

NO. A06-1252

State of Minnesota
In Supreme Court

Carol Bernice Baker,

Respondent,

vs.

Daniel Remember Baker,

Appellant.

**APPELLANT'S REPLY BRIEF
AND SUPPLEMENTAL 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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ARGUMENT

I. CAROL BAKER'S NUMEROUS REFERENCES TO THE DISTRICT COURT'S "VERBATIM" ADOPTION OF LANGUAGE PROPOSED BY DR. BAKER ON THE TWO ISSUES THAT HAPPEN TO BE INVOLVED IN THIS APPEAL MISS THEIR MARK.

In her brief, Carol Baker repeatedly uses the term "verbatim" to refer to the district court's adoption of findings proposed by Dr. Baker on the SIGS accounts and the attorney-fee dissipation issue.¹ The intended implication, it seems, is that its having done so was in some way improper. It was not.

Even a verbatim adoption of one party's entire set of proposed findings on all matters at issue is neither uncommon nor improper. *See e.g. Schallinger v. Schallinger*, 699 N.W.2d 15, 23 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005). In fact, doing so is "accepted practice". *Id.* (citation omitted). At most, the wholesale adoption of the entirety of one side's proposed findings merely raises the question of whether the court reviewed the evidence independently. *Id.* The "clearly-erroneous" standard still applies to appellate review of all such findings. *Id.*

While it is clear that the district court here incorporated the overall *format* of the findings proposed by Dr. Baker, it is equally clear it rejected many of Dr. Baker's proposed findings on important issues. For example, Dr. Baker proposed a finding on Ms. Baker's Income and Monthly Expenses – a finding crucial to the issue of spousal maintenance – that

¹ *See* Respondent's Brief at pp. i (twice), 7, 14, 18 (three times), 19, 20, and 26.

characterized (a) her claim of physical limitations as not supported by the evidence, (b) her current earning capacity as \$45,000 per year based on expert testimony, and (c) her reasonable monthly expenses as \$4,597. (See Dr. Baker's proposed Finding XI at SA-22 to SA-24.)² On each of these points, the district court made findings to the contrary; it found Ms. Baker's evidence of physical limitations adequate, rejected the conclusions of Dr. Baker's expert on Ms. Baker's current earning capacity, and set Ms. Baker's reasonable monthly expenses at the much higher amount of \$6,841.³ The district court also rejected Dr. Baker's proposed findings on the eight statutory spousal-maintenance factors, and concluded that Ms. Baker was entitled to \$8,764 per month in maintenance instead of the \$2,500 per month Dr. Baker proposed,⁴ an amount significantly higher than the maintenance Ms. Baker herself had proposed.⁵

Carol Baker offered the district court only a cursory and conclusory proposed finding on the SIGS accounts. Her proposed finding on that asset consisted of a mere 16 lines. (See SA-2 to SA-3, proposed Finding XXI.) She offered the very same conclusory finding, word-for-word, without supplementation, in her motion for amended findings after the decree was

² Pages in the appellant's Supplemental Appendix, *post*, are numbered "SA-[page number]."

³ See the relevant portions of the judgment and decree at A-55 to A-56.

⁴ Compare Dr. Baker's proposed Finding XVIII at SA-32 to SA-35 and the district court's Finding XVIII at A-73 to A-77.

⁵ See SA-4, Ms. Baker's proposed Conclusion of Law 2 (proposing a maintenance award of \$7,200 per month).

issued. (See SA-7 to SA-8) Compare that proposed finding to the detailed findings on this issue proposed by Dr. Baker. (See Dr. Baker's Proposed Finding XV labeled "Respondent's Retirement Assets" at SA-26 to SA-30.)

Thus, even where the district court engages in a wholesale adoption of one party's proposed findings, verbatim, on *all issues*, its findings must nevertheless be affirmed unless "clearly erroneous", as long as the district court "evaluated the evidence independently." *Schallinger* at 23 ("Based on a review of the record and the district court's extensive findings of fact and conclusions of law, we conclude that the district court evaluated the evidence independently."). Here, although the district court's findings on the SIGS accounts tracked those proposed by Dr. Baker, there is no indication the court failed to evaluate the evidence independently. In fact, its rejection of many other findings Dr. Baker proposed demonstrates precisely the opposite.

