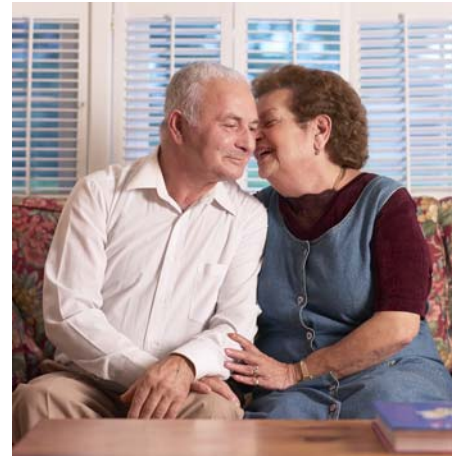


## *Planning for the Non-Citizen Spouse*

Gift and estate tax laws permit spouses to transfer unlimited amounts of property to each other entirely free of gift and estate taxes IF the recipient spouse is a U.S. citizen. The “unlimited marital deduction” does not apply to non-citizen spouses because Congress is concerned that the non-citizen spouse might move to another country and thereafter transfer the estate without being subject to U.S. gift and estate taxes. Therefore, providing for a non-citizen spouse can be tricky.

During life, you may give up to \$117,000 annually to your non-citizen spouse without gift tax. Therefore, you may want to have a systematic gifting program in place. Of course, there may be non-tax reasons why transferring large amounts of property to your spouse during life may not be desirable, for example, the fear of divorce.



At death, only gifts held in a special kind of trust, known as a Qualified Domestic Trust (QDOT), qualify for the “unlimited marital deduction.”

In establishing a plan for a non-citizen spouse, you may want to consider making an outright gift to your spouse and giving your spouse the option of having the gift be held in a QDOT. We make this suggestion because between the time you create your plan and your death, the citizenship problem may go away. Congress may change the rules or your spouse may become a citizen. Your spouse may also prefer to pay the estate tax and have complete control over what’s left. Or, your spouse may elect to have the property held in a QDOT thereby deferring the estate tax until the non-citizen spouse’s death. If you have not provided that any gift to a non-citizen spouse is made through a QDOT, your spouse has the option to establishing a QDOT and transferring any outright gift to that trust IF that is done before the federal estate tax return is due, which is nine months after death.

On the other hand, your plan may require that any gift to your spouse be held in a QDOT for both tax and non-tax reasons. For example, you may prefer a trust because you want to direct where the trust will be distributed upon your spouse’s subsequent death. Or, you want to guarantee tax-free treatment of the gift. If you plan to use a trust, there are very few requirements to satisfy the QDOT rules.

The primary requirement is that the non-citizen spouse cannot be the sole trustee. A U.S. citizen or a U.S. bank must act as an additional trustee or may be the sole trustee. If the QDOT assets exceed \$2,000,000, the U.S. trustee must be a bank or the individual trustee must furnish a bond or an irrevocable U.S. letter of credit for 65% of the QDOT assets.

Distributions of trust income are not subject to estate tax when made. However, distributions of trust principal are subject to federal estate tax when made, calculated at the marginal estate tax rate of the deceased spouse. When the non-citizen spouse dies, the QDOT assets will be included in his or her taxable estate.