

A06-1252

State of Minnesota
In Court of Appeals

Carol Bernice Baker,

Appellant,

v.

Daniel Remember Baker,

Respondent.

**BRIEF OF APPELLANT
CAROL BERNICE BAKER**

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STATEMENT OF THE ISSUES

- I. ARE THE FUNDS ADDED TO AND ACCUMULATED BY THE PARTIES IN THE RETIREMENT ACCOUNTS (SIGS RETIREMENT ASSETS) DURING THE PARTIES' MARRIAGE MARITAL OR NONMARITAL PROPERTY?

The trial court held that Respondent Dr. Baker had proven his nonmarital claim in the SIGS retirement assets and assigned \$2,678,477 of the SIGS retirement assets as Dr. Baker's nonmarital property with \$639,577 assigned as marital.

Minn. Stat. § 518.54, subd. 5.

Olsen v. Olsen, 562 N.W.2d 797 (Minn. 1997).

Nardini v. Nardini, 414 N.W.2d 184 (Minn. 1987).

- II. IS ENTERPRISE/INSTITUTIONAL GOODWILL OF A BUSINESS, DANIEL R. BAKER, M.D., P.A., THAT IS ESTABLISHED AND EARNED DURING THE PARTIES' MARRIAGE MARITAL PROPERTY?

The trial court held that goodwill could not be included in the valuation of Daniel R. Baker, M.D., P.A. as a matter of law.

Roth v. Roth, 406 N.W.2d 77 (Minn. Ct. App. 1987).

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

- III. IS THERE A DISSIPATION OF ASSETS IN CONTRAVENTION TO MINNESOTA LAW WHERE ONE SPOUSE PAYS HIS ATTORNEY'S FEES OUT OF MARITAL ASSETS WITHOUT THE OTHER SPOUSE'S CONSENT AND FUNDS 529 PLANS AND PROVIDES FUNDS TO HIS CHILDREN WITHOUT HIS SPOUSE'S CONSENT?

The trial court held in the negative and that Respondent Dr. Baker had not dissipated assets.

Minn. Stat. § 518.58, subd. 1(a).

Bollenbach v. Bollenbach, 285 Minn. 418, 175 N.W.2d 148 (1970).

STATEMENT OF THE CASE AND FACTS

Appellant/Petitioner Carol Bernice Baker (“Ms. Baker”) and Daniel Remember Baker’s (“Dr. Baker”) long-term marriage of 15 years was dissolved by Judgment and Decree entered November 3, 2005, the Honorable Charles H. Williams, Jr., Referee of the Family Court, and the Honorable Marybeth Dorn, presiding. (A. 1.) Post-trial, Ms. Baker challenged the trial court’s ruling that Dr. Baker had met his burden of proof with regard to his nonmarital claim to retirement assets and challenged the trial court’s determination and allocation of the retirement assets as marital and nonmarital. Further, the value assigned by the trial court to Daniel R. Baker, M.D., P.A., specifically the trial court’s refusal, as a matter of law, to consider institutional/enterprise goodwill in assigning a value to that marital property, was asserted to constitute error. Ms. Baker also challenged the trial court’s refusal to acknowledge that Dr. Baker had dissipated the parties’ marital assets, and the denial to her of attorney’s fees. (A. 97.) By Order filed May 8, 2006, Referee Williams and the Honorable John T. Finley presiding, Ms. Baker’s request for post-trial relief was denied. (A. 50.) Ms. Baker challenges those rulings on appeal. (A. 103.)

A. Background of the Parties.

Dr. and Ms. Baker were married on May 12, 1990. (T. 11.) At the time their marriage of 15 years was dissolved, Ms. Baker was 57 years of age and Dr. Baker was 69. (T. 17, 552; Finding of Fact 1, A. 2.) Ms. Baker is unemployed and has not worked outside the home since 1998. (T. 14.) 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.) Ms. Baker has been on high dosages of Prednisone and Decadron and continues to take pain pills and Ibuprofen to manage her pain. (T. 18.)

Prior to leaving the workforce in 1998, Ms. Baker worked as a registered nurse. (T. 12.) She began working as a nurse's aide in 1969 and then as a licensed practical nurse and a registered nurse, ultimately finishing her Bachelor's degree in nursing in 1990. (T. 9-10.) At the time of the parties' marriage in May of 1999, Ms. Baker worked as a nurse on a cardiovascular unit. (T. 13.) After the parties' marriage, Ms. Baker reduced her nursing hours and began working part-time as a cardiac nurse on an on-call basis. (Id.) When her nursing hours were reduced, Ms. Baker began teaching part-time for Anoka-Ramsey Community College on a temporary, as-needed basis. (Id.) Ms. Baker stopped working outside the home altogether in 1998 and has stayed home to take care of the parties' home and grandchildren. (T. 14-15.)

Ms. Baker is unable to return to work in a hospital clinical setting because her health issues preclude her from doing heavy lifting and other physically intensive work that such work requires. (T. 22.) 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 Master's degree that she would need in order to work in either a management position in nursing or in a teaching position. (T. 21-22.)

In contrast to Ms. Baker, Dr. Baker has built a successful medical practice during the parties' 15-year marriage. (T. 45.) In 1999, a year during which Ms. Baker did not work outside the home, Dr. Baker earned approximately \$300,000. (Trial Ex. 3, T. 16.) In 2000, Dr. Baker "retired" from Specialists in General Surgery, Ltd. (SIGS). (T. 554.) At the time of his retirement, the major portion of Dr. Baker's practice was general surgery. (T. 555.) Dr. Baker then formed Daniel R. Baker, M.D., P.A., a medical practice which specializes in bariatric surgery. (T. 561-62.) Dr. Baker is its sole shareholder. (T. 565.) This practice presently employs four full-time surgeons, which include Dr. Baker and his son, Dr. Jeffrey Baker. (T. 487.) By 2003, Dr. Baker's income had increased to nearly \$600,000 per year. (Trial Ex. 7, T. 16.)

