

NO. A06-1252

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State of Minnesota  
**In Court of Appeals**

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Carol Bernice Baker, petitioner,

*Appellant,*

vs.

Daniel Remember Baker,

*Respondent.*

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**RESPONDENT'S BRIEF AND APPENDIX**

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## LEGAL ISSUES

1. Does the evidence support the trial court's allocation between the marital and nonmarital components of Dr. Baker's retirement accounts?

Trial court ruled (implicitly) in the affirmative.

*Most Apposite Authorities:*

*Duffey v. Duffey*, 416 N.W.2d 830 (Minn. App. 1987), *review denied* (Minn. Feb. 24, 1988)

*Hope v. Hope*, No. C5-00-287 (Minn. App. Aug. 22, 2000), 2000 WL 1182796

*White v. White*, 521 N.W.2d 874 (Minn. App. 1984)

*Chamberlain v. Chamberlain*, 615 N.W.2d 405 (Minn. App. 2000), *review denied* (Minn. Oct. 25, 2000)

2. Did the trial court abuse its discretion in excluding from the valuation of Dr. Baker's medical practice a component for good will, where both parties' experts agreed a buyer would pay for good will only if Dr. Baker signed a noncompetition agreement?

Trial court ruled (implicitly) in the negative.

*Most Apposite Authorities:*

*Lowe v. Lowe*, 372 N.W.2d 65 (Minn. App. 1985)

*Sweere v. Gilbert-Sweere*, 534 N.W.2d 294 (Minn. App. 1995)

3. Did the trial court abuse its discretion in rejecting Ms. Baker's dissipation claim?

Trial court ruled (implicitly) in the negative.

*Most Apposite Authorities:*

*Volesky v. Volesky*, 412 N.W.2d 750 (Minn. App. 1987)

Minn. Stat. §518.58, subd. 1a

4. Did the trial court err in awarding Ms. Baker maintenance of \$8,764 per month where the award was based on inconsistent findings of fact with respect to her budget, an omission of necessary findings as to Dr. Baker's income and ability to pay, and erroneous findings as to Ms. Baker's ability to contribute to her own support through investment and employment?

*Most Apposite Authorities:*

*Schallinger v. Schallinger*, 699 N.W.2d 15 (Minn. App. 2005)

*Lyon v. Lyon*, 439 N.W. 2d 18, 21-22 (Minn. 1989)

Minn. Stat. §518.552

## STATEMENT OF FACTS<sup>1</sup>

**A. Background.** The parties married in May of 1990, and separated 13 years later. (A.3; I T. 33)<sup>2</sup> Ms. Baker was age 42 at the time of the marriage; Dr. Baker was 54. (A.2) Both had been married and divorced before, and their respective children – all adults – are from those earlier marriages. (I T. 10, 15)

The parties stipulated to marital and nonmarital values of nearly all their assets. (A.3) Issues tried included spousal maintenance, the value of Dr. Baker's medical practice, the proper allocation between marital and nonmarital components of Dr. Baker's retirement accounts, Ms. Baker's "dissipation" claim, and the value and character (marital or nonmarital) of certain real-estate and partnership interests. (A.1 to A.48)

In the decree, entered in November of 2005, the marital estate of nearly \$2.3 million was divided evenly between the parties. Included in Ms. Baker's marital award of \$1,147,316 were, *inter alia*, \$300,000 cash, \$402,557 in profit-sharing funds, \$317,100 equity in her homestead, and \$92,500 equity in her cabin. (A.47 to A.48) In addition, she

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<sup>1</sup> The case was tried over five days in May of 2005. The transcript covers 827 pages and is divided into six volumes. References to the transcript will be made as follows: "[Volume] T. [Page number]". The six volumes are the following:

Volume	Date	Pages
I	05/02/05	1 - 164
II	05/03/05	165 - 247
III	05/03/05	248 - 398
IV	05/04/05	399 - 583
V	05/16/05	584 - 781
VI	05/17/05	782 - 827

<sup>2</sup> References to "A.[page number]" are to pages in the Appellant's Appendix.

was awarded \$180,342 as her nonmarital property, including \$71,250 in North Dakota land, and the entirety of her nurse's pension (\$83,170), her retirement account (\$22,512), and her IRA (\$8,424). (A.47 to A.48)

In addition to those property awards, Ms. Baker was awarded permanent spousal maintenance of \$8,764 per month (\$105,168 per year). (A.34)<sup>3</sup>

**Ms. Baker's Employment History.** Ms. Baker worked as a nurse from 1970 until 1998, when, at age 50, she decided to stop. (RA-1<sup>4</sup>; I T. 12-14) She received an L.P.N. degree in 1970, an Associate Degree in nursing in 1974, and a B.S. degree in nursing from Augsburg College in 1990, where she was on the Dean's List and maintained a 3.57 grade-point average. (RA-1; I T. 9-10)

She worked as a full-time nurse at Abbott Northwestern Hospital in Minneapolis for 2-3 years (from 1970 to 1972) on a 24-bed surgical unit, and spent the next 16 years working full time at North Memorial Medical Center in Robbinsdale in a variety of positions, including the following:

- Assistant Head Nurse on a 63-bed Cardiovascular unit
- Acting Manager of 35-bed Acute Medical-Surgical Unit
- Assistant Head Nurse on a 43-bed Acute Neurology and Medical-Surgical Unit
- Staff Nurse on a 38-bed Orthopedic Unit

(RA-1)

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<sup>3</sup> Ms. Baker testified that she wants to own her house without a mortgage. (I T. 96, lines 15-17) Her monthly mortgage payment, which she included in her budget, is \$2,634. (I T. 95-96)

<sup>4</sup> "RA" refers to the Respondent's Appendix, *post*.

In May of 1990, when she married Dr. Baker, she was 42 years old and held the full-time Cardiac Nursing position in the 63-bed unit at North Memorial mentioned above. (I T. 12-13)

Some time after the marriage – her testimony is unclear – Ms. Baker reduced her hours. (I T. 13) She became a part-time cardiac nurse and a part-time Clinical Nursing Instructor at Anoka/Ramsey Technical College. (*Id.*) Toward the end of 1998, she stopped working altogether. (I T. 14) She didn't discuss that decision with Dr. Baker, but just "assumed" he had no objection. (I T. 15) He was working and, in her opinion, there was no need for her to work as well. (I T. 17)

In late 1998, Ms. Baker approached Dr. Baker about purchasing a house in North Oaks, Minnesota. (V T. 614) She told him she really wanted to buy it. (V T. 614-15) Dr. Baker explained that the house was "very expensive" and its purchase would be "a huge financial commitment". (V T. 615) He explained that they already had a home, that he was close to retirement, and that he did not believe it wise to take on this new obligation. (*Id.*) Ms. Baker told him that if they bought the house, she would return to work and make the monthly mortgage payments until it was time for her to retire, when they could sell it. (*Id.*) Dr. Baker agreed. (*Id.*)

Ms. Baker never returned to work after 1998, and never contributed to the mortgage payments on the North Oaks home. (V T. 615) She is still licensed as an RN, and has continued to meet all her continuing-education requirements through the present. (I T. 82) Despite this, and despite conceding that there is currently a very high demand for registered nurses in the Twin Cities area, she has not made any effort in the past few years to find

employment as a nurse or teacher, either full or part time, or any inquiry at all into positions for which she is qualified. (I T. 83-84)

She has been working, but not for pay. She has chosen to do “a lot of volunteer work” in her church. (I T. 22) She serves on the Board of Directors of Luther Seminary, does “facilitator group training” at the church, and provides “spiritual care” to hospital patients and “shut-ins”. (I T. 22-23) Her church does have some paid positions involving the work she does – paying \$10 to \$15 dollars per hour – but she has not inquired into any of those positions. (I T. 92)

At the time this dissolution action was commenced, she told Dr. Baker that “retirement was her life-style” and she had no intention of ever returning to work. (V T. 616)

At trial, Ms. Baker testified that it would be difficult for her to work as a nurse because technology has changed and she could not “do the heavy clinical work” of a nurse because she has some lifting and other physical limitations. (I T. 21-22) She offered no details on technology changes; she did offer excerpts from her medical records (Ex. 9, received at V T. 597) but no medical testimony on any physical restrictions.

