NICOLE M. SCHWENSOW, APPELLEE AND CROSS-APPELLANT, V. PAUL N. BARTNICKI, APPELLANT AND CROSS-APPELLEE.

___ N.W.3d ___

Filed April 9, 2024. No. A-23-593.

1. **Divorce: Appeal and Error.** In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Divorce: Property Division.** In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties.
3. **Property Division.** Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 2016) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and determine the parties' marital liabilities. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
4. **Divorce: Property Division.** As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
5. **Divorce: Property Division: Proof.** Where there is nothing on the record to show the source of premarital funds, they should be considered part of the marital estate.
6. **Property Division: Proof.** The burden of proof rests with the party claiming the property is nonmarital.
7. **Property Division.** Generally, the date on which a court values the marital estate should be rationally related to the property composing the marital estate.
8. **Divorce: Property Division: Equity.** The purpose of assigning a date of valuation in a dissolution decree is to ensure that the marital estate is equitably divided.

9. **Divorce: Property Division: Appeal and Error.** The date of valuation is reviewed for an abuse of discretion.
10. **Divorce: Property Division: Pensions.** Investment earnings accrued during the marriage on the nonmarital portion of a retirement account may be classified as nonmarital where the party seeking the classification proves: (1) The growth is readily identifiable and traceable to the nonmarital portion of the account and (2) the growth is due solely to inflation, market forces, or guaranteed rate rather than direct or indirect effort, contribution, or fund management of either spouse.
11. **Divorce: Property Division: Words and Phrases.** Appreciation caused by marital contributions is known as active appreciation, and it constitutes marital property.
12. ____: ____: ____. Passive appreciation is appreciation caused by separate contributions and nonmarital forces.
13. **Divorce: Property Division.** Marital assets dissipated by a spouse for purposes unrelated to the marriage should be included in the marital estate in dissolution actions.
14. **Divorce: Attorney Fees.** In awarding attorney fees in a dissolution action, a court shall consider the nature of the case, the amount involved in the controversy, the services performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.

Appeal from the District Court for Hall County: ANDREW C. BUTLER, Judge. Affirmed in part, and in part vacated and remanded with directions.

David V. Chipman, of Monzón, Guerra & Chipman, for appellant.

Katheryn L. Harouff, of Harouff Law, P.C., L.L.O., and Sean M. Reagan, of Reagan, Melton & Delaney, L.L.P., for appellee.

PIRTLE, Chief Judge, and RIEDMANN and WELCH, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Paul N. Bartnicki (Paul) appeals, and Nicole M. Schwensow (Nicole) cross-appeals, the order of the district court for Hall County, which dissolved the parties' marriage and valued

and divided the marital estate. For the reasons that follow, we vacate the district court's decree regarding the classification and valuation of certain property as set forth herein and remand the matter with directions to recalculate the marital estate consistent with this opinion and provide an equitable division.

II. BACKGROUND

Paul and Nicole were married on June 24, 2017. There were no children born during the marriage. Prior to their marriage, the parties signed a prenuptial agreement. In the agreement, Paul listed $38,000 in premarital investments and "[g]uns" as his separate property, and Nicole listed over $169,000 in premarital assets as her separate property. Nicole filed a complaint for dissolution of marriage in February 2022. Paul filed a counterclaim shortly thereafter.

Trial was held in May 2023 to determine, inter alia, the extent and value of the marital estate and whether either party merited dissipation funds. The evidence presented will be described in more detail as needed in the analysis section below.

Paul and Nicole did not have any real estate, and the district court divided their personal property aligned with their agreed division of items of property. Paul and Nicole were awarded their respective checking accounts, savings accounts, and life insurance policies.

During the marriage, Nicole transferred her premarital investment accounts to two new accounts, an Ameriprise IRA and a Principal 401K. The district court awarded Nicole the entirety of these two accounts, which was composed of $179,598 in the Ameriprise IRA and $139,502 in the Principal 401K. It found that the evidence revealed $58,518 of the Ameriprise IRA and $7,946 of the Principal 401K should be included in the marital estate. The district court awarded Paul all four of his retirement accounts. It allocated a total of $36,206.72 from Paul's accounts and $66,464 from Nicole's two retirement accounts to the marital estate.

Nicole had three premarital debts that she paid off during the marriage. She owed a total of $91,742.18 on two student loans. She also had a car loan valued at $18,600 for a 2015 Audi. The district court found that Nicole "solely" paid her debts, that Paul "desired to keep financial issues separate," and that Nicole made efforts to reduce these debts on her own. The district court concluded that based on these findings, Nicole's debts should not be included in the marital estate.

