75166-2

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Division I
State of Washington

NO. 75166-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CAROL LOUISE SILVI

Appellant,

and

PAUL GILBERT SILVI

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MARY ROBERTS

AMENDED BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 1

The Silvi Family 1

The Silvis' Income 2

The Silvis' Assets 7

The Silvis' Liabilities 14

The Decree 18

III. ARGUMENT 21

A. Standard of Review 21

B. The Trial Court's Award of Assets and Liabilities Was Supported by Substantial Evidence and Was Not a Manifest Abuse of Discretion. 22

1. Appellant Ms. Silvi was awarded 59% of the parties' community net worth and 64% of their combined community and separate net worth. 22

2. By awarding the very valuable and easily marketable family residence to Ms. Silvi, she is able to accumulate savings of at least $250,000 and a $200,000 401(k) account. 25

3. By doing so Ms. Silvi will also cut her housing expenses by more than half and, with the lifetime of maintenance she will receive from Mr. Silvi and her own earned income, she will have substantial financial security. 26

4. On the other hand, Mr. Silvi will have no money left over after paying his modest living expenses and maintenance to Ms. Silvi. 28

C. The Trial Court's Decision to Ascribe No Goodwill to the Value of Mr. Silvi's Interest in Silvi Sports, Inc. Was Supported by Substantial Evidence and Was Not a Manifest Abuse of Discretion. 30

IV. CONCLUSION..... 34

CERTIFICATE OF SERVICE 35

TABLE OF AUTHORITIES

STATE CASES

Marriage of Crosetto
82 Wash. App. 545,556, 918 P.2d 954 (1996)..... 22

Marriage of Fleege
91 Wn. 2d 324, 588 P.2d 1136 (1979)..... 30, 34

Marriage of Gillespie
89 Wash. App. 390, 398, 948 P.2d 1338 (1997)..... 22, 25

Marriage of Hall
103 Wash. 2d 237, 692 P.2d 175 (1984)..... 30-34

Marriage of Knight
75 Wn.App. 721, 880 P.2d 71 (1994)..... 31, 34

Marriage of Larson and Calhoun
178 Wash. App. 133, 137–138, 313 P.3d 1228 (2013),
review denied, 180 Wn. 2d 1011, 325 P.3d 913 (2014) 21

Marriage of Lukens
16 Wn. App. 481, 558 P.2d 279 (1976)..... 30, 34

Marriage of Monaghan
78 Wash. App. 918, 899 P.2d 841 (1996)..... 30, 34

Suther v Suther
28 Wn. App. 838, 627 P.2d 110 (1981)..... 31, 34

Marriage of Tower
55 Wash. App. 697, 700, 780 P.2d 863 (1989)..... 22

STATUTES

RCW 26.09.080	.....	21, 24-25

RULES AND REGULATIONS

CR 59	.....	23
KCLR 59	.....	23

I. INTRODUCTION

Ms. Silvi received 59% of the net community property of the parties, and 64% of all of their net property, in addition to $1,263,000.00 in maintenance over the remainder of her life. Awarding her "only" $200,000 of Mr. Silvi's 401(k) was hardly a manifest abuse of the trial court's broad discretion to justly and equitably divide the Silvis' assets and liabilities.

Substantial evidence supported the trial court's decision not to include any goodwill in the value of Mr. Silvi's ownership interest in the Silvi Sports, Inc. The company lost of $34,000 in its four years of existence preceding the trial, and Ms. Silvi chose not to produce any expert testimony that it had any goodwill value.

II. STATEMENT OF THE CASE

The Silvi Family

By September 28, 2015 when trial in this matter began, only Appellant Carol Silvi was permanently living in the family home. Respondent Paul Silvi had permanently moved out two years earlier. **CP 838 The Silvis' oldest son Alex (age 22) had recently graduated from Central Washington and was temporarily living in the house; Ryan (age 20) had just begun his junior year at Central; and their daughter Samantha (18) was a freshman at Central Michigan University.[1] CP 841, 844**

Mr. and Ms. Silvi grew up in suburban Detroit. They were

[1]All highlighted statements are taken verbatim from the trial court's Findings of Fact.

married in Bloomfield Hills, Michigan on September 4, 1987. CP 841 Ms. Silvi was six credits short of obtaining her degree in court reporting from Central Michigan University when she married Mr. Silvi. During the first two years of their marriage she was a legal secretary for lawyers in private practice, then she worked for a judge for several years. CP 841 In 1993 she earned $32,740. Exh. 78

Mr. Silvi had graduated from Bowling Green University with a B. A. in Journalism in 1986, and – after a brief stint as a sports writer – was a sports reporter at television stations in the Midwest for seven years until he moved to Seattle in late 1993 to work for KING TV as a sports reporter. CP 841 Ms. Silvi and 13 month-old Alex joined Mr. Silvi in Seattle in February 1994. CP 841

The Silvis' Income

Mr. Silvi's Income

Mr. Silvi was initially a sports reporter, then became the sports anchor, at KING TV. He received regular salary increases. Between 1999 and 2014 he earned:

1999:	$180,476
2000:	$196,246
2001:	$223,983
2002:	$225,061

2003:	$238,398
2004:	$241,583
2005:	$260,600
2006:	$290,866
2007:	$308,363
2008:	$307,195
2009:	$292,523
2010:	$315,229
2011:	$321,702
2012:	$315,415
2013:	$336,185
2014:	$324,727 CP 841-842

