

75166-2

75166-2

Court of Appeals No. 75166-2

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

CAROL LOUISE SILVI

Appellant

v.

PAUL GILBERT SILVI

Respondent

APPELLANT'S REPLY BRIEF

By:

John S. Stocks, WSBA 21165
Stephanie Messplay, WSBA 47017
VAN SICLEN, STOCKS & FIRKINS
Attorney for Appellant
721 45th Street NE
Auburn, WA 98002
(253) 859-8899

2016 DEC 12 PM 4:58
COURT OF APPEALS
DIVISION I
CLERK'S OFFICE

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	1
II. Argument	1
A. The trial court’s findings of fact call for unequal distribution of assets, not net worth.....	1
B. The trial court’s valuation of Silvi Sports, Inc. fails to account for all of the assets of the business...	6
III. Conclusion	8

TABLE OF AUTHORITIES

	<u>Page No</u>
<u>Washington Cases:</u>	
<i>In re Marriage of Clark</i> , 13 Wn. App. 805, 538 P.2d 145, review denied, 85 Wn.2d 1025 (1997).....	2
<i>In re Marriage of Williams</i> , 84 Wn. App. 263, 927 P.2d 679 (1996).....	2
<i>In re Marriage of Estes</i> , 84 Wn. App. 586, 929 P.2d 500 (1997).....	5
<i>In re Marriage of Hall</i> , 103 Wn.2d 236, 692 P.2d 175 (1984).....	6, 8
<i>In re Marriage of Berg</i> , 47 Wn. App. 754, 737 P.2d 680 (1987).....	6, 7
 <u>Revised Code of Washington</u>	
RCW 21.20.005 (14), (17)(a).....	8

I. INTRODUCTION

A trial court's conclusions must be supported by its findings. Here, however, the trial court entered a property division inconsistent with multiple findings of fact. This Court should reverse and remand, so that the trial can do what its findings suggested it would: divide the community property in favor of Ms. Silvi.

II. ARGUMENT

A. The trial court's findings of fact call for unequal distribution of assets, not net worth.

Contrary to Respondent's assertion, the trial court's findings of fact do not call for Ms. Silvi to be awarded a greater share of the parties' "net worth." Rather, the trial court's findings state, "The court will award more **assets** to Ms. Silvi in recognition thereof." CP 848 (emphasis added). "Assets" was a purposeful choice of words, as demonstrated by the very next sentence in the trial court's unchallenged findings. This sentence states, "This is fair and equitable going forward, and also recognizes the community funds Mr. Silvi secretly spent on non-community purposes; those expenditures played a significant role in leaving the parties in their current less-than-ideal financial circumstances." CP 848.

Mr. Silvi's dissipation of community assets and the financial strain it caused the family is addressed by the court in no fewer than four findings of fact. CP 844-45 (Findings of Fact No. 15, 17, 18, and 32). The trial court noted in these findings that Mr. Silvi neglected to pay family bills in favor of paying rent on his secret apartment, and took out multiple loans to maintain his duplicitous lifestyle. In thus drawing attention to Mr. Silvi's large expenditures toward his secret affair, the trial court acknowledged that a substantial portion of the parties' debt was the direct result of the diversion of community assets.

In *In re Marriage of Clark*, 13 Wn. App. 805, 808, 538 P.2d 145, review denied, 85 Wn.2d 1025 (1997), the Court of Appeals held that, "The dissipation of marital property is as relevant to its disposition in a dissolution proceeding as would be the services of a spouse tending to increase as opposed to decrease those same assets." The trial court thus has the discretion to apportion a higher debt load and/or fewer assets to the partner who wasted marital assets. *In re Marriage of Williams*, 84 Wn. App. 263, 270, 927 P.2d 679 (1996). Notably, the majority of obligations apportioned to Mr. Silvi were classified as separate, not community, debts. In classifying these debts as separate even though most had been incurred during the marriage, the trial court recognized that these were debts that would not have been incurred had it not been for Mr. Silvi's diversion of

“significant community funds to maintain his second, secret residence.” CP 844. Thus, the trial court’s findings of fact demonstrate that it intended for Mr. Silvi alone to be responsible for his dissipation of community assets. In other words, the trial court did not intend for Ms. Silvi to bear the financial burden of Mr. Silvi’s non-community actions, made without her knowledge or consent, and which served no community benefit.