B. Determination and Division of SIGS Retirement Assets.

At the time of the parties' marriage, Dr. Baker had an interest in retirement funds with his then-employer, SIGS. (T. 174, 178.) Dr. Baker's balance in his SIGS retirement accounts as of 1989 (the year prior to the parties' marriage) was \$957,473. (Trial Ex. 265, Tab 2; T. 174.) The parties agreed upon the value of the SIGS retirement accounts on the date of the marriage and agreed that that amount is Dr. Baker's nonmarital property. During the parties' marriage, contributions totaling \$396,455 were made by Dr. and Ms. Baker to the retirement accounts (hereinafter SIGS retirement assets). (T. 68, 178; Trial Ex. 265, A. 114.) As of the February 17, 2005 valuation date, the value of the SIGS retirement assets was \$3,318,054. (T. 172.) Dr. Baker asserts that \$2,678,477 of the SIGS retirement assets is nonmarital, and only \$639,577 is marital.

(T. 173.) It is Ms. Baker's position that the amount of the SIGS retirement assets in excess of the balance at the time of the marriage is marital. (T. 67-68, 75.)

1. Testimony of Mr. Harjes.

Dr. Baker presented the testimony of Mr. Thomas Harjes, a CPA, to support his claimed marital-nonmarital allocation of the SIGS retirement assets. (T. 167, 169.) Mr. Harjes' report was submitted as Trial Exhibit 265. (T. 170.) Mr. Harjes treated as nonmarital the value of SIGS retirement assets on the date of the marriage. (T. 174.) Mr. Harjes acknowledged he had no idea if the SIGS retirement assets at the date of the marriage consisted of stocks, bonds or money market accounts. (T. 220-21.) Mr. Harjes was accordingly unable to identify what particular investments made up Dr. Baker's retirement accounts at the date of marriage (i.e., which particular stocks, bonds, cash accounts, mutual funds, etc., were held in his accounts). (T. 213-14.) Mr. Harjes could therefore not identify whether any of the investments that were owned by Dr. Baker at the date of the marriage were still in existence and owned at the time of trial. (T. 213-14, 221.)¹

Mr. Harjes admitted that during the marriage, Dr. Baker had "discretion with the activity" of the SIGS retirement assets. (T. 211.) Dr. Baker had the ability to change accounts, transfer funds between retirement accounts, and maintain control over his retirement investments. (T. 212.) As illustrated in the extensive schedule submitted

¹ Only two accounts – the American Express IRA and a Dain Rauscher IRA – were in existence throughout the marriage. (T. 216-20.) The trial court dealt with these two IRA accounts separate from the SIGS retirement assets. (A. 22.)

under Tab 1 of Dr. Baker's Exhibit 265, funds were moved from one retirement account to another on a frequent basis throughout the parties' marriage. (A. 111.) Throughout the marriage, Dr. Baker rolled over the SIGS retirement assets into other accounts and commingled in these accounts the \$396,455 added by the parties during their marriage. (T. 178, 212; Trial Ex. 265.)

No analysis was conducted by Mr. Harjes to determine what portion of any increases in value may be attributable to forces such as increased stock prices or stock splits and what increases are attributable to investment decisions and reinvested dividends. Mr. Harjes testified: "The way we treated this is that any elements of increase in value be it interest, dividends, capital gains distributions or stock appreciation was considered a return on the account." (T. 212.)

Mr. Harjes' methodology of "tracing" was simply a method of accounting in which he calculated "nonmarital" versus "marital" based on the percentage of funds owned before the marriage versus funds deposited after the marriage multiplied by the percentage of valuation increases, with no specific tracing being made to actual assets. In 1990, the year the parties were married, there was a contribution made by the parties of \$30,000 to the SIGS retirement assets. The investment return was \$60,267, bringing the total balance at the end of 1990 to \$1,047,740. Mr. Harjes allocated \$930 of the investment return to the \$30,000 marital contribution and the balance of the return to the beginning nonmarital portion of \$957,473. Mr. Harjes continued this methodology for the years 1991 through the valuation date of February 28, 2005, each year increasing the

marital percentage and decreasing the nonmarital percentage. (Trial Ex. 265, A. 114.)

Using this methodology, Mr. Harjes concluded the total value of the SIGS retirement assets was \$3,088,072, the marital value was \$639,577, and the nonmarital value was \$2,448,495. (T. 176.)

2. SIGS retirement assets have been transferred to various accounts and commingled with money contributed by the parties during the marriage.

During the parties' marriage, the SIGS retirement assets have resided in a multitude of accounts and the funds have been moved to various accounts and with various brokerage firms. (T. 69.) Throughout the parties' marriage, Dr. Baker chose to utilize an account advisor to advise on financial investments. (T. 711). Initially the retirement assets were with Trusted Advisors. (T. 711.) Following the advice of his accountant, and after a meeting with Mr. Trask in 1992, Mr. Trask, a certified financial manager with Merrill Lynch, became the parties' account advisor. (T. 68, 712.) Dr. Baker then had the majority of the SIGS retirement assets transferred to Merrill Lynch. (T. 452-53.)

Mr. Trask admitted that Dr. Baker could "direct where his money goes" and could at any time call and say "I want this stock bought or sold." (T. 460, see also T. 68-69.) Dr. Baker could withdraw money from any and all of the accounts at any time. (T. 461.) Dr. Baker has the ultimate control over those accounts. (Id.)²

² Mr. Trask and Dr. Baker (self-servingly) testified that Dr. Baker's role was passive. (T. 455, 619.)

Dr. Baker could also transfer his money away from Mr. Trask/Merrill Lynch and had done so in the past. (T. 461.) Mr. Trask testified that Dr. Baker did transfer accounts away from Merrill Lynch and Mr. Trask “for a while, but – and then he came back.” (T. 456, 458.) In fact, in March of 1999, and at Dr. Baker’s direction, the sum of \$508,222 was transferred from Merrill Lynch/Randy Trask to a Charles Schwab retirement account. (T. 457, 712-13; Trial Ex. 265, Tab 12; A. 23.) The Charles Schwab account remains intact and has a value of \$572,882 as of January 31, 2005. (Trial Ex. 265, Tab 12; A. 23) Mr. Trask also recalled one occasion where Dr. Baker had made the decision to invest in stock associated with his son. (T. 455-56.)