In March 2012 Mr. Silvi signed a new three-year employment agreement which provided for a base annual salary from October 2011 through September 2014 of:

2011:	$279,877
2012:	$285,474
2013:	$291,183 (CP 843)

Mr. Silvi's income from KING TV was not limited to his base salary: he earned additional pay equal to 110% of his average per diem income whenever he worked more than five days in a week, virtually all spent covering the Seahawks during the NFL season. In 2013 he was paid over $51,000 for that additional work, *Exh. 1*, and in 2014 after Gannett purchased the station and began imposing budgetary restrictions he was still paid over $35,000 in addition to his $291,183 salary. *Exhs. 2 and 3* CP 843

In 2013, Belo, Inc. – which owned a number of televisions stations, including KING TV – was acquired by another large United States media company, Gannett Company. CP 843

In late 2014, after several months of negotiations between Mr. Silvi's agent and KING TV, Mr. Silvi signed a new three year employment agreement that dramatically slashed his income from his 2014 base salary of $291,183 to $225,000 for 2015 and $175,000 for 2016 and 2017. *Exh. 6* KING TV insisted on these new terms due to changes in local television news market conditions, especially regarding sports. There were no opportunities for Mr. Silvi to leave KING TV and work for another Seattle area television station, so he reluctantly signed the new agreement. It is not likely that there will be new opportunities for Mr. Silvi to significantly increase his earnings in the future. CP 845

Mark Ginther was the executive news director of KING TV from January 2008 to September 2015. **RP 232** With Mr. Silvi's agent, Mr. Ginther negotiated the terms of Mr. Silvi's employment agreements during that time, including the last one in 2014 that extends through the end of 2017. **RP 234 – 241**

At trial Mr. Ginther testified that Mr. Silvi's dramatic pay cut

beginning in January 2015 was "because of the changing economic climate of the broadcast business. We [KING TV] are supposed to lower salaries for employees. . . [T]he advertising market is more competitive for non-traditional platforms such as digital. That was a competition that we didn't face earlier. And now instead of competing just with other broadcast entities, we were forced to compete with other emerging businesses for the advertising dollar." **RP 240 – 241** Mr. Ginther testified that KING TV was willing to risk Mr. Silvi going to work elsewhere "[b]ecause our business would no longer support him at the salary that we had paid him in the past." **RP 248**

However, no other local television station – CBS affiliate KIRO **RP 62 – 63,** ABC affiliate KOMO **RP 519,** or regional station ROOTS Sports **RP 528** – had an opening.

As Mr. Silvi testified: "[s]ports departments – and our local sports are becoming dinosaurs. And a lot of stations don't have them anymore. . . Because people can get their information from ESPN, and FOX – all the national guys. They can go on social media. They can go on every website. Getting sports information is super easy. So why do you need the local guy?" **RP 213**

Mr. Silvi's last paycheck under his prior employment

agreement was made on December 26, 2014. It reflected that through December 20, 2014 he had received $34,496 in extra income at the rate of $1,232 per diem in addition to his regular salary of over $291,000. **Exh. 117** His new agreement with its $66,200 reduction in annual regular salary took effect the following week.

Through December 20, 2015, exactly one year later, Mr. Silvi had received $17,416 in extra pay at $952 per day, barely one-half of what he had been paid in 2014. **CP 787**

During the first two months of 2016, Mr. Silvi had received only $2,220 in extra pay at $740 per day. **CP 796**

The chart below demonstrates the apocalyptic drop in Mr. Silvi's income after its peak in 2014:[2]

Gross Annual Income: Paul Silvi

	2014	2015	2016
Regular Salary	$291,200	$225,000	$175,000
Extra Per Diem	$ 35,728	$ 18,368	$ 2,200
Total	**$326,928**	**$243,368**	**$177,220**[3]

Ms. Silvi's Income

Per the parties' agreement, Ms. Silvi did not seek

[2] This assumes that Mr. Silvi received one more extra day's income for the Seahawks games in the last week of December in 2014 and 2015 that were not reflected in his paychecks for the period ending December 20.

[3] Plus any extra days Mr. Silvi will be paid for Seahawks games during the 2016 regular season that will begin on Sunday, September 11.

employment after the Silvis moved to Seattle. Ryan was born in January 1995 and Samantha in June 1997. CP 841 In 2008 or 2009, Ms. Silvi decided that she might be interested in becoming a fitness instructor and/or trainer after joining the Tacoma Athletic Club near the family residence and discovering she enjoyed working out. She obtained a considerable amount of training to become a certified instructor in several different aspects of fitness training, and since 2009 she has been a part-time fitness instructor at the Tacoma Athletic Club. CP 842

Ms. Silvi's gross income from that work averaged $1,065 per month. **Exh. 203** Between February 1 and September 15, 2015, Ms. Silvi's pay stubs reflect that she was paid for an average of only 6.7 hours work per week. **CP 149**

Ms. Silvi does have sufficient current education and training to obtain full-time employment at a reasonable rate. She is able to earn approximately $40,000 per year in the near future, but she is unlikely to earn more. CP 849

