

# Gift Splitting

Gift splitting allows a married couple to maximize the total amount of gifts that can be made tax-free to a trust or other beneficiary in a given year by combining individual gift tax exclusions. This piece highlights the ins and outs of this commonly used estate planning technique.

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## 1. What is the General Rule for Splitting Gifts?

Section 2513(a)(1) of the IRC provides that, for gift tax purposes, if both spouses consent to split gifts made by either of them during a calendar year, then all gifts made by either spouse will be considered to be made one-half by each spouse in that calendar year.

**Example:** Mary and Joe are married. Joe transfers \$30,000 to their son, Bobby. If Mary consents to split the gift, the gift will be treated as if each of them individually transferred \$15,000 to Bobby that year.

## 2. Are There Any Conditions That Must Be Met in Order to Split Gifts?

Yes, gift splitting is only permitted if the following conditions are met:

- Both spouses consent to split the gifts;
- At the time of the gift, both spouses are either U.S. citizens or residents;
- The spouses are married at the time of the gift and, if they subsequently divorce (or one spouse dies), neither spouse (or the widowed spouse) remarries prior to the end of the calendar year; and
- The donor spouse does not create in his/her spouse a power of appointment over the gifted property.

## 3. Can Spouses Choose Which Gifts They Split in a Year?

No, spouses cannot pick and choose which gifts to split in a particular year. If consent is provided to split gifts, **all** gifts made during the calendar year by either spouse must be split. If spouses do not want to split all gifts, gifts should be made in different calendar years.

**Example:** Mary and Joe have made prior gifts in the past leaving them with unequal exclusion amounts. Mary has \$250,000 left of her applicable exclusion and Joe has \$1,000,000. In 2018, Mary makes an outright gift of \$30,000 to each of her three children and Joe consents to split the gifts. In that same year, Joe funds a Dynasty Trust with his remaining \$1 million of applicable exclusion. Because Joe and Mary consented to split gifts for 2018, the transfer to the Dynasty Trust by Joe will be treated as if \$500,000 was contributed by Mary and \$500,000 was contributed by Joe. Because Mary only has \$250,000 left of exclusion, this transfer to the Dynasty Trust will result in a gift tax to Mary. If Joe had waited to make the gift to the Dynasty Trust in 2019 instead of 2018, no gift tax would be due as he would have been considered the sole donor and his applicable gift tax exclusion would have been sufficient to shelter the entire transfer to the trust from gift tax.

## 4. How Do Spouses Signify Consent for Gift Splitting?

The regulations provide that consent is only effective if signified by both spouses. In the case of a deceased spouse, consent may be given by an executor or administrator, and, in the case of a legally incompetent spouse, by a guardian.<sup>1</sup> Generally, consent is provided on a timely filed gift tax return (see question 6).

## 5. Can Consent Be Revoked?

Yes, consent can be revoked but only 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. Consent given on a return filed after April 15th cannot be revoked.<sup>2</sup>

## 6. Does the Consenting Spouse Have to File a Gift Tax Return?

Generally, if spouses elect to split gifts, each spouse will have to file his/her own gift tax return for the calendar year and each spouse will provide consent on the other's return — even if only one spouse actually makes gifts. The instructions for Form 709 (Gift Tax Return) provide, however, that only one spouse must file a gift tax return if one of the following exceptions applies:

### EXCEPTION 1

During the year:

- (a) only one spouse made any gifts,<sup>3</sup>
- (b) the total value of gifts to each third-party donee did not exceed \$30,000, and
- (c) all the gifts were present interest gifts.

### EXCEPTION 2

During the year:

- (a) only one spouse (the donor spouse) made gifts of more than \$15,000 but not more than \$30,000 to any third-party donee,
- (b) only gifts made by the other spouse (the consenting spouse) were gifts of not more than \$15,000 to third-party donees other than those to whom the donor spouse made gifts, and
- (c) all gifts by both spouses were present interest gifts.

**Example:** In the calendar year, Joe makes a gift of \$30,000 to each of his three children, Bobby, Clara, and Marcia. Joe's wife, Mary, consents to split all gifts for the year. In the same year, Mary makes a \$15,000 gift to her mother and father. Because Mary and Joe have consented to split gifts, each of them will be deemed to have gifted \$15,000 to each child and \$7,500 to Mary's mother and father. Although no gift tax is due because the gifted amounts fall within the couple's annual exclusion, a gift tax return must be filed. Only Joe needs to file a return, with Mary indicating her consent on the return, because their gifts meet the requirements of Exception 2. If, however, Mary had gifted \$30,000 to her parents instead of \$15,000, both Mary and Joe would be required to file gift tax returns as neither Exception 1 nor Exception 2 applies.

## 7. Can a Gift to a Trust in Which the Consenting Spouse is a Beneficiary Be Split?

Maybe. In general, gifts in which the consenting spouse has an interest may not be split, unless the spouse's interest is "ascertainable" and "severable" from the interest of third parties.<sup>4</sup> If the spouse's interest is severable and ascertainable, gift splitting is allowed for the amount deemed to benefit the other trust beneficiaries.

For example, if spouse has a mandatory income interest in a trust for life with the remainder passing to the other trust beneficiaries, the spouse's interest is ascertainable and severable from the rights of the other beneficiaries and gift splitting on the value of the remainder should be allowed.

