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Court of Appeals
Division II
State of Washington
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No. 53630-7-II

THE COURT OF APPEALS, DIVISION II

State of Washington

In re the marriage of:

BEN M. THIELHORN,

Petitioner/Appellant

and

CHERYL THIELHORN,

Respondent/Appellee,

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

The Superior Court erred in its award of maintenance.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

The Superior court's decision regarding maintenance is expressly based on trying "to equalize the known income stream of the parties"; is that a lawful way to calculate maintenance?

Did the Superior Court create a record of its analysis of the statutory factors to be considered in awarding maintenance sufficient to review the decision, and if not should a remand issue for further findings about those statutory factors?

Did the Superior Court fairly analyze the statutory factors that properly must be considered in awarding maintenance, including the disparate award of community and separate property awarded to each party?

In light of the Superior Court's finding that both parties "can work," is there a reasonable analysis of the facts justifying an award of maintenance "for life"?

Does the Superior Court’s award of maintenance in this case violate the federal law and specifically the Uniformed Services Former Spouses’ Protection Act (USFSPA) by giving Ms. Theilhorn part of Mr. Theilhorn’s disability under the guise of “maintenance”?

Should the case also be remanded because the trial court erroneously believed Ms. Thielhorn would lose medical coverage if the separation were converted to a divorce?

STATEMENT OF THE CASE

OVERVIEW AND INTRODUCTION

This case calls upon the court to review a trial court’s award of maintenance “for life” to Ms. Thielhorn.

Mr. Thielhorn asserts that the award is in violation of federal law pertaining to his military pension and disability, parts of which were illegally given to Ms. Thielhorn under the guise of “maintenance.”

There is no challenge to the underlying facts as found, but the court’s reasoning and analysis, such as it is, is contained in the written Findings and Conclusions, and its Decree, all augmented by a written letter opinion. CP 313-17

(attached as Appendix 1). The court's reasoning doesn't fairly or properly analyze the law or properly apply the law to the facts.

(The court issued no oral ruling and a reconsideration was perfunctorily denied without any oral argument pursuant to local rule.) CP 340.

Mr. Thielhorn is requesting a determination that the existing decision is based on untenable grounds or based on untenable reasoning. He requests a remand with instructions to properly exercise the court's discretion, but with guidance about what factors can properly be used to determine maintenance along with guidance about how federal law restricts the court's ability to award military pension and disability money under the guise of "maintenance."

STANDARD OF REVIEW

Trial courts are entitled to broad discretion in dissolution proceedings. In re Marriage of Wright, 179 Wn.App. 257, 261, 319 P.3d 45 (2013). Because the trial court is in the best position to determine what is fair, its decisions will be reversed only if there has been a manifest

abuse of discretion. In re Marriage of Muhammad, 153 Wn.2d 795, 803, 108 P.3d 779 (2005).

A trial court abuses its discretion if its decisions are based on untenable grounds or untenable reasons. *Id.* This discretion applies to determinations regarding division of property and maintenance. Wright, *supra*, 179 Wn.App. at 261 (property division); In re Marriage of Valente, 179 Wn.App. 817, 822, 320 P.3d 115 (2014).

IMPORTANT FACTS AND NATURE OF DISPUTE

Matters not genuinely disputed.

This case is a very ordinary divorce case that was decided by a trial to the court. CP 323. There are no minor children involved. CP 325 (finding no. 18)

The parties were married in Spokane, Washington on June 13, 1992. CP 324. The parties separated on March 15, 2016. CP 324.

Neither party presented evidence about debts at trial. CP 314 (last sentence). The court thus didn't make any specific findings or directions as to identified debt. It seems there was no significant debt either community or separate.

The household effects were divided prior to trial according to agreement and there wasn't evidence of some disparate or unfair division of those assets. Both parties were awarded a Toyota Highlander that they'd been driving prior to the trial and the personal effects then in their possession. CP 315.

Assets of substantial value having disputes as to allocation.

The substantial assets about which there were allocation disputes were as follows:

1. An IRA in Mr. Thieland's name amounting to \$9,945. It was entirely a community asset. CP 314 (paragraph 3).
2. An IRA in Ms. Thielhorn's name amounting to \$63,796. The parties stipulated that the IRA in Ms. Thielhorn's name was 16% community property and the balance was separate property of Ms. Thieland. CP 314 (paragraph 2).
3. A military disability award that paid \$1,768 a month to Mr. Thielhorn which is all his separate property. CP 314 (paragraph 6).

