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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

2011 JUL 29 AM 10:36

No. 65994-4-I

STATE OF WASHINGTON COURT OF APPEALS  
DIVISION I

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In re the Marriage of

PATRICIA M. JORDAN  
(n.k.a. Patricia L. Murphy),

Respondent,

and

DENNIS W. JORDAN,

Appellant.

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On Appeal from Skagit County Superior Court  
Honorable Susan K. Cook

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Respondent's Brief

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Dennis J. McGlothin  
Attorney, WSBA No. 28177  
Robert J. Cadranel  
Attorney, WSBA No. 41773  
Counsel for Respondent Patricia Murphy  
Olympic Law Group, PLLP  
1221 East Pike Street, Suite 7205  
Seattle, Washington 98122  
(206) 527-2500 Phone  
(206) 527-7100 Fax

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## **INTRODUCTION**

Appellant Dennis Jordan's, the husband's, sole argument is that the trial court manifestly abused its discretion when it divided and distributed the parties' property. He bases his argument on the fact he gifted a cabin in Mount Baker that he owned prior to the marriage (the "Mt. Baker Cabin") to a community owned limited liability company formed during the marriage and owned equally by the parties (the "LLC"). Prior to trial, Dennis Jordan stipulated the LLC was community property. Now on appeal, he insists that the trial court was required to give him a special credit for his separate property contribution to the LLC. The trial court, however, considered all the required factors in this case and its property distribution was within the range of reasonable distributions.

### **A. Restated Statement of Issues**

1. Whether the trial court properly exercised its wide discretion in distributing the parties' property because the property distribution was within the range of reasonable alternatives.
2. Whether the trial court properly exercised its wide discretion when it chose not to apply a discretionary special separate property credit allowed in *In re Marriage of Nuss*, 65 Wn. App. 334, 828 P.2d 627 (1992). (Appellant's Assignment of Error no. 1.)
3. Whether Dennis Jordan is incorrect in his argument that the trial court manifestly abused its discretion because the trial court never

distributed the Mt. Baker Cabin because it was, and is, owned by the LLC.  
(Appellant's Assignment of Error no. 2.)

4. Whether this Court should award Respondent Patricia Murphy, the wife, her attorney fees and costs on appeal based on RCW 26.09.140 because Appellant has the superior ability to pay and Patricia has need for attorney fees and based upon Appellant's intransigence.

### **B. Statement of the Case**

1. *The Marriage.* The parties have known each other since childhood in the 1950s.<sup>1</sup> They reconnected in October 2004.<sup>2</sup> The parties were married on April 1, 2005 and separated on August 1, 2008.<sup>3</sup>

2. *The LLC.* About four months into the marriage, the parties entered into the LLC agreement and formed the LLC.<sup>4</sup> The trial court made an unchallenged finding that the husband drafted the LLC agreement, that he was an experienced real estate attorney with decades of experience drafting LLC documents, and that the LLC agreement listed the parties' ownership interests in the LLC at 50% each.<sup>5</sup>

At trial, the LLC owned three real property parcels, as follows:

A) A residential condominium (the "Everett condominium" or the

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<sup>1</sup> CP 49 and Appellant's Br. at 2.

<sup>2</sup> *Id.*

<sup>3</sup> CP 265.

<sup>4</sup> CP 266; VRP July 12, 2010, 33:12 – 16.

<sup>5</sup> CP 267, Finding of Fact 3.8(F).

