

## **Gift-Splitting – A Boondoggle or a Bad Idea?\*** **A Comprehensive Look at the Rules**

**By Diana S.C. Zeydel<sup>♦</sup>**

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Many married couples are aware that the Federal gift tax law permits gifts made by a husband or wife to a third party to be considered for tax purposes as made one-half by each spouse. This so-called “gift-splitting” rule under Section 2513 of the Code<sup>1</sup> is an advantage to the donor spouse who will obtain the benefits of using the consenting spouse’s annual exclusion(s) under Section 2503(b) and available Federal credit against gift tax under Section 2505. Although the basic effects of gift-splitting are generally well understood, spouses and their advisors may not be fully aware of the substantial additional gift, estate and generation-skipping transfer (GST) tax consequences of consenting to gift-splitting. Should the spouses wish to proceed with gift-splitting, a complete understanding of the intricacies of qualifying will also be necessary to avoid unexpected adverse tax consequences. Accordingly, the benefits and burdens of gift-splitting should be considered carefully before making the election.

### OVERVIEW OF RULES ON GIFT-SPLITTING

#### When Can Spouses Split Gifts

Section 2513(a)(1) provides that a gift made by one spouse to any person other than his or her spouse shall, for gift tax purposes, be considered made one-half by each spouse. Gift-splitting is permitted only if the following conditions are met: (1) at the time of the gift, both spouses are either citizens or residents<sup>2</sup> of the United States which would mean that each is fully subject to U.S. gift tax under Section 2501; (2) the spouses are married at the time of the gift, and if they subsequently divorce, neither remarries prior to the end of the calendar year;<sup>3</sup> (3) both

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\* The author wishes to acknowledge the authors of the following articles which were most helpful to the writing of this article: Handler & Chen, *Fresh Thinking About Gift-Splitting*, 36 *Trusts & Estates* 36 (2002), Peebles, *Gift Splitting Made Easy*, 143 *Trusts & Estates* 24 (2004) and Diaz, *Effective Use of Election to Split Gifts*, 26 *Estates, Gifts and Trusts Journal* 247 (2001).

<sup>♦</sup> Diana S.C. Zeydel is a shareholder in the Miami office of the law firm of Greenberg Traurig, P.A. She is a frequent lecturer and author on a variety of estate planning topics and a member of the Florida and New York bars.

<sup>1</sup> All references herein to a “Section” or “§” of the “Internal Revenue Code” or the “Code” refer to the Internal Revenue Code of 1986, as amended, unless specifically provided to the contrary.

<sup>2</sup> Regs. §25.2501-1(b) defines “resident” to mean “an individual who has his domicile in the United States at the time of the gift.” A person acquires a domicile in a place by living there, even for a brief period of time, with no definite present intention of moving therefrom. *Id.*

<sup>3</sup> There appears to be no exception to this rule even if one of the spouses dies. The instructions to the United States Gift (and Generation-Skipping Transfer) Tax Return, Form 709, apply the rule to a widow (or widower) so that if one of the spouses dies and the surviving spouse remarries prior to the end of the calendar year, gift-splitting is not allowed. It therefore appears that it is not permitted to split gifts with more than one spouse in any one calendar year.

spouses consent to gift-splitting; and (4) the donor spouse does not create a general power of appointment over the gifted property in the consenting spouse.<sup>4</sup>

Stated another way, if both spouses consent to split all gifts made by either of them during the calendar year, gift-splitting is available except with respect to:

- (1) Gifts made during any portion of the year that the spouses were not married.
- (2) Gifts made by the surviving spouse after the death of the other spouse.<sup>5</sup>
- (3) Gifts made during a year when the spouses divorce, or one of them dies, and either spouse, or the surviving spouse, remarries before the end of the year;
- (4) Gifts made while either spouse was a non-resident alien.
- (5) Gifts of an interest in property over which the consenting spouse has a general power of appointment.
- (6) Gifts with respect to which the consenting spouse has an interest, unless the interest of third parties is ascertainable at the time of the gift and hence severable from the interest transferred to the spouse.<sup>6</sup>

The sixth limitation creates both a hurdle and an opportunity. The hurdle is that unless the interest of third parties is ascertainable, the gift may not be split. The opportunity is that if the donor does not wish to receive split gift treatment for a particular gift, but wishes to split gifts as to other gifts made during the same calendar year, the donor can include an interest in the spouse that prevents the gift for which split gift treatment is not desired from qualifying.

#### Basic Effects of Gift-Splitting

Section 2513(a)(1) in essence provides that a gift made by one spouse to any person other than his or her spouse shall for purposes of Chapter 12 (relating to Federal gift tax) be considered as made one-half by the donor spouse and one-half by the consenting spouse. Outright gifts made by either spouse to third parties will qualify for gift-splitting. In general, outright gifts will also qualify for the gift tax annual exclusion under Section 2503(b) as gifts of a present interest.<sup>7</sup> Accordingly, the donor spouse can double up on the annual amount that may be transferred without gift tax by causing the annual exclusion of the consenting spouse to be used. Similarly, gift-splitting also permits one of the spouses, in effect, to use the other spouse's gift tax credit under Section 2505. Therefore, if neither spouse has used any portion of his or her \$1 million

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<sup>4</sup> §2513(a)(1) and (2).

<sup>5</sup> The deceased spouse's executor is permitted to consent to gift-splitting on behalf of the decedent, if the gifts were made while the decedent was alive and the surviving spouse has not remarried by year end. Regs. §25.2513-1(b)(1).

<sup>6</sup> Regs. §25.2513-1(b)(4). As discussed more fully below, case law has expanded the rule so that if the consenting spouse's interest is ascertainable, then the interests of the third parties will be deemed ascertainable by subtracting the value of the spouse's interest from the value of the gifted property.

<sup>7</sup> In general, outright gifts should qualify for the annual exclusion under Section 2503(b); however, an outright gift of an interest in an entity may not qualify if the interest does not give the donee the present right to income or the ability currently to transfer the interest. *See Hackl vs. Commissioner*, 335 F.3d 664 (7<sup>th</sup> Cir. 2003).

gift tax exclusion, one spouse could, under current law, transfer \$2 million to third parties without paying gift tax if the other spouse consents to gift-splitting. In addition, gift-splitting causes each of the donor spouse and the consenting spouse to be treated as the transferor of one-half the gift for generation-skipping transfer tax purposes.<sup>8</sup>

### Gift-Splitting Applies to All Gifts During the Year

Once consent to gift-splitting is signified by both spouses, it automatically applies to all gifts made during the calendar year that are permitted to be split. The spouses are not permitted to pick and choose which gifts to split during a particular calendar year.<sup>9</sup> Moreover, if both spouses make gifts, all gifts made by either spouse must be split. In other words, the consent to gift-splitting is bilateral.<sup>10</sup> This means that if the parties do not wish to split all gifts, gifts may need to be timed in different calendar years.

For example, suppose that by reason of prior gifting, the spouses do not have equal remaining applicable exclusion amounts.<sup>11</sup> Suppose the wife has \$1,000,000 and the husband has only \$300,000. Suppose that the wife makes outright gifts during the year of \$24,000 to each of three children, and the spouses elect to split gifts. However, in the same year the wife funds a dynasty trust for descendants with \$1,000,000. Because all gifts must be split, the transfer to the dynasty trust would be treated as made \$500,000 by wife and \$500,000 by husband, producing a gift by husband in excess of his remaining applicable exclusion amount which would result in gift tax. If the wife had instead made the transfer to the dynasty trust in a calendar year in which no election to split gifts is made, no gift tax would be due, as she would be treated as the sole donor and her gift tax credit would have been sufficient to shelter the entire transfer to the trust from gift tax.

Alternatively, if the wife had given the husband a discretionary interest in the dynasty trust she created not subject to an ascertainable standard, the transfer to the dynasty trust would not have been eligible for gift-splitting, as discussed in detail below. In that case, the transfer to the dynasty trust could be made in the same calendar year as the annual exclusion gifts intended to be split. And because only the wife's gift tax credit would be applied to the gift to the dynasty trust, it would shelter the entire transfer from gift tax.