At the time of trial, the Bakers had nine retirement accounts with Merrill Lynch. (T. 458.) On eight of the nine accounts, Dr. Baker pays a fee for management of the accounts. (T. 454.) Mr. Trask testified that one of the accounts is managed by Mr. Trask on a discretionary basis. (T. 454.) According to Mr. Trask, on seven of the accounts, “we have hired independent institutional money managers to manage . . . on a fully discretionary basis.” The other account, which consists of mutual funds, is managed by outside managers with 50% of the account in bonds that Mr. Trask recommends that the Bakers purchase. (T. 454.) Over the years, accounts have been added or subtracted and managers have changed. (T. 458.) Dr. Baker’s permission is required in order to subtract or add to these accounts. (T. 458-59.) Mr. Trask testified:

Q. And when you would change managers and then subtract or add accounts, you would have to get permission from Dr. Baker to do that; correct?

A. Yes.

(T. 458-59).

Mr. Trask acknowledged that earnings have been added to the accounts since Mr. Trask became involved in 1992 and that Ms. Baker and Dr. Baker both made deposits into those accounts. (T. 459.) Assets in the accounts have generated income, cash dividends and interest, which have all been reinvested back into the accounts. (T. 459-60.) All of these accounts are available to Dr. Baker as a liquid assets. (T. 460.) It is Dr. Baker's decision whether to leave the money in the retirement accounts at the current time even though he could be taking out the money because he is 69 years old. (Id.)

3. Trial court's ruling.

The trial court concluded that Dr. Baker has met his burden and proven his nonmarital claims in the retirement assets. (A. 23.) The trial court held that Dr. Baker was a passive investor because the management of the Merrill Lynch retirement assets were under the control of Mr. Trask. (Id.) The trial court assigned \$2,678,477 as the nonmarital value of the SIGS retirement assets with the marital value assigned as \$639,577. (Id.)

C. Valuation of Daniel R. Baker, M.D., P.A.

1. Testimony of neutral expert Schmidt.

The parties initially retained a neutral expert, Pat Schmidt, to appraise the parties' business interests, including Daniel R. Baker, M.D., P.A. (Baker P.A.). (T. 290.) During the parties' marriage, Dr. Baker formed Baker P.A. which employs four full-time

surgeons, including Dr. Baker. (T. 487, 561-62; Trial Ex. 211; A. 162.) The initial value placed by Mr. Schmidt on Baker P.A. was \$205,000. (T. 301.) Mr. Schmidt subsequently concluded the business decreased in value by December 2004 to \$185,000. (T. 303.) Both values assigned by Mr. Schmidt included a goodwill value of \$73,000. (T. 303.)

To reach his goodwill determination, Mr. Schmidt calculated the value of goodwill and then reduced the goodwill by a factor of 80% based on his conclusion that “most of the goodwill, at least in my opinion in this practice, is due to Dr. Baker and his reputation.” (T. 302; Trial Ex. 211-12; A. 163.) Mr. Schmidt’s assigned goodwill value of \$73,000 is “intangible institutional goodwill.” (T. 322.) Mr. Schmidt explained:

I’m also of the opinion that there is some intangible institutional goodwill . . . and I put a total intangible value on that of roughly \$75,000. I was influenced by the fact – although it wasn’t executed – I was influenced by the fact that Dr. Baker had offered to sell and I understand that Dr. Johnson was willing buy half the practice, not including receivables, at \$40,000. The book value at that time was \$20,000. Okay. So, you know, if half the practice is 40, the whole practice would be worth 80. It seems to me that even Dr. Johnson and Dr. Baker did put a little bit of personal goodwill – or I’m sorry – institutional goodwill into the practice. So, I guess all that went into kind of what I felt was fair from a marital/non-marital, personal/non-personal point of view.

(T. 322-23.)

Mr. Schmidt further testified that if Dr. Baker was willing to sign a noncompete, he would place a value on the goodwill at \$365,000. (T. 328.) Mr. Schmidt recognized that at the time of trial Dr. Baker was 69 years old and Dr. Baker had expressed to him his

desire to retire in 2-3 years. (T. 328-39.) Without goodwill, Mr. Schmidt assigned a value to Baker P.A. of \$112,000. (T. 304.)

2. Testimony of Howard Kaminsky.

Ms. Baker's expert, Howard Kaminsky, a CPA with extensive experience in business valuation, explained to the trial court that Mr. Schmidt's opinion of goodwill was flawed and did not follow Minnesota law nor the commonly accepted Revenue Rulings 59 and 60. (T. 342-46.) The only difference between Kaminsky and Schmidt's valuation is the amount of goodwill. (T. 366.) Mr. Kaminsky disagreed with the value assigned by Mr. Schmidt to goodwill as well as the allocation by Mr. Schmidt of such a large percentage of the goodwill to personal goodwill as opposed to enterprise goodwill. (T. 343.)

Mr. Kaminsky explained the difference between personal goodwill and enterprise goodwill, explaining that Baker P.A. had enterprise goodwill and not goodwill based solely on Dr. Baker's reputation. (T. 342.) As an example, after Dr. Baker added other physicians, his salary increased by \$317,000 per year. (T. 344.) This increase is directly related to the increase in revenue of the entire group practice and the fact that it was not just Dr. Baker but other physicians performing surgery in the group. (T. 344.) In other words, the workforce in place represents approximately fifty percent of Dr. Baker's salary; correspondingly, such a large percentage increase of the net income attributable to the entire workforce does not equate to an eighty percent reduction in personal goodwill. (T. 345.)

According to Mr. Kaminsky, if the court were to utilize the average goodwill from the sale of surgical practices in the goodwill registry, the goodwill for this practice would be \$365,000; therefore, Mr. Schmidt's reduction of that to \$73,000 is without basis. (T. 348-49.) Mr. Kaminsky testified that an appropriate decrease from the goodwill registry would be \$25,000, resulting in goodwill of \$270,000. (T. 350.) Mr. Kaminsky would add \$112,000 in value of the practice to the goodwill, thereby assigning a fair market value of \$382,000 to the practice. (T. 350.) According to Mr. Kaminsky, it made no difference if Dr. Baker retired or not; he was basing the amount "on the financial attributes of the practice and not the financial attributes of what Dr. Baker is doing, but what the group is doing; the group practice is doing." (T. 363.)

