

The Perils of Prenups: Part I

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Prenuptial agreements are gaining in popularity even, according to one source, at a fivefold increase despite the fact that almost two-thirds of those surveyed believe that a prenup would weaken their relationship and likely increase their chances for divorce.

Indeed asking for (read, demanding) a prenuptial agreement creates significant risk to the pending nuptials and, for many, provides no real benefit while simultaneously creating substantial risk. Although there are situations (outlined in the next article in this series) in which an agreement's benefits outweigh its psycho-social risks, asking for one should never be a mere casual decision. Its costs are too high. Moreover, like a self-fulfilling prophecy, the prenup might itself plant the seed for exactly that outcome that the parties fear the most—a divorce!

In New York State a prenup is not required to protect separate property – While there are some states that allow for the distribution of one spouse's pre-marital property to the other at the time of divorce,¹ in New York a person's pre-marital property retains its "separate property" character and is not subject to distribution by a divorce court. So long as the owner of separate property does not change its character by, for example, retitling it in both spouses' names, commingling it with marital property, or depositing it into a jointly-titled bank account, it will remain protected. Thus, in New York,

a prenup is generally not needed to protect one's pre-marital property.

Similarly, under current law, if a married couple purchases real estate and one of them uses pre-marital, separate property for the down payment, a Court will typically allow that person an "origination" credit equal to the amount of separate-property funds contributed to the property's purchase. If the property is sold at divorce, the separate property contribution is recouped after the mortgage is paid off, and any remaining equity is split between the parties. Again, no prenup is necessary to protect the separate-property contribution for jointly-titled real estate. (For some reason that isn't well explained, origination credits are applied only to real estate. Couples should, therefore, be forewarned not to transfer any money or assets that they want to have retain its separate property character, into a joint bank or investment account. The typical prenup, however, does not protect against such an intentional commingling anyway.)

Thus, under "standard" New York matrimonial law, assets owned before the marriage continue to belong to the party who owned them, and anything earned or acquired during the marriage belongs to the both of them. Because that tracks the general expectation of the contemporary public, it is near-nigh impossible to demand different terms without sounding like a scoundrel who is attempting to take advantage of the other.

The very predictability that the parties seek, is also one of the prenup's

greatest danger. While parties now have a clear idea about how to fairly divvy up their current belongings, life inevitably throws either curve balls or monkey wrenches into everyone's expectations. Thus, at the dissolution of their hopefully-long-lived marriage, parties' situations will invariably be different from what either of them had expected it to be.

In a divorce action the Court is mandated to distribute the parties' property "equitably" after considering their individual circumstances. Moreover, as the mores of society change, develop, and evolve the law strives to catch up. When there is a valid prenup, however, fair-and-equitable under current standards is no longer a consideration. The parties remain bound by the immutable terms that they negotiated for themselves for the most part without regard to any injustice that might later occur.

A party may have given up an education, a career, and any hope for significant earning potential, in order to care for or raise a family. The parties' major asset may be a business that absorbed decades of the family's joint, constant efforts. Nevertheless, if that business was designated as separate property in a prenup and no provision made for the stay-at-home parent, the non-titled spouse will have no claim to, and receive perhaps only minimal benefit from,² the parties' major asset, no matter the extent of the non-titled spouse's contributions to it or the family.

Such an in-hindsight-onerous prenup can result in what I call the "Pretty Woman" result, after the movie of that name.

¹See n. 1–4 and its accompanying text in Part II of this series.

²By way of increased maintenance payments.

In those situations, the Richard Gere character need only ask the Julia Roberts character, "What street corner shall I drop you off at?" and owe her nothing more, despite the dramatic change of intervening lifestyle and expectations. Obviously, this result can be devastating to the non-monied spouse who has become accustomed (and perhaps morally entitled) to a better lifestyle, and its threat might even keep someone permanently trapped in an abusive relationship.

Alternatively, the tides of fortune may turn and the formerly-wealthy spouse who demanded a prenup may later be compelled to live up to what are now onerous obligations, well-beyond the person's current ability to pay. Because the terms were agreed upon, however, the Courts will have very little ability to reform their agreement.

