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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1252**

In re the Marriage of:
Carol Bernice Baker, petitioner,
Appellant,

vs.

Daniel Remember Baker,
Respondent.

**Filed December 9, 2008
Affirmed in part, and remanded in part.
Harten, Judge***

Ramsey County District Court
File No. F6-03-860

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Considered and decided by Toussaint, Chief Judge; Minge, Judge; and Harten,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HARTEN, Judge

On remand from the supreme court, this court has been directed to address whether the investment return on appellant's nonmarital interests in certain retirement accounts is marital because appellant did not (a) trace nonmarital interests in the appreciation of his interests in the retirement accounts or (b) distinguish the nonmarital appreciation of his interests from the marital income generated by those interests. We affirm in part, reverse in part, and remand.

FACTS

Appellant Daniel Baker, M.D. was employed by Specialists in General Surgery (SIGS) during part of the parties' marriage. He and respondent Carol Baker dispute whether the investment return accruing during their marriage on Dr. Baker's nonmarital interests in certain SIGS retirement accounts is marital or nonmarital property. We previously addressed this question, the propriety of an attorney fee award, and other questions. *Baker v. Baker*, 733 N.W.2d 815 (Minn. App. 2007). The supreme court affirmed our remand of the attorney fee question to the district court. *Baker v. Baker*, 753 N.W.2d 644, 654 (Minn. 2008).

The supreme court also ruled that there are two possible components to the "investment return" on Dr. Baker's nonmarital interests in the SIGS accounts: the appreciation or depreciation of the value of the investments comprising the SIGS accounts that occurs due to "market fluctuations," and any "income the investments generate." *Id.* at 646 & n.1, 2; *cf. id.*, at 649 n.6 (stating that the court of appeals "did not

address the question of whether there was an increase due to income earned by the nonmarital portion of the SIGS accounts, and [that question] is not before [the supreme court] on review”). The supreme court noted that income earned by a nonmarital asset during a marriage is marital property. *Id.* at 653. It then held that the “single test” for determining whether the appreciation of nonmarital property is marital or nonmarital is the extent to which marital effort generated the appreciation, and stated that “in this case, no significant marital effort was expended to generate the appreciation in the value of the [SIGS] funds at issue.” *Id.* at 646; *see id.* at 652-53 (holding that “Dr. Baker’s role in the investments was insufficient to render active the appreciation in the value of the overall portfolio”).

Dr. Baker failed to distinguish the portion of the investment return on his nonmarital SIGS interests that was appreciation, and hence nonmarital, from any portion of the investment return that might be income, and hence marital; the supreme court noted that this court has held “that commingling of marital and nonmarital funds can render the nonmarital funds marital property” if there is no ability to trace the nonmarital interest in the commingled property. *Id.* at 653 (citing *Wieggers v. Wieggers*, 467 N.W.2d 342, 344 (Minn. App. 1991)). The supreme court then remanded to this court the questions of whether the appreciation of Dr. Baker’s nonmarital interests in the SIGS accounts is marital because he did not trace his nonmarital interests in the appreciation of the accounts or because he did not distinguish the accounts’ nonmarital appreciation from their marital income. *Id.* at 653.

DECISION

During the parties' marriage, contributions were made to the SIGS accounts by Dr. Baker and his employer, the investments in the SIGS accounts appreciated, and the investments in the SIGS accounts earned income. Also, "[t]he Bakers made no withdrawals and received no distributions from the [SIGS] accounts during the marriage." *Baker*, 753 N.W.2d at 648. Therefore, when the marriage ended, the SIGS accounts contained commingled marital and nonmarital funds. *Id.* at 648, 653. Generally, for nonmarital property that has been commingled with marital property to retain its nonmarital status, the proponent of the nonmarital interest must show, by a preponderance of the evidence, that the nonmarital interest is "readily traceable" to a nonmarital source. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). Strict tracing, however, is not required, and testimony credited by the district court but otherwise unsupported by documentation can be sufficient to trace a nonmarital interest. *Doering v. Doering*, 385 N.W.2d 387, 390-91 (Minn. App. 1986).

1. *Tracing of Nonmarital SIGS Interest*

Carol Baker argues that, for the period from 1990, when the parties married, through 1997, Dr. Baker's expert lacked the information and documentation required to identify the portion of the investment return on Dr. Baker's nonmarital SIGS interests that was appreciation, and hence nonmarital property. Carol Baker concludes that, absent this information and documentation, Dr. Baker cannot trace a nonmarital interest in the appreciation of his nonmarital SIGS interests, and therefore all of the appreciation of those interests was marital. We reject this argument.

We note that, regardless of the extent of the documentation, because the parties “made no withdrawals and received no distributions from the [SIGS] accounts during the marriage,” all of the marital and nonmarital portions of the investment return on Dr. Baker’s nonmarital SIGS interests were in the accounts when the marriage ended. *Baker*, 753 N.W.2d at 648.

