

A06-1252

**State of Minnesota
In Court of Appeals**

Carol Bernice Baker,

Appellant,

v.

Daniel Remember Baker,

Respondent.

**REPLY BRIEF AND SUPPLEMENTAL APPENDIX
OF APPELLANT CAROL BERNICE BAKER**

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TABLE OF CONTENTS

I. SIGS RETIREMENT ASSETS, IN EXCESS OF THE AMOUNT OWNED BY DR. BAKER ON THE DATE OF THE PARTIES' MARRIAGE, ARE MARITAL PROPERTY 1

 A. Appreciation in SIGS Retirement Assets Is Active Appreciation 1

 B. Dr. Baker Did Not Meet His Burden of Proof That Current Retirement Assets Are Traceable to Nonmarital Property 6

 1. Mr. Harges did not trace the nonmarital property into the present accounts 6

 2. Trial court failed to follow Minnesota law, which mandates that an asset acquired with income generated from a nonmarital asset is a marital asset 9

 3. Ms. Baker is not seeking a new trial but amended findings of fact and conclusions of law 9

II. THE TRIAL COURT COMMITTED ERROR IN FAILING TO CONSIDER THE INTANGIBLE ASSET OF GOODWILL AS PART OF THE MARITAL PROPERTY ATTACHED TO THE BUSINESS KNOWN AS DANIEL R. BAKER, M.D., P.A. 10

III. DR. BAKER DISSIPATED MARITAL ASSETS 12

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS AWARD TO MS. BAKER OF PERMANENT SPOUSAL MAINTENANCE 13

 A. Dr. Baker Fails to Abide by the Standard of Review 13

 B. Trial Court Adequately Considered Statutory Factors 13

 1. Ms. Baker is not capable of being employed and contributing to her own support 14

 2. Dr. Baker has the ability to meet his needs and contribute to Ms. Baker's support 16

a. The trial court’s finding is the finding proposed by Dr. Baker 16

b. Facts support Dr. Baker’s ability to meet needs of both parties 17

3. Findings as to Ms. Baker’s mortgage obligation are not inconsistent 19

CONCLUSION 20

CERTIFICATION OF BRIEF LENGTH 22

TABLE OF AUTHORITIES

Statutes:

Minn. Stat. § 518.54, subd. 5	1
Minn. Stat. § 518.552, subd. 2	13
Minn. Stat. § 518.58, subd. 1(a)	12

Cases:

Anderson v. Anderson, 2006 WL 2599154 (Minn. Ct. App. 2006)	2
Carrick v. Carrick, 560 N.W.2d 407 (Minn. Ct. App. 1997)	16
Cashin v. Cashin, 2000 WL 1528668 (Minn. Ct. App. 2000)	2
Crosby v. Crosby, 587 N.W.2d 292 (Minn. Ct. App. 1998), rev. denied	7
Erlandson v. Erlandson, 318 N.W.2d 36 (Minn. 1982)	13
Gottsacker v. Gottsacker, 664 N.W.2d 848 (Minn. 2003)	4
Greenwald v. Greenwald, 565 N.Y.S.2d 494 (N.Y. App. Div. 1 st Dep't 1991)	5, 6
Hope v. Hope, 2000 WL 1182796 (Minn. Ct. App. 2000)	3
McAlpine v. Fidelity & Cas. Co., 134 Minn. 192, 158 N.W. 967 (1916)	17
Merrick v. Merrick, 440 N.W.2d 142 (Minn. Ct. App. 1989)	1
Nardini v. Nardini, 414 N.W.2d 184 (Minn. 1987)	2, 5, 9

Olsen v. Olsen, 562 N.W.2d 797 (Minn. 1997)	1
Peterka v. Peterka, 675 N.W.2d 353 (Minn. Ct. App. 2004)	13
Prahl v. Prahl, 627 N.W.2d 698 (Minn. Ct. App. 2001)	9
Rathbun v. W.T. Grant Co., 300 Minn. 223, 219 N.W.2d 641 (1974)	10
Schallinger v. Schallinger, 699 N.W.2d 15 (Minn. Ct. App. 2005), rev. denied	16
Swick v. Swick, 467 N.W.2d 328 (Minn. Ct. App. 1991), rev. denied	6, 9
Washington v. Milbank Ins. Co., 551 N.W.2d 513 (Minn. Ct. App. 1996)	3, 4
White v. White, 521 N.W.2d 874 (Minn. Ct. App. 1994)	5-8

Other Authorities:

Levy, An Introduction to Divorce-Property Issues, 23 Fam. Q. 147 (Summer 1989)	8
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I. SIGS RETIREMENT ASSETS, IN EXCESS OF THE AMOUNT OWNED BY DR. BAKER ON THE DATE OF THE PARTIES' MARRIAGE, ARE MARITAL PROPERTY.