Asking for a prenuptial agreement damages the parties' relationship. There are certain things that once uttered aloud can never be erased, forgotten, or recanted. These utterances are so toxic that they continue to linger on in the ether, and infect the parties, even decades later. This is so, in typical cases, when a man tells his woman that he doesn't find her sexually appealing or when a woman tells her man that he doesn't satisfy her in the bedroom. They might continue to remain "happily" married for decades longer, but the insecurity, self-doubt, self-consciousness, and uncertainty continue to gnaw and endure no matter how many times it is renounced, disclaimed and denied by the person who originally uttered them or how much reassurance and penance is later given. Some bells can never be unring.

The same is true if a person ever utters the "D"-[divorce]-word to a spouse or fiancé.³ The parties may continue to remain married but, like Pandora's ills once released, can never be corralled and reconfined to the repressed-subconscious. The thoughts continue to linger on, affecting them both as well as their relationship and commitment to each another. Neither is ever completely secure in their marriage, each wary of any sudden movement by the other.

Thus, at the time that the parties should be planning their lives together

and joining in cohesion and unity, discussing and negotiating the terms of a prenuptial agreement requires them to give voice to the very threats they fear most, threats that are better kept repressed. Because a prenup sets the terms of divorce, the couple is thrust into adversarial stances one to the other at the very time they should be working in unison to create a shared bond.

Requesting a prenup further reveals that a party either lacks confidence in the viability of the marriage or questions their own commitment or that of their betrothed. No matter which, the request sets the other on high alert leaving them both feeling insecure about the forthcoming marriage.

Although every marriage ends in either marriage or divorce, the vast majority of people refuse to consider either. Perhaps they are justified in refusing to articulate such eventualities knowing that people lead happier lives in blissful denial and that by articulating an unwanted outcome they might create a self-fulfilling prophecy.

Additionally, when negotiating a prenup a fiancé may reveal more about themselves and how they treat others than they might intend or want to. For better or worse, negotiating a prenup shows each fiancé who the other really is, what their values are, how they go about achieving their goals, and how they behave when they encounter resistance. It reveals whether the person is a fair negotiator and good sport. It reveals if the person is seeking a fair result or whether they are trying to take advantage of the other. It reveals if the person remains respectful even when they don't get the result that they want. How they behave under pressure. Whether they negotiate from a position of mutual care and respect. A person's behavior is the best indicator of who they really are and, therefore, might put the kibosh on the marriage by revealing more about themselves than betrothed typically intend or want to reveal. While some argue that this is precisely the reason to demand a prenup—to see how the future spouse behaves under strain—it seems like an unwarranted stress test for the relationship that only the most solid can endure.

The prenup may inadvertently create a roommate relationship rather

than the loving, committed marital partnership most people desire. In 1980, the New York State legislature transformed New York's divorce law by decreeing that all income earned during marriage belongs to both of the parties. New York recognized that a marriage is not only a physical and emotional partnership, but an economic one as well.

A simple prenup that opts out of this scheme and provides that each party's earnings remains the separate property of the party earning it, while having superficial appeal and being easy and inexpensive to draft, also means that the parties are no longer partners-in-life but only roommates sharing living expenses. Such an economic choice has profound psychological effects, each person knowing that there are clear boundaries and limitations to the relationship. They know that they are less than full life-partners. This knowledge alone could very well prevent their relationship from ever maturing into the lifelong emotional partnership, commitment, and unity that most marrying people desire.

A prenup that paves the way for a simple, easy, and predictable divorce could itself make divorce a too-easy option and remove the incentive for spouses to work hard to resolve the difficulties that inevitably arise in every relationship. The point of a prenup, its advocates argue, is to remove the common points of controversy and litigation typical in divorce actions, thereby reducing or eliminating its transactional costs. When difficulties arise as they inevitably do, a spouse may be lured by the seemingly-easy, well-prepared escape route, and forego the hard work of confronting and dealing with the tough issues, and gaining the required insight, self-awareness and growth. Moreover, without the incentive to resolve things together, the relationship may remain perpetually stagnant at its nascent relatively superficial level.

Future articles in this series will discuss the circumstances that might warrant betrothed couples to incur these significant risks, and the techniques they and their lawyers can employ to minimize the damage and dangers that negotiating prenups often create.

³To remain gender neutral, this article will use the term "fiancé" to refer cumulatively to both a fiancé and fiancée.

