

Handling Unique Assets in Massachusetts Prenuptial Agreements

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What is a prenuptial agreement?

A prenuptial agreement is a legal tool encompassing the selection and control of the legal and financial rights that parties acquire upon marriage. A prenuptial agreement is a written contract between two spouses detailing each of their assets and what will happen to their assets if the parties divorce. Prenuptial agreements can also protect assets in the event of death. In marriages in Massachusetts, where the parties do not have a prenuptial agreement, everything owned both intangible, tangible, and personal property by either party is considered a marital asset. In Massachusetts, what is “marital” is broadly construed. For example, it does not matter whose name the asset is in, whether the asset existed prior to the marriage or whether it was given to a party by a third party during the marriage. Generally, all assets are considered for division in a Massachusetts divorce unless there’s a prenuptial agreement. Prenuptial agreements have the ability to address property that exists at the time of marriage and such property that will or may be acquired during the marriage.

Massachusetts is an equitable division state, and the Court considers many factors in determining the equitable division of assets upon divorce. Some of those factors are length of marriage, contributions of the parties during the marriage, income of the parties, and age and health of the parties. A full list of factors are pursuant to M.G.L. c. 208 section 34 and is often colloquially referred to as “section 34 factors.” Prenuptial agreements allow parties to carve out which assets will be separate property, and therefore off the proverbial table pursuant to “section 34 factors” in the asset division in the event of a divorce. Any other assets not specifically carved out as separate property through a prenuptial agreement will be considered marital property, and therefore subject to division if there is a divorce.

Why execute a prenuptial agreement?

There are many reasons to execute a prenuptial agreement. The general reason for doing so is to protect certain assets from being divided if parties divorce, or in the event of either party’s death. Despite the notion that prenuptial agreements are associated with celebrities and those with great wealth, the fact is that prenuptial agreements are a common tool for all parties to utilize despite financial status.

Today, a number of societal changes have made public attitudes about the institution of marriage mixed and the age at which Americans marry for the first time has risen.¹ This fact also means that parties entering a marriage have had more time to individually acquire pre-marital assets such as real property or contributions toward retirement.

A prenuptial agreement is a mechanism to protect both assets acquired before marriage and those that may be acquired during the marriage. Other common reasons for executing a prenuptial agreement include but are not limited to: protecting and preserving assets for children of a prior relationship, protecting business interest(s), protecting future inheritances or trust interests, and addressing existing or future liabilities.

What is the standard for challenging a prenuptial agreement in Massachusetts?

Like other types of legal contracts, a prenuptial agreement can be challenged. Every state permits prenuptial agreements, but each state has its own requirements and procedures. Generally, judges will still

¹ D’Vera Chohn, Jeffrey S. Passel, Wendy Wang and Gretchen Livingston, *Barely Half of U.S Adults are Married – A Record Low*, PEWRESEARCH.ORG, (Dec. 14, 2011), <https://www.pewresearch.org/social-trends/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/>.

set aside prenuptial agreements that are considered by the court to be “unfair” or otherwise do not meet state requirements for prenuptial agreements.

As stated, the purpose of a prenuptial agreement is to contract around Massachusetts state divorce law, so if a party challenges the prenuptial agreement, it will be evaluated by Probate and Family Court judges for fairness and reasonableness. However, a valid prenuptial agreement that addresses asset division does not owe a spouse the same percentage or distribution of assets as they would otherwise be entitled to under applicable Massachusetts divorce law, even if one of the parties or the judge later questions such a distribution.

In March 2023, the Massachusetts Appeals Court issued a decision addressing prenuptial challenges, and evaluated the standard for successfully doing so.² The *Rudnick* decision held that prenuptial challenges must involve both a “first look” and a “second look.”³ This entails that to uphold a prenuptial agreement, the court must find that (1) the agreement must have been fair and reasonable at the time of execution and (2) that it must be conscionable at the time of the enforcement.⁴ The Court cited to the previously decided *DeMatteo* case, and further enshrined the “second look” as a conscionability standard.⁵ The Court stated that the “second look” consists of measuring the contesting spouse’s ability to retain some marital assets, such as through alimony, retention of marital property, or both.⁶ If a prenuptial agreement strips a spouse of essentially all of their marital interests, this would be contrary to public policy and would become an unenforceable agreement.⁷ A court must glean the circumstances surrounding the creation of the prenuptial agreement *and* the parties’ circumstances at the time of the enforcement or at the time of divorce to determine if the agreement can be upheld. A judge will consider factors such as voluntariness, independent legal counsel for both parties, full and fair financial disclosure, and fairness or reasonableness of the agreement’s terms to determine whether to uphold a prenuptial agreement. The party who challenges the agreement will be burdened to prove that such circumstances, either at the time of the agreement or enforcement, are unconscionable to enforce.

Unique Assets in Prenuptial Agreements

Beyond what property is commonly associated as protected by a prenuptial agreement, prenuptial agreements also have the power to protect assets that are unique or special to an individual. Parties who spend significant time and money collecting specific items should also execute a prenuptial agreement and include these treasured items in their prenuptial agreements, just like any other type of property.