**Dr. Baker’s Employment History.** Dr. Baker’s employment history is covered in detail in Finding of Fact XII in the judgment and decree. (A.9 to A.12) At the time of his marriage to Ms. Baker in 1990, Dr. Baker still worked for the same general surgery practice he had started 20 years earlier. (A.9) In 2000, he retired from that practice and started a new one, this time specializing in bariatric surgery, then a relatively-new procedure for treating the obese. (*Id.*) At that time, his was one of only four medical practices in the Twin Cities specializing in this type of surgery. (*Id.*)

Susan Clark is a health-care business consultant who has been working with Dr. Baker's medical group since 2001. (IV T. 480-82) Both she and Dr. Baker testified about the current state of Dr. Baker's medical practice. Ms. Clark has had to become more involved in the day-to-day operations since October of 2004. (IV T. 485) Through the middle of that year, the practice group was performing 80 surgeries a month. (IV T. 487) By September of 2004, the number had dropped to the mid-50's, and has remained at that level ever since. (IV T. 488) Since surgeries generate nearly 100% of the revenues of the practice (IV T. 488), this decline has had a direct, adverse effect on gross revenues. (IV T. 488-89) The decrease was not reflected in the books immediately because the practice is on a cash basis, and there is a three-month delay in the receipt of payments for surgeries. (IV T. 489-490)

As a result, Dr. Baker has cut as many expenses as he could and attempted to increase revenues. (IV T. 490-91, 600) Two of the surgeons have accepted a 25% cut in salary (IV T. 491-92, 601, 767-68), and Dr. Baker's salary was reduced to \$84,000 a year (IV T. 496-97, 575-79). In fact, in some months, he received no salary at all because there was no money to pay him. (IV T. 496-97) In January of 2005, he had to lend the practice \$60,000, a loan the practice has been unable to repay. (IV T. 498, 579-580) Contrary to past practice, the surgeons in the group now pay personally for the time of their surgical assistants. (IV T. 569, 655, 750) A full-time, non-physician employee was terminated to cut costs, and two surgical technicians were asked to cut their hours. (IV T. 498) The reduction in revenues has amounted to 39%, and the practice has been and is operating at a loss. (IV T. 499, 505) A physician capable of performing laparoscopic bariatric surgery – a kind of surgery none

of the other physicians in the group could perform – was hired in an attempt to attract more patients and avoid having to refer elsewhere patients desiring or needing that procedure. (IV T. 540-41, 572-73)

There were two primary reasons for this downturn. First, the field of bariatric surgery has expanded locally. (IV T. 493) While Dr. Baker was the pioneer in this field, the surgery has become more popular over time and several large health-care providers (including Abbott Northwestern, the University of Minnesota, and HealthEast) decided to expand their presence in the field. (IV T. 493) Dr. Baker used to be the only bariatric surgeon in the area; now there are 17. (IV T. 568) Second, the major payors in the local market (including Blue Cross, Medica, HealthPartners, and Preferred One) implemented a six-month waiting period for patients. (IV T. 494) They now require a patient to undergo six months of a medically-supervised weight-loss regimen before approving any surgery. (IV T. 494) Some of those patients successfully treat their obesity without surgery, and others change their minds about undergoing it. (IV T. 495-96) The result is that the volume of bariatric surgeries across the board is down, for all providers. (IV T. 495-96)

The trial court noted that Dr. Baker has earned in excess of \$500,000 a year in past years, most recently in 2004, but also found that, because of the downturn in the prospects of his practice, earnings at that level are not likely to continue. (A.9) The court noted the evidence that Dr. Baker's current earnings are limited to his salary of \$90,000 per year, but did not make a finding to that effect, or any other finding as to Dr. Baker's current income or earnings. (A.9)

**The Parties' Marital Standard of Living and Ms. Baker's Living Expenses.** The only evidence of the standard of living of the parties during the marriage offered or received at trial was the following testimony by Ms. Baker:

Q: Would you describe your standard of living during that time [1998-2003]?

A: Very, very good, very well. We had a very good standard of living.

(I T. 17)

The court found that Ms. Baker's living expenses are \$6,841 per month. (A.8)

**B. Dr. Baker's Retirement Accounts.**

The parties agreed upon the value of the retirement accounts on the date of the marriage and agreed that that amount was Dr. Baker's nonmarital property. (I T. 67-68) Dr. Baker took the position at trial that those funds appreciated in value in the succeeding years, and that the appreciation of those funds was also nonmarital. Dr. Baker conceded, however:

- that he made contributions to the accounts during the marriage
- that those contributions were marital property
- that the value of those contributions also appreciated in value
- that that appreciation was also marital

Ms. Baker argued below and again argues before this Court that no part of the appreciation of the nonmarital funds in the accounts on the date of the marriage is nonmarital, but that all of it belongs to the marital estate.

**Randy Trask.** Randy Trask is a certified financial planner with Merrill Lynch. (IV T. 452) Mr. Trask recalls a single meeting with the Bakers in late 1991 or January of 1992, shortly after the marriage, during which he presented them with an investment management proposal. (IV T. 452-53) Dr. Baker agreed to the proposal, and, according to Trask, turned

over all his accounts to Trask to manage, at Trask's sole discretion, either personally or through independent money managers that Trask engaged. (IV T. 454-55) The account managers made all the decisions with respect to the accounts during the marriage. (IV T. 454-55; *see also* V T. 619-20 [Testimony of Dr. Baker])

Trask's testimony was as follows:

One of the accounts I manage on a discretionary basis where I make all the decisions. Seven of the accounts, we have hired independent institutional money managers to manage those accounts, and they manage it on a fully discretionary basis.

(IV T. 454) Trask testified he has managed Dr. Baker's for the past 13 years, and that Dr. Baker had simply turned them all over to him to manage. (IV T. 454-55) He described Dr. Baker's role throughout as "very passive". (IV T. 455)

Dr. Baker's expert, Tom Harjes, also testified to his understanding of the relationship between Dr. Baker and Mr. Trask, namely, that Dr. Baker simply pays a management fee to Mr. Trask to manage the accounts at his discretion and the discretion of whatever money managers Trask engages to help (II T. 188-89), and that it had been Mr. Trask who had "directed the accounts" and made the investment decisions over the years (II T. 224).<sup>5</sup>

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<sup>5</sup> The appellant states that Harjes testified that Dr. Baker "had discretion" over the accounts, that he "had the ability" to take action, and that some accounts were "rolled over" into others during the marriage. (Appellant's Brief at 5-6) Dr. Baker concedes that he owned these accounts, and had whatever theoretical rights ownership entails. However, he testified, and the trial court found, that he decided early in the marriage to surrender discretion and control over the accounts to Mr. Trask and did so, and did not exercise control after that. (V T. 619 & A.23) With respect to the appellant's statement that a review of the single-page excerpt from Ex. 265 in her appendix (A.111) showing many different account numbers, the explanation is that there had been several mere name changes (II T. 217) and that, when Trask moved his office from St. Paul to Stillwater, the account numbers on all Dr. Baker's Merrill Lynch accounts had to be changed (II T. 183; *see also* A.23).

**Dr. Baker.** Dr. Baker testified that once he turned over the retirement accounts to Randy Trask, he has not played any role in selecting the investments. (V T. 619) At one point he transferred an account to Charles Schwab on the advice of his accountant to reduce the annual fees, but he made no investment decisions with respect to that or any other account during the marriage. (V T. 757-58)

**Dr. Baker's Expert (Harjes).** Dr. Baker's expert on the marital-nonmarital allocation of his retirement funds was CPA Thomas Harjes. Mr. Harjes' time as a CPA is spent "close to 100 percent" on family law, with a third to half of his work involving an analysis of nonmarital claims. (II T. 168) He has served as a neutral expert, been qualified and testified as an expert, and presented seminars to attorneys, all with respect to the tracing of nonmarital assets. (II T. 168-69)<sup>6</sup>

Ms. Baker stipulated at trial that Mr. Harjes qualifies as an expert under Minn.R.Evid. 702-704 in the field of accounting. (II T. 167) The testimony of Mr. Harjes – direct and cross – covered 80 pages. (II T. 167 - 246)

**The Harjes Report.** Mr. Harjes's report, Exhibit 265, was received without objection. (II T. 170) That report covers some 1,750 pages and consists of the following:

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<sup>6</sup> See RA-20 to RA-23 for his Curriculum Vitae (received as Tab 35 to Exhibit 265 [see II T. 168 & 170]).

**Harjes Report -- Exhibit 265**

Exhibit Index (one page)

Lists and Identifies Contents of Tab 1 through Tab 35 . . . . . RA-24

Trial Exhibit [List] two pages)

Lists and Identifies 33 Summary Exhibits [labeled  
“Schedules”] Pertaining to the Retirement Accounts<sup>7</sup> . . . . RA-25 to RA-26

Schedules 1 through 7e (33 pages)

The 33 Summary Exhibits, or Schedules, Harjes  
Prepared Pertaining to the Retirement Accounts . . . . . RA-27 to RA-59

Actual Tracing Documents (1,750 pages)

Book I:        Contains tracing documents in Tab1 through Tab 25  
Book II:       Contains tracing documents in Tab 26 through Tab 35<sup>8</sup>

Schedule 1 is the one-page, overall summary exhibit which shows the results of Harjes’ analysis of the nonmarital and marital components of each of the 13 retirement accounts at issue. (RA-27) His analysis was based on all relevant information, including the 1,750 pages of tracing documents. (RA-24 & II T. 170-73) The last column for each line on that document (Schedule 1 [RA-27]) is entitled “Source of Information”. Under that column is the number of the particular Schedule which contains the calculations underlying the results shown on that particular line. (*Id.*)

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<sup>7</sup> Harjes prepared 38 summary exhibits, or “Schedules”, but only 33 of them (Nos. 1 through 7e) pertained to the retirement accounts. (*See* RA-25)

<sup>8</sup> These “Books”, obviously, are too voluminous to include in the Respondent’s Appendix. Book I contains 4 inches of documents; Book II contains 3 inches. A ream of copy paper is 2 inches, and contains 500 sheets, or 250 pages per inch. Thus, the two books of tracing documents contain approximately 1,750 pages (7 [inches] x 250 [pages]).