Typically, the value of the spouse's interest in the trust will be determined using the same principles applied in the valuation of annuities, life estates, term of years, remainders and reversions.<sup>5</sup>

## 8. When Is a Spouse's Interest in a Trust Ascertainable and Severable?

If actuarial principles can be used to determine the value of the interest of the consenting spouse, the spouse's interest is likely ascertainable and severable.<sup>6</sup> For example, if the spouse had a mandatory income interest in a trust for life or a term of years, the spouse's interest in the trust is ascertainable based on general valuation methods set forth in the Regulations.

Even if the spouse only has a discretionary interest in a trust, the courts have indicated that gift splitting is available if the trustee's discretion to distribute to the consenting spouse is limited by an ascertainable standard, such as health, education, maintenance and support.<sup>7</sup> However, it is unclear exactly how to value this "ascertainable" discretionary interest apart from the interest of the third-party beneficiaries, so it may be difficult to determine the amount of the gift that can be split.

## 9. Can Crummey Gifts Be Split?

Yes, but the spouse's interest in the trust may need to be ascertainable and severable from the interest of the third-party beneficiaries. In the past, *Crummey* gifts typically had been treated as gifts made directly to the *Crummey* beneficiary who had the right to withdrawal. Consequently, when *Crummey* gifts were made to beneficiaries other than the spouse, the spouse-beneficiary's interest in the trust was irrelevant for purposes of determining whether the gift qualified for split-gift treatment.<sup>8</sup> However, in two recent Private Letter Rulings, the IRS looked beyond the third-party withdrawal powers to see if the spouse had an interest in the trust that was ascertainable and severable from the interest of the other beneficiaries before permitting the gift splitting (see question 8).<sup>9</sup> It is unclear whether the IRS's failure to follow its prior position in these most recent PLRs was inadvertent or whether these rulings signal a change in its analysis for the ability to elect gift splitting for *Crummey* gifts to third-party beneficiaries.

**Example:** Joe creates an irrevocable trust for the benefit of Mary and their three children. Each of the three children has a pro rata right to withdraw any contribution made to the trust for a period of 30 days; Mary has no right to withdraw amounts contributed. Based on prior IRS rulings, if Joe contributes \$75,000 to the trust and each child has a right to withdraw his/her pro rata share of such contribution (i.e., \$25,000), the gift should be eligible for gift splitting between Joe and Mary because Mary has no interest in these *Crummey* gifts. Mary's income/principal interest in the trust should be irrelevant for determining whether gift splitting is permitted. Based on more recent rulings, however, the Service may review the trust to determine if Mary's underlying interest in the trust is ascertainable and severable from the interest of the other beneficiaries before permitting the *Crummey* gifts to be split (see question 8).

## 10. Are There Estate Tax Implications for a Spouse Who Consents to Split Gifts?

In general, consent to gift splitting should not cause estate inclusion for the consenting spouse because the spouse will not be deemed the transferor of the property for estate tax purposes.<sup>10</sup>

## 11. How is the Generation-Skipping Transfer (GST) Tax Exemption Used for Split Gifts?

If spouses elect to gift split for a particular calendar year, each spouse will be treated as the transferor for GST tax purposes of one-half of the gift eligible for gift splitting.<sup>11</sup> The deemed allocation rules under IRC §2632 will apply automatically to each spouse’s one-half gift and any voluntary allocation of the GST tax exemption must be made by each spouse on his or her own gift tax return.

**Example:** Mary gifts \$100,000 to her grandson and Joe consents to split the gift with her. This is the only gift Mary and Joe make in the calendar year. Mary and Joe will each need to file a gift tax return as neither exception discussed in Question 6 applies here. Because the gift is a direct skip gift, \$50,000 of Mary’s GST exemption and \$50,000 of Joe’s GST tax exemption will automatically be allocated to the gift to their grandson.

## 12. Can Spouses Gift Split in Community Property States?

Yes, if the gifted property is considered “separate property” of the donor spouse. If a gift is made from community property, the gift will automatically be considered made one-half by each spouse and each spouse will need to file a gift return.

**Example:** Mary and Joe live in California, a community property state. Joe gifts \$100,000 to his son, Bobby, from an account that is considered separate property under California law. If Mary consents, Joe and Mary can split the gift so that \$50,000 will be treated as coming from Joe and \$50,000 will be considered as coming from Mary. If, instead, Joe gifts the \$100,000 to Bobby from community property, Mary will not need to consent as she will be the donor of \$50,000 for which she will have to file her own gift tax return.

1. See Treas. Reg. §25.2513-2.
2. See Treas. Reg. §25.2513-3.
3. Instructions for Form 709 define “gifts” (for the purposes of the exceptions provided) as gifts that do not qualify for the political organization, educational or medical exclusions.
4. See Treas. Reg. 25.2513-1(b)(4).
5. Id.
6. Id.
7. See Wang, TC Memo 1972-143 and Falk, TC Memo 1965-22; see also PLR 200345038
8. PLR 200130030, PLR 81381092 and PLR 8112087.
9. PLR 200422051 and 200616022
10. Rev Rul 54-246. See also, PLR 200213013.
11. IRC § 2652(a)(2).

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