4.09 Selecting the right marital deduction method for clients

Deciding on the right formula clause requires careful consideration of the interaction of four factors:

First, it requires a solid understanding of the estate and income tax consequences of the different formula clauses;

Second, it requires a complete understanding of the clients’ financial situation;

Third, it requires a complete understanding of the clients’ relationship, on both legal and personal terms; and

Fourth, it requires a full understanding of the clients’ estate planning objectives, ensuring that they understand and are willing to comply with the strategies implemented in their estate plan.

After determining the amount to distribute as a marital deduction gift for the surviving spouse, the client must decide how the property will be administered and distributed. As we will see, the surviving spouse may benefit from distributions from the Marital share, Non-Marital share, or both. Whether the property distributed to or for the benefit of the surviving spouse actually qualifies for the marital deduction depends entirely on the manner in which the property is held and distributed.

The following chart, adapted from an article by Sebastian V. Grassi, Jr., may help guide the grantor client (and the client's counsel) into selecting an appropriate marital deduction funding method. 40 But remember that there is no "hard and fast" rule, and the best marital deduction method for clients is generally only determined after balancing all of their planning concerns against the value and asset composition of the clients' estates.

<table>
<thead>
<tr>
<th>Primary planning concern…</th>
<th>Consider:</th>
<th>Avoid:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contentious family; separate descendants from prior relationships</td>
<td>• Fractional pro-rata</td>
<td>• Minimum Worth marital, or pick &amp; choose</td>
</tr>
<tr>
<td>Avoiding/minimizing realization of capital gain upon funding</td>
<td>• Minimum Worth marital pecuniary</td>
<td>• True Worth marital pecuniary</td>
</tr>
<tr>
<td></td>
<td>• Fairly Representative marital pecuniary</td>
<td>• True Worth credit shelter pecuniary</td>
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<tr>
<td></td>
<td>• Fairly Representative credit shelter pecuniary</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Any fractional marital formula</td>
<td></td>
</tr>
<tr>
<td>Avoiding realization of income on IRD assets</td>
<td>• Any fractional marital formula</td>
<td>• Any pecuniary formula</td>
</tr>
</tbody>
</table>

40 The concept and content of this table was greatly influenced by the excellent article, Choosing the Appropriate Marital Deduction Formula.; Sebastian V. Grassi, Jr., WG&L Estate Planning Journal (2006)
<table>
<thead>
<tr>
<th>Primary planning concern…</th>
<th>Consider:</th>
<th>Avoid:</th>
</tr>
</thead>
</table>
| GSTT planning             | • Any fractional marital formula  
• True Worth marital pecuniary  
• Fairly Representative marital pecuniary  
• True Worth credit shelter pecuniary  
• Fairly Representative credit shelter pecuniary | • Minimum Worth formula |
| "Pick & choose" funding flexibility (easier administration) | • True Worth marital pecuniary  
• True Worth credit shelter pecuniary  
• Minimum Worth formula  
• Fractional pick & choose⁴¹ | • Fractional pro-rata |
| Avoiding revaluation of funded assets; assets difficult to value | • Fractional pro-rata  
• True Worth marital pecuniary  
• True Worth credit shelter pecuniary  
• Minimum Worth formula | • Fractional pick & choose  
• Fairly Representative marital pecuniary  
• Fairly Representative credit shelter pecuniary |
| Minimizing administrative expenses | • True Worth marital pecuniary  
• True Worth credit shelter pecuniary | • Either Fractional formula  
• Fairly Representative marital pecuniary  
• Fairly Representative credit shelter pecuniary |
| Maximizing the Marital share | Best: Minimum Worth marital pecuniary  
Next: True Worth marital pecuniary | • Either Fractional formula  
• Fairly Representative marital pecuniary  
• Fairly Representative credit shelter pecuniary |
| Ensuring a fixed amount is funded and unaffected by interim depreciation | • True Worth marital pecuniary  
• True Worth credit shelter pecuniary  
• Minimum Worth marital pecuniary | • Either Fractional formula  
• Fairly Representative marital pecuniary  
• Fairly Representative credit shelter pecuniary |
| Maximum marital deduction planning, maximum flexibility in modest estates, flexibility for decoupling | • Clayton election  
• All to Marital, disclaimer to Non-Marital | • Any pecuniary marital formula  
• Any pecuniary credit shelter formula  
• Fractional formula without two-QTIP option |

⁴¹ The default WealthDocs fractional marital deduction language includes "pick and choose" authority. WealthDocs does not contain a strict fractional pro-rata funding option.