“Mukilteo condominium”) that the husband had owned prior to the marriage. On September 19, 2005 he contributed the Everett condominium into the LLC.<sup>6</sup> Subsequently, the Wife contributed \$150,000 in cash into the LLC that was earmarked to remodel and improve the Everett condominium.<sup>7</sup>

B) A small office building (the “office building” or the “Rucker building”) in Everett. It was purchased by the LLC on September 21, 2005.<sup>8</sup> Both parties contributed separate funds into the LLC that was used to make the down payment on the office building, and both parties maintained offices in that building.<sup>9</sup>

C) The Mt. Baker Cabin.<sup>10</sup> In August, 2003, which was prior to the parties’ marriage, husband caused a different limited liability company that he owned to purchase the Mt. Baker Cabin.<sup>11</sup> On October 27, 2007, he transferred the Mt. Baker Cabin to the parties’ LLC by quitclaim deed.<sup>12</sup>

3. *The Stipulation.* Prior to trial, the parties entered into a written Agreed Stipulation and, among other things, stipulated that the LLC was community property and that certain real property in Panama was also

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<sup>6</sup> CP 267; Appellant’s Br. at 3-4.

<sup>7</sup> VRP, July 12, 2010, 37:2 – 3.

<sup>8</sup> CP 267; Appellant’s Br. at 4-5.

<sup>9</sup> Appellant’s Br. at 5.

<sup>10</sup> CP 266; Appellant’s Br. at 5.

<sup>11</sup> Appellant’s Br. at 5.

<sup>12</sup> *Id.* at 7; CP 267, Finding of Fact 3.8(I).

community property. They stipulated to the value of the three real property parcels the LLC owned – the Everett condominium, the office building, and the Mt. Baker Cabin. They also stipulated that the wife had invested \$224,000 of her separate funds while the husband had only invested \$173,450.<sup>13</sup> Wife, therefore, had contributed over \$50,000 more in her separate funds than husband contributed in his separate funds to the Panama property.

4. *Property Characterization.* After considering the evidence presented, the trial court found that although the Mt. Baker Cabin was originally the husband's separate property, he had quitclaimed the property to the LLC in October 2007.<sup>14</sup> It also found that at the time of trial the parties had agreed that the Everett condominium, the office building, the Mt. Baker Cabin, the Panama house, and the LLC were all community property.<sup>15</sup> *The husband did not assign error to these findings.*

5. *Property Distribution.* When distributing the parties' property, the trial court valued all the community property and distributed the value equally – a 50/50 split.<sup>16</sup> The Stipulation provided the husband would receive the community-owned LLC that owned the Everett condominium,

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<sup>13</sup> CP 242.

<sup>14</sup> CP 267, Finding of Fact 3.8(I).

<sup>15</sup> CP 266, Finding of Fact 3.8(D).

<sup>16</sup> CP 296.

the office building and the Mr. Baker Cabin, and the wife would receive the Panama property. The trial court accepted husband's proposed value<sup>17</sup> and specifically found the Panama property was worth \$490,000.<sup>18</sup> It distributed the LLC to husband and the Panama property to wife. This, along with the other property distributed, resulted in an unequal community split favoring husband. In order to equalize the community property distribution, the trial court required husband to pay \$45,953.50 to wife.<sup>19</sup>

## **C. Argument**

### **1. Standard of Review**

RCW 26.09.080 gives trial courts broad discretion to determine how to distribute assets in a dissolution proceeding.<sup>20</sup> The trial court is in the best position to evaluate the assets and liabilities of the parties and determine what is fair, just and equitable under all the circumstances.<sup>21</sup> On appeal, this Court will overturn a lower court's distribution of property only if there has been a "manifest abuse of discretion."<sup>22</sup> A manifest abuse of discretion is a decision manifestly unreasonable or exercised on untenable

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<sup>17</sup> CR 242.

<sup>18</sup> CP 266, Finding 3.8(C).

<sup>19</sup> CP 274, ¶2(J).

<sup>20</sup> *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

<sup>21</sup> *Brewer*, 137 Wn.2d at 769.