3. Trial court's ruling.

The trial court adopted the value of \$112,000 for Baker P.A., reasoning that "goodwill cannot be included, given the evidence presented, as a matter of law." (A. 13.)

D. Dissipation of Assets.

1. Dr. Baker dissipated assets by payment of his attorney's fees out of marital assets.

Ms. Baker has contended that during the parties' marriage Dr. Baker dissipated assets. (T. 70-71.) The parties separated and Ms. Baker filed for divorce in April of 2003. (A. 84.) Trial Exhibit 73 shows Dr. Baker paid a total of \$114,257 to his attorney out of marital assets from May 15, 2003 through April 11, 2005. (A. 110; T. 706-08.)³

³ The dissolution hearing was held in May 2005. (A. 1.)

Those funds do not appear on the asset division. (A. 47.) Ms. Baker certainly did not agree that Dr. Baker's attorney's fees could be paid out of marital assets. (T. 70.)

In contrast, Ms. Baker was not able to pay her own attorney's fees and costs except by putting attorney's fees and expert fees on credit accounts, thereby ending up in debt at the time of trial. (T. 34, 78-79.) Ms. Baker asserted that it was appropriate, pursuant to Minn. Stat. § 518.14, that Dr. Baker pay Ms. Baker's attorney's fees and costs incurred. (T. 78-81.)

2. Dr. Baker dissipated assets by marital funds spent on children/grandchildren.

In addition, Dr. Baker spent marital funds on the children/grandchildren without Ms. Baker's permission. Dr. Baker placed \$135,000 in Merrill Lynch 529 accounts for three of his grandchildren, Benjamin Baker, Emma Baker and Jacob Baker, and \$25,000 into the account of Ms. Baker's granddaughter Kai Mason.⁴ (T. 72-74.) Those funds do not appear on the asset division. (T. 71; A. 48.)

\$28,000 was paid by Dr. Baker to Jenna Baker for her wedding expenses. (T. 264.) It was paid out of marital funds, not out of Dr. Baker's nonmarital funds, and without Ms. Baker's permission. (T. 70-71, 436.) That amount did not appear on the asset division. (A. 48.)

⁴ The marriage at issue is Dr. Baker's third and Ms. Baker's second. (T. 10, 556.) Dr. Baker has four children as a result of his first marriage. (T. 557.) He has eight grandchildren. (T. 557.) Ms. Baker has two children from previous relationships and one granddaughter, Kai Mason. (T. 10.)

Finally, Dr. Baker paid his son John Baker \$30,000 for one-half interest in a Porsche. (T. 271, 723.) The value of the Porsche on the marital balance sheet was \$19,475. (A. 48.) This results in a dissipation of marital funds by \$10,525 without the consent of Ms. Baker.

3. Trial court's ruling.

The trial court concluded that “[a]ll of the so-called dissipation is included in the marital estate and thus cannot be characterized as dissipation.” (A. 25.)⁵ The trial court denied Ms. Baker attorney’s fees, stating that she “will have funds from the cash awarded to her to satisfy her attorney’s fees and costs.” (A. 29.)

E. Denial of Post-Trial Relief.

Ms. Baker sought amended findings of fact, conclusions of law and judgment as to the issues set forth above. (A. 97.) The trial court, by order filed May 8, 2006, denied her post-trial relief. (A. 50.) Ms. Baker has appealed. (A. 103.) Dr. Baker has filed a notice of review challenging the trial court’s ruling on spousal maintenance. (A. 109.)

⁵ In denying Ms. Baker post-trial relief, the trial court states: “There is no evidence that any of these expenditures (with the exception of 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.” (A. 63-64.)

ARGUMENT

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

Dr. Baker's nonmarital claim with regard to the SIGS retirement assets fails for two independent reasons. First, Dr. Baker actively managed his retirement accounts throughout the parties' marriage, causing those funds to lose their nonmarital character. Second, Dr. Baker commingled the retirement funds that he had at the time of the parties' marriage with marital funds. Dr. Baker has been unable to trace his nonmarital funds and could not designate what SIGS retirement assets were attributable to passive forces. The trial court's rulings to the contrary constitute reversible error.

A. Standard of Review.

Whether property is marital or nonmarital is a question of law, although the appellate court defers to the trial court's underlying findings of fact. Olsen v. Olsen, 562 N.W.2d 797, 800 (Minn. 1997). Findings of fact are reviewed under the clearly erroneous standard. Id.

The scope of review under the clearly erroneous standard has been described "as the broadest exercised by an appellate court." In re Probate Court, 293 Minn. 94, 198 N.W.2d 260, 261 (1972), reh'g denied. If the Court is "left with the definite and firm conviction that a mistake has been made," this Court may find the trial court's decision to be clearly erroneous notwithstanding the existence of evidence to support such findings. Id. Moreover, and as explained by the Supreme Court in Olsen, when the "critical

evidence is documentary, there is no necessity to defer to the trial court's assessment of the meaning and credibility of that evidence." Olsen, 562 N.W.2d at 800.

B. Marital Versus Nonmarital Property.

A spouse claiming that property is nonmarital must prove the necessary underlying facts by a preponderance of the evidence. Johnson v. Johnson, 388 N.W.2d 47, 49 (Minn. Ct. App. 1986). "Marital property" means "property, real or personal . . . acquired by the parties, or either of them, . . . during the existence of the marriage relation between them." Minn. Stat. § 518.54, subd. 5. All property acquired during the marriage is presumed to be marital, regardless of the form of ownership. Minn. Stat. § 518.54, subd. 5.

"Nonmarital property" means property, real or personal, acquired by either spouse before, during or after the existence of their marriage, which

- (a) is acquired as a gift, bequest, devise or inheritance made by a third party to one but not to the other spouse;
- (b) is acquired before the marriage;
- (c) is acquired in exchange for or is the increase of value of property which is described in clauses (a), (b), (d) and (e);
- (d) is acquired by the spouse after the valuation date; or
- (e) is excluded by a valid antenuptial contract.

Minn. Stat. § 518.54, subd. 5. In order to maintain its nonmarital character, nonmarital property must be kept separate from marital property or, if commingled, must be readily traceable. Olsen, 562 N.W.2d at 800.

