

NO. A06-1252

State of Minnesota
 In Supreme Court

Carol Bernice Baker,

Respondent,

vs.

Daniel Remember Baker,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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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).

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LEGAL ISSUES

1. Where a spouse has accumulated nearly \$1 million in retirement assets before marrying, should the entire amount by which that \$1 million increases in value during the marriage be deemed marital property as a matter of law simply because the owner-spouse gives an investment advisor complete discretion and control over the account at the outset of the marriage?

In a published, 2-to-1 decision, the two-judge majority reversed the trial court, and held that the hiring of the advisor precluded any finding of passive appreciation as a matter of law, even though no marital effort or resources of significance were expended by the parties on the account.

Most Apposite Authorities:

Schmitz v. Schmitz, 309 N.W.2d 748 (Minn. 1981) (seminal case on ability of an asset to have both marital and nonmarital components)

Nardini v. Nardini, 414 N.W.2d 184 (Minn. 1987) (leading case on active-passive appreciation distinction)

Antone v. Antone, 645 N.W.2d 96 (Minn. 2002) (use of management company to manage nonmarital real estate during marriage did not convert all appreciation in value to marital)

2. Where (a) a temporary spousal-maintenance award is made pending trial, (b) the obligor spouse makes all maintenance payments in timely fashion, and (c) the temporary order is based on a stipulation that allows both parties to make distributions from future earned income as they see fit, is it a dissipation of marital assets for the obligor spouse to pay his attorney's fees from his future earned income to bring the case to trial?

The panel held such that all payments of attorney's fees pending trial constituted dissipation.

Most Apposite Authorities:

Minn. Stat. §518.58, subd. 1a (2004) (written consent to an expenditure precludes a finding of dissipation)

Minn. Stat. §518.54, subd. 5(d) (2004) (property acquired “after the valuation date” is nonmarital)

STATEMENT OF THE CASE

This marriage-dissolution action was commenced by Carol Baker in April of 2003 in Ramsey County District Court. Charles H. Williams, Jr., Referee of District Court, presided.

The parties stipulated to the value and character of most of their assets (A-51 to A-54 [Finding of Fact IX])¹ and litigated only a few issues, including, among others, (a) the marital and nonmarital portions of Dr. Daniel Baker's retirement accounts, (b) Carol Baker's claim of dissipation by Dr. Baker's having, among other things, paid his attorney's fees during the pendency of the proceeding, and (c) spousal maintenance.

The case was tried in May of 2005. A judgment and decree was entered in November of 2005. (A-49) Carol Baker's motion for amended findings was denied in May of 2006. (A-103)

Carol Baker appealed to the Minnesota Court of Appeals. In a published decision filed last July, a three-judge panel reversed the trial court's findings and rulings on Dr. Baker's retirement funds (with Judge Minge dissenting from that portion of the ruling), reversed the trial court's rejection of Carol Baker's dissipation argument on attorney's fees, and ruled on various other matters no longer at issue.

Dr. Baker petitioned this Court for review of the rulings on the retirement accounts and dissipation. (A-24) Carol Baker sought denial of the petition, but not cross-review. (A-30) This Court granted the petition on September 18, 2007. (A-1)

¹ References to "A – [page number]" are to pages in the Appellant's Appendix.

STATEMENT OF FACTS²

A. Background

The parties married in May of 1990, and separated in August of 2003. (A-51; T. 33, 708) Ms. Baker was age 42 at the time of the marriage; Dr. Baker was 54. (A-50) Both had been married and divorced before, and their respective children – all adults – are from those earlier marriages. (T. 10, 15)

In the decree, the marital estate of nearly \$2.3 million was divided evenly. (A-96) Included in Ms. Baker's marital award of \$1,147,316 were, *inter alia*, \$300,000 cash, \$402,557 in Dr. Baker's retirement accounts, \$317,100 equity in her homestead, and \$92,500 equity in her cabin. (A-95 to A-96) In addition, she 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). (*Id.*)

In addition to those property awards, Ms. Baker was awarded permanent spousal maintenance of \$8,764 per month (\$105,168 per year). (A-82 [Conclusion of Law 2])

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-57 to A-60) At the time of his

² The case was tried over five days in May of 2005. The transcript covers 827 pages and is divided into six volumes. Because the transcript pages are consecutively numbered from beginning to end, references to the transcript ("T") will include only the page number. The versions of the statutes at issue in this appeal (the 2004 versions) are set forth in their entirety in an Addendum at the end of the brief, and preceding the Appendix. Pages of the Addendum are labeled "ADD-[page number]".

marriage to Ms. Baker in 1990, Dr. Baker worked for the same general surgery practice he had started 20 years earlier, known as Specialists in General Surgery. (A-57; T. 554-555) In 2000, he retired from that multi-physician practice and started a new one, which he called "Daniel R. Baker, M.D., P.A." (T. 555, 562-563) At the time of trial, he was still fully-employed by that practice. (*Id.*) He reaches age 72 next month. (See A-50 [date of birth: November 8, 1935])

B. Dr. Baker's SIGS Retirement Accounts

The SIGS Retirement Accounts. The primary issue on appeal concerns Dr. Baker's retirement accounts (referred to throughout the proceedings as the "SIGS" retirement accounts), and the proper marital-nonmarital allocation of the funds they contain.

In 1990, when he married Carol Baker, Dr. Baker had been a physician for 28 years. (T. 11, 552) He was 54, the father of four children from a prior marriage, and the grandfather of eight. (A-50: FF I; T. 557) He was also at that time a partner in Specialists in General Surgery, or "SIGS". (T. 554) SIGS had both a pension and a profit-sharing plan. (T. 616; A-139 to A-140 ["Statement of Participant's Account: Specialists in General Surgery"]) The plans were funded with annual employer contributions, typically \$30,000 per year. (See A-142 [fourth column]; A-144 [third column: "Employer Contribution"]; A-159, top [contributions were \$30,000 per year].)³

³ See also A-169 (middle of page): Carol Baker never made any contributions to Dr. Baker's retirement plans.

The parties agreed that the SIGS retirement accounts were worth \$957,473 at the time of the marriage, and that that amount was Dr. Baker's nonmarital property. (A-144 [line 1]; T. 67-68)⁴

Shortly after the marriage, Randy Trask, a Merrill Lynch financial advisor, contacted Dr. Baker and proposed that he entrust him with management of his SIGS retirement accounts. (T. 452) Dr. and Carol Baker met with Trask at their house, and Dr. Baker placed Trask in charge of a substantial portion of his SIGS accounts, transferring them from Fidelity Investments, where they then resided, to Merrill Lynch. (T. 453, 455, 457, 711; A-71 [first full paragraph])

Trask divided the SIGS funds into nine Merrill Lynch accounts, and made all the investment decisions concerning those funds during the marriage, either directly or through other money managers he engaged. (T. 454)⁵ On one of the nine accounts, Trask made all decisions personally. (T. 454) On seven of the accounts, Trask hired independent institutional money managers to manage the accounts. (T. 454) Half of the ninth and final account consists of mutual funds (which are always managed by money managers at the mutual fund in question), and the other half of bonds personally selected by Trask. (T. 454)

⁴ Exhibit 266 (A-139 to A-142) shows the value of the SIGS accounts around the time of the marriage. The value as of the end of 1989, four months prior to the marriage, is shown to be precisely \$957,473. (A-142 [1989 figure in fifth column]) That is the figure Dr. Baker's expert (Tom Harjes) used for the premarital figure. (A-144, line 1)

⁵ One minor exception involving a company involving Dr. Baker's son will be discussed shortly.