Had dissipation of marital assets been the only factor in the court’s property disbursement, perhaps Respondent’s “net value” theory would make sense. However, the trial court also found that Ms. Silvi did not work for most of the marriage per the parties’ agreement, that she “does not have sufficient current education and training to obtain full-time employment at a reasonable rate,” and that her financial resources “are significantly less than Mr. Silvi’s.” CP 849-50. Further, the trial court found that because Mr. Silvi did not have the ability to pay maintenance at the appropriate level, Ms. Silvi would need to be compensated through a greater award of assets. CP 848. In other words, the trial court found that Mr. Silvi would need to be responsible for his misuse of funds in the past, **and** for providing sufficient income to Ms. Silvi in the future.

Even when community debt is factored into the calculation of assets, the trial court’s error remains readily apparent. Ms. Silvi was

ultimately awarded \$525,000 worth of community assets. CP 853. However, she was also allotted \$17,145 in community debt. CP 853. The net community property Ms. Silvi received is thus \$507,855. She received none of Mr. Silvi's separate property. CP 853. Mr. Silvi was ultimately awarded \$468,652 in community assets. CP 853. He was only allotted \$4,800 in community debt, for a net community property award of \$463,582. CP 853.

Whether or not the court factors in community debt, the difference in community property awards is equivalent to little over one year of maintenance at its current level. The prior monthly spousal maintenance obligation under the temporary order, and the amount awarded for the first three months post-trial, was \$8,000 per month, which, presumably, was the "appropriate level" to which the trial court was referring. CP 117, 850. That being the case, there is a \$3,000 per month shortfall that the trial court stated it would be making up for in its award of property. However, the trial court only awarded Ms. Silvi \$44,273 above Mr. Silvi; approximately 15 months of maintenance shortfall.

Moreover, the difference in awards is also intended to cover the \$12,000 that Mr. Silvi owed to Ms. Silvi for matters arising out of the litigation. CP 847. When this obligation is factored in, the difference in property awards is equivalent to approximately only eleven months of

maintenance shortfall. The trial court's numbers simply do not add up and are otherwise inconsistent with the trial court's findings that Ms. Silvi would require support for the rest of her life.

In re Marriage of Estes, 84 Wn. App. 586, 929 P.2d 500 (1997), is instructive. In that case, the trial court found that the husband (a lawyer) had a significantly higher earning capacity than the wife (a bank teller), who had never earned more than \$12,200 a year. *Estes*, 84 Wn. App. at 594. The trial court decided that the wife should be awarded a disproportionate share of the property in lieu of maintenance. *Id.* at 593. However, the difference between the awards to the husband and wife was only about \$16,000, equivalent to little over a year of maintenance (as calculated in that case). *Id.* The Court of Appeals remanded the case for the property allocation to be reconsidered, noting that \$16,000 was likely an inappropriate amount for maintenance "in view of the disparate earning capacities of the parties." *Id.* at 594.

Here, even at his lowest earnings point, Mr. Silvi has an earning capacity at least four times that of Ms. Silvi.¹ The trial court recognized this in its finding that the current level of maintenance (\$5,000) is not the appropriate level. CP 848. Yet the property distribution – intended to

¹ If Mr. Silvi continues to earn what he was making at the time of trial, he would be earning over *seven times* what Ms. Silvi is capable of. CP 842-49.

make up for the deficiency in maintenance for the rest of her life – only makes up for the deficiency for the first year. Even under the most favorable calculation, there is simply no way the trial court’s distribution of property accounts for Mr. Silvi’s dissipation of assets, the \$12,000 owed to Ms. Silvi, and the inadequate level of maintenance. This Court should remand for the trial court to enter a property distribution that is actually consistent with its findings of fact.

B. The trial court’s valuation of Silvi Sports, Inc. fails to account for all of the assets of the business.

Trial courts “must set forth on the record which factors and methods were used in reaching its finding” as to the value of a business. *In re Marriage of Hall*, 103 Wn.2d 236, 247, 692 P.2d 175 (1984); accord *In re Marriage of Berg*, 47 Wn. App. 754, 757, 737 P.2d 680 (1987). Here, the trial court did not set out any factors or describe what method it used to value Mr. Silvi’s business, and instead simply valued the business at zero because it had a negative cash flow. CP 846.

