

A06-1252

**State of Minnesota
In Supreme Court**

Carol Bernice Baker,

Respondent,

v.

Daniel Remember Baker,

Petitioner.

**BRIEF AND APPENDIX OF RESPONDENT
CAROL BERNICE BAKER**

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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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STATEMENT OF THE ISSUES

- I. WHERE AN ASSET INCREASED IN VALUE DURING THE MARRIAGE DUE TO FINANCIAL INVESTMENT, INVESTMENT DECISION-MAKING AND USE OF MARITAL FUNDS, IS THE INCREASE ACTIVE APPRECIATION AND THEREFORE MARITAL PROPERTY?

The trial court held in the negative; the Court of Appeals reversed.

Minn. Stat. § 518.003, subd. 3b.

Gottsacker v. Gottsacker, 664 N.W.2d 848 (Minn. 2003).

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

- II. DOES A PARTY IMPROPERLY DISPOSE OF MARITAL ASSETS IN VIOLATION OF MINN. STAT. § 518.58, SUBD. 1a WHEN HE USES SUCH ASSETS TO PAY HIS ATTORNEY'S FEES AND SUCH USE OF ASSETS IS NOT ACCOUNTED FOR IN THE DISTRIBUTION OF MARITAL PROPERTY?

The trial court held in the negative; the Court of Appeals reversed.

Minn. Stat. § 518.58, subd. 1a.

Thomas v. Thomas, 407 N.W.2d 124 (Minn. Ct. App. 1987).

STATEMENT OF THE CASE AND FACTS

In his Statement of the Facts, Petitioner Daniel Remember Baker (Dr. Baker) asserts as fact that “the marital estate of nearly \$2.3 million was divided evenly.” (Petitioner’s Brief, p. 4.) That, of course, ignores that one of the questions before the Court is whether the trial court committed error in its determination that over \$1 million is Dr. Baker’s nonmarital property, which was then not included by the trial court in the marital estate and subject to division.

The parties agreed that Dr. Baker had \$957,473 in retirement funds at the date of the marriage which is Dr. Baker’s nonmarital property. During the marriage, additional contributions of marital funds and investment returns caused the value of the funds to reach \$3,088,072 by the 2005 date of valuation. The trial court held that only \$639,577 of this \$3,088,072 was marital property. (Finding of Fact XV; A. 71.) The Court of Appeals reversed, agreeing with Respondent Carol Bernice Baker (Ms. Baker) that the district court should have allocated the entire amount by which the funds have increased above the premarital amount of \$957,473 to marital property. (A. 5-11.)

Also during the dissolution proceedings, Dr. Baker paid \$114,257 to his attorney from marital assets. Those funds do not appear on the asset division. (A. 96.) The Court of Appeals held the use of marital property to pay the attorney’s fees incurred by one party during marital dissolution proceedings without the consent of the other party constitutes an improper disposal of marital property for which the other party must be compensated. (A. 15.) This Court has also accepted that issue for further review. (A. 1.)

A. The Background of the Parties.

Dr. and Ms. Baker were married on May 12, 1990. (T. 11.) At the time their marriage of 15 years was dissolved, Ms. Baker was 57 years of age and Dr. Baker was 69. (T. 17, 552; Finding of Fact 1; A. 50.) Ms. Baker is unemployed and has not worked outside the home since 1998. (T. 14.) She suffers from the following health problems: osteoporosis in her spine and left hip; arthritis in her feet, hands and back; vertebrae that are compressing nerves; a neck injury that caused her left arm to be weak and two fingers to be numb; and some permanent nerve damage. (T. 17.) Ms. Baker has been on high dosages of Prednisone and Decadron and continues to take pain pills and Ibuprofen to manage her pain. (T. 18.)

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

Ms. Baker, as the trial court found, does not have the ability to earn wages at the present time. (Finding of Fact XI; A. 54.) The trial court found that Ms. Baker's medical

condition is corroborated by her medical records and “her physical problems would preclude her from being employed as a nurse.” (*Id.*; A. 55.)

In contrast to Ms. Baker, Dr. Baker has built a successful medical practice during the parties’ 15-year marriage. (T. 45; Finding of Fact XII; A. 57.) In 1999, a year during which Ms. Baker did not work outside the home, Dr. Baker earned approximately \$300,000. (Trial Ex. 3, T. 16.) In 2000, Dr. Baker retired from Specialists in General Surgery, Ltd. (SIGS). (T. 554; Finding of Fact XII; A. 57.) At the time of his retirement, the major portion of Dr. Baker’s practice was general surgery. (T. 555.) Dr. Baker then formed Daniel R. Baker, M.D., P.A., a medical practice which specializes in bariatric surgery. (T. 561-62.) As the trial court found, Dr. Baker’s practice, at its inception, was one of only four in the Twin Cities area specializing in this type of surgery. (Finding of Fact XII; A. 57.) Dr. Baker is its sole shareholder. (T. 565.)

This practice at the time of trial employed four full-time surgeons, which included Dr. Baker and his son, Dr. Jeffrey Baker. (T. 487.) By 2003, Dr. Baker’s income had increased to nearly \$600,000 per year. (Trial Ex. 7, T. 16.) Dr. Baker has the exclusive control to determine his pay. (Finding of Fact XII; A. 57.) Accordingly, the trial court concluded Dr. Baker’s annual income will equal or be more than his 2004 wages of \$565,220. (*Id.*)

B. The Trial Court Divided the SIGS Funds as \$639,557 Marital and \$2,678,477 Nonmarital.

At the time of the parties' marriage, Dr. Baker had an interest in retirement funds with his then-employer, SIGS. (T. 174, 178.) Dr. Baker's balance in his SIGS retirement funds as of 1989 (the year prior to the parties' marriage) was \$957,473. (Trial Ex. 265, Tab 2; A. 142; T. 174.)¹ As previously stated, the parties agreed upon the value of the SIGS funds on the date of the marriage and agreed that amount is Dr. Baker's nonmarital property. During the parties' marriage, contributions totaling \$396,455 were made to the SIGS funds. (T. 68, 178; Trial Ex. 265, A. 144.) The parties agree that is marital property. As of the February 17, 2005 valuation date, the value of the SIGS funds was \$3,318,054. (T. 172.) Dr. Baker asserts that \$2,678,477 of the SIGS funds is nonmarital, and only \$639,577 is marital. (T. 173.) It is Ms. Baker's position that the amount of the SIGS funds in excess of the balance at the time of the marriage is marital. (T. 67-68, 75.)

1. SIGS funds have been transferred to various accounts and commingled with money contributed during the marriage.

During the parties' marriage, the SIGS funds have come to reside in a multitude of accounts with \$396,455 in additional funds added during the marriage and commingled with the premarital funds. The funds have been moved by the Bakers to various accounts. (Trial Ex. 265; A. 145.) Trial Exhibit 265, which is the documentation of the funds' movement from 1998 through 2005, consists of two large three-ring binders containing

¹ For ease of reference, throughout this brief, this account, which has been transferred by the parties to other accounts, will be referred to as the SIGS funds.