An annual fee is charged by Merrill Lynch for these services. (T. 454-455)⁶

By the time of trial, Trask had been managing Dr. Baker's SIGS accounts for more than 13 years. (T. 454-455)

Of course, for Trask to exercise control over these accounts, he needed at the outset authorization from Dr. Baker (T. 459), and Trask conceded that Dr. Baker at all times could have transferred the accounts to a different firm, closed the accounts, or directed Trask on how to manage the funds. (T. 460-61) In fact, however, according to Trask, Dr. Baker's involvement with the accounts during the marriage was "[v]ery passive". (T. 455) In all those years, Trask testified, Dr. Baker made only one investment decision. (T. 455-456) In 2000 or 2001, Dr. Baker had directed Trask to buy a few thousand dollars of stock in a company with which his son had some association. (T. 455-456) According to Trask, the company went out of business and the entire investment was lost. (T. 455-456)

A couple bulk transfers of some of the retirement funds also occurred during the marriage. In 1999, some of the SIGS funds were rolled into a Charles Schwab IRA, where they reside today. (A-71 [first full paragraph]; T. 712-713)

In August of 2000, three months shy of his 65th birthday, Dr. Baker retired from SIGS. (T. 555) When he left, he was asked to, and did in fact, "roll over" those SIGS retirement

⁶ The record shows that, on at least some of the accounts, the management fee was automatically deducted from the account. *See e.g.* Ex. 265, Tab 29, Statements for Merrill Lynch Account 72Z-05023, Journal Entry 03/28/02, and Tab 30, Statements for Merrill Lynch Account No. 72Z-05025, Journal Entries for 03/14/02 and 04/11/02.

funds that had not been transferred from Fidelity Investments to Trask at the outset of the marriage; they were initially transferred to a firm called "Trusted Advisors". (T. 184, 620; A-145 [line 31])⁷ Two years later, based on the advice of an accountant that doing so would reduce the annual fees, those funds were transferred to Merrill Lynch and added to the funds already being managed by Trask. (T. 711, 757-758; A-145 [line 31 and lines 19-25].)⁸

Harjes (Dr. Baker's expert) testified that Dr. Baker pays a management fee to Trask to manage the accounts at the sole discretion of Trask and the money managers Trask hires (T. 188-189), and that it had been Trask who had "directed the accounts" and made the investment decisions throughout the marriage (T. 224).

Dr. Baker testified that once he turned over the retirement accounts to Trask, he did not play any role in selecting the investments or managing the accounts. (T. 619, 757-758)

There is no evidence Carol Baker played any role at all with respect to any of these accounts. She contributed no funds and made no decisions. Her sole involvement had been to listen to Trask's proposal shortly after the marriage to transfer the accounts to Trask.

⁷ Tom Harjes (Dr. Baker's expert) testified that when a person leaves one job for another, it is common, and sometimes mandatory, to "roll over" one's retirement funds into a new account, and that such transfers do not constitute "investment decisions". (T. 224)

⁸ The trial exhibits suggest there were more retirement accounts and bulk transfers than there actually were. When Mr. Trask moved from Merrill Lynch's St. Paul office to its office in Stillwater, new account numbers had to be assigned each of the retirement accounts, creating the impression there were twice as many accounts and transfers as there were. (T. 183) In addition, whenever Trask would make a change in money managers, accounts would have to be closed and created even though the investments they contained did not change. (T. 458)

Carol Baker's evidence with respect to "active" management of the SIGS accounts by Dr. Baker during the marriage – apart from the original transfer to Trask, the one stock purchase, and the bulk transfers described above – consisted of what Dr. Baker had the "ability" or "right" to do. For example, through her questioning of Dr. Baker's witnesses, she elicited that Dr. Baker *could* have transferred the accounts elsewhere (T. 461), that he *could* have told Trask what investments to make (T. 460), that he *could* have withdrawn funds from the accounts without penalty because of his advanced age (T. 713), and that he had "ultimate control over [the] accounts" (T. 461). Representative of this evidence is the following exchange with Mr. Trask:

Q: You could not have discretionary management over any of these accounts if Dr. Baker would not allow it, correct?

A: Of course not. Right.

(T. 459)

Increase in Value in the SIGS Retirement Accounts During the Marriage. 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. (T. 67-68) Dr. Baker took the position at trial that those nonmarital funds appreciated in value in the succeeding years, and that the appreciation of those funds was also nonmarital. Dr. Baker conceded, however:

- that his employer made contributions to the accounts during the marriage
- that those contributions constituted marital property
- that the amount of those contributions also appreciated during the marriage
- that any increase in value of those contributions was also marital

Ms. Baker argued, on the other hand, that no part of the appreciation of the nonmarital funds in the SIGS retirement accounts on the date of the marriage was nonmarital, but that all of it belonged to the marital estate. (T. 67-69)

Dr. Baker's Expert (Harjes). Dr. Baker's expert on the marital-nonmarital allocation of his retirement funds was Thomas Harjes. Harjes' time as a CPA is spent "close to 100 percent" on family law, with a third to half his work involving an analysis of nonmarital claims. (T. 168) He has frequently served as an expert on nonmarital claims, both as a neutral and as an expert for one of the parties, and has made seminar presentations to attorneys on nonmarital tracing. (T. 168-69)⁹

Carol Baker stipulated at trial that Harjes qualified as an expert under Rules 702-704 of the Minnesota Rules of Evidence. (T. 167)

The Harjes Report. Harjes's report, Exhibit 265, was received without objection. (T. 170)

Schedule 1a (A-144) of that exhibit pertains to the SIGS Pension and Profit Sharing Plans. That schedule shows the balance in the account at the beginning of each year, the employer contributions made during that year, the amount by which the account appreciated in value during the year, and the allocation of the increase between its marital and nonmarital components.

⁹ His Curriculum Vitae appears in Tab 35 to Exhibit 265 [*see* T. 168 & 170]).

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, all of which were made by Dr. Baker's employer. (T. 174; [extra cite needed]) Harjes then allocated between marital and nonmarital components the amount by which each account grew in value each year, using the following method. For year one of the marriage, he calculated the percentage of the funds in the account at the beginning of the year which were marital, and the percentage which were nonmarital. He then applied those percentages to the amount by which the account increased in value during that year and allocated that increase between its marital and nonmarital components. (T. 175) He then followed the same procedure with respect to the second year of the marriage, and so on, through the valuation date in 2005. Cumulative totals produced the end results.