Nicole was awarded her vehicle, a 2019 Mercedes sport utility vehicle, which was valued at $40,550, and Paul was awarded his vehicle, a 2019 Toyota Tacoma, which was valued at $30,098. Paul also assumed the remaining car loan for the Tacoma, which had a balance of $11,808.64 at the time of separation, but which he had paid off at the time of trial.

At issue are three additional bank accounts owned by Nicole: a Barclays savings account, a Discover savings account, and a Wells Fargo checking account. The district court did not include the Barclays savings account in the marital estate because "it is a dedicated account to cover 1099 employment." The district court valued the Discover savings account at $240.54 and included it in the marital estate. Finally, it valued the Wells Fargo checking account at $1,750, as "evidence shows the account having an average balance of that value," and included it in the marital estate.

To equalize property, the district court ordered a judgment against Nicole, in favor of Paul, for $20,000. It found that the evidence did not warrant a "complete equal division of the marital estate." It determined the value of the marital estate was $197,061.73 and awarded approximately 41 percent to Paul. It also found that Paul did not provide an "accurate picture" of his full financial position in the prenuptial agreement and would not invest with Nicole until she achieved a debt-free status. Neither party was awarded alimony.

Both parties requested attorney fees. The district court explained that Paul "created some concerning issues by not following the Court's Order on the Motion to Compel, to

which the Court questions whether a full and accurate picture of his financial situation was shown." Because of Paul's concerning issues, the district court denied his request for attorney fees, but awarded Nicole $8,000 for attorney fees. Paul appeals, and Nicole cross-appeals.

III. ASSIGNMENTS OF ERROR

Paul assigns five errors. He assigns the district court abused its discretion (1) by not including Nicole's student loan debt and the 2015 Audi car loan debt in the marital estate, (2) by excluding one of Nicole's bank accounts from the marital estate and incorrectly valuing two other bank accounts, (3) in its determination of the marital value of Nicole's retirement accounts, (4) in its division of the marital estate, and (5) by awarding Nicole $8,000 in attorney fees.

Nicole cross-appeals and assigns two errors. She assigns the district court erred by finding that the parties did not meet their burden to establish when the irretrievable breakdown of the marriage occurred and by finding Nicole failed to prove dissipation of marital assets.

IV. STANDARD OF REVIEW

[1] In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Burgardt v. Burgardt*, 304 Neb. 356, 934 N.W.2d 488 (2019).

V. ANALYSIS

1. Marital Estate

Four of Paul's five assignments of error address how the district court classified, valued, and ultimately divided the marital estate. He argues the district court erred in classifying Nicole's student loans, a 2015 Audi car loan, and Nicole's "tax savings account" as nonmarital property. He also argues the district court erred in its valuations of Nicole's Wells Fargo checking account, Discover savings account, and her retirement accounts. He argues that because the district court

erred in its classification and valuation of Nicole's property, it also erred in its division of the marital estate.

[2,3] In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties. *Stanosheck v. Jeanette*, 294 Neb. 138, 881 N.W.2d 599 (2016). Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 2016) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and determine the parties' marital liabilities. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. See *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017).

(a) Property Classification

(i) Additional Facts

Nicole entered the marriage with $91,742.18 in student loan debt and an $18,600 car loan for a 2015 Audi. She testified at trial that during the marriage, she accepted two additional jobs in 2018 to help her pay off her student loan debt. She explained that Paul wanted her to pay off her debt before they had joint marital assets, so all the money from her additional jobs "was to go to pay off my school loans." She paid off her student loan debt in January 2021.

Nicole continued to work her extra jobs and used the money to pay off the car loan for the 2015 Audi and traded it in on a Mercedes in June 2021. Nicole obtained a car loan for $25,000 for the remaining balance of the Mercedes. She used some of her income from the additional jobs to pay off the new car loan.

At trial, Nicole testified that her Barclays savings account was a "tax savings account." She explained that she used the account for her income taxes. Because her income is derived from 1099 employment, her income taxes are not automatically withdrawn from her paycheck, so she pays her income taxes quarterly. She testified she routinely deposits 30 to 40

percent of her paycheck into the tax savings account. The account pays only for her taxes and accountant fees, and its sole purpose is to offset her income tax obligations. Any income remaining in the account after Nicole satisfies her tax obligations is used for the following quarter of tax obligations and accountant fees.

On January 31, 2022, Nicole had $15,087.61 in her tax savings account. At the time of trial, Nicole testified the balance in the tax savings account was $5,400; the remainder had been used to pay taxes.

