

Love, Marriage and the Prenuptial Agreement

By Marisa W. Higgins, Esq.

Spring is once again upon us, and with spring (and summer) comes another season of weddings. And while so much time, effort, and money go into planning the big day, the happy couple's financial arrangements after the wedding are often not discussed or even contemplated before they exchange vows. Although the topic of finances, including the division of the couple's assets in the event their marriage ends, may seem unromantic, it is incumbent upon the bride and groom to consider and discuss their financial future, particularly the need for a prenuptial agreement.

A prenuptial agreement is a contract entered into by two people intending to marry. The agreement, which must be in writing, has no effect until and unless the couple marries. The purpose of the agreement is to fix and determine all rights, claims, and obligations of the husband and wife in the event of a separation, divorce or death. Prenuptial agreements usually address the disposition of assets and liabilities upon termination of the marriage as well as spousal support. Although prenuptial agreements may address issues pertaining to children of the marriage, such as custody, visitation, and child support, those issues are always subject to review and approval by the court.

Prenuptial agreements are commonly enforced in every jurisdiction, including Massachusetts. However, Massachusetts courts have held that the enforceability of prenuptial agreements is not without restriction. In fact, Massachusetts courts have established certain requirements for the enforceability of a prenuptial agreement. Initially, a court asked to enforce a prenuptial agreement will consider whether there was full and complete financial disclosure by both spouses prior to the agreement's execution and/or whether each spouse had or should have had independent knowledge of the other spouse's worth before executing the agreement.

In deciding to enforce a prenuptial agreement, a court must conclude that the agreement was fair and reasonable at the time of its execution. In making that determination, the court may consider the spouses' respective worth, their ages, intelligence, literacy and business acumen as well as prior family ties and commitments. In *DeMatteo v. DeMatteo*, the Supreme Judicial Court of Massachusetts determined that the terms of a prenuptial agreement do not need to approximate

a potential alimony award or property division should the couple divorce without a valid prenuptial agreement. Instead, a pre-nuptial agreement, even if one sided, is considered fair and reasonable at the time of execution if the contesting party is not substantially stripped of all his or her marital interests. 436 Mass. 18 (2002).

If a prenuptial agreement is fair and reasonable at the time of execution, a court must then take a "second look" at an agreement at the time it is sought to be enforced. This second look requires a court to determine that a prenuptial agreement is not unconscionable at the time of its enforcement. In other words, enforcement of a prenuptial agreement cannot leave a spouse without "sufficient property, maintenance, or appropriate employment" to support himself or herself. *DeMatteo*, 436 Mass. at 37.

Prenuptial agreements have become an increasingly popular means of establishing the respective rights and obligations of spouses in the event of death or termination of the marriage by divorce or separation. The enforceability of prenuptial agreements, however, is not absolute and prenuptial agreements should not be drafted without the assistance of experienced counsel.

To learn more about Prenuptial Agreements, please contact Eugene P. O'Donnell, Jr. at 508-459-8063 or eodonnell@fletchertilton.com, or Marisa W. Higgins at 508-459-8041 or mhiggins@fletchertilton.com.

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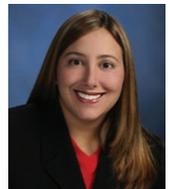
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