No distributions of any kind were made from any of these accounts during the marriage. (T. 212, 460)

The result of his analysis was the following. The total value of the accounts at the time of the marriage was \$957,473. (T. 174) By the valuation date (April of 2005), their cumulative value was \$3,318,054. (II T. 172) Employer contributions made during the marriage totaled \$396,455, and the appreciation on those contributions totaled \$243,122, for a total marital component of \$639,577.¹⁰ Thus, the original nonmarital value, plus

¹⁰ See A-144: Schedule 1a. to Ex. 265 (totals for the columns labeled "Employer Contribution" [\$396,455], Marital – Return" [\$243,122]).

appreciation of that amount during the marriage, was \$2,678,477; total contributions during the marriage, all of which were classified as marital, and all appreciation in value of those contributions, all of which was also classified as marital, totaled \$639,577. (See T. 173 and A-143 [Ex. 265, Schedule 1].)

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. (T. 178-179, 182) He is unaware of his methodology ever having been rejected by the courts. (T. 180-81)

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

Carol Baker's Employment History. Carol Baker worked as a nurse from 1970 until 1998, when, at age 50, eight years into the marriage, she decided to stop. (A-54; T. 12-14)¹¹ She didn't discuss that decision with Dr. Baker, but just "assumed" he would have no objection. (T. 15) He was working and, in her opinion, there was no need for her to work

¹¹ 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, maintaining a 3.57 grade-point average. (A-54; T. 9-10)

as well. (T. 17)

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. (T. 616)

The Trial Court’s Ruling. The district court spent four pages of the judgment and decree analyzing the evidence before it on the SIGS retirement accounts, and discussing the Harjes analysis in detail. (A-68 to A-71 [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-71)

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-70)

The trial court expanded its discussion of the evidence and the applicable legal principles in denying Carol Baker's motion for amended findings. (See the trial court's six-page discussion at A-108 to A-114.)

The Decision of the Court of Appeals. The two-judge majority reversed, holding that the entire increase in the SIGS accounts from their value on the date of the marriage (\$957,473) is marital property as a matter of law. (A-11) The majority ruled that Dr. Baker's ability to control the accounts and his ability to withdraw funds from them during the marriage, as well as his having engaged Mr. Trask to manage the accounts, rendered all increase in value as "active appreciation", and thus, marital property. (Part I of the opinion at A-5 to A-11)

Judge Minge dissented, concluding that the trial court had used the proper legal standard and had properly applied that standard. (A-22) Judge Minge found that the "three relatively minor" respects in which Dr. Baker played an "active" role in the management of the SIGS accounts (the investment in the one company that went out of business, a bulk transfer of some of the funds from one investment firm at another, and rolling over funds "within the same family of funds") did not convert the entirety of the increase in the value of the nearly \$1 million in the accounts at the time of the marriage into marital property. (A-

22 to A-23)

C. Alleged Dissipation by Payment of Attorney's Fees.

Carol Baker contended below that Dr. Baker dissipated hundreds of thousands of dollars during the marriage by doing a variety of things, including making loans to the parties' children (Carole Baker's own daughter and two of Dr. Baker's sons), placing funds in college-education accounts for the parties' grandchildren (including Carol Baker's own granddaughter), paying for his own daughter's wedding, and paying his own attorney's fees in this proceeding. The trial court rejected the dissipation claim in its entirety, ruling that these expenditures met neither the common-law nor statutory definitions of "dissipation".¹² The Court of Appeals affirmed that ruling in all respects except as to the payment of attorney's fees. (A-15)

The facts relevant to the attorney's-fee issue are the following.

The Stipulated Order of August 25, 2003. Carol Baker served the summons and petition on Dr. Baker in April of 2003. The parties physically separated four months later in August. On August 22, 2003, both parties signed a "Stipulated Temporary Order"; it was signed by the Court and filed on August 25, 2003. Relevant provisions of the Order include the following:

1. As and for temporary spousal maintenance, commencing September 1, 2003, [Dr. Baker] shall pay directly to [Carol Baker] the amount of

¹² For the trial court's treatment of the dissipation issue, *see* A-71 (Judgment and Decree), and A-115 to A-119 (ruling on Ms. Baker's post-trial motion).

\$7,300 per month.

* * *

4. Both parties are restrained from transferring, encumbering, concealing or disposing of property except in the usual course of business or for the necessities of life, *except as to any future earned income*, except as the parties with their attorneys may mutually agree in writing.

* * *

(A-36 to A-37 [italics added]) No part of the Order mentioned or addressed attorney's fees.

(*Id.*)

Pursuant to that Order, Dr. Baker paid Carol \$7,300 each month as spousal maintenance from September of 2003 (when the Order was issued) through the date of trial (and beyond). (T. 612)¹³

Carol Baker testified that her understanding of the Order was that she was to receive \$7,300 per month in maintenance, that there were no restrictions on how she could spend those funds, and that "... likewise, there was no restraint on how Dr. Baker spent his earned income ... " (T. 428-429)

Dr. and Carol Baker maintained separate checking accounts during the marriage (T. 429-430), and Dr. Baker deposited all his employment earnings into his personal checking account (T. 751-753). His personal checking account was Merrill Lynch Account No. 72Z-

¹³ Dr. Baker continued to pay temporary maintenance of \$7,300 per month until the Judgment and Decree directed that he pay permanent maintenance of \$8,764 per month effective December 1, 2005 (A-82, Conclusion of Law 2), at which time he began paying the higher amount.

16061. (T. 261-262) It was from this account, where all his employment earnings were deposited, that he made his monthly maintenance payments to Carol Baker.¹⁴

Dr. Baker's Payment of Attorney's Fees. It was from this same checking account that Dr. Baker paid some \$114,000 in attorney's fees through April of 2005. (A-148) Carol Baker submitted an exhibit that listed all payments of fees made from this account by Dr. Baker between May of 2003 and April of 2005. (Ex. 73 at A-148: "Payments made from Merrill Lynch Account #16061".) Except for an initial retainer of \$5,000 paid in May of 2003, all payments by Dr. Baker were made after the Stipulated Order of August of 2003 discussed above. (A-148)

Payment of Carol Baker's Attorney's Fees. Carol Baker paid a \$5,000 retainer to her attorney prior to the parties' separation as well, charging it on one of her credit cards. (T. 132-133) By the time of trial, she had paid a total of \$21,000 in fees, paying with both cash and credit-card charges along the way. (T. 431-432) When asked how much of her attorney's fees were paid by credit card, she replied "I don't know". (T. 133)¹⁵ She owed