33 schedules. At all relevant times, Dr. Baker has been able place the money into accounts of his choosing. (T. 457.)

a. Randy Trask was paid by the parties to provide investment expertise to SIGS funds deposited with Merrill Lynch.

Mr. Randy Trask is a certified financial manager with Merrill Lynch. (T. 452.)

Dr. and Ms. Baker met with Mr. Trask in 1992. Mr. Trask discussed Merrill Lynch financial services and presented an investment portfolio proposal. Mr. Trask thereafter became the parties' Merrill Lynch account advisor. (T. 68, 452.) As Ms. Baker explained, which testimony is undisputed, "after we were married we invited Merrill Lynch representatives to come out to our home and discuss retirement plans for our future [T]ogether we sat down and chose some Merrill Lynch plans and then invested money in those plans." (T. 68.) Ms. Baker explained that the Bakers were able to direct Merrill Lynch on where these funds would be placed. (T. 68-69.) All of these accounts are available to the Bakers as a liquid asset. (T. 460.) "And throughout the marriage [the Bakers] continued to contribute to those plans." (T. 68.)

Mr. Trask acknowledged there are accounts such as TIAA-CREF, for example, where money cannot be moved around. (T. 462.) The accounts with Merrill Lynch allow an investor, such as the Bakers, to direct what they do with their money. (*Id.*)

Mr. Trask acknowledged that Dr. Baker could "direct where this money goes" and could at any time call and say "I want this stock bought or sold." (T. 460, *see also* T. 68-

69.) Dr. Baker could withdraw money from any and all accounts at any time. (T. 461.)

Dr. Baker had the ultimate control over these accounts. (*Id.*)²

b. Not all of the SIGS funds resided with Merrill Lynch.

The record does not establish when SIGS funds were actually transferred and in what amounts to Merrill Lynch. On page 6 of Dr. Baker's brief, he states he placed Mr. Trask in charge of a substantial portion of the SIGS funds, transferring them from Fidelity Investors to Merrill Lynch. None of the record testimony cited – T. 453, 455, 457 or 711 – states when such funds were initially transferred to Merrill Lynch and do not identify Fidelity Investors as the source. The only other record reference provided by Dr. Baker is to the trial court's finding at A. 71, which cannot itself provide record support. There is nothing in the record that supports the trial court's finding that "[i]n 1992, the majority of the Respondent's SIGS retirement assets were transferred from Fidelity to Merrill Lynch." (A. 71.) That finding is simply taken verbatim from Dr. Baker's proposed findings of fact.³ (*Compare* A. 71 with R.A. 5.)

Dr. Baker did not retire from SIGS until 2000. (T. 555.) If 1992 is the date that SIGS funds were transferred by the Bakers to Merrill Lynch accounts selected by the Bakers, as Dr. Baker asserts, this would be eight years before Dr. Baker's retirement from

² Mr. Trask and Dr. Baker (self-servingly) testified that Dr. Baker's role was passive. (T. 455, 619.) Dr. Baker also testified he has taken no role with respect to selecting investments, which is contradicted by the facts of record. (T. 619.)

³ Given this lack of a record and the resulting commingling also illustrates why Dr. Baker did not meet his burden of proof that current retirement assets are traceable to nonmarital property.

SIGS. In any event, the record does show that as of 1998, which is prior to Dr. Baker's retirement, some SIGS funds resided with Merrill Lynch. (Trial Ex. 265; A. 145.)

Mr. Trask acknowledged that since 1992 earnings generated by the accounts have been added to the Merrill Lynch accounts and that the Bakers have made deposits into those accounts. (T. 459.) Assets in the accounts have generated income, cash dividends and interest, which have all been reinvested back into the accounts. (T. 459-60.) The record shows that in 1998, SIGS funds resided with Fidelity, American Express Annuity, Invesco Profit Sharing Plan and Merrill Lynch. (Trial Ex. 265; A. 145.)

In 2000, Dr. Baker retired from SIGS. (T. 555.) Dr. Baker asserts in his brief that when he retired from SIGS he rolled over "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.'" (Petitioner's Brief, p. 8.) He cites T. 184, 620 and A. 145 at line 31. But all Dr. Baker states at T. 620 is that he was requested to roll over his plan when he left SIGS. At T. 184, Mr. Harjes testifies that when Dr. Baker retired he took SIGS funds that were at Firststar/U.S. Bank and transferred them to Trusted Advisors. A. 145 (which is Trial Exhibit 265) simply shows money resided in Trusted Advisors in 2001 and no funds then resided in Fidelity. (A. 145.) Some funds continued to reside in Firststar/U.S. Bank. (*Id.*)

The record also shows that in 2001, the year after Dr. Baker's retirement from SIGS, he contributed \$54,698 to the SIGS funds, followed by \$40,000 in 2003. Most of the SIGS funds did not reside with Merrill Lynch until 2002. (A. 145.)

c. Dr. Baker transferred funds into and out of Merrill Lynch.

During the parties' marriage, Dr. Baker could and did transfer his money to or away from Mr. Trask/Merrill Lynch. (T. 458, 461.) In fact, in March of 1999, and at Dr. Baker's direction, the sum of \$508,222 was transferred from Merrill Lynch/Randy Trask to a Charles Schwab account. (T. 456-57, 712-13; Trial Ex. 265, Tab 12; A. 145; Finding of Fact XV; A. 71; Schedules 2d, 2f.) Mr. Trask did not know why Dr. Baker made that transfer. (T. 456.)⁴ The Charles Schwab account remains intact and has a value of \$572,882 as of January 31, 2005. (Trial Ex. 265, Tab 12; A. 145.)

The record also shows that after 2000 no funds resided with Fidelity. (Trial Ex. 265; A. 145.) In 2001, Dr. Baker had transferred \$1,402,633 of the SIGS funds to Trusted Advisors. (*Id.*) Mr. Harjes testified that it was his understanding that Dr. Baker had the funds that were contained in Firststar/U.S. Bank transferred to Trusted Advisors. (T. 184.)

Two years later, in 2003, Dr. Baker had the funds transferred from Trusted Advisors to Merrill Lynch. Dr. Baker, who testified he also had an account advisor at Trusted Advisors, stated he moved the funds to Merrill Lynch on the advice of his accountant. (T. 711-712.)

⁴ Mr. Trask incorrectly stated that account came back to Merrill Lynch. (T. 456, 457-458.) The record is to the contrary. (T. 713; Trial Ex. 265; Finding of Fact XV; A. 71.)

Mr. Trask also recalled one occasion when Dr. Baker took funds from a Merrill Lynch account and made the decision to invest funds in stock associated with his son. (T. 455-56.)

On the date of valuation in 2005, the Bakers had nine accounts with Merrill Lynch. (Trial Ex. 265; A. 145.) He additionally had one account worth \$572,882 that resided with Charles Schwab and \$33,941 that resided with Firststar/U.S. Bank. (T. 458; A. 145.)

Mr. Trask testified that on eight of the nine accounts with Merrill Lynch the Bakers pay an annual management fee. (T. 454-455.) Over the years, Merrill Lynch accounts have been added or subtracted and managers have changed. (T. 458.)