### Joint and Several Liability for Gift Tax

Section 2513(d) provides that consent to gift-splitting causes the liability for gift tax on all gifts made during the calendar year by either spouse to be joint and several. Each spouse should therefore be fully informed of all gifts made by the other spouse before giving consent. It is probably more often than not the case that the question is never asked, let alone fully explored. The other side of the coin is the case where the donor makes gifts assuming the other spouse will consent to gift-splitting, but as a result of a subsequent divorce, or otherwise, when the time to

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<sup>8</sup> I.R.C. §2652(a)(2).

<sup>9</sup> Regs. §25.2513-1(b). See *Nordstrom v. Comm'r*, 1996 WL 807431 (N.D. Iowa 1996).

<sup>10</sup> Regs. §25.2513-1(b)(5).

<sup>11</sup> The applicable exclusion amount is the amount that each individual can transfer without incurring gift tax by reason of the shelter provided by the lifetime gift tax credit. The applicable exclusion amount is currently \$1,000,000.

file gift tax returns arrives, consent is withheld. All of these matters deserve a full discussion, particularly when the advisor is engaged in a joint representation of the couple. Indeed, because all estate planning that involves lifetime giving has the potential to deplete the marital estate, thus reducing spousal rights in the event of divorce for purposes of equitable distribution, and the elective estate in the event of death, a complete explanation of the competing risks and rewards of any gift should be undertaken in the planning stage.<sup>12</sup>

### How Do You Signify Consent?

Treasury Regulation §25.2513-2 sets forth the rules concerning the manner and timing of signifying consent to gift-splitting. In general, to be effective, consent must be signified by both spouses. If both spouses file gift tax returns, each spouse may signify consent on his or her own return or on the other spouse's return, or both may signify consent on one of the returns. It is preferred for each spouse to consent on the other spouse's return.<sup>13</sup> If (i) the donor spouse does not make gifts in excess of twice the annual exclusion, (ii) the consenting spouse does not make gifts in excess of one annual exclusion and does not make gifts to any of the donees to whom the donor spouse made gifts, and (iii) all gifts are gifts of a present interest (and therefore under Section 2503(b) qualify for the annual exclusion), only the donor spouse must file a return signifying the consent of both spouses.<sup>14</sup>

### Revocation of Consent

Consent to gift-splitting may not be revoked except by filing, in duplicate, a signed statement of revocation on or before April 15 following the close of the calendar year in which the gift was made.<sup>15</sup> A consent given on a return filed after April 15 cannot be revoked.

### Validity of Spousal Consent

Split gift treatment is permitted only if both spouses consent. As previously discussed, the regulations set forth the proper manner for signifying consent. However, deficiencies in signifying consent may not be fatal to an election for split gift treatment.

In *Jones v. Comm'r*,<sup>16</sup> the IRS assessed gift taxes against taxpayer because taxpayer's wife had not signed in the place on the husband's United States Gift (and Generation-Skipping Transfer) Tax Return (Form 709) provided for the purpose of showing her consent that gifts by taxpayer be considered as made one-half by his wife. No taxes would have been due if the gifts

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<sup>12</sup> Compare *Schneider v. Schneider*, 864 So.2d 1193 (Fla. 4<sup>th</sup> D.C.A. 2004) (irrevocable life insurance trust created by husband for parties' children without the wife's knowledge and consent was part of the marital estate and wife was entitled to be compensated out of other assets) with *Hedendal v. Hedendal*, 695 So.2d 391 (Fla. 4<sup>th</sup> D.C.A. 1997) (irrevocable education trust created by husband for parties' son was not a marital asset for equitable distribution purposes).

<sup>13</sup> Note that the instructions to the United States Gift (and Generation-Skipping Transfer) Tax Return, Form 709, recommend filing both gift tax returns together in the same envelope. It appears, however, that some IRS offices improperly process such returns and insist upon separate filings.

<sup>14</sup> See Regs. §25.2513-2(c) and Instructions to Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return.

<sup>15</sup> Regs. §25.2513-3.

<sup>16</sup> 327 F.2d 98 (4<sup>th</sup> Cir. 1964).

could be split. The Tax Court sustained the Commissioner's determination. The Fourth Circuit observed that nowhere in the statute or the regulations is it required that the other spouse sign the return and nowhere is it stated that signification can be evidenced only by a signature. The requirement for a signature is contained only in the return itself. The court admitted a preference for having the consenting spouse signify that consent by signing the return. However, the court found that the intent of the parties to include the spouse's consent was signified and "abundantly evident" by reason of a pattern in prior years; accordingly, the court determined that to require the signature of the consenting spouse under the circumstances would be "an oppressive construction of the statute and regulation."

In *Clark v. Comm'r*,<sup>17</sup> however, the Tax Court reached a contrary conclusion, finding on facts similar to *Jones*, that although the donor answered "Yes" to the question electing gift-splitting, because the spouse's did not sign the consent portion, nor did her signature appear anywhere on the return, no effective election to split gifts had been made. An amended return was subsequently filed that was appropriately signed by the consenting spouse. Nevertheless, the Tax Court distinguished *Jones*, analyzing *Jones* as deciding only the issue of whether consent had been "signified." Because in *Clark* the existence of consent was in dispute, the court held the spouse's failure to sign the return fatal to an effective election to split gifts, and concluded the consent on the amended return to be "of no weight," it not being on the first filed return.

If one of the spouses signifies the other spouse's consent by a forgery, the consent is not valid even if the purported consenting spouse later validates the consent, unless the validation occurs prior to the due date for filing the return or facts are presented showing that one spouse was authorized to act as agent for the other.<sup>18</sup>

The foregoing cases demonstrate the importance of a properly completed gift tax return. It is preferable that each spouse signify consent to gift-splitting on the other spouse's return so that two returns are filed. If the taxpayers fail properly to signify consent in all respects, however, a pattern in prior years and some indication of an intention to split gifts may be sufficient to qualify.

#### Gift-Splitting Must Be Signified on the First Filed Return

Consent should be signified on timely gift tax returns for the calendar year. But if no timely return is filed, consent may be signified on the first return for the calendar year filed by either spouse provided no notice of gift tax deficiency has been issued for that year to either

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<sup>17</sup> 65 T.C. 126 (1975).

<sup>18</sup> See Rev. Rul. 78-27, 1978-2 C.B. 258; Regs. §25.6019-1(h) which provides as follows: "The return shall not be made by an agent unless by reason of illness, absence, or nonresidence, the person liable for the return is unable to make it within the time prescribed. Mere convenience is not sufficient reason for authorizing an agent to make the return. If by reason of illness, absence or nonresidence, a return is made by an agent, the return must be ratified by the donor or other person liable for its filing within a reasonable time after such person becomes able to do so. If the return filed by the agent is not so ratified, it will not be considered the return required by the statute. Supplemental data may be submitted at the time of ratification. The ratification may be in the form of a statement, executed under the penalties of perjury and filed with the internal revenue officer with whom the return was filed, showing specifically that the return made by the agent has been carefully examined and that the person signing ratifies the return as the donor's. If a return is signed by an agent, a statement fully explaining the inability of the donor must accompany the return."

spouse.<sup>19</sup> Consent may be signified by the executor of a deceased spouse's estate or by the guardian of a legally incompetent spouse.<sup>20</sup> Because consent to gift-splitting may be signified late, it will permit retroactive application of the consenting spouse's annual exclusion under Section 2503(b), gift tax credit under Section 2505, and GST exemption under Section 2631.

If a gift tax return is filed by either spouse, or by either spouse's executor, and no election to split gifts is made, even if the other spouse does not file a gift tax return, the ability to split-gifts is foreclosed.<sup>21</sup> Thus, in PLR 8843005,<sup>22</sup> where both taxpayers died within months of one another, the filing of a gift tax return by one taxpayer's executor precluded a later election to split gifts by the other spouse's executor. The taxpayer's executor reported only gifts made after the death of the other spouse (gifts that were not eligible for gift-splitting) and failed to report an earlier gift made to a third party when both spouses were living. Nevertheless, because the spouses were married at the time of the earlier gift and the taxpayer's executor filed a return for the calendar year, consent was required to be signified on the first gift tax return filed by or on behalf of either taxpayer. The IRS concluded that to hold otherwise would in effect give the taxpayers a second chance when the purpose of the regulations is to prevent more than one opportunity after the due date of the return for a spouse to claim or grant consent.

