

The Massey Prenup: In Search of the Unbreakable Agreement

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There are matrimonial lawyers, and then there is Miles Massey.

For those who have forgotten the Coen brothers' 2003 film "Intolerable Cruelty," George Clooney's Massey is an enormously successful Beverly Hills divorce lawyer: impeccably dressed, insufferably confident, obsessed with his teeth, and the author of what may be the Holy Grail of matrimonial practice — the Massey Prenup. **"The Massey prenup has never been penetrated."** Miles Massey, *Intolerable Cruelty*¹

The Massey Prenup is legendary. Its purpose is simple: if the marriage ends, nobody profits from having married the other. And its claim to fame is even simpler. It has never been successfully challenged.

Every matrimonial lawyer should be so lucky.

After 40 years of watching people fall in love, fall out of love, and occasionally develop remarkably different memories of what happened in between, however Miles Massey may have gotten one thing wrong.

The secret to the unbreakable prenup is not the prenup. It is everything that happens before anybody signs it.

You Are Allowed to Make a Bad Deal

Let's start there.

A prenuptial agreement does not have to be equal to be enforceable. It does not have to approximate what equitable distribution would have produced. And a matrimonial judge does not get to rewrite an agreement because, 15 years after the wedding, one spouse realizes that signing it was a spectacularly bad financial decision.

New York takes agreements seriously.

The Court of Appeals told us that long ago in *Christian v. Christian*, 42 N.Y.2d 63 (1977), and our appellate courts have repeated the principle ever since. New York recognizes a strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements, and duly executed prenuptial agreements are accorded the same presumption of legality as other contracts. See *Bloomfield v. Bloomfield*, 97 N.Y.2d 188 (2001); *Gottlieb v. Gottlieb*, 138 A.D.3d 30 (1st Dep't 2016).

Of course, that does not mean anything goes. Fraud, duress, overreaching and unconscionability remain grounds upon which

agreements can be attacked. But a considerable distance exists between an agreement someone considers unfair and one a court will refuse to enforce. Or, without the legalese: You are allowed to make a bad deal. That is where our search for the Massey Prenup begins.

\$103 Million Versus \$610,817

If Miles Massey practiced in New York, *Gottlieb* would probably be framed on his office wall. When the parties signed their prenuptial agreement, the husband disclosed a net worth of \$103,894,476. The wife's was \$610,817. That is quite a disparity.

The agreement narrowly defined marital property and broadly protected separate property, including business interests, income earned during the marriage, and appreciation. The wife had experienced matrimonial counsel. Negotiations occurred over months. Changes requested on her behalf were incorporated.

Her lawyer advised her not to sign it. She signed it anyway.

When the marriage ended, she challenged the agreement. The First Department enforced it. The most interesting part of *Gottlieb* is not the \$103 million. It is the lawyer saying, essentially, do not sign this, and the client saying, essentially, I am signing it anyway.

That is something every matrimonial lawyer understands. We advise. Clients decide. Sometimes they listen to us. Sometimes they do not. Sometimes, years later, they very much wish they had. But regret is not fraud. Regret is not duress. And regret does not transform a knowingly accepted bargain into an unconscionable one. That tells us something important about the Massey Prenup. Ironclad does not mean equal. It means defensible.

Draft the Cross-Examination First

Here is something I have learned from litigating matrimonial agreements: if you want to draft a good prenup, stop thinking like the lawyer drafting it. Think like the lawyer trying to destroy it.

Before I worry about another representation, warranty, or defined term, I want to be in a courtroom 15 years from now. The marriage is over. Everybody is angry. The agreement is suddenly worth millions of dollars. And, miraculously, everyone's memory of what happened before the wedding has improved dramatically.

One spouse takes the witness stand:

When did you first see the agreement?

How close was it to the wedding?

Did you have your own lawyer?

Who found that lawyer?

Did you understand what you were giving up?

Did you know what your prospective spouse owned?

Were financial documents provided?

Were you permitted to negotiate?

Were you told there would be no wedding unless you signed?

Did somebody promise you something that is not in the agreement?

Were you afraid not to sign?

There is your drafting checklist. Draft the future cross-examination first. Then draft the prenup. Because the real question is not simply whether the agreement is enforceable today, it is how the story of its execution will sound to a judge 15 years from now.

The Agreement Does Not Begin on Page One

Cioffi-Petrakis v. Petrakis, 103 A.D.3d 766 (2d Dep't 2013), is the cautionary tale.

There, the problem was not simply that one spouse had negotiated a very favorable agreement. The trial court credited the wife's account of fraudulent inducement, and the Second Department affirmed the determination setting the agreement aside. That should get every drafter's attention.

The document may say there were no promises. Someone may later swear there were. The document may say execution was voluntary. Someone may later describe pressure. The document may acknowledge knowledge of the other's finances. Someone may later claim concealment. Recitals are useful. Facts are better.

Which is why, if I were trying to construct the real Massey Prenup, I would spend at least as much time protecting the process as protecting the assets. The agreement does not begin on page one. It begins the first time somebody says, "We need a prenup."

I Want the Other Side to Have a Good Lawyer

Yes, really. When representing the monied prospective spouse, some clients seem puzzled by this. Why would I want the other side to have an excellent matrimonial lawyer?

Because I want the agreement to survive. I do not want my client's future spouse represented by someone's cousin who does real estate closings, or by an attorney parachuting in three days before the wedding who has never negotiated a matrimonial agreement. I want a real matrimonial lawyer.