The same applies to the language adopted by the district court on the attorney's-fee dissipation issue.⁶

⁶ In her proposed findings submitted after trial, Carol Baker did not request a finding of dissipation with respect to attorney's fees, but merely cited Dr. Baker's payment of his fees as a ground for awarding her "need-based" fees of \$51,000. (SA-3 to SA-4: Proposed Finding XXIII.) It was in her post-trial motion that she first proposed a finding of attorney's-fee dissipation. (SA-8 to SA-9: Proposed Amended Findings XVII and XIX.) The language used by the district court in rejecting her dissipation claim on attorney's fees consisted primarily of quoting the relevant section of the governing statute, Minn. Stat. §518.58, subd. 1a (A-116 to A-117), hardly evidence of a failure to conduct an independent review.

II. THE DISTRICT COURT'S ALLOCATION OF THE APPRECIATION OF THE SIGS ACCOUNTS DURING THE MARRIAGE WAS CORRECT, AND IN ACCORDANCE WITH THE PRINCIPLES ESTABLISHED BY THIS COURT.

A. Carol Baker Concedes Dr. Baker's Primary Argument.

In his opening brief, Dr. Baker, relying upon the decisions of this Court, argued that it is a diversion of marital resources, either money or effort, from the marriage to one party's nonmarital property which underlies the active-passive appreciation doctrine. If marital resources are expended on one party's nonmarital property, and that expenditure causes the nonmarital asset to increase in value by a certain dollar amount ("x" dollars), then that increase in value ("x") is marital property. That, in a nutshell, is the active-passive appreciation doctrine as delineated by this Court in its prior decisions. Nowhere in her brief does Carol Baker dispute this analysis. Thus, the primary legal principle upon which Dr. Baker's argument rests has, in effect, been conceded to be accurate.

B. Carol Baker Urges a Strict-Tracing Standard that Has Never Been Required.

Instead of contesting Dr. Baker's primary argument, Carol Baker suggests that the tracing done by Dr. Baker's expert was inadequate. She points out that Dr. Baker's expert did not do a strict tracing of particular investments owned on the date of the marriage to particular investments owned on the valuation date, and account dollar-for-dollar for each investment transaction during the 15 years of the marriage. For example, she notes that Dr. Baker's expert did not know in what investment vehicles the SIGS funds were housed on the day the parties married in May of 1990 (cash, stocks, bonds, *etc.*), and therefore could not

know if any of those particular investments remained in tact when the parties divorced in November of 2005. (Respondent's Brief at 17) She points out that because contributions were made by Dr. Baker's employer (\$30,000 per year on average) to the SIGS accounts, the nonmarital funds were "commingled" with marital funds. (*Id.* at 12) She cites as a deficiency in the expert's analysis that he did not separately attribute the increase in value of the SIGS accounts during the marriage among "forces such as increased stock prices or stock splits and what increases are attributable to income, investment decisions and reinvested cash dividends." (*Id.*)

Minnesota law has never required such an analysis to support a nonmarital claim. "There is not a 'strict-tracing' standard, but a party need only show by a preponderance of the evidence that the asset [is nonmarital]". *Carrick v. Carrick*, 560 N.W.2d 407, 413 (Minn. App. 1997) (citation omitted). *Accord, Doering v. Doering*, 385 N.W.2d 387, 390 (Minn. App. 1986); *Kottke v. Kottke*, 353 N.W.2d 633, 636 (Minn. App. 1984), *review denied* (Minn. Dec. 20, 1984). "Commingling of nonmarital and marital property is not fatal to a party's claim that property remained nonmarital." *Carrick* at 413 (citations omitted). In fact, commingling often occurs where nonmarital interests are upheld. The purpose of the *Schmitz* formula, for example, is to achieve a fair apportionment between marital and nonmarital interests in a single asset which has both components.

Findings of the district court that current assets are traceable to nonmarital assets are to be upheld if not clearly erroneous. *Doering* at 391.