4. A military pension on account of Mr. Thielhorn's service partly before marriage; partly during marriage. Mr. Thielhorn's separate property portion of the pension was 22% of the pension; the community portion is 78% of the pension. CP 324-25 (paragraphs 9 and 10 of the written findings).

Allocation of IRAs.

The court recognized that the community portion of Ms. 's IRA was essentially equal to Mr. Theiland's community IRA; the community interest in each being more or less \$10,000. Rather than split up both IRA's, the court awarded all Mr. Theiland's IRA to him and gave Ms. all of the community portion of her IRA. The court also gave Ms. all the separate portion of her IRA. CP 315.

The net effect was that Mr. Thielhorn received \$9,945 of IRA and Ms. Thielhorn received \$63,796. CP 315

Allocation of Mr. Thielhorn's disability.

Mr. Thielhorn was given 100% of his separate property disability. CP 315.

Allocation of Military Pension.

The method by which Mr. Thielhorn's pension was divided is difficult to discern from the court's writings. The IRA's were split by giving each the equivalent of 1/2 the community interest and each 100% of his or her separate portion. As indicated, that resulted on balance with Mr. Thieland getting 100% of his IRA worth \$9,945 and Ms. Thieland getting 100% of her IRA worth \$63,796. That's because all of Mr. Thielhorn's IRA was community property; only about \$10,000 of Ms. Theiland's IRA was community property. This each party got 1/2 of the entire community property interest in IRAs and Ms. Theiland got 100% of her separate property interest in her IRA.

As to the military pension, the court found that 22% of the pension was separate property of of Mr. Theiland's CP 324-25. Mr. Theiland was not given that separate portion of the pension – at least not expressly. Nor was the community portion of the pension divided expressly.

Instead, the court indicates that “The parties have agreed that Mr. Thielhorn's portion of the retirement is sixty two (62)% and Ms. Thielhorn's portion is thirty-eight (38)%.” See letter opinion at page 2, paragraph 1); CP 314.

It's not easy to understand how these numbers were arrived at and the court might send the case back for further findings or explanation, but Mr. Thielhorn believes that the court intended to explain that the parties stipulated that the military pension administrator had already calculated that, under the provisions of the USFSPA (10 U.S.C. § 1408(a)(2) (C)) Ms. Thielhorn should be paid \$1,328.00 per month; that being 1/2 of the marital portion of the retirement less SBP payment, or 1/2 of 78% of the total pension amount after deducting the SBP amount.

To put numbers to the formula: \$3,648 (gross pension payment CP 314) - \$240 (SBP payment) = \$3,408. \$3,408 x 78% = \$2,658 (community portion of the pension). \$2,658 / 2 = \$1,329 and that's the sum the military pension administrator calculated as Ms. Thielhorn's proper amount under federal law.

So, while the court's written opinion indicates that the parties "agreed that Mr. Thielhorn's portion of the retirement is sixty-two(62)% and Ms. Thielhorn's portion is thirty-eight (38)%," the reality is that this is a stipulation as to *the pension administrator's calculation of what each should receive under federal regulations.*

The “agreement” about what are the parties respective portions of the pension are different from what is Mr. Thielhorn’s separate property portion – 22% and what is the community property portion – 78%. CP 324-25.

The court then accepted and awarded to each party the pension amount which was calculated as appropriate under the federal regulation and which the parties stipulated as being as each parties’ respective part of the pension. CP 314 (paragraph 1).

Calculation of maintenance.

As indicated, the court awarded Mr. Thielhorn \$9,945 of IRA and Ms. Thielhorn \$63,796 of IRA. CP 315.

The court then awarded to Mr. and Mrs. Thielhorn, their respective portions of the military pension as called for by federal regulations. CP 315.

The court then awarded Mr. Thielhorn 100% of his disability as required under federal law. CP 315 (first paragraph numbered 4).

It then set about calculating maintenance. And, to do that, after reciting more-or-less correctly the factors for consideration, the court announced that “The Court believes that the fairest thing to do initially in its analysis is to

equalize the known income stream of the parties.” CP 316 (last paragraph).

Without regard to the fact that a) it awarded Ms. Thielhorn \$63,796 of IRA and Mr. Thielhorn \$9,945 of IRA, and despite finding as fact that “They both can work,” (CP 316), the court calculated that Mr. Thielhorn would be receiving 1) his disability, 2) 62% of the pension money and, to “equalize” the income streams, awarded \$1,380 per month in spousal support from Mr. Thielhorn. CP 317. The effect of this was expressly to assure that Ms. Thielhorn would share equally in Mr. Thielhorn’s disability money and his higher federally mandated pension payments.