For example, a party may build a valuable collection of cards, antiques, rare coins, wine, vintage cars, watches, jewelry, or priceless artwork. For many parties, such collectibles are not only personal passions, but have required significant search and investment. Other clients may not have a full collection, but may have a single, or a few, high value, unique assets. A proper prenuptial agreement will include specifically tailored provisions to protect valuable collectibles and high-end assets. Counsel for the party with the unique assets is tasked with obtaining a valuation of their client’s assets, establishing the types of assets, and drafting appropriate provisions for including such assets in a prenuptial agreement.

² *Rudnick v. Rudnick*, 102 Mass. App. Ct. 467 (2023)

³ *Id.* at 471.

⁴ *Id.*

⁵ *DeMatteo v. DeMatteo*, 436 Mass. 18, 35 (2002).

⁶ *Id.*

⁷ *Id.* at 36.

While not a tangible collection per se, digital assets are also something a client may have invested significant time and money into and can also be addressed in prenuptial agreements. Digital assets can include airline, hotel or credit card points, cryptocurrency, NFTs, and digital media libraries. These items can be of significant value and are often overlooked in prenuptial agreements. If your client ends up divorced, they may want to use those Chase points for their own *Eat, Love, Pray* self-care escape.

Intellectual property should also be included in prenuptial agreements. Intellectual property can include anything from books and royalties to trademarks, patents, trade secrets, copyright, and inventions. If your client wrote a book pre-marriage that gets turned into a box office hit during the term of the marriage, that client will be happy that you listed that book and any subsequent earnings related to it as their separate property in the prenuptial agreement.

Another unique asset for counsel to pay special attention to when drafting a prenuptial agreement is pets. While many consider pets to be family, the law categorizes pets as an asset. Pets may outlive the length of a parties' marriage. This means that pets are divided in the same way a car would be at the time of divorce, meaning only one person can retain ownership. When this process involves a pet, it can be particularly distressing for parties. It is better for counsel to do the necessary intake with the parties to be inclusive of all of assets and include them in the prenuptial agreement.

Protecting Unique Assets in Prenuptial Agreements

The process and due diligence required to properly include unique assets in prenuptial agreements can be laborious. The first step in the process for including provisions for collectibles is cataloging or inventorying the collection. This step can vary in difficulty depending on the type of collection.

A collection of a few highly popularized high-end watches will be easier to catalogue than a collection of ten thousand rare trading cards. Generally, counsel needs to have their clients physically identify the items in the collection and organize an internal memorandum or list for identification in the prenuptial agreements. A way to simplify the process of cataloging or inventorying the collection could be to simply identify the party's trading card collection as a whole and assign a value to the entire collection, thus obviating the need to inventory and assign individual card values.

The second step in the process is valuation. Understanding the values of collectibles is an integral part of handling unique assets because certain items may appreciate or depreciate significantly over time. Parties can assign a good faith valuation to their assets or may opt to have their assets professionally appraised. Some parties' collectibles may be more common than others, so that locating and paying an expert for their services may be a significant cost.

The third step in the process is detailing in the agreement how these unique assets will be retained in the event of divorce. It is important to specifically address how this will be handled if the particular asset changes over time. For instance, some card collections are played with or traded over time. Will the agreement only protect the original cards of the collection, or will it also include modifications to the collection? If marital assets are used to purchase additional cards for the collection during the marriage, will those cards be separate property or marital property? These questions need to be addressed in detail in the agreement to avoid any ambiguity should there be a divorce.

Addressing Unique Assets in Death

Prenuptial agreements in Massachusetts may include provisions on how separate property will be treated in the event of death. Specific language may be added that allows a party to dispose of their separate property in the event of death in any way they feel is appropriate. The prenuptial agreement will include a

waiver of rights to such property in the deceased's estate by the surviving party. This language is imperative to include if a party feels strongly about what happens to their separate property after their passing and wants to have the option to leave it to someone other than their surviving spouse. For some parties, it's important to keep family money in their direct bloodlines so such estate provisions in a prenuptial agreement would allow separate property to be passed directly to relatives other than a spouse so long as there is a corresponding estate plan directing such. In the example of collectables or pets, there may be individuals a party wishes to convey such property to other than their spouse.

Conclusion

Prenuptial agreements are wrought with nuances, but what makes prenuptial agreements in Massachusetts such a great planning mechanism and legal tool is the ability to uniquely craft language to suit your client's individual needs. From a complex collection of trading cards to a precious pet cat, there are so many unique assets that can be addressed in a prenuptial agreement in addition to more traditional assets. Clients are often so focused on the "big ticket" items when entering into a prenuptial agreement, such as a house or 401k, that they forget to think about their unique assets that not only mean so much to them but can also lead to nasty and often costly litigation over their division in the event of a divorce or death. Using prenuptial agreements can provide great protection of property for clients in the event of divorce, or even death, and give your clients peace of mind that even in the worst-case scenario, all their assets, including their unique ones, will be protected.