If Minnesota law required what Carol Baker suggests, Dr. Baker's expert would have had to produce every statement for every account which contained a SIGS asset over a 15-year period, and identify each stock, bond, mutual fund, and other investment transaction; record the purchase and sale date and price to calculate any gain or loss; subtract any broker or transaction fees on each transaction; trace the proceeds of each sale into each new purchase; calculate and trace to each asset each bit of interest and each dividend paid; do a market analysis over the 15-year period with respect to each investment held during that period to determine whether market forces increased the value of the investment during the period it was held; and on and on. Of course, that cannot be done, at least not as a practical matter. Tom Harjes, Dr. Baker's expert, produced two large three-ring binders of documentation supporting his analysis, and summary charts which traced each of his findings to those underlying documents – all of which was received in evidence without objection. (T. 170)⁷ Had he done what Carol Baker suggests he was required by law to do, his expert report would have had to be delivered in a small truck, and his fees would have rivaled some of the parties' larger assets. The applicable burden of proof is preponderance of the evidence, not beyond a reasonable doubt.⁸ No tracing of the kind Carol Baker demands could be done with large money investments held over a 15-year period of time.

⁷ Carol stipulated that he is an expert in accounting. (T. 167)

⁸ The trial court's findings on the adequacy of Dr. Baker's proof are detailed, meticulous, and fully supported by the record. (See Finding of Fact XV in the judgment and decree at A-68 to A-71, and paragraphs 12-19 in the Order denying Carol Baker's post-trial motion at A-108 to A-114.)

C. **The Method Used by Dr. Baker's Expert Closely Tracks the Schmitz Analysis, and Carol Baker's Criticisms of That Analysis are Without Merit.**

Ms. Baker's argument of commingling and failure to trace income and dividends to particular stocks and bonds over a 15-year period ignores the soundness of the analysis Dr. Baker's expert conducted. In effect, he performed a *Schmitz* analysis for each year of the marriage. This Court has described the *Schmitz* formula as follows:

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). Mr. Harjes calculated the percentage of SIGS funds that were nonmarital, the amount of the marital contributions made to the account during the year, and applied those percentages to the amount by which the account increased in value during the year. The only contributions to the accounts during the marriage were those made annually by Dr. Baker's employer in a lump sum (an average of \$30,000 per year). It made perfect sense, then, for Mr. Harjes to do the *Schmitz* analysis year-by-year. Doing so credited the marital estate with the maximum appreciation on the annual marital contributions (in addition to the contributions themselves). Where a 15-year marriage and substantial money investments are involved, this is a perfectly practical, fair, and legitimate way to allocate increases in value between an asset's marital and nonmarital components. In *Nardini*, this Court made it clear that the *Schmitz* formula can be broadly

applied to apportion interests in most “mixed” assets (*i.e.*, those having both marital and nonmarital components) that are involved in marriage-dissolution cases. *Nardini v. Nardini*, 414 N.W.2d 184, 194 (Minn. 1987).

A similar analysis was approved by the Court of Appeals in *White v. White*, 521 N.W.2d 874, 878-79 (Minn. App. 1994). There, the trial court found that the value of the husband’s retirement account at the time of the dissolution was \$244,073. (*Id.* at 873) Its value at the time of the marriage was found to have been \$94,739. (*Id.* at 876) The trial court then made a finding that, if the husband had terminated his employment at the time of the marriage and made no additional contributions, his account *would have been worth* \$193,975 at the time of the dissolution. (*Id.*) Based on that analysis, the trial court classified \$193,975 as the nonmarital portion, and the difference of \$50,098 (\$244,073 - 193,975) as the marital portion. The wife argued on appeal, as did Ms. Baker here, that the entire increase on value should have been classified as marital. (*Id.* at 877) The *White* Court rejected that argument and affirmed the lower court’s analysis. There was no “tracing” done by the husband in *White* of stocks or other investments in the plan on the date of the marriage to those in the plan at the time of the dissolution. There was no discussion by the *White* Court about the “commingling” of nonmarital and marital funds in the same retirement account having converted all the increase in value in the account after the date of the marriage to a marital asset.

