

## **WHY DIVORCE IS SO EXPENSIVE**

*(And How a Smart-Nup Can Help)*

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Pre-/post-nuptial agreements do not put a price tag on love and marriage. They put a price tag on divorce. Divorce is not only a time-consuming, contentious, and emotionally draining process – it is very expensive.

A legally binding pre-/post-nuptial agreement can drastically reduce the cost of divorce. For every \$1 you spend on a pre-/post-nup, you will save between \$100 and \$1,000 on the cost of divorce.

I call pre-/post-nuptial agreements “Smart-Nups”, because they may just be one of the best financial planning decisions you ever make.

**Below are some of the expenses that contribute to the high cost of divorce, but that you can avoid by signing a Smart-Nup.**

### **Tracing**

The Law presumes that all property spouses acquire after marriage is marital property. This is the case because the Law wants to capture as many assets as possible in the marital estate. These assets must be divided between the spouses upon divorce.

If one spouse claims that a particular asset is his/her separate property, that spouse bears the burden of tracing the asset back to a separate property source – such as a gift, an inheritance, or an asset that he/she owned before the marriage.

Tracing your separate property asset(s) back to one of these separate property sources is problematic. The greatest of these problems is the burden of proof. Detailed documentary proof, such as bank statements, wills, or trusts, is required. However, most people do not maintain such detailed and accurate records for extended periods of time.

Consequently, you will most likely need the services a forensic accountant to help with tracing. Your attorney will then have to review the tracing to make sure that it complies with evidentiary standards. Then, your spouse's attorney will have to review the tracing to determine whether it is sufficient. Lastly, if your spouse claims that you have not sufficiently traced your separate property asset, you will likely end up going to trial over the issue. While this process is time consuming and can cause a considerable delay in the divorce proceedings, each of these professionals is also likely to charge you at an hourly rate, contributing to the costliness of divorce.

Conceivably, the entire value of your separate property assets could be gobbled up by the cost of the tracing alone.

#### **The Smart-Nup Solution:**

In your Smart-Nup, you can list all of the property that you bring into the marriage as your separate property. One of the technical requirements for entering into a Smart-Nup is that each of you has to fully disclose all of your assets and debts at the time of marriage. You do this by completing individual financial disclosure statements that will be attached to your Smart-Nup. Your Smart-Nup can provide that all of the assets listed on each of your financial disclosure statements will remain each of your separate property. In the event of divorce, this will eliminate any need to trace separate property.

#### **Valuations**

If part of the marital estate consists of a business, a professional license, stock options, retirement assets, or real estate, the Judge is likely going to appoint one or more neutral experts, such as accountants, pension experts, and real estate appraisers, to value these assets. These services also come with a hefty price tag.

The first thing everybody has to agree on is the valuation date. The Judge has the discretion to set the valuation date at any point between the date of commencement of the matrimonial action (when one of the parties files a summons) and the date of the trial (that can be anywhere from 12 to 18 months later). Married couples can spend inordinate amounts of money on litigation, fighting over just the date when assets should be valued.

Even when you get to the point where the valuation has been completed, you have not necessarily finished with the process. One of you may disagree with the valuation done by the court-appointed expert. In that event, you will have to hire your own expert to identify why the neutral expert is wrong. Your spouse will then get his/her own expert to contest why your expert is wrong and why the Court's expert is right. The end is a battle of the experts - funded by you and your spouse.

By examining the costs of tracing and valuation alone, one can see how the cost of divorce litigation can spiral out of control.

### **The Smart-Nup Solution:**

Let's assume the asset to be valued in a divorce is a business. You can avoid the whole valuation quagmire by agreeing in your Smart-Nup that:

- Your partner waives any interest in your business in exchange for a reciprocal waiver of an interest in your partner's assets; or
- Your partner waives any interest in your business in exchange for an agreed-upon sum of cash or specific items of property (such as the marital residence); or
- If you do agree that your partner should receive a portion of your business, you can agree in advance on the percentage that your partner will receive, the valuation formula, and the date of valuation (all things you can waste tens of thousands of Dollars fighting over in divorce court).

*The above list is by no means exclusive or prescriptive. Rather, think of it as a menu of possibilities to avoid a costly valuation.*

### **The Court's Discretion**

Part of the reason divorce is so emotionally and financially devastating, is that there is virtually no certainty about how the case is going to come out.

It is literally a shot in the dark.

The reason for this uncertainty is that the Judge has enormous discretion over the financial aspects of a divorce case.

For example, the Law provides for the *equitable* distribution of marital assets and debts – not equal distribution. The Judge has far-reaching discretion to assign property to either you or your spouse, depending on a laundry list of statutory factors, such as your income and property, length of marriage, your age and health, the need of a caretaker to stay at home, and each spouse's financial and non-financial contributions, such as homemaking and child rearing.

**The Smart-Nup Solution:**

In a Smart-Nup, you and your partner can avoid a Judge's subjective determination by agreeing in advance – in an optimistic atmosphere of mutual goodwill, love, and generosity – on an appropriate division of assets.

This is much easier to do when you are engaged and in love, rather than when you are facing divorce – a time when both of you feel disappointed, hostile, and vengeful and have difficulty negotiating.

The award of spousal maintenance (so-called “alimony”) is also subject to the Court's discretion. The Judge is charged with the highly unscientific exercise of balancing a list of statutory factors and arriving at an appropriate dollar amount and duration of alimony. Some of these statutory factors include: the pre-separation standard of living, income of the parties and property distribution, duration of the marriage, age and health of the parties, present and future earnings capacity of each spouse, ability of the party seeking alimony to become self-supporting and the time and training needed to reach that point, the reduced earnings capacity of one spouse due to the career building of the other spouse, and the presence of children in the home.

**The Smart-Nup Solution:**

You can avoid a subjective determination of alimony and the thousands upon thousands of Dollars it can cost to litigate the issue by agreeing in your Smart-Nup:

- To an amount and duration of alimony; or
- To accept a property settlement instead of alimony; or
- To a so-called “escalator” clause – an upward sliding scale of alimony – where the amount of alimony increases the longer you are married; or
- If you are relatively young and both working, to each waive spousal support from the other

*Again, the above list is by no means exclusive or prescriptive. Rather, think of it as a menu of possibilities to avoid the exorbitant cost of divorce litigation.*

Remember: Love is grand, but divorce will be Fifty Grand! Get a Smart-Nup.