¹⁴ See that portion of Exhibit 73 that consists of the "Annual Statement Summary" of checks written on Account 72Z-16061 in calendar year 2004, which shows checks written to "Carol B. Baker" in the amount of "7,300.00" at the end of each month. (A-148 to A-155) Also part of that same exhibit (although not included in the Appendix) are the statements for the same account for October through December of 2003, and the first few months of 2005, all of which were covered by the temporary maintenance award of \$7,300 per month, and all of which show the same payments to Carol Baker of \$7,300 per month. (Ex. 73)

¹⁵ Later she testified that her balance on her credit cards at the time of trial was then up to \$25,000, and the only charges appearing on her statements were \$20 per month for internet service, and those for attorney's fees. (T. 443)

an additional \$6,000 by the time of trial, and she and her attorney estimated her total fees, through the end of trial, would amount to some \$55,000. (*Id.*; see also A-146 to A-147 and A-77 [Finding of Fact XIX].)¹⁶

She had four different credit cards which only she used. (T. 757) By November of 2004, the balances on those four cards totaled more than \$43,000. (A-48; T. 130)

The parties received a joint tax refund of \$50,000 in 2003, which was placed in trust pending later distribution. (T. 692-694, 756; A-48) In November of 2004, Carol Baker's attorney notified the court that "I would like to file a motion requesting a property advance from Dr. Baker to pay off the credit cards and to pay Ms. Baker's attorney fees while this matter is pending." (A-48 [end of first paragraph]) An agreement was reached to use the \$50,000 tax refund to pay off the \$43,000+ balance on Carol's four credit cards, and that was in fact done. (Ex. 329 [line 2]; T. 708, 757, 130, 132)

The trial court rejected Carol Baker's dissipation argument. The appellate panel reversed, ruling as follows:

Wife argues that the district court erroneously concluded that husband's payment of his attorney fees out of the parties' marital assets did not violate section 518.58, subdivision 1a. We agree. The district court's conclusion not only is inconsistent with our case law, see *Thomas v. Thomas*, 407 N.W.2d 124, 127-28 (Minn. App. 1987) ("Any amount taken from marital property to pay one party's attorney's fees should be accounted for . . . in the distribution

¹⁶ Carol Baker's trial attorney took no depositions prior to trial (T. 239, 287), and retained no expert on the primary financial issue, namely, Dr. Baker's retirement funds (A-70 [top of page], accounting in part for the difference between the fees incurred by her and those incurred by Dr. Baker.

[of marital property].”), it also is inconsistent with the district court’s own order that “[e]ach party shall be responsible for [his or her] own attorney’s fees and costs.” We, therefore, reverse the district court’s determination that husband did not improperly dispose of marital assets in violation of section 518.58, subdivision 1a, when he used them to pay his attorney fees. Accordingly, we remand to the district court with instructions to compensate wife by placing her in the position she would have occupied had this improper disposal of marital assets not occurred.

(A-15 [parenthetical amendments by the Court].)

The Order quoted by the panel that “[e]ach party shall be responsible for [his or her] own attorney’s fees and costs” is from Finding of Fact XIX (A-77) in the Judgment and Decree, which was entered in November of 2005, well after the challenged payments had been made, and more than two years after issuance of the Stipulated Temporary Order, which had carved out as an exception to the transfer prohibition any payments or transfers made from “future earned income” (A-37).

ARGUMENT

I. STANDARD OF REVIEW.

A. The Only Issue Before the Court of Appeals was 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).

This rule applies to all civil cases, including marriage-dissolution cases. *See Rubey v.*

Vannett, 714 N.W.2d 417, 425 (Minn. 2006) (where this Court in such a case cited *Gruenhagen* on this point, and applied this very principle just this past May).

As both the trial court and the appellate panel noted, Carol Baker did not file a motion for a new trial in this case. (A-5, A-104) 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,¹⁷ and the memorandum nowhere addressed the issue.¹⁸ No ground for a new trial was identified and no argument was offered.

Based on these deficiencies, the trial court ruled that “[n]o motion for a new trial is before the Court.” (A-104, para. 2) Carol Baker did not challenge that ruling in the trial court or before the Court of Appeals. Thus, the only issue before the Court of Appeals – and the same applies to this Court – was whether the evidence supported the trial court’s findings, and whether the findings supported its conclusions.

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

In conducting that analysis, the appellate 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, the party challenging the findings – Carol Baker here – must summarize in her brief “the evidence, if any, tending directly or by reasonable

¹⁷ See A-97 to A-102 (Ms. Baker’s post-trial motion).

¹⁸ See Ms. Baker’s supporting memorandum, entitled “Petitioners’ Memorandum in Support of Motion for Amended Findings of Fact, [etc.]”, dated December 28, 2005.

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 an Appellate Court Might or Would Have Decided the Issue Differently.

The perspective the reviewing court must assume in these circumstances has been described by this Court 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, this 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 this Court in 1988 when it ordered an amendment to Minn.R.Civ.P. 52.01 which explicitly so provided.¹⁹

II. THE TWO-JUDGE MAJORITY HAS ERRONEOUSLY ADOPTED A “RIGHT-OF-CONTROL” RULE TO APPORTION MARITAL AND NONMARITAL COMPONENTS OF AN ASSET, AND STRAYED FAR FROM THE PRINCIPLES ESTABLISHED BY THIS COURT IN ITS PRIOR DECISIONS.

In 1981, this Court first addressed how trial courts should apportion marital and nonmarital interests in a single asset. In subsequent decisions, this Court has refined that distinction into one between active and passive appreciation of assets with “mixed” character (those having both marital and nonmarital components). In developing this distinction, this Court has always emphasized several points. First, for appreciation to be “active”, two requirements must be met: (a) there must be an application of marital effort or funds, and (b) the appreciation in the asset must have been caused by the application of those marital

¹⁹ See 2 *Minnesota Practice*, D. Herr & R. Haydock, “Civil Rules Annotated” §52.13 (West 4th ed. 2006).

resources. Second, the principle underlying the active-passive appreciation distinction is that it is the *diversion* of resources (effort or funds) *from the marriage* to the development of one party's nonmarital property that warrants classifying some or all of the increase in value of that property as marital.

The Minnesota Court of Appeals, on the other hand, has in a series of decisions, strayed far from these principles. The culmination of this departure is the published decision in the instant case, which has the effect of establishing a strict "right-of-control" principle which eliminates the possibility of passive appreciation of nearly any nonmarital asset. This right-of-control principle leads to impractical and absurd results, untethered to logic, common sense, or the prior decisions of this Court. It must be reversed.