The Silvis' Assets

The Family Residence

In 1999 Mr. Silvi and Ms. Silvi purchased the current family home in Maple Valley. It is 3,520 square feet with a 1,040

square foot garage on a .40 acre lot, including a swimming pool, with three bedrooms and 2.75 bathrooms. CP 841

Although the house was built in 1996, the September 23, 2015 appraisal report obtained by Ms. Silvi indicated it had an "effective age" of only ten years, because of, among other things, its newly "updated kitchen" which included "new hardwood flooring [and] slab granite kitchen countertops", a new composition roof, and no deferred maintenance or needed repairs. **Exh. 204** page 3 The appraised value of the house at the time of trial was $650,000, and the appraiser was very optimistic it would sell quickly at that price: "Predominate sale-to-list price ratio is 100%, marketing time is under 3 months, and inventory is scarce. Low interest rates make buying/refinancing attractive and a review of sales data indicates that most deals are funded with Conventional or FHA loans." **Exh 204** page 3

Moreover, between February 2015 and February 2016 (over five months after the date of Ms. Silvi's appraisal), the median price of a single-family home in the Maple Valley area increased by 14.5%. **CP 811, 826 – 828** It is therefore likely that by March 15, 2016, when the trial court finally entered its Decree of Dissolution, **CP 833 – 836**, and Findings of Fact and Conclusions of Law, **CP 837**

– **853**, the house was worth at least $700,000.

At trial, real estate agent Sean Henderson testified that from the proceeds of the sale of the family residence Ms. Silvi could purchase either a house for $350,000 or a condominium for $310,000, each with three bedrooms and 2.75 bathrooms, in the Maple Valley area. **RP 305, 310, CP 218.** After making a 20% down payment, Ms. Silvi's monthly payments for the 80% mortgage loan, real estate taxes, insurance, and homeowners association dues (for the condominium) would be between $1,700 and $1,800 for either type of dwelling. **CP 60, RP 310**

By 2014 the residence's 3,520 square feet with its .40 acre lot, three-car garage and swimming pool were no longer needed because the family was no longer intact, and it was extremely expensive to maintain. It was encumbered by a first deed of trust with a balance of $249,000 and a second deed of trust with a balance of $17,500 at the conclusion of the trial. **Exh. 203** page 5 Monthly payments on those debts (which included real estate taxes of $9,192, **Exh. 204** page 3), were $3,311 and $419, respectively. **Exh. 203** page 3.

In the fall of 2014 when only Ms. Silvi and Samantha lived in the house, the utilities payments (even excluding the $150 monthly

telephone bill) totaled $845 per month, **Exh. 153** page 4, and a year later when only Ms. Silvi (and occasionally Alex) were living in the house, they were still $701 per month according to Ms. Silvi. **Exh. 203** page 4

Mr. Silvi filed his Petition for Dissolution of Marriage on June 16, 2014. **CP 1 – 6** By September 2014 he knew that his income was going to be slashed beginning in 2015 and the parties could not afford to keep making payments on the house and utilities and their other living expenses, so Mr. Silvi filed a Motion for Temporary Orders, which included a request that the house be sold. **Exh. 102** A temporary order was entered on September 29, 2014 that required Mr. Silvi to pay temporary maintenance and other expenses, and denied his motion to sell the house. **Exh. 116** He sought revision of that order, **Exh. 26,**[4] which was denied on January 29, 2015. **CP 219 – 226**

After Mr. Silvi's motion was denied and because his gross income was immediately reduced by an average of over $11,000 per month beginning in January of 2015, he withdrew $30,100 from his KING TV 401(k) to cover his court-ordered obligations until the mid-May 2015 trial date. **RP 78 – 79, CP 16**

[4] As did Ms. Silvi.

However, Ms. Silvi successfully moved to continue the trial date to late September 2015. **RP 80** Knowing that Samantha would be leaving for college in August and even with the "hardship withdrawal" he would have great difficulty complying with his maintenance obligations, on June 16, 2015 Mr. Silvi filed another motion to sell the residence, **Exh. 105,** which was again denied on July 15, 2015. **Exh. 33**

In its Findings of Fact and Conclusions of Law the trial court concluded that "[b]ecause the house is now unnecessarily large and expensive to maintain, the Court assumes it will be sold." CP 845

Mr. Silvi's 401(k)

Mr. Silvi's 401(k) was worth $647,011.71 as of June 30, 2015. *Exh. 16* It was worth $550,126.00 at the end of 2013, just after separation. In 2014 and the first half of 2015, a net total of $25,485.35 was contributed to the 401(k) by KING TV and by Mr. Silvi. The pertinent increase percentage for 2014 was 11.28%. The net contributions after separation, and the increase in their value total $28,360.10, all of which is Mr. Silvi's separate property. The remaining $618,651.61 is community property. CP 845-846

Mr. Silvi's Pension

The current value of [Mr. Silvi's] pension is approximately $60,000. The value at the time of the separation was approximately $50,000, which is the total community value. $10,000 is Mr. Silvi's separate property. CP 846

Mr. Silvi's Ownership Interest in Silvi Sports, Inc.