In addition, “[u]nlike real or personal property, money is fungible.” *U.S. v. Sperry Corp.*, 493 U.S. 52, 62 n.9, 110 S. Ct. 387, 395 n.9 (1989); *see e.g., Sabri v. U.S.*, 541 U.S. 600, 606, 124 S. Ct. 1941, 1946 (2004) (noting that “[m]oney is fungible”); *Allstate Sales & Leasing Co., Inc. v. Geis*, 412 N.W.2d 30, 33 (Minn. App. 1987) (stating that “[m]oney is fungible”). Therefore, to the extent that the accounts contain money, it is not necessary to identify exactly which dollars are marital and nonmarital, as long as the number of dollars in the SIGS accounts identified as marital and nonmarital is adequately supported by the record. *See Nash v. Nash*, 388 N.W.2d 777, 781 (Minn. App. 1986) (stating that “[t]racing does not require a party to produce the serial numbers of the dollar bills used”), *review denied* (Minn. 20 Aug. 1986).

Furthermore, the record contains evidence regarding the SIGS accounts for the disputed period. Dr. Baker left SIGS in 2000, and tab 2 of Exhibit 265 is a chart prepared by Dr. Stoltenberg¹ of SIGS² showing Dr. Baker’s interests in his SIGS pension and profit-sharing accounts for the period 1982 through 1999. And Exhibit 266 includes

¹ We note that the record contains at least two spellings of this name. For purposes of this opinion, we adopt the “Stoltenberg” spelling.

² Dr. Baker’s expert and the parties’ attorneys each indicate that Dr. Stoltenberg, who provided the chart but who did not testify at trial, is the SIGS record keeper.

(a) statements showing that, as of 1 January 1991 and 31 December 1991, Dr. Baker's "PENSION PLAN" had balances of \$684,860.92 and \$782,589.77, respectively; (b) statements showing that, as of 1 January 1991 and 31 December 1991, Dr. Baker's "PROFIT SHARING PLAN" had balances of \$362,879.54 and \$420,253.40, respectively; and (c) the chart prepared by Dr. Stoltenberg.

Despite a significant dispute at trial regarding Dr. Stoltenberg's chart and what Carol Baker argued was a lack of underlying documentation to support the figures in that chart, the district court adopted the figures in the chart and the calculations of Dr. Baker's expert, which were based, in part, on the figures in that chart. Thus, the district court implicitly found the figures in Dr. Stoltenberg's chart credible, and we must defer to that determination. *Alstores Realty, Inc. v. State*, 286 Minn. 343, 353, 176 N.W.2d 112, 118 (1970) (stating that appellate courts defer to district court determinations of the weight and credibility of evidence, including expert evidence). Also, the adoption of the figures on Dr. Stoltenberg's chart is consistent with the record. The figures on the chart for the end of 1990 and 1991 are the same as those on Dr. Baker's statements for his pension and profit-sharing accounts for 1 January 1991 and 31 December 1991, respectively. Further, Dr. Baker's expert testified that (a) he was able to verify the 1998 figures on Dr. Stoltenberg's chart with other documentation; (b) the ability to "tie actual statements to the ending balance [for 1998 on Dr. Stoltenberg's chart] . . . add[ed] credibility to this analysis that was provided [by Dr. Stoltenberg]"; (c) he had no reason to believe that Dr. Stoltenberg's chart was not credible; (d) the figures for 1 January 1991 on the statements for Dr. Baker's pension and profit-sharing accounts "tie exactly to our

analysis [of Dr. Baker's nonmarital interests]"; and (e) Dr. Baker's expert could not trace to Dr. Stoltenberg's chart other information in a statement for a different account and therefore the expert disregarded those arguably nonmarital funds when addressing Dr. Baker's nonmarital interests. On this record, we will not reverse the district court's implicit determination that the figures on Dr. Stoltenberg's chart were credible.

Because a party asserting the existence of a nonmarital interest is not required to strictly trace that interest, and because the figures on Dr. Stoltenberg's chart address the period that Carol Baker alleged that Dr. Baker failed to trace his asserted interests, we reject Carol Baker's argument that the record lacked sufficient evidence to allow the tracing of a nonmarital interest in the appreciation of Dr. Baker's nonmarital SIGS interests. Thus, we affirm the district court's determination that Dr. Baker's tracing of the existence of a nonmarital interest was not defective.

2. *Nature of Dr. Baker's Nonmarital SIGS Interests*

Without addressing the propriety of the analysis, the supreme court noted that instead of separating the investment return on Dr. Baker's nonmarital SIGS interests into marital income and nonmarital appreciation, Dr. Baker's expert essentially used the *Schmitz* formula³ to apportion the entire investment return between marital and nonmarital interests:

³ Under the *Schmitz* formula:

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

The valuations of the retirement accounts are taken from the testimony of Dr. Baker's expert, Thomas William Harjes. Ms. Baker does not seriously dispute the valuation methods and offered no expert testimony of her own. Harjes assumed that the investment return on the nonmarital portion was also nonmarital. To trace which amounts were attributable to the original nonmarital portion and which to the annual marital contributions, he used the following method. For each year of the marriage, he determined what percentage of the account was nonmarital and what was marital, applied that percentage to annual investment return, and added the years together to determine the final amounts. We express no opinion as to the propriety of this methodology.