<sup>22</sup> *Id.*, citing *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985).

grounds or for untenable reasons; it is one that no reasonable person would have made.<sup>23</sup> The essential consideration in property distribution appeals is whether the final distribution is fair, just, and equitable under the circumstances.<sup>24</sup>

In making a division of the property the law does not impel an equal or exact division of the community property of the parties.<sup>25</sup> A reviewing court is most reluctant to substitute its evaluation and judgment for that of the trial judge, and will do so only when inequity and injustice are apparent beyond simply an honest difference of opinion, and it can be said that an abuse of judicial discretion is clearly manifest on the part of the trial judge.<sup>26</sup>

All property, both community and separate, is before the court for distribution in a dissolution proceeding.<sup>27</sup> The trial court must divide the parties' property, both community and separate, as appears just and equitable after considering all relevant factors.<sup>28</sup> The factors that a trial court must consider when distributing property include, but are not limited to: (1) the nature and extent of the community property; (2) the nature and

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<sup>23</sup> *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989).

<sup>24</sup> RCW 26.09.080.

<sup>25</sup> *Rogstad v. Rogstad*, 74 Wn.2d 736, 738, 446 P.2d 340 (1968).

<sup>26</sup> *Rogstad v. Rogstad*, 74 Wn.2d 736, 738, 446 P.2d 340 (1968).

<sup>27</sup> RCW 26.09.080; *Friedlander v. Friedlander*, 80 Wn.2d 293, 305, 494 P.2d 208 (1972); *In re Marriage of Stachofsky*, 90 Wn. App. 135, 142, 951 P.2d 346 (1998), *rev. denied by* 136 Wn.2d 1010, 966 P.2d 904 (1998).

<sup>28</sup> RCW 26.09.080.

extent of the separate property; (3) the duration of the marriage or domestic partnership; and (4) the economic circumstances of each spouse or domestic partner at the time the division of property is to become effective.<sup>29</sup>

To apply these factors, the trial court must first characterize all property as either separate or community.<sup>30</sup> The characterization of property is a question of law and is reviewed *de novo*.<sup>31</sup> However, the mischaracterization of property is not grounds for setting aside a trial court's property distribution, as long as the distribution is fair and equitable.<sup>32</sup> Finally, our Washington Supreme Court has expressly refused to single out one factor, such as origin of the property, and require that it be given more weight than other relevant factors.<sup>33</sup>

In this appeal, husband has neither argued nor shown that the overall distribution scheme was unjust or inequitable. He has, instead, focused on one asset that is owned by the LLC—the Mt. Baker Cabin—and argued the trial court was required to give him a special credit for that asset

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<sup>29</sup> *Id.*

<sup>30</sup> *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002), *rev. denied* by 148 Wn.2d 1023, 66 P.3d 637 (2003).

<sup>31</sup> *Id.*, citing *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000).

<sup>32</sup> *In re Marriage of Gillespie*, 89 Wn. App. 390, 399, 948 P.2d 1338 (1997), citing *In re Marriage of Shannon*, 55 Wn. App. 137, 140, 777 P.2d 8 (1989).

<sup>33</sup> *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985), *cert. denied*, 473 U.S. 906, 105 S.Ct. 3530, 87 L.Ed.2d 654 (1985).

because it was his separate property prior to him contributing it to the LLC during the marriage. Husband does not challenge the trial court's finding that he agreed that the Mt. Baker Cabin was community property at the time of trial.

Even if the Mt. Baker Cabin were mischaracterized, that alone does not require reversal. Mischaracterizing property does not require reversal if the overall property distribution is just, fair and equitable.<sup>34</sup> Husband, therefore, cannot show reversible error in this appeal by focusing on one asset owned by the LLC; to be successful in his appeal he was required to show the trial court manifestly abused its broad discretion in the entire distribution scheme and that it was unjust, unfair and unreasonable. This he has not done. Not only has this not been done, but husband would be hard pressed to challenge a trial court's equally distributing all the couple's agreed-upon community assets. The findings of fact and conclusions of law, dissolution decree, and the property distribution contained therein should all be affirmed.