Strong v. Dubin, 48 A.D.3d 232 (1st Dep't 2008), helps explain why. The wife had counsel. Her attorney advised her that the agreement appeared one-sided. She nevertheless chose to sign it. The agreement survived the challenge. Independent counsel protects the prospective spouse. But let us not kid ourselves. It also protects the agreement. Someone can later say: I explained it. We discussed it. I told my client what she was relinquishing. I gave my advice. And she chose to sign.

The goal is not simply consent. The goal is informed consent you can prove. And please disclose the money. Every matrimonial lawyer has heard this conversation:

"She knows I have money."

Fine.

"He knows about the business."

Wonderful.

"We've lived together for eight years. She knows everything."

Terrific.

Put it in writing.

New York does not impose a mechanical rule that every asset must be valued to the penny or the agreement disappears. But that is beside the point. Why voluntarily create something for the future lawyer to litigate? If your client owns a business, disclose it. If there is real estate, disclose it. If there are substantial investment accounts, disclose them. If there are significant liabilities, disclose those too.

Use schedules. Use reasonable values. Preserve the documents. Fifteen years from now, I do not want to depose somebody about what was supposedly discussed over dinner in the Hamptons. Could I win that issue? Maybe.

But why would I want the issue? The best Massey Prenup is not the agreement that can survive the most attacks. It is the agreement that eliminates the attacks before anyone gets the chance to make them.

If You See the Florist, You Have Waited Too Long

Nothing improves a duress argument quite like an impending wedding.

The venue has been paid. Two hundred guests have responded. Grandma has flown in from Florida. The dress is upstairs. The flowers have arrived. And somebody produces a 62-page prenuptial agreement. Sign here.

You can already hear the opening statement. Does that necessarily constitute legal duress? No. But why are we giving opposing counsel the facts? Start early.

Let the lawyers negotiate. Exchange drafts. Let the parties think. Make changes.

Document them. Then execute the agreement without drama. A prenup signing should be boring. Painfully boring. If you see the florist in the hallway, you have waited too long.

Sometimes the Lawyer Breaks the Prenup

And then came *Gaudette v. Gaudette*, 249 A.D.3d 1369 (3d Dep't 2026).

Every lawyer who drafts matrimonial agreements should read it.

The parties had been married for more than four decades. Their prenuptial agreement contained ambiguous provisions. The case had already reached the Third Department, and the matter was remitted for an evidentiary hearing to determine what the parties actually intended.

The hearing did not solve the problem. The ambiguity remained. Because the provisions were intertwined and the agreement contained no severability clause, the agreement ultimately failed. Think about that. More than 40 years of marriage. A prenuptial agreement. An evidentiary hearing. Two trips through the appellate process. And the prenup failed.

Not because someone hid \$50 million. Not because the wedding was the next morning. Not because somebody was coerced into signing. Because the drafting failed.

We lawyers sometimes confuse complexity with sophistication. They are not the same thing. A 90-page agreement is not necessarily better than a 35-page agreement. A paragraph containing seven defined terms, four exceptions, three cross-

references, and a semicolon nobody understands is not necessarily protecting anyone.

If a judge cannot determine what we meant, we have not drafted an ironclad agreement. We have drafted an expensive lawsuit.

Do not Lose \$50 Million Over a Notary

There is, of course, another way to destroy a magnificent New York prenup. Botch the acknowledgment.

Domestic Relations Law § 236(B)(3) requires marital agreements to be in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded.

This is not decorative statutory language.

Matisoff v. Dobi, 90 N.Y.2d 127 (1997), *Galetta v. Galetta*, 21 N.Y.3d 186 (2013), and *Anderson v. Anderson*, 37 N.Y.3d 444 (2021), should have cured the matrimonial bar of any tendency to treat acknowledgment as an afterthought.

There are interesting legal distinctions among a defective certificate, the underlying act of acknowledgment, and what may or may not subsequently be cured. Save that discussion for the motion papers.

My drafting advice is shorter: get it right the first time.

There are few things more painful than negotiating an exquisitely drafted agreement protecting tens of millions of dollars and later litigating what somebody did — or did not do — in front of a notary. No wriggle room should include the signature page.

There Is No Secret Clause

I understand why Miles Massey's fictional achievement is so appealing. Lawyers love the idea that somewhere there is a clause — a magnificent combination of defined terms, waivers, and legal prose — that will make an agreement impervious to attack.

After 40 years, I have not found it. What I have found is considerably less glamorous. Start early. Get good lawyers on both sides. Disclose the finances. Negotiate honestly. Document the negotiations. Do not make side promises. Do not play games. Do not squeeze simply because you can. Draft clearly.

Then put the agreement down for a day and read it again as though someone had just retained you to destroy it. And, for heaven's sake, execute it correctly.

George Clooney could probably not make much of a movie out of that.

So, Can We Draft the Massey Prenup?

I think we can come awfully close. Not because we can prevent somebody from challenging it. We cannot. Anyone sufficiently angry, sufficiently wealthy, or sufficiently determined can litigate almost anything. And no responsible matrimonial lawyer should promise that an agreement is “unbreakable.” But we can accomplish something better.

We can draft an agreement that another experienced matrimonial lawyer pulls from the file 15 years later, reads twice, examines the financial disclosure, reconstructs the negotiations, speaks to the client, considers the available causes of action, and finally says the five words your former client paid you to make inevitable: I do not see a case.

That is the real Massey Prenup. Not an agreement nobody can challenge. An agreement nobody particularly wants to

challenge.

And after all the sophisticated drafting, negotiations, disclosure, independent counsel, and statutory formalities, the secret of the supposedly unbreakable prenuptial agreement turns out to be remarkably simple. The Massey Prenup is not a document. It is a process. Get the process right, and perhaps even Miles Massey would have to concede: no wriggle room.

¹Intolerable Cruelty (2003), Producers Ethan Coen and Brian Grazer