Ms. Baker's current objections to the analytical method used by Mr. Harjes conflict with a concession she made in the district court. In her memorandum in support of her motion for amended findings, Ms. Baker conceded that the tracing method used by Dr. Baker's expert was proper. She stated: "The Court's finding that the methodology used by Tom Harjes was appropriate begs the question of whether or not the underlying data used was correct. In o[t]her words, [Ms. Baker] is not challenging the 'methodology' of the tracing. Rather, it is the underlying data that is deficient." (SA-14 [emphasis added]). The underlying data was primarily the value of the SIGS accounts on the date of the marriage, a value the parties have always agreed upon. In her brief to this Court, she continues to refer to the analysis used as the Harjes "methodology", which she now appears to dispute. (*See e.g.* Respondent's Brief at 13[first full paragraph] through 14 [top].)⁹

D. Like the Two-Judge Majority of the Court of Appeals, Ms. Baker Continues to Stress Dr. Baker's Theoretical Right of Control As a Determining Factor.

The illogic of the "right-of-control" rule established by the appellate panel's two-judge majority below is illustrated by the following. Even if Dr. Baker's expert had done the

⁹ Thus, Ms. Baker's suggestion that if this Court reverses, a remand to the Court of Appeals on the commingling issue is required (Respondent's Brief at 24) is misplaced. If the basis of the reversal is that the analysis of Dr. Baker's expert, which simply utilizes the well-established *Schmitz* formula, is adequate, no remand is needed. The ruling of the district court on the proper allocation between the marital and nonmarital components should simply be reinstated. The *Schmitz* formula assumes an asset having both nonmarital and marital components, that is, interests "commingled" in a single asset. The percentages used in the formula are designed to separate, or "un-commingle," those interests. After the *Schmitz* formula is applied, there is no issue of commingling to be addressed.

unrealistic “strict tracing” Carol Baker argues was required, all of the appreciation in the SIGS accounts would still have to be classified as marital under the new *Baker* rule. Why? Because Dr. Baker still had the right in theory throughout the marriage “to control those assets.” One wonders how a 54-year-old surgeon, having accumulated \$1 million in retirement assets through years of hard work, could possibly arrange to preserve their nonmarital character before embarking on a second marriage? If the ruling of the *Baker* majority stands, it would be virtually impossible. Even if he set up a blind trust the day before his marriage, retained an investment firm to manage the account during his marriage (and to take their fee from those nonmarital assets), instructed them not to consult him about any investment decisions during the marriage, and made no contributions of marital funds to the trust during the marriage, all the appreciation would nevertheless be marital because he would still have had the right to change his mind at any time about any one of these features. If he could revoke the trust and exercise control, each day he did not do so during the marriage would constitute an “entrepreneurial decision” involving “marital effort”. To guard against that, he would have to make the trust irrevocable, and surrender all control of any kind. According to Ms. Baker, however, *even that would not be enough*. Dr. Baker would have had to instruct the advisors not to make decisions for the purpose of increasing their value, but only to avoid depleting the funds while the marriage lasted. (*See Respondent’s Brief at 31.*)

This cannot be the law.

E. In an Attempt to Skirt These Difficulties with the Majority Ruling, Ms. Baker Attempts to Muddy the Factual Record to Suggest That Dr. Baker Exercised More Personal Control than He Did.

Conceding as she must that it is the diversion by one party of marital resources from the marriage that causes an enhancement of that party's nonmarital property that underlies the active-passive appreciation doctrine, Ms. Baker chooses to isolate features of the record in an attempt to suggest that Dr. Baker devoted more personal effort than he did to the SIGS accounts. For example, she spends nearly four pages in her Statement of Facts addressing matters such as when and from which investment firm certain bulk transfers were made. Dr. Baker stands on his summary on pages 5 to 8 of his opening brief. Detailed responses could be provided if these issues made any difference. They do not. The transfers that occurred were all made during the marriage, and there were precious few: the initial transfer of some of the SIGS funds to Trask in 1992; a transfer of \$619,993 to a Schwab account in 1999 (where the funds still remain); the bulk transfers that occurred when Dr. Baker retired from SIGS in 2000; and the eventual transfer of the remainder (except for the Schwab funds) to Trask in 2002.