C. Appreciation in SIGS Retirement Assets Is Marital Property.

1. Active versus passive appreciation.

The Court treats active and passive appreciation of an asset differently in categorizing the increases in value as marital or nonmarital property. Gottsacker v. Gottsacker, 664 N.W.2d 848, 854 (Minn. 2003). Active appreciation is marital. Id. In Nardini v. Nardini, 414 N.W.2d 184 (Minn. 1987), the Minnesota Supreme Court explained:

[I]ncrease 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. Likewise, in White v. White, 521 N.W.2d 874 (Minn. Ct. App. 1994), this Court stated:

[I]ncreases in value during marriage attributable to efforts of the spouses, whether by financial investment, labor or entrepreneurial decision-making, are marital property. On the other hand, increases in value of nonmarital property remain nonmarital if shown to be attributable solely to market forces or conditions, such as simple appreciation in value of an asset.

Id. at 878.

In White, the retirement plan at issue consisted of two accounts referred to as the Teacher Insurance Annuity Association/College Retirement Equities Fund (TIAA/CREF). Under the TIAA/CREF, a participant initially elects how investments will be made. After the initial election, the participant has no further control over the investments. Neither

account provides for advancements or cash withdrawal. Contributions and earnings are unavailable until the participant terminates employment or retires. Id. at 876.

This Court held a portion of the growth in White's TIAA/CREF annuity attributable to the parties' marital investment was marital property and the increased values attributable to the contributions made by both spouses was marital property. The remainder remained nonmarital. This Court explained:

With regard to this portion of growth, the investor's role is passive. No entrepreneurial decisions were made. Neither spouse decided during the marriage whether to invest money in the nonmarital funds, nor could either spouse withdraw the funds. After the initial contributions were made by White prior to marriage, he had no further control over the investments. The TIAA/CREF does not provide for cash withdrawal prior to termination from employment or retirement. Income is deferred and not taxed until realized at termination or retirement.

Id. at 879.

Subsequently, in Chamberlain v. Chamberlain, 615 N.W.2d 405 (Minn. Ct. App. 2000), rev. denied, a court denied appellant's claim of a nonmarital interest in the appreciation of his premarital contribution to his Keogh retirement plan. The district court ruling was premised on the legal conclusion that appreciation was marital property because "appellant maintained control over the investments in the plan before and during the marriage through the investment advisor." Id. at 413. Although expressing unexplained concern in a footnote, this Court affirmed.

2. Appreciation in SIGS retirement assets is active appreciation.

In essence, the role of a “passive” investor is one in which “no investment decisions are made, neither party may withdraw the funds or otherwise control the investments.” Prahl v. Prahl, 627 N.W.2d 698, 706 (Minn. Ct. App. 2001). Dr. Baker is not a “passive” investor, and the trial court committed error in so ruling. Not only had Dr. Baker made investment decisions and acted on them throughout the marriage, but the funds in the SIGS retirement accounts were available to the parties and the parties were free to withdraw the funds, move the funds, and otherwise control the funds throughout their marriage. All of these circumstances are contrary to the definition of a passive investor.

The trial court reasoned that Dr. Baker is a passive investor because “[f]or most of the past 13 years, management of [Dr. Baker’s] Merrill Lynch retirement assets has been under the control of Mr. Trask.” (A. 23.) The trial court’s legal conclusion is contrary to this Court’s holding in Chamberlain.

The fact that Dr. Baker chose to employ a financial advisor to act as his agent in making decisions on his investments does not turn the appreciation into passive appreciation or Dr. Baker into a “passive investor.” As the New York court explained in Greenwald v. Greenwald, 565 N.Y.S.2d 494, 502 (N.Y. App. Div. 1991), “It is of no significance that the financial decisions were made exclusively by the titled spouse’s financial advisor. Though he/she acts through an agent, the decisions are still those of the

titled spouse and the results, be they beneficial or adverse, are the product of his/her labors, not random market fluctuations.”

As the record reflects, Dr. Baker, through hand-picked agents, the latest being Mr. Trask, actively managed the SIGS retirement assets. Moreover, even with such an agent, Dr. Baker’s role was other than blindly following his agent’s advice. This is illustrated by Dr. Baker’s decision to move over \$500,000 away from Mr. Trask and to a different brokerage firm. In addition, Dr. Baker has always had the ability to, and on at least one occasion did, make the decision to purchase handpicked individual stock. The appreciation here is active. As a matter of law, the amount in the SIGS retirement assets in excess of the balance at the time of marriage is marital.

3. Duffey v. Duffey is inapplicable.

The trial court, post-trial, turned to this Court’s decision in Duffey v. Duffey, 416 N.W.2d 830 (Minn. Ct. App. 1987), rev. denied, to support its ruling. (A. 60, 61.) As this Court cautioned in Ranik v. Ranik, 383 N.W.2d 431, 435 (Minn. Ct. App. 1986), rev. denied, each case must be decided on its own facts and “[t]he precedential value of comparing the particular facts in one case to the facts in another case is slight at best.” Duffey is simply inapplicable to this case.

In Duffey, the husband was employed in a family business that consisted of a number of corporate entities. All stock was held by a broad group of family members. The husband was not involved in management decisions or in the operation of the company, although he was an officer and director of several corporations. Id. at 832-33.

Testimony was presented that the husband had shown no interest in the running of the business and had a minor role confined primarily to the warehouse. Id. at 832. It was in that factual context that the court held that the husband's interest in various business entities was nonmarital and any increase in value in the various entities remained nonmarital.

It is difficult to extrapolate from Duffey to this case. Here, Dr. Baker and Ms. Baker contributed funds throughout their marriage to the SIGS retirement assets. Dr. Baker had complete control of these commingled funds. He could choose or choose not to use the expertise of a financial advisor. He could choose to disregard a financial advisor's advice and take his money elsewhere, which he did on at least one occasion. Dr. Baker was certainly involved in the management of his retirement assets and his situation bears no relationship to that in Duffey.