Part II

Part I of this series describes the several dangers commonly caused by asking a betrothed to sign a prenuptial agreement. There are, however, circumstances in which a compelling need outweighs the risks that the typical prenup creates. These include situations like when:

A couple intends to have an unconventional marriage and wish to set their own terms. Many cultures don't share our view of a marital economic-partnership or our expectation that each spouse has a duty to support the other. For people with those beliefs, the ideas of marital-earnings-belongs-to-both-spouses or post-marital support might be anathema. Our society allows people to set their own terms for their marriage and, by a properly drafted and executed writing, the terms will generally be respected by the Courts.

A couple anticipates that one of them will be sacrificing a career or education to care for the family and they want to ensure that that spouse is secured and properly provided-for. Though New York recently enacted formulaic maintenance guidelines, the maintenance guidelines will not provide sufficient resources for a non-monied spouse in a high-net-worth family to continue the marital standard of living. It might also be unfair to a spouse who left the workforce and relinquished a career to care for children. A couple may, therefore, want to provide the future homemaker with the peace of mind and security to know that the homemaker's future lifestyle and standard of living will be assured.

A betrothed intends to bequeath more than two-thirds of her estate to beneficiaries other than the spouse—as is common for people entering a second marriage who have children from the first. New York law properly does not permit a resident to completely disinherit a surviving spouse. New York, like many other states, protects surviving spouses from being disinherited by allowing them to “elect” to take one-third of the estate in defiance of any will that leaves them less.¹ Thus, if a betrothed wishes to ensure that prior children inherit more than two-thirds of their estate, the intended spouse has to execute a waiver of the spousal right of election, most preferably done before their marriage.

A fiance has, or will likely inherit, a substantial fortune and the family needs assurances that the fortune will remain in its blood-line. Because, as stated above, without a waiver a spouse inherits no less than one-third of a decedent's estate (and significantly more if the decedent dies intestate), the wealthy family of a betrothed may fear that its wealth will be inherited by the spouse and from there pass on to the *spouse's* family and not its own, diluting the original family's estate. To protect against such an eventuality, a family might insist that any betrothed obtain a prenuptial agreement ensuring that its wealth only be passed to the family's progeny and not to a spouse's family. Whatever the wisdom and effects of such a demand, the couple might have to accede to it. If the request for such a carve-out is refused and the betrothed proceeds with the marriage,

the family might opt to exclude even the child from inheritance rights and bequeath directly only to the children of the couple.

Similarly, a betrothed that has a significant estate and wants to control who among the couple's beneficiaries will receive it after the death of the both of them, needs a waiver of the right of election by the future spouse to ensure that their estate plan is not defeated if the future spouse outlives the betrothed. Without such a waiver, the surviving spouse can “elect,” reduce the estate by one-third, and dispose of that third in any way the surviving spouse desires without regard to the decedent's wishes. A waiver of the right of election therefore is necessary to eliminate the survivor's ability to defeat the decedent's wishes. Then, to allow the surviving spouse all of the income from the property but still guarantee its ultimate disposition after the death of the second-to-die spouse, the title-owner may want to transfer the property into a QTIP (Qualified Terminable Interest Property) Trust, thereby ensuring that the interest of the designated “remainder” beneficiaries cannot be defeated by the surviving spouse.

There is a significant chance that the couple will move to a state that allows its courts to invade a spouse's pre-marital property in a divorce. There are currently nine states² with community property laws some of which incorporate pre-marital property into the “community” pot available for distribution upon dissolution of the marriage.³ In addition, there are several other states that divide all of

¹EPTL § 5-1.1-A.

²Nine states (eight western, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington, and Wisconsin) Laura W. Morgan & Edward S. Snyder, *When Title Matters: Transmutation and the Joint Title Gift Presumption*, 18 J. Am. Acad. Matrim. Law 335 n. 8 (2003), derive their community property laws from what the Visigoths brought into southwest France and Spain and from there to the Spanish colonies of the Americas. Caroline Bermeo Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It, and Why Community Property Principles Benefit Women* 11 U. Md. L.J. Race Relig. Gender & Class 1 at 2 & fn. 3; 13-14 & fn. 63 (2011) (available at: <http://digitalcommons.law.umaryland.edu/rgec/vol11/iss1/2/>); William Q. de Funiak & Michael J. Vaughn, *Principles of Community Property* § 10 at 18; § 13 at 31 (University of Arizona Press, 1971). In addition, Alaska has an elective community property regime allowing couples to themselves choose whether they wish community property to control. Puerto Rico and the Philippine Republic have also adopted the community property regime. de Funiak, *supra*. Thus, about one-quarter of the population of the United States are subject to community property laws. Moreover, because the community-property regime has been in effect longer than equitable distribution ones, courts in equitable distribution jurisdictions often take guidance from community-property courts and how they treated certain issues. J. Thomas Oldham, *Divorce, Separation and the Distribution of Property* § 3.03[5] & n. 46 (Law Journal Press, 2020).

