spouse and is not a United States citizen at the time of the gift.

Example 1. Outright transfer of present interest. In 1995, D, a United States citizen, transfers to S, outright, 100 shares of X corporation stock valued for federal gift tax purposes at $130,000. The transfer is a gift of a present interest in property under section 2503(b). Additionally, the gift qualifies for the gift tax marital deduction except for the disallowance provision of section 2523(i)(1). Accordingly, $100,000 of the $130,000 gift is excluded from the total amount of gifts made during the calendar year by D for gift tax purposes.

Example 2. Transfer of survivor benefits. In 1995, D, a United States citizen, retires from employment in the United States and elects to receive a reduced retirement annuity in order to provide S with a survivor annuity upon D’s death. The transfer of rights to S in the joint and survivor annuity is a gift by D for gift tax purposes. However, under paragraph (b) of this section, the gift qualifies for the gift tax marital deduction even though S is not a United States citizen.

Example 3. Transfer of present interest in trust property. In 1995, D, a resident alien, transfers property valued at $500,000 in trust to S, who is also a resident alien. The trust instrument provides that the trust income is payable to S at least quarterly and S has a testamentary general power to appoint the trust corpus. The transfer to S qualifies for the marital deduction under section 2523 but for the provisions of section 2523(i)(1). Because S has a life income interest in the trust, S has a present interest in a portion of the trust. Accordingly, D may exclude the present value of S’s income interest (up to $100,000) from D’s total 1995 calendar year gifts.

Example 4. Transfer of present interest in trust property. The facts are the same as in Example 3, except that S does not have a testamentary general power to appoint the trust corpus. Instead, D’s child, C, has a remainder interest in the trust. If S were a United States citizen, the transfer would qualify for the gift tax marital deduction if a qualified terminable interest property election was made under section 2523(i)(4). However, because S is not a U.S. citizen, D may not make a qualified terminable interest property election. Accordingly, the gift does not qualify for the gift tax marital deduction but for the disallowance provision of section 2523(i)(1). The $100,000 annual exclusion under section 2523(i)(2) is not available with respect to D’s transfer in trust and D may not exclude the present value of S’s income interest in excess of $10,000 from D’s total 1995 calendar year gifts.

Example 5. Spouse becomes citizen after transfer. D, a United States citizen, transfers a residence valued at $350,000 on December 20, 1995, to D’s spouse, S, a resident alien. On January 31, 1996, S becomes a naturalized United States citizen. On D’s federal gift tax return for 1995, D must include $250,000 as a gift ($350,000 transfer less $100,000 exclusion). Although S becomes a citizen in January, 1996, S is not a citizen of the United States at the time the transfer is made. Therefore, no gift tax marital deduction is allowable. However, the transfer does qualify for the $100,000 annual exclusion.

[T.D. 8612, 60 FR 43552, Aug. 22, 1995]

§ 25.2523(i)–2 Treatment of spousal joint tenancy property where one spouse is not a United States citizen.

(a) In general. In the case of a joint tenancy with right of survivorship between spouses, or a tenancy by the entirety, where the donee spouse is not a United States citizen, the gift tax treatment of the creation and termination of the tenancy (regardless of whether the donor is a citizen, resident or nonresident not a citizen of the United States at such time), is governed by the principles of sections 2515 and 2515A (as such sections were in effect before their repeal by the Economic Recovery Tax Act of 1981). However, in applying these principles, the donor spouse may not elect to treat the creation of a tenancy in real property as a gift, as provided in section 2515(c) (prior to its repeal by the Economic Recovery Tax Act of 1981, Pub. L. 97–34, 95 Stat. 172).

(b) Tenancies by the entirety and joint tenancies in real property.—(1) Creation of the tenancy on or after July 14, 1988. Under the principles of section 2515 (without regard to section 2515(c)), the creation of a tenancy by the entirety (or joint tenancy) in real property (either by one spouse alone or by both spouses), and any additions to the value of the tenancy in the form of improvements, reductions in indebtedness thereon, or otherwise, is not deemed to be a transfer of property for purposes of the gift tax, regardless of the proportion of the consideration furnished by each spouse, but only if the creation of the tenancy would otherwise be a gift to the donee spouse who is not a citizen of the United States at the time of the gift.
(2) Termination—(i) Tenancies created after December 31, 1954 and before January 1, 1982 not subject to an election under section 2515(c), and tenancies created on or after July 14, 1988. When a tenancy to which this paragraph (b) applies is terminated on or after July 14, 1988, other than by reason of the death of a spouse, then, under the principles of section 2515, a spouse is deemed to have made a gift to the extent that the proportion of the total consideration furnished by the spouse, multiplied by the proceeds of the termination (whether in the form of cash, property, or interests in property), exceeds the value of the proceeds of termination received by the spouse. See section 2523(i), and §§25.2523(i)-1 and 25.2523-2(f) as to certain of the tax consequences that may result upon termination of the tenancy. This paragraph (b)(2)(i) applies to tenancies created after December 31, 1954, and before January 1, 1982, not subject to an election under section 2515(c), and to tenancies created after December 31, 1981, and before July 14, 1988.