Baker, 753 N.W.2d at 647 n.3.

a. Carol Baker's Alleged Concession

Dr. Baker argues that Carol Baker conceded that the "methodology" used by his expert for determining the marital and nonmarital interests in the SIGS accounts was correct. But Carol Baker's failure to seriously dispute the method used by Dr. Baker's expert to value the retirement accounts is not the same as accepting the expert's method for apportioning the investment return on Dr. Baker's nonmarital interests in those accounts between their marital and nonmarital components. Carol Baker's posttrial motion notes that passive appreciation of a nonmarital asset is nonmarital property while active appreciation of, and income generated by, a nonmarital asset becomes marital property. And her posttrial motion argues that Dr. Baker (1) failed to provide adequate evidence to support his claimed nonmarital interests; (2) actively managed the SIGS accounts; and (3) commingled the marital and nonmarital interests in the SIGS accounts.

multiplied by the value of the property at the time of separation. The remainder of equity increase is characterized as marital property[.]

Brown v. Brown, 316 N.W.2d 552, 553 (Minn. 1982) (citing *Schmitz v. Schmitz*, 309 N.W.2d 748, 749-50 (Minn. 1981)).

On this record, we cannot say that Carol Baker conceded the propriety of the method used by Dr. Baker's expert for apportioning the marital and nonmarital interests in the investment return on Dr. Baker's nonmarital SIGS interests.

b. Schmitz Formula

In addressing whether marital effort generated a marital interest in the appreciation of Dr. Baker's nonmarital interests in the SIGS accounts, the supreme court noted that Maine's property-division statutes are "similar to Minnesota's," and cited *Warner v. Warner*, 807 A.2d 607, 615 (Me. 2002) for the proposition that "in evaluating a portfolio of investments, we look to the character of the underlying investments themselves." *Baker*, 753 N.W.2d at 652. Dr. Baker argues that distinguishing the appreciation and income components of the investment return on the individual investments comprising the SIGS accounts is impractical because it would require an expert's report that "would have had to be delivered in a small truck, and [the expert's] fees would have rivaled some of the parties' larger assets. No tracing of the kind Carol Baker demands could be done with large money investments held over a 15-year period of time."

But the supreme court stated that an investment-by-investment analysis is consistent with dicta in *Nardini v. Nardini*, 414 N.W.2d 187,193-94 (Minn. 1987) "indicat[ing] that the *Schmitz* formula applies to publicly traded stocks." *Baker*, 753 N.W.2d at 652. Further, the *Warner* opinion cited by the supreme court states:

Publicly traded securities are a species of property that generally require individual analysis under Maine's marital property statute. A "portfolio" is not a species of property unless the evidence regarding the portfolio fails to reasonably permit the trial court to identify and distinguish the various investments comprising it. It is not sufficient for a divorce court to limit its

analysis under 19-A M.R.S.A. § 953 to a stock portfolio as a whole when it has before it discrete information that reasonably permits an assessment of some or all of the individual securities that comprise the portfolio.

Warner, 807 A.2d at 615-16. Thus, the extent to which an investment-by-investment analysis is required to show a nonmarital interest depends, in part, on the extent to which the information necessary to perform that analysis is available.

Here, the district court did not address why an investment-by-investment analysis did not occur. If the available information was insufficiently “discrete” to “reasonably permit[] an assessment of some or all of the individual securities that comprise the portfolio” under *Warner*, or if an investment-by-investment analysis was unreasonable for some other reason, that analysis is not required. But even if an investment-by-investment analysis was unavailable here, the district court did not address whether it was reasonable under the circumstances of this case to attempt to approximate Dr. Baker’s nonmarital interests in the appreciation of his nonmarital SIGS interests by using the *Schmitz* formula as was proposed by Dr. Baker’s expert. Nor would it be appropriate for this court to address these factual questions. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988); *Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966). Thus, we remand these questions to the district court.

On remand, the district court may reopen the record if it deems it necessary or equitable to do so to address the questions involving the SIGS accounts. Also, given the time consumed by these appellate proceedings, the district court may adjust the value of retirement interests awarded to the parties to effect an equitable distribution of those assets. *See* Minn. Stat. § 518.58, subd. 1 (2006) (stating that “[i]f there is a substantial

change in value of an asset between the date of valuation and the final distribution, the court may adjust the valuation of that asset as necessary to effect an equitable distribution”). Finally, on remand, the district court shall address the attorney fee question as described by the supreme court. *Baker*, 753 N.W.2d at 654.

Affirmed in part, and remanded in part.