Each supporting schedule is, in turn, a summary exhibit which shows how that particular figure was arrived at. Schedule 1a (RA-28), for example, pertains to the SIGS Pension and Profit Sharing Plan. That schedule shows the balance in the account at the beginning of each year, the amount of contributions made during that year, the amount by which the account appreciated in value during the year, and the appropriate allocation of that increase between its marital and nonmarital components. Each year's totals provide the baseline for the following year's analysis. (II T. 174-76 [discussion by Harjes of Schedule 1a], and RA-28.) The final column for each line entry identifies which of the 33 schedules provide the underlying data for the totals included in each line. Each of those 33 schedules in turn sets forth the underlying data, and the final column of each line of each of those schedules (the final column labeled "Source of Information") identifies the "Tab Number" where the raw underlying data are found. (See RA-30 to RA-59) In most cases, that underlying raw data consist of the actual monthly statements for the account in question. (See RA-24)

In short, the Harjes report consists of a summary exhibit showing the breakdown between the marital and nonmarital components of each retirement account (Ex. 265, Schedule 1 [RA-27) and some 33 supporting tracing schedules (Schedules 1a - 7e, [RA-28 to RA-59], all in turn supported by two large, 3-ring binders containing some 1,750 pages of original tracing documents. The 33 schedules identify by schedule or tab number the precise source of the information for each of the entries in each line of each schedule.

**The Harjes Methodology.** Harjes treated as nonmarital the value of Dr. Baker's retirement accounts on the date of the marriage, and as *marital* all contributions made to the

accounts during the marriage. (II T. 174)

Mr. Harjes then turned to the amount by which each account grew in value each year, and allocated that appreciation as follows: for each year of the marriage, he calculated the percentage of the funds in the account at the beginning of the year which were nonmarital, and the percentage which were marital. He calculated the amount by the which the value of each account increased during the year, and, using these percentages, allocated the increase between its nonmarital and marital components. (II T. 175) Cumulative totals produced the end results. No distributions were made from any of these accounts during the marriage. (II T. 212)

The total value of the accounts at the time of the marriage was \$957,473. (II T. 174) By the valuation date, their value was \$3,318,054. (II T. 172) Contributions made during the marriage totaled \$396,455, and the appreciation on those contributions totaled \$243,122, for a total marital component of \$639,577.<sup>9</sup> The result of the Harjes analysis was that the original nonmarital value, plus appreciation of that nonmarital amount during the marriage, was \$2,678,477; the martial contributions, plus appreciation of those contributions during the marriage, totaled \$639,577. (See II T. 173 and Ex. 265, Schedule I [RA-27].)

The methodology Harjes used is the same one he has used (a) in all cases where he has served as a neutral expert on tracing nonmarital claims, (b) in all 100 or so cases where he has served as any kind of expert on nonmarital issues, that is, as a neutral or as expert for one of the parties, and (c) in all seminars he has conducted for family-law attorneys. (II T.

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<sup>9</sup> See RA-28: Schedule 1a. to Ex. 265 (totals for the columns labeled "Employer Contribution" [\$396,455], Marital – Return" [\$243,122]) .

178-79, 182) He is unaware of his methodology ever having been rejected by the courts. (II T. 180-81)

**Ms. Baker's Evidence on the Retirement Accounts.** Ms. Baker produced no expert testimony, no expert report, and no exhibits on this issue. Her evidence on the issue consisted only of her testimony about the meeting early in the marriage with Mr. Trask, and her counsel's cross-examination of Dr. Baker's witnesses.

**The Trial Court's Ruling in the Judgment and Decree.** The district court spent four pages of the judgment and decree analyzing the evidence before it on this issue and noting the detail and comprehensiveness of the Harjes analysis. (A.20 to A.23 [Finding of Fact XV].) After summarizing the evidence, the court ruled as follows:

[Dr. Baker] has met his burden and has proven his nonmarital claims in his retirement assets. The Court accepts Mr. Harjes' conclusions and finds that the nonmarital value of [Dr. Baker's] retirement assets is \$2,678,477, and the marital value is \$639,577. To equalize the property settlement, [Ms. Baker] will receive the sum of \$402,557 of the marital portion of [Dr. Baker's] retirement assets . . .

A.23)

In so ruling, the court noted the following:

[Ms. Baker] produced no expert on this issue, and no exhibits. It is her position, stated by [Ms. Baker] herself on direct, that all of [Dr. Baker's] retirement funds should be treated as marital, with the sole exception of their balance at the time of the marriage because money was contributed to the accounts during the marriage and, according to her, shortly after the marriage, the parties "sat down and chose some Merrill Lynch plans and then invested money in those plans." (I T. 68) [Ms. Baker's] position is that no part of the appreciation in these accounts should be treated as nonmarital.

The appreciation in nonmarital funds, like that of other nonmarital assets, is not converted in its entirety to a marital asset simply because marital contributions are made to the account. The law provides for and in fact

requires an allocation between marital and nonmarital appreciation of nonmarital assets. Nor does such a conversion occur 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. In short, [Ms. Baker] obliterates the distinction between active and passive appreciation of nonmarital assets and ignores the conditions which must obtain for such a conversion of any portion of the appreciation in value to occur.

(A.22)

**The Post-Trial Motion.** In her motion for amended findings on this issue, Ms. Baker offered little new, submitting instead what amounted to “cut-and-paste” excerpt from what she had given the court prior to issuance of the decree, as the court took pains to note. (A.56) She did make two new points, neither of which, the court found, favored her position. First, the court noted Ms. Baker’s statement in her supporting memorandum that she was not challenging the Harjes methodology after all; second, the court pointed out that Ms. Baker had mischaracterized the trial record in her memorandum in support of her post-trial motion when she claimed (falsely) that Randy Trask testified that he always needed Dr. Baker’s permission to act with respect to the retirement accounts. (*Id.*, A.57 to A.58)

**C. Treatment of Good Will in Valuation of the Surgical Practice.**

Dr. Baker is the sole shareholder in Daniel R. Baker, M.D., P.A., a corporation which opened for business in 2001.<sup>10</sup> It is that entity that constitutes his medical practice.

**Expert Testimony.** Patrick Schmidt is an experienced business appraiser and litigation consultant; his curriculum vitae is Exhibit 325. (III T. 282-83)

Schmidt was hired, *by both parties*, to serve as their neutral expert on the valuation

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<sup>10</sup> See Ex. 211, report of May 5, 2004, page 2.

of several of Dr. Baker's assets, including the medical practice. (III T. 283-84, 290, 316, 317)

Displeased with Schmidt's valuation, Ms. Baker retained Howard Kaminsky to offer a different one. Kaminsky examined no documents on this issue (other than the Schmidt report), did not visit the medical practice or speak with any of its staff or accountants, and produced no written analysis or report. (See III T. 365-66) He simply reviewed the Schmidt report. He agreed with Schmidt's methodology and results. (Schmidt valued the practice "the same way I would go about it" [III T. 341].) His sole disagreement was with the value Schmidt assigned to goodwill. (III T. 341-42, 366)

Both experts agreed that the measure of the value of the practice is its fair market value, and that that value equals the amount a willing buyer would pay a willing seller. (Ex. 211 [report of May 5, 2004, page 1 [Schmidt]; III T. 361-62 [Kaminsky]) Both experts agreed that a willing buyer would pay for good will only if Dr. Baker signed a noncompetition agreement in connection with the sale. (III T. 327-29 [Schmidt] and 364, lines 12-15 [Kaminski]) Mr. Kaminsky, Ms. Baker's own expert on this matter, responded as follows to questioning about how he would advise a client who wanted to purchase Dr. Baker's practice:

Q: . . . I am asking what you would advise your client.

A: If a client came to me based on the financial attributes of this practice, I would advise my client that the goodwill portion of his value, besides the hard assets which we have talked about is 112 [thousand], that the goodwill portion of his value is 270,000.

Q: And you would tell your client to pay that even though Dr. Baker is no longer going to continue to practice?

A: That's exactly – even if he was – if Dr. Baker were going to compete, he would still pay that but *he would pay for it in the form of a noncompete.*

(III T. 364 [emphasis added]) Finally, both experts agreed that if good will is excluded from the calculation, a willing buyer would pay only \$112,000 for the practice. (*See* both Ex. 211 [Schmidt Report of April 27, 2005, p. 1, supported by two attached updated financial schedules] and III T. 303-04, 317, 350 [Kaminsky's agreement with this figure].)

The practice has few tangible assets (desks, chairs, some equipment), and consists primarily of cash, accounts receivable, and liabilities [such as accounts payable]. (III T. 301) Schmidt described it as “a high overhead practice which consumes a lot of dollars and . . . needs a lot of money just to keep it going”. (III T. 318)

No other expert testified on this issue.