The district court did not include the reduction in Nicole's student loan debts or in her car loan debt in the marital estate. It explained that Nicole had paid her debts through her own efforts. Evidence showed that Paul wanted to keep financial issues separate and that Nicole made additional efforts to balance her debt. The district court also did not include Nicole's tax savings account in the marital estate because that account was dedicated to covering her income tax obligations.

(ii) Discussion

Paul assigns the district court erred by classifying Nicole's student loan debt, 2015 Audi car loan, and tax savings account as nonmarital property. He argues that because the debts and the tax savings account were funded with marital income, they should have been classified as marital property. We agree.

[4-6] As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). Debt, like property, should be considered in dividing marital property upon dissolution. *Radmanesh v. Radmanesh*, 315 Neb. 393, 996 N.W.2d 592 (2023). Where there is nothing on the record to show the source of premarital funds, they should be considered part of the marital estate. *Stanosheck v. Jeanette*, 294 Neb. 138, 881 N.W.2d 599 (2016). The burden of proof rests with the party claiming the property is nonmarital. *Id.*

a. Student Loan Debt

The district court excluded Nicole's premarital student loans from the marital estate because they were "paid solely" by Nicole during the marriage. However, Nicole paid these loans with income derived from supplemental employment. In a marriage, all income is generally considered marital income. See *Wiech v. Wiech*, 23 Neb. App. 370, 871 N.W.2d 570 (2015).

In *Wiech v. Wiech*, 23 Neb. App. at 381, 871 N.W.2d at 578, we held that despite the wife's paying her premarital debt with "'[her] income,'" the district court abused its discretion by not including the premarital debt in the marital estate. The wife brought $56,400 of debt into the marriage that she paid off in $1,200 increments from her income. *Wiech v. Wiech, supra*. We reasoned that because any income accumulated during the marriage is marital income, and the wife used income to pay the debts, her portion of the marital estate should have been offset by the premarital debt she brought into the marriage which was reduced during the marriage using marital funds. *Id*. The Nebraska Supreme Court has previously held that income earmarked for a certain purpose, like a savings plan, should still be included in the marital estate. See *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

Here, the district court abused its discretion by not classifying Nicole's student loan debt as part of the marital estate. Akin to *Wiech v. Wiech, supra*, Nicole paid off a premarital debt with marital income. Earmarking income for certain purposes does not make the income nonmarital; likewise, taking additional jobs for the sole purpose of paying a debt cannot transform marital income into nonmarital income.

The district court abused its discretion by not including the reduction in Nicole's premarital student loan debts in the marital estate. The debts were premarital, and Nicole used marital income to pay them off; thus, the reduction of debts should have been included in the marital estate.

b. Car Loan

Similarly, the district court did not include the reduction of Nicole's 2015 Audi car loan in the marital estate because it was paid off "solely by [Nicole]." For the reason explained above, the district court abused its discretion in excluding the reduction in the 2015 Audi car loan from the marital estate.

We recognize that after Nicole paid off the 2015 Audi car loan, she traded the Audi for a 2019 Mercedes with a $25,000 car loan. Arguably, the Audi's value reduced the amount of loan needed for the Mercedes and Nicole may have been entitled to the Audi's value; however, she failed to adduce any evidence of what the number might be. Therefore, the full amount of the Audi car loan paid during the marriage should have been included in the marital estate.

c. Tax Savings Account

The district court abused its discretion by not including Nicole's tax savings account in the marital estate. Nicole testified that she put 30 to 40 percent of her income into the tax savings account. Income gained during the marriage is generally marital income. See *Wiech v. Wiech, supra*. Therefore, the tax savings account was composed of marital income and should have been classified as marital income. The evidence reveals the value of the account was $15,087.61 on January 31, 2022.

Nicole testified that taxes are not automatically deducted from her income, so she pays her income taxes quarterly. Because Nicole's income was marital income, the income taxes she incurred for that income was marital debt. See *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000) (reasoning income tax liability should be treated as marital debt).

The evidence revealed that Nicole paid a total of $7,216 in income taxes in February 2022, after the parties separated. This debt was marital, as it was accrued during the marriage, and the district court should take this amount into consideration in its division of the marital estate.

(iii) Conclusion

The district court abused its discretion by classifying Nicole's student loans, Audi car loan, and tax savings account as nonmarital. They were all funded with income earned during the marriage, which makes them marital property.