Permission is required in order to subtract or add to these accounts. (T. 458-59.)

Mr. Trask testified:

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

A. Yes.

(T. 458-59).

All of the accounts are available to Dr. Baker as a liquid asset. (T. 460.) It is Dr. Baker's decision whether to leave the money in the accounts at the current time even though he could be taking out the money because he is 69 years old. (*Id.*)

2. Mr. Harjes, Dr. Baker's expert, does not know what the SIGS funds consisted of on the date of the marriage.

Since the presumption under Minnesota law is that all property acquired during the marriage is marital, Minn. Stat. § 518.003, subd. 3b, Dr. Baker, who was contesting that

presumption, bore the burden of proof. In addition to the testimony of Mr. Trask and himself, Dr. Baker presented the testimony of Mr. Thomas Harjes, a CPA, to support his claimed marital-nonmarital allocation of the SIGS funds. (T. 167, 169.) Mr. Harjes' report was submitted as Trial Exhibit 265. (T. 170; *see* A. 145, Schedule 1a summary.)

Mr. Harjes treated as nonmarital the value of the SIGS funds on the date of the marriage. (T. 174.) He acknowledged that he had no idea what the SIGS funds at the date of the marriage consisted of – i.e., stocks, bonds, money market accounts, etc. (T. 220-21.) In fact, for the years prior to 1998, Mr. Harjes had no documentation for the SIGS funds other than a one-page summary that states the value of SIGS funds. This summary was generated by Dr. Stoltenberg, one of Dr. Baker's partners. (T. 209; Trial Ex. 265; A. 142.)

The record is devoid of where, prior to 1998, the SIGS funds were held or in what form of investments. Mr. Harjes was accordingly unable to identify what particular investments made up Dr. Baker's SIGS funds in 1990, the year of his marriage (i.e., which particular stocks, bonds, cash accounts, mutual funds, etc., were held or where they resided). (T. 213-14.) Mr. Harjes could therefore not identify whether any of the investments that were owned by Dr. Baker at the date of the marriage were still in existence and owned at the time of trial. (T. 213-14, 221.)⁵

⁵ Only two accounts – the American Express IRA and the Dain Rauscher IRA – were in existence throughout the marriage. (T. 216-20.) The trial court dealt with these two IRA accounts separate from the SIGS funds. (Finding of Fact XV; A. 70-71.)

Mr. Harjes admitted that during the marriage, Dr. Baker had “discretion with the activity” of the SIGS funds. (T. 211.) Dr. Baker had the ability to change accounts, transfer funds between accounts, and maintain control over his investments. (T. 212.) Mr. Harjes also understood that Dr. Baker maintained control over some of his investments through an investment advisor. (T. 230-231.)

As illustrated in the extensive schedule submitted under Dr. Baker’s Exhibit 265, Tab 1, Schedule 1a – Summary, funds were moved from one account to another throughout the parties’ marriage and funds resided outside the purview of Merrill Lynch and Mr. Trask. (A. 145.) Throughout the marriage, the Bakers moved SIGS funds into other accounts and commingled into these accounts funds added during their marriage. (T. 212; Trial Ex. 265; A. 145.) In making his analysis, Mr. Harjes did not talk to Ms. Baker about any of those investments or how they were made. (T. 221.) Mr. Harjes testified that it was his understanding that Dr. Baker paid a fee to Merrill Lynch on a percentage of the assets under Merrill Lynch management. (T. 188.)

No analysis was conducted by Mr. Harjes to determine what portion of any increases in value may be attributable to forces such as increased stock prices or stock splits and what increases are attributable to income, investment decisions and reinvested cash dividends. Mr. Harjes testified: “The way we treated this is that any elements of increase in value be it interest, dividends, capital gains distributions or stock appreciation was considered a return on the account.” (T. 212.) When asked by Ms. Baker’s counsel whether “in fact each one of these [accounts] has been turned over several times and

commingled with all the money that they've made during the marriage," Mr. Harjes replied, "I guess I'll have to let the schedules speak for themselves as far as the activity." (T. 214.) When the trial court pressed Mr. Harjes for an answer, stating "the witness will answer if the witness knows," Mr. Harjes replied, "I believe schedule 3 identifies the transfers that have taken place." (T. 215.)⁶

Mr. Harjes' methodology of "tracing" was simply a method of accounting in which he made his determination and calculation of "nonmarital" versus "marital" simply based on the percentage of funds owned before the marriage versus funds deposited after the marriage multiplied by the percentage of valuation increases, with no specific tracing being made to actual assets. (T. 174-176, 214.) Mr. Harjes did not factor into his calculation that income from nonmarital property is marital property. (T. 212.)

In 1990, the year the parties were married, there was a contribution made by the parties of \$30,000 to the SIGS funds. The investment return was \$60,267, bringing the total balance at the end of 1990 to \$1,047,740. Mr. Harjes' method of purported tracing consisted of a mathematical calculation of allocating \$930 of the investment return to the \$30,000 marital contribution and the balance of the return to the beginning nonmarital portion of \$957,473. (T. 174-175.) Mr. Harjes continued this methodology for the years 1991 through the valuation date of February 28, 2005, each year increasing the marital percentage and decreasing the nonmarital percentage. (T. 175-176; Trial Ex. 265,

⁶ Trial Exhibit 265, Schedule 3 only shows the purported tracing of the Invesco Funds Profit Sharing Plan (Schedule 3a), the Fidelity Pension Plan (Schedule 3b), the Fidelity Profit Sharing Plan (Schedule 3c) and the Fidelity Account (Schedule 3d).

A. 145.) Using this methodology, Mr. Harjes concluded the total value of the SIGS funds was \$3,088,072, the marital value was \$639,577, and the nonmarital value was \$2,448,495. (T. 176.)

3. Trial court's ruling and denial of post-trial relief.

The trial court concluded that Dr. Baker had met his burden and proven his nonmarital claim to the SIGS funds. (Finding of Fact XV; A. 71.) The trial court, in so ordering, adopted Dr. Baker's proposed finding which is quoted on page 13 of Dr. Baker's brief verbatim. (*Compare* A. 68-71 with R.A. 2-6.) The trial court found that Dr. Baker was a passive investor because portions of SIGS funds were "Merrill Lynch retirement assets" that "has been under the control of Mr. Trask," and that Mr. Trask testified that Dr. Baker was a "passive investor" and Dr. Baker "testified that he did not at any time direct the investments in the individual [Merrill Lynch] accounts." (A. 71.) The trial court assigned \$2,678,477 as the nonmarital value of the SIGS funds with the marital value assigned as \$639,577. (*Id.*)

In response to the trial court's ruling, Ms. Baker sought amended findings of fact and conclusions of law. (R.A. 36; proposed amended finding XV at R.A. 37.) Specifically, Ms. Baker asserted that since all property acquired during the marriage is presumed to be marital property, Dr. Baker bears the burden of demonstrating the property is nonmarital. The record evidence is that Dr. Baker actively managed his SIGS funds throughout the parties' marriage, and the funds above that which he owned on the date of the marriage are marital. Ms. Baker also asserted that with the commingling of

funds during the parties' marriage, and given Mr. Harjes' inability to trace nonmarital funds and his failure to account for the fact that income generated from a nonmarital asset becomes marital property, the assets above those which Dr. Baker owned on the date of marriage are marital. (Petitioner's Memorandum in Support of Motion for Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree or for a New Trial, pp. 3-9, dated 12/28/05.) The trial court denied Ms. Baker's motion.

