

65994-4

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No. 65994-4-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

DENNIS JORDAN, Appellant

vs.

PATRICIA JORDAN, Respondent

BRIEF OF APPELLANT

Dennis Jordan
Dennis Jordan & Associates,
Inc., P.S.
Appellant Pro Se

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Abbreviations

CP - Clerk's Papers

RP - Record of Proceedings

NOTE: Volume I and Volume III of the Record of Proceedings contains two page numbers on each page. For purposes of the Appellant's citations to Volume I, only the page numbers at the bottom of the page are used.

I. ASSIGNMENT OF ERROR

1. The Appellant, Dennis Jordan, assigns error to Finding of Fact 3.8 K (CP 267) which Finding of Fact states as follows:

K. The case of *In re Marriage of Nuss* with respect to the Mount Baker Cabin does not apply. (CP 264)

2. The Appellant, Dennis Jordan, assigns error to Conclusion of Law 2. E. (CP 275) but only to the extent that it has the effect of awarding the Respondent under Exhibit C to the Findings and Conclusions (CP 278) an interest in the \$180,247.00 net equity of the Mount Baker Cabin which award failed to take into account the origin or source of that property as authorized by the holding of *In re the Marriage of Nuss*, 65 Wash. App. 334 (1992):

E. Any and all interest in Rocking Jays LLC, including but not limited to the three (3) parcels of real estate as follows:

- 1)
- 2) 7707 Church Mountain Place, Glacier, WA, net value \$180,247.00
- 3) (CP 275 and CP 278)

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether or not the trial court erred when it determined that the following holding of *Nuss (supra)* “did not apply” where the property at issue had been conveyed into a community owned Limited Liability Company:

We hold that the origin of community property may still be considered in appropriate cases as a reason for awarding all or a disparate share thereof to that party.¹

2. Whether or not the trial court erred when it awarded the Respondent the equivalent of a 50% interest in the Mount Baker Cabin net equity of \$180,247.00 despite the fact that the origin of the Cabin as community property came from the Appellant's separate property just nine months prior to the parties' separation.

III. STATEMENT OF THE CASE

The Appellant, Dennis Jordan, and the Respondent, Patricia Murphy Jordan, married on April 1, 2005 (CP 265) and separated on August 1, 2008, some three years and five months later (CP 265). Their marriage was dissolved on August 4, 2010 by the entry of Findings of Fact/Conclusions of Law (CP 264-303) and Decree of Dissolution (CP 286-303). Even according to Respondent's counsel, their marriage was short term. (Vol. III, RP 4, line 21)

The parties had known each other since 3rd grade and had gone through high school together after which time they went their separate directions until they reconnected in October, 2004 and married shortly thereafter. (Vol. I, RP

¹ *In re the Marriage of Nuss*, 65 Wash.App. 334, 341 (1992).

21, lines 9-16; Vol. I, RP 24, lines 21-23) As the Respondent testified, their marriage struggled from the very beginning (Vol. I, RP 47, lines 13-16) and, for all intents and purposes, ended in June, 2008 (Vol. I, RP 47, lines 17-22).

Formed about four months into their marriage (Vol. I, RP 30, lines 15-16), one of the assets to be divided by the trial court was the parties' interest in Rocking Jay's, a Washington Limited Liability Company.² (Vol. I, RP 30, lines 12-17, 1-3; Vol. I, RP 31, line 4-19; CP 266-267, paragraph 3.8; Exhibit 5³) Prior to trial, the parties entered into an Agreed Stipulation under which this LLC and its assets were to be awarded to the Appellant while another property, located in Panama, was to be awarded to the Respondent. (CP 242) Under that same Agreed Stipulation, it was also acknowledged that the LLC, its assets and the Panama property constituted community property. (CP 242)

At the time of trial, the assets of the LLC consisted of three real

² Respondent testified that she understood that the purpose of the LLC was to act as a "way" that "we could combine the things that we had with the things that we wanted to have together." (Vol. I, RP 32, lines 4-8)

³ The terms and conditions of the LLC Operating Agreement also stated that the Appellant and the Respondent each owned a 50% ownership interest in the LLC.