## **2. The Trial Court did not Manifestly Abuse Its Discretion.**

Under RCW 26.09.080, the trial court is required to "make disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant

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<sup>34</sup> *Baker v. Baker*, 80 Wn.2d 736, 745-46, 498 P.2d 315 (1972).

factors.”<sup>35</sup> Husband argues one relevant factor was that he contributed the Mt. Baker Cabin, which was his separate property, to the LLC. Assuming this is correct, the trial court’s findings clearly show the trial judge understood that the Mt. Baker Cabin was husband’s separate property prior to the transfer to the LLC and that she considered this factor in the overall distribution scheme.<sup>36</sup>

**a. The Trial Court Properly Characterized Both the LLC and the Cabin as Community Property.**

A spouse’s separate property is that which was owned before marriage or acquired after marriage by gift, bequest, devise, descent, or inheritance.<sup>37</sup> All property acquired after marriage is presumed to be community property, unless it fits within a separate property provision.<sup>38</sup> Spouses may contractually agree to change the character of their separate property into community property.<sup>39</sup> To recognize such an agreement, courts require written evidence of the mutual intent of the parties to change the character of the property.<sup>40</sup>

Here, the trial court found that the parties had agreed that all four real

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<sup>35</sup> RCW 26.09.080.

<sup>36</sup> CP 277, ¶G.

<sup>37</sup> RCW 26.16.010.

<sup>38</sup> RCW 26.16.030; *In re Marriage of Short*, 125 Wn.2d 865, 870, 890 P.2d 12 (1995).

<sup>39</sup> *Volz v. Zang*, 113 Wash. 378, 381-84, 194 P. 409 (1920).

<sup>40</sup> *In re Marriage of Shannon*, 55 Wn. App. 137, 140, 777 P.2d 8 (1989).

properties and the LLC itself were community property.<sup>41</sup> Husband did not assign error to this finding; it is, therefore, a verity on appeal.<sup>42</sup> The trial court, therefore, correctly characterized all these properties.

Even if there was error assigned to the community property findings, there is sufficient evidence to support the trial court's characterizations. The LLC was formed during the marriage.<sup>43</sup> The LLC purchased the office building during the marriage.<sup>44</sup> Despite the Everett condominium and the Mt. Baker Cabin having been originally husband's separate property, the trial court found husband contributed these properties to the LLC during the marriage.<sup>45</sup> The LLC owned the Everett condominium, the office building, and the Mt. Baker Cabin both at and after trial. Ownership did not change. The only asset the trial court really awarded to husband was both his and wife's 50% interests in the LLC. The LLC's properties were valued to arrive at an overall value for the LLC. Since the LLC interests that were awarded to husband were acquired during the marriage, they were presumptively community.

Even if this Court were to go one level deeper and review the trial court's characterizing the LLC's assets, the result is still the same.

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<sup>41</sup> CP 266. Finding of Fact 3.8.

<sup>42</sup> *In re Estate of Lint*, 135 Wn.2d 518, 533, 957 P.2d 755 (1988).

<sup>43</sup> CP 266.

<sup>44</sup> CP 267, Finding of Fact 3.8(H).

<sup>45</sup> CP 266-67.

Husband's own trial testimony underscores his donative intent to gift the Mt. Baker Cabin to the community via the LLC: "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 [of the Mt. Baker Cabin] with the belief that was the only way I could save [*sic*] this marriage."<sup>46</sup> Wife additionally testified, "The significance of the cabin as a gift to me was an expression of his love."<sup>47</sup> The trial court's characterizing the Mt. Baker Cabin as community property was, therefore, not error.

**b. The Trial Court Made a Just and Equitable Distribution of the Property.**

Here, the trial court carefully considered the nature and extent of the separate and community property and the duration of the marriage. The trial court took into account the Panama property as well as wife's and husband's respective separate property contributions to the Panama property, the LLC, and the parties' respective separate property contributions to the LLC.<sup>48</sup> The trial court considered the Acura that had been community property and the insurance proceeds for the Acura, and that the Acura had been a gift from Appellant's separate assets to the community.<sup>49</sup> The trial court valued the pickup truck and awarded it to

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<sup>46</sup> VRP, July 12, 2010, 170:15 – 19.

