
KAJKO, WEISMAN, COLASANTI & STEIN, LLP

A T T O R N E Y S A T L A W

W W W . M A S S F I R M . C O M

Peter J. Kajko
Mitchell E. Weisman
AnnMarie Colasanti
David B. Stein
Cynthia Sherman
Julie R. Hess
Charlene A. Caldeira

Molly Wilson Chung
Emily B. Rabin
Craig J. Tiedemann
Matthew R. Passalacqua*
Stephen A. MacKenzie

The Hon. Isaac Borenstein (Ret)*
Richard Keshian
Of Counsel

430 Bedford Street, Suite 190
Lexington, MA 02420

Phone: (781) 860-9500
Fax: (781) 863-0046

*also admitted in NH
**also admitted in FL

The Enforceability of Premarital Agreements in Massachusetts

In General

A prenuptial agreement is executed prior to a marriage. It allows the parties to clearly set forth the rights, interests, and property each wishes to retain should the marriage end either by death or divorce. A prenuptial agreement can be drafted in many different ways. For example, the agreement can define marital assets and can set forth a description of what assets should be considered to be an individual's "Separate Property" to be retained by that individual at the termination of the marriage. Separate Property can encompass only certain types of property (i.e. future inheritances) or the agreement can attempt to completely segregate all of each party's respective property and any future appreciation thereon from the claims of the other party.

Financial Disclosure

One element considered by the court while determining the validity of a prenuptial agreement is whether the parties fully and fairly disclosed their respective financial circumstances to each other. The parties must exchange financial disclosure schedules. A disclosure schedule should provide information regarding the value of the party's assets and any outstanding liabilities, the sources of the party's income and the estimated value of potential inheritances. It is imperative that this disclosure is as complete and accurate as possible. It is good practice to provide back-up documentation to supplement the disclosure.

Divorce

In the event a marriage ends in divorce, a prenuptial agreement can provide for a disposition of property which is not Separate Property. The terms of the agreement can set forth a method for dividing the parties' assets and a determination of what amount, if any, of alimony to be paid. (Please note that a prenuptial agreement cannot address issues relating to children born to the parties, including issues relative to child support). In the alternative, the agreement can provide that the

parties waive all rights to alimony. The agreement might provide for limited alimony or for a one-time alimony payment.

Death

If the marriage ends with the death of one of the parties, a prenuptial agreement can establish exactly what interest, if any, the surviving party has in the decedent's estate.

Enforceability

While the provisions of a prenuptial agreement can be tailored to each couple's situation, the agreements must provide for a minimum set of rights. A prenuptial agreement cannot strip the parties of all of their "marital interests". In *DeMatteo v. DeMatteo*, the Supreme Judicial Court of Massachusetts outlined the test for determining the validity of prenuptial agreements. An agreement must be fair and reasonable at the time it is executed and fair and reasonable at the time of enforcement. Under *DeMatteo*, an agreement will be considered fair and reasonable at the time of enforcement provided that enforcement of the agreement would not "leave the contesting spouse without sufficient property, maintenance, or appropriate employment" to support him or herself. In addition, the court will examine whether the parties made full and fair disclosure to one another of their financial circumstances. A trial court will also consider whether the parties fully understood the terms of the agreement and its implications. Finally, the agreement must contain a waiver of rights.

Effect

The provisions of a prenuptial agreement set forth the minimum each party will receive if the marriage ends by death or divorce. However, over the course of the marriage, each party may provide more generously for the other. The parties are free to make gifts to one another and may execute a last will and testament which provides more generously for their spouse than the terms of the agreement. A valid last will and testament executed after the prenuptial agreement supersedes the terms of the agreement. A prenuptial agreement can therefore be considered a "floor" rather than a "ceiling" which caps the parties' rights.