(A. 103.)

C. Dr. Baker Dissipated Assets by Payment of His Attorney's Fees Out of Marital Assets.

1. Dr. Baker paid attorney's fees out of marital assets.

The parties separated in 2003. In August 2003, the parties agreed to a temporary order by which Dr. Baker would pay Ms. Baker \$7,300 a month as temporary spousal maintenance. (A. 36; T. 33.) Ms. Baker's budgeted monthly expenses exceeded this amount and did not include a budgeted item for attorney's fees. (T. 34; Trial Ex. 2; R.A. 10.) The amount budgeted was for basic necessities only. (T. 428.) The 2003 Temporary Order states in part:

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, dispositions and expenditures made after the date of this Order.

(A. 36-37.)

In 2004, Ms. Baker requested a property advance to pay off credit cards.

Ms. Baker recalled she had charged the \$5,000 initial retainer for her divorce attorney on one of those credit cards. (T. 132; *see also* T. 708.) Ms. Baker's counsel notified the trial court that "Ms. Baker is making payments out of her temporary maintenance on the marital credit card debt totaling approximately \$43,000 and these revolving charges have significant interest accruing on them." And that Dr. Baker "has total control over the majority of the marital assets," including the parties' \$50,000 2003 tax refund. (A. 48.)

The parties ultimately reached an agreement that Dr. Baker would pay out of marital assets the \$43,000 due on these credit cards. (T. 41; Trial Ex. 57, 58; R.A. 13, 36.) From that day forward, the credit cards would be Ms. Baker's sole responsibility "with the exception of attorney fees," which would be an issue for trial. (Trial Ex. 57; R.A. 19.) Dr. Baker took the position prior to trial that the \$43,000 paid during the proceeding should be assigned to Ms. Baker as distribution to her of marital property. (T. 626; Trial Ex. 329; R.A. 14.)

At trial, Dr. Baker testified that he had a chance to review the \$43,000 in credit card charges. (T. 621.) In investigating what the \$43,000 was utilized for, Dr. Baker admits that it was used for a replacement washer and dryer, two refrigerators, a dishwasher, drain tile and plumbing repairs – all for the parties' homestead. (T. 694-696.) When asked whether under his proposed division of property it would be fair that those debts should be assigned solely to Ms. Baker in the property division, Dr. Baker replied:

I can't answer that question because I don't know what of those purchases represents – actually represent an improvement in the house that's factored into the value of the furnishings or what are replacements because of malfunctions.

(T. 696-698.) Dr. Baker, who acknowledged that he had reviewed the credit card charges, 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. (T. 708.)

After that \$43,000 payment, Ms. Baker placed most of her attorney's fees on a MasterCard credit card. (T. 79, 443.) She paid some of her fees out of her monthly temporary maintenance. (T. 79.) Ms. Baker had an outstanding balance owing to her attorney at the time of trial. (T. 79-80.)

In contrast to Ms. Baker, Dr. Baker had no debt from the date of separation. (T. 699.) Dr. Baker paid his attorney \$114,257.16 in attorney's fees prior to trial. (T. 706.) In contrast, Ms. Baker's estimated attorney's fees and costs through trial were \$54,640.66. (T. 78-79; Trial Ex. 62; A. 146; Finding of Fact XII; A. 77.)

There was no agreement by the parties that Dr. Baker would pay his attorney's fees out of marital assets. Nor is Merrill Lynch CMA Account No. 16061, out of which Dr. Baker asserts he paid his attorney's fees, a "nonmarital" account. (Conclusion of Law 6.3; A. 88-89; Exhibit B; A. 95.)⁷ Specifically, this account is listed as having a net marital value on February 28, 2005 of \$68,606, and that account and amount was awarded

⁷ Dr. Baker points to the testimony of Karen Kritta, a CPA, who simply testified that Merrill Lynch Account 72Z-16061 is in the name of Daniel R. Baker. (T. 261-262.)

to Dr. Baker as part of his share of the marital property. (A. 95.) Nowhere does the trial court account for the \$114,257.16 which was paid prior to that date to Dr. Baker's attorney.

In July 2005, Ms. Baker objected to Dr. Baker's request that the date for after trial final submissions be extended. Ms. Baker pointed out to the trial court that Dr. Baker has full control over all the assets, while Ms. Baker only had her temporary maintenance. Ms. Baker reminded the court that Dr. Baker had paid his attorney out of marital funds, yet Ms. Baker has been unable to pay her attorney. (R.A. 11.) Ms. Baker had been forced to pay her costs through credit cards which had high interest rates. (*Id.*)

2. Trial court adopts Dr. Baker's proposed findings regarding attorney's fees verbatim.

In addressing attorney's fees, the trial court adopted verbatim Dr. Baker's proposed Finding of Fact XIX. (*Compare* A. 77 with R.A. 8.) That finding states "[e]ach party shall be responsible for their own attorneys' fees and costs." That finding further states that Ms. Baker expects her total attorney's fees and expert fees and costs will be \$54,640.66. There is no finding as to Dr. Baker's attorney's fees and costs. (*Id.*) The trial court also adopted verbatim Dr. Baker's proposed Conclusion of Law 9, entitled "Attorney's Fees." (*Compare* A. 90 with R.A. 9.) The trial court held, "[e]ach party is responsible for their own individual attorney's and expert fees and costs incurred in these proceedings." (*Id.*)

3. Trial court denies Ms. Baker's motion for amended findings, again adopting Dr. Baker's response verbatim.

In response to the trial court's Findings of Fact and Conclusions of Law, Ms. Baker sought to amend Finding of Fact XIX to reflect that Dr. Baker had already paid \$114,257 to his attorney out of the marital estate. (R.A. 39.) Ms. Baker submitted to the trial court the following amended finding:

Therefore, based on the fact that [Dr. Baker] depleted the marital estate by over \$100,000 by paying his attorney's fees during these proceedings, and based on the disparate earnings of the parties and the disparate assets of the parties, it is appropriate that [Dr. Baker] pay the sum of \$51,000 to [Ms. Baker] as and for attorney fees and costs incurred herein.

(Id.)

In Ms. Baker's memorandum in support of her motion for amended findings of fact and conclusions of law, she asserted under the title "Dissipation of Assets" that Dr. Baker, by his own admission, had spent marital funds on nonmarital items "that were solely to the benefit of himself (attorney's fees), his children and his grandchildren" She pointed out that the \$114,257 expended by Dr. Baker for his attorney does not appear on the asset division and "this is a dissipation of the marital estate since it was paid out of marital assets" Ms. Baker argued, "that amount should be added back into the marital assets and should be set aside to [Dr. Baker] as part of his division of property." (Petitioner's Memorandum in Support of Motion for Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree or for a New Trial, p. 10, dated 12/28/05.)