**Trial Court Decision.** The trial court included no good will in its valuation based on the opinions of both experts that a willing buyer would pay for good will only if Dr. Baker signed a noncompetition agreement. (A.12 to A.13) The court went on to find that Kaminsky's opinions and analysis, even if one went beyond the noncompete issue to assign a value to good will, were far less reliable and credible than those of Patrick Schmidt. (A.19)

**D. Alleged Dissipation.**

Ms. Baker contended below that Dr. Baker dissipated \$289,500 of marital assets by making loans to the parties' children (the appellant's daughter and two of the respondent's sons) during the marriage. The trial court rejected that argument, noting that these \$289,500 in receivables were listed as assets on the schedule of marital property to be divided between the parties. Ms. Baker's own expert agreed. The court awarded the respondent receivables

of \$275,133 (125,133 [amount due from one son] + 150,000 [amount due from another son]), and directed that the remaining amount of approximately \$14,400 – which the respondent had lent the appellant's daughter – be paid into the appellant's granddaughter's educational account (as the parties stipulated be done with that amount). In sum, the court included the entire \$289,500 in the marital estate, and charged Dr. Baker with the receipt of all but \$14,400 of that amount.<sup>11</sup>

Over and above the \$289,500, Ms. Baker contended below that the \$160,000 placed in accounts for the college education of her granddaughter and Dr. Baker's three grandchildren constituted dissipation. Also dissipated, she argued, were \$28,000 paid for the wedding of Dr. Baker's daughter, and \$114,257 in attorney's fees paid to Dr. Baker's counsel for work done in this proceeding. The trial court rejected this claim, ruling that these expenditures met neither the common-law nor statutory definitions of "dissipation".<sup>12</sup>

## ARGUMENT

### I. STANDARD OF REVIEW.

#### A. The Only Issue Before the Court is Whether the Evidence Supports the Findings of Fact, and Whether the Findings Support the Conclusions of Law.

In cases tried to the court, it is well established that, "where there has been no motion for a new trial the only questions for review are whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and the judgment." *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976) (citations omitted).

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<sup>11</sup> For the trial court's treatment of the dissipation issue, see A.25 (Judgment and Decree), and A.61 to A.64 (ruling on Ms. Baker's post-trial motion).

<sup>12</sup> A.61 to A.64.

This rule applies to all civil cases, including divorce cases. *See Rubey v. Vannett*, 714 N.W.2d 417, 425 (Minn. 2006) (where the Minnesota Supreme Court in a divorce case cited *Gruenhagen* on this point, and applied this very principle just this past May).

Ms. Baker did not file a motion for new trial in this case. She did file a post-trial motion and memorandum with the term “new trial” in the title to the documents, but that was the only mention of or reference to the term in her papers. The motion itself did not even contain a request for a new trial,<sup>13</sup> and the memorandum nowhere addressed the issue.<sup>14</sup> No ground for a new trial was identified and no argument was offered.

A motion for a new trial must identify specific grounds; if it does not, it does not constitute a new-trial motion, and the court has no choice but to deny it. *Waldner v. Peterson*, 447 N.W.2d 217, 219 (Minn. App. 1989) (“Appellant’s motion for a new trial failed to identify any specific grounds which would justify a new trial. A motion for new trial which fails to identify specific grounds must be affirmed on appeal.” [Citation omitted]); *see also, Custody of Child of Williams v. Carlson*, 701 N.W.2d 274, 282 (Minn. App. 2005) (affirming denial of motion for new trial where the trial court denied it for a failure to set forth any grounds for the motion).

In the instant case, based on these deficiencies, the trial court ruled that “[n]o motion for a new trial is before the Court.” (A.51, para. 2) Ms. Baker did not challenge that ruling below and does not on appeal. Thus, the only issue before this Court is whether the evidence

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<sup>13</sup> *See* A.97 to A.102 (Ms. Baker’s post-trial motion).

<sup>14</sup> *See* Ms. Baker’s supporting memorandum, entitled “Petitioners’s Memorandum in Support of Motion for Amended Findings of Fact, [etc.]”, dated December 28, 2005.

supports the findings, and whether the findings support the conclusions. This Court has described its role in such circumstances as conducting a “limited scope of review”. *Reif v. Reif*, 410 N.W.2d 414, 416 (Minn. App. 1987).

**B. The Evidence Must be Viewed in the Light Most Favorable to the Findings.**

In conducting that analysis, this Court “must view the evidence in the light most favorable to the trial court’s findings. *Keith v. Keith*, 429 N.W.2d 276, 278 (Minn. App. 1988) (citations omitted). In addition, an appellant, when challenging the sufficiency of evidence to support the findings, must summarize in her brief “the evidence, if any, tending directly or by reasonable inference to sustain the . . . findings or determination.” (Minn.R.Civ.App.P. 128.02, subd. 1[c])

**C. Findings Must be Affirmed if the Evidence Supports Them, Even Though the Evidence Would Also Support Contrary Findings, and Even Though this Court Might or Would Have Decided the Issue Differently.**

The perspective the reviewing court must assume in these circumstances has been described as follows:

We have, as any court of review must, stated the facts in the light most favorable to the trial court’s findings. As usual, there was a sharp conflict in the evidence on many factual phases. Upon review, however, the question is not whether the evidence would reasonably sustain findings contrary to those made by the trial court, [b]ut whether its findings as made are reasonably sustained in the light of the evidence as a whole.

*Ehmke v. Hill*, 236 Minn. 60, 63-64, 51 N.W.2d 811, 814 (1952) (emphasis added). More recently, the Minnesota Supreme Court expressed the same idea as follows:

Although the record also contains testimony which, if believed, would support different findings of fact more favorable to the respondent, when the record contains credible evidence to support the fact findings and those findings support the trial court’s conclusion, we may not reverse just because we might

have found the facts differently in the first instance.

*Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777, 779 (Minn.1989) (emphasis added).

The *Stiff* Court added:

An appellate court exceeds its proper scope of review when it bases its conclusions on its own interpretation of the evidence and, in effect, tries the issues anew and substitutes its own findings for those of the trial judge.

*Stiff* at 779 (citing *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 [Minn. 1988]).

**D. Findings, Whether Based on Testimony or Documentary Evidence, May be Reversed Only if Clearly Erroneous.**

The standard of review applicable to findings of fact is set forth in Minn.R.Civ.P.

52.01:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The old rule, that the appellate courts could conduct a *de novo* review of findings based on documentary evidence, was abandoned by the Minnesota Supreme Court in 1988 when it ordered an amendment to Minn.R.Civ.P. 52.01 which explicitly so provided.<sup>15</sup>

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<sup>15</sup> A leading treatise on Minnesota procedure describes the change as follows:

The “clearly erroneous” standard applies to all factual findings, whether based on testimony, or documentary evidence. *Matter of Knops*, 536 N.W.2d 616 (Minn. 1995). Rule 52.01 specifically states that the clearly erroneous standard applies to “oral and documentary evidence.” Minnesota practice prior to 1988 permitted appellate courts to review documentary evidence *de novo* based on the notion that the appellate court could review exhibits in the same way trial judges could. See *In re Trust Known as Great N. Iron Ore Properties*, 308 Minn. 221, 243 N.W.2d 302 (1976), *cert. denied*, 429 U.S. 1001, 97 S.Ct. 530, 50 L.Ed.2d 612 (1976), *appeal after remand*, 263 N.W.2d 610 (1978), *cert. denied*, 439 U.S. 835, 99 S.Ct. 116, 58 L.Ed.2d 130 (1978). Minnesota decisions prior to 1988 stated that the appellate court does not defer

## II. THE EVIDENCE SUPPORTS THE COURT'S FINDINGS ON DR. BAKER'S RETIREMENT ACCOUNTS, AND THOSE FINDINGS SUPPORT THE TRIAL COURT'S CONCLUSIONS OF LAW.

It is Ms. Baker's position, asserted by her during her testimony at trial, that all of Dr. Baker's retirement funds should be treated as marital, with the sole exception of their balance at the time of the marriage. (I T. 67-69) Her rationale? Because money was contributed to the accounts during the marriage and, according to her, shortly after the marriage, "we sat down and chose some Merrill Lynch plans and then invested money in those plans". (I T. 68) That's it -- the entirety of her "evidence" that no part of the appreciation in these accounts

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to the trial court's assessment of evidence that may be just as accurately reviewed by the appellate court (*Minneapolis Co. v. Normandin*, 338 N.W.2d 18 (Minn. 1983)) and that documentary evidence and other types of evidence are to be determined de novo by the appellate court (*Northern States Power Co. v. Williams*, 343 N.W.2d 627 (Minn. 1984)). **Rule 52.0[1] was amended in 1988, and these cases no longer reflect Minnesota law.** A case making clear the effect of the 1988 amendments and the effective overruling of *Great Northern* is *First Trust Co. v. Union Depot Place Ltd. Partnership*, 476 N.W.2d 178 (Minn.App. 1991).

2 *Minnesota Practice*, D. Herr & R. Haydock, "Civil Rules Annotated" §52.13 (West 4<sup>th</sup> ed. 2006) (bolding and underscoring added). It appears that the Minnesota Supreme Court in *Olsen v. Olsen*, 562 N.W.2d 797 (Minn. 1997) simply overlooked its 1988 amendment of Rule 52.01. In fact, the *Olsen* Court cites in the excerpt quoted by Ms. Baker in her brief (see Appellant's Brief at 15-16) the very cases overruled by the 1988 amendment on this very point, and only those cases. See *Olsen* at 800 (citing as the sole authority for its statement both cases mentioned in the above excerpt as having been overruled by the amendment, namely, *In re Trust Known as Great Northern*, *supra*, and *Northern States Power*, *supra*). In any event, in the instant case, unlike in *Olsen*, the only significant documents at issue are those generated by an expert witness for trial, namely, the 33 schedules generated by Mr. Harjes on the retirement accounts. Those documents are inextricably tied to Mr. Harjes' credibility as a witness, and this Court, in reviewing the lower court's acceptance of the Harjes analysis, must therefore give due regard to the lower court's opportunity to evaluate his credibility and that of the other witnesses who testified on the issue of the retirement accounts (Randy Trask and the two parties).

should be treated as nonmarital.