Many years ago Mr. Silvi developed a portable soccer net that he hoped would make him a substantial fortune. However, it has not been a success. The rights to distribute the product are now owned by a Washington corporation he formed called Silvi Sports, Inc., in which Mr. Silvi contributed $500 and his concept (his patent for the product expired a long time ago) in return for what is now a 41% interest in the company. In 2013, the most recent year Silvi Sports filed a tax return, it reported gross sales of $22,270, cost of goods sold of $18,146 and other expenses of $21,541, for an operating loss of $17,417. *Exh. 132* CP 846

The 2012 federal income tax return for Silvi Sports, Inc. reflected no sales or income of any kind for either 2011 or 2012, and net operating losses of $11,673 and $11,684, respectively. **Exh. 131**

During the 24 months between February 2013 and 2015, Silvi Sports sold only 75 goals to its top ten customers, five of whom purchased only two each. **Exh. 22** In 2014, even without paying a cent for the manufacture of any of the goals and spending $15,740 in advertising, the company's net income was only $6,341. **Exh. 21**

In other words, the net annual operating income of Silvi Sports, Inc. for the four years preceding the trial was:

($11,673)	2011
($11,684)	2012
($17,417)	2013
$ 6,341	2014
($34,333)	**Total Negative Net Income**

The value of a share of stock in Silvi Sports, Inc. was set at $10,000 by David Chamberlin, its CEO and majority shareholder, not because that reflected what the company was worth but solely to attract money from investors to be used to have the product manufactured. **RP 513** However, in the past several years there has been only one "investor" in Silvi Sports, Inc.: Mr. Chamberlin. He deposited $20,000 with the company in April 2013 to pay company bills (increasing his ownership and reducing Mr. Silvi's by 2% each), and another $20,000 in October 2014 to buy back the 5% ownership of one of the three initial investors. **Exh. 186**

The company's only asset is its inventory, consisting of approximately 50 poorly constructed nets, and an undetermined number (substantially fewer than 350) that were better produced. The only credible evidence indicates that the cost of operating Silvi Sports, Inc. each year is and will continue to be the same or more than the sales it generates. The Court therefore finds the company has no net value, and awards to Mr. Silvi his 41% interest in it. CP 846

The Silvis' Liabilities

Mr. Silvi will be responsible for paying his current obligations for the parent plus loans for Alex and Ryan (currently approximately $90,000) and all future such obligations for Ryan and Samantha, if any. He shall also be responsible for paying his outstanding debts to Springleaf Financial, Gregory Miller, and the loans he has taken using his 401(k) as collateral. He will also be responsible for paying the debt, if any, arising from Ryan's 2013 automobile accident. CP 847

The Children's Student Loans

Every year that Alex and Ryan have attended Central Washington, their tuition has been funded by student loans, and their

room and board has been paid by Parent Plus loans. **RP 150** The tuition money goes directly to the university and each child is solely legally responsible for the re-payment of those loans, although Mr. Silvi has informed them that he is going to do whatever he can to pay it for them. **RP 151 – 152** The Parent Plus loan funds go directly to Mr. Silvi, who uses the money to pay the children's rent, food, and other expenses: Mr. Silvi is legally obligated to repay the Parent Plus loans. **RP 150, 153** As of September 2015 the outstanding balance of the Parent Plus loans which Mr. Silvi is obligated to pay – all four years of Alex' room and board and the first two years for Ryan – was approximately $90,000. **RP 153**

During the trial – testimony was taken between September 30 and October 8, 2015 -- Mr. Silvi had not yet received the Parent Plus loan proceeds for the first semester of Ryan's junior year at Central Washington, or for the first semester of Samantha's freshman year at Central Michigan. **RP 152 – 153**

Assuming Ryan attends college for two additional years and Samantha the full four years (likely scenarios) and the loan amounts do not increase (which is unlikely), Mr. Silvi will be legally obligated to repay at least $180,000 in Parent Plus loans for the parties'

children, and will also pay whatever he can towards their student loan obligations.

Mr. Silvi's 401(k) Loans

Mr. Silvi regularly obtained loans using his 401(k) for collateral. He borrowed $30,000 in 2008 to pay back bills. **Exh. 10, RP 73 – 74** That loan was later paid off. **RP 76** By June 2014, Mr. Silvi had two outstanding loans secured by his 401(k): one for $35,000 in 2013 to pay for potential claims arising out of an auto accident caused by the parties' son Ryan, and another for $11,700 in 2014 to pay bills. **CP 14, CP 15, RP 68, 76 – 78** As of March 31, 2015 Mr. Silvi still owed a total of $33,158.10 on both loans. **Exh. 16** page 5 Each month Mr. Silvi had and has an average of $995 withheld from his paychecks and was applied against the 401(k) loans. **Exh. 99** page 3

Spring Leaf Financial and Gregory Miller

Mr. Silvi also borrowed money from other sources to pay family bills that his income would not cover. In June 2014 he borrowed $12,000 from Springleaf Financial, at an annual interest rate of 27.31%. **CP 24, RP 149** He is obligated to make monthly payments of $415 to Spring Leaf Financial through July 2018. **CP 24**

The balance of that loan was still approximately $10,000 at the time of the trial in October 2015. **Exh. 99** page 6

Gregory Miller has been a friend of Mr. Silvi's for over 20 years. **RP 140** During that time he has allowed Mr. Silvi to receive advances from his credit card, which Mr. Silvi pays back over time, whenever money was needed to pay bills incurred by the Silvi family. **RP 149 – 150** At the time of the trial Mr. Silvi owed Mr. Miller approximately $3,000 for the most recent loan, which Mr. Silvi was paying back at the rate of $500 per month. **Exh. 99** page 6

Attorneys' Fees

Each party will pay his or her own attorney's fees and costs. Those outstanding debts will not be reflected in the distribution of community and separate assets and debts.