On remand, the reduction of the student loans of $91,742.18 and the car loan of $18,600 should be classified as marital property and included in the marital estate as a marital asset that is awarded to Nicole. See *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017). The tax savings account of $15,087.61 should be classified as marital property and included in the marital estate, with consideration of the $7,216 debt satisfaction by Nicole postseparation in the division of the marital estate.

(b) Property Valuation

Paul assigns the district court abused its discretion in its valuation of Nicole's Wells Fargo checking account, her Discover savings account, and her retirement accounts. The district court valued the Wells Fargo checking account at $1,750 based on its average daily balance and valued the Discover savings account at $240.54. It used Nicole's testimony to assign value to her two retirement accounts. We hold that the district court abused its discretion in each valuation, which is explained below.

(i) Additional Facts

At trial, Nicole acknowledged that during her deposition, she agreed that February 1, 2022, would be the date used for valuing the marital estate. She testified that "the date of valuation is agreed amongst us."

Nicole had two checking accounts during the marriage. One of the checking accounts was her Wells Fargo checking account. She testified that this account had an average daily balance of $1,750, because it was her "working account." She used this account to pay bills and for daily purchases.

She later testified she estimated her average daily balance to be $2,000.

Nicole offered multiple bank statements for her Wells Fargo checking account into evidence in support of her position that the account had an "average daily balance" of $1,750. In those statements, Nicole's overall account value grew from a beginning balance of $6,703.08 on March 8, 2021, to a closing balance of $10,670.32 on February 8, 2022. The lowest daily balance shown was $4,475.82.

Nicole also acknowledged that exhibit 77 accurately reflected her Discover savings account. The statement provided was from January 31, 2022, and reflected an ending balance on that date of $6,440.51.

In the prenuptial agreement, Nicole listed the following premarital property: Empower retirement account ($38,000); Vanguard retirement account ($24,000); Fidelity SCLHS 403B ($74,000); Fidelity DH+H 401A ($6,900); and Fidelity DH+H 457B ($1,600). She testified her retirement accounts totaled approximately $144,000 prior to marrying Paul. During the marriage, Nicole had 10 different retirement accounts that were rolled into two accounts: Ameriprise IRA and Principal 401K.

Nicole uses a financial advisor for her Ameriprise IRA account, but not for her Principal 401K. She affirmed that she "can call [her] own shots." All the selling and transferring shown in her account records reflect the management plan she chose, which is discussed annually. Because Ameriprise operates by the plan, they have discretion to make certain investments as well.

Nicole testified at trial that she believed she invested "maybe around $50,000" into her retirement accounts during the marriage. In the joint property statement she provided in April 2022, she estimated that the Ameriprise IRA had a marital value of $95,413.42 and a premarital value of $80,612.05. She also valued her Principal 401K at $65,774.31 as marital

and $73,728.04 as premarital. At the time of trial, however, she estimated that the Ameriprise IRA had a premarital value of $117,507 and marital value of $58,518 for a total of $176,025. She estimated the Principal 401K had a premarital value of $131,556 and a marital value of $7,946 for a total of $139,502.

To help her communicate her findings, Nicole constructed a "cheat sheet" of her retirement accounts, which included their premarital values, premarital appreciation, marital contributions, and marital appreciation. She testified she essentially traced the retirement accounts listed in the prenuptial agreement to her present-day retirement accounts. Nicole's cheat sheet was admitted into evidence for demonstrative purposes only.

Because the balance of Nicole's Wells Fargo checking account fluctuated, the district court assigned an average daily balance of $1,750 and used that as the account's value. The district court valued Nicole's Discover savings account at $240.54 and included it in the marital estate. It determined that Nicole showed at trial the marital value of her Ameriprise IRA was $58,518 and the marital value of her Principal 401K was $7,946. It awarded Paul his retirement accounts.

(ii) Discussion

[7-9] Generally, the date on which a court values the marital estate should be rationally related to the property composing the marital estate. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016). The purpose of assigning a date of valuation in a dissolution decree is to ensure that the marital estate is equitably divided. *Radmanesh v. Radmanesh*, 315 Neb. 393, 996 N.W.2d 592 (2023). The Supreme Court has declined to tie the hands of the district court and mandate that it must use only one particular valuation date in equitably dividing the marital estate. *Id*. The date of valuation is reviewed for an abuse of the trial court's discretion. *Id*.

a. Wells Fargo Checking Account

The district court abused its discretion in determining that the Wells Fargo checking account should be valued using an "average daily balance" and in determining that amount to be $1,750. Nicole has not provided any authority to support the use of an average daily balance nor did the district court include any in its decree. The purpose of assigning a date of valuation in a dissolution decree is to ensure that the marital estate is equitably divided. *Radmanesh v. Radmanesh, supra*.