If these bulk transfers, one made at the outset of the marriage, and others made in response to a request that he roll over his SIGS accounts when he retired years later in 2000, and a final transfer in 2002, shortly after his retirement from SIGS to consolidate his funds with Trask and Merrill Lynch, constitute "active management" of nonmarital funds, then, as Judge Minge stated, "the bar is very high". (A-22)

Beginning with the first employer contribution after the marriage, these funds contained marital as well as nonmarital funds. A few simple bulk transfers of all those funds – marital and nonmarital – over the course of a 15-year marriage, done “as any wage earner with a 401(k) account or other flexible retirement fund might adjust a retirement portfolio mix to maintain balance”,¹⁰ protected both the nonmarital *and marital* components of the funds. (Dr. Baker’s expert and the district court classified all contributions during the marriage, *and all appreciation* of those contributions that occurred during the marriage, as marital property.)

Although not couching the matter explicitly in terms of a diversion of marital effort for the purpose of enhancing one party’s nonmarital property, Judge Minge had it right when he described Dr. Baker’s actions as infrequent and minor. (*See* A-22 [“not often or dramatic”])¹¹

¹⁰ A-22 (Judge Minge).

¹¹ Ms. Baker suggests that Dr. Baker made inconsistent statements in his opening brief about whether Trask’s fees were paid with marital or nonmarital funds. (*See* Respondent’s Brief at 31 n. 9.) Not true. It is common knowledge, at least among those having such accounts, that management fees are commonly paid with deductions from the accounts themselves, and Dr. Baker pointed to specific instances in the record where that was done here. (*See* Dr. Baker’s opening brief at 7 n. 6.) Dr. Baker made two points in this connection. First, if the fees are paid from the account, the fee is paid with the same percentage of nonmarital and marital funds as are in the account. If the account is 70% nonmarital, then 70% of the fee is taken from nonmarital funds and 30% from marital funds. Any increase in the value of the nonmarital funds caused by management by the investment advisor paid with those fees would be due entirely to an expenditure of nonmarital funds, since only 70% of the increase in the value of the account would be classified as nonmarital. 30% of the overall increase would be marital, paid for by 30% of the fee (the marital portion). Second, the two-judge majority decided it did not matter whether the management

Summary. The rule of the *Baker* majority deviates from the rationale for the active-passive appreciation doctrine as developed by this Court. It allows wholesale reclassification of nonmarital appreciation as marital where no marital resources of any significance are diverted from the marriage. (It also dispenses with the requirement, ignored by the *Baker* majority, that a causal connection be shown between the diversion and the appreciation for the latter to be classified as marital.) Carol Baker attempts to distract this Court from that single feature of the majority ruling, but those attempts turn upon a strict-tracing analysis that has never been required, and a recitation of evidence of marginal relevance. The district court's allocation of the increase in the value of the SIGS accounts during the marriage was far from clearly erroneous; it was correct, and perfectly in line with this Court's prior decisions. The holding of the two-judge majority must be reversed and the district court's allocation reinstated.

III. THE DISTRICT COURT'S RULING THAT DR. BAKER DID NOT DISSIPATE MARITAL ASSETS UNDER SECTION 518.58, SUBD. 1a MUST BE REINSTATED.

A. The Rule Precluding the Raising of New Issues on Appeal Does Not Apply to Dr. Baker's Argument Based on the Stipulated Temporary Order.

In his opening brief, Dr. Baker argued that the district court's ruling on dissipation was correct, and that the Court of Appeals misapplied the "dissipation" statute in holding to the contrary. (Appellant's Brief at 37-39) The first argument he offered was that the

fees were paid with nonmarital funds; all the increase was still ruled to be marital. (A-8 n. 2)

Stipulated Temporary Order filed August 22, 2003 explicitly allowed Dr. Baker to use his “future earned income” for whatever purposes he pleased, including paying his attorneys, and that the requirements of the dissipation were therefore not met. (*Id.*) Ms. Baker now argues that because the stipulated order was not relied upon in the proceedings before the district court to justify its ruling that no dissipation occurred, it cannot now be offered to support that ruling. In support of her position, she cites a criminal case in which the appellant sought reversal of a murder conviction on a ground not lodged in the district court. (*See* Respondent’s Brief at 37, *citing State v. Davis*, 735 N.W.2d 674, 681 [Minn. 2007].)