The appreciation in nonmarital retirement funds, like that of other nonmarital assets, is not converted to a marital asset simply because marital contributions are made to (or commingled with) the account. The law provides for and in fact requires an allocation between marital and nonmarital appreciation of nonmarital assets. Nor does such a conversion occur 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. Ms. Baker obliterates the distinction between active and passive appreciation of nonmarital assets, and ignores the conditions which must obtain for such a conversion of any portion of the appreciation in value to occur. The law is as follows.

**The Law.** Property is nonmarital if it:

- Is acquired
  - before the marriage,
  - after the valuation date, or
  - in exchange for such property,
- OR
- Constitutes the increase in value of such property.

*See* Minn. Stat. §518.54, subd. 5.

While property acquired during the marriage (and before the valuation date) is presumed to be marital, that presumption “is overcome by a showing that the property is nonmarital property”. (*Id.*) A showing made by a “preponderance of the evidence” is all that is required. *Kottke v. Kottke*, 353 N.W.2d 633, 636 (Minn. App. 1984), *review denied* (Minn. Dec. 20, 1984); *Doering v. Doering*, 385 N.W.2d 387, 390 (Minn. App. 1986). Strict tracing

is not required, and has consistently been rejected as the applicable standard. *Id.*<sup>16</sup>

The Minnesota Supreme Court has “divided the last of these nonmarital classifications – an increase in the value of nonmarital property – into active and passive appreciation.” *Gottsacker v. Gottsacker*, 664 N.W.2d 848, 853 (Minn. 2003) (citation omitted). “Active appreciation is marital property while passive appreciation is nonmarital.” (*Id.*) Appreciation is “active” only when “it is the result of marital effort”. *Id.* at 854.

That the increase in value be the result of *actual effort* expended during the marriage in order for the doctrine of “active appreciation” to apply has always been a requirement.

In *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987), the Minnesota Supreme Court’s first opportunity to address the “increase-in-value” provision of the statute in any detail, the following principle was adopted:

We hold that the increase in the value of nonmarital property *attributable to the efforts* of one or both spouses during their marriage, like the increase resulting from the application of marital funds, is marital property. Conversely, an increase in the value of nonmarital property attributable to inflation or to market forces or conditions, retains its nonmarital character.

*Id.* at 192 (emphasis added).

The dual requirement of active appreciation that actual marital effort be expended, and that the increase in value be attributable to that effort, was underscored by the Court of Appeals a few months following *Nardini* in *Duffey v. Duffey*, 416 N.W.2d 830 (Minn. App. 1987), *review denied* (Minn. Feb. 24, 1988). In *Duffey*, the husband was the Vice President,

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<sup>16</sup> See *Doering* at 390 (“A spouse seeking to trace an asset to a nonmarital source is not held to a ‘strict tracing’ standard, but need only show by a preponderance of the evidence that the asset [falls within the relevant portion of the statutory definition] [citation omitted]”).

Secretary, and board member of a family corporation. He had worked for the business throughout the parties' 20-year marriage. His stock in the corporation – which amounted to a 26% interest – had all been acquired either prior to the marriage or by gift or inheritance. By the time of the dissolution, the value of the husband's interest in the business had increased to more than \$3 million.<sup>17</sup>

The actual day-to-day work the husband in *Duffey* performed related to warehousing, equipment, buildings, trucks, and maintenance. Despite his many corporate titles, he did not participate in management decisions. The trial court made the following finding:

The evidence does not support that [the husband] contributed in any material way toward any increase in value in any of the business entities during the marriage relationship. Any increase in value in [the husband's] interest in the various business entities is attributed to factors unrelated to [his] efforts and is in the nature of appreciation.

*Id.* at 832-33. Based on that finding, the trial court ruled that all of his interests in the various businesses, *including the increase in value* of those interests during the marriage, constituted his nonmarital property. Challenging this ruling on appeal, the wife argued, *inter alia*, that because her husband had *the power*, along with other family members, *to control the business*, including the right to declare dividends, a portion of his interest should have been treated as marital. This Court rejected that argument, emphasizing the *Nardini* requirement

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<sup>17</sup> The husband also owned minority interests, ranging from 12% to 36%, in six other family corporations and in a partnership, all of which were part of the family's overall business of wholesaling paper products. (The other owners in these entities were his mother and sister.) He was also an officer and director of each of these other corporations. His interests in those entities, like that in the primary corporation, qualified as nonmarital. The valuation of more than \$3 million mentioned above was an overall valuation of his interests in the seven corporations and the partnership. *Duffey*, 416 N.W.2d at 831.

that, for an increase in value of such interests during the marriage to be classified as marital, it must have resulted from the “efforts” or one or both of the spouses. *Id.* at 832-33. *See also Robert v. Zygmunt*, 652 N.W.2d 537, 544 (Minn. App. 2002) (holding that, where the wife played no role in the management of the corporation other than attending quarterly board meetings, voting on annual distributions, and voting to alter the tax structure of the corporation, she was not engaged in the kind of active effort or entrepreneurial decision-making that converts an increase in the value of a nonmarital asset into “active appreciation”).<sup>18</sup>

Thus, where the wife was beneficiary of a trust created prior to the marriage, and the trust increased in value during the marriage due to the management of its corporate trustee (Norwest Bank), the entire trust, including its appreciation during the marriage, remained the wife’s nonmarital property. *Hope v. Hope*, No. C5-00-287 (Minn. App. Aug. 22, 2000), 2000 WL 1182796.<sup>19</sup> The husband’s argument that the trust had lost its nonmarital character because he “actively participated in the decision making regarding the trust” was rejected, the Court finding “insufficient evidence in the record to support [his] claim that his advice to [his wife] increased the value of the trust”, and “no evidence in the record regarding what

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<sup>18</sup> Of course, where a spouse is “instrumental in building, establishing and managing” a significant portion of the business, an increase in the value of the stock in a family-held corporation can properly be classified as marital. *See Berenberg v. Berenberg*, 474 N.W.2d 843, 845 (Minn. App. 1991), *review denied* (Minn. Nov. 13, 1991) (with one member of the three-judge panel dissenting, contending that an insufficient showing had been made that the increase in value resulted directly from the husband’s efforts and should therefore have been classified as nonmarital [*id.* at 849-50, Short, J., *dissenting*]).

<sup>19</sup> Copies of all unpublished decisions cited in this memorandum are included in the Respondent’s Appendix. The *Hope* decision can be found at RA-74.

type of advice, if any, [he] gave to [her] or how much of that advice was in fact relied upon in managing trust assets". *Id.* at \*2.

The Minnesota Supreme Court's most recent, general pronouncement on this issue continues to confirm the dual nature of the "marital-effort" requirement:

If the interest [associated with a nonmarital asset] is classified as "appreciation," or an increase in the value of the nonmarital asset, it too is nonmarital unless it is classified as "active appreciation" *because it is the result of marital effort.*

*Gottsacker v. Gottsacker*, 664 N.W.2d 848, 854 (Minn. 2003) (emphasis added).

Of course, retirement plans, like any other asset, can have both marital and nonmarital portions. That is, some funds can be nonmarital, and other funds marital, even though they are found in the very same retirement account. Where credible expert testimony establishes which portion of the appreciation is attributable to the premarital portion, that portion of the increase remains nonmarital; the portion of the increase attributable to contributions made during the marriage, on the other hand, is marital. *See White v. White*, 521 N.W.2d 874, 878-79 (Minn. App. 1994) ("We disagree that the entire accretion [in the retirement plan and in the annuity] must be deemed marital property. Some assets may be part marital and part nonmarital." *Id.* at 878; citation omitted).)

In *White*, the trial court found that the value of the husband's retirement account at the time of the dissolution was \$244,073. (*Id.* at 873) Its value at the time of the marriage was found to have been \$94,739. (*Id.* at 876) The trial court then made a finding that, if the husband had terminated his employment at the time of the marriage and made no additional contributions, his account *would have been worth* \$193,975 at the time of the dissolution.

(*Id.*) Based on that analysis, the trial court classified \$193,975 as the nonmarital portion, and the difference of \$50,098 (\$244,073 - 193,975) as the marital portion. The wife argued on appeal, as does Ms. Baker here, that the entire increase on value should have been classified as marital. (*Id.* at 877) This Court rejected that argument, and affirmed the lower court's analysis, and its allocation of the increase between its marital and nonmarital components. There was no "tracing" done by the husband in *White* of stocks or other investments in the plan on the date of the marriage to those in the plan at the time of the dissolution. There was no discussion by the *White* Court about the "commingling" of nonmarital and marital funds in the same retirement account having converted all the increase in value in the account after the date of the marriage to a marital asset.

The kind of analysis approved in *White* amounts to the same thing Dr. Baker's expert, Thomas Harjes, did in the instant case. In effect, the Harjes 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. That is precisely the methodology explicitly approved in *White* for valuing the nonmarital portion of retirement accounts.<sup>20</sup>

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<sup>20</sup> In affirming the trial court's allocation between marital and nonmarital components of a retirement fund in *White*, the appellate panel noted the following: "In findings of fact, the trial court accepted a valuation to which the [retirement fund] would have increased during the marriage had White terminated employment on the date of the marriage and made no further contributions during the marriage." *White*, 521 N.W.2d at 879 (footnote omitted). "In other words", the *White* Court noted, "no evidence demonstrates that this portion of [the retirement account] growth is attributable to efforts of either spouse during the marriage." (*Id.*) This result is not inconsistent with *Prahl v. Prahl*, 627 N.W.2d 698 (Minn. App. 2001), another case relied upon by the appellant. (See Appellant's Brief at 23-24) Central to the holding in *Prahl* was that the stock in question "was not part of a retirement program" and

Ms. Baker appears to believe that, because Dr. Baker had the right to discharge or control Randy Trask, the financial advisor who “made all of the decisions” on his retirement accounts (IV T. 454), the funds automatically became marital in nature. (*See e.g.*, II T. 211-12 [cross of Thomas Harjes]) That is not the law.