³For example, Washington and Wisconsin are community property states that do not ascribe to the “marital property system” that segregates premarital from marital property. Oldham, *supra*, § 3.03[3]

the parties' property without regard to when it was acquired.⁴ A few states use a "hybrid" system that allows a court to invade the separate property of one spouse when distribution of the couple's marital assets would be unfair to the other.⁵ Additional proposals, if enacted, would merge separate property into marital property after a certain number of years.⁶ Thus, where a betrothed has significant premarital assets and there's a chance that the couple will move to a state with one of these regimes, a prenuptial agreement might be appropriate.

A betrothed wants to ensure that the appreciation of separate property will also remain separate, free from any claim of being marital. Whether the appreciation of one spouse's separate property during the marriage is subject to equitable distribution depends on whether the asset was passive or actively managed, whether the appreciation was due to market forces alone or the efforts of one or both of the spouses. A non-titled spouse can have a significant claim to the appreciation of an actively-managed asset. This can lead to significant litigation and require expensive and intrusive expert valuations. The parties may want a prenup to memorialize the existence and current values of any premarital assets, or the separate property investment one is making to a joint asset.

To eliminate or reduce these areas of contention, prenups are often drafted simply to provide that any appreciation of separate assets continue to belong exclusively to the titled-owner. While this may be simple and easy, when it applies to a couple's main future busi-

ness, the non-titled spouse is left knowing that they've been excluded from the parties' major asset.

This type of a prenuptial provision might, nevertheless, be necessary where a fiance has a business with other partners. Most partners would never countenance a partnership with one of their partners' ex-spouse. (Indeed many business owners purchase "key man" life insurance policies so that in the event a partner dies, the business has the funds with which to "buy out" the surviving spouse's interest in the business. Insurance, however, is not available to pay out in the event of a partner's divorce. And, worse than having a partner's widow as a partner would be having a partner's ex-spouse as a one-half partner in the business.) Thus, business partners may require every partner to have a prenup preventing their spouses from ever obtaining an ownership interest in the business.

A prenup with such a provision, however, does not solve the inherent unfairness of excluding a non-titled spouse from what might likely be the parties' most valuable asset—one in which perhaps one or the both of them may have devoted the bulk of their energies to.⁷

(An Appellate Division decision has introduced further uncertainty into this field when it held that a spouse who listed separate property on a joint tax return might have converted it into marital property.⁸ Though this reasoning has been rejected by two other Departments,⁹ a party who requires certainty might wish to employ a prenuptial agreement. Moreover, with case law constantly evolving, a couple may wish to chart their own course and ensure

what their outcome will be, without worrying about the shifting currents of judicial tides.)

A betrothed has significant debt and the couple wishes to decide how that will be handled. Generally Courts will not entertain claims for recoupment of marital expenditures.¹⁰ Where one of the parties has significant debt and the parties want that debt allocated in a certain way, they might wish to memorialize their agreement in an enforceable prenup.

A betrothed, having seen friends or family experience terrible divorce battles, may be so afraid that they won't get married without a prenup. Because so many people have been through or seen ugly, painful divorces, a substantial number of them may fear marriage and may only consider getting married if they are assured of a smooth landing if the marriage fails. They may insist that all of the terms be resolved ahead of the marriage, and the number of issues to be fought-over reduced, so that they can rest assured that any divorce will be as painless as possible. For these people a prenup facilitates their marriage.

To avoid the transactional costs of divorce, the couple might agree that unless one stops working to care for children, there will be no post-divorce support from either of them to the other. They might want to agree on the existence and value of each of their separate properties and each's origination credits, and how any separate-property appreciation will be handled.

The next installment of this series will explore the least destructive ways of drafting and negotiating prenuptial agreements when they are necessary.

⁴A number of states use the "kitchen sink" or "hotchpot" system in which courts divide all of the parties' property at divorce, regardless of how or when the property was acquired. Oldham, *supra*, § 3.03[2]. These include Connecticut, Hawaii, Indiana, Kansas, Massachusetts, Montana, New Hampshire, North Dakota, South Dakota, Vermont, and Wyoming. *Id.* n. 3.