The respondent’s argument has no merit.

First, the issue is not “new”. The record shows that Dr. Baker did rely upon the Stipulated Temporary Order before the trial court to justify his expenditures of funds from his “future earned income” during the pendency of the proceedings. Dr. Baker’s counsel questioned Ms. Baker explicitly about her various “dissipation” claims and her understanding of the Temporary Order:

Q: Ms. Baker, in your direct testimony you were asked some questions about moneys that were loaned by Dr. Baker to his children and other moneys he spent. Do you recall that series of questions that Ms. Lach asked you? I don’t mean specifically, but generally do you recall them?

A: Generally.

Q: All right. And one of the comments you made with regard to money spent after the Temporary Order - - and I’m going to quote you and I think I wrote it correctly - - you said that Dr. Baker - - and I assume it would apply to you - - was not to spend beyond the immediate needs, end of quote. Do you remember saying that?

A: Yes.

Q: What did you mean by that?

A: My understanding is that when you go through a divorce procedure, you have a court decree that says that for the time being, until the marriage is dissolved, that we are only to spend for our basic needs. We're not supposed to be making large expenditures on things until assets are divided; looked at and divided.

Q: Okay. You mean not a decree, but the Temporary Order?

A: Yes.

Q: I'm going to show you a copy of what's captioned Stipulated Temporary Order dated August 25th – or filed August 25th, '03, and signed by Referee Williams and District Court Judge Michael Fetsch on August 22nd, '03, and ask you if you recognize this Order which was also signed by you and Dr. Baker?

A: Yes. I recognize this.

Q: Okay. This Order is based upon an agreement that you and Dr. Baker reached; is that correct?

A: Right.

Q: Okay. And would you read paragraph 4?

A: "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. Each party is accountable to the Court for all such transfers, encumbrances" - -

Q: Okay. Just that paragraph. Now, my question to you is, one of the exceptions to the restraining language of the Order is future earned income; is that correct?

* * *

A: Yes, yes.

Q: All right. There was no restraint on you. You received \$7,300 and then you said you earned a little more money annually on the farm rental; is that correct?

A: Yes.

Q: 7,300 a month was the temporary maintenance that was agreed upon?

A: Yes.

Q: There was no restraint on how you spent that money, was there?

A: No, but it was budgeted for basic needs. There was nothing beyond.

Q: I understand that. But if you decided not to spend money on entertainment and to spend money on clothes or give it to your daughter, there was no restraint on that, was there?

A: Correct.

Q: Okay. And likewise, there was no restraint on how Dr. Baker spent his earned income, was there?

A: Yes. Correct.

(T. 426, line 5 through 429, line 8, reproduced in the Supplemental Appendix, *post*, at SA-38 to SA-41 [emphasis added])¹² Thus, Carol Baker's argument that Dr. Baker is relying upon the Stipulated Temporary Order for the first time on appeal is not correct.

¹² The Stipulated Temporary Order is reproduced in the Appendix to Dr. Baker's opening brief at A-36 to A-37.

Second, even if the “consent” argument had not been made below, it could nevertheless be relied upon to show that the district court made the correct decision.