A. Appreciation in SIGS Retirement Assets Is Active Appreciation.

All property obtained by either spouse during the marriage is presumed to be marital property, regardless of the form of ownership. Minn. Stat. § 518.54, subd. 5. Since it is Respondent Dr. David Baker (“Dr. Baker”) who claims that an amount over and above the amount he owned in the SIGS retirement assets (SIGS assets) on the date of marriage constitutes nonmarital property, it is Dr. Baker who bears the burden of proof of overcoming the marital presumption. Olsen v. Olsen, 562 N.W.2d 797, 800 (Minn. 1997); Merrick v. Merrick, 440 N.W.2d 142, 146 (Minn. Ct. App. 1989). Dr. Baker’s statements in his brief and the trial court’s statements in its Finding of Fact XV regarding Ms. Baker’s purported lack of evidence or expert testimony that the retirement assets are marital property directly contradicts Minnesota law.¹ (Respondent’s Brief, pp. 15, 23, 32; A. 22.)

Ms. Baker is not “obliterat[ing] the distinction between active and passive appreciation,” as Dr. Baker and the trial court have asserted. (A. 22.) Rather, her position that the appreciation is active is based on Minnesota law as applied to the undisputed facts of record. It is Dr. Baker’s position and the trial court’s holding that cannot be squared with Minnesota law.

¹ The trial court’s findings in this regard are taken verbatim from Dr. Baker’s proposed findings. (Compare A. 22 with Supplemental Appendix [S.A.] 20.)

A case in point is this Court's recent decision in Anderson v. Anderson, 2006 WL 2599154 (Minn. Ct. App. 2006). (S.A. 46.) In Anderson, Appellant husband (husband) testified that his stepfather promised to place \$500,000 in an investment account in husband's name and to give husband the increase on the account. Stepfather agreed with husband's contention, but also testified that husband had ultimate control over the money, but that stepfather made all of the trading decisions. Wife testified that she and husband did the final trading for the account and that she had placed a sell order. This Court, applying the principle of Nardini v. Nardini, 414 N.W.2d 184, 193-94 (Minn. 1987), held that the increase in value of the \$500,000 loan, even if the loan was made to husband alone, was marital property. This Court explained:

In this case, husband monitored the account, had the authority to use the principal and to trade on the account, but husband primarily deferred to [stepfather's] management. There is evidence that husband and wife discussed the account and that wife was involved in placing at least one order to sell stock. The increase, therefore, was due in part to husband's decision-making about how the account was to be managed and did not occur by inflation or market forces alone.

(S.A. 47.)

Likewise, in Cashin v. Cashin, 2000 WL 1528668 at *6 (Minn. Ct. App. 2000) (S.A. 49), this Court reversed the trial court's determination of nonmarital property based on the record that the spouses had transferred money in an IRA from a cash account to other investments. Since the income was attributable to the efforts of the spouses, it was marital property. (S.A. 53.)

Similarly, here, the increase in the SIGS assets did not occur by inflation or market forces alone. The increase is marital property.²

Whether property is marital or nonmarital is a question of law. Moreover, where, as here, the facts regarding the parties' handling of the retirement assets are undisputed, the question is one of law. Washington v. Milbank Ins. Co., 551 N.W.2d 513, 515 (Minn. Ct. App. 1996). The undisputed testimony of record is:

- Dr. Baker at all times had the ultimate right to control the SIGS assets and at all times the accounts were liquid. (T. 460-61.)
- During the marriage, Dr. Baker hired and paid a financial advisor to help manage the SIGS assets. (T. 454-55.)
- During the marriage, Dr. Baker directed the SIGS assets be sent to various brokerage firms. (T. 457, 711-13.)
- During the marriage, Dr. Baker did not solely rely on his hired financial advisor. Dr. Baker could transfer money away from his hired financial advisor at any time and did so. Dr. Baker decided to remove \$500,000 from the hands of his financial advisor and place it elsewhere. On one occasion, Dr. Baker, without the advice of his hired financial advisor, made the investment decision to purchase a stock using SIGS assets. (T. 455-56, 457, 712-13.)³

² Dr. Baker cites to Hope v. Hope, 2000 WL 1182796 (Minn. Ct. App. 2000). (R.A. 74.) Hope involved a trust created prior to the parties' marriage and to which neither party made financial contributions during the marriage. Id. There was no evidence as to any type of advice given by appellant, the husband, to respondent, the wife, as to management of the trust assets. Hope does not support the trial court's decision in this case.