⁵Alabama, Alaska, Arkansas, Hawaii, Iowa, Minnesota, Ohio, and Wisconsin. Oldham, *supra*, § 3.03[4] & n. 24. Some states limit the degree that a party's separate property can be invaded (e.g., Minnesota, 50%), and some require a showing of "hardship" before the court may do so (e.g., Iowa, Minnesota, and Wisconsin). *Id.* & n. 27-28.

⁶American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 4.12 (2002); J. Thomas Oldham, *Should Separate Property Gradually Become Community Property as a Marriage Continues*, 72 La. L.Rev. 127, 128-29 (2011) available at <https://digitalcommons.law.lsu.edu/lalrev/vol72/iss1/6>; Elijah L. Milne, *Recharacterizing Separate Property at Divorce*, 84 U. Det. Mercy L.Rev. 307 (Spr. 2007).

⁷Part III of this series will explore possible options that are more fair to both spouses in these situations.

⁸*Foti v. Foti*, 114 AD3d 1207, 979 NYS2d 914 (4th Dept., 2014) (losses from wife's inherited businesses listed on joint tax returns may constitute commingling and therefore summary judgment to declare them separate property was inappropriate).

⁹*Mizko v. Mizko*, 163 AD3d 1204, 81 NYS3d 617(3rd Dept., 2018), *Giannuzzi v. Kearney*, 160 AD3d 1079, 74 NYS3d 123 (3rd Dept., 2018), *Angelo v. Angelo*, 74 AD2d 327 (2d Dept 1980), all expressly rejecting the theory that listing separate property on a joint return converts it to marital.

¹⁰*Mahoney-Buntzman v. Buntzman*, 12 NY3d 415, 881 NYS2d 369 (2009).

Part III

Having established the dangers that prenuptial agreements create and that certain situations nevertheless require them, it may be useful to consider how to effectively negotiate and draft a prenuptial agreement in a way that minimizes the dangers and maximizes its benefits.

Use the prenup as a marriage-planning document. Instead of approaching the prenup as a divorce-contingency document, view and draft it as marriage-planning one. A marriage-planning document should require the parties to consider how they intend to lead their joint lives. What can each expect from the other? How will they pay their joint and separate living expenses? If their incomes differ substantially, how will they allocate their common expenses and vacations? Will they share all of their finances, or will they each maintain some portion for discretionary, whimsical expenditures that will not be subject to the veto or judgment of the other? Though some or all of these “lifestyle” provisions may not be legally enforceable, the change of focus converts the tone of the discussions, and the resulting document helps the parties avoid surprises. A good adage in life is that any time one person is surprised, another has failed to communicate properly.¹ Negotiating and drafting the prenuptial agreement can be converted into an opportunity for the parties to articulate and discuss their shared values, goals and desires, memorialize their common aspirations, and set the joint vision for their union, creating a stronger basis for their marriage instead of weakening it.

Use “Fairness” as the touchstone of negotiations. To the extent that the parties can anchor their positions and

negotiating style to an expectation of fairness, they can use controversy to bring them closer to one another instead of driving them further apart.² Use the negotiation strategies of “Getting to Yes”³ by using “principled negotiation” rather than positional bargaining. Consider:

- Whether the non-monied spouse is sacrificing anything now (like giving up a home or furniture to move into the other’s apartment) or during the marriage (forsaking a career or education) that could potentially leave the spouse disadvantaged at the conclusion of the marriage, and the methods that are available to fairly provide for it?

- Whether either party is contributing separate property to the acquisition of a marital-property asset (like a new home) and how that should be treated?

- How each party will be provided for at the time of their retirement?

- How the parties wish to treat any pre-marital or separate-property debt, any prior marriage’s assets (like support payments from a previous spouse) or liabilities?

- How the parties can fairly treat a business interest which might become the parties’ most valuable asset?

- Will one spouse be working in the other’s separately-titled business and how will those efforts be fairly recognized and compensated; will it result in any ownership or other interest in the business’ appreciation?

Sometimes, however, one of the betrothed is compelled by external forces to insist on certain terms that are not fair. Asking for fairness in such a situation may call attention to the otherwise invisible elephant in the room and some lawyers might object to such an approach.

