

Altshuler and Spiro

EST. 1959

9301 WILSHIRE BOULEVARD, SUITE 504
BEVERLY HILLS, CALIFORNIA 90210-5412
(310) 275-4475 – (323) 272-5339
FAX (310) 858-6763

Bruce J. Altshuler*
Randy M. Spiro

* a professional corporation

Leo Altshuler
(1919-1999)
James J. Brown
(1918- 1987)

ESTATE PLANNING DURING DIVORCE By Randy Spiro

Mel and Sally have a QTIP Trust. When one of them dies, the survivor receives income from the first spouse to die's share plus the right to invade principal for health, education, support and maintenance. Mel and Sally are divorcing. They have not thought about what would happen should one of them die before the divorce has been finalized.

Like most divorcing couples, Mel and Sally, if they thought about it, would not want to give the spouse anything. Mel wakes up to this idea first and he calls the attorney who prepared the trust and tells him to "fix things." Mel is surprised that the attorney is unwilling to do so.

This couple may have stipulated that they had no conflicts of interest when they signed their trust. Now they have many conflicts. The estate planning attorney cannot choose one of them to represent and abandon his co-client. Further, in some states trusts cannot be modified during divorce unless specific procedures are complied with. Since Mel and Sally should each have their own divorce attorney, it is these attorneys who can see to it that the procedures which enable the estate plan to be changed are complied with.

Often, divorce attorneys are concerned with protecting their respective clients rights and not with helping their clients jointly modify their estate plans. If Mel calls his divorce attorney, that attorney may "float" a proposal to Sally's attorney that the two clients stipulate to changing their trust so that if one spouse dies during the divorce, the survivor will not receive any portion of what is ultimately determined to be the deceased spouse's share of the assets.

Sally's attorney relays the message to Sally. Maybe Sally will say "Mel is more likely to die than I am, so why should I stipulate to anything." If this were the case, Mel's attorney, if permitted by state law, might petition the court for the right to change the estate plan during divorce.

As with other issues of divorce, the failure of the spouses to cooperate regarding changes to the estate plan will drive up the attorneys fees on both sides. Also, if Mel and Sally are healthy, they may be unwilling to invest more energy on issues pertaining to changes in the estate plan when those changes will become irrelevant if both parties are still living by the time that the divorce is granted and the property is divided.

The estate planning attorney is typically unfamiliar with divorce court rules regarding what can and cannot be done during divorce to change the estate plan. Even if the estate planning attorney is familiar with these rules, he will worry about issues of conflict of interest and may also choose to defer to what the two divorce attorneys can get their clients to jointly agree on.