A. The Origin and Scope of the Active-Passive Appreciation Distinction as Developed by this Court.

This Court first addressed the principles by which marital and nonmarital interests in a single asset are to be computed in *Schmitz v. Schmitz*, 309 N.W.2d 748 (Minn. 1981). There, the husband had used premarital funds to make the down payment on the duplex in which the parties resided during the marriage and used the rental income from the other unit to make the mortgage payments. *Id.* at 748-49. The trial court in *Schmitz* had treated the homestead as having both marital and nonmarital components. *Id.* at 750. This Court affirmed, relying upon the analysis in *Woosnam v. Woosnam*, 587 S.W.2d 262 (Ky. App. 1979), which this Court later described as "recognizing the marital character of appreciation *attributable to the joint or team efforts of the spouses* with respect to property purchased in

part with nonmarital funds.” *Nardini v. Nardini*, 414 N.W.2d 184, 191 (Minn. 1987) (emphasis added). *Schmitz* gave rise to the now famous “*Schmitz* formula”, which this Court has described in the following terms:

The present value of a nonmarital asset used in the acquisition of marital property is the proportion the net equity or contribution at the time of acquisition bore to the value of the property at the time of purchase multiplied by the value of the property at the time of separation. The remainder of equity increase is characterized as marital property and is distributed according to Minn.Stat. § 518.58 (1980).

Brown v. Brown, 316 N.W.2d 552, 553 (Minn.1982).²⁰

In addition to the homestead in *Schmitz*, the wife had inherited cash during the marriage, and invested \$31,400 in municipal bonds and a savings account, both of which generated interest during the marriage. *Schmitz*, 309 N.W.2d at 749. By the time of trial, their value had reached \$38,702. *Id.* The husband argued that the “accretions during the marriage” on that investment were marital. *Id.* at 750. This Court disagreed, labeling the entire \$38,702 “clearly nonmarital assets within the meaning of the statute”, and finding “no basis” in the husband’s argument that any portion was marital. *Id.*²¹

²⁰ See also *Nardini*, 414 N.W.2d at 191 (citing this very excerpt from *Brown* as the correct description of the *Schmitz* formula).

²¹ The only difference between the definition of “nonmarital property” at the time of *Schmitz* and when the instant case was commenced is clause (d) of Minn. Stat. §518.54, subd. 5; at the time of *Schmitz*, that clause used “after a decree of legal separation” (*Schmitz*, 309 N.W.2d at 749) as the point at which property acquired by a party is no longer classified as marital. The 2004 version used “after the valuation date” as the cut-off. (See Minn. Stat. §518.54, subd. 5 [d] [2004], reproduced in the Addendum to this brief at ADD-2, *post.*)

The following year, in *Brown v. Brown*, 316 N.W.2d 552 (Minn. 1982), this Court (with little discussion) reversed a trial-court ruling which had failed to apportion the parties' homestead between its marital and nonmarital components as required by *Schmitz*.

In another case that same year, this Court rejected an argument that, because premarital funds had been used to purchase the couple's first homestead which, when sold, generated sufficient funds for an outright purchase of their second, the entire market value of the second homestead was the husband's nonmarital property. *Faus v. Faus*, 319 N.W.2d 408, 412 (Minn. 1982). This Court noted that there was a marital component to the increase in value of the second homestead because, during the marriage, the parties had made substantial improvements (furnace, electrical and water systems, bathroom, kitchen, and insulation), and that "sums expended for improvements are properly *attributable to the parties' joint efforts* and constitute marital property." *Id.* at 412 (citations omitted).

Except for a cursory reference to *Schmitz* in 1985,²² this Court did not address the issue of marital and nonmarital components to assets in marriage-dissolution cases until *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987), the case in which this Court addressed the issue at greatest length. In *Nardini*, the parties had been married for 31 years. By the time of trial, the family business was valued by one expert as high as \$725,000. *Id.* at 186. The husband testified that he had, the year prior to the marriage, purchased half of that

²² In *Kelly v. Kelly*, 371 N.W.2d 193 (Minn. 1985), the husband's argument that the trial court had not given "due allowance" to his nonmarital interest in the homestead as required by *Schmitz* was rejected without discussion. *Id.* at 197.

business for \$2,500, and that half of its current value (whatever that was determined to be) was therefore his nonmarital property. The trial court agreed, and the Court of Appeals affirmed. This Court reversed. Although the definition of “nonmarital property” then included (and still includes) the “increase in value” of nonmarital property, this Court held that an additional inquiry is needed, stating:

We hold that the increase in the value of nonmarital property *attributable to the efforts of one or both spouses during the 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.

Nardini, 414 N.W.2d at 192 (emphasis added).

In addition to adopting that principle, the *Nardini* Court made it clear that the *Schmitz* formula and its underlying principles apply, not just to real property but, with some narrow exceptions, to the kinds of assets typically at issue in marriage-dissolution cases.

Th[e][*Schmitz*] formula, designed to apportion marital and nonmarital interests in a specific parcel of residential real estate, usually the homestead of the parties, may also be used to apportion interests in certain other kinds of property, such as publicly traded stock, the value of which depends on forces outside the marital partnership. While the general principles underlying the *Schmitz*, *Brown*, and *Faus* decisions are susceptible of broad application, the mechanical application of the formula is inapposite when the property in question is a business or some complex combination of real and personal property.^[23]

Id. at 194.

²³ The retirement assets involved in the instant case do not fall within the exception noted by the *Nardini* Court.

The wife in *Nardini* had married in her early 20's, given birth to and raised the couple's two children, been periodically employed by the family business as a bookkeeper over the 31 years of the marriage, enhanced the family's and its business' standing over the course of the marriage through civil and social activities, and provided a traditional marital home during the years the business flourished. Based on those factors, the *Nardini* Court noted:

[A] business, like a garden, must be tended if it is to flourish . . . [W]ere it not for *the personal efforts contributed by the spouses*, the investment would have withered and died . . .

* * *

The fundamental error in the trial court's apportionment of marital and nonmarital interests in [the family business] lies in the assumption that because [the husband] purchased a one-half interest in a business prior to the marriage, his nonmarital interest should forever be one-half of the value of the business. The assumption ignores the fact that the events of the past 31 years have diluted the significance of the original nonmarital interest: [the husband's] \$2,500 investment in 1949 has been dwarfed by the overall success of the business.

Nardini, 414 N.W.2d at 194-95 (emphasis added).

The *Nardini* Court then used the principles underlying the *Schmitz* formula to apportion the value of the business between its marital and nonmarital components. *Id.* at 195. Noting that the premarital investment had been only \$2,500, while the marital contributions over the 31-year marriage had exceeded \$576,000, the Court ruled that nearly

the entire value of the business should be apportioned as marital. *Id.*²⁴

The inherent logic and rationale for the *Nardini* holding is clear from this Court's statement of the holding itself: "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." *Id.* at 192 (emphasis added). It is the diversion of marital resources, either effort or funds, away from the marriage and toward one party's nonmarital property, that justifies treating any appreciation in value caused by that diversion as marital. It would not be fair to deprive the marriage of increases in value in one party's nonmarital property which resulted from an application of effort or funds which *could* have been devoted to the marriage but were not. (A husband who spends all his free time researching and trading stocks and bonds in an account he brought into the marriage is diverting resources from the marriage. One who simply opens and files away his monthly statements is not.) This "diversion" principle is the basis of the distinction between active and passive appreciation, both logically and historically, as subsequent decisions of this Court illustrate.