From March 2014 through September 30, 2015, shortly after the trial started, Mr. Silvi's attorney had billed him a total of $148,176 for fees and costs, none of which had been paid, because Mr. Silvi had no money with which to pay him. **Exh. 51, CP 494 – 528, RP 150** The only asset awarded to Mr. Silvi was his interest in his 401(k), which will be used to pay that debt.

Ms. Silvi, on the other hand, had paid her attorneys $56,500 by the time the trial had started. She paid $37,500 to the first law firm

that represented her – a $7,500 retainer from community savings, $20,000 from a loan from her parents, and $10,000 from temporary maintenance payments made by Mr. Silvi – and $19,000 to her second set of attorneys; $10,000 from a credit card, $5,000 from her share of the parties' 2014 income tax refund, and $4,000 from a source she could not recall. **Exh. 87, RP 607 – 609**

Other Liabilities

The parties shall file a tax return, if possible, as married filing jointly for 2015. Mr. Silvi shall pay any liability. Any refund shall be shared 50%/50%. CP 851

Health insurance for the children shall continue under Mr. Silvi's coverage for so long as permitted and if the children qualify to be covered up to any age permitted by law (unless any child obtains their own health insurance). Ms. Silvi shall remain on said health insurance coverage as well as long as permitted, but thereafter, if she seeks COBRA continuing benefits, then Mr. Silvi shall cooperate 100% with any paperwork, forms, and the COBRA process. CP 852

The Decree

Allocation of Assets and Liabilities

Ms. Silvi's claim at page 12 of her Opening Brief that she

was awarded barely 51% of the Silvis' property is remarkably misleading, in that it completely ignores the liabilities Mr. Silvi will be obligated to pay that substantially offsets the value of the allocation of the parties' assets to him.

The trial court awarded Ms. Silvi ***59%*** of the net community property.

Distribution of Community Assets and Liabilities

Asset Name	Net Value	To Husband	To Wife
House	$325,000		$325,000
401(K)	$618,652	$418,652	$200,000
Pension	$ 50,000	$ 50,000	
Silvi Sports	-0-	-0-	
Total Assets	**$993,652**	**$468,652**	**$525,000**
Creditor			
Student loans	$ 72,000	$ 72,000	
401(k) loans	$ 31,300	$ 31.300	
Total Debts	**$103,300**	**$103,300**	
Total Net Assets	**$890,352**	**$365,352**	**$525,000**

The following allocation Includes separate assets (Mr. Silvi's portion of his 401(k) and pension) and liabilities (the parties' credit card debts and Mr. Silvi's responsibility for an estimated $180,000 in Parent Plus loans for the parties' children):

Distribution of All Assets and Liabilities

Asset Name	Net Value	To Husband	To Wife
House	$ 325,000		$325,000
401(K)	$ 647,012	$447,012	$200,000
Pension	$ 60,000	$ 60,000	
Silvi Sports	-0-	-0-	
Total Assets	**$1,032,012**	**$507,012**	**$525,000**
Creditor			
Student loans	$ 180,000	$180,000	
401(k) loans	$ 31,300	$ 31.300	
Spring Leaf	$ 10,000	$ 10,000	
Greg Miller	$ 3,000	$ 3,000	
Credit cards	$ 21,945	$ 4,800	$ 17,145
Total Debts	**$ 246,245**	**$229,100**	**$ 17,145**
Total Net Assets	**$ 785,767**	**$277,912**	**$507,855**

The trial court awarded Ms. Silvi over ***64.6%*** of all the net assets of the parties.

Maintenance

Ms. Silvi then completely neglects to mention that she was also awarded substantial maintenance from Mr. Silvi for the rest of her life. **RP 850**

Dates	Amount @ Month	Total
10 – 12/15	$8,000	$ 24,000
01/16 – 12/25	$5,000	$ 600,000
01/26 – 12/31	$4,000	$ 288,000
01/32 – 06/51[5]	$1,500	$ 351,000
Total		**$1,263,000**

III. ARGUMENT

A. Standard of Review.

As the Appellant states in her Opening Brief, in domestic relations cases as with other civil cases:

- The trial court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence;
- "Substantial evidence" exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise; and
- All evidence and reasonable inferences must be construed in favor of the prevailing party. (citations omitted)

Ms. Silvi cites only two assignments of error, both of which involve the allocation of the parties' assets and liabilities. The trial court has broad discretion in justly and equitably distributing those assets and debts pursuant to RCW 26.09.080. *In Re Marriage of Larson and Calhoun,* 178 Wash. App. 133, 137–138, 313 P.3d 1228 (2013), *review denied,* 180 Wn. 2d 1011, 325 P.3d 913 (2014):

[5] Ms. Silvi's life expectancy at the time of the trial was 34.5 years, according to the Social Security Department life expectancy calculator. **RP 813**

> A just and equitable division "does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future of the parties." *In re Marriage of Crosetto,* 82 Wash. App. 545, 556, 918 P.2d 954 (1996). "Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules." *In re Marriage of Tower,* 55 Wash. App. 697, 700, 780 P.2d 863 (1989).

