

Summary of the Gift Tax Marital Deduction

In order for the unlimited gift tax marital deduction under Section 2523 to apply, the following requirements must be met:

1. The spouses must be married at the time of the gift—gifts made prior to the marriage or after a divorce is finalized do not qualify;
2. The interest transferred must *not* be a “nondeductible terminable interest” (the property must be subject to tax at the donee spouse’s death):
 - a. A “nondeductible terminable interest” is an interest that will terminate or fail upon the lapse of a period of time, or upon the occurrence or non-occurrence of an event, such as life estates, terms of year, and annuity interests
 - b. A nondeductible terminable interest *will* qualify for the marital deduction if the gift is to a “general power of appointment trust”, which requires the following requirements are met:
 - i. The donee spouse is entitled to all of the income from the transferred interest for life;
 - ii. The income is payable in installments no less frequently than annually;
 - iii. The donee spouse has a power of appointment over the transferred property that includes the power to appoint the transferred property to him or herself, or to his or her own estate; and
 - iv. No other person has the power to take away the donee spouse’s interest in the property.
 - c. A nondeductible terminable interest will also qualify for the marital deduction if it is a “qualified terminable interest”, which requires the following requirements be met:
 - i. The donee spouse is entitled to all of the income from the transferred property for life;
 - ii. The income is payable in installments no less frequently than annually;
 - iii. No other person has the power to take away the donee spouse’s interest in the property; and
 - iv. A timely election is made on the donor spouse’s gift tax return to treat the transferred property as qualified terminable interest property.
3. If the donor spouse is not a U.S. citizen or resident, the donee spouse must be a U.S. citizen.

Section 2523(i) disallows the gift tax marital deduction for transfers to non-citizen spouses, with the exception for the first \$100,000 (as adjusted for inflation) of present interest transfers to the non-citizen spouse each year. In 2013, the inflation-adjusted amount for tax-free gifts to non-citizen spouses is \$143,000.