In response to Ms. Baker's claim of dissipation to the children, Dr. Baker asserted there could be no dissipation as "[funds used] are treated as marital assets and divided (fairly) between the parties." (Respondent's Memorandum in Opposition to Motion for Amended Findings of Fact and Conclusions of Law or for a New Trial; R.A. 24.) As to the attorney's fees, Dr. Baker did not contest that he had paid his attorney out of marital assets, nor did he assert that such payment was somehow justified under the trial court's 2003 temporary order or that the amount should not be treated as a marital asset. (R.A. 23-27.) Instead, he quoted Minn. Stat. § 518.58, subd. 1a, the statute governing dissipation, and provided the following response:

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

(R.A. 26.)

The trial court, by Order filed May 8, 2006, denied Ms. Baker's request for post-trial relief on the attorney's fees issue. (A. 103.) In denying Ms. Baker post-trial relief, the trial court adopted Dr. Baker's response verbatim and stated:

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

(A. 116-117.)

D. The Court of Appeals Reversed the District Court.

On appeal, Ms. Baker contended the trial court (1) understated the portion of the SIGS funds that is marital property; (2) understated the overall value of Dr. Baker's surgical practice by not including the value of institutional goodwill; and (3) the use of marital property to pay Dr. Baker's attorney's fees without consent of Ms. Baker constituted improper disposal of marital property for which she must be compensated. (A. 138.) Dr. Baker filed a notice of review challenging the trial court's ruling on spousal maintenance. (A. 3.)

1. Court of Appeals reversed the district court's determination of the marital/nonmarital portion of the investment.

The Court of Appeals held that the ability to control investments or withdraw funds can defeat a claim that the increase in value of premarital funds were the result of passive appreciation. (A. 10.) Taken together with the statutory presumption that all property acquired during the marriage is marital property, the Court of Appeals held the facts of record established that the appreciation of Dr. Baker's premarital funds were not the result of mere market forces or conditions but rather the result of marital efforts in the form of entrepreneurial decision-making. (A. 10-11.) Because the district court erroneously concluded the value of appreciation of the husband's premarital funds were nonmarital, the Court reversed and remanded to the district court with instructions to divide the parties' marital property in a just and equitable manner. (A. 11.)

In so ruling, the Court of Appeals, in a footnote, recognized that in addition to the extensive testimony regarding Dr. Baker's ability to control and withdraw the funds in the SIGS funds, the trial court's findings and the record evidence show that the marital contribution to the SIGS funds were commingled with the premarital funds therein.

(A. 11.) "But because [the Court of Appeals] conclude[s] that the appreciation of the premarital funds in [Dr. Baker's] SIGS accounts is marital property on the ground that it is active appreciation, [the Court of Appeals] need not reach [Ms. Baker's] argument that this appreciation is marital property because it cannot be traced to nonmarital property."

(*Id.*)

The Court of Appeals also agreed that the trial court erroneously concluded that Dr. Baker's payment of his attorney's fees out of the parties' marital assets did not violate Minn. Stat. § 518.58, subd. 1a. Not only was the district court's conclusion inconsistent with Minnesota case law, *see Thomas v Thomas*, 407 N.W.2d 124, 127-28 (Minn. Ct. App. 1987) ("Any amount taken from marital property to pay one party's attorney's fees should be accounted for . . . in the distribution [of marital property]."), it is also inconsistent with the trial court's own order that "[e]ach party shall be responsible for [his or her] own attorney's fees and costs. (A. 15.) The Court of Appeals remanded this issue to the district court with instructions to compensate Ms. Baker by placing her in the position she would have occupied had this improper disposal of marital assets not occurred. (*Id.*) Ms. Baker's other arguments as to dissipation with regard to expenditures by Dr. Baker was rejected. (A. 16.)

The Court of Appeals reversed the trial court's conclusion that Minnesota law precludes the inclusion of the value of institutional goodwill accumulated in Dr. Baker's surgical practice. (A. 14.) The Court of Appeals affirmed the award of spousal maintenance to Ms. Baker. (A. 20.)

In seeking further review, Dr. Baker did so only on the issues of the appreciation of SIGS funds as marital property and the conclusion that Dr. Baker's payment of attorney's fees constituted a dissipation of assets. It is these issues that are before this Court for further review.

ARGUMENT

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

In response to the trial court's ruling on the marital/nonmarital split of the SIGS funds, Ms. Baker asserted that Dr. Baker's nonmarital claim in excess of that owned at the date of the marriage failed for two independent reasons. First, the marital property presumption applies and since the accounts were actively managed throughout the parties' marriage, the appreciation was active appreciation. The funds in excess of the amount owned by Dr. Baker on the date of the marriage are therefore marital. Second, Dr. Baker commingled the SIGS funds that he had at the time of the parties' marriage with marital funds. Dr. Baker has been unable to trace his nonmarital funds and could not designate what SIGS funds were attributable to forces such as increased stock prices or stock split and what increases are attributable to income or active investment decisions. The Court

of Appeals addressed only the first ground and, given its reversal, did not address Ms. Baker's second ground for reversal.⁸

A. Standard of Review.

As the Court of Appeals acknowledges, the issue of whether the appreciation of the SIGS funds is marital or nonmarital property was an issue addressed before the trial court both at the time of trial and in response to Ms. Baker's motion for amended findings of fact and conclusions of law. (A. 7-8.) On appeal, this Court's scope of review includes substantive legal issues properly raised and considered by the district court. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 310 (Minn. 2003) (stating that new trial motion is not prerequisite to appellate review of substantive legal issues properly raised and considered in district court); *Gruenhagen v. Larson*, 310 Minn. 454, 246 N.W.2d 565, 569 (1976) (stating that absent motion for new trial, appellate courts may review whether evidence supports findings of fact and whether findings support conclusions of law and judgment).

Whether property is marital or nonmarital is a question of law, although the Court defers to the trial court's underlying findings of fact. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). Findings of fact are reviewed under the clearly erroneous standard. The scope of review under the clearly erroneous standard has been described by this Court "as the broadest exercised by an appellate court." *In re Probate Court*, 293 Minn.

⁸ Accordingly, if this Court should reverse the Court of Appeals, the Court must send this case back to the Court of Appeals to address the second ground.

94, 198 N.W.2d 260, 261 (1972), *reh'g denied*. If the Court is “left with the definite and firm conviction that a mistake has been committed,” this Court may find the trial court’s decision to be clearly erroneous notwithstanding the existence of evidence to support such findings. *Id.* Moreover, and as stated by this Court in *Olsen*, when the ““critical evidence is documentary, there is no necessity to defer to the trial court’s assessment of the meaning and credibility of that evidence.”” *Olsen*, 562 N.W.2d at 800.