³ In his brief, Dr. Baker conveniently ignores Mr. Trask's testimony regarding Dr. Baker's decision to invest in stock associated with his son, which testimony Dr. Baker does not refute. (T. 455-56.) Dr. Baker reluctantly acknowledges that he transferred \$500,000 away from Mr. Trask's hands to Charles Schwab, and asserts he did so "on the advice of his accountant to reduce the annual fees." (Respondent's Brief, p. 11.)

The trial court's conclusion, based on these undisputed facts of record, that Dr. Baker was a "passive investor" and the appreciation is nonmarital is a legal conclusion not binding on this Court. Washington, 551 N.W.2d at 515. Further, Dr. Baker's statement on appeal that "Dr. Baker's involvement consisted of opening and filing away the monthly statements he received in the mail" is contrary to the record. (Respondent's Brief, p. 33.) The appreciation under these undisputed facts is marital property as a matter of law.

The trial court states that appreciation is not marital funds "simply because the spouse in question retains the ultimate right to control the funds, or because he hires a financial advisor to manage the funds."⁴ (Finding of Fact XV; A. 22.) But Dr. Baker not only controlled the funds, he hired and paid someone a fee out of the marital estate to manage the funds. Dr. Baker then acted independently of his paid financial advisor when he chose to do so. Dr. Baker, in conjunction with his agent, actively managed the assets to make more money. Dr. Baker's decision to hire someone to move his money around does not make the appreciation nonmarital, as the trial court has erroneously ruled.

Dr. Baker quotes from Gottsacker v. Gottsacker, 664 N.W.2d 848 (Minn. 2003). Gottsacker dealt with Subchapter S corporate income where "the shareholder spouse has little to no control over whether to retain or distribute the earnings and it is not active appreciation when no marital effort was expended to increase the value of the stock interest." Id. at 858 (emphasis in original). In contrast, the SIGS assets were available to

⁴ The trial court adopted its finding in this regard verbatim from Dr. Baker's proposed finding. (S.A. 20.)

Dr. Baker as a liquid asset, he could take the money out if he so chose, and he expended marital effort to increase the value of that asset.

Dr. Baker cites White v. White, 521 N.W.2d 874 (Minn. Ct. App. 1994). But White also offers no support for Dr. Baker's position. In White, the nature of the accounts prohibited entrepreneurial decisions from being made. Once the participant elected how his initial investment would be made, the participant had no further control over the investments. Id. at 876. The same is not true here.

Dr. Baker, in a lengthy footnote, attacks Ms. Baker's citation to the New York decision in Greenwald v. Greenwald, 565 N.Y.S.2d 494 (N.Y. App. Div. 1st Dep't 1991). Dr. Baker asserts that New York law on the active/passive distinction had nothing to do with Minnesota's law on classification of assets. (Respondent's Brief, p. 33, n. 25; emphasis in the original.) The Minnesota Supreme Court disagrees. In Nardini, the Minnesota Supreme Court turned to the active/passive appreciation rationale in New York law to support its holding. 414 N.W.2d at 194, n. 8.

Moreover, Dr. Baker is simply wrong that the New York Court's decision in Greenwald rested on the fact that the husband's activities made the account active. Rather, the New York court held that it did not matter whether the increase or decrease in value was due to the husband's investment strategy and decisions in conjunction with his financial adviser or were made "exclusively by the titled spouse's financial advisor. Though he/she acts through an agent, the decisions are those of the titled spouse and the

results, be they beneficial or adverse, are the product of his/her labors, not random market fluctuations.” 565 N.Y.S.2d at 502.

Dr. Baker cites this Court’s example in Swick v. Swick, 467 N.W.2d 328, 331 (Minn. Ct. App. 1991), rev. denied, of a painting which the owner has a right to control but the appreciation is nonmarital. Unlike the hypothetical painting, time, effort and money have been contributed to and commingled with the nonmarital asset during the parties’ marriage. This is not like the situation where one party brings into the marriage a piece of art or piece of property which simply sits and appreciates in value.

In essence, Dr. Baker’s argument is not so much with Ms. Baker, but with Minnesota law. Marriage is a financial partnership and the presumption under Minnesota law is that all assets acquired during the marriage are marital property. As this Court has stated, “increases in value during marriage attributable to efforts of the spouses, whether by financial investment, labor or entrepreneurial decision making are marital property.” White, 521 N.W.2d at 878. That is what undisputedly occurred in this case. As a matter of law, the amount of the SIGS assets in excess of the balance at the time of marriage is marital property.