In *Antone v. Antone*, 645 N.W.2d 96 (Minn. 2002), a 4-3 majority held, *inter alia*, that the *Schmitz* formula applies, not just to property acquired during the marriage, but to real property acquired prior to the marriage where marital funds are used to reduce the mortgage

²⁴ Thus, after suggesting that the *Schmitz* formula was perhaps unsuitable for use in the case of such a complex asset as the *Nardini* family business (*id.* at 195), the Court employed it to reach its ruling.

balances. *Id.* at 103. In *Antone*, the husband had acquired 18 rental properties prior to the marriage. Each was subject to a mortgage on the date of the marriage. Rental income generated during the marriage was used to pay down the mortgages. The trial court classified as marital only the amount by which the mortgages had been reduced during the marriage, and credited the marital estate with no part of the amount by which the properties increased in value during the 12-year marriage. That, the majority held, was error.

The trial court's characterization of all of the market-related appreciation during the marriage as [the husband's] nonmarital property ignores the fact that those same market forces caused the marital equity to appreciate . . . We therefore conclude that the trial court should have applied the *Schmitz* formula to apportion the marital and nonmarital interests in the 18 rental properties.

Antone, 645 N.W.2d at 103.²⁵

It must be noted that, in *Antone*, the husband employed a **management company** to manage the 18 properties during the marriage. *Id.* at 99. Despite this, the trial court found that market forces, not marital effort, caused the properties to appreciate. *Id.* This Court did not disagree; it simply held that a portion of the appreciation was marital because part of

²⁵ This is precisely the reverse of the error made by the Court of Appeals in the instant case. In *Antone*, the use of marital funds to reduce the mortgages created "mixed" assets, ones having both marital and nonmarital components. The lower court's error was to treat the entire increase in value of those assets during the marriage as nonmarital. In the instant case, Dr. Baker's retirement accounts became mixed when his employer made annual contributions to the accounts during the marriage. Yet the Court of Appeals has committed the same kind of error as did the lower court in *Antone*; it has treated the entire increase in value in these accounts as marital, ignoring the obvious fact that the \$1 million in the accounts on the date of the marriage must also have increased in value over time (and, indeed, much more so than did \$30,000 per year in marital funds added to the accounts during the marriage).

what was appreciating was marital, namely, the amount by which the mortgage balances had been reduced during the marriage through the application of marital funds.²⁶

The last time this Court addressed the active-passive distinction was in *Gottsacker v. Gottsacker*, 664 N.W.2d 848 (Minn. 2003). In that case, the wife received gifts of stock in a family business from her parents before and during the marriage. The business was a subchapter “S” corporation, and the wife was required to pay taxes on her share of the corporate income whether or not it was in fact distributed to her. (Sufficient distributions were made to her to pay the taxes due each year.) The corporation kept a record (called an Accumulated Adjustment Account, or “AAA”) of the difference between the income on which she paid taxes and the income actually distributed to her. The lower court (a consensual special magistrate in that case) ruled that the amount in the wife’s AAA was nonmarital because “*the husband and wife have not expended efforts to enhance the value of the [underlying] nonmarital stock.*” *Gottsacker*, 664 N.W.2d at 851 (emphasis added). The husband appealed that ruling, and both the Court of Appeals and this Court affirmed. Among the issues addressed was the husband’s argument that the increase in value of the AAA over the marriage resulted from “active appreciation” and was therefore marital. (Part II of the *Gottsacker* decision, 664 N.W.2d at 857-58.) Noting with approval the trial court’s reliance upon *Duffey v. Duffey*, 416 N.W.2d 830 (Minn. App. 1987), *review denied* (Minn. Feb. 24, 1988), and the *Duffey* Court’s rejection of a right-of-control argument in favor

²⁶ The dissent would have held the entire increase to be nonmarital. *Id.* at 105 *ff.*

application of the well-established factor of whether marital resources were devoted, this Court affirmed, stating:

The court [in *Duffey*] was not persuaded by the argument that the husband had *control* over fund disbursement and focused instead on *marital effort*. Thus, it was not, as Gottsacker asserts, the corporate structure that guided the court in *Duffey*; rather, it was whether the retained earnings, as an increase in the value of the stock, *could be attributed to marital effort*.

Gottsacker, 664 N.W.2d at 857 (emphasis added). Noting that none of the husband's arguments "contradict the lower court's finding that no marital effort can be said to have increased the value of [the wife's] interest in [the family corporation]", this Court affirmed. *Id.* at 858.²⁷

Summary. What this Court established through this line of cases is best summarized by the following excerpt from *Gottsacker*:

[W]e conclude that Minnesota courts have established the following method of analyzing interests associated with nonmarital assets. If the interest 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*

²⁷ It should be noted that another part of the *Gottsacker* decision dealt with the husband's argument that the use of marital funds to pay taxes on the undistributed corporate earnings converted the appreciation in the AAA from nonmarital to marital. This Court held it did not. *Gottsacker*, 664 N.W.2d at 858. It stated: "It is not marital income when the shareholder spouse has little to no control over whether to retain or distribute the earnings, and it is not active appreciation when no marital effort was expended to increase the value of the stock interest." (*Id.*) It is important to note that the reference to "control" had to do with the husband's argument that the earnings distributions not in fact made to the wife were "income", and not with whether the appreciation over the course of the marriage was active or passive. The determining factor on the latter issue was, at this Court stated, whether "*marital effort was expended to increase the value of the stock interest.*" (*Id.* [emphasis added])

the result of marital effort. If the interest is "income" from the nonmarital asset, it is marital income.

Gottsacker, 664 N.W.2d at 854 (emphasis added).

In the instant case, although Dr. Baker in fact exercised virtually no control over his retirement accounts during the marriage, the mere fact that he had the legal right to do so, according to the majority, was enough. That it took virtually no time, effort, or funds from the marriage to appoint an investment advisor to manage the accounts is now irrelevant, even though the original rationale for treating the appreciation in value of a nonmarital asset as marital property is that it results from just such a diversion. A spouse who spends marital time or funds increasing the value of his nonmarital assets diverts resources from the marriage, and fairness dictates that the marital estate be credited with the fruits of such diversions. That is the rationale – logically and historically under this Court’s decisions – for the "active- appreciation" doctrine. However, a spouse who pays an investment advisor from nonmarital funds to manage his nonmarital retirement account diverts nothing from the marriage, and the rationale for the doctrine does not apply. Under the majority opinion, however, whatever a spouse's agent does is automatically imputed to the principal-spouse as a matter of law, even though the agent's activities in no way divert any marital effort or funds from the marriage. To reach that result, the majority adopted a “right-of-control” principle which has the effect of obliterating the active-passive appreciation distinction and rendering it impossible, as a practical matter, for a party owning nonmarital assets to successfully argue that any portion of their appreciation during the marriage is also nonmarital. The majority

reasoning ignores binding precedent, and establishes a new rule of law, which, if allowed to stand, will produce unjust results for litigants with nonmarital claims, and spawn a line of decisions severed from common sense, logic, and this Court's prior decisions.

