" test. As noted in [Biliouris v. Biliouris \(2006\)](#), a party who is represented by counsel during the review and negotiation of a prenuptial agreement is generally presumed to have understood the agreement's terms prior to execution. Similarly, in [Rudnick v. Rudnick \(2023\)](#), the Appeals Court found that a prenuptial agreement was fair and reasonable on the “first look” even though “wife's attorney — with whom she only had one contact — recommended that she not sign the agreement [and] there were no further discussions between the wife and her attorney about Massachusetts law or the division of assets.”

Rudnick v. Rudnick (2023): The “Second Look” Test

In 2023, the Massachusetts Appeals Court provided a comprehensive review of the “second look” test in its decision in [Rudnick v. Rudnick \(2023\)](#). In [Rudnick](#), the Court determined that the prenuptial agreement satisfied the “first look” test where it “was fair and reasonable at the time of execution”, but found that the agreement failed the “second look” test because the agreement was “unconscionable at the time of the divorce due to ‘material and substantial events’ that ‘essentially stripped [the wife] of substantially all her marital interests.’”

In its decision, the [Rudnick](#) Court focused on two areas: (1.) a financial position that the wife would be left in if the agreement was enforced at the time of the divorce and (2.) the deliberate steps the husband had taken during the marriage to prevent the wife from receiving a share of joint property contemplated in the agreement. In the first area, the Court found that the prenuptial agreement was “unconscionable, and thus unenforceable, because it stripped the wife of all marital interests and left her with insufficient financial resources to support herself.”

In its analysis, the Court noted that “[t]he conscionability requirement of the second-look analysis is closely tied in large measure to the contesting spouse's ability to retain at least some marital interests, whether those interests comprise some marital property, a right to seek alimony, or a combination of both ...” Another factor the Court considered was whether “circumstances during the marriage led to any changes of any significance” such as the wife suffering a “debilitating illness” making her “unable to work should she [have chosen] to supplement her income.”

The [Rudnick](#) Court also cited the [Austin](#) decision, observing in [Austin](#) that a “[prenuptial] agreement that allowed the wife to retain her premarital property” and ‘permitted [her] a joint interest in marital

assets and provided that any appreciation on the marital home ... even if the husband held sole title to the property' was not deemed unconscionable" under the "second look" test.

In Rudnick, the second factor in its conscionability finding centered on the husband's deliberate efforts to deprive the wife of joint property contemplated under the prenuptial agreement, where the Court found that the "wife waived her right to alimony with the understanding that she would be entitled to the appreciation of the value of any real property acquired during the marriage — here the Canton and Florida homes. However, the manner in which the husband took title to those properties placed them out of the wife's reach and thus prevented her from 'retaining her marital rights.'" The Court summarized the implications of enforcing the agreement as follows:

[A]s a result of the husband's actions to "circumvent" the agreement, the wife (1) would get "nothing after 27 years of marriage" and would be "essentially stripped of substantially all her marital interests," and (2) was in a worse situation due to her "age and health circumstances," "had to tap her assets to support herself in a modest lifestyle," and "now does not have sufficient property, maintenance or suitable employment for self-support." If the agreement were enforced, the wife would be in the same position as if she had never been married at all, in direct contravention to the intent of the parties that the wife retain at least some marital property interests, as set forth in their agreement.

The Rudnick Court concluded that the wife was "eighty-six years old at the time of trial, ailing, and unable to earn income ...", and that "enforcement of the agreement would leave the wife with no marital assets and no alimony". Although Rudnick focused in part on the husband's deliberate efforts to deprive the wife of joint property, most of the Court's analysis centered on the economic poverty the wife would face if the prenuptial agreement were enforced. Even if a prenuptial agreement was fair and reasonable at the time it was executed, Rudnick tells us that the agreement may be invalid if enforcement of the agreement would leave one spouse devoid of assets and unable to feed, house and/or support him or herself.

Although the prenuptial agreement was ruled invalid in Rudnick, the case nevertheless reinforces the state's trend toward enforcing prenuptial agreements in which parties make proper disclosure and engage in no misconduct prior to the divorce, so long as one party is not left "with no marital assets and no alimony".

(Check out [Attorney Lynch's blog on the Rudnick case here.](#))

How Stingy is Too Stingy Under Current Massachusetts Prenuptial Law?

Last year, I blogged about the [epidemic of harsh prenuptial agreements in Massachusetts](#). In that blog, I wrote:

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.

I went on to caution soon-to-be-spouses about the dangers of executing very harsh prenuptial agreements, including the possibility that agreements that leave one spouse in virtual poverty, without marital property or alimony, run the risk of failing the “second look” test. At the same time, the increasing prevalence of strict and stingy prenuptial agreements is consistent with the longer-term trend in Massachusetts towards enforcement of most prenuptial agreements, even when enforcement results in substantial disparities in income and assets between spouses following the divorce.

At the end of the day, clients and practitioners need to understand that even spouses who share similar financial positions early in a marriage may find themselves in very different circumstances after ten or twenty years. Prenuptial agreements that assume that each spouse will continue to earn and save similar amounts of individual assets during the marriage often fail to account for the risk that something unpredictable may happen during the marriage. It is important for parties to consider the rights they are forfeiting if something unpredictable happens, i.e. some misfortune like a serious illness or disability, catastrophic job loss, or other low-probability-high-impact issue that would traditionally result in one spouse needing to provide additional financial resources to the negatively affected spouse in the event of a divorce. These types of events are difficult to predict, but Massachusetts law provides significant protections for spouses in the event of a disaster, including alimony and/or an unequal assignment of assets, to help make up for the hardship faced by the affected spouse.

Signing a prenuptial agreement that waives alimony and essentially holds that each party will keep what they earned, individually, during the marriage, can mean giving up protections that most spouses can take for granted under Massachusetts law. Although our judge-made law on prenuptial agreements could radically change through a future appellate opinion, the emerging reality is that is that most probate and family court judges will only invalidate a prenuptial agreement if enforcement of the agreement would leave a party in fairly *extreme* financial distress.

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