B. Dr. Baker Did Not Meet His Burden of Proof That Current Retirement Assets Are Traceable to Nonmarital Property.

1. Mr. Harges did not trace the nonmarital property into the present accounts.

The record stands undisputed that Dr. Baker’s SIGS assets have been commingled with marital contributions throughout the parties’ marriage. And throughout the parties’

marriage, those commingled funds have been rolled over into various accounts. Tracing is the tracking of nonmarital property from its original form into its current form. What Dr. Baker refers to as tracing is not tracing at all. Dr. Baker did not trace his stocks or other investments in the SIGS plan on the date of the marriage to those assets in existence at the time of dissolution. Mr. Harges did not trace because he could not identify the form of the property that Dr. Baker owned on the date of the marriage. (T. 213-14, 220-21.) All Mr. Harges did was perform a pro rata calculation based on the percentage of funds owned before the marriage and the funds deposited after marriage, without any tracing of actual assets.⁵ In Crosby v. Crosby, 587 N.W.2d 292, 296-97 (Minn. Ct. App. 1998), rev. denied, this Court held that was legally insufficient.

Like Crosby, the Bakers regularly commingled nonmarital and marital funds “to such extent that deposited nonmarital funds lost that character.” Id. Like Crosby, the fact that nonmarital assets were the primary source of funds is “insufficient to establish the nonmarital character of assets acquired during the marriage.” Id.

Dr. Baker bases his claim that he met his burden of proof based solely on this Court’s decision in White. White does not support such a ruling here.

In White, there was no challenge concerning the valuation of the TIAA/CREF accounts. 521 N.W.2d at 874, n. 1. Specifically, the trial court accepted a valuation to

⁵ Contrary to Dr. Baker’s assertion, Ms. Baker made the same argument post-trial that is being made on appeal. (Petitioner’s Memorandum in Support of Motion for Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree or for a New Trial, pp. 3-4, dated December 28, 2005.) There is no change in theory on appeal, as Dr. Baker asserts on page 32 of his brief.

which the TIAA/CREF would have increased during marriage had White terminated employment on the date of marriage and made no further contributions during the marriage. In the accounts at issue in White, the participant elected how the investments would be made at the inception, but had no further control over the investments. 521 N.W.2d at 874. Money could not be advanced or withdrawn until termination of employment or retirement. Id.

Unlike White, Mr. Harges did not opine as to the increase in value of the SIGS assets if there had been no contributions during the marriage. Dr. Baker states on appeal that “[i]n effect, the Harges analysis discloses what the accounts would be worth today if they contained only the premarital contribution and the amount by which that amount appreciated during the marriage.” (Respondent’s Brief, p. 29.) That is not true. Mr. Harges offered no such testimony, nor could he, because of the commingling and transfers that occurred throughout the marriage. Unlike White, money here could be withdrawn and funds were moved from investment to investment. (T. 211-12, 214, 460-61.) White does not support Dr. Baker’s pro rata approach and the trial court’s adoption of that approach.

The presumption of marital property is crucial to Minnesota’s statutory scheme. The goals of Minnesota’s statutory scheme are the efficiency goal of minimizing contentious litigation “tracing” the origin of particular acquisitions by either spouse and the substantive goal of recognizing both spouses as partners. Levy, An Introduction to

Divorce-Property Issues, 23 Fam. Q. 147, 151-52 (Summer 1989). The trial court's ruling based on Mr. Harges' testimony runs contrary to those goals and should be reversed.

2. Trial court failed to follow Minnesota law, which mandates that an asset acquired with income generated from a nonmarital asset is a marital asset.

Under Minnesota law, an asset acquired with income generated from a nonmarital asset, such as shares purchased with reinvested dividends, becomes marital property.

Nardini, 414 N.W.2d at 194. Mr. Harges did not factor into his marital/nonmarital formula that an asset acquired with income generated from a nonmarital asset – such as shares purchased with reinvested dividends – is marital property. (T. 212.) Prahl v. Prahl, 627 N.W.2d 698, 706 (Minn. Ct. App. 2001); Swick, 467 N.W.2d at 331 (“Because such income [cash dividends from stock, interest earned from stock debentures and interest earned on certification of deposits] acquired during marriage is marital property, any assets acquired with the income generated by a nonmarital asset are also marital property divisible upon dissolution.”).

The trial court ignored this fact in adopting Mr. Harges' marital/nonmarital allocation and Dr. Baker ignores that error on appeal. (Finding of Fact XV; A. 21.) The division of assets based on Mr. Harges' mathematical formula is contrary to Minnesota law and must be reversed.