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

1. Applicable standard.

Where the appreciation of nonmarital property is commingled with marital contributions and income earned on marital contributions, the nonmarital investment loses that character unless it can be readily traced. Olsen, 562 N.W.2d at 800. A party asserting that current assets are traceable to nonmarital property has the burden of proof. Minn. Stat. § 518.54, subd. 5 (2002). A party seeking to establish the nonmarital character of an asset must do so by a preponderance of the evidence. Freking v. Freking, 479 N.W.2d 736, 738 (Minn. Ct. App. 1992).

2. Dr. Baker did not meet his burden of proof.

The record shows that Dr. Baker had retirement assets at the date of the marriage, that these assets were rolled into various accounts throughout the marriage, and that contributions were made to these accounts during the marriage. Dr. Baker failed to trace the nonmarital retirement assets he owned on the date of the marriage to his current retirement assets.

Dr. Baker provided no evidence regarding the content of his retirement accounts at the time of the parties' marriage and has failed to trace the contents of those accounts to the contents of his current retirement accounts. All Dr. Baker presented to the court was the beginning dollar balance, which he identified as nonmarital. He failed to show what particular investments made up his retirement accounts at the date of the marriage (i.e., which particular stocks, bonds, cash accounts, mutual funds, etc., were held in his account) and could not even establish what types of investments comprised those accounts. Without that initial information, Dr. Baker could not provide evidence tracing the funds from the investments he held at the time of the parties' marriage to the investments in his current retirement accounts. Haaland v. Haaland, 392 N.W.2d 268, 272 (Minn. Ct. App. 1986) ("Where all funds pass through a general fund such as this and there is no attempt to segregate the funds by their source 'the presumption that property acquired during the marriage is marital controls.'"); Crosby v. Crosby, 587 N.W.2d 292, 296-97 (Minn. Ct. App. 1998) (finding that appellant did not meet burden when funds

were extensively commingled and appellant only showed her funds were “primary source” to acquired assets).

As the record shows, there was no attempt to separate marital and nonmarital funds and there have been voluminous transactions involving the retirement assets. Without that specific information, the trial court was unable to conduct the analysis necessary to determine what portion of any increases in value may be attributable to passive forces, such as increased stock prices or stock splits, and what increases are attributable to income or active investment decisions. As the Supreme Court explained in Nardini, 414 N.W.2d at 194, income from marital property acquired prior to the marriage is marital property, and gave the following stock example:

[A] stock dividend or split is nonmarital property; a stock dividend or split, the value of which is determined by market forces, does not increase the shareholder’s proportionate ownership interest in the corporation and is not usually regarded as income. Cash dividends, on the other hand, would be considered a return on the investment or income and, therefore, be marital property. Thus, Jane’s 300 original shares and the 300 shares received in the stock split, having a total value of \$24,000, would be Jane’s nonmarital property, and the 200 shares purchased by reinvesting dividends and having a present value of \$8,000 would be marital property.

Recognizing that “as an asset acquired with income generated from a nonmarital asset, shares purchased with reinvested dividends become marital property,” in Prahl, 627 N.W.2d at 706, this Court held:

[R]espondent’s decision to continue reinvesting the dividends during the marriage was an active investment decision, even though it was a decision to refrain from acting. Thus, the shares of Minnesota Power stock acquired through stock

splits are nonmarital property. But the additional shares acquired by dividend reinvestment are marital property.

See, e.g., Gottsacker, 664 N.W.2d at 854 (“If the interest is ‘income’ from the nonmarital asset, it is marital income.”). In Gottsacker, the Supreme Court cited in fn. 3 at 854 to Prahl, 627 N.W.2d at 706 (“stating that ‘[a]s an asset acquired with income generated from a nonmarital asset, shares purchased with reinvested dividends become marital property.’”); Swick v. Swick, 467 N.W.2d 328, 331 (Minn. Ct. App. 1991), rev. denied (“stating that ‘[u]nlike appreciation, income becomes an asset acquired during the marriage and, as marital property, is divisible between the parties upon dissolution’”); and Wieggers v. Wieggers, 467 N.W.2d 342, 344 (Minn. Ct. App. 1991) (“designating the interest earned from nonmarital certificates of deposit as marital property . . .”).

Dr. Baker’s expert, Tom Harjes, acknowledged that in preparing the schedules that form the basis of Exhibit 265, he did not distinguish between passive and active increases in the value of Dr. Baker’s retirement accounts: “The way we treated this is that any elements of increase in value be it interest, dividends, capital gains distributions or stock appreciation was considered a return on the account.” (T. 212.) In other words, all increases are active appreciation resulting in marital property, but the trial court failed to treat them as such in its marital/nonmarital allocation.

The trial court failed to follow Minnesota law in its determination of marital/non-marital allocation of the SIGS retirement assets. The amount in the SIGS retirement assets in excess of the balance at the time of the marriage is marital. Ms. Baker

respectfully requests the trial court be reversed with ordered remand and instructions to award Ms. Baker one-half of the reallocated marital portion.

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.

A. Testimony of the Experts.

The trial court committed an error of law when it ruled as a matter of law that it could not consider goodwill as part of the marital property attached to the business known as Daniel R. Baker, M.D., P.A. Both Mr. Schmidt, the parties' neutral expert, and Mr. Kaminsky, Ms. Baker's expert, testified that the goodwill they attached to Daniel R. Baker, M.D., P.A. is institutional/enterprise goodwill, not personal goodwill attributable to Dr. Baker. The trial court in its findings acknowledged that fact.

The trial court acknowledges that "Schmidt determined that 80% of the goodwill associated with the practice is Dr. Baker's personal goodwill, and 20% institutional goodwill. As a result, [Mr. Schmidt] valued the goodwill of the practice at \$73,000." (Finding of Fact XIII; A. 17.) The trial court also recognized that Mr. Kaminsky "acknowledged the legitimacy of distinguishing between personal and institutional goodwill but disagreed with the 80-20 allocation used by Schmidt. In Kaminsky's opinion, the allocation should be 40% personal, 60% institutional." The trial court continued:

Kaminsky also disagreed with Schmidt's initial reduction of the 25% average contained in the *Registry* to 20%. Thus, according to Kaminsky, one should calculate goodwill at 25%

of 60% of \$1.8 million (Kaminsky's estimate of annual revenues), or approximately \$270,000.

(Finding of Fact XIII; A. 17.)