The court then looked at predicted earnings. It calculated that Mr. Thielhorn had average earnings of the last three years of \$1,269 a month and essentially imputed that income to Mr. Thielhorn. CP 317.

The court then assumed that Ms. Thielhorn would draw \$789 per month in social security even though there is no evidence that she would be drawing social security. CP 317.

Then the court reasoned that “equalizing those two income streams will necessitate an [additional] payment of

\$240 per month in spousal support from Mr. Thielhorn to Ms. Thielhorn.” CP 317.

Totaling the money to “equalize” imputed income streams and pension and disability money, the court indicated that it would “award spousal support in the amount of \$1,620 per month from Mr. Thielhorn to Ms. Thielhorn for life.” CP 317.

A motion to reconsider was perfunctorily denied without argument or response as allowed by local rule. CP 340.

This timely appeal followed. CP 341-53.

LAW AND ARGUMENT

The trial court improperly calculated maintenance by “equalizing” expected income, rather than by analyzing and applying the factors statutorily set out for consideration in awarding maintenance; if the court considered the statutory factors, that’s not apparent from the decision and the case should be remanded for re-assessment based on the statutory factors.

In its written letter opinion, the court recites properly the factors to be considered for an award of maintenance as required by RCW 26.09.090. However, if the trial court actually applied or analyzed those factors, there’s nothing in

either the letter opinion or the Findings of Fact or in the Decree of Dissolution demonstrating how those factors were analyzed and why the maintenance award can be justified by reference to the statutory factors.

For example, RCW 26.09.090(1)(a) requires that the trial court consider “The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently.”

As to the financial resources and the property actually divided, Mr. Thielhorn received an IRA worth \$9,945. Ms. Thielhorn received an IRA worth \$63,796. These were the only assets left of significant value. Thus, it’s apparent that Ms. Thielhorn exited the marriage with over six times the cash Mr. Thielhorn received. If this disparity of property award was considered by the court, it’s not apparent anywhere and there’s no mention of how it affects the trial court’s decision to merely “equalize” post-trial income.

RCW 26.09.090(1)(b) requires that the court consider “The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances.” From the decision,

it's apparent that Ms. Thielhorn already holds an Associate's Degree. CP 316. The court specifically found that both parties "can work." CP 316. There is no discussion or analysis of what further education or training might be required to allow Ms. Thielhorn to independently earn an income or how factor (1)(b) plays into the trial court decision. Because the trial court merely "equalized" income, it appears that the trial court did not actually analyze this factor. If it did, there's an insufficient record of how this factor was analyzed.

RCW 26.09.090(1)(c-e) requires the court to consider such things as: "The standard of living established during the marriage, the duration of the marriage or domestic partnership and the age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance. Again, if these factors were considered at all the record is insufficient to show how these factors played into the trial court decision on maintenance or why these factors militate in favor of just "equalizing" the income of the parties.

RCW 26.09.090(1)(f) requires the court to consider "The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial

obligations while meeting those of the spouse or domestic partner seeking maintenance.” However, there is no discussion at all of relative need or ability to pay at all because the trial court simply “equalized” incomes. That would be fair perhaps, but only if the parties had roughly equal expenses. There are no findings about respective expenses of the parties and the decision fails to account totally for Ms. Thielhorn’s much greater award of IRA money by which she ought to be more able than Mr. Thielhorn to meet existing expenses.

Significantly, the trial court’s decision awarded maintenance “for life” regardless of whether Ms. Thielhorn actually becomes employed. So, Ms. Thielhorn could obtain employment generating income far in excess of Mr. Thielhorn’s income and still be entitled to essentially 1/2 of everything Mr. Thielhorn likely will earn.¹ Why that’s justified based on the facts and on the statutory factors

¹ The trial court cryptically calculated the parties respective expected income by assigning to Ms. Thielhorn \$789 a month from social security. CP 317. However, the trial court also found that “Ms. Thielhorn testified that she does not want to start drawing Social Security until she reaches 70.” CP 316. So, it’s entirely unclear why the court would assign to her that imputed income in it’s calculation of how to “equalize” post-trial incomes. The assignment to Ms. Thielhorn of some imputed income, of course, ameliorates the unfairness of just “equalizing” income, but it demonstrates also that the trial court’s decision is just arbitrary, rather than based on an analysis of the facts of the case and the statutory factors to be considered in awarding maintenance.

underlying maintenance is a mystery and impossible to discern from the findings.