<sup>47</sup> VRP July 14, 2010, 289:15 – 16.

<sup>48</sup> CP 266 – 68; VRP, July 15, 2010, 33:20 – 35:20.

<sup>49</sup> CP 267, 268; VRP July 15, 2010, 35:21 – 36:5.

wife.<sup>50</sup> The trial court accounted for a loan that wife had made to husband from her separate estate as well as husband's partial repayment.<sup>51</sup> The trial court concluded,

This case was not a complex case. There were essentially four assets that needed to be divided, and the parties agreed just to the character of the assets, for all intents and purposes, mostly as to the value, and in every respect who was going to receive those items.<sup>52</sup>

Because the trial court properly considered each asset, the parties respective separate contributions to each asset, and distributed the community property 50% to each party, husband cannot show, as he must, that the trial court manifestly abused its discretion in making its property distribution.

### **3. Applying *Nuss* is Expressly Discretionary, Not Mandatory.**

The property award in *Nuss* was decided under RCW 26.09.080, which then, just as it does now, “requires the trial court to make a just and equitable disposition of property, considering all relevant factors.” RCW 26.09.080 requires the trial court to consider the following factors: 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.<sup>53</sup> The *Nuss* court pointed out that former RCW 26.08.110,

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<sup>50</sup> VRP July 15, 2010, 36:6 – 11.

<sup>51</sup> CP 268; VRP July 15, 2010, 36:12 – 16.

<sup>52</sup> VRP (July 15, 2010) 37:7 – 12.

<sup>53</sup> *Nuss*, 65 Wn. App. at 340.

repealed in 1973, expressly gave the court the discretion to consider additional factors other than marital misconduct when distributing property, including whether the property was a party's separate property when it was given to the community.<sup>54</sup> With RCW 26.09.080 lacking an express provision regarding the origin of community property, the issue in *Nuss* was whether a court could still consider origin as a reason for awarding all or a disparate share of property to one party.<sup>55</sup> The *Nuss* court reasoned:

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.<sup>56</sup> (Emphasis added).

*Nuss* makes clear that the trial court has discretion whether to apply the *Nuss* result and may do so only in appropriate cases. Here, the trial court did not abuse its broad discretion in not applying *Nuss* and in determining this is not an appropriate case to apply the *Nuss* result.

*Nuss* is distinguishable from this case. First, *Nuss* involved a single home where the other spouse made no separate property contribution to

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 341.

<sup>56</sup> *Id.* (Emphasis added)

the home's value.<sup>57</sup> It did not involve a situation like the one before this Court where both spouses owned LLC interests and both spouses made varying separate property contributions to the LLC and the other community assets, like the Panama property. Wife contributed \$150,000 in cash to remodel the Everett condominium,<sup>58</sup> money toward the office building down payment,<sup>59</sup> and the community provided labor to remodel the Mt. Baker Cabin.<sup>60</sup> Here, also, the community and the husband used the LLC's assets to obtain loans.<sup>61</sup>

The trial court considered all these differentiating factors and in its oral ruling stated:

The Rocking J's, LLC is community property. It is composed of three parcels of real estate. The stipulated value of the Mukilteo condo is \$365,260. The stipulated value of the Everett office on Rucker is \$82,026 dollars. The stipulated value of the cabin at Mt. Baker is \$180,247. That LLC is community property.

The LLC agreement has the ownership interest of the parties at 50 percent each, and the entirety of the LLC is awarded to Mr. Jordan. It is all, however, put on his side of the ledger as community property for distribution and equalization purposes, including the cabin. The cabin was originally Mr. Jordan's separate property.

However, in October of 2007 Mr. Jordan transferred the cabin from his separate ownership to ownership under the LLC. Mr. Jordan drafted the LLC agreement, so there is no possible

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<sup>57</sup> *Nuss*, 65 Wn. App. at 336-37.

<sup>58</sup> VRP, July 12, 2010, 37:2 – 3.

<sup>59</sup> VRP, July 12, 2010, 101:23 – 102:11; 135:20 – 136:3.