properties.⁴ (CP 266-267, paragraph 3.8) The first consisted of a residential condominium that the Appellant had owned prior to the parties' marriage (Vol. I, RP 32, lines 21-23; Vol. I, RP 33, lines 25-3) and into which the Respondent was intending to invest funds to remodel same. (Vol. I, RP 30, lines 8-11) The Appellant transferred that property into the LLC on September 19, 2005. (Exhibit 18; Vol. I RP 130, lines 25 and 1-10) At the time of that transfer, Appellant's equity in the property exceeded by twice the cash contribution toward the remodel being paid for by the Respondent⁵. Under the Agreed Stipulation (CP 242), the parties acknowledged that the condominium had a net equity of \$365,200.00 arrived at by subtracting the underlying debt of \$99,740.00 then owing (CP 45) from an agreed fair market value of \$465,000.00 (CP 43; Exhibit 7; CP 266, paragraph 3.8D)

The second real property was purchased directly in the name of the LLC

⁴ There was also a fourth property that was acknowledged by the parties to be community property but which was not part of the LLC. That property was a house that the parties had built in Panama. At trial, its value was disputed. (CP 266, paragraph 3.8C and 3.8D)

⁵ The cash contribution was \$150,000.00. (Vol I, RP 33, lines 2-3) The fair market value of the condominium in September, 2005 was \$400,000.00 with a debt of \$105,000.00 leaving equity in the unit of \$295,000.00. (Vol. I, RP 132, lines 12-24; Vol. I RP 133, lines 1-5) (The Respondent testified that she had no opinion regarding the fair market value of the condominium as of the time of its transfer to the LLC. (Vol. I, RP 92, lines 17-22))

on September 21, 2005. (Exhibit 17; Vol. I, RP 138, lines 12-24) It consisted of a small office building located at 4218 Rucker, Everett to which both parties contributed separate monies toward the down payment with the Appellant having paid for the remodeling expenses. (Vol. I, RP 32, lines 9-11; Vol. I, RP 123) Both parties had an office in that building. (Vol. I, RP 91, lines 17-25; Vol. I, RP 124, lines 1-11) Under the Agreed Stipulation (CP 242), the parties acknowledged that this office had a net equity of \$82,026.00. (CP 242; CP 266, paragraph 3.8D)

The third property owned by the LLC is referred to as the "Mount Baker Cabin" or "Cabin." (CP 313, paragraph 3.8A) Under the Agreed Stipulation the net value of the Cabin was established to be \$180,247.00 (CP 242) calculated by subtracting the then underlying debt of \$84,753.00 (CP 39) from the agreed fair market value of \$265,000.00 (Exhibit 7).

The Cabin was originally owned by the Appellant as his separate property (CP 314, paragraph 3.8I) which, in the name of another LLC, he had purchased on August 21, 2003 for \$172,430.00. (Exhibits 22 and 23; Vol. II, RP 189 and 190) Of the purchase price, the Appellant paid down \$117,136.00 in cash derived from inherited funds along with borrowed funds of \$54,064.35 the repayment of which was secured by a note and deed of trust. (Exhibit 23; Vol. II, RP 190) (In addition, while still owned in the

name of his LLC, but following Appellant and Respondent's marriage, the Appellant had spent approximately \$76,000.00 in capital improvements to the Cabin using separate, not community funds, to fund the cost. (Exhibit 19; Vol. I, RP 136-138, 141-148))

When asked at trial why the Cabin was not conveyed into the LLC at the same time as the condominium and the office building in September, 2005, the Appellant stated –

Because that wasn't community property. I didn't intend to make that community property. (Vol. I, RP 136, lines 5-9)

In August, 2006, the Appellant, who then had a loan on the Cabin having a balance owing of about \$80,000.00 determined, for purposes of payment convenience, he wanted to consolidate the interest only Cabin loan (which had to be renewed with the Bank each year) with the interest only condominium loan (which also had to be renewed each year) itself having a balance owing of about \$105,000.00.⁶ While in the process of accomplishing that objective, the Respondent requested that the Appellant quit claim the Cabin to the LLC (Vol. I, RP 150, lines 16-19):

And I responded to her at that time, why would I do that when just two weeks ago you said you wanted a divorce. (Vol. I, RP 151, lines 20-21)

⁶

See footnote 5.