In contrast, in *Frieder v. Comm'r*,<sup>23</sup> the Tax Court permitted taxpayer's wife to consent to split gifts with taxpayer even though a gift tax return had been filed on behalf of wife by her son, as agent, because taxpayer was not married at the time of the prior gifts and the return filed by the agent was not deemed filed until it was ratified by taxpayer.<sup>24</sup>

Accordingly, when filing a gift tax return for either spouse, both spouses should be consulted with respect to gifts either spouse may have made. It may frequently occur that a couple believes an election to split gifts is not necessary because all gifts were within the couple's annual exclusions, or were made from a joint account. Yet, if the spouse who writes the checks for the annual exclusion gifts, or who pays premiums on a life insurance policy held in trust that contain *Crummey*<sup>25</sup> powers of withdrawal, transfers an amount in excess of one annual exclusion per beneficiary or powerholder, a return electing gift-splitting must be filed. Similarly, the better view is that a payment from a joint bank account consisting of funds contributed otherwise than equally by both spouses is attributable to the person who contributed the funds, and is not treated *de facto* as a separate gift of one-half the amount by each joint tenant.<sup>26</sup> Hence,

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<sup>19</sup> Regs. §25.2513-2(b)(1).

<sup>20</sup> Regs. §25.2513-2(c).

<sup>21</sup> See Rev. Rul. 80-224, 1980-2 C.B. 281 (spouses may not elect to split gifts after one spouse has filed a gift tax return reporting the gifts and the due date for filing the return has passed, even though failure to make the election is due to an oversight, an error in judgment or a lack of knowledge of the law).

<sup>22</sup> Under Section 6110(k)(3) a private letter ruling may not be used or cited as precedent. All references in this article to a private letter ruling or similar IRS pronouncement are for illustration purposes and serve only to show the point of view of the IRS employee responsible for issuing the letter or pronouncement.

<sup>23</sup> 28 T.C. 1256 (1957).

<sup>24</sup> Regs. §25.6019-1(h).

<sup>25</sup> See *Crummey v. Comm'r*, 397 F.2d 82 (9<sup>th</sup> Cir. 1968).

<sup>26</sup> Support for this proposition may be found in Regs. §25.2511-2(c) which treats a gift as incomplete in every instance where a donor reserves the power to revest the beneficial title to the property in the donor. Under the laws of most States, a contributor to a joint bank account retains the authority to withdraw the entire account at any time. This would mean that the transfer to a joint bank account is not a completed gift of one-half the contributed property to the joint tenant. Instead, a gift would occur only upon a withdrawal by the joint tenant or at the time funds are

gifts from a joint bank account that exceed one annual exclusion per beneficiary may require an election to split gifts to obtain the intended gift tax result.

### Consent to Gift-Splitting Post Death

Consent to gift-splitting may be signified post-death by the decedent's executor provided the gifts were otherwise eligible for gift-splitting.<sup>27</sup> Only gifts made prior to death may be split. Gifts by the surviving spouse after the decedent's death may not be split.<sup>28</sup> There is no provision allowing for a surviving spouse to give consent to gift-splitting on behalf of the deceased spouse if no executor for the deceased spouse has been appointed by the due date for filing the gift tax return.<sup>29</sup> Note that the decedent's gift tax returns are due on the earlier of the date the return would otherwise be due under Section 6075 (generally, April 15 of the year following the calendar year the gift was made) or the due date of the Federal estate tax return due in respect of the decedent's estate. Whether a gift tax return is filed first by the executor of the deceased spouse's estate or by the surviving spouse, it must contain the consent to gift-splitting.

In determining whether to consent to gift-splitting on behalf of a decedent, the deceased spouse's executor faces possible liability for additional gift tax as a result of undisclosed gifts by the surviving spouse made prior to the decedent's death. As previously stated, the entire gift tax liability is joint and several for any year for which gift-splitting is elected.<sup>30</sup> And there is no innocent spouse relief for the gift tax liability as there is for income tax.<sup>31</sup> On the other hand, because consenting to gift-splitting causes the liability for gift tax to become joint and several, payment by one spouse of all or part of the gift tax liability does not result in a gratuitous transfer by one spouse to the other that is potentially subject to gift tax.<sup>32</sup> But if one spouse pays the tax and the other spouse receives any portion of the gift tax refund for overpayment of tax, a gift would occur at the time any portion of the refund is retained by the non-payor spouse.

In general, when gift-splitting has occurred, the entire amount of the gift tax unpaid at the deceased spouse's death and attributable to a gift actually made by the deceased spouse is deductible as a debt for Federal estate tax purposes.<sup>33</sup> However, there is no deduction for gift tax resulting from a gift actually made by the surviving spouse because the gift tax was not a personal obligation of the decedent at the time of the deceased spouse's death unless the

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transferred to a third party. And at that time, the transfer should be considered exclusively a transfer by the contributor, no completed gift having occurred prior to that time. Indeed, the instructions to the United States Gift (and Generation-Skipping Transfer) Tax Return, Form 709, expressly state that gift-splitting is permitted for property held as joint tenants or tenants by the entireties, implying that consent is necessary to obtain the desired result. On the other hand, if the account consists of community property, a transfer to a third party could automatically be deemed made one-half by each spouse, and both spouses would need to consent to make an effective transfer.

<sup>27</sup> Regs. §25.2513-2(c) (The executor or administrator of a deceased spouse, or the guardian or committee of a legally incompetent spouse, as the case may be, may signify consent).

<sup>28</sup> Regs. §25.2513-1(b)(1).

<sup>29</sup> I.R.C. §2203 defining an executor to include any person in actual or constructive receipt of any property of the decedent expressly applies only for estate tax purposes, and any agency for purposes of filing a gift tax return would have terminated upon the decedent's death.

<sup>30</sup> I.R.C. §2513(d); Regs. §25.2502-2.

<sup>31</sup> I.R.C. §6015.

<sup>32</sup> Regs. §25.2511-1(d).

<sup>33</sup> Regs. §20.2053-6(d).

deceased spouse consented to gift-splitting prior to death.<sup>34</sup> An exception is available if the obligation is in fact enforced against the estate of the deceased spouse with no effective right of contribution against the surviving spouse.<sup>35</sup>

Given the collateral effects of post-death gift-splitting, including (i) the potential increase in the decedent's adjusted taxable gifts and resulting increase in estate tax due,<sup>36</sup> (ii) joint and several liability for the gift tax on pre-death gifts in fact made by the surviving spouse and (iii) non-deductibility of the obligation for gift tax on gifts by the surviving spouse, a decedent's executor should consider carefully the appropriateness of post-death gift-splitting. Moreover, if the executor is a beneficiary under the estate plan, a potential conflict of interest arises that should be considered and specifically addressed by the decedent's will, either by exonerating the executor from liability for self-dealing, or appointing an independent executor for purposes of making the election.

### GIFT-SPLITTING AND SPOUSAL INTERESTS

Section 2513(a)(1) provides that a gift may be split only if it is to any person other than the spouse.<sup>37</sup>

#### Spousal Interests in Trust

In general, gifts in which the consenting spouse may have an interest may not be split. This rule primarily affects gifts made in trust. Revenue Ruling 56-439<sup>38</sup> was one of the Internal

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<sup>34</sup> Regs. §20.2053-4. See *Proesel v. U.S.*, 585 F.2d 295 (7<sup>th</sup> Cir. 1978), *cert. denied*, 441 U.S. 961. See also Rev. Rul. 70-600, 1970-2 C.B. 194, which distinguished, in the case of a consenting spouse, between consent to split gifts given by decedent prior to death and consent given by the decedent's executor after death. The deduction would be available if decedent consented prior to death because then the gift tax has become an obligation of the decedent at the time of death; whereas, consent given by the decedent's executor after death where the decedent is not the donor is not an enforceable obligation against the decedent's estate at the time of death, thus no Section 2053 deduction is available.

<sup>35</sup> See Rev. Rul. 70-600, 1972-2 C.B. 194 and Regs. §20.2053-6(d); see also PLR 8837004 (only gift tax that is, in fact, paid by the estate for transfers made by the decedent is deductible as a claim against the estate so that post-death gift-splitting and payment of a portion of the gift tax obligation by the surviving spouse on a gift made by the decedent will reduce the amount deductible to the decedent's estate).

<sup>36</sup> See I.R.C. §2001(b).