The trial court nonetheless held that institutional/enterprise goodwill could not be included in the valuation of Baker P.A. as a matter of law. (A. 13.) The trial court states:

Both experts testified that a buyer of the practice would be willing to pay for goodwill *only if* Dr. Baker signed a non-competition agreement in connection with the sale. 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.

(Id.) Neither the record nor the law supports the trial court's holding.

B. Standard of Review.

The trial court's ruling rests on its legal conclusion to which this Court owes no deference. Lindsey v. Lindsey, 369 N.W.2d 26, 29 (Minn. Ct. App. 1985), aff'd as modified 388 N.W.2d 713 (Minn. 1986). Further, whether goodwill can be included in the valuation of the corporation under the undisputed facts presents a question of law. Roberts v. Flanagan, 410 N.W.2d 884, 886 (Minn. Ct. App. 1987) (where facts are undisputed, only question remains whether trial court erred in applying the law).

C. Applicable Law on Goodwill.

Goodwill has been defined as "a transferable property right which is generally defined as the amount a willing buyer would pay for a going concern above the book value of the assets." Roth v. Roth, 406 N.W.2d 77, 80 (Minn. Ct. App. 1987). In

Nardini, the Minnesota Supreme Court acknowledged that in dissolution actions the district court may consider intangible assets, including goodwill, to value marital property. 414 N.W.2d at 190.

In the subsequent case of Sweere v. Gilbert-Sweere, 534 N.W.2d 294 (Minn. Ct. App. 1995), this Court explained that goodwill is marital property to the extent a value can be established that does not include the value of continued spousal labor. Id. at 298-99. This Court recognized that the mere fact that a business valuation assumes the spouse will provide a noncompete agreement does not, by itself, establish that the valuation method denies or restricts that spouse's future employment options. Rather, the court must consider all of the agreements made by the seller when transferring a business, not just the agreement not to compete.

For example, in Sweere, the noncompete agreement also included payment for other promises such as agreements not to divulge trade secrets, solicit customers or keep any tangible personal property. In fact, four of the five promises in the "noncompete" agreement prohibited the seller from using the business' assets while only one of the promises restricted the future use of his personal services. Id. at 298. Therefore, this Court did not preclude goodwill from being included in the value of a business as a "matter of law." This Court remanded the matter with instructions that only that portion of the noncompete payments that "compensates the spouse for restricting post-marital personal service" can be treated as nonmarital property. Id. at 300-01. Rather, goodwill can and should be included when calculating the transfer of intangible assets such as the

name of the business, the place where the business is located, the lease, the employees that will stay with the business when it is transferred and, in general, its institutional assets. Id.

In Lowe v. Lowe, 372 N.W.2d 65 (Minn. Ct. App. 1985), a case cited by the trial court, this Court approved the inclusion of \$25,000 added to the book value of the business as “goodwill” in calculating the marital value of the business.

[Goodwill] was defined to include the ongoing value to the corporation of contributions by employees other than the respondent in generating referrals and paying a percentage of business they brought into the corporation.

Id. at 67.

D. Trial Court Failed to Recognize Legal Distinction Between Personal and Enterprise Goodwill.

In essence, the trial court failed to recognize the legal distinction between personal goodwill and enterprise/institutional goodwill. Enterprise goodwill is an asset of the business. It is attributed to the business by virtue of existing arrangements with suppliers, customers or others and its future customer base and is due to factors attributable to the business. Yoon v. Yoon, 711 N.E.2d 1265, 1268-69 (Ind. 1999). Personal goodwill is a personal asset that depends on the continued presence of a particular individual and may be attributed to his personal skill, training or reputation. Id. Both experts’ valuation of goodwill was that of enterprise/institutional goodwill and is marital property.

The majority of states differentiate between enterprise goodwill and personal goodwill. May v. May, 589 S.E.2d 536, 545 (W. Va. Ct. App. 2003). Enterprise

goodwill is marital property and Minnesota has been placed in the category of having recognized this distinction. Id. at 546, n.16, citing Roth v. Roth, 406 N.W.2d 77 (Minn. Ct. App. 1987). See also Trebtoske v. Trebtoske, 1995 WL 296071 (Minn. Ct. App. 1995) (A. 174) (citing cases recognizing that goodwill can be separated between personal and institutional goodwill). The trial court, however, failed to recognize this distinction.

In this case, both experts testified that the goodwill they calculated consisted of institutional goodwill, not personal goodwill. Therefore, the trial court erred as a matter of law in deleting the goodwill calculated by the expert witnesses.

E. Experts' Testimony Is Not Tied to Noncompete.

The trial court states that "both experts traced their goodwill figures directly to the execution of a noncompete agreement." (A. 13.) This statement is incorrect.

Mr. Schmidt testified that if Dr. Baker was willing to sign a noncompete, the value of the goodwill would be \$365,000, not the \$73,000 goodwill assigned by Mr. Schmidt.

(T. 327-28.) Similarly, Mr. Kaminsky testified that his determination of goodwill was not tied to Dr. Baker. (T. 363.) He explained:

[Goodwill is] based on the financial attributes of the practice and not the financial attributes of what Dr. Baker is doing, but what the group is doing; the group practice is doing.

(T. 363.) Accordingly, the experts' testimony is not tied to the execution of a noncompete as the trial court erroneously states.

It should also be noted that, contrary to the trial court's conclusion, the fact that Dr. Baker was 69½ years old at the time of trial would be the very reason Dr. Baker

would in fact sign a noncompete agreement. He has already retired once, and therefore, upon the sale of his practice is unlikely to start another practice. It is probable that Dr. Baker would capitalize on his age and decision not to compete by selling that noncompetition asset. For this additional reason, the trial court committed an error of law in finding, as a matter of law, that goodwill could not be considered in reaching a valuation of this marital asset.

Ms. Baker requests that the trial court's erroneous legal conclusion that goodwill cannot be included as a matter of law be reversed. Although the trial court appears to favor the goodwill assigned by Mr. Schmidt, the trial court ultimately reached no ruling on the goodwill it would assign if the law so allowed. (A. 19.) The issue should be remanded to the trial court to decide the amount of goodwill to be added that constitutes marital property.