Eventually, the ownership of the Cabin became “a significant source of conflict in the marriage.” (Vol. I, RP 149, lines 11-14) Since the beginning of their marriage, the parties had been going to the Cabin most every weekend. (Vol. I, RP 151, lines 5-6) Around the latter part of 2006 or the early part of 2007, however, the Respondent told the Appellant that by not conveying the weekend Cabin to the community LLC, he was indicating that he did not have “faith in the relationship”. (Vol. I, RP 151, lines 1-24) Respondent threatened that if the conveyance was not made, she would no longer be spending weekends at the Cabin but, instead, was going to develop a second life in Seattle.⁷ (Vol. I, RP 151, lines 7-16) The Respondent told the Appellant that she could be trusted never to claim an interest in the Cabin if the marriage did not survive. (Vol. I, RP 152, lines 19-25; Vol. I, RP 153- 154.) At trial the Respondent offered no testimony or other evidence disputing the testimony of the Appellant as described above.

On October 27, 2007, as a result of repeated demands, the Appellant conveyed the Cabin into the LLC (Exhibit 20; Vol. I, RP 149, lines 11-18; RP 150, lines 19-20):

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In fact, according to the Respondent, the failure to make the conveyance, to the Respondent, itself evidenced a lack of trust. (Vol. I, RP 152, lines 23-25)

- Q. (By Appellant's counsel) Was the conveyance of the cabin to Rocking J's a significant source of conflict in your marriage?
- A. (By Appellant) Yes.
- Q. In what way?
- A. I would say that the cabin was – at least, I perceived the cabin to be a, something that Patty wanted me to convey to her as proof of my love for her.
- Q. Did she ever say that directly?
- A. Many times.

(Vol. I, RP 149, lines 11-18; RP 150, lines 19-20)

When asked why he ultimately made the conveyance, the Appellant testified as follows:

Because I felt that was the only way I was going to save the marriage. I wanted to save the marriage. I loved this woman. Notwithstanding all the problems we had, I had loved her since third grade. I loved her then. I made the conveyance with the belief that was the only way to save this marriage.⁸

* * *

I [the Appellant] conveyed that [the Cabin] for one purpose and one purpose only and that was to try to save my marriage.⁹

Then, seven months later, according to the Respondent, the marriage between the parties was, for all intents and purposes, over (Vol. I, RP 47, lines 17-22) and the parties separated two months after that (CP 265).

⁸ Vol. I, RP 154, lines 13-19.

⁹ Vol. II, RP 234, lines 18-19.

Respondent's only testimony on the subject of the above facts was as follows:

Q. (By Respondent's Counsel) All right. With regard to the cabin, you heard Dennis testifying that conveying it to you would prove his love and his comments about how your relationship -- there were several times when your relationship was very difficult, that you threatened to spend your weekend in Seattle and threatened divorce. Would you please describe the significance of the cabin as a gift?

....

JUDGE COOK: The question is what is the significance to you of the cabin as a gift?

THE WITNESS: The significance of the cabin as a gift to me was an expression of his love.¹⁰

It was also undisputed that the Respondent had no financial investment in the Cabin whether in the form of the payment of utilities, real estate taxes, the interest only¹¹ mortgage payments or otherwise. (Vol. I, RP 149, lines 17-22)

Q. (By Appellant's counsel) I want to talk to you about the Panama property -- actually, I want to back up and ask you one question I overlooked. With regard to the cabin, you have not invested any of your separate property funds into the cabin, is that correct, and I'm talking money, cash money?

A. (By Respondent) Other than some decorations and

¹⁰ Vol. II, RP 288-289.

¹¹ CP 267, paragraph 3.8J

furnishings, probably not.

Q. And, in fact, in your deposition in May of 2010 you admitted from a monetary standpoint you have nothing into the cabin?