Findings of fact must glean from the record the pertinent facts of the case and thereby resolve conflicting evidence; the decision must apprise a reviewing court of the legal basis for the court's ruling, and must support the conclusions of law. Mayes v. Emery,³ Wn. App. 315, 321, 475 P.2d 124 (1970); see also In re Marriage of Monkowski, 17 Wn. App. 816, 818 (Wash. Ct. App. 1977) ("The findings of fact are insufficient for us to determine whether [the 26.09.090] factors were considered and, if they were, upon what facts the court based its conclusions. We therefore remand for entry of those factual findings.") And see McConnell v. Mothers Work, 131 Wn. App. 525, 535 (Wash. Ct. App. 2006) (In analyzing the factors underlying a fee award: "The court must make a record of this process, sufficient for review." Citing Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998).)

In this case, **if** the trial court actually considered the factors for maintenance set out in Washington's maintenance statute, how the court analyzed those factors is impossible to discern from the decision. The case should therefore be remanded to give the trial court an opportunity to explain

how it considers and analyzes the factors it listed and how those considerations, applied to the facts, justify a decision to “equalize” the income because “equalizing” post dissolution income is not in and of itself an objective of maintenance.

Ms. Thielhorn was illegally awarded part of Mr. Thielhorn’s disability under the guise of maintenance.

In “equalizing” income, the court applied a two-part analysis. First, it addressed Mr. Thielhorn’s pension and disability, indicating expressly:

Mr. Thielhorn will have \$4,088.00 per month from his portion of the military retirement and his full disability payment, and Ms. Thielhorn will have \$1,328 per month from her portion of the military retirement. Equalizing that income stream will necessitate a payment of \$1,380 per month in spousal support from Mr. Thielhorn.

CP 316-17.

This kind of division – basically an award of pension and disability benefits under the guise of “maintenance” – was determined to be illegal in Marriage of Perkins, 107 Wn. App. 313. (Wash. Ct. App. 2001).

Military disability benefits are not divisible by state courts and federal law removes state court authority to divide veteran’s disability benefits in a divorce. See Mansell

v. Mansell, 490 U.S. 581, 594–595, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989). This principle was recently affirmed in Howell v. Howell, 137 S. Ct. 1400 (2017).

The Perkins court held, consistent with Mansell, that “a Washington dissolution court may not divide or distribute a veteran's disability pension, but it may consider a spouse's entitlement to an undivided veteran's disability pension as one factor relevant to a just and equitable distribution of property under RCW 26.09.080, and as one factor relevant to an award of maintenance under RCW 26.09.090, provided of course that it follows the usual state-law rules for applying those statutes.”

For reasons outlined above, the trial court did not analyze the factors pertinent to maintenance and so it's apparent that the court did not “consider” Mr. Thielhorn's pension and disability as “one factor” affecting maintenance. Rather the court simply divided the entirety of the pension and disability for the express purpose of “equalizing” income.

This simply is an award to Ms. Thielhorn of Mr. Thielhorn's disability with an attempt to purify an improper division and distribution by calling it "maintenance." That does not comply with the law. Perkins, supra, 107 Wn. App.

At 327 (“All we hold here is that a trial court may not divide a veteran's disability pension and award part of it to the nondisabled spouse, even if the court labels its award as "maintenance.")

One reason it's obvious that the court is illegally awarding Ms. Thielhorn a share of Mr. Thielhorn's disability and pension is that the maintenance transfer amount is \$1,620 a month. But, the court's own findings are that Mr. Thielhorn's average monthly earnings over the three years predating the decree were \$1,269 a month; it imputes that amount to Mr. Thielhorn on a going-forward basis. CP 317. With such earnings, if Mr. Thielhorn tendered to his ex-spouse *100% of his earnings*, it would not cover the “maintenance” awarded; the only possible way to comply with the court order would be to also pay over part of his disability and pension.

The other reason that it's apparent the court is simply dividing the pension and disability is that the court's maintenance award is unaffected by whether Mr. Thielhorn even holds a job, and he loses his job, because he was awarded less than \$10,000 in assets, the only way to pay the maintenance “for life” would be to invade his pension and disability award.

And, of course, it's apparent that the court improperly divided the pension and disability because it ***expressly said*** that was its plan in the written letter opinion. CP 316-17 (pages 4-5 of the letter opinion: "equalization of that income stream [pension and disability] will necessitate a payment of \$1,380 per month in spousal support from Mr. Thielhorn.") CP 317.