3. Ms. Baker is not seeking a new trial but amended findings of fact and conclusions of law.

Dr. Baker expends much effort on the fact that a new trial is not being sought in this case. (See Respondent's Brief, pp. 20-21.) Ms. Baker has raised no evidentiary

ruling or trial procedure issues which require a new trial. Rather, her position is that the trial court's findings and conclusions of law, as challenged by her on appeal, cannot stand based on the evidence of record as applied to Minnesota law. Rathbun v. W.T. Grant Co., 300 Minn. 223, 219 N.W.2d 641, 651 (1974). This is in accord with her post-trial motion for amended findings of fact and conclusions of law. On this record, the SIGS assets, in excess of the amount owned by Dr. Baker on the date of the parties' marriage, are marital property.

II. THE TRIAL COURT COMMITTED ERROR IN FAILING TO CONSIDER THE INTANGIBLE ASSET OF GOODWILL AS PART OF THE MARITAL PROPERTY ATTACHED TO THE BUSINESS KNOWN AS DANIEL R. BAKER, M.D., P.A.

While acknowledging that Patrick Schmidt was retained by both parties to appraise the parties' business interests, Dr. Baker fails to acknowledge his own dispute with Mr. Schmidt's valuation of Daniel R. Baker, M.D., P.A. (Baker P.A.). (See Respondent's Brief, p. 16-17.) Mr. Schmidt refused to include personal goodwill attributable to Dr. Baker in his valuation of Baker P.A., but did include in his valuation "some institutional goodwill." (A. 163). In response to inclusion of institutional goodwill in his valuation, Dr. Baker's attorney requested that Mr. Schmidt provide a valuation without such institutional goodwill. (A. 158). Mr. Schmidt complied, but remained firm that the business valuation of Baker P.A. for this marital dissolution proceeding should include the institutional goodwill value assigned by him. (Id.)

At trial, Mr. Schmidt testified, in accord with his written report, that Baker P.A.'s valuation for this marital dissolution action should include institutional goodwill at an assigned value of \$73,000. (T. 322; A. 158). This value is not based on Dr. Baker's personal efforts but on the value of such things as having a lease in place. (Id.) At no time did Mr. Schmidt testify that such institutional goodwill required a noncompete agreement, as Dr. Baker asserts on appeal. Instead, Mr. Schmidt testified that if personal goodwill was being added – which Mr. Schmidt valued at \$365,000 – a noncompete by Dr. Baker would be needed in return. (T. 327-28). Mr. Schmidt did not testify that a noncompete would be necessary of Dr. Baker if the valuation of the business included institutional goodwill at a value of \$73,000.⁶

The trial court accepted the valuation assigned by Mr. Schmidt minus the institutional goodwill because the trial court erroneously concluded that institutional goodwill required a noncompete agreement. Once again, the trial court adopted Dr. Baker's proposed findings in this regard word for word. (Compare A. 12-19 with S.A. 11-17.)⁷ The trial court committed legal error.

⁶ The trial court rejected Mr. Kaminsky's testimony, so his view on goodwill is irrelevant. (A. 19.) Moreover, as explained in Ms. Baker's initial brief to this Court, Mr. Kaminsky also testified his goodwill was not tied to Dr. Baker personally. (T. 363.) The amount paid would be the same regardless of whether Dr. Baker retired or not. (T. 364-65.)

⁷ Most of the trial court's post-trial order at A. 50 is also taken word for word from Respondent Dr. Baker's Memorandum in Opposition to Motion for Amended Findings of Fact and Conclusions of Law or for a New Trial, dated February 2, 2006.

Fundamentally, the trial court misunderstood the difference between personal goodwill, which derives from a person's reputation, and enterprise/institutional goodwill, which is separate and distinct from the presence and reputation of the individual. Enterprise/institutional goodwill is a marital asset and is to be included in a divorce valuation. (T. 327-28.) Goodwill was wrongly excluded by the trial court in valuing Baker P.A.

III. DR. BAKER DISSIPATED MARITAL ASSETS.

On appeal, Ms. Baker is not challenging the trial court's rejection of her claim that Dr. Baker dissipated \$289,500 of marital assets by making loans to the parties' children. Therefore, Dr. Baker's initial discussion on pages 38-39 of his brief is simply not relevant to this appeal. Ms. Baker's claim of dissipation is that as set forth on her brief on appeal on pages 32-33.

Expenditures by Dr. Baker for his attorney's fees for this dissolution proceeding out of marital assets is a dissipation of marital assets. Such an expenditure violates Minn. Stat. § 518.58, subd. 1(a), because marital funds were used other than to meet necessary living expenses or the necessities of life and such an expenditure reduced the marital estate available for division without the consent of Ms. Baker.