A. I have made no financial investment in the cabin.

(Vol. I, RP 95, lines 19-25;RP 96, lines 1-5)

Following the separation of the parties, the condominium loan again came up for renewal. At that time, the Cabin loan and the condominium loan were segregated back to their original property (\$84,753.00¹² to the Cabin and \$99,740.00¹³ to the condominium) rather than remaining consolidated on the condominium. (Vol. I, RP 66, lines 20-25)

No evidence was presented at trial that any increase in the Cabin value had been associated with any community effort. In fact, the, the remodeling had been completed prior to the conveyance and the community had only owned the Cabin for a period of seven months before the marriage “was over” and nine months before separation had occurred.

At trial, the Appellant sought a division that would accomplish an allocation of the community interest in the LLC to the Appellant but only to the extent associated with just the condominium and the office building

¹² Balance owing at trial.

¹³ Balance owing at trial.

thereby denying the Respondent an financial interest in the Cabin. The trial court denied that request.

IV ARGUMENT

The authority submitted to the trial court in support of the request for a disproportionate award of the Cabin in favor of the Appellant was *In re the Marriage of Nuss*, 65 Wash. App. 334 (1992). In that case, the husband was awarded a disparate share of the “community owned Bothell property” that he had owned prior to the marriage because, among other things, the five year marriage was defined to be one of “short duration.” In fact, in that case the parties married in 1983, the husband’s property was transferred to the community in 1984 and, for all intents and purposes, the marriage ended in 1988 upon the filing of a domestic violence claim. (*Nuss, supra* at 336-338) Therefore, the property was owned by the community for four out of the five years of marriage.

Further, in that case, while the community did receive a share of the equity in the Bothell property, the Court specifically found that community efforts had enhanced the value of that property. In upholding the disparate award of the trial court, the Court of Appeals stated as follows:

The trial court found that respondent had converted the Bothell property from separate to community property. Respondent was given a credit of one-half the community equity in the property for having brought it into the marriage. The court based this

award on a finding that no more than half the present value of the property, and probably less than that, was the result of community effort and increase in value since it became community property. The court also based its award on the short duration of the marriage, the younger age and better health of the appellant, and her good economic prospects. Appellant challenges this decision.

RCW 26.09.080 requires the trial court to make a just and equitable disposition of property, considering all relevant factors, including the nature and extent of community and separate property, the duration of the marriage, and the economic circumstances of each party at the time of distribution.

* * * *

While the current statute, RCW 26.09.080, does not list the party through whom the property was acquired as one of the factors the trial court must consider, the statute's list of factors is not exclusive. Moreover, one of the factors from the former statute was barred from consideration under the new statute-marital misconduct-while the factor at issue here was not. We hold that the origin of community property as one party's separate property may still be considered in appropriate cases as a reason for awarding all or a disparate share thereof to that party.

Appellant mischaracterizes the trial court's award, claiming the court ignored respondent's conversion of the Bothell property to community property. On the contrary, the court expressly found it was community property, and disposed of the remaining equity in it as community property. . . .

In this case, the Cabin property was community property for only seven months before the marriage, "for all intents and purposes" was over, or nine months before separation occurred. In addition, there was no appreciation of the property that was attributable to community efforts and the Respondent admitted to having contributed nothing to the expenses or costs associated

with the property.

While a trial court has broad discretionary power in making a division of the parties assets and liabilities in a dissolution proceeding, that discretion does not include ignoring the law or the fundamental principles that the trial court is subject to when determining what a fair and equitable division is. For example, a trial court has broad discretionary power in making a division of the property and debts of divorcing spouses. *In re Marriage of Nicholson*, 17 Wn.App. 110, 118, 561 P.2d 1116 (1977). Accordingly, a decision of the trial court will be reversed only for a manifest abuse of discretion. *In re Marriage of Monkowski*, 17 Wn.App. 816, 817, 565 P.2d 1210 (1977). A trial court abuses its discretion only when its decision is manifestly unreasonable, or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The essential consideration is whether the final distribution is fair, just, and equitable under the circumstances. RCW 26.09.080; *In re Marriage of Olivares*, 69 Wn.App. 324, 328-29, 848 P.2d 1281 (1993) (quoting *In re Marriage of Hadley*, 88 Wn.2d 649, 656, 565 P.2d 790 (1977)). Factors to be considered are (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of the parties. RCW 26.09.080. A trial court is not obligated to make an equal

division of property. *Rogstad v. Rogstad*, 74 Wn.2d 736, 737-38, 446 P.2d 340 (1968).