The trial court’s reasoning, or lack thereof, resembles the reasoning found in *In re Marriage of Berg*, 47 Wn. App. 754, 737 P.2d 680 (1987). In that case, the trial court valued a closely held corporation at \$42,000, because “the business has a market value, but that value is substantially impacted by the capitalization problems,” and the opposing

party's expert was not entirely credible. *Berg*, 47 Wn. App. at 757 n. 4. This Court articulated that, "Because of the complexities involved in valuing a closely held corporation, an appellate court must be able to determine the method by which the trial court determined valuation and the weight that the trial court gave to the factors relevant to valuation." *Id.* at 757. This Court held that the trial court's reasoning was inadequate and remanded the case for further proceedings. *Id.*

Similarly, here, the trial court only discussed Silvi Sports' cash flow, and briefly mentioned its small inventory without assigning any value to it. As articulated in Appellant's opening brief, this reasoning is not only scant, but fails to consider other assets of the business, such as goodwill.

Respondent claims that there are no other assets to account for because "Mr. Chamberlin's injection of funds in 2013 and 2014 is unrelated to the company's market value." Brief of Respondent, at 33. This is incorrect and involves a mischaracterization of the evidence. The 2013 email and 2014 emails from Mr. Chamberlin to Mr. Silvi are the best evidence of the value of 1% share in the company. Those emails state: "The \$20,000 is purchasing 2% of Silvi Sports from your holdings." Ex. 186. Silvi Sports' 2013 tax returns characterize these transactions not as an injection of funds (i.e. capital contributions), but as common stock. Ex.

132. Additionally, unless the corporate governance documents provided otherwise, a contribution of capital would not be automatically accompanied by a rearrangement in ownership shares.² Because Mr. Chamberlin increased his share of ownership by virtue of his \$20,000 payment, the transaction is more accurately reflective of a securities sale than a mere “injection of funds.” See RCW 21.20.005 (14), (17)(a). The sale of securities is highly relevant to a business’ value. *Hall*, 103 Wn.2d at 245-46. The trial court erred by failing to even address this evidence in its findings.

III. CONCLUSION

Due to Mr. Silvi’s dissipation of community assets for his sole benefit, a \$12,000 debt Mr. Silvi owes to Ms. Silvi, Ms. Silvi’s limited earning potential, and Mr. Silvi’s significant income in comparison, the trial court found that it should distribute the couple’s assets unequally, in favor of Ms. Silvi. However, the trial court’s award falls far short of accomplishing this goal. Further, the trial court’s valuation of Silvi Sports, Inc. is inadequately reasoned and fails to account for evidence of its intangible assets. Accordingly, this Court should REVERSE the decision of the trial court, and remand for further proceedings.

² Not to mention that it would be foolish to make such an arrangement.

DATED this the 11 day of October, 2016.



John S. Stocks, WSBA #21165
Stephanie L. Messplay, WSBA #47017
Attorneys for Appellant
Van Sicien, Stocks & Firkins
721 45th Street N.E.
Auburn, Washington 98002

CERTIFICATE OF SERVICE

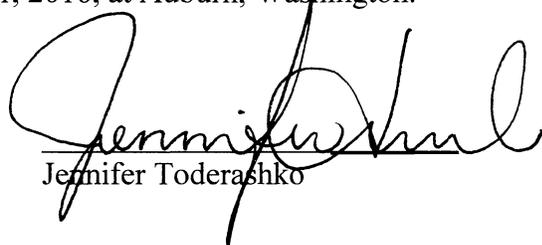
I certify that I caused one copy of the foregoing Reply Brief of Appellant to be served on the following parties of record and/or interested parties by E-mail and ABC Legal Messenger, delivery to the same to the below named attorneys as follows:

Michael D. Hunsinger
THE HUNSINGER LAW FIRM
Attorney for Respondent
6100 – 219th Street SW #480
Mountlake Terrace, WA 98043

mike@hunsingerlawyers.com

2016 OCT 12 PM 4:58
STATE OF WASHINGTON
COURT OF APPEALS
1000

Dated this 11th day of October, 2016, at Auburn, Washington.


Jennifer Toderashko