In *Chamberlain v. Chamberlain*, 615 N.W.2d 405 (Minn. App. 2000), *review denied* (Minn. Oct. 25, 2000) – a case decided six years after *White* – the husband claimed as nonmarital the appreciation of his pre-marital contributions to a Keogh plan. The trial court classified the appreciation as marital on the ground that he had “maintained control over the investments in the plan before and during the marriage through [an] investment advisor.” *Id.* at 413. About this ruling, the Court of Appeals stated as follows:

Although the treatment of this nonmarital asset as marital by the district court based on the alleged active management of the account by the [husband’s] agent is troubling for several reasons, it is not necessary to settle this question to affirm the treatment of this asset and, accordingly, we leave for another day the resolution of the active-management issue.

*Id.* at 413 n. 2.<sup>21</sup>

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there was “no evidence in the record that the parties regarded [it] as a retirement asset”. (*Id.* at 706) Because it was “a garden-variety equity investment with no long-term expectations . . .”, the *Prahl* Court held that the decision not to sell it, but to continue reinvesting the dividends was “an active investment decision”. (*Id.*) That is clearly not the case here. The assets at issue are indisputably long-term retirement assets and regarded as such by the parties. In addition, the lower court made findings, clearly supported by the record, that Dr. Baker was a “passive investor”, having turned over the discretion on these plans at the outset of the marriage.

<sup>21</sup> This Court affirmed the trial court’s decision to award the wife “marital property in an amount corresponding to the appreciation on [the husband’s] premarital Keogh contributions” on the ground that the wife had foregone \$100,000 in pension benefits – approximately the same amount by which the husband’s Keogh had appreciated during the marriage – when she left her job to raise the parties’ children. *Chamberlain* at 413. Thus, the appellate court did not accept the trial court’s characterization of the appreciation as

While the *Chamberlain* Court did not describe why it was troubled by the lower court's ruling, and no appellate court has yet commented upon the remark it made, it is not difficult to discern the reason. Converting a nonmarital asset, namely, the appreciation of nonmarital retirement contributions, to a marital asset on the ground the trial court cited -- having the right of control through an investment advisor -- ignores the clear requirement that *actual* marital effort be expended, and that *that* effort cause the appreciation, in order to classify the increase as "active appreciation". There are extraordinarily few nonmarital assets over which the owner does not have the right of control. Even the often-mentioned example of the increase in value of a painting owned by a spouse prior to the marriage is subject to the very same argument, yet the appreciation is indisputably nonmarital.<sup>22</sup> Clearly, the owner of any painting has the power, during a marriage, to sell it, pledge it as collateral to generate funds for marital living expenses, or entrust it to a curator for safekeeping and preservation. Yet no aspect of this right of control converts either the painting or its increase in value to a marital asset.

In short, Ms. Baker's right-of-control argument proves too much. If accepted, it

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marital, but simply affirmed the award of a like amount of marital property to the wife as being within the lower court's discretion under the facts presented.

<sup>22</sup> This example was used in *Swick v. Swick*, 467 N.W.2d 328 (Minn. App. 1991), *review denied* (Minn. May 16, 1991):

[W]e consider the example of a painting that a wife brings into the marriage as nonmarital property. Over time the painting appreciates in value. Upon dissolution, the wife receives the painting, now worth more due to its appreciation, as her nonmarital property. The appreciation is not severable from the asset.

*Id.* at 331.

would effectively preclude any appreciation in the value of a nonmarital asset from being classified as nonmarital. In other words, it effectively does away with the active-versus-passive-appreciation distinction established in *Nardini*.

What do we have here? On Dr. Baker's side, we have the detailed and precise testimony and calculations of an expert highly experienced in nonmarital tracing issues, supported by 33 meticulously-prepared summary-and-tracing schedules, in turn supported by two large volumes of original tracing documents. Such evidence clearly meets the preponderance-of-the-evidence standard applicable to nonmarital claims. In addition, we have case-law precedent which clearly supports the allocation of the retirement accounts' appreciation between its marital and nonmarital components. Mr. Harjes treated as marital all contributions made to the accounts during the marriage, as well as the amount by which those contributions grew in value. On Ms. Baker's side, on the other hand, we have (a) a few lines of testimony by Ms. Baker herself that she "believes" all of the appreciation should be treated as marital property, and (b) no evidence that any of the appreciation resulted from the actual marital efforts of either party.

In addition, it must be noted that, after conceding to the trial court that she had no objection to the methodology used by Mr. Harjes,<sup>23</sup> Ms. Baker on appeal attempts to do precisely that. (*See e.g.* Appellant's Brief at 6 [last paragraph].)

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<sup>23</sup> In her post-trial memorandum, Ms. Baker stated: "In other words, [Ms. Baker] is not challenging the 'methodology' of the tracing." (Petitioner's Memorandum in Support of Motion for Amended Findings, *etc.*, Dec. 28, 2005, at 3.)

One final point. Analysis of fine legal points can at times obscure the goal in marriage-dissolution proceedings: to reach a “just and equitable result”.<sup>24</sup> Here, Dr. Baker married Ms. Baker in 1990 when he was 55 years old, after working hard for years as a surgeon. He had set aside nearly \$1 million in retirement assets (\$957,473) by that time, savings Ms. Baker played absolutely no role in generating. It defies common sense to believe that the value of those assets, parked in retirement accounts, would not greatly increase in value during the following 15 years. Dr. Baker did nothing, and Ms. Baker did nothing, to generate that increase. Dr. Baker’s involvement consisted of opening and filing away the monthly statements he received in the mail. Ms. Baker did nothing at all. Market forces alone caused those assets to appreciate, and competent expert testimony carefully traced the amount of that increase. What right does Ms. Baker have to share in that increase? She is being credited with the marital contributions and the appreciation on that amount. Why should she also be allowed to share in the nonmarital portion, generated through years of Dr. Baker’s hard work, performed while Ms. Baker was married to someone else? In addition to conflicting with Minnesota law, such a result would make no sense.<sup>25</sup>

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<sup>24</sup> See e.g., Minn. Stat. §§518.58 (division of marital estate to be “just and equitable”), and 518.552, subd. 2 (amount and duration of maintenance to be set “as the court deems just”).

<sup>25</sup> Discouraged by Minnesota law on this issue, Ms. Baker cites a New York decision to establish that use of a financial advisor does not preclude appreciation from being classified as “active”. (See Appellant’s Brief at 19, citing *Greenwald v. Greenwald*, 164 A.D.2d 706, 565 N.Y.S.2d 494 [N.Y.App.Div. 1991].) There are numerous reasons why *Greenwald* is inapplicable, indeed irrelevant, here. The respondent will mention just a few. First, the active-passive appreciation distinction at issue under New York law has nothing to do with the classification of assets as subject to division or not (*i.e.*, in Minnesota parlance, as “marital” or “nonmarital”). It pertains only to the date on which the asset is to be valued. The rule in New York is that “[p]assive assets should generally be valued as of the trial date

The trial court's handling of Dr. Baker's retirement accounts is fully supported by the record, and its allocation between their marital and nonmarital components must be affirmed.

**III. BOTH EXPERTS TESTIFIED THAT A WILLING BUYER WOULD PAY FOR GOOD WILL ONLY IF DR. BAKER SIGNED A NONCOMPETITION AGREEMENT; THEREFORE, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING GOOD WILL FROM THE VALUE OF THE PRACTICE.**

Both experts testified that a buyer of the practice would be willing to pay for goodwill only if Dr. Baker signed a noncompetition agreement in connection with the sale. (III T. 327-29 [Schmidt] and 364 [Kaminsky at lines 12-15]) Under Minnesota law, if the value paid by the theoretical buyer can be traced directly to a noncompetition agreement, it cannot be included in a valuation of the marital portion of the business because it restricts the "selling" spouse's ability to provide personal services and earn a living after the marriage. *See Lowe v. Lowe*, 372 N.W.2d 65, 66-67 (Minn. App. 1985) (affirming the trial court's rejection of

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so as to prevent a windfall to the titled spouse if the asset has increased in value; active assets should generally be valued as of the commencement date of the action in order to benefit the titled spouse, since any appreciation in value is the product of that spouse's labors." (*Id.*, 164 A.D.2d at 716, 565 N.Y.S.2d at 500 [citation omitted].) Second, the evidence in *Greenwald* was that "although a Merrill Lynch broker is responsible for the administrative aspects of the account's operation, the husband, not the broker, determined how the stock portfolio was to be administered." (*Id.*, 164 A.D.2d at 718, 565 N.Y.S.2d at 501) That was true of one Merrill Lynch account and, as the Court noted, "[t]he same holds true of the other Merrill Lynch account [at issue] . . ." (*Id.*) On the one account, "the husband alone made the transaction decisions"; on the other, the husband made the transaction decisions "jointly with his advisor". " (*Id.*, 164 A.D.2d at 718, 565 N.Y.S.2d at 502) Thus, the Court agreed with the husband, held that the appreciation was active, and valued the accounts as of the date the action was commenced so that the wife could not participate in the increased value of those accounts which occurred while the action was pending since, between the two parties, the husband was deemed responsible for that increase. These two features alone are sufficient to establish that neither the *Greenwald* Court's ruling, nor the *dicta* quoted by Ms. Baker in her brief from the *Greenwald* opinion, has any relevance to the issues before this Court.

the husband's expert's valuation of the wife's solely-owned corporation because it included in the valuation the theoretical buyer requiring the wife to sign a noncompetition agreement); *Sweere v. Gilbert-Sweere*, 534 N.W.2d 294 (Minn. App. 1995) (see the lengthy discussion of this principle at 297-99, and particularly at 299, where the Court notes that the principle in *Lowe* "applies only to noncompetition agreements that actually restrict a former spouse from providing personal services after the marriage").