Dr. Baker, like the trial court, offers no justification for allowing Dr. Baker to pay his attorney's fees for this marital dissolution action from marital property and not factoring that amount into the division of property. (A. 63.)

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS AWARD TO MS. BAKER OF PERMANENT SPOUSAL MAINTENANCE.

A. Dr. Baker Fails to Abide by the Standard of Review.

A district court's spousal maintenance award will not be reversed unless there has been a clear abuse of discretion. Erlandson v. Erlandson, 318 N.W.2d 36, 38 (Minn. 1982).

In setting out the facts for the issues Ms. Baker raises on appeal, she has done so in accord with the standard of review and has presented the facts in a light most favorable to the district court's decision. In contrast, Dr. Baker, when challenging the award of spousal maintenance pursuant to his notice of review, has failed to follow the standard of review. Dr. Baker's statement of facts on pages 3-9 which are directed at the spousal maintenance issue are not in accord with the standard of review. Dr. Baker has presented the facts in a light most favorable to himself and ignores the record that supports the trial court's findings.

B. Trial Court Adequately Considered Statutory Factors.

Minn. Stat. § 518.552, subd. 2 sets out the factors to be considered in determining the amount and duration of a maintenance award. No single factor is dispositive and each case must be determined on its own facts. Erlandson, 318 N.W.2d at 39. "The district court is not required to make specific findings on every statutory factor if the findings that were made reflect that the district court adequately considered the relevant statutory factors." Peterka v. Peterka, 675 N.W.2d 353, 360 (Minn. Ct. App. 2004).

The record reflects, and the findings reveal, that the trial court considered all of the relevant statutory factors. (A. 25-29.) The trial court's award should be affirmed.

1. Ms. Baker is not capable of being employed and contributing to her own support.

The parties were married for 15 years. Ms. Baker is unemployed and has not worked outside the home since 1998. (T. 14.) The trial court found as fact that “[Ms. Baker] is not capable of being employed and contributing to her own support.” (Finding of Fact XVIII; A. 26.) The trial court also found as fact that:

- The parties had reached an accommodation whereby Ms. Baker remained at home to provide for Dr. Baker's needs;
- With Ms. Baker's medical problems, “it is not possible to conclude that she could return to the field of professional nursing at this time.”

(Finding of Fact XVIII; A. 27.) These findings are fully supported by the record and the trial court did not abuse its discretion in so finding.⁸

As the record reflects, Ms. Baker was 57 years old at the time of trial and she suffers from the following health problems: osteoporosis in her spine and left hip; arthritis in her feet, hands and back; vertebra that are compressing nerves; a neck injury that causes her left arm to be weak and two fingers to be numb; and some permanent nerve damage. (T. 17; A. 26.) Ms. Baker is unable to return to working in a hospital or clinical setting because her health issues preclude her from doing the heavy lifting and

⁸ Dr. Baker ignores the testimony of record that when Ms. Baker quit working outside the home she did all the work at the parties' home and took care of Dr. Baker's grandchildren as well. (T. 15.)

other physically intensive work that such work requires because she has no clinical experience. (T. 22; A. 27-28.) Additionally, the rapid technological changes that have occurred since Ms. Baker left the nursing field make much of Ms. Baker's knowledge outdated. (T. 21-22.) Ms. Baker lacks the masters degree that you would need in order to work in either a management position in nursing or a teaching position. (Id.)

Dr. Baker points out he called a vocational rehabilitation expert to testify. At the eleventh hour, Dr. Baker did call Jan Lowe as a witness at trial. (T. 785.) Ms. Lowe does not support Dr. Baker's request for reversal. Ms. Lowe is an employability consultant with Rehabilitation Counselors. (T. 797.) Ms. Lowe did not interview Ms. Baker and she made no assessment of her other than reading her resumé. (T. 804-05.) Ms. Lowe also testified that she was given a few pages from a transcript of Ms. Baker's testimony, but not her entire testimony. (T. 805.) Ms. Lowe testified she did not know what the competition was for any of the particular jobs she surveyed in her market survey. (T. 813.) And as the trial court found as fact, "Ms. Lowe made no inquiry about whether [Ms. Baker] had physical conditions which would prevent her from returning to her field of nursing." (Finding of Fact XI; A. 7.) Ms. Lowe "was unable to make any correlation between [Ms. Baker] as an appropriate candidate for those jobs and the job in question." (A. 7.)