<sup>37</sup> This limitation may no longer to be appropriate due to the unlimited marital deduction which would permit one spouse to transfer property first to the other spouse without gift tax, after which both spouses could transfer property in trust. One exception would be if the donee spouse is not a U.S. citizen. See I.R.C. §2523(i). However, the rule prohibiting gift-splitting if the consenting spouse has an interest in the transferred property may continue to be important notwithstanding the unlimited marital deduction for another reason. Gift-splitting does not cause the consenting spouse to be treated as a transferor for estate tax purposes, as discussed below. This rule avoids estate tax inclusion of the property subject to gift-splitting in the consenting spouse's estate even if the consenting spouse has an interest in the property which, if self-created, could have caused estate tax inclusion. For example, suppose the donor spouse transfers property in trust and confers on the consenting spouse an annuity interest for a period of years described in I.R.C. §2702(b). Split gift treatment is available but only for the property in excess of the consenting spouse's annuity interest. On the other hand, if the donor were to transfer one-half the property to the consenting spouse and the consenting spouse were to create a trust for himself, the consenting spouse could likely not avoid estate tax inclusion during the period that the annuity interest is retained. Thus, gift-splitting would in effect permit a greater tax benefit than could be achieved by the parties by first rearranging the property between them.

Revenue Service's earliest pronouncements that a transfer to a wholly discretionary trust in which the consenting spouse has an interest is not eligible for gift-splitting. The trust in Rev. Rul. 56-439 permitted any part of the income or principal to be distributed to or among the spouse of the donor and any lineal descendants of the donor at such times and in such proportions as the trustee would determine in the trustee's sole discretion. The ruling concludes that the gift to the spouse was not severable from the gifts to the other beneficiaries; accordingly, the gift may not be considered to any extent as made one-half by the donor and one-half by the spouse.

*Wang v. Commissioner*<sup>39</sup> is the leading case on whether a spouse's interest in a transfer in trust is severable from the interest of third parties. In *Wang*, husband transferred life insurance policies and real estate to an irrevocable trust in which wife had an income interest until husband's death. After husband's death, the trustees were to set apart the trust into Fund A and Fund B. Fund A was a general power of appointment marital deduction trust described in Section 2056(b)(5). Wife also had an income interest in Fund B, and was entitled to principal distributions from Fund B "as the Trustees . . . in their sole an absolute discretion may deem necessary or advisable for her proper support, care and health, or for any emergency affecting the Donor's said wife or her family, first having regard to her other sources of income and other assets as certified to such Trustees by her." The Tax Court held that the standard for invasion of principal from Fund B was not an ascertainable standard by which the possibility of invasion could be measured or stated in definite terms of money because of the use of the word "emergency" without qualification. Accordingly, because the interest of the wife could not be quantified, the court held that the interest which the husband transferred to third parties was not severable from the interest transferred to the wife, rendering the interest transferred to third parties unascertainable. Therefore, no portion of the property transferred to the trust was eligible for split gift treatment.

Although the test for whether a gift in which the consenting spouse has an interest qualifies for gift-splitting is articulated by requiring the interest of third parties to be ascertainable, the IRS has permitted gift-splitting as long as the spouse's interest is ascertainable. This allowance is likely based on the valuation principle set forth in Treas. Reg. §25.2511-1(e), pursuant to which a gift to a third party is normally measured by a subtraction method whereby the gift is equal to the value of the entire property transferred reduced by the value of any interest in that property retained by the donor provided it is susceptible of measurement on the basis of generally accepted valuation principles. Thus, if actuarial principles can be applied to determine the value of the interest of the consenting spouse, the value of the transfer reduced by the spouse's interest is eligible for gift-splitting.

In *Falk v. Comm'r*,<sup>40</sup> taxpayer established an irrevocable trust in December 1959 for the primary benefit of his wife and children. Taxpayer and his wife were married in 1942 and on the date the trust was established had seven children ranging in age from one to sixteen and a life "filled with happiness." The trust permitted distributions of income to the wife as the trustees from time to time deemed appropriate under all the facts and circumstances and also permitted

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<sup>38</sup> 1956-2 C.B. 605. See *Kass v. Comm'r*, T.C. Memo 1957-227 (power to invade for spouse's "general welfare" rendered gift in trust ineligible for gift-splitting).

<sup>39</sup> T.C. Memo. 1972-143.

<sup>40</sup> 24 T.C.M. (CCH) 86

distributions of principal as the trustees from time to time deemed appropriate “to provide for the proper care, comfort, support, maintenance and general welfare of the Grantor’s wife and issue, and for the proper education of the Grantor’s issue.” While the foregoing language does not appear to define an ascertainable standard, the trust also contained the following statement of intent:

In determining whether or not to make any payments of either income or principal which may be made in the Trustees’ discretion, the Trustees may, among other things, take into consideration any other funds which may be available to any beneficiary, the age and status of any beneficiary, the aptitude and desire of any beneficiary for higher education, and the amount of income and principal of each trust hereunder. While no one such factor or combination of such factors need be conclusive or final upon the Trustees, Grantor’s primary purpose and intent is to provide for the adequate care, comfort, support and maintenance of the Grantor’s wife during her lifetime, taking into consideration other funds known by the Trustees to be available to her from other sources, including the Grantor, and after the Grantor’s death, the standard of living that the Grantor was able to provide to her during his lifetime . . .

The Tax Court held that the foregoing language, construing the agreement as a whole, was sufficient to establish that distributions to the wife were subject to an ascertainable standard.<sup>41</sup> The court next addressed whether distributions to the wife under the standard were so remote as to be negligible so that 100% of the transfers to the trust were eligible for split gift treatment. The court analyzed taxpayer’s income and assets as well as the income and assets of his wife.<sup>42</sup> The court also reviewed their expenses, their respective life expectancies and the stability of their marriage, and concluded that during taxpayer’s life, the possibility of distributions to his wife were so remote as to be negligible. The court then analyzed the possibility of distributions in the event of taxpayer’s death. The court determined that in the event of taxpayer’s death, distributions of trust income were not so remote as to be negligible. Accordingly, the court held that the value of a life estate after the taxpayer’s death in the contributed assets would not be eligible for gift-splitting, but the balance of the transfer would be eligible for gift-splitting.

*Falk* highlights the importance of an appropriately drafted trust instrument. The articulate statement of taxpayer’s intent in *Falk* permitted the taxpayer to provide financial security for his wife by including her as a beneficiary of the trust, but nevertheless substantially to qualify transfers to the trust for split gift treatment.

On the other hand, in PLR 200551009, taxpayer created a trust for the benefit of his son and daughter and their descendants during his lifetime and, upon his death, for the benefit of his

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<sup>41</sup> Regs. §20.2041-1(c)(2) defines a power limited to an ascertainable standard to include a power of invasion limited to health, education, support or maintenance.

<sup>42</sup> During the relevant taxable years, taxpayer had total taxable income ranging from \$40,000 to \$51,000, paid \$13,000 to \$15,000 in income tax, made charitable gifts ranging from \$3,000 to \$3,500 and gifts to children ranging from \$600 to \$840. At the time of the gifts to the trust, taxpayer had a net worth of approximately \$300,000 and an estate of \$600,000. Taxpayer made two gifts to the trust, one gift of \$161,531.99 consisting of his interest in a family trust and one gift of an insurance policy on the life of his wife with a value of \$307.87. The wife also had certain assets in her name, an expectancy from her mother’s estate and life insurance benefits.

wife and descendants. The trustee had discretionary authority to distribute income and principal among the beneficiaries. The IRS relied on Revenue Ruling 54-285<sup>43</sup> from the charitable area, which at that time permitted a charitable deduction for a charitable remainder interest in a trust if the probability of invasion of the trust corpus for the non-charitable beneficiaries is so remote as to be negligible, to conclude that the possibility of invasion for taxpayer's son and daughter and their descendants during the taxpayer's lifetime was not so remote as to be negligible. The IRS ruled that the interests of son and daughter and their descendants were not susceptible of determination and, hence, severable from the distributions to taxpayer's wife that might occur after taxpayer's death. Accordingly, split gift treatment was not allowed as to any portion of the trust.