If the execution of a noncompetition agreement by Dr. Baker is a condition of a buyer paying for any amount of good will – and that is what the testimony of both experts amounts to – then including good will in the valuation would be improper under *Lowe* because doing so would deprive Dr. Baker of his ability to make a living.

In *Lowe*, the wife was a vocational rehabilitation consultant, and the sole owner of her own corporation, Rehabilitation Counselors, Inc. *Lowe*, 372 N.W.2d at 66. The wife's expert valued her business at book value, and discounted it for doubtful receivables, bad loans, and the like. *Id.* The husband's expert arrived at a value nearly seven times that amount, a valuation which relied, in part, upon an assumption that a willing buyer would require the wife to sign a noncompete. *Id.* The trial court rejected the husband's expert's valuation on the ground that, under governing case law, "one spouse should not benefit from a valuation method that denies or restricts the other spouse's future employment options."

*Id.* This Court agreed, stating:

[The husband's] valuation had that effect [*i.e.*, denying or restricting the wife's future employment options]. The value was based, in part, on an assumed sale where [the wife] would be required to sign a non-compete agreement. [The wife] is licensed in Minnesota, has the majority of her clients in the metropolitan area, and has built her reputation here. The sale of her business

with a non-compete agreement would substantially deprive her of her livelihood.

*Lowe* at 66-67. The same considerations apply, *mutatis mutandis*, to the instant case.

Ms. Baker points out, however, that in *Lowe*, the appellate court went on to approve of the trial court's having adopted a valuation for the business which included \$25,000 in good will. (See Appellant's Brief at 28.) In doing so, the trial court picked a value which had not been offered by either party's expert, but which lay between the valuations offered by the two experts. That feature of the *Lowe* case hardly *requires*, as Ms. Baker argues, that it was *reversible error* not to include some amount for good will in the instant case.

As the *Lowe* court made clear, as long as a valuation has "an acceptable basis in fact and principle and was not an abuse of the trial court's discretion", it must be affirmed. *Lowe* at 67, citing *Castonguay v. Castonguay*, 306 N.W.2d 143, 147 (Minn. 1981) (where the Court stated: "The trial court's decision is to be affirmed if it has an acceptable basis in fact and principle even though this court may have taken a different approach. *Bollenbach v. Bollenbach*, 285 Minn. 418, 175 N.W.2d 148 [1970].") The *Lowe* Court's affirmance of the trial court's overall valuation, which included an element of good will, is simply an application of the following, well-established principle enunciated in *Hertz v. Hertz*, 304 Minn. 144, 229 N.W.2d 42 (1975):

[V]aluation is necessarily an approximation in many cases, and it is only necessary that the value arrived at lies within a reasonable range of figures. Thus, the market valuation determined by the trier of fact should be sustained if it falls within the limits of credible estimates made by competent witnesses even if it does not coincide exactly with the estimate of any one of them.

*Hertz*, 304 Minn. at 145, 229 N.W.2d at 44 (citations omitted).

There was no evidence in *Lowe* that a buyer would pay for good will *only if* the wife signed a non-competition agreement. In the instant case, the evidence is that for a buyer to pay for any good will, Dr. Baker would have to sign a non-compete. There is no evidence in the instant case of what the value of good will might be absent a non-competition agreement. In short, not only was it not an abuse of this court's discretion to exclude good will, Ms. Baker gave the court no grounds for including any specific amount for that element. Thus, there was no error needing correction.

Ms. Baker's reliance on *Sweere v. Gilbert-Sweere*, 534 N.W.2d 294 (Minn. App. 1995) (*see* Appellant's Brief at 27-28) is similarly misplaced. *Sweere* confirmed the applicability of *Lowe* to "noncompetition agreements that *actually restrict* a former spouse from providing personal services after the marriage." *Sweere* at 299 (emphasis added). Here, as in *Lowe*, setting a valuation based on what a hypothetical, willing buyer would pay for the business if the buyer were to require, and the seller were to sign, a noncompete agreement, is sufficient to invoke the *Lowe* holding.

*Sweere*, on the other hand, presented far different circumstances. There, it was held to have been error for the trial court to value at \$200,000 the husband's promise not to work for a competitor for three years, and exclude that amount from the marital estate, where:

- the husband had in fact sold the business and signed a non-compete agreement, but signed the non-compete *only after* he had obtained another job as president of a non-competitor (establishing that the non-compete he signed had not, in fact, deprived him of the ability to make a living after the divorce)
- the non-compete included at least five restrictions on the husband's activities; in addition to prohibiting him from working for a competitor, it prohibited him from using or divulging trade secrets, retaining any company property, soliciting company customers, and enticing employees to leave the company

and work elsewhere; by finding that the entire \$200,000 was a payment only for the agreement not to compete (only one of the five promises contained in the agreement), the trial court implicitly held that the other four promises were worthless, something the evidence showed was not true

- the \$200,000 figure had been set by parties to the sale agreement, but the evidence showed that that figure did not reflect the true value of the husband's not working for a competitor after the sale; what the evidence showed was that it was to the benefit of both parties (to the sale), for tax purposes, to allocate as much of the sales price as possible to the non-compete agreement

It was for *these* reasons that the *Sweere* Court found error in the allocation of all \$200,000 only to the husband's promise not to compete.

None of these reasons come into play in the instant case. If Dr. Baker were to sell his practice and sign a non-compete, he certainly could *not* earn a living in a non-competitive activity. He is a bariatric surgeon by training and experience and can do nothing else. There is no evidence here that a non-compete would not prevent Dr. Baker from earning a living (as opposed to *Sweere*, where the evidence conclusively established that, despite signing a non-compete, the husband did not miss a day of work, and remained fully employed as president of another company).

Thus, because both experts in the instant case agree that a willing buyer would pay for good will only if Dr. Baker signed a non-compete agreement, the exclusion of good will from the valuation of Dr. Baker's practice was well within the trial court's discretion.

#### **IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO FIND A DISSIPATION OF ASSETS.**

The trial court rejected the claim that Dr. Baker dissipated \$289,500 of marital assets by making loans to the parties' children (Ms. Baker's daughter and two of Dr. Baker's sons). (A.25 & A.61-A.64) The Court noted that this \$289,500 consists of receivables listed as

assets on the schedule of marital property. It awarded Dr. Baker receivables of \$275,133 (125,133 [loan to Jeffrey Baker] + 150,000 [loan to Joseph Baker]), and directed that the remaining amount, the \$14,400 receivable owed by Ms. Baker's daughter, be paid into Ms. Baker's granddaughter's account. (A.25 [Finding of Fact XVII], and A.47 [Ex. B {Property Division} to Judgment and Decree], lines 29-31.)

In sum, the Court included the entire \$289,500 in the marital estate, and charged Dr. Baker with the receipt of all but \$14,400 of that amount. Obviously, there can be no dissipation claim related to the \$289,500.

Ms. Baker contended, however, that the Court erred in finding that the \$289,500 in question is the same \$289,500 Ms. Baker's expert, Karen Kritta, testified was included in the list of marital assets. An examination of the record, however, shows that the Court was correct, and Ms. Baker is mistaken. The \$289,500 in question is precisely the amount of the three receivables due from the parties' three children, and those receivables were included in both Exhibit 66 and Exhibit 329 as part of the marital estate (two of the charts of marital assets used at trial), as Ms. Kritta did indeed confirm. (II T. 259, line 20 through 260, line 18 [referring to Exhibit 66].)

Dissipation is an issue only when marital funds are improperly spent and are no longer part of the marital estate; they are charged against the dissipating party in the division of marital property to achieve a fair result. Here, there can be no dissipation issue with respect to the \$289,500 in receivables. They are treated as marital assets and divided (fairly) between the parties. (See A.47 [Ex. B {Property Division} to Judgment and Decree], lines 29-31.)

Over and above the \$289,500, Ms. Baker contends that funds placed in accounts for the college education of Ms. Baker's granddaughter and Dr. Baker's three grandchildren constituted dissipation. (Appellant's Brief at 33.) Also dissipated, she argues, were \$28,000 paid for the wedding of Dr. Baker's daughter Jenna, and \$114,257 in attorney's fees paid to Dr. Baker's counsel. (*Id.*) None of this, however, constitutes dissipation of marital assets under the law.

What must be shown to prove dissipation has long been clear.