B. The Decision of the Majority of the Appellate Panel in the Instant Case Marks an Extreme and Unacceptable Departure from the Principles Developed by this Court to Allocate between Marital and Nonmarital Components of Property.

There are two serious flaws with the reasoning of the two-judge majority. First, it imputes to Dr. Baker all time, effort, and activity engaged in by his financial advisor without regard to the linchpin of the active-passive appreciation distinction, namely, whether any marital resources were diverted *from* the marriage *to* Dr. Baker's nonmarital interests. Second, it adopts a "right-of-control" rule which virtually eliminates the active-passive appreciation distinction from family-law jurisprudence.

The two-judge majority below characterized the retirement-accounts issue as follows:

Wife challenges [the trial court's] allocation, arguing that the district court should have allocated the entire amount by which the SIGS accounts have increased above the premarital amount of \$957,473 to marital property because that increase is attributable to the exertion of marital efforts. Specifically, wife argues that this increase is the result of husband's active management of the SIGS accounts himself and through his financial advisor.

(A-7 to A-8) The majority then purported to agree that having a financial advisor manage a retirement account is not sufficient to classify all appreciation as marital. (A-8) To rule on the issue, the majority stated, "a district court must examine the nature of the spouses' efforts regarding these retirement accounts." (*Id.* [citation omitted])

What the panel in fact did, however, was quite different. Relying upon case law from the law of agency (none of it arising in the family-law setting), the majority ruled that “[t]he evidence conclusively establishes that husband and Trask created an agency relationship when they mutually agreed that Trask would act on husband’s behalf but subject to husband’s control.” (A-9 [citations omitted]) Thus, the majority concluded, Dr. Baker “actively manage[d] the SIGS accounts *through Trask . . .*” (A-9 [emphasis added]) That is, for purposes of the active-passive appreciation distinction, the acts of Trask are all to be imputed to Dr. Baker. If Trask spent “x” number of hours over the course of the marriage dealing with the investments in the SIGS accounts, it’s just as if Dr. Baker had done so.

One must ask here, where was the diversion of marital resources? Of what was this marriage deprived by Trask managing these accounts? No marital “effort” was in fact diverted from the marriage by Dr. Baker or his wife. A single meeting with Trask at the outset of the marriage, and a single directive over 13 years to Trask to make a modest stock purchase that soon became worthless neither deprived the marriage of either party’s time or effort or caused any appreciation in the retirement accounts. In fact, by having Trask manage the accounts, Dr. Baker was allowed to go to work every day in his late 50's and throughout his 60's to perform surgeries to earn the money that enabled his wife to bask in her early “retirement”. Far from “diverting” resources from the marriage, it preserved them.

The management fees were paid (at least on some of the accounts) through automatic deductions from the accounts themselves, meaning they were paid with funds partly marital

and partly nonmarital, the proportions being identical to those applicable to the bulk of the funds in the accounts. (If the funds in an account are half marital and half nonmarital, a fee deducted from the account is paid half with marital funds and half with nonmarital.) Thus, any appreciation in the nonmarital portion of the accounts resulting from Trask's management was due to the application of nonmarital, not marital, funds.²⁸

After denying that the use of a financial advisor is by itself sufficient to convert all the appreciation in the accounts to marital property, the majority in effect held precisely that, and in so doing, ignored the line of this Court's decisions discussed above which make the diversion of marital effort or funds essential to a finding of active appreciation.

Essential to the majority's ruling that all of Trask's activities are to be imputed to Dr. Baker is Dr. Baker's theoretical right to control the accounts. This right of control is all based on Carol Baker's questioning of witnesses about what Dr. Baker *could have done* with the funds, or *had the right to do* with them. The majority holds, in effect, that because Dr. Baker had *the right* to make "investment decisions" with respect to the funds, his "decision" not to exercise that right was itself a form of "entrepreneurial decision-making". This logic makes the right of control over an asset the same as active decision-making, and it applies to virtually every asset one can imagine.

²⁸ Even though the record is not clear as to the source of the payment of the management fees on some of the accounts, the majority's holding renders the source of the payments irrelevant, since it noted the unclarity (*see* A-8 n. 2) and proceeded to rule as it did, rendering it irrelevant in this and future cases whether the payments came from nonmarital or marital funds.

Appreciation in the value of the painting discussed in *Swick v. Swick*, 467 N.W.2d 328 (Minn. App. 1991), *review denied* (Minn. May 16, 1991), until now a classic illustration of passive appreciation, is now marital property under the ruling of the *Baker* majority, since the party can in theory sell the painting, pledge it as security for a loan, have it re-framed in a more expensive setting, or convert it to cash, and the decision not to do so is an "entrepreneurial" one. The same is true of homesteads and other real estate, until now subject to the *Schmitz* formula for allocating between marital and nonmarital components whatever appreciation occurs during a marriage. The appreciation in the price of publicly-traded nonmarital stock, a classic form of passive appreciation under *Nardini*, is now entirely marital, because again, the owner can sell it or otherwise dispose of it as he or she pleases. Each day the owner fails to sell the stock he or she makes an "active" investment decision. Virtually the only nonmarital assets exempt from the new right-of-control rule of the *Baker* majority are those rare retirement plans, such as those involved in *White v. White*, 521 N.W.2d 874 (Minn. App. 1994), where the participant has no right to control the investment at all, or to make any withdrawals prior to retirement. Any other nonmarital asset falls under the new *Baker* rule.

Judge Minge had it right when he stated:

. . . I conclude that [the district court] used the proper standard for determining what constituted active management of nonmarital investment assets and properly applied that standard.

With three relatively isolated and minor exceptions, [Dr. Baker] did not play an active or practical role in the management of his nonmarital retirement

funds. [His] “active” involvement consists of three decisions: (1) Investing a modest amount in a business in which his son was involved. This was ultimately a loss; it contributed nothing to the growth of the nonmarital asset *and even worse it now contributes to all appreciation as being classified as marital property.* (2) Changing his investment advisor. This was done once upon the recommendation of [Dr. Baker’s] accountants. This was not active management. It was simply an attempt to save advisory service fees and obtain better services. [Dr. Baker] subsequently reversed that decision. (3) Rolling funds from certain widely-held mutual funds to others largely within the same family of funds. This was done as any wage earner with a 401(k) account or other flexible retirement fund might adjust a retirement portfolio mix to maintain balance. It was not often or dramatic. [Dr. Baker] was working full-time. The record is clear that [he] did not engage in research, take time from his medical practice, take time from his family for this activity, or engage an active, hands-on manager. If this constitutes active management, the bar is very high.

In these circumstances, I would not overrule the district court, but rather defer to its decision that [Dr. Baker’s] management did not cause the appreciation of a nonmarital retirement fund [to] become[] marital property.

(A-22 to A-23 [emphasis added].)