III. DR. BAKER DISSIPATED MARITAL ASSETS.

A. Law on Dissipation.

Under Minnesota law, a party cannot be permitted to benefit by depletion before trial of marital assets within his control. Bollenbach v. Bollenbach, 285 Minn. 418, 175 N.W.2d 148, 155 (1970). The general rule in Minnesota is that if a party in a dissolution has dissipated marital assets, that party shall be accountable for that dissipation unless the assets are justifiably consumed to meet necessary living expenses of the parties or their mutual dependents. Volesky v. Volesky, 412 N.W.2d 750, 752 (Minn. Ct. App. 1987); Minn. Stat. § 518.58, subd. 1(a).

In Coleman v. Coleman, 2004 WL 2590639 (Minn. Ct. App. 2004) (A. 178), for example, appellant was charged with Medicare/Medicaid fraud. As a result of the conviction, the State of Minnesota obtained a civil judgment based on a restitution claim solely against appellant. The appellant satisfied the judgment with marital proceeds. The district court found that appellant's \$50,000 payment was a dissipation of marital assets and deducted \$25,000 from her homestead equity. This Court affirmed, stating:

Appellant testified on cross-examination that she used marital money to satisfy a nonmarital judgment. More importantly, the payment was made during the pendency of the dissolution proceeding – which began in June 2001 – and without respondent's consent. This fact brings the payment directly within the ambit of the dissipation statute.

(A. 178.)

Dr. Baker, by his own admission, spent \$313,757 of marital funds on nonmarital items that were solely to the benefit of himself (attorney's fees), his children and his grandchildren (with the sole exception of the \$25,000 paid into the account for Ms. Baker's granddaughter). The trial court ruled that none of this constitutes dissipation of marital assets under the law. According to the trial court, all of the items in question "constitute payments made either in 'the usual course of business' or 'for the necessities of life' or both." (A. 64.) In so ruling, the trial court committed an error of law. The amount dissipated should be added back into the marital assets and should be set aside to Dr. Baker as part of the division of his property.

B. Dr. Baker Dissipated \$114,257 by Paying His Attorney Out of Marital Funds.

During the dissolution proceeding, Dr. Baker paid \$114,257 to his attorney from marital assets. (Trial Ex. 73, A. 110.) Those funds also do not appear on the asset division. (A. 47-48.) Ms. Baker did not agree that Dr. Baker's attorney should be paid out of marital assets, particularly when Ms. Baker was not able to pay her own attorney's fees and costs except by putting attorney's fees and expert fees on credit card accounts, thereby ending up in debt at the time of trial. Under Minnesota law, attorney's fees for one's divorce are that party's sole responsibility absent a court order. See Minn. Stat. § 518.14. As other courts have held, "expenditures for attorney fees out of marital assets is a dissipation of marital assets." In re Toth, 586 N.E.2d 436, 440 (Ill. App. 1991), reh'g denied.

The trial court offers no justification for allowing Dr. Baker to pay his attorney's fees out of marital property and not factoring that into the division. On this record, either the \$114,257 should be added back into the marital assets and be set aside as part of Dr. Baker's division of property or Dr. Baker should be ordered to pay Ms. Baker's attorney's fees.

The fact that Ms. Baker received cash assets should not be the deciding factor on whether Dr. Baker should pay all or a portion of her attorney's fees. Dr. Baker paid a significant amount of his own attorney's fees with Ms. Baker's money because he paid them out of the marital funds before the property was divided. In essence, Ms. Baker has paid one-half the attorney's fees Dr. Baker has paid to his attorney, while not having any

access to those funds nor the ability to pay her own attorney's fees. The trial court's ruling prejudices Ms. Baker and all future litigants when they are in Ms. Baker's position of being at the mercy of the spouse who has access to all the marital funds.

C. Dr. Baker Dissipated by Making Payments to Others Out of Marital Funds.

The record stands undisputed that Dr. Baker, without Ms. Baker's permission, placed \$135,000 in Merrill Lynch 529 accounts for the education of his grandchildren and for Ms. Baker's granddaughter, Kai Mason. Those funds do not appear on the asset division and were done without her knowledge or consent. Since Dr. Baker had a nonmarital estate of approximately \$1,000,000 on the date of the marriage, had he wanted to so fund, he should have done so out of his nonmarital assets and not out of the marital assets without the consent or agreement of Ms. Baker.

The same is true with Dr. Baker's payment of \$28,000 to Jenna Baker for her wedding expenses. Again, those funds do not appear on the asset division. They were paid out of marital funds, and not out of Dr. Baker's nonmarital funds. No one certainly is arguing that Dr. Baker should not pay for his daughter's wedding; however, it should be paid out of his nonmarital estate and not out of marital assets without the consent or agreement of Ms. Baker.

Dr. Baker also paid his son \$30,000 for one-half interest in a Porsche. The value of the Porsche on the marital balance sheet, however, is only \$19,475. \$10,525 was marital funds dissipated by Dr. Baker without the consent of Ms. Baker.

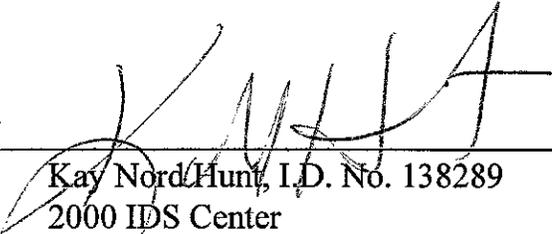
CONCLUSION

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 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 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 through payment of his attorney's fees, Dr. Baker should be ordered to pay Ms. Baker's attorney's fees.

Dated: August 7, 2006

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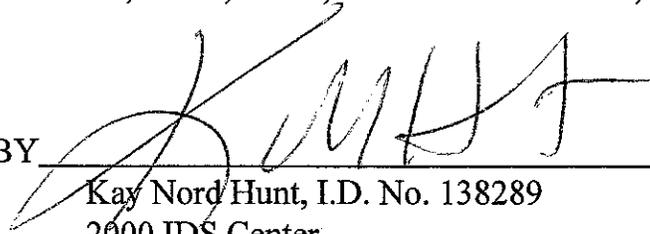
CERTIFICATION OF BRIEF LENGTH

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 8,340 words. This brief was prepared using Word Perfect 10.

Dated: August 7, 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).