The court can properly consider Mr. Thielhorn's pension and disability money in making its property award. See Perkins, *supra*, 107 Wn. App. at 322-23.

The problem here is that the court has already given Ms. Thielhorn all but \$9,945 of all the parties' separate *and* community property; she got over 85% of the assets. CP 315. So, if the court were to find need on the part of Ms. Thielhorn, it could theoretically give her another \$9,445 of property, but the court would still have to provide an analysis showing why there is need on the part of Ms. Thielhorn and why Mr. Thielhorn should equitably exit the marriage with nothing in the way of property.

On remand, given the grossly disparate award of property in favor of Ms. Thielhorn and the court's express finding that she is "able to work," it would be difficult, but still not impossible for the trial court to craft an analysis that

would justify maintenance. Still, the court must make that award based on a fair analysis of the evidence and the statutory standards; it can't just "equalize income" from the pension and disability merely to equalize income.

The trial court erroneously believed that Ms. Thielhorn would lose medical coverage if the separation were converted to a decree of dissolution.

Pertinent probably to need, the court had in mind that "Ms. Thielhorn will then have to pay for her own health insurance." CP 316.

It's not clear why the court believes that to be so. First, of course, it's dependent on whether she happens to obtain employment providing healthcare benefits. Second, because the marriage overlapped 15 years of military service, Ms. Thielhorn is entitled to one year of TRICARE healthcare services. But, that would cease if she became covered by an employer plan. *See Appendix 2.*

This is not a critical part of the decision, but it is part of the problem associated with the court's apparent lack of any need analysis in awarding maintenance.

The trial court court erred in awarding maintenance “for life” or at least did not properly consider the factors justifying maintenance “for life.”

Awards of maintenance are reviewed for abuse of discretion. See In re Davaz, 157 Wn. App. 1049, (Wash. Ct. App. 2010 UNPUBLISHED), citing In re Marriage of Zahm, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999). However, "An award of maintenance that is not based upon a fair consideration of the statutory factors constitutes an abuse of discretion." In re Marriage of Crosetto, 82 Wn. App. 545, 558, 918 P.2d 954 (1996).

A trial court's discretion to order maintenance is limited only by the requirement that the amount and duration of the award be just in light of the statutory factors. In re Marriage of Washburn, 101 Wn.2d 168, 178, 677 P.2d 152 (1984). The court must consider the parties' post-dissolution financial resources; their abilities to meet their needs independently; the duration of the marriage; the standard of living established during the marriage; the parties' ages, health, and financial obligations; and the ability of one spouse to pay maintenance to the other. In re

Marriage of Williams, 84 Wn. App. 263, 267-68, 927 P.2d 679 (1996); RCW 26.09.090(1).

Permanent maintenance awards are generally disfavored. In re Marriage of Coyle, 61 Wn. App. 653, 657, 811 P.2d 244 (1991). Nonetheless, the award of lifetime maintenance in a reasonable amount is proper "when it is clear the party seeking maintenance will not be able to contribute significantly to . . . her own livelihood." In re Marriage of Mathews, 70 Wn. App. 116, 124, 853 P.2d 462 (1993).

Here, given the trial court's express finding that "They both can work," it appears difficult to conclude that Ms. Thielhorn "will not be able to contribute significantly to . . . her own livelihood." That may not be impossible, but the trial court still has to explain that finding in the context of factors to properly be considered before maintenance – particularly lifetime maintenance – is awarded.

The trial court also has to explain how lifetime maintenance is appropriate in light of the grossly disparate award of property because RCW 26.09.090(1)(a) requires the court to consider "The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to

meet his or her needs independently.” There is nothing in the record to demonstrate the trial court analyzed Ms. Thielhorn’s needs, much less her needs in light of the disparate award of property.

Again, a trial court decision must fairly apprise a reviewing court of the legal basis for the court’s ruling, and findings must support the conclusions of law. Mayes v. Emery, 3 Wn. App. 315, 321, 475 P.2d 124 (1970); see also In re Marriage of Monkowski, 17 Wn. App. 816, 818 (Wash. Ct. App. 1977). The court’s entire analysis in this case was expressly to “equalize income,” but that isn’t one of the factors to consider, nor is the *purpose* of maintenance to equalize income for life – something that would occur if the parties never separated their affairs or divorced.

CONCLUSION

This case should be remanded for further findings and to allow the trial court an opportunity to analyze the evidence and the factors appropriate when awarding maintenance.