#### Spousal Interest in Trust Subject to Powers of Withdrawal

In PLR 200616022, the IRS ruled that a gift in trust for the consenting spouse and children could be split because the value of the spouse's interest in the trust could be established, making the interest of the children ascertainable. Husband established an irrevocable trust for the primary benefit of husband and wife's children. The husband's descendants had a noncumulative right to withdraw all or part of each contribution to the trust. The trust contained a qualified terminable interest property (QTIP) marital trust described in Section 2056(b)(7) in the event husband died within three years from the date of funding and a substantial portion of the trust estate is included in husband's gross estate for federal estate tax purposes. No gift tax returns were filed in the first two years that contributions were made to the trust. In the following three years, gift tax returns were filed and the husband signified wife's consent to split gifts on his gift tax return, but wife never signed the return. The IRS concluded that split gift treatment was available for all five years because the value of the wife's interest was susceptible of determination and therefore severable from the gifts to the other beneficiaries. To the extent the value of the transfers to the trust exceeded the actuarial value of wife's interest as determined under Section 7520, split gift treatment was available. The IRS also concluded that since no returns were filed for years 1 and 2, split gift treatment would be available under Section 2513(b)(2)(A) which permits consent to split-gift treatment to be signified on the first filed return for the year. Because husband and wife evidenced their intention to elect split gift treatment for years 3, 4 and 5 on husband's return, and wife did not file her own return, the consent to split gift treatment was effective for those years as well.

Although the analysis in PLR 200616022 is helpful for purposes of confirming that split gift treatment is available if the spouse's interest is ascertainable, the ruling appears incorrectly to have analyzed whether the consenting spouse had an interest in the trust in the first place. The trust in PLR 200616022 contained so-called *Crummey*<sup>44</sup> powers of withdrawal. The facts in the ruling do not state whether any of the transfers to the trust exceeded the amounts that could qualify for the annual exclusion. However, to the extent of the powers of withdrawal, the ruling is in conflict with a series of prior rulings,<sup>45</sup> under which the IRS concluded that a gift to a trust over which various beneficiaries have powers of withdrawal will be considered a gift to the

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<sup>43</sup> 1954-2 C.B. 302.

<sup>44</sup> See *Crummey v. Comm'r*, 397 F.2d 82 (9<sup>th</sup> Cir. 1968).

<sup>45</sup> See, e.g., PLRs 8044080, 8112087, 8138102 and 200130030. GCM 38005. 1979 WL 52819, concludes that where annual exclusion treatment is available by reason of the children's powers of withdrawal it would be inconsistent to deny split gift treatment.

powerholders, not to the trust, for gift tax purposes. If the gift is treated as made to the powerholders, then the spouse would not have an interest in the gifted property, with the consequence that the interest of the spouse can be ignored for purposes of determining whether the gift qualifies for split gift treatment. Accordingly, split gift treatment would be available regardless of whether the spouse's interest is ascertainable. The analysis in the earlier rulings is consistent with *Crummey* which treats a gift in trust subject to powers of withdrawal as present interest gifts to the powerholders that qualify for the annual exclusion under Section 2503(b).

In PLR 200422051 (dealing predominantly with generation-skipping transfer tax issues), the IRS unfortunately engages in the same type of split gift analysis as in PLR 200616022 in the context of a life insurance trust with *Crummey* powers of withdrawal. The trust provided that upon a contribution to the trust, the taxpayer's spouse would have a power of withdrawal over a fixed portion of the contribution, and the taxpayer's descendants would have pro rata powers of withdrawal over the balance. The trust provided that upon taxpayer's death, all the income of the trust and so much of the principal as the trustee determines for reasonable support and medical care was payable to taxpayer's spouse. Ignoring the powers of withdrawal in the descendants, the IRS ruled that the interests of the taxpayer's spouse as beneficiary and holder of a power of withdrawal were susceptible of determination and severable from the interests of the other beneficiaries, and gift-splitting was permitted.

In contrast, PLR 200130030, which is also a fairly recent ruling, confirms the effectiveness of *Crummey* powers of withdrawal for purposes of preserving eligibility for split gift treatment. In PLR 200130030, wife created a trust for husband and three children. Husband was the trustee of the trust. Husband's authority to distributed property to himself was limited by an ascertainable standard. The trust provided that upon each transfer by gift to the trust, each descendant of wife could withdraw an amount from the trust equal to the lesser of the annual exclusion or a pro rata share of the contribution based upon the number of beneficiaries at that time. The taxpayer represented that contributions to the trust would not exceed twice the available annual exclusion multiplied by the number of wife's descendants who possessed a power of withdrawal. The powers of withdrawal would lapse, but only as to \$5,000 or 5% of the assets subject to withdrawal in each year. The ruling concludes that split gift treatment is available because "[t]he right of the trustee to make discretionary distributions to either Husband or the descendants is subordinate to the right of the descendants to exercise their withdrawal right."

### Powers of Appointment

Section 2513 contains a separate prohibition against gift-splitting if the consenting spouse is granted a general power over appointment over an interest in the property given to a third party. This prohibition is, apparently, not encompassed by the prohibition against gift-splitting if the consenting has an interest in the gifted property. The gift tax law appears to embrace a distinction between powers of appointment and interests in property.<sup>46</sup> That being the case, it would appear that the consenting spouse could be granted a special power of appointment over the gifted property, exercisable either during life or at death, without disqualifying the transfer for gift-splitting.

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<sup>46</sup> See Blattmachr, Zeydel & Gans, *World's Greatest Tax Mystery, Solved*, Tax Notes (April 16, 2007).

## Some Conclusions on Spousal Interests

Including the consenting spouse as a discretionary beneficiary of a trust will likely disqualify transfers to the trust for split gift treatment. This might be the desired result, and in that case care should be taken to make sure the trust contains no language that would cause the likelihood of the trustee's exercise of discretion in the spouse's favor to be quantifiable. If split gift treatment is desired, it would seem unwise to attempt to qualify a spousal interest for the "so remote as to be negligible" exception. Instead, a spousal discretionary interest should be limited by a standard susceptible of quantification under accepted actuarial principles to be less than the value of the entire trust. Alternatively, the spousal interest can be limited to a certain portion of the trust, such as net income, or it could take the form of an interest that takes effect only after certain other events, which would permit the actuarial value of the transfer not subject to the spousal interest to qualify. An exception to the foregoing rule appears to be a discretionary spousal interest in trust that is subordinate to the exercise of *Crummey* powers of withdrawal held by third parties. It would appear that notwithstanding a few ambiguous private letter rulings that failed to analyze the effect of the *Crummey* powers, a transfer to a trust subject to powers of withdrawal should be treated as gifts to the powerholders, rather than gifts to the trust in which the spouse has a discretionary interest. The gifts to the powerholders, who are third parties, should qualify for split gift treatment.

One might ponder the effect of powers to make the consenting spouse a discretionary beneficiary of a trust by other means. It appears that the authority of a beneficiary to appoint property in favor of the consenting spouse who is not otherwise a taker in default of the exercise of the power does not cause transfers to a trust to be ineligible for gift-splitting. In PLR 200213013, the independent trustee of a trust had the power to confer on beneficiaries of a trust for descendants a general power of appointment without negative effects. This is the correct result in so far as a permissible appointee under a power of appointment is not generally considered to have an interest in a trust for State law purposes. Instead, it would be the takers in default of the exercise of the power, and then typically only those who would take in default of the exercise of a special power of appointment, who would be deemed to have an interest.<sup>47</sup>

Consider as well the effect of any applicable State decanting statutes, or provisions in the governing instrument, that permit a trustee to distribute in further trust.<sup>48</sup> Suppose the trustee has the authority to cause the trust estate to be distributed to a new trust in which the consenting spouse would have a discretionary interest rather than an interest subject to an ascertainable standard. It would appear that there are two possible outcomes. One would be to prohibit gift-splitting in all cases where a spouse could be introduced as a beneficiary in such a manner that the interests of third parties would no longer be ascertainable. The other would be to analyze the trust on the basis of the likelihood that the power would be exercised in such a manner. To ensure the desired outcome, it may be wise to consider including intent language in the governing instrument similar to that contained in *Falk* sufficient to cause the possible introduction of a disqualifying spousal interest to be construed as so remote as to be negligible.

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<sup>47</sup> *But see* Florida Statutes 731.303 permitting the holder of a general or special power of appointment to bind the takers in default for certain purposes.