It is true that the district court did not explicitly cite the Stipulated Temporary Order signed by Carol Baker as constituting “consent” under the statute to payments of attorney’s fees by Dr. Baker from his “future earned income.” It simply ruled that the requirements of the dissipation statute had not been met, and explicitly mentioned only the “usual-course-of-business” and “necessities-of-life” exceptions. (*Id.* at A-116 to A-117) That it chose to rely upon certain language in the governing statute instead of other language appearing nearby, however, hardly precludes Dr. Baker from relying upon the latter to justify the district court’s decision. When a party to an appeal is attempting to sustain a district court’s ruling, rather than overturn it, as in *State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007) – the single authority upon which Carol Davis relies – a different rule of appellate review comes into play. It is well established that this Court “will not reverse a correct decision simply because it is based on incorrect reasons.” *Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (citation omitted); *see also Bartl v. Bartl*, 497 N.W.2d 295, 301 (Minn. App. 1993) (affirming the district court’s assignment of tax exemptions for the children, even though it relied upon an inapplicable version of the statute where an amendment to the statute, ignored by the district court, dictated the same result, the Court noting that “though the court’s result on this issue was appropriate, its reasoning was not.” [Citation omitted]); *Brecht v. Schramm*, 266 N.W.2d 514, 520 (Minn.1978) (“If the trial court arrives at a correct decision, that decision should

not be overturned regardless of the theory upon which it is based.” [Citations omitted]; *Cambern v. Hubbling*, 307 Minn. 168, 171, 238 N.W.2d 622, 624 (1976) (“If the trial court’s rule is correct, it is not to be reversed solely because its stated reason was not correct.” [Citations omitted]). This is true even when – unlike here – the explicit ground urged for sustaining the district court’s ruling on appeal was never made in the trial court. *See e.g. Northway v. Whiting*, 436 N.W.2d 796, 798 (Minn. App. 1989) (where the district court granted the defendants summary judgment on a contract claim on the grounds the action was barred by the statute of frauds, the ruling was affirmed where the respondents justified the district court’s ruling on appeal *on grounds never raised below*).¹³

Third, the “consent” ground relied upon by Dr. Baker to sustain the district court’s ruling is closely related to the ground upon which the district court in fact relied. The district court rejected Carol Baker’s dissipation claim on the general ground that the requirements of the dissipation statute had not been met, and quoted the bulk of the dissipation statute, including the twice-mentioned requirement that the challenged transfer be made “without [the] consent of” the other party:

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

¹³ “Appellants argue that whether the contract is unenforceable for reasons other than the statute of frauds is not an issue properly before this court. However, we may affirm a summary judgment if there are no genuine issues of material fact and if the decision is correct on other grounds.” *Northway v. Whiting*, 436 N.W.2d 796, 798 (Minn. App. 1989) (citations omitted).

Volesky, 412 N.W.2d 750, 752 (Minn. App. 1987) (emphasis [omitted]).

The governing statut[e] . . . also undercuts the Petitioner's [Carol Baker's] argument as follows:

Minn. Stat. 518.58, subd. IA . . .

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

Memorandum attached to Findings and Order Re: Amended Findings, New Trial at A-116 (bolding omitted; underscoring added)¹⁴ This same short statutory excerpt quoted by the district court contains not only the "usual-course-of-business" and "necessities-of-life" exceptions, the ones the district court in fact later mentioned, but also the exception for expenditures made with the "consent" of the other party. No claim of prejudice or surprise could legitimately be made by Carol Baker under these circumstances and, indeed, no such claim has been made.

¹⁴ The dissipation statute, Section 518.58, subd. 1a, is reproduced in its entirety in the Addendum to Dr. Baker's opening brief at ADD-4 to ADD-5.

Finally, Carol Baker's argument before the Court of Appeals on the attorney's-fee dissipation issue contained no Minnesota case law – she cited only one case from Illinois – and no reference to the provision in the judgment and decree that each party was responsible for their own fees.¹⁵ It was the appellate panel that ruled that the finding of no dissipation “was 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.’” (A-15) That order, however, appears in the judgment and decree of November of 2005, long after Dr. Baker had made the disputed payments to his attorneys. It was the appellate panel that raised for the first time the issue of whether the district court’s dissipation ruling was inconsistent with its own orders. Dr. Baker can hardly be faulted for noting, in light of that ruling, that the district court’s ruling was entirely consistent with the order that was *in effect* throughout the time the disputed attorney’s-fee payments were made.