Ms. Baker does not understand why Dr. Baker finds the lack of a new trial motion relevant to this appeal. The purpose of a new trial motion is generally to preserve for appeal procedural rulings and jury instructions, none of which is an issue on appeal. *Alpha Real Estate Co. of Rochester*, 664 N.W.2d at 310-11. In contrast, Ms. Baker sought amended findings of fact and conclusions of law based on the record evidence presented. As the Court of Appeals held, her issues raised were all properly preserved for appeal.

B. All Property Obtained by Either Spouse During the Marriage Is Presumed to be Marital Property.

All property obtained by either spouse during the marriage is presumed to be marital property, regardless of the form of ownership. Minn. Stat. § 518.003, subd. 3b. Since it is Dr. Baker who claimed that an amount over and above the amount he owned in the SIGS funds on the date of marriage constitutes nonmarital property, it is Dr. Baker who bore the burden of proof of overcoming the marital presumption. *Olsen*, 562 N.W.2d at 800. Accordingly, Dr. Baker’s statements in his brief and the trial court’s

statement in Finding of Fact XV (adopted verbatim from Dr. Baker's proposed findings) regarding Ms. Baker's purported lack of evidence or expert testimony that the retirement assets are marital property directly contradicts Minnesota law. (*Compare* A. 70 with R.A. 4.)

C. Increases in Value During the Marriage Attributable to Efforts of a Spouse, Whether by Financial Investment, Labor or Entrepreneurial Decision-Making, Are Marital Property.

Nonmarital property does include property that "is acquired in exchange for or is the increase in value of [nonmarital property]." Minn. Stat. § 518.003, subd. 3b(c). In examining property that falls into this category, this Court has instructed the courts to consider whether the appreciation of the property is active or passive. *Nardini v. Nardini*, 414 N.W.2d 184, 192 (Minn. 1987). Active appreciation of a nonmarital asset is considered marital property, while passive appreciation of a nonmarital asset is considered nonmarital property. *Gottsacker v. Gottsacker*, 664 N.W.2d 848, 853 (Minn. 2003). An increase in value of a nonmarital asset is classified as "active appreciation" when it is "the result of marital effort." *Id.* at 854.

Further, if the interest in a nonmarital asset represents income from that asset, the income is marital. *Id.* As this Court explained in *Nardini*, "increase in value" is not intended to cover the income from property acquired prior to marriage. 414 N.W.2d at 193. Accordingly, a party asserting that the increase in value of an otherwise nonmarital asset is also nonmarital has the burden of proving the same.

In *Nardini*, 414 N.W.2d at 195, this Court held that the increase in value during a marriage of a closely-held business owned by the husband was marital property. This Court in *Nardini* stated:

[T]he increase in the value of nonmarital property attributable to 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 market forces or conditions, retains its nonmarital character.

Id. at 192.

After *Nardini*, the Minnesota appellate courts have determined that the increase in value of nonmarital property remains nonmarital when the party owning the property had no control over the disposition of earnings from that property, and the parties did not increase the property's value through active effort. *See, e.g., Gottsacker*, 664 N.W.2d at 857-58 (holding that wife's Accumulated Adjustment Account (AAA) in Subchapter S corporation was nonmarital because former wife had no control over whether to retain or distribute earnings from account and no marital effort was expended to increase value of stock interest); *see, e.g., Prahl v. Prahl*, 627 N.W.2d 698, 706 (Minn. Ct. App. 2001) (stating that "[a]s an asset acquired with income generated from a nonmarital asset, shares purchased with reinvested dividends become marital property").

Following this Court's decision in *Nardini*, the Minnesota Court of Appeals in *White v. White*, 521 N.W.2d 874 (Minn. Ct. App. 1994), was faced with a retirement plan which consisted of two accounts referred to as the Teacher Insurance Annuity Association/College Retirement Equities Fund (TIAA/CREF). Under the TIAA/CREF, a

participant initially elects how investments will be made. After the initial election, the participant has no further control over the investments. Neither account provides for advancements or cash withdrawal. Contributions and earnings are unavailable until the participant terminates employment or retires. *Id.* at 876.

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

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

Id. at 879. In so holding, the Court of Appeals, following this Court's decisions, made this distinction:

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

Id. at 878.

Subsequently, the Court of Appeals in *Prahl*, 627 N.W.2d at 698, cited *White* and stated that "[a] portion of a retirement account, for example, may have a nonmarital

component because the investor's role is passive, that is, no investment decisions are made, and neither party may withdraw the funds or otherwise control the investments.”

Id. at 706.

D. The Bakers Are Not Passive Investors.

The Court of Appeals' decision in this case is in full accord with Minnesota law. Using *Nardini's* garden analogy, the market may provide “fertile ground” for the SIGS funds to grow, but the funds, like a garden, have been able to flourish because the Bakers made active efforts to tend to it. Dr. Baker did much more than make a routine and rudimentary decision to enroll in a dividend reinvestment program. There is no question that throughout the parties' marriage, efforts were made through financial investment, labor and entrepreneurial decision-making to increase its value. Despite Dr. Baker's best efforts to downplay his role, the evidence supports that he had a substantial active role during the marriage in managing and improving the property. Here, both marital effort and money was expended to increase the value of the property.

While there is no question that Dr. Baker looked to and received advice from Mr. Trask with regard to the funds contained in the Merrill Lynch portfolio, there is also no question that Dr. Baker always retained ultimate control and made his own independent decisions with regard to the SIGS funds. Dr. Baker's “passive” argument is based on his purported reliance on Mr. Trask. But Mr. Trask is the parties' agent who was paid a sum solely by the Bakers to provide expertise on the SIGS funds that resided with Merrill Lynch.

As the Court of Appeals acknowledged, the evidence conclusively establishes that the Bakers mutually agreed that Mr. Trask would act on their behalf in managing the Merrill Lynch accounts but the funds were always subject to Dr. Baker's control. "As such, [Dr. Baker] is bound by Trask's active management of the accounts as if it were his own." (A. 9.) *Greenwald v. Greenwald*, 565 N.Y.S.2d 494, 502 (N.Y. App. Div. 1991) ("[I]t is of no significance that the financial decisions were made exclusively by the titled spouse's financial advisor. Though he/she acts through an agent, the decisions are still those of the titled spouse and the results, be they beneficial or adverse, are the product of his/her labors, not random market fluctuations."). This principle cannot be disputed.

The fact that Dr. Baker chose to employ Mr. Trask to act as his agent in making decisions on his investments within the Merrill Lynch portfolio cannot turn the appreciation into passive appreciation or Dr. Baker into a "passive investor." It should be of no significance that financial advice and expertise were made by a financial advisor hired by the Bakers to enhance their portfolio. Dr. Baker asserts if he personally had spent marital time increasing the value of his nonmarital assets, then "fairness dictates that the marital estate be credited with the fruits of such diversions." (Petitioner's Brief, p. 32.) But, according to Dr. Baker, if he expends time hiring experts to advise him and marital funds to pay for that advice, then the appreciation is passive. That cannot be the distinction.