(ii) Tenancies created after December 31, 1954 and before January 1, 1982 subject to an election under section 2515(c) and tenancies created after December 31, 1981 and before July 14, 1988. When a tenancy to which this paragraph (b) applies is terminated on or after July 14, 1988, other than by reason of the death of a spouse, then, under the principles of section 2515, a spouse is deemed to have made a gift to the extent that the proportion of the total consideration furnished by the spouse, multiplied by the proceeds of the termination received by the spouse. See section 2523(i), and §§25.2523(i)-1 and 25.2523-2(f) as to certain of the tax consequences that may result upon termination of the tenancy. This paragraph (b)(2)(i) applies to tenancies created after December 31, 1954, and before January 1, 1982, subject to an election under section 2515(c), and to tenancies created after December 31, 1981, and before July 14, 1988.

(3) Miscellaneous provisions—(i) Tenancy by the entirety. For purposes of this section, tenancy by the entirety includes a joint tenancy between husband and wife with right of survivorship.

(ii) No election to treat as gift. The regulations under section 2515 that relate to the election to treat the creation of a tenancy by the entirety as constituting a gift and the consequences of such an election upon termination of the tenancy (§§25.2515-2 and 25.2515-4) do not apply for purposes of section 2523(i)(3).

(4) Examples. The application of this section may be illustrated by the following examples:

Example 1. In 1992, A, a United States citizen, furnished $200,000 and A’s spouse B, a resident alien, furnished $50,000 for the purchase and subsequent improvement of real property held by them as tenants by the entirety. The property is sold in 1998 for $300,000. A receives $225,000 and B receives $75,000 of the sales proceeds. The termination results in a gift of $15,000 by A to B, computed as follows:

\[
\frac{\text{consideration furnished by A}}{\text{total consideration furnished by both spouses}} \times \frac{\text{proceeds of termination}}{\text{(proceeds of termination attributable to A)}} = \frac{200,000}{250,000} \times \frac{300,000}{240,000} = 15,000
\]
Example 2. In 1986, A purchased real property for $300,000 and took title in the names of A and B, A’s spouse, as joint tenants. Under section 2511 and §25.2511–1(h)(1) of the regulations, A was treated as making a gift of one-half of the value of the property ($150,000) to B. In 1995, the real property is sold for $400,000 and B receives the entire proceeds of sale. For purposes of determining the amount of the gift on termination of the tenancy under the principles of section 2515 and the regulations thereunder, the amount treated as a gift to B on creation of the tenancy under section 2511 is treated as B’s contribution towards the purchase of the property. Accordingly, the termination of the tenancy results in a gift of $200,000 from A to B determined as follows:

\[
\frac{150,000}{300,000} \times (400,000 - 0) = 200,000
\]

The following examples (in both of which it is assumed that the donor has previously utilized his entire $30,000 specific exemption provided by section 2521, which was in effect at the time) illustrate the application of the provisions of this section:

Example (1). A donor made transfers by gift to his spouse of $5,000 cash on January 1, 1971, and $1,000 cash on April 5, 1971. The donor made no other transfers during 1971. The first $3,000 of such gifts for the calendar year is excluded under the provisions of section 2503(b) in determining the “total amount of gifts” made during the “calendar period” (as defined in §25.2503–1(c)(1)), computed as provided in section 2503 and §25.2503–1 (i.e., the total gifts less exclusions). The following examples (in both of which it is assumed that the donor has previously utilized his entire $30,000 specific exemption provided by section 2521, which was in effect at the time) illustrate the application of the provisions of this section:

Example (1). A donor made transfers by gift to his spouse of $5,000 cash on January 1, 1971, and $1,000 cash on April 5, 1971. The donor made no other transfers during 1971. The first $3,000 of such gifts for the calendar year is excluded under the provisions of section 2503(b) in determining the “total amount of gifts” made during the first calendar quarter of 1971. The marital deduction for the first calendar quarter of $2,500 (one-half of $5,000) otherwise allowable is limited by section 2524 to $2,000. The amount of taxable gifts is zero ($5,000 – $3,000 (annual exclusion) – $2,000 (marital deduction)). For the second calendar quarter of 1971, the marital...