Include provisions that assure the non-monied spouse’s financial safety.

In certain circumstances, it might be appropriate for a monied spouse to provide the non-monied spouse an annual stipend *during* the marriage. This money should go into a separate-property account in the non-monied spouse’s name alone, and is not to be used for marital expenses. In the event of a divorce, the non-monied spouse will then have their own post-marriage security. With an amount properly set, it maximizes the enforceability of the prenup, precludes challenge to it, and is an immediate demonstration of the monied spouse’s love and commitment to the betrothed.

An important cautionary note should be included here. Clients must be advised of the need to live up to this type of a prenuptial obligation all throughout the marriage. Complied with, each year’s acceptance of the stipend becomes a ratification of the prenuptial agreement, strengthens it, and renders it impervious. If, however, the monied spouse fails to live up to the prenup’s obligation, the breach itself makes the prenup vulnerable even if no grounds for challenge otherwise existed. As with so many other things, such a provision is a double-edged sword and clients should be cautioned to adhere to it scrupulously.

Consider and provide survivorship benefits. Particularly in second marriages where a non-monied spouse will live in the monied-spouse’s home, the monied spouse should include appropriate provisions if the non-monied spouse outlives him. If the non-monied spouse waives the statutory right of election and the marital home is left to other beneficiaries, the non-monied spouse can be ejected

¹Steinberger, *Make More Money by Being More Ethical*, 33 Family Advocate 2 at 13 (Fall 2010) (any time a client is surprised, their lawyer has failed to communicate the possible and likely outcomes).

²Applying the principle that one should view every adversity as an opportunity for improvement, and each controversy as an opportunity to forge a stronger relationship. *Steinberger, supra*, at 14

³Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*.

from the home almost immediately upon the monied-spouse's death. The monied-spouse might, therefore, want to leave a life-estate to the surviving spouse or make some other direction or provision in a prenup and will for the surviving-spouse's residence, support and lifestyle.

Determine a fair methodology for apportioning the marital-appreciation of the business in a manner that will not be unduly disruptive or invasive to its operation, and will fairly recognize the non-titled spouse's contributions.

The common approach of designating the pre-marital business and all its appreciation as the separate property of the titled spouse, leaves both spouses knowing that the marriage is not a total partnership. The more time, effort, and energy devoted to the business and the more the business overshadows the other marital assets or the marriage itself, the more excluded the non-titled spouse is from the marital partnership. Thus, there's great value to the parties to develop ahead of time, a fair methodology and formula that assures the non-titled spouse that they too have an interest in the success of the business. To accomplish the goals of the prenup, however, the methodology should be reasonable, predictable, and not susceptible to manipulation when the marriage unravels.

Business partnership or buy-sell agreements often contain clauses set-

ting out the values of each partnership interest or the method to determine it in the event of the businesses' dissolution or an irreparable rift between the partners. These clauses, negotiated at arms length, are presumptively fair to all of the business partners and necessarily delineate a spouse's value in the business. A business might also purchase "key man" life-insurance policies that provide funds for the buyout of a survivor's widow(er), revealing the expectation of that partner's interest. A prenuptial agreement can, therefore, link to those values at the time of the marriage and its dissolution, and use an appropriate formula to determine the non-titled spouse's interest in the marital-appreciation of the business. The titled spouse can then hopefully obtain financing to "cash out" the non-titled spouse's interest with little disruption to the business itself.

Audited financial statements can also be linked to with relative ease to designate a non-titled spouse's buyout from a business. When statements are routinely audited, the non-titled spouse can safely rely on their accuracy and year-to-year stability.

Alternatively, parties to a prenup can designate a trusted auditor or business valuator who will be used at the time of dissolution to determine its marital-appreciation. By agreeing in advance, the parties can avoid

any later dispute over the valuator, and the disruptiveness and intrusion of unconsented-to outside evaluators.

Obviously, these are all complicated issues that must be carefully considered and developed to minimize disruption to the business but ensure fairness to both parties, so that they are both invested in the success of the marriage and its business enterprises. They also have profound psycho-social ramifications on the parties' psyches and therefore must be handled with wisdom, insight and afthought.

All prenuptial agreements require parties to consider and plan for their worst ultimate fates—mortality or divorce. These issues should not be undertaken or treated lightly and parties undertaking it should enlist the help of not only competent lawyers but also wise legal counselors to guide them safely through these perilous shoals.

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