<sup>60</sup> “I completely landscaped. I designed the kitchen. I designed the fireplace, designed some furniture.” VRP, July 12, 2010, 55:6 – 8.

<sup>61</sup> CP 267, Finding of Fact 3.8(J); VRP, July 15, 2010, 35:8 – 11.

argument that he didn't realize that he was transferring 50 percent of that interest to Mrs. Jordan in doing so.

The LLC was his idea to begin with, and he had drafted hundreds of those LLC documents in the past. He is an experienced real estate attorney with decades of experience practicing in that area. He used a quit claim deed to accompli[sh] the transfer, and he was well aware of the effect of the that transfer.

Just as importantly, Mr. Jordan used the assets in the LLC which were community, jointly owned assets, as security for the loan on the cabin during the marriage. In fact, beginning -- I believe the uncontested testimony was about the time he settled things with Ms. Ringen until after the party's separation. The loan that had originally been on the cabin was incorporated into the LLC assets, and those assets were used as security for that loan.

I don't find any equitable basis to follow *Nunn* [sic], with respect to this cabin, and back it out of the LLC in some fashion and award it to Mr. Jordan as separate property.<sup>62</sup>

The trial court made an express written finding as to the Cabin's separate property origin.<sup>63</sup> The trial court made an express written finding as to how the Cabin became community property when Mr. Jordan transferred it to the LLC,<sup>64</sup> and the trial court made express written findings that both the LLC and the cabin were community property.<sup>65</sup> Finally, the trial court properly exercised its discretion when it found no equitable basis to follow *Nuss* with respect to the cabin by backing it out of the LLC and awarding it to husband as his

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<sup>62</sup> VRP, July 15, 2010, 34:7 – 35:20

<sup>63</sup> CP 267, Finding of Fact 3.8(I).

<sup>64</sup> *Id.*

<sup>65</sup> CP 266.

separate property. Appellant mischaracterizes the trial court's finding when he states that it took the "position that once property is owned in an LLC and the husband and wife are the sole equal owners [of] the LLC, that the trial court loses its authority to divide the underlying assets in a manner that is just and equitable."<sup>66</sup> The trial court never stated that it had *no authority* to divide the LLC assets in a just and equitable manner, but rather that it could find *no equitable basis* to follow *Nuss* with respect to the Mt. Baker Cabin, back it out of the LLC, and award it to husband as his separate property.

Finally, although not required to consider *Nuss*, the trial court did take note of the Mt. Baker cabin's separate property origin. The court made a specific written finding,<sup>67</sup> and stated in its oral ruling, "The cabin was originally Mr. Jordan's separate property. However, in October of 2007 Mr. Jordan transferred the cabin from his separate ownership to ownership under the LLC."<sup>68</sup> A *Nuss* award of an unequal share was not appropriate in light of other considerations, and this determination was well within the discretion of the trial court.

#### **4. Husband's Other Arguments are Based on Disputed Evidence.**

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<sup>66</sup> Appellant's Br. at 14.

<sup>67</sup> CP 267, Finding of Fact 3.8(I).

<sup>68</sup> VRP July 15, 2010, 34:19 – 23.

Appellant argues that no appreciation of the Cabin was attributable to community efforts and that Patricia admitted having contributed nothing to the expenses or costs associated with the Cabin.<sup>69</sup> However, Patricia in fact testified that she did contribute community labor to the Cabin remodel, including landscaping and interior design.<sup>70</sup>

During the marriage, Appellant used the assets in the LLC, which were community assets, as security for the loan on the Cabin. The loan that had originally been on the cabin was incorporated into the LLC assets, and the LLC assets were used as security for that loan.<sup>71</sup> He then used community property, his salary, from the Frontier Bank account, commingled with other assets, to pay a debt that had been on the Cabin but was now on the condominium.<sup>72</sup> Appellant cannot claim that Patricia contributed no funds to the cabin when community assets were used as security for the loan and community funds went toward loan payments.