As the party challenging a property distribution, Ms. Silvi must demonstrate that the trial court ***manifestly*** abused its discretion, which occurs only when the discretion was exercised on ***untenable*** grounds. *See, e.g., In re Marriage of Gillespie,* 89 Wash. App. 390, 398, 948 P.2d 1338 (1997).

B. The Trial Court's Award of Assets and Liabilities Was Supported by Substantial Evidence and Was Not a Manifest Abuse of Discretion.

1. Appellant Ms. Silvi was awarded 59% of the parties' community net worth and 64% of their combined community and separate net worth.

Ms. Silvi did not assign error to the trial court's valuation of any of the parties' assets except Mr. Silvi's interest in Silvi Sports, Inc., discussed below. Nor does she challenge the factors used by the court in ¶32 of Exhibit A to its Findings of Fact and Conclusions of Law in allocating those assets. **CP 848** She simply asserts that the trial court's reduction of her share of the 401(k) from $300,000

in the trial court's draft Findings of Fact to $200,000 in its final Findings of Fact fails to comport with its statement in ¶32 that "[t]he community property will be distributed unequally, in favor of Mr. Silvi." **CP 348** Both of her reasons supporting that claim are utterly meritless.

Ms. Silvi first claims at page 11 that the $100,000 reduction was the result of "procedural irregularities", that the trial court's action was in essence a "reconsideration" without complying with the CR 59's requirement of newly discovered or newly submitted evidence and without calling for the "mandatory" response to the request for reconsideration under KCLR 59.

But CR 59 only applies when a party seeks to vacate a "verdict . . or any other decision or order." CR 59(a) A motion for new trial or reconsideration "shall be filed not later than 10 days after the entry of the ***judgment***, ***order***, or ***other decision***." CR 59(b) (emphasis added)

Here, the trial court transmitted its ***draft*** Findings of Fact and Conclusions of Law to counsel for both parties on March 3, 2016 with the following cover letter:

> Attached are the court's draft Findings of Fact and Conclusions of Law, and Decree of Dissolution in the above referenced matter. The court gives notice

> of its intent to enter these orders on March 15, 2016. The parties are invited to provide any objections or clarifications to the court, by way of a brief memorandum, not later than March 11, 2016. If either believes a hearing is warranted, please contact my law clerk/bailiff, Nicholas Kelly, to select a date and time. **CP 854**

Both parties filed response pleadings in response to the trial court's invitation: a Memorandum and Declaration by Mr. Silvi, **CP 807 – 832, 783 – 806**, and a Memorandum by Ms. Silvi. **CP 779 – 782**

CR 59 was triggered when the trial court entered its Findings of Fact and Conclusions of Law, **CP 837 – 853,** and Ms. Silvi filed a Motion for Reconsideration, most of which was denied, **CP 878 – 880**, although one component of it was subsequently granted. **CP 910 – 912**

There were no "procedural irregularities".

As discussed, *supra,* Ms. Silvi's other contention – that Ms. Silvi received at most 51% of the parties' "property" – is more than disingenuous. She apparently believes the trial court should have disregarded the community obligations that she ordered Mr. Silvi to pay in making the allocation, an argument for which there is no factual basis or legal authority.

After all, the statute applicable to this process, RCW

26.09.080, is entitled "Disposition of property ***and liabilities"*** and requires the court to "make such disposition of the property ***and the liabilities*** of the parties . . . as shall appear just and equitable . . ." (emphasis added)

The economic circumstances of each spouse upon dissolution is the paramount concern of a court making a property division. *See, e.g., In re Marriage of Gillespie, supra*, at page 399, (1997). According to Ms. Silvi's Opening Brief those economic circumstances included only the assets, excluding the enormous "Parent Plus" student loans incurred for their children's college education, as well as other debts incurred by Mr. Silvi to pay bills while the marital community was intact. It would have been reversible error had the trial court ordered Mr. Silvi to pay them but not consider them in allocating the parties' assets.

2. **By awarding the very valuable and easily marketable family residence to Ms. Silvi, she is able to accumulate savings of at least $250,000 and a $200,000 401(k) account.**

The trial court correctly concluded that "'[b]ecause the house is now unnecessarily large and expensive to maintain, the Court assumes it will be sold." **CP 845** At the time of trial Ms. Silvi could have quickly sold the house for at least $650,000 and generated

net proceeds of around $325,000. **CP 853** She could use (and presumably will use) between $60,000 and $70,000 of that cash for a down payment to purchase a three bedroom, 2.75 bathroom house near the family residence for between $310,000 and $350,000. Brief, *supra,* at page 8 At that point, she will own a nice house, over $250,000 of cash savings, and a $200,000 401(k).

3. **By doing so Ms. Silvi will also cut her housing expenses by more than half and, with the lifetime of maintenance she will receive from Mr. Silvi and her own earned income, she will have substantial financial security.**

As the trial court stated in ¶35 of Exhibit A to its Findings of Fact and Conclusions of Law, "[t]he parties' post-dissolution economic circumstances are the paramount consideration in awarding maintenance." (citations omitted).