The record before us contains documentary evidence of the Wells Fargo checking account at intermittent dates beginning on March 11, 2021, through February 15, 2022. The parties agreed to use February 1, 2022, as the valuation date, and although a court need not use the same date for all property, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate. *White v. White*, 304 Neb. 945, 937 N.W.2d 838 (2020). The evidence reveals that on February 1, the account balance was $10,594.85, and that on February 8, the date on which Nicole filed for divorce, the balance was $10,870.32. Either of these two dates are rationally related to the value of the checking account for purposes of determining its value to be included in the marital estate.

Because all other accounts were valued on or near February 1, 2022, we find no rational reason to value this account any differently. The district court valued this account at $1,750, because "evidence shows the account having an average balance of that value." However, other than Nicole's testimony that the average daily balance was $1,750, none of the statements in our record reveal a daily balance below $4,475.82, much less an average daily balance below that amount. Even assuming that using an average daily balance is permissible in some circumstances, the record before us does not support its use here because the value is not reasonably related to the account in question. Thus, the district court should have used the balance of Nicole's Wells Fargo checking account as of

February 1 of $10,594.85. This amount should be included in the marital estate.

b. Discover Savings Account

The district court abused its discretion by valuing the Discover savings account at $240.54. At trial, Nicole acknowledged that exhibit 77 was a true and accurate copy of her account for the statement period of January 1 to 31, 2022, which reflected a closing balance of $6,440.54. The district court valued the account at $240.54 because it "was the value of the account at the time the complaint was filed." Nicole filed her complaint for dissolution on February 8; however, there is no evidence in the record reflecting the balance of this account on February 8. Therefore, the district court abused its discretion by valuing it at $240.54, instead of its January 31 value of $6,440.54.

Nicole admits the district court erred in its determination of the value of the account, but argues the error is harmless. She explained that "[c]onsidering the lack of information provided by Paul and the enormous amount of dissipation alleged by Nicole, Paul's extra-marital spending more than offsets this scrivener's error." Brief for appellee at 17. She contends that because Paul failed to complete the discovery request, there is no way to determine how many accounts he had; thus, the district court's error did not have any significant impact on the division of property in the case. But a spouse's behavior is not a basis for valuing a marital asset incorrectly. Nor do we consider the error harmless given the $6,000 difference between the two numbers. We therefore reject Nicole's argument that the error was harmless and direct the district court on remand to value the Discover savings account at $6,440.54.

c. Retirement Accounts

At the date of marriage, Nicole had five premarital retirement accounts, which, according to the prenuptial agreement, had a value of approximately $145,000. During the marriage, Nicole contributed to five additional retirement accounts.

Eventually, she rolled all of these accounts into two accounts (Ameriprise IRA and Principal 401K) and continued to contribute to them during the marriage. The Ameriprise IRA was valued at $179,598 and the Principal 401K was valued at $139,502 as of January 31, 2022. Nicole claimed that she was able to trace the premarital value, including its appreciation, by reviewing the various statements and that therefore, the premarital value and its appreciation were nonmarital property. The district court adopted her testimony and the numbers contained on her demonstrative exhibit. Because Nicole failed to meet the requirements of *White v. White*, 304 Neb. 945, 937 N.W.2d 838 (2020), we find the district court abused its discretion in determining the premarital and marital value of the accounts.

All property accumulated and acquired by either spouse during a marriage is part of the marital estate, including portions of pensions or retirement accounts which were earned during marriage. See *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015). Separate property becomes marital property by commingling if inextricably mingled with marital property or with the separate property of the other spouse. *Id*. If separate property continues to be segregated or can be traced into its product, commingling does not occur. *Id*. Any given property can constitute a mixture of marital and nonmarital interests; a portion of an asset can be marital property while another portion can be separate property. *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017).

[10] Amounts added to and interest accrued on pension or retirement accounts that have been earned during the marriage are a part of the marital estate, but contributions before marriage or after dissolution are not, which can make them separate property. See *Stanosheck v. Jeanette*, 294 Neb. 138, 881 N.W.2d 599 (2016). Investment earnings accrued during the marriage on the nonmarital portion of a retirement account may be classified as nonmarital where the party seeking the classification proves: (1) The growth is readily identifiable

and traceable to the nonmarital portion of the account and (2) the growth is due solely to inflation, market forces, or guaranteed rate rather than the direct or indirect effort, contribution, or fund management of either spouse. *Id*. This presents "a narrow and fact-specific exception to the general rule that the marital estate includes amounts added to and interest accrued on pensions and retirement accounts." *Id*. at 148, 881 N.W.2d at 607. The burden of proof rests with the party claiming that property is nonmarital. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016).