Dr. Baker also argues that income should be imputed to Ms. Baker when determining the amount of Dr. Baker's spousal maintenance. However, generally, in order to impute income to a party for the purpose of setting maintenance, the court must

find that the party is voluntarily underemployed in bad faith. Carrick v. Carrick, 560 N.W.2d 407, 410 (Minn. Ct. App. 1997). Here, Ms. Baker has not worked outside the home since 1998 and she is unable to return to work at the only occupation which she has ever worked: nursing. It is not appropriate to impute income where a homemaker maintains the same employment status at the time of the dissolution that she maintained during the majority of the parties' marriage.

Dr. Baker seeks reversal based on Schallinger v. Schallinger, 699 N.W.2d 15 (Minn. Ct. App. 2005), rev. denied. In Schallinger, the spouse seeking maintenance had remained in the workforce throughout the marriage and the trial court had found that "she had maintained sufficient education and training to enable her to find appropriate employment to become fully self supporting." Id. at 22. The trial court's findings in this case do not support reversal based on Schallinger.

2. Dr. Baker has the ability to meet his needs and contribute to Ms. Baker's support.

a. The trial court's finding is the finding proposed by Dr. Baker.

Before the trial court post-trial, Dr. Baker did not challenge the trial court's award of spousal maintenance.⁹ On appeal, Dr. Baker complains that "the trial court failed to make a finding as to Dr. Baker's current income or earnings." (Respondent's Brief,

⁹ Dr. Baker on February 2, 2006 filed a counter motion asking the court to deny Ms. Baker's motion for amended findings of fact and conclusions of law. He did not file a post-trial motion challenging the trial court's award of spousal maintenance to Ms. Baker.

p. 44.) But the trial court adopted verbatim Dr. Baker's proposed finding in this regard. The trial court found, as proposed by Dr. Baker, that "[a]s long as he remains employed as a medical doctor, he will have the ability to meet his needs and contribute to [Ms. Baker's] support." (Compare A. 28 with S.A. 26.) If there was error in this regard, which Ms. Baker disputes, the error was invited by Dr. Baker and cannot now be attacked by Dr. Baker on appeal. McAlpine v. Fidelity & Cas. Co., 134 Minn. 192, 158 N.W. 967, 970 (1916).

b. Facts support Dr. Baker's ability to meet needs of both parties.

There is no question that Dr. Baker has the ability to meet his needs while meeting those of Ms. Baker. Dr. Baker has built a successful medical practice during the parties' 15 year marriage. (T. 45.) During the parties' marriage, Dr. Baker retired from one surgical practice and started his present surgical practice known as Daniel R. Baker, M.D., P.A. (T. 554, 561-62.) This business has been propelled during the parties' marriage from a start-up to an ongoing successful practice. (T. 487.) Dr. Baker is actively involved in his practice, performing approximately 35% of the total surgeries and managing three other surgeons plus a professional staff. (T. 487, 547, 565, 657-58.)

Dr. Baker has historically received gross annual income of approximately \$639,220, broken down as follows: \$565,220 in gross income, \$50,000 in schedule C business income (based on an average of the past three tax years), \$5,000 in interest/dividend income (3 year average) and \$19,000 in social security income. (See

Trial Ex. 5, 6, 7; T. 369-71.) Dr. Baker's income from his surgical practice alone is as follows:

- 2001 - \$428,169 (Trial Ex. 5)
- 2002 - \$698,153 (Trial Ex. 6)
- 2003 - \$598,000 (Trial Ex. 7)
- 2004 - \$593,000 (T. 651)

Dr. Baker's income from his surgical practice, therefore, has averaged \$579,000 per year.

The evidence also shows that the first quarter earnings of the surgical practice for 2005-2006 fiscal year were \$425,000, which when annualized was \$1.7 million for 2005 (compared to \$1.8 million in the prior year). (T. 319-20.) Howard Kaminsky, a certified public accountant, explained that if Dr. Baker paid Ms. Baker \$10,400 in monthly maintenance, he would still have \$26,267 each month, even after paying maintenance, with which to meet his own monthly expenses of \$10,312. (Trial Ex. 61; T. 329.)

Dr. Baker is the sole owner/shareholder of Baker P.A. (T. 565.) He is the boss and sets the compensation. (T. 565.) Dr. Baker has exclusive control to determine what his and others' monthly and annual pay will be and set bonuses. (Id.) Although Dr. Baker performs 35% of the surgeries, he testified that he recently reduced his salary to \$90,000 per year. (T. 611-12.)¹⁰ With respect to his employees, Dr. Jeffrey Baker has an annual salary of \$280,000; Dr. Fred Johnson has an annual salary of \$325,000; and the most recently added physician, Dr. John Krook, has an annual salary of \$280,000. (T. 653, 655.) In contrast to Dr. Baker's claimed salary reduction, Dr. Jeffrey Baker only

¹⁰ In addition, Baker P.A. receives \$7,500 a month from Allina which is attributable solely to Dr. Baker's work. (T. 691-92.)

recently accepted a 13% pay reduction, with Dr. Johnson accepting a 25% reduction.