By replacing the family residence with a more modest house, Ms. Silvi will reduce the monthly expense for her mortgage, taxes and insurance and utilities by more than $2,300, from $4,430, **Exh. 203,** to approximately $2,100, **CP 820**

Mr. Silvi submitted a Memorandum Re: Proposed Decree of Dissolution and Findings of Fact and Conclusions of Law ("Memorandum") in response to the trial court's draft Findings and Conclusions. **CP 807 – 816** The trial court then issued Final

Findings of Fact and Conclusions of Law, reducing Ms. Silvi's share of Mr. Silvi's 401(k) from $300,000 to $200,000 and reducing the amount of his monthly maintenance payments beginning in 2026. **CP 837 – 853**

Mr. Silvi's Memorandum included the following itemization of Ms. Silvi's net cash flow beginning in 2016 after the family residence is sold: **CP 809 – 810, 817 – 823**

Income:		
$5,000	Maintenance	
$3,330	Salary ($40,000 per year	
$8,330	Gross income	**$8,330**
Deductions:		
$1,250	Federal income tax	
$ 650	FICA/Social Security	
$1,900	Deductions from income	**($1,900)**
Net Income		**$6,430**
Expenses		
$1,700	Mortgage, taxes, insurance, HOA	
$ 450	Utilities	
$1,100	Food and supplies	
$ 550	Transportation	
$ 700	Health care	
$ 945	Personal expenses	
$ 500	Debt payments	
$5,945	Total	
Total Expenses		**($5,945)**
Net Cash Flow		**$ 485**

In other words, Ms. Silvi will be able to save an average of almost $500 per month, and over $5,000 per year, for as long as she continues to receive $5,000 in monthly maintenance (10 years, through 2025) and earns $40,000 per year.[6]

4. **On the other hand, Mr. Silvi will have no money left over after paying his modest living expenses and maintenance to Ms. Silvi.**

Mr. Silvi's Memorandum was accompanied by his Declaration, which included his net cash flow, based upon his September 11, 2015 Financial Declaration that he submitted at trial, **Exh. 99**, with some updated information regarding his current expenses and income, **CP 784 – 797,** resulting in the following: **CP 783 – 785, 799 – 805**

Income:		
$14,583	Salary ($175,000 @ year)	**$14,583**
Deductions:		
$1,844	Federal income tax	
$1,063	FICA/Social Security	
$ 167	Mandatory union payments	
$ 995	401(k) loans	
$ 600	Medical insurance	
$ 85	Vision and dental insurance	
$4,754	Deductions from income	**($4,754)**
Net Income		**$9,829**

[6] In her Opening Brief at page 9, Ms. Silvi falsely states that "the trial court expressed its doubts as to whether the full amount of maintenance would actually be paid. CP 848" The trial court *actually* said that ". . . the current cash-flow situation means that it would be difficult for Mr. Silvi to pay monthly maintenance at an appropriate level. The court will award more assets to Mrs. Silvi in recognition thereof." **CP 848**

Expenses

$1,150	Rent
$ 280	Utilities
$1,150	Food and supplies
$ 500	Children
$1,600	Transportation (for Paul and the children)
$ 210	Health care
$1,090	Personal expenses
$1,200	Debt payments
$7,180	Total

Total Expenses **($7,180)**

Net Cash Flow Before Maintenance **$2,649**

After payment of $5,000 per month maintenance, Mr. Silvi will have a negative cash flow of $2,351 per month, which will hopefully be eliminated by the occasional extra per diem pay and the tax credit for the maintenance payments.

As a result of the trial court's allocation of assets and liabilities and maintenance award, Ms. Silvi will have at least $70,000 equity in an appreciable asset (a home), at least $250,000 in the bank, $200,000 in a 401(k), and enough income to pay all of her expenses and accumulate at least $5,000 per year in additional savings for at least the next decade. Mr. Silvi, on the other hand, will be living in an apartment, driving an 11-year old automobile, have no savings or any other liquid asset other than what is left of his 401(k) plan after he pays his enormous attorneys' fees

obligation, and maybe enough earned income to meet his monthly obligations.

Awarding Ms. Silvi $200,000 instead of $300,000 from Mr. Silvi's 401(k) was hardly an abuse, let alone a *manifest* abuse, of the trial court's discretion.

C. The Trial Court's Decision to Ascribe No Goodwill to the Value of Mr. Silvi's Interest in Silvi Sports, Inc. Was Supported by Substantial Evidence and Was Not a Manifest Abuse of Discretion.

The business of Silvi Sports, Inc. involves arranging for the manufacture of, and selling, portable soccer goals. Mr. Silvi's sole participation in the company was developing the concept, and attempting to sell the goals during what little spare time he had after fulfilling his full-time duties as the sports anchor for KING TV.