III. THE COURT OF APPEALS MISAPPLIED THE “DISSIPATION” STATUTE IN RULING THAT DR. BAKER’S PAYMENTS OF ATTORNEY’S FEES PENDING TRIAL CONSTITUTED A DISSIPATION OF MARITAL ASSETS.

The ruling of the Court of Appeals that Dr. Baker’s payment of attorney’s fees pending trial was erroneous on several independent grounds.

The parties and their attorneys signed a written stipulation on August 22, 2003 that provided in relevant part as follows:

Both parties are restrained from transferring, encumbering, concealing or disposing of property except in the usual course of business or for the necessities of life, *except as to any future earned income*, except as the parties with their attorneys may mutually agree in writing.

(A-36 to A-37, para. 4 [emphasis added].)²⁹ Carol Baker testified that she understood this stipulation to allow Dr. Baker to spend his future earnings on whatever he pleased (as long as he paid her the \$7,300 per month in temporary maintenance). All the challenged payments of attorney's fees were all made from Dr. Baker's checking account, the account into which he deposited all his earnings from the practice of medicine (and the same account from which he made the \$7,300-per-month maintenance payments to his wife). The payments fell squarely within the exception of the Stipulated Temporary Order of August of 2003.

The "dissipation" statute contains an explicit exception for payments or transfers the parties agree may be made. It provides in relevant part as follows:

Minn. Stat. §518.58 (2004)

* * *

Subd. 1a. Transfer, encumbrance, concealment, or disposition of marital assets. During the pendency of a marriage dissolution, separation, or annulment proceeding, or in contemplation of commencing a marriage dissolution, separation, or annulment proceeding, each party owes a fiduciary duty to the other for any profit or loss derived by the party, without the consent of the other, from a transaction or from any use by the party of the marital assets. 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

²⁹ That stipulation was signed by both Referee Williams and District Court Judge Michael F. Fetch that same day, and made "An Order of the Court". (A-37)

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 . . .

* * *

(Emphasis added)

By entering into this stipulation, Carol Baker consented to Dr. Baker's use of his future earned income to pay his attorney's fees to bring the case to trial. In *Thomas v. Thomas*, 407 N.W.2d 124 (Minn. App. 1987), the one decision upon which the Court of Appeals relied (*see* A-15), no such written consent had been given.

On this ground alone, without any further discussion, the panel's ruling on dissipation must be reversed.

However, it is perhaps also important to note that there are other considerations as well – those of equity and common sense – that support that result.

Dr. Baker had every reason to believe he was paying his attorney, not only pursuant to an exception in the Stipulated Order that allowed him to make use of “marital” income for this purpose (as discussed above), but with funds that were nonmarital.

The dissipation statute and the *Thomas* ruling apply only to expenditures of “marital assets”. Property “acquired by a spouse after the valuation date”, however, is not marital property. (Minn. Stat. §518.54, subd. 5[d] [2004]) The valuation date is set as follows:

The court shall value marital assets for purposes of division between the parties as of the day of the initially scheduled prehearing settlement

conference, unless a different date is agreed upon by the parties, or unless the court makes specific findings that another date of valuation is fair and equitable.

(Minn. Stat. §518.58, subd. 1 [2004])

The initially scheduled pretrial conference was held January 8, 2004. (See A-38 & A-39) Thus, under the statute, that was the presumptive valuation date. All but \$12,851 of the \$114,257 in challenged payments of attorney's fees were made after that date, and were therefore made, as far as Dr. Baker knew, with nonmarital funds.

Nine months later, in its Findings and Order for Trial dated September 22, 2004, the district court set a valuation date of February 17, 2004. (A-45, Para. 4) By the time that order was issued, however, Dr. Baker had paid his attorneys another \$74,127 in fees. (A-148 [sum of payments from 01/14/04 to 08/17/04])

On April 21, 2005, Carol Baker's attorney requested that the valuation date be changed to December 31, 2004. (A-48[b]) On May 2, 2005, the first day of trial, the trial court ruled on her request, and changed the valuation date to February of 2005. (A-48[d], line 22 to A-48[e], line 3) By the time that ruling was made, all \$114,257 of the challenged payments had been made. (A-148)

From the perspective of Dr. Baker, he had been paying his attorneys with nonmarital funds, only to learn on the first day of trial, after all the payments had been made, that the funds he used had retroactively (and technically) been reclassified as "marital". It is hardly fair to penalize Dr. Baker for such a retroactive change. While the focus of the valuation

date were the important valuation issues presented by some large assets, the change in the date had this technical and unforeseen consequence with respect to the funds he was using to pay his attorney.

While statutory rules and bright lines are obviously needed in these cases, justice and equity also have their place.³⁰ Dr. Baker's payment of attorney's fees under these circumstances can hardly be seen as a dissipation of marital assets under the statute.³¹

Finally, it cannot be ignored that Carol Baker also paid her own attorney's fees with marital funds, and that the \$43,000-plus payment of her credit-card balances with the parties' joint tax refund included payments (or reimbursement for past payments) of attorney's fees. Those payments were no more a dissipation of marital property than were Dr. Baker's payments to his attorney.

Dr. Baker paid his attorney in timely fashion while the case was pending to move the case to trial. (*See* A-148) Treating as dissipation all attorney's fees paid pending trial will make parties reluctant to pay their attorneys any fees at all without prior court approval, thereby creating a risk of lowering the quality of legal representation available to parties to

³⁰ *See e.g.*, Minn. Stat. §518.58, subd. 1 (2004) ("the court shall make a just and equitable division of the marital property of the parties"), and *Nardini v. Nardini*, 414 N.W.2d 184, 188 (Minn. 1987) ("[E]quity denotes fairness and requires the application of the dictates of conscience or the principles of natural justice to the settlement of controversies.").

³¹ Again, as mentioned earlier, that the payments were allowed by the Stipulated Temporary Order alone requires reversal, and this discussion simply addresses why it is also equitable, in addition to being correct, that the ruling be reversed.

marriage dissolutions, and unnecessarily adding to the burden of trial courts by requiring them to grant prior approval for each such payment.

The ruling of the appellate panel below conflicts with the parties written stipulation of August 22, 2003 and the language of the dissipation statute, and for that reason alone, must be reversed. In addition, principles of equity and common sense compel the same result. The ruling must be reversed.

CONCLUSION

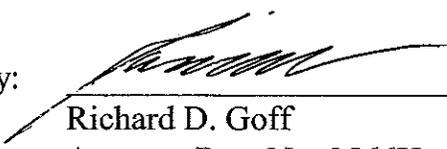
Based upon the entire record in this proceeding, including the foregoing points and authorities, the appellant Daniel Baker respectfully requests that this Court reverse the rulings of the Court of Appeals that the entire value of his SIGS retirement accounts, with the exception of their value on the date of the marriage, be treated as marital, and that Dr. Baker's payments of attorney's fees to bring the case to trial constituted a dissipation of marital assets.

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) 11,958 words.

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