Dr. Krook's salary was not reduced. (T. 491-92.)¹¹

Dr. Baker also testified that he has looked at other jobs. Dr. Baker testified that if he sold Baker P.A. he could obtain other employment in the medical field. (T. 657-58.)

The record supports the trial court's finding that Dr. Baker can meet his own needs and pay the ordered support.

3. Findings as to Ms. Baker's mortgage obligation are not inconsistent.

Dr. Baker asserts the trial court made inconsistent findings as to Ms. Baker's mortgage obligation. The trial court, in setting out Ms. Baker's income and expenses, finds that Ms. Baker has a \$262,900 mortgage on her home. (Finding of Fact XI; A. 8.) The trial court also acknowledges in its findings that if Ms. Baker were to use the \$300,000 awarded to her and pay off that mortgage, she would have little in the way of income-producing assets. (Finding of Fact XVIII; A. 26.) The trial court further found as fact that Ms. Baker "will receive some funds by way of property division; however, she must preserve those in order to properly care for herself in the future." (Finding of Fact XVIII; A. 27.) Those statements are not inconsistent and do not constitute reversible legal error.

¹¹ There was no testimony as to what Dr. Baker expected to be paid in bonuses. In 2004, for example, Dr. Baker's bonuses were over \$300,000. (T. 531.) Dr. Johnson's were approximately the same. (T. 532.)

What Dr. Baker ignores is that while he paid his lawyer out of marital assets which then were not factored into the divorce allocation, Ms. Baker was not allowed to do the same. Ms. Baker has had no choice but to pay her attorney out of the \$300,000 awarded, which expense is not included in her monthly budget. (Trial Ex. 2; A. 38.) There is not, in fact, \$300,000 available to Ms. Baker to pay off the home's mortgage. The rest of the property division, as the trial court found and the record reflects, is not liquid and is in the form of retirement assets. (Finding of Fact XVIII; A. 26.)

It should be noted that Ms. Baker asserted her reasonable monthly expenses are \$7,946. (Trial Ex. 2; T. 34.) She needed \$10,400 in monthly spousal maintenance in order to provide her with sufficient after-tax income to meet her \$7,946 in expenses. The trial court instead awarded her \$8,764 to meet a budget of \$6,841. (A. 29.)¹² Dr. Baker claims reasonable monthly expenses of \$10,312. (Trial Ex. 268; T. 644.) Obviously, Ms. Baker's monthly expenses are commensurate with the parties' standard of living. The trial court's award of permanent spousal maintenance should be affirmed.

CONCLUSION

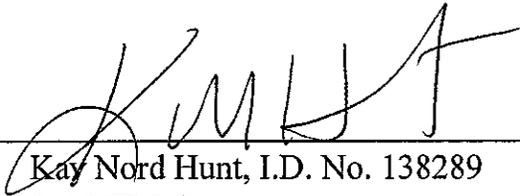
For the reasons set forth above, Appellant respectfully requests that the Judgment and Decree be reversed with regard to the trial court's determination and allocation of the SIGS retirement assets as nonmarital property and the trial court's failure to include goodwill as part of the Daniel R. Baker, M.D., P.A. marital asset. Further, the amount

¹² During the pendency of the divorce, Dr. Baker paid \$7,300 a month in temporary maintenance, during which time Ms. Baker did not have to pay for medical insurance. (T. 33.)

dissipated by Dr. Baker should be ordered added back into the marital assets, which amount should be set aside as part of Dr. Baker's division of marital property. In the alternative, and due to Dr. Baker's dissipation of marital assets through payment of his attorney's fees, Dr. Baker should be ordered to pay Ms. Baker's attorney's fees. The award of permanent spousal maintenance should be affirmed.

Dated: September 21, 2006

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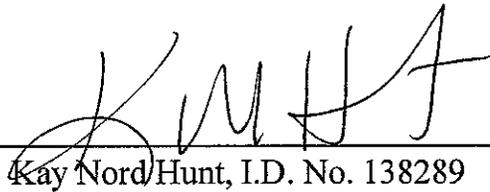
CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 5,258 words. This brief was prepared using Word Perfect 10.

Dated: September 21, 2006

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

BY

A handwritten signature in black ink, appearing to read 'K. Nord/Hunt', is written over a horizontal line. The signature is stylized and cursive.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).