<sup>48</sup> *See, e.g.*, N.Y. EPTL 10-6.6, Delaware Statutes, Title 12, Part V §3528, Alaska Statutes §13.36.157, and pending Florida Statutes §736.04117.

## WHAT IS THE EFFECT OF GIFT-SPLITTING ON A GIFT SUBSEQUENTLY INCLUDED IN THE DONOR'S GROSS ESTATE?

In general, the Federal estate tax is computed by adding to the taxable estate the amount of any adjusted taxable gifts (meaning taxable gifts made after December 31, 1976 unless includible in the gross estate).<sup>49</sup> The tentative estate tax computed on that total is then reduced by the gift tax that would have been payable on the adjusted taxable gifts had the rate table in effect at the date of the decedent's death been in effect when the gifts were made.<sup>50</sup> When a donor and consenting spouse elect split-gift treatment, one-half the value of each taxable split gift constitutes an adjusted taxable gift in the estate of each spouse under Section 2001(b). Accordingly, gift-splitting can increase the estate tax due in the estate of the consenting spouse by reason of the treatment of any split gifts as adjusted taxable gifts. The consenting spouse is entitled to a reduction in the tentative estate tax by one-half the gift tax payable on split gifts included in the consenting spouse's adjusted taxable gifts, even if the gift tax was in fact paid by the donor spouse.

A special rule obtains, however, if Section 2035 applies to include the split gift in the gross estate of the donor spouse. Section 2035 is the so-called three year rule provision that causes inclusion of transferred property in the estate of a decedent if the decedent had an interest in or power over the transferred property that would have caused inclusion under any of Sections 2036, 2037, 2038 or 2042, and the decedent transferred the interest or released the power within three years of death.<sup>51</sup> In that case, the donor spouse's estate is entitled to exclude the entire gift (the portion attributable to the donor under the split gift rules and the portion attributed to the consenting spouse) from adjusted taxable gifts and may reduce the tentative estate tax by the entire gift tax payable.<sup>52</sup> Conversely, under Section 2001(e), the consenting spouse's estate must exclude one-half the gift from adjusted taxable gifts (the gift having been included in full in the donor spouse's estate) and the computation of the gift tax payable under Section 2001(b)(2) (which operates to reduce the estate tax due) in the consenting spouse's estate is reduced by any gift tax that was treated under Section 2001(d) as payable by the donor spouse. Hence, the consenting spouse avoids inclusion in the consenting spouse's gross estate of one-half the gift treated as made by the consenting spouse, but consistent with that exclusion, may not receive any credit (for purposes of computing the consenting spouse's estate tax) for the gift tax paid on the split gift.

The foregoing rule appears equitable but creates a number of timing problems. One problem arises if the consenting spouse predeceases the donor spouse, and the donor spouse

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<sup>49</sup> I.R.C. §2001(b).

<sup>50</sup> I.R.C. §2001(b)(2).

<sup>51</sup> I.R.C. §2035(a) generally includes in the gross estate of a decedent any property with respect to which the decedent transferred an interest or relinquished a power during the three year period prior to the decedent's death, if the value of the property would have been included in the decedent's gross estate under section 2036, 2037, 2038 or 2042 if the transferred interest or power had been retained by the decedent at the time of the decedent's death. Note also that the special rule under I.R.C. §2035(c) that requires property transferred within three years of death to be included in the decedent's gross estate for purposes of determining the estate's entitlement to the benefits of I.R.C. §303 (redemptions to pay estate tax), I.R.C. § 2032A (special use valuation of farm, etc. real property) and I.R.C. §6166 (deferral of payment of estate taxes) appears not to except split-gifts within the annual exclusion because a tax return would be required to be filed by the donor spouse. H. Rept. No. 97-291 (PL 97-34) p.163.

<sup>52</sup> I.R.C. §2001(d).

subsequently dies within the three year inclusion period. In that event, there is a potential for double taxation unless the consenting spouse's estate is able to file a timely claim for refund. Here's why. When the consenting spouse dies first, one-half the gift is included in the computation of the consenting spouse's adjusted taxable gifts. Section 2001(e) (permitting the consenting spouse's estate to exclude split gifts from adjusted taxable gifts if the entire gift was included in the estate of the donor spouse under Section 2035) would not apply because the donor spouse is still alive. If the donor spouse subsequently dies within three years of the gift, the entire gift would be included in the donor spouse's adjusted taxable gifts. Therefore, the consenting spouse's one-half of the gift will have been counted twice, and that double counting can be avoided only if the estate of the consenting spouse (who it is assumed has died first) is able to file a timely claim for refund to obtain the benefit of Section 2001(e).<sup>53</sup>

Another problem occurs if inclusion of the split gift in the donor spouse's estate is not by reason of Section 2035. Suppose that the inclusion is purely by reason of Section 2036(a)(1) (relating to property transferred during life in which the donor retained the right to income). For example, suppose the donor spouse creates a five year qualified personal residence trust (QPRT),<sup>54</sup> and elects to split the gift of the remainder interest. The donor spouse dies in the fourth year of the QPRT. Although the entire QPRT would be included in the gross estate of the donor spouse under Section 2036, by reason of the retained right to use and occupy the residence, it does not appear that the relief under Section 2001(e) is available to the estate of the consenting spouse.

A third problem occurs if the consenting spouse's gift tax credit under Section 2505 was used to shelter any portion of the consenting spouse's one-half of the split gift. In that case, the consenting spouse's credit will not be restored for gift tax purposes by reason of the Section 2035 inclusion in the donor spouse's gross estate. Thus, if Section 2035 applies to the estate of the donor spouse, the couple is worse off than if the gift had not been split. For example, suppose in 2006, donor makes a gift of \$1,000,000 to a trust. Donor and consenting spouse elect to split gifts and \$500,000 of each spouse's applicable exclusion amount is used to shelter the gift from tax. The donor, as trustee, retains a power to determine distributions in conjunction with two co-trustees, each having a substantial adverse interest in the disposition of the property in the trust. The gift is complete for gift tax purposes<sup>55</sup> but includible in the donor's estate under Section 2036(a)(2). Donor resigns as trustee in 2007 and dies in 2008. The entire gift is included in the donor's estate under Sections 2035(a) (because Section 2036(a)(2) would have applied if the resignation by the donor had not occurred), and the donor's applicable exclusion amount is restored and reapplied. The consenting spouse, on the other hand, has lost the use of \$500,000 of applicable exclusion amount until the consenting spouse's subsequent death when it may be used for estate tax purposes. This loss is important if the consenting spouse's assets appreciate prior to consenting spouse's death, because the consenting spouse has lost the opportunity to shelter that appreciation from estate tax by making a completed gift under the protection of what should be a restored applicable exclusion amount. If the transferred property could be drawn back into the donor spouse's estate, it is probably advisable not to elect split gift treatment or to structure the transfer so the split gift treatment is not available.

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<sup>53</sup> See Rev. Rul. 81-85, 1981-1 C.B. 452.

<sup>54</sup> I.R.C. §2702(a)(3).

<sup>55</sup> See Treas. Reg. §25.2512-2(e).

Note, however, that if gift tax is paid by the consenting spouse, and the consenting spouse dies within three years of the date of the gift, Section 2035(b) applies to include the gift tax paid in the gross estate of the consenting spouse notwithstanding the application of any of the foregoing rules. In fact, Section 2035(b) applies even if the gift tax is paid by the estate of the consenting spouse because the trigger in Section 2035(b) is gift tax paid on gifts made within three years of death. Thus, the timing of the payment of gift tax is not the test, rather it is the timing of the gift itself being within three years of death. And because no offsetting deduction would be available under Section 2053,<sup>56</sup> it appears that the payment of gift tax by the consenting spouse's estate would likely result in a double inclusion, once because the unpaid tax is part of the gross estate under Section 2031, and again under Section 2035(b) (and without any offsetting deduction under Section 2053). Thus, the estate of a consenting spouse should not volunteer to pay any portion of the gift tax due on split gifts, the tax being the primary obligation of the donor spouse.