In either situation – Dr. Baker day trading or Dr. Baker paying another to do the trading for him – Dr. Baker had total control over where those funds would be placed and

when and where they would be transferred. Moreover, effort was expended in hiring others and marital funds were expended to pay for such expertise.⁹

In discussing this Court's decision in *Antone v. Antone*, 645 N.W.2d 96 (Minn. 2002), Dr. Baker states that there "the husband employed a management company to manage the 18 properties during the marriage. Despite this, the trial court found that market forces, not marital effort, caused the properties to appreciate. This Court did not disagree." (Petitioner's Brief, p. 29; internal citations omitted; emphasis in the original.) But what Dr. Baker ignores is that in *Antone* the husband "instructed the [management] company not to improve the properties and authorized it to make only the minimum amount of repairs necessary to maintain them." According to the Court, these facts are what prompted the trial court to conclude that market forces, rather than marital efforts, caused the properties to appreciate. 645 N.W.2d at 99. The same certainly cannot be said here.

Certainly, Dr. Baker did not instruct Mr. Trask that he should not work to improve the performance of the SIGS funds. Mr. Trask was specifically hired to increase the parties' earnings. And it stands to reason that if the management company had been employed in *Antone* to improve the properties, this Court would have found the appreciation active. The same result should follow here.

⁹ On this record, Dr. Baker cannot assert that the investment advisor was paid out of nonmarital funds, as he asserts on page 32 of his brief. Later in his brief, at page 34, Dr. Baker acknowledges that there were marital funds expended.

The record stands undisputed that the Bakers, during the marriage, expended effort to enhance the value of the SIGS funds. The facts regarding the parties' handling of the SIGS funds are undisputed.

- Dr. Baker at all times had the ultimate right to control the SIGS funds and had full discretion regarding how the funds were controlled. At all times the funds were liquid. (T. 460-461.)
- The Bakers hired and paid Mr. Trask, using marital funds, to help the Bakers manage their SIGS funds placed with Merrill Lynch. (T. 454-455.) At some time prior to 1998, SIGS funds were deposited by the Bakers with Merrill Lynch. Dr. Baker made the decision not to deposit the entire SIGS funds with Merrill Lynch.
- Dr. Baker could transfer SIGS funds away from Mr. Trask and Merrill Lynch at any time and did so. He could move funds to Merrill Lynch, and did so. Within the period of 1999 to 2002, Dr. Baker moved over \$2 million in funds.
- Dr. Baker directed assets to be transferred outside his Merrill Lynch portfolio. (T. 457, 711-713.)
- Dr. Baker directed assets to be transferred to Merrill Lynch.
- Dr. Baker transferred over \$1 million in SIGS funds to Trusted Advisors. He subsequently transferred those funds to Merrill Lynch.
- On at least one occasion, Dr. Baker, without the advice of Mr. Trask, made the investment decision to purchase stock using SIGS funds residing with Merrill Lynch. (T. 455-456, 457, 712-713.)¹⁰

On this record, Dr. Baker cannot be heard to say that his effort during the marriage consisted of a "single meeting with Trask" and "a single directive over 13 years to Trask

¹⁰ Likewise, Judge Minge's recitation of Dr. Baker's role in dissent is not in full accord with the record. (A. 22.)

to make a modest stock purchase,” as he asserts in his brief to this Court. (Petitioner’s Brief, p. 34.)

What the record shows is that Dr. Baker chose not to place all the SIGS funds in Merrill Lynch accounts and transferred funds both into and out of the Merrill Lynch accounts throughout the parties’ marriage. Such activities are not that of a passive investor. And on this record, one cannot say that marital efforts and funds were not expended to increase the value of the SIGS funds.

While Dr. Baker now wants to tie his investments solely to Merrill Lynch and management by Mr. Trask, the record reflects that Dr. Baker, not Mr. Trask, diverted half a million dollars away from the Merrill Lynch accounts. It was also Dr. Baker, and not Mr. Trask, who moved \$1.4 million of his funds to Trusted Advisors and not to Merrill Lynch in 2001. Only later did Dr. Baker move these funds to Merrill Lynch. And even if Dr. Baker has acted solely through an agent, Mr. Trask (which he did not), those decisions are still Dr. Baker’s and the results are the product of marital funds expended to pay for such expertise and are not random market fluctuation. The appreciation here is active.

E. Cases Relied Upon by Dr. Baker Do Not Support Reversal of the Court of Appeals.

Dr. Baker also turns to the Court of Appeals decision in *Duffey v. Duffey*, 416 N.W.2d 830 (Minn. Ct. App. 1987), *rev. denied*, and this Court’s discussion of that decision in *Gottsacker*, 664 N.W.2d at 857. *Duffey* does not support affirmance of the trial court.

In *Duffey*, the husband was employed in a family business that consisted of a number of corporate entities. All stock was held by a broad group of family members. Testimony was presented that the husband was not involved in making management decisions and played no role in the operation of the company. 416 N.W.2d at 831. The husband had an extremely minor role confined primarily to the warehouse. *Id.* at 832. The husband, although not involved in management decisions or in the operation of the company, was an officer and director of several corporations. *Id.* at 832-33. It was in that factual context that the Court of Appeals held that the husband's interest in various business entities was nonmarital and any increase in value in the various entities remained nonmarital. *Id.* at 833.

It is difficult to extrapolate from *Duffey* to this case. Here, the parties contributed funds throughout their marriage to the SIGS retirement funds. Dr. Baker had complete control over these commingled funds and he certainly had a major role in the movement of those funds. He could choose or not choose to use the expertise of the paid financial advisor. He could choose to disregard the parties' paid financial advisor's advice and take his money elsewhere. Dr. Baker was certainly involved in the management of his retirement assets, and this situation bears no relationship to that in *Duffey*.

Dr. Baker cites the Court of Appeals' example in *Swick v. Swick*, 467 N.W.2d 328, 331 (Minn. Ct. App. 1991), *rev. denied*, of a painting which the owner has a right to control but the appreciation is nonmarital. Dr. Baker's situation is not like the situation where a party brings into the marriage a piece of art or an undeveloped piece of property,

which simply sits and appreciates in value. Unlike the hypothetical painting or the undeveloped piece of property, time, effort and money have been contributed to and commingled with the nonmarital assets during the parties' marriage to increase the value of the investments.

Marriage is a financial partnership and the presumption under Minnesota law is that all assets acquired during the marriage are marital property. The amount of the SIGS funds in excess of the balance at the time of the marriage is marital property. Ms. Baker respectfully requests that the Court of Appeals be affirmed.

II. DR. BAKER'S PAYMENT OF HIS ATTORNEY'S FEES OUT OF THE PARTIES' MARITAL ASSETS VIOLATED MINN. STAT. § 518.58, SUBD. 1a.