In addition, “a trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law.”¹⁴

The trial court’s position that the *Nuss* principles “did not apply” make no sense at all and the Appellant has been unable to find any authority to support a position that once property is owned in an LLC and the husband and wife are the sole equal owners the LLC, that the trial court loses its authority to divide the underlying assets in a manner that is just and equitable. Specifically, the terms and conditions of a buy-sell agreement do not control the authority of a trial court in a marriage dissolution proceeding to come up with a different method of valuation. For example, Washington courts have consistently found that valuation provisions contained in buy/sell agreements, while relevant to a determination of value, constitute one factor to be considered, but are not determinative. *Suther v. Suther*, 28 Wn.App. 838, 847, 627 P.2d 110 (1981). *See also In re Marriage of Brooks*, 51 Wn.App. 882, 890-91, 756 P.2d 161 (1988) (valuation based on provision

¹⁴

Council House, Inc. v. Hawk, 136 Wash. App. 153, 159, 147 P.3d 1305, 1307 (Wash. Ct. App. 2006)

contained in buy/sell agreement only one method by which to value goodwill).

A disproportionate allocation of an award of value as to properties owned by an LLC, despite the terms and conditions of the LLC Operating Agreement, do not seem wildly different from a trial court being able to ignore a valuation process outlined by a buy-sell agreement entered into between the parties.

In addition, when one considers that the marriage was of such short duration and the time that the Cabin property was owned by the community LLC as community property was not more than nine months with no financial contribution having been made to its improvements or related expenses by the Respondent, it is clear that the failure of the trial court to order a disparate allocation is, in and of itself, “manifestly unreasonable” and clearly not “fair, just or equitable” under the applicable facts and circumstances.

Therefore, in light of the undisputed facts of this case, the trial court abused its discretion when it failed to consider and apply the authority of the *Nuss* holding and, therefore, by implication, the very short duration of the parties’ marriage as well as the following undisputed facts:

1. In addition to its short duration, the marriage was also a struggle from its very beginning coupled with the threats to develop a second weekend life in Seattle if the conveyance was not made all of which makes the undisputed motive for

the transfer from separate property to community (i.e. to save the marriage) an important consideration in determining what is otherwise a just and equitable division of its net worth.

2. Also of significance is the short duration during which the Cabin was held as community property - some nine months prior to the separation of the parties and some seven months prior to the Respondent believing that the marriage was, for all intents and purposes, over.
- 3 The Respondent's lack of investment in the Cabin either in the form of mortgage payments, real estate taxes, utility costs or capital improvements all of which were paid for by the Appellant using separate property funds.

Bottom line is that the Respondent ended up, under the trial court's award, of receiving a full share of the community equity in the Cabin property under circumstances that are clearly not just and equitable all because the trial court concluded that *Nuss* did not apply in the situation before it.

V. CONCLUSION

The Appellant seeks a reversal of the trial court's order refusing a disparate allocation of the Cabin net value along with a direction in remand that the fairness, justice and equity require a disparate allocation in favor of the Appellant; alternatively, that this Court enter an order re-allocating the Cabin net value to the Appellant without the Respondent being entitled to share in it at all.

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Respectfully submitted this 27th day of June, 2011.

DENNIS JORDAN & ASSOCIATES,
INC., P.S.

By

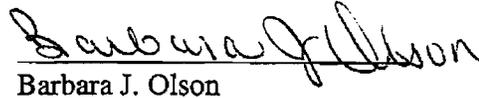

Dennis Jordan, WSEA # 4904
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DECLARATION OF SERVICE

I declare under the penalty of perjury of the laws of the State of Washington that a copy of the Brief of Appellant was on this day transmitted via email as well as arrangements were made with ABC Legal Messengers to deliver a copy to:

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Executed at Everett, Washington on this 27th day of June, 2011.


Barbara J. Olson