### GENERATION-SKIPPING TRANSFER TAX EFFECTS OF GIFT-SPLITTING

If spouses elect split gift treatment for a particular calendar year, each spouse will be treated, under Section 2652(a)(2), as the transferor for generation-skipping transfer (GST) tax purposes of one-half of all gifts eligible for gift-splitting. If any split gift is a direct skip that qualifies for the annual exclusion under Section 2503(b), one-half such gift will be treated as a nontaxable gift under Section 2642(c) with respect to each spouse. In addition, each spouse may elect to allocate his or her GST exemption<sup>57</sup> to one-half of each split gift. And importantly, the deemed allocation rules under Section 2632 will automatically apply to each spouse's one-half of all split gifts. Any voluntary allocation of GST exemption under Section 2631 must be made by each spouse on his or her own gift tax return. Moreover, if the spouses elect to gift split and wish to elect out of deemed allocation, each spouse must file his or her own timely Form 709 making the appropriate elections. An election out of deemed allocation by the spouse making the transfer will not effectuate an election out of deemed allocation by the consenting spouse.<sup>58</sup>

The regulations provide that upon the filing of the late gift tax return(s) electing split gift treatment, each spouse would be treated as the transferor of 50% of the property, and if the transfer is a direct or indirect skip, under Sections 2632(b) and 2632(c), respectively, each spouse's GST exemption would be automatically allocated to his or her portion of the transfer.<sup>59</sup> Significantly, if the returns with respect to the transfer are filed late, there is no opportunity to elect out of deemed allocation. By making an election to split gifts after the due date of the gift tax return for the transfer, the spouses can cause the deemed allocation rules to apply the consenting spouse's GST exemption to 50% of the transfer irrevocably and retroactive to the date of transfer.

For example, assume that on December 1, 2005, wife transfers \$100,000 to a GST trust within the meaning of Section 2632(c). Wife fails to file a timely gift tax return for the transfer.

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<sup>56</sup> See Rev. Rul. 70-600, 1970-2 C.B. 194 and Regs. §20.2053-6(d).

<sup>57</sup> I.R.C. §2631.

<sup>58</sup> Treas. Reg. §26.2632-1(b)(2)(iii)(A) ("In the case of a transfer treated under section 2513 as made one-half by the transferor and one-half by the transferor's spouse, each spouse shall be treated as a separate transferor who must satisfy separately the requirements of paragraph (b)(2)(iii)(B) to elect out with respect to the transfer.")

<sup>59</sup> See Treas. Reg. §26.2632-1(b)(4)(iii) *Example 5*.

Under Section 2632(c), \$100,000 of wife's GST exemption would be deemed allocated to the transfer. Suppose that on December 1, 2006, husband and wife file late gift tax returns for the calendar year 2005 electing split gift treatment. Now wife's \$100,000 transfer is deemed made \$50,000 by wife and \$50,000 by husband. Upon the filing of the late returns, \$50,000 of wife's GST exemption is deemed allocated to the transfer, and \$50,000 of husband's GST exemption is deemed allocated to the transfer, thus undoing, retroactively \$50,000 of the deemed allocation of wife's GST exemption that otherwise would have occurred. This result could be obtained even after the wife's death because Section 2513 would permit a posthumous election of split gift treatment by the wife's executor.<sup>60</sup>

Surprisingly, Section 2652(a)(2) provides that the consenting spouse to a split gift becomes the transferor of one-half of the entire property transferred for GST purposes, even if only a portion of the transfer constitutes a split gift. Treasury Regulation §26.2652-1(a)(4) provides that in the case of split gift transfers, "the electing spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor, regardless of the interest the electing spouse is actually deemed to have transferred under section 2513." Accordingly in *Example 9* of Treasury Regulation §26.2652-1(b)(1), in the case of a grantor retained annuity trust ("GRAT") described in Treasury Regulation 25.2702-3 that terminates in favor of a grandchild, even though only the actuarial value of the remainder interest is treated as made one-half by the grantor and one-half by the grantor's spouse for purposes of Section 2513, each spouse becomes the transferor of one-half of the entire property transferred to the GRAT at inception for GST purposes. Therefore, assuming the rules prohibiting effective immediate allocation of GST exemption to a trust subject to an ETIP<sup>61</sup> apply to the GRAT, the transfer to the grandchild upon termination of the annuity period could be sheltered only by an allocation by each of the donor spouse and the consenting spouse of their respective GST exemptions to one-half the value of the GRAT at the termination of the annuity period.<sup>62</sup>

Furthermore, if the transfer is a direct skip on which GST tax is imposed, Section 2515 causes the amount of the gift to be increased by any GST tax imposed on the transferor with respect to the gift. If the donor and the consenting spouse elect split gift treatment, the additional taxable gift created by Section 2515 is also treated as split.<sup>63</sup> For example, suppose at a time when husband and wife each have gift tax credit remaining but no GST exemption remaining wife makes a gift of \$124,000 to granddaughter. The couple elects to split gifts. The first \$24,000 qualifies for the annual exclusion and is treated as a nontaxable gift for GST purposes and \$100,000 is treated as a taxable gift and a direct skip. Each spouse is initially treated as

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<sup>60</sup> Treas. Reg. §25.2513-2(c).

<sup>61</sup> Section 2642(f) contains the special rule relating to an estate tax inclusion period ("ETIP") which is the period that the transfer would be includible in the gross estate of the transferor if the transferor died immediately after the transfer (other than by reason of the so-called three year rule under Section 2035). The statute provides that if the transfer is subject to an ETIP, any allocation of GST exemption shall not be made before the close of the ETIP. This means that if an allocation is GST exemption is made on a timely gift tax return reporting the transfer, the allocation does not take effect until the ETIP period closes. *See* Regs. §26.2642-4(b) *Example 5*.

<sup>62</sup> *See generally* PLRs 200702002, 200452003 and 200422051 for effect of gift-splitting on allocation of GST exemption. In PLR 200422051, the taxpayers had both died having in some years failed to file gift tax returns and in other years having filing without making effective allocations of GST exemption to transfers to a trust. Retroactive relief to allocate GST exemption was granted under Section 2642(g), Notice 2001-50, 2001-2 C.B. 189, and Treas. Reg. §301.9100-3.

<sup>63</sup> *See, e.g.*, PLR 200147021.

making a gift of \$50,000. But GST tax of \$45,000 is due. The GST tax is an additional deemed gift by the donor under Section 2515 that is also split under Section 2513, causing an additional deemed gift of \$22,500 by the consenting spouse absorbing additional gift tax credit.

If the gifted property is included in the gross estate of the donor spouse, there is no special rule restoring the GST exemption of either the donor spouse or the consenting spouse. Instead, the problem is addressed by the application of the ETIP rule. If the property were includible in the gross estate of the donor or the donor spouse immediately after the transfer, effective allocation of GST exemption would generally be suspended until the ETIP period closes. But the ETIP rule does not cover all situations in which the gifted property might be included in the donor's estate. Indeed, it expressly does not include situations where inclusion might occur by reason of Section 2035. In addition, it might not include all situations where Section 2038 could apply because Section 2038 causes estate tax inclusion when the decedent at the date of the decedent's death has a power to alter the beneficial enjoyment of gratuitously transferred property, whether or not that power was retained at the date of transfer. Accordingly, the appropriateness of allocating GST exemption (and the effect of the deemed allocation rules under Section 2632) should be reviewed carefully, particularly by the consenting spouse, when inclusion of the gifted property in donor's estate is a possibility, as it would be for a QPRT and as the IRS apparently contends it is for a GRAT.

#### OTHER TAX EFFECTS OF GIFT-SPLITTING

As discussed, an election to split gifts can have consequences for purposes other than gift tax. For generation-skipping transfer tax purposes, the consenting spouse becomes the transferor of one-half the property involved in the transfer, even if a portion of the property transferred does not constitute a taxable gift. But in several other respects, the consenting spouse does not in any sense become treated as a transferor of the property.

#### Gift Completeness

Section 2513 carefully articulates the rule that a gift made by one spouse, if both spouses consent, shall be considered as made one-half by each spouse for purposes of Chapter 12. Nevertheless, the distinction, even for purposes of the gift tax, between the donor spouse and the consenting spouse is maintained. It does not appear that a power over the transferred property held by the consenting spouse will cause a gift by the donor spouse to be rendered incomplete for gift tax purposes.