The cases involving the goodwill of a business cited in the Appellant's Opening Brief and others discussed in those cases, on the other hand, all involve a divorcing party's full-time occupation, frequently as a professional: a dental practice (*In re the Marriage of Fleege*, 91 Wn. 2d 324, 588 P.2d 1136 (1979) and *In re the Marriage of Monaghan*, 78 Wash. App. 918, 899 P.2d 841 (1996); a physician's practice (*In re the Marriage of Lukens,* 16 Wn. App. 481, 558 P.2d 279 (1976) and In *re the Marriage of Hall,* 103

Wash. 2d 237, 692 P.2d 175 (1984); the 50% owner of a mechanical contracting business whose annual salary was $120,000 (*Suther v. Suther,* 28 Wn. App. 838, 627 P.2d 110 (1981); and the sole owner of Ramtha Dialogues, who used the business to market items related to Ramtha, an alleged 35,000-year-old-warrior (*In re Marriage of Knight*, 75 Wn. App. 721, 880 P.2d 71 (1994).

Nevertheless in her Opening Brief Ms. Silvi appears to equate Mr. Silvi's role in Silvi Sports, Inc. to dentists Fleege and Hall, physicians Lukens and Monaghan, mechanical contractor Suther, and Judy Knight, the so-called channeler of "Ramtha". Their contributions to their businesses were far more likely to include a component of goodwill than Mr. Silvi, based on the description of "goodwill" in *Suther, supra,* quoted in the Appellant's Opening Brief at page 15, or the Washington Supreme Court's discussion in *Hall, supra,* at page 241:

> Goodwill is a property or asset which usually supplements the earning capacity of another asset, a business or a profession. Goodwill is not the earning capacity itself. It is a distinct asset of a professional practice, not just a factor contributing to the value or earning capacity of the practice. (citation omitted) Discontinuance of the business or profession may greatly diminish the value of the goodwill but it does not destroy its existence. When a professional retires or dies, his earning capacity also either retires or dies. Nevertheless, the goodwill that once attached to his

> practice may continue in existence in the form of established patients or clients, referrals, trade name, location and associations which now attach to former partners or buyers of the practice. (citation omitted)

In her Opening Brief at page 16 Ms. Silvi discusses the five ways that the Washington Supreme Court stated in *Hall* could be used by a trial court to value a business' goodwill. However, none of those five methods support a claim for goodwill in this case.

> There are three accounting formulas. Under the straight capitalization accounting method the ***average net profits*** of the practitioner are determined and this figure is capitalized at a definite rate, as, for example, 20 percent. * This result is considered to be the total value of the business including both tangible and intangible assets. To determine the value of goodwill the book value of the business' assets are subtracted from the total value figure.
>
> The second accounting formula is the capitalization of excess earnings method. Under the pure capitalization of excess earnings the ***average net income*** is determined. From this figure an annual salary of average employee practitioner with like experience is subtracted. The remaining amount is multiplied by a fixed capitalization rate to determine the goodwill.
>
> The IRS variation of capitalized excess earnings method takes the ***average net income of the business*** for the last 5 years and subtracts a reasonable rate of return based on the business' average net tangible assets. From this amount a comparable net salary is subtracted. Finally, this remaining amount is capitalized at a definite rate. The resulting amount is goodwill.

> The fourth method, the market value approach, sets a value on professional goodwill by establishing what fair price would be obtained in the current open market if the practice were to be sold. ***This method necessitates that a professional practice has been recently sold, is in the process of being sold or is the subject of a recent offer to purchase.*** Otherwise, the value may be manipulated by the professional spouse.
>
> The fifth valuation method, the buy/sell agreement method, values goodwill by reliance on a recent actual sale or an unexercised existing option or contractual formula set forth in a partnership agreement or corporate agreement. Since the professional spouse may have been influenced by many factors other than fair market value in negotiating the terms of the agreement, courts relying on this method should inquire into the presence of such factors, ***as well as the arm's length nature of the transaction***. *Hall, supra,* at pages 243 - 245 (emphasis added)

The first three formulas support the trial court's conclusion that no goodwill exists because they require that the business' average net income exceed zero: conversely, the average net income Silvi Sports' income was a ***negative*** $8,608 per year.[7]

The market value and buy/sell agreement methods do not apply because no sale of the business has occurred or is imminent, and Mr. Chamberlin's injection of funds in 2013 and 2014 is unrelated to the company's market value.

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[7] Brief, *supra,* at page 13

Also contrary to this case, all of those parties seeking an award of goodwill in cases cited by Ms. Silvi produced expert testimony of its value. *Fleege* at page 327; *Hall* at page 242; *Knight* at page 724; *Lukens* at page 487; *Monaghan* at pages 928-929; and *Suther* at page 842. Ms. Silvi produced no such evidence here.

IV. CONCLUSION

Neither of the assignments of error has merit.

Had the trial court awarded Ms. Silvi $300,000 of Mr. Silvi's 401(k) as she requests in this appeal, she would have received 70% of the net community property and 77% of the net value of all of the property, an indefensible allocation of assets and liabilities especially when Ms. Silvi will also received a lifetime of maintenance exceeding $1.26 million.

The trial court properly based its determination that Silvi Sports, Inc. had no goodwill value on the its history of minimal sales and chronic operating losses, and Ms. Silvi's failure to introduce any evidence that any of the five *Hall* formulas to calculate goodwill applies.

DATED this 12th day of September, 2016.

THE HUNSINGER LAW FIRM
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By:_____
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CERTIFICATE OF SERVICE

I certify that on the 12th day of September, 2016, I caused a true and correct copy of this Amended Brief of Respondent to be served on the following on September 12, 2016, in the manner indicated below:

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