Nicole was able to identify the value of her retirement accounts at the time of marriage (their premarital value); however, to exclude the amount of appreciation on those accounts from the marital estate and therefore fit within the "narrow and fact-specific exception," she was required to trace the appreciation to the nonmarital portion of the accounts and prove the appreciation was not due to her or Paul's active efforts. See *White v. White, supra*. Nicole claimed that at the time of marriage, she had approximately $144,000 in retirement accounts, and that at the time of filing for divorce, that amount had increased to $315,527. She claimed $117,507 of the Ameriprise IRA account was nonmarital and $131,556 of the Principal 401K account was nonmarital. It was her burden to prove these amounts.

Nicole identified five retirement accounts in the prenuptial agreement, and the supporting documentation received at trial reveals the following values as of the date of marriage:

Empower/Infinity	$ 47,120
Vanguard	23,289
Fidelity 403B	73,728
Fidelity 401A	8,344
Fidelity 457	1,860
TOTAL	$154,341

We find the evidence sufficient to support a finding that at the time of marriage, Nicole had $154,341 of premarital retirement assets. Thereafter, but prior to September 30,

2017, Nicole rolled her Empower/Infinity account over to her Vanguard account and had not made any additional contributions to the Empower/Infinity account. All of the other accounts, except the Fidelity 403B, were rolled over to an Ameriprise IRA account in January 2020. The Fidelity 403B account was rolled over to the Principal 401K, which is where Nicole's 401K from her current employer is maintained.

At the time Nicole rolled over her Vanguard account to the Ameriprise IRA, she had made minimal contributions to it postmarriage ($59.58), and its value had grown to $88,823. The Fidelity 401A was rolled over to the Ameriprise IRA with a value of $20,149; however, after June 2017, Nicole and her employer made multiple contributions to this account totaling nearly $20,000. The Fidelity 457 was rolled over to the Ameriprise IRA with a value of $7,555; however, the statement for this account shows employee contributions after the date of marriage of approximately $4,400.

The Fidelity 403B account had a value of $73,728 as of May 31, 2017. It showed a change in market value of $57,813 from June 1, 2017, to January 20, 2022, with no contributions from either Nicole or her employer. From this account, $131,556 was rolled over to the Principal 401K in early 2022. Nicole admits that the remaining $7,139 contained in the Principal 401K account is marital.

Nicole claimed at trial that she could trace the value of her premarital accounts and that therefore, she was entitled to those amounts and their appreciated value. Regardless of whether Nicole traced her various premarital accounts, she failed to prove the growth of these accounts was not the result of active efforts. Tracing the growth of premarital assets is but one step a party claiming appreciation of premarital property is nonmarital must prove. The other step is to prove the growth is not attributable to the active efforts of the parties. The active appreciation rule sets forth the relevant test to determine to what extent marital efforts caused any part of an

asset's appreciation or income. *White v. White*, 304 Neb. 945, 937 N.W.2d 838 (2020).

[11,12] Accrued investment earnings or appreciation of nonmarital assets during the marriage are presumed marital unless the party seeking the classification of the growth as nonmarital proves: (1) The growth is readily identifiable and traceable to the nonmarital portion of the account and (2) the growth is not due to the active efforts of either spouse. *Id*. Appreciation caused by marital contributions is known as active appreciation, and it constitutes marital property. *Id*. Passive appreciation is appreciation caused by separate contributions and nonmarital forces. The burden is on the owning spouse to prove the extent to which marital contributions did not cause the appreciation or income. *Id*.

The act of rolling over retirement accounts itself does not constitute active efforts. In *Schnackel v. Schnackel*, 27 Neb. App. 789, 937 N.W.2d 234 (2019), the wife received an inheritance from her mother. She initially placed the inherited stocks and cash into a TD Ameritrade account, but later decided to transfer the funds into a mutual fund. We determined that simply depositing the inheritance into a TD Ameritrade account and then transferring it to a mutual fund did not constitute active efforts sufficient to turn the account into a marital asset. We reasoned that concluding otherwise would "lead to the question of how a spouse could ever invest inherited funds so as to ensure that their appreciation during the marriage would remain nonmarital." *Id*. at 822, 937 N.W.2d at 259.