Treasury Regulation §25.2511-2 describes circumstances under which a "donor" is deemed to have retained sufficient dominion and control over the transferred property to cause a gift to be incomplete. One such circumstance is the retention of a beneficial interest in property transferred in trust coupled with a testamentary special power of appointment. Another is the reservation of a power to name new beneficiaries or change the interests of the beneficiaries between themselves unless the power is limited by an ascertainable standard. Because a consenting spouse appears not to be treated as a "donor" for this purpose, granting the consenting spouse such interests or powers appears not to render a split-gift incomplete.

For example, in PLR 200130030, the donor transferred property in trust. The consenting spouse was named as sole trustee of the trust with a power to distribute to himself for health and maintenance in reasonable comfort. The trustee had the authority to make discretionary distributions to the donor's descendants other than to discharge a legal obligation of husband or wife. In addition, the consenting spouse had a testamentary special power of appointment over the trust estate among descendants. Contributions to the trust were subject to *Crummey* powers of withdrawal. The taxpayers represented that contributions to the trust would not exceed twice the amount of the annual exclusion. The IRS ruled that all transfers were eligible for gift-splitting and that no portion of any transfer would be included in the estate of the consenting spouse under any of Sections 2036 through 2038 or 2041.

If the transfers to the trust were incomplete gifts as to the portion treated as made by the consenting spouse, then that portion could not have been treated as a gift to a third party eligible for gift-splitting. On the other hand, in the facts of the particular ruling, for gift tax purposes, all gifts were treated as made to the powerholders, not to the trust, thus, perhaps making the ruling not probative on the incomplete gift issue.

Nevertheless, treating interests in or powers over the gifted property held by the consenting spouse as potentially causing the deemed gift by the consenting spouse to be incomplete would be wholly inconsistent with estate tax rules applicable to consenting spouses discussed below. The better view, therefore, is that whether a transfer is complete for gift tax purposes is tested solely by reference to the donor spouse. Indeed, because the determination to split gifts will be made only when a gift tax return is filed by one of the spouses, to hold otherwise would mean that one-half of every transfer by a donor would be incomplete until the filing of a gift tax return in respect of the transfer, if the consenting spouse has an interest in the transferred property such that, had the interest had been created by the consenting spouse, the transfer would be an incomplete gift.

#### Effect of Gift-Splitting on Timing of Gifts

It seems that the timing of a gift by the donor spouse should determine the timing of the deemed gift by the consenting spouse. The sequence of all gifts made by both spouses, taken together, must be considered for purposes of determining the use of the spouses' annual exclusions and GST exemption. If the donor spouse makes a gift to a grandchild on April 7, 2007 and the consenting spouse subsequently makes a gift to a direct skip trust on August 13, 2007, the automatic allocation rules of Section 2632(b) would appear to apply, in the context of an election to split gifts, to allocate the consenting spouse's GST exemption first to one-half the gift on April 7 and second to one-half the gift on August 13. Should the spouses have insufficient GST exemption to cover both gifts, thought should be given to electing out of automatic allocation to the gift on April 7 in favor of an allocation fully to shelter the gift in trust on August 13 because the outright transfer on April 7 would produce a one-time GST tax, whereas the transfer to the trust on August 13 would produce a GST tax not only at the time the trust is created, but could also be subject to GST tax upon a subsequent taxable distribution from the trust or taxable termination of the trust.

### Effect of Gift-Splitting on Valuation of Gifts

Even though consent to gift-splitting causes a gift by the donor spouse to be treated as made one-half by the consenting spouse, no fractionalization of other valuation discounts would apply merely because of that 50/50 attribution of the gift.<sup>64</sup> The reason is that the value of the gift for tax purposes is determined before attribution of one-half the gift to the consenting spouse. Thus, on Schedule A of the United States Gift (and Generation-Skipping Transfer) Tax Return, Form 709, Column F requires the taxpayer to compute the value of the gift in total first, and then for split gifts, one-half the value reflected in Column F is reported in Column G, and the difference is reported in Column H as the “net transfer.” This treatment is consistent with the incomplete gift analysis above and the estate tax treatment of split gifts discussed below. Accordingly, if a fractionalization or minority interest discount would otherwise be available if each spouse could independently transfer a one-half interest in the property, the spouses should consider transferring title into a tenancy in common, assuming that transfer could be accomplished without gift tax under the marital deduction,<sup>65</sup> and then each spouse would make a gift of his or her one-half interest to the third party.

### No Estate Tax Inclusion for the Consenting Spouse

In general, consent to gift-splitting is not deemed to create in the consenting spouse an interest in the property transferred that would render any part of the property includible in the consenting spouse’s gross estate for Federal estate tax purposes.<sup>66</sup> The reason is that consent to gift-splitting does not cause the consenting spouse to be deemed a transferor of the property for estate tax purposes. This rule has been confirmed in a number of different contexts including the possible application of Section 2035(a) to the consenting spouse’s estate<sup>67</sup> and the appointment of the consenting spouse as successor custodian of property transferred pursuant to a split gift.<sup>68</sup> The principle applies to all applicable provisions of the Code dealing with retained interests including Sections 2035(a) and 2036-2038.<sup>69</sup> Estate tax inclusion under Section 2042 would appear to be a possibility, however, even if gift-splitting were allowed. For example, suppose gifts are made to a trust owning a policy of insurance on the life of the consenting spouse. Suppose the consenting spouse is appointed as trustee and is also a discretionary beneficiary of the trust, but distributions are limited to an ascertainable standard. In that case, gift-splitting would not be precluded, but the consenting spouse would be deemed to have incidents of ownership with respect to the policy held in trust.<sup>70</sup> The distinction is that estate tax inclusion under Section 2042 can be triggered solely because the decedent holds incidents of ownership at death, even if there was no antecedent transfer of the policy by the decedent. On the other hand,

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<sup>64</sup> Cf. *LeFrak v. Comm’r*, T.C. Memo. 1993-526; Rev. Rul. 93-12, 1993-1 C.B. 202.

<sup>65</sup> See I.R.C. §2523(i) regarding disallowance of the marital deduction for gifts to a non-citizen spouse.

<sup>66</sup> Rev. Rul. 54-246, 1954-1 C.B. 179.

<sup>67</sup> Rev. Rul. 82-198, 1982-2 C.B. 206.

<sup>68</sup> Rev. Rul. 74-556, 1974-2 C.B. 300.

<sup>69</sup> See, e.g., PLR 200213013.

<sup>70</sup> See Rev. Rul. 84-179, 1984-2 C.B. 195 (excepting trustee powers only if the insured has no beneficial interest in the trust).

if the consenting spouse has a general power of appointment over the gifted property, gift-splitting would be precluded in the first instance.<sup>71</sup>

### No Grantor Trust Status for the Consenting Spouse

Consent to gift-splitting will not render the consenting spouse a grantor of a trust for purposes of Sections 671 through 677 or 679 of the Code. Treasury Regulation §1.671-2(e)(1) provides that a grantor includes any person to the extent such person either creates a trust or directly or indirectly makes a gratuitous transfer of property to a trust. However, a person who makes no gratuitous transfers to the trust is not treated as an owner of any portion of the trust for purposes of the grantor trust rules. Section 2513 expressly provides that the election to treat gifts as made one-half by each spouse applies only for gift tax purposes. The effect of an election to split gifts for GST purposes is expressly provided by statute and in fact is different from the gift tax rule, further supporting the conclusion that an election to split gifts does not create tax consequences for the consenting spouse other than as expressly provided by statute.

### CONCLUSION

Although the concept of gift-splitting is simple to understand, application of the rules is far from straightforward. Advisors should pay careful attention to the mandatory consequences of gift-splitting, such as the requirement that all gifts must be split for the entire calendar year and joint and several liability for any gift tax due, in order properly to advise their clients. Independent action by one spouse or her executor, such as filing a gift tax return without the required election, can eliminate the opportunity of the other spouse to split-gifts, even if the filing of the return was made in error. The application of the spousal interest rule to trusts affords opportunities and pitfalls that place a premium on careful draftsmanship. Moreover, a split gift is not treated as split for most tax purposes. In fact, a rule emerges that a split gift continues to be a gift solely by the donor spouse for completed gift purposes, valuation purposes, estate tax purposes and grantor trust purposes. Lastly, the collateral effects of gift-splitting on the application of GST taxes should not be overlooked.

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<sup>71</sup> I.R.C. §2513(a)(1).