

9 Common Mistakes Related to Spousal Gift Splitting

The Requirements

A husband and wife may consent to “split gifts” for a given calendar year so that all gifts that they both make are considered as having been transferred one-half by each spouse, if each of the following three conditions are met:

- 1) Both spouses must be US Citizens or residents on the date of the gift;
 - 2) Both spouses must consent to having all gifts made by each of them treated as having been made one-half each; and
 - 3) The spouses must be married on the date of all gifts made during the year, and cannot remarry during the remainder of the calendar year.
- I.R.C. § 2513(a).

–PLANNING NOTE – It will be possible to split some gifts but not others by making the gifts that you want to split before getting divorced, and then divorcing and making the gifts that you do not want to split thereafter.

–WARNING – Do not remarry in the same year – see Mistake #5.

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Mistake 1) Not Making the Election Correctly

If the spouses agree to split the gifts, Box 12 of Part 1 - General Information of the Form 709 should be checked.

The consenting spouse's name should be entered in Box 13, and his or her Social Security number should be entered in Box 14.

The consenting spouse must also sign the Form 709 where indicated in Box 18.

The spouses should file both of the individual gift tax returns together in one envelope to help the IRS process the returns and to avoid correspondence from the IRS. Form 709 Instructions, page 5 (I.R.S. 2010).

Mistake 2) Forgetting to Make the Election

If a return is filed by one spouse, the consenting spouse must signify his or her consent on the return.

Generally, consent to split gifts cannot be made after the later of:

- a. April 15th of the year following when the gifts were made; or
- b. when the donor spouse files the gift tax return.

Therefore, a couple is not able to file a gift tax return reporting all of the gifts as having been made by one spouse, and then wait to see if the return is audited before electing gift splitting.

Mistake 3) Having the Splitting Spouse be the Beneficiary of a Trust That He or She Would Be Likely to Receive Benefits From

If a spouse splitting a gift is a beneficiary of a trust being funded by such gifts then it must be very unlikely that the spouse will need to receive benefits from the trust for the split to be effective. See Private Letter Ruling 200345038 and the case of *William H. Robertson vs. Commissioner, 26 TC 246 (1956)*.

Mistake 4) Thinking it is Too Late to Make the Election – One Possible Exception to the April 15th Deadline

An election to split gifts may be made by spouses after April 15th of the year following when the gifts are made if

- 1) No gift tax return has been filed by either spouse before April 15th; and
- 2) When the gift tax return for the year in question is filed, the spouses elect to split the gifts.

–It is important to note, however, that a late gift tax return cannot be filed splitting gifts if a notice of deficiency has been sent by the IRS.

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Mistake 5) Dead Spouses can Make the Election

The executor for a deceased spouse or the guardian for a legally incompetent spouse may sign the consent to split a gift made prior to the death of the deceased spouse. Treas. Reg. § 25.2513-2(c).

However, a donor may not split the gift with his or her deceased spouse if the gift is made after the spouse's death. Rev. Rul. 55-506, 1955-2 C.B. 609.

Mistake 6) Spouses may not remarry during the year.

It is important to note that spouses can elect to split gifts that were made when they were married, but only if they do not remarry during the remainder of the year.

If the spouses divorce, and one spouse remarries before the end of the year then the gifts made while the spouses were married cannot be split.

Consider whether there should be a provision in a marriage settlement agreement related to this.

Mistake 7) The Split is on All Gifts by Both Spouses – No “Picking and Choosing”

If spouses elect to split gifts, the election is effective with respect to all gifts made by either spouse to any third party.

The spouses cannot elect to split certain gifts. Treas. Reg. § 25.2513-1(b).

Mistake 8) Thinking the Election is Irrevocable

Many practitioners believe that the election to split gifts is irrevocable. Generally this is true, subject to the one exception below.

Either spouse may rescind the election to split gifts if

- 1) the consent was originally made on a return filed before April 15th of the year after the gifts were made; and
- 2) the consent is rescinded before April 15th of the year after the gifts were made.

To rescind the election, either spouse may file in duplicate a signed statement of revocation with the IRS. Treas. Reg. § 25.2513-3(a)(1).

Mistake 9) Sometimes the Consenting Spouse does not need to file a Gift Tax Return

If only one spouse made gifts and

- 1) All of the gifts are present interests, and
 - 2) The total amount received by each donee from the donor spouse does not exceed twice the annual exclusion,
- Then the consenting spouse does not need to file a gift tax return