Although Nicole testified in general that her accounts "had grown without me doing anything to them," this does not overcome the presumption that the growth is marital. In *White v. White, supra*, the husband argued that the appreciation of his nonmarital account was passive because he did not actively manage the account. His testimony showed, he contended, that after selecting the initial mutual funds, he relied

on professional money managers to manage the funds. The Supreme Court rejected his argument, stating:

> [The husband] presented no evidence to establish that this growth was attributable solely to passive market forces or separate contributions, even in part. [He] did not present evidence of some recognized benchmark of general market growth, which might have been very persuasive evidence of the effect of market forces. Nor did he present evidence that the annual rate of return, or some portion of it, was guaranteed or statutorily prescribed. He failed to show that he relied on the recommendations or management of his account by a third party.

Id. at 961, 937 N.W.2d at 851.

Here, there was no testimony regarding benchmarks of market growth or whether Nicole relied upon recommendations or management of these accounts by a third party. She testified as to the existence or nonexistence of a fund manager for the Ameriprise and Principal accounts, but provided no such testimony as to the other 10 funds that were rolled into these accounts. The transaction history for her Infinity account and her Fidelity 403B statements reflects numerous exchanges in and exchanges out among the various funds during the marriage. The record does not contain any information about who directed this activity, and we can only assume it was done to increase the performance of Nicole's investments.

Having failed to present evidence to prove the appreciation was not the result of active efforts, Nicole failed to rebut the presumption that the appreciation of her retirement accounts was marital property. The district court abused its discretion in finding otherwise. The nonmarital value of the premarital retirement accounts should be calculated based upon their value at the time of marriage, $154,341, and the remaining $161,186 ($315,527 - $154,341) should be added to the marital estate.

(iii) Conclusion

The district court abused its discretion in its valuation of Nicole's Wells Fargo checking account, Discover savings

account, and her retirement accounts. The evidence presented at trial does not support using an average daily value for the Wells Fargo checking account, nor does it support such value at $1,750. This account should be valued at $10,594.85, its balance as of February 1, 2022.

The Discover savings account reflects a balance of $6,440.54 on February 1, 2022; there is no evidence of a $240.54 balance, as found by the district court. Accordingly, this account should be valued at $6,440.54.

Lastly, Nicole failed to rebut the presumption that the growth of her retirement accounts was marital. Thus, the premarital retirement accounts should be valued as of the date of marriage at $154,341, with the remaining $161,186 ($315,527 - $154,341) added to the marital estate.

(c) Property Division

Paul argues that because of the errors outlined above, the district court abused its discretion when dividing the marital estate. He asserts that when the errors are corrected, the court's division of property results in an award of the marital estate to Nicole of 81.45 percent. This runs afoul of the general rule that a spouse should be awarded one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Dooling v. Dooling*, 303 Neb. 494, 930 N.W.2d 481 (2019).

We agree with Paul that the erroneous categorization and valuation of the property resulted in an inequitable distribution of the marital estate. We therefore vacate the court's division of the marital estate and remand the matter with directions to determine an equitable division based upon the categorization and valuation set forth in this opinion.

2. Dissipation

(a) Additional Facts

At trial, both parties claimed dissipation of assets by the other. Numerous exhibits were admitted into evidence detailing financial transactions between Paul and different people.

Paul admitted that he spent marital funds on two extramarital affairs, but denied that he spent the amount Nicole claimed the documentary evidence supported. Instead, he testified that most of those transactions were for rent, lodging for his employment, security deposits, and massages. Paul estimated he spent roughly $1,000 on his extramarital affairs. Nicole admitted that she was unaware of Paul's extramarital affairs until days prior to filing the dissolution petition. She was unaware of the money he spent on the extramarital affairs until discovery began.

The district court held that neither party established the burden for dissipation of marital assets; thus, their requests were denied. It reasoned that neither party established a timeline for when the marriage was "'undergoing an irretrievable breakdown.'" Although Paul had two brief affairs, "such relationships are not enough in and of themselves to conclude that an irretrievable breakdown of the marriage was occurring." Furthermore, there was no testimony that either party contemplated divorce prior to January 25, 2022.

(b) Discussion

Nicole's cross-appeal is twofold. First, she assigns the district court erred by finding the parties did not meet their burden for establishing when the irretrievable breakdown of their marriage began. Second, she argues that based on the district court's error in not recognizing the date of the irretrievable breakdown, it erred by not finding that Paul dissipated marital assets. The basis of Nicole's argument is the marriage began undergoing irretrievable breakdown when Paul started sending other women money, which she estimates began in early 2018; thus, any use of marital funds for selfish purposes after that should be considered dissipation.