Finally, Husband's argument that any effort expended to improve the Mt. Baker Cabin while it was still his separate property cannot have been community effort<sup>73</sup> is without legal support. That the Mt. Baker Cabin was still husband's separate property at the time of the remodel is

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<sup>69</sup> Appellant's Br. at 12-13.

<sup>70</sup> "I completely landscaped. I designed the kitchen. I designed the fireplace, designed some furniture." VRP, July 12, 2010, 55:6 – 8.

<sup>71</sup> VRP, July 15, 2010, 35:14 – 16.

<sup>72</sup> VRP, July 15, 2010, 21:6 – 22:3.

<sup>73</sup> Appellant's Br. at 10.

irrelevant. Washington case law abounds with examples of separate property that increased in value because of community effort.<sup>74</sup>

Also, the Cabin was used for community purposes; both parties testified that they spent almost every weekend together at the Cabin.<sup>75</sup>

**5. This Court Should Award Patricia her Attorney Fees and Costs on Appeal Due to Intransigence and RCW 26.09.140.**

RAP 18.1 allows this Court to award attorney fees if they are awardable at trial. Attorneys' fees are awardable under RCW 26.09.140. Patricia is entitled to appellate attorney fees based on Appellant's intransigence and under RCW 26.09.140 because Patricia has the need and Appellant has the ability to pay. Patricia therefore requests the court award her reasonable attorney's fees and costs, and she will file and serve an Affidavit of Financial Need in accordance with RAP 18.1(c).

In addition, this Court has the ability to award attorney fees based on husband's intransigence. Intransigent conduct includes foot-dragging or obstructionist behavior, repeatedly filing unnecessary motions, or simply making a trial unduly difficult with increased legal costs.<sup>76</sup> A court may consider the extent to which one spouse's intransigence caused the spouse

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<sup>74</sup> See, e.g., *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 869, 855 P.2d 1210 (1993) (although increases in the value of separate property are presumed to be separate, the presumption may be rebutted by evidence that an increase is attributable to community effort) and *Hamlin v. Merlino*, 44 Wn.2d 851, 858, 272 P.2d 125 (1954) (where community labor increases the value of separate property, the property's characterization and distribution depends on the particular facts).

<sup>75</sup> VRP July 12, 2010, 54:23 – 55:1; 167:5 – 7.

<sup>76</sup> *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120, review denied, 120 Wn.2d 1002 (1992).

seeking a fee award to require additional legal services.<sup>77</sup> Here, this appeal is not well taken and constitutes excessive litigation. Husband is an attorney and can represent himself. Wife cannot represent herself effectively because she is not a skilled and experienced lawyer like husband is. This appeal is nothing more than a vexatious attempt to force wife to expend substantial funds in order to keep her equalizing payment properly awarded by the trial court. Under these circumstances, fees are appropriate.

#### **D. Conclusion**

The trial court properly exercised its discretion and correctly made a just and equitable distribution of the parties' assets. The trial court also properly exercised its discretion when it found *Nuss* inappropriate and inapplicable to this case. This Court should affirm the trial court's property distribution and award wife her appellate attorney fees.

Dated this 27th day of July, 2011.

OLYMPIC LAW GROUP, PLLP

  
Dennis J. McGlothlin, WSBA No. 28177  
Robert J. Cadranell, WSBA No. 41773  
Attorneys for Patricia Murphy, Respondent

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<sup>77</sup> *In re Marriage of Crosetto*, 82 Wn. App. 545, 564, 918 P.2d 954 (1996).

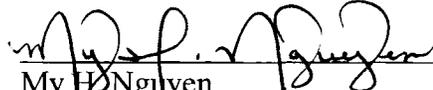
**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of Respondent's Brief to the following individual via U.S. Mail:

Dennis Jordan  
4218 Rucker Ave  
Everett, WA 98203

DATED this 27th day of July, 2011 Seattle, Washington.

  
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My H. Nguyen  
Legal Assistant