The term "dissipate" (defined as "wasting or expending funds foolishly," Black's Law Dictionary 425 (5<sup>th</sup> ed. 1979)), is not appropriate in this matter. ***Dissipation is frivolous, unjustified spending of marital assets.***

*Volesky v. Volesky*, 412 N.W.2d 750, 752 (Minn. App. 1987) (emphasis added).

Clearly, gambling away marital assets qualifies as dissipation. *See e.g. Carrick v. Carrick*, 560 N.W.2d 407, 413 (Minn. App. 1997). Just as clearly, however, repaying loans and covering living expenses, including family vacations, is not. *Moore v. Moore*, 391 N.W.2d 42, 43-44 (Minn. App. 1986) (no dissipation where husband used marital funds to repay loans, pay taxes, and pay for family vacations). That the creditor to whom a loan is repaid is a relative does not change this result. *Kenville v. Kenville*, 385 N.W.2d 398, 401 (Minn. App. 1986) (rejecting husband's argument that an \$8,000 loan to the wife by her mother was a gift, and that repayment of that amount by the wife with a marital asset – corporate stock – constituted dissipation).<sup>26</sup>

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<sup>26</sup> Unpublished decisions provide additional guidance. *See e.g., Brown v. Brown*, No. C2-91-1176 (Minn. App. Jan. 21, 1992), 1992 WL 6491 at \*3 (RA-71) (rejecting wife's dissipation claim pertaining to husband's spending of tax refund and boat-sale proceeds where the trial court found that the funds had been spent "in good faith" and some of them

The governing statutory language also undercuts Ms. Baker's argument.

If the court finds that a party to a marriage, without consent of the other party, has *in contemplation of commencing, or during the pendency of*, the current dissolution, separation, or annulment proceeding, transferred, encumbered, concealed, or disposed of marital assets *except in the usual course of business or for the necessities of life*, the court shall compensate the other party by placing both parties in the same position that they would have been in had the transfer, encumbrance, concealment, or disposal not occurred. *The burden of proof under this subdivision is on the party claiming that the other party transferred, encumbered, concealed, or disposed of marital assets in contemplation of commencing or during the pendency of the current dissolution, separation, or annulment proceeding, without consent of the claiming party, and that the transfer, encumbrance, concealment, or disposal was not in the usual course of business or for the necessities of life.*

Minn. Stat. §518.58, subd. 1a (emphasis added).

There is no evidence that any of these expenditures (with the exception of the attorney's-fee payments) were made either "in contemplation of" commencing divorce proceedings, or during this proceeding. All of the items in question constitute payments made either in "the usual course of business", or "for the necessities of life", or both.

Ms. Baker even objects to money being set aside for her own granddaughter's education, arguing the funds should have been retained and should now be given to her. She objects to money being spent on a child's wedding, without any argument that paying for a daughter's wedding is outside the normal course of events. She also objects, without citation

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were applied against the mortgage on the homestead [emphasis supplied]; *Windebank v. Windebank*, No. C5-00-564 (Minn. App. Dec. 26, 2000), 2000 WL 1869560 at \*4 (RA-84) (no dissipation where husband spent \$35,000 without wife's consent on, among other things, **an adult child's college expenses**); *Sparks v. Sparks*, No. C6-88-182 (Minn. App. Sep. 6, 1988), 1988 WL 90579 at \*3 (RA-81) (rejecting wife's claim of dissipation where, although husband had sole control over the assets during the separation and spent funds on, among other things, "investments" and his own support, the Court holding that "the expenditures were for proper purposes and not frivolous and unjustified").

to any Minnesota legal authority, to Dr. Baker paying his attorney to represent him in this proceeding, as if she should be rewarded for not paying hers. How can paying one's attorney constitute the "frivolous, unjustified spending of marital assets"? In fact, Ms. Baker asked as part of her post-trial motion that her attorney be paid \$51,000 with marital assets which had been awarded to Dr. Baker. (A.101)

The only other dissipation item Ms. Baker raises is Dr. Baker's having acquired a half interest in a Porsche for \$30,000, an interest valued by the court at \$19,475. Many classic cars appreciate in value. This one has not. How is this different from a stock purchased for \$30,000 now being worth only \$20,000? How could such a drop in value be classified as dissipation? And where is the proof that the investment was made by Dr. Baker "in contemplation" of the divorce? There is none, and the \$10,525 in question is not dissipation.

In short, the trial court did not abuse its discretion in failing to find a dissipation of assets.

**V. THE MAINTENANCE AWARD IS BASED ON INCONSISTENT AND INADEQUATE FINDINGS AND MUST BE REVERSED AND REMANDED.**

District courts have wide discretion with respect to the duration and amount of maintenance awards. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn.1997) (appellate courts review maintenance awards under an abuse-of-discretion standard, and that discretion is abused only if the findings of fact are unsupported by the record or if the law is improperly applied).

Dr. Baker argued below that Ms. Baker should be awarded maintenance of far less than the amount awarded, pointing out that she had quit working on her own, had broken a

promise to him to return to work to pay the mortgage on the homestead, and was capable of obtaining any number of nursing positions locally available paying \$40,000 to \$60,000 per year. A vocational rehabilitation expert testified to the open positions and Ms. Baker's qualifications. (See RA-3 to RA-19; see also VI T. 801-02 [Jan Lowe: market for nurses is excellent and open positions pay \$40-\$60,000 per year].) Dr. Baker also argued that Ms. Baker was receiving sufficient liquid assets to contribute to her own support.

The trial court failed to make a specific finding as to Dr. Baker's income, and made findings that Ms. Baker was no longer able to work as a nurse and lacked sufficient assets to contribute to her own support. In making the latter finding, the court credited Ms. Baker's testimony that she intended to use the \$300,000 cash she was being awarded to pay off the mortgage on her homestead and therefore lacked liquid assets other than retirement funds to contribute in any way to her support. (A.26 [top of page]) On the other hand, the trial court made a contrary finding on her budget, finding that there was no evidence she intended to pay off the mortgage, and thus, no reason to subtract her \$2,600 per month mortgage payment from her budget. (A.8 [middle of page])

Based on monthly needs of \$6,841 (which *included* the \$2,600 per month mortgage payment on her home), the court determined that Ms. Baker needed \$8,764, pre-tax, to pay those expenses, and awarded her permanent maintenance in that amount. (A.28 [last paragraph] & A.34) No income from any source was imputed to her to offset these expenses, whether from investments or from employment.

A wife is not entitled to a maintenance award based on her lack of any employment earnings where the evidence shows she could work and generate income but chooses not to

do so, as a decision last year by this Court makes clear. In *Schallinger v. Schallinger*, 699 N.W.2d 15 (Minn. App. 2005), the wife reduced her workload at 3M from full time to three days a week after giving birth to the first of the couple's two children, and continued to work part time for the remainder of the parties' 15-year marriage. (*Id.* at 18) Her part-time work generated a net income of \$1,350 per month, or \$16,200 per year. (*Id.*) The evidence showed she could earn \$40,000 per year in gross income if she worked full time. (*Id.* at 22) The trial court declined to award any maintenance, finding that the wife "is partially self-supporting and does not demonstrate a need for spousal maintenance because she has the ability to work full time, but chooses not to." (*Id.*) This Court affirmed.

Here, the trial court failed to make a finding as to Dr. Baker's current income or earnings, and made inconsistent findings with respect to the continued existence of Ms. Baker's mortgage obligation. In addition, it failed to impute any income at all to her based on a demonstrated earning capacity and employment history that establish a clear ability to contribute to her own support.

Even if the Court were to rule that the absence of a finding as to Dr. Baker's ability to pay were not a fatal deficiency, and that his earnings history were sufficient to support an implicit finding that he has the means to pay the amount ordered, it must be remembered that maintenance awards are to be based on need, not on the ability of the obligor to pay. *Lyon v. Lyon*, 439 N.W. 2d 18, 21-22 (Minn. 1989) (reversing award of maintenance where, although husband conceded he had the ability to pay \$4,000 per month in maintenance, the evidence showed the wife was able to meet her reasonable needs with income from the marital property awarded her in the decree). In the instant case, maintenance in an amount

far below that ordered would have been sufficient to enable Ms. Baker to meet her needs. Her earning capacity, along with the income to be generated from \$1,327,658 in marital and nonmarital assets Ms. Baker received in the property division, demonstrate that the amount awarded was far too high.

### CONCLUSION

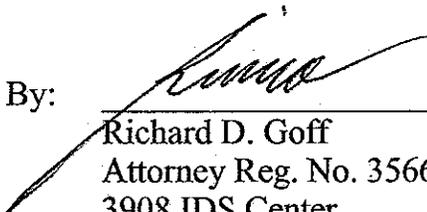
Based on the entire record in this proceeding, including the foregoing points and authorities, Dr. Baker respectfully requests that the judgment and decree entered November 3, 2005 be affirmed in all respects except for the award of spousal maintenance, which Dr. Baker requests be remanded to the trial court for additional and corrected findings and a decrease in the amount of the award based thereon.

### CERTIFICATION OF BRIEF LENGTH

The foregoing brief complies with Rule 132.01, subd. 3(a)(1) of the Minnesota Rules of Civil Appellate Procedure in that it was prepared using WordPerfect Version 12 and Times New Roman 13-point proportional font, and contains (exclusive of the Table of Contents, Table of Authorities, and Appendix) 13,931 words.

Dated: September 11, 2006

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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).