[13] Dissipation of marital assets is generally defined as one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). As a remedy, the marital

assets dissipated by a spouse for purposes unrelated to the marriage should be included in the marital estate in dissolution actions. *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009). The party alleging dissipation of marital property has the initial burden of production and persuasion. *Schnackel v. Schnackel*, 27 Neb. App. 789, 937 N.W.2d 234 (2019). Although Nebraska case law does not precisely define when a marriage is undergoing an irretrievable breakdown, this court has previously declined to conclude that such breakdown can be found only when the parties are estranged or have separated. See *Malin v. Loynachan*, 15 Neb. App. 706, 736 N.W.2d 390 (2007).

In *Malin v. Loynachan, supra*, we held that a husband spending money on a third party was not sufficient, in and of itself, to conclude that an irretrievable breakdown of the parties' marriage was occurring. The husband admitted the charges in question of $12,526.67 for trips, jewelry, and lingerie were for someone who was not his wife. *Id*. The charges spanned almost 3 years prior to the wife's filing for divorce. *Id*.

Here, Nicole failed to establish when the marriage began to undergo an irretrievable breakdown; thus, she failed to meet her burden in establishing the dissipation of marital funds. Akin to *Malin v. Loynachan, supra*, the only evidence Nicole presented of the irretrievable breakdown of the marriage was Paul's spending money on third parties. Furthermore, Nicole admits that she did not know about Paul's spending until the discovery phase of the divorce. There is no additional evidence to show that the marriage was undergoing an irretrievable breakdown when Paul was allegedly dissipating marital assets. Therefore, we find that the district court did not abuse its discretion in finding that Nicole did not provide sufficient facts to meet her burden of establishing the date on which the marriage began an irretrievable breakdown.

Nicole likens her case to *In re Marriage of Morrical*, 216 Ill. App. 3d 643, 576 N.E.2d 465, 159 Ill. Dec. 796 (1991). She explained that just like her case, in *In re Marriage of*

Morrical, "the evidence demonstrated that the husband had sold stocks worth $32,000 at a time when the marriage was undergoing difficulty." Brief for appellee on cross-appeal at 30 (emphasis omitted). But the "difficulty" that the parties were undergoing in *In re Marriage of Morrical* is distinct from the present facts. In *In re Marriage of Morrical*, the dissipation occurred after the parties admitted their marriage was undergoing serious problems. Here, there was no similar admission, and there is nothing in the record to indicate either Paul or Nicole believed their marriage was undergoing difficulties prior to Nicole's filing for divorce. Despite Nicole's contention, *In re Marriage of Morrical* is distinguishable from the present facts.

Because we hold the district court did not abuse its discretion in finding that Nicole did not meet her burden in establishing a date when the marriage was irretrievably broken, we do not need to address her second assignment of error regarding the amount of dissipation of marital funds.

3. Attorney Fees

Paul's final assignment of error is that the district court abused its discretion by awarding Nicole $8,000 in attorney fees. He argues that despite the district court's reference to a motion to compel as justification for the award, no motion to compel was ever granted against Paul.

[14] It has been held that in awarding attorney fees in a dissolution action, a court shall consider the nature of the case, the amount involved in the controversy, the services performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014). The award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Id*.

The district court stated that Paul "created some concerning issues by not following the Court's Order on the Motion to Compel, to which the Court questions whether a full and accurate picture of his financial situation was shown." But the district court reasoned that Paul's failure to provide a full accounting of his finances caused Nicole to "proceed forward with the trial with what information was known at the time, including the questionable number of exhibits amounting to thousands of pages." Paul's testimony exhibited a lack of awareness as to his finances, because he admitted he was unaware of what he spent various charges on, totaling over thousands of dollars.

Furthermore, Nicole originally testified that her attorney fees amounted to $21,465. The district court exercised its discretion in considering the requisite factors to order only $8,000 of attorney fees for Nicole, which order reflects the district court's concern about the thousands of pages of exhibits Nicole's counsel had to put together in piecing together Paul's finances. Altogether, despite no motion to compel in the record regarding Paul's finances, the evidence of his finances at trial show the district court did not abuse its discretion in awarding Nicole attorney fees.

VI. CONCLUSION

We vacate that portion of the district court's decree classifying and valuing Nicole's student loan debt, auto loan, Barclays account, Discover savings account, Wells Fargo checking account, and retirement accounts and remand the matter for recalculation of the marital estate and division thereof. We otherwise affirm the district court's decree.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED WITH DIRECTIONS.