Thus, the “consent” argument under the Stipulated Temporary Order (a) was made in the district court, (b) could be relied upon to sustain the district court’s ruling even if it had not been made below, (c) does not in any way disadvantage Ms. Baker, who has had a full opportunity to brief the issue, and (d) is an entirely proper response to the new issue raised by the decision of the Court of Appeals.

¹⁵ See Brief of Appellant Carol Baker dated Aug. 7, 2006 in the Court of Appeals, pp. 32-33 (SA-43 to SA-44), and her Reply Brief and Supplemental Appendix dated Sept. 21, 2006 in the Court of Appeals, p. 12 (SA-46).

Ms. Baker's argument that this argument may not be considered by this Court must therefore be rejected.

B. Carol Baker Makes Certain Representation on the Merits of the Dissipation Issue That Require Correction or Supplementation.

Little of Ms. Baker's argument on the dissipation issue is directed toward the merits; she relies almost entirely on her "new-issue" argument. However, she does make a few representations that require correction or supplementation.

She states, for example, that Dr. Baker "did not testify that of the \$43,000 in charges more was charged for attorney's fees than Ms. Baker's admitted charge of \$5,000 to retain her attorney." (Respondent's Brief at 17) Later in her brief, she implies that when the parties agreed to use \$43,000 of the \$50,000 tax refund, "Dr. Baker understood that \$5,000 charged on those credit cards was Ms. Baker's attorney's fees," the implication being that the credit-card balances included only \$5,000 in her attorney's fees (*Id.* at 38)¹⁶ Dr. Baker's testimony, however, was to the contrary. He testified he believed her to be "paying attorney's fees through her credit cards," and that he "paid off her credit card account and that included significant attorney's fees". (T. 708) His belief is supported by Carol's testimony. Carol testified that by the time of trial she had paid more than \$20,000 in attorney's fees by making payments as the proceeding progressed, some in cash, some with

¹⁶ In support of this statement, she cites portions of the record, including page 41 of the transcript and trial exhibits 57 and 58, none of which support the statement made or its implication. (Respondent's Brief at 38)

credit cards. (T. 132-133, 431-432) When asked how much in fees she paid with credit-card charges, she testified she did not know. (T. 133) It was not until November of 2004 – six months before trial – that her attorney asked the court for a property advance “to pay off the credit cards and to pay Ms. Baker’s attorney fees while this matter is pending.” (A-48, last sentence of first paragraph.) It was not until December of 2004 – five months before trial – that the parties reached agreement to use \$43,000 of the \$50,000 tax refund for this purpose. (Ex. 58, R.A. 13)¹⁷ Carol testified that the only charges on her credit card statements from August of 2004 – four months before the \$43,000 payment was made – were \$20 a month for AOL service and charges for her attorney’s fees. (T. 443) Carol Baker’s suggestion in her brief that the \$43,000 in credit-card debts included only her initial \$5,000 retainer is simply not supported by the record. She was not charged with any portion of that \$43,000 advance in the property division.¹⁸

In addition, she states that “[t]here is no testimony of record that Merrill Lynch Account No. 16061 consisted solely of Dr. Baker’s ‘future earnings’.” (Respondent’s Brief at 38) In fact, the evidence was that (a) all of Dr. Baker’s employment earnings were deposited into that account, which was his personal checking account, (b) that he made all spousal-maintenance payments to Carol of \$7,300 per month from that account, and (c) that all payments to his attorneys were made from that same account, as Carol Baker’s own trial

¹⁷ The respondent labeled the pages to her Appendix “R.A. [page number].”

¹⁸ See Ex. B to the judgment and decree at A-95, line 2 (charging her with “0” of the \$43,000 used to pay off her credit-card debt).

exhibit indicated.¹⁹

The ruling of the appellate panel is inconsistent 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, equity and common sense, as addressed in Dr. Baker's opening brief, fully support that result.²⁰

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(b)(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) 6,574 words.

¹⁹ See the discussion and record references in Dr. Baker's opening brief at page 16, last paragraph, through the middle of page 17 (including the section "Dr. Baker's Payment of Attorney's Fees").

²⁰ See Dr. Baker's opening brief at 37-42.

Dated: November 26, 2007

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