A. There Was a Dissipation of Marital Assets.

The Court of Appeals agreed with Ms. Baker's assertion that Dr. Baker's payment of his attorney's fees out of the parties' marital assets violated Minn. Stat. § 518.58, subd. 1a. (A. 15.) Minnesota law prohibits a spouse from transferring, encumbering, concealing, or disposing of marital assets in contemplation of commencing, or during the pendency, of a marital dissolution proceeding unless the spouse does so with the other spouse's consent or "in the usual course of business or for the necessities of life." Minn. Stat. § 518.58, subd. 1a. A violation of this statute requires the trial court to compensate the other spouse "by placing both parties in the same position that they would have been in had the transfer, encumbrance, concealment or disposal not occurred." *Id.*

The Court of Appeals held that the trial court's conclusion that Dr. Baker had not dissipated marital assets by payment of his attorney's fees was not only inconsistent with Minnesota law, *see Thomas v. Thomas*, 407 N.W.2d 124, 128 (Minn. Ct. App. 1987) ("Any amount taken from marital property to pay one party's attorney's fees should be accounted for . . . in the distribution [of marital property]."), it was also inconsistent with the trial court's own conclusion of law that "[e]ach party shall be responsible for [his or her] own attorney's fees and costs." (A. 15.)

Dr. Baker does not contest that the use of marital assets to pay attorney's fees, without the consent of the other spouse, is the disposal or transfer of marital assets not in the usual course of business or for the necessities of life. *In re Marriage of Toth*, 586 N.E.2d 436, 440 (Ill. App. Ct. 1991), *reh'g denied* (use of marital assets to pay one's divorce attorney's fees are not in the usual course of business or for the necessities of life). Therefore, Minn. Stat. § 518.58, subd. 1a precludes such conduct.

B. Dr. Baker Asserts Before This Court a New Defense.

Only before this Court does Dr. Baker contend that the temporary order of August 2003 constitutes Ms. Baker's consent. This argument was not presented to the trial court in response to Ms. Baker's motion to amend the findings of fact and conclusions of law. (R.A. 26.) Nor was such an argument raised by Dr. Baker before the Court of Appeals. (R.A. 34.) At no time did Dr. Baker raise, in response to Ms. Baker's arguments post-decision, that the 2003 Order sanctioned Dr. Baker's activity.

When an argument is raised for the first time on appeal, this Court has declined to consider it. *State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007). In fact, Dr. Baker, both before the trial court and before the Minnesota Court of Appeals, offered no justification for allowing him to pay his attorney's fees for this marital dissolution action from marital property and in not factoring that amount into the division of property. Dr. Baker's sole response to this dissipation issue, raised both in response to Ms. Baker's motion for amended findings and before the Minnesota Court of Appeals, was as follows:

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

(R.A. 26; Respondent's Brief to the Court of Appeals, p. 41, dated September 11, 2006.)

At no time did Dr. Baker assert to the Court of Appeals that the payments to his attorney "fell squarely within the exception of the Stipulated Temporary Order of August of 2003." (Petitioner's Brief, p. 38.) He did not argue that by entering into this stipulation, Ms. Baker had consented to Dr. Baker's use of his future earned income to pay his attorney's fees. Nor did Dr. Baker establish that it was in fact the use of future earned income, which does not constitute marital assets, that was used to pay his attorney's fees. Having failed to raise such theories, he should not be allowed to raise them here.

C. Dr. Baker Controlled the Marital Assets.

The testimony of record is that after the parties separated, Dr. Baker controlled the parties' marital assets. When the parties agreed in 2004 that \$43,000 of marital assets would be used to pay the outstanding credit card balances, Dr. Baker understood that \$5,000 charged on those credit cards was Ms. Baker's attorney's fees. (T. 41; Trial Ex. 57, 58; R.A. 13, 19.) Accordingly, Dr. Baker, by agreement, consented to the payment of \$5,000 of Ms. Baker's attorney's fees out of marital assets, with the ultimate determination of how to handle additional attorney's fees incurred to be made at trial. In fact, how the \$43,000 would be ultimately categorized was an issue at trial. As the record reflects, payments for appliances and plumbing repair services for the parties' homestead were charged on those credit cards. (T. 694-696.)

Ms. Baker's temporary spousal maintenance only provided for her basic needs, not attorney's fees. (T. 428.) She was forced in large part, after the \$43,000 payment, to place attorney fee bills on her credit card and await a marital distribution to pay those fees.

There is no testimony of record that Merrill Lynch CMA Account No. 16061 consisted solely of Dr. Baker's "future earnings." In fact, Merrill Lynch CMA Account No. 16061, is designated as of February 28, 2005 to have net marital value of \$68,606, which account is then awarded to Dr. Baker. (A. 95.) And as Dr. Baker admits, all of the payments to his attorney were made with marital funds. Accordingly, on this record, the

Court cannot conclude that Dr. Baker was paying his attorney “with funds that were nonmarital.” (Petitioner’s Brief, p. 39.)

The fact that the valuation date was ultimately designated as February 2005 does not excuse Dr. Baker’s dissipation. The trial court’s pretrial rulings clearly establish there had been no agreement between the parties on the valuation date. (A. 45.) Prior to trial, Dr. Baker had requested a valuation date closer to trial – April or May 2005. (A. 48(c)). At trial, the valuation date established was February 2005. (T. 6; A. 48(d)). Dr. Baker knew that there was no set valuation date prior to trial.

Finally, Dr. Baker’s argument that he paid for attorney’s fees out of what he then viewed to be nonmarital funds is inconsistent with his response to Ms. Baker’s other dissipation arguments. To claims that Dr. Baker improperly transferred funds to his grandchildren and children during the parties’ separation, Dr. Baker asserted the funds used were marital and were accounted for in the division. He also argued that these other expenditures were not made in contemplation of divorce proceedings or during the proceeding. Therefore, he argued those payments were made in the usual course of business or for necessities of life. No such argument was made by Dr. Baker in response to his payment of attorney’s fees.

It is certainly not unfair to require Dr. Baker, who controlled the marital assets prior to their division, to have his use of marital funds deducted from his awarded share of the marital assets. What is unfair is to allow the party who controls the marital assets during the pendency of the divorce to pay his attorney out of marital assets and refuse to

have that payment factored into the division of the marital assets. On this record, \$114,257 should be added back into the marital estate and be set aside as part of Dr. Baker's division of the property.

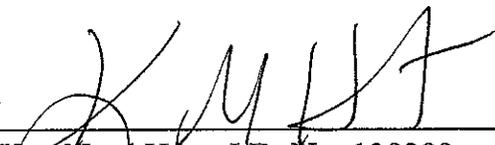
CONCLUSION

Respondent Carol Bernice Baker respectfully requests that the Court of Appeals be affirmed. If this Court should reverse on the issue of whether the SIGS funds appreciation was active appreciation, the case must be remanded to the Court of Appeals to address Ms. Baker's argument that this appreciation is marital because it cannot be traced to nonmarital property.

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Dated: November 16, 2007

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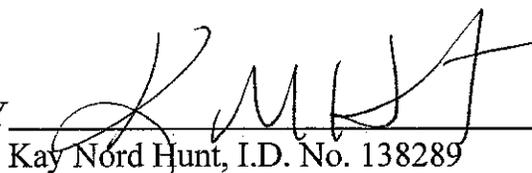
CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 9,945 words. This brief was prepared using Word Perfect 10.

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