A proper basis for awarding maintenance can’t be simply to “equalize income,” and certainly a military

disability can't be divided and awarded in part to a spouse simply to "equalize income." That clearly violates federal law which doesn't allow for a division of the disability award at all.

It is not enough for a trial court to merely identify the correct legal rules or factors to be considered. The court has to explain how those factors are actually being applied and what facts properly support a decision. Cf. Tupas v. State, No. 72259-0-I (Wash. Ct. App. Dec. 7, 2015) (unpublished opinion remanding for further findings in connection with a fee award.)

A maintenance award cannot properly be based on simply "equalizing" income and that's all the trial court seems to have done in this case.

DATED this 25th day of October, 2019.



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53630-7-II
Marriage of Thielhorn
Appendix

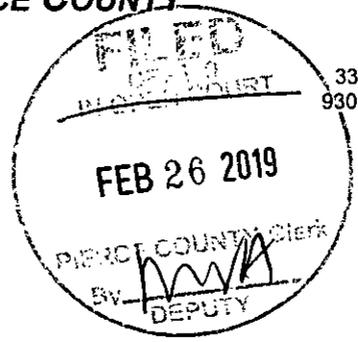
1. Court's Written Opinion

0023



**SUPERIOR COURT
OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY**

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**RE: BEN M THIELHORN vs. CHERYL THIELHORN
Pierce County Cause No. 18-3-00259-1**

Dear Counsel:

This matter came before the Court for trial on February 11-12, 2019. The Petitioner husband appeared with his attorney, David Smith, and the Respondent wife appeared with her attorney, Andrew Hay. The Court heard the testimony of the parties, has reviewed the exhibits admitted into evidence, and has heard the argument of counsel. The Court took the matter under advisement and is now issuing this written decision.

The Court makes the following Findings of Fact: Mr. Thielhorn is a resident of the State of Washington. Mr. Thielhorn filed a petition for Legal Separation on January 19, 2018. Ms. Thielhorn signed an Acceptance of Service on February 15, 2018 and filed it with the Court on March 16, 2018. Ms. Thielhorn appeared and responded to the petition on March 16, 2018 and is also a resident of the State of Washington. No petition for Dissolution has been filed with the Court, although Mr. Thielhorn made a request at trial that the petition for Legal Separation be converted to a petition for Dissolution. Absent a filing of a petition for Dissolution, and the passing of the 90-day waiting period required under RCW 26.09.030, the Court is not able to grant a Decree of Dissolution.

The parties were married on June 13, 1992 in Spokane, Washington. They separated on March 15, 2016, when Mr. Thielhorn moved out of the marital home. There is no known written separation contract or prenuptial agreement between the parties. The parties do have community and separate property, which the Court will divide. The Court will also address the issues of spousal support and attorney's fees. There has been no request for restraining orders or orders of protection. There were no children

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born to this marriage, so there is no need for the Court to address a Parenting Plan or Child Support. Ms. Thielhorn is not pregnant. From these Findings of Fact, the Court will make the following Conclusions of Law: The Court has jurisdiction to enter a decree in this matter and will enter a Decree of Legal Separation.

The Court must dispose of the property and liabilities of the parties. RCW 26.09.080 is the law that the Court must follow. It says, "In a proceeding for dissolution of the marriage, the court shall, without regards to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to: 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 each spouse at the time the division of property is to become effective". The Court must make a series of determinations. It must characterize all property as either separate or community property. Property acquired during the marriage is presumed to be community property unless it was acquired during marriage by gift, bequest, devise or descent. The Court must then value the property and, finally, the Court must distribute all the property before it with both the character of the property and all other relevant factors in mind to achieve a just and equitable distribution. Everything is on the table, whether it be classified as community property or debt, or separate property or debt. The Court is going to round figures to the nearest whole dollar amount for sake of convenience. The Court has attempted to value community property and debt as close to the time of separation as possible.

The parties have the following assets:

- 1) Mr. Thielhorn's military retirement, which is currently \$3,648.00 per month. The parties have agreed that Mr. Thielhorn's portion of the retirement is sixty-two (62)% and Ms. Thielhorn's portion is thirty-eight (38)%. At the current time, this amounts to \$2,320.00 per month to Mr. Thielhorn and \$1,328.00 per month to Ms. Thielhorn.
- 2) Ms. Thielhorn's American Century Investments IRA. It had a balance of \$63,796.36 as of March 31, 2016, which is close in time to the date of separation. The parties have agreed that the marital portion of the IRA is sixteen (16)% and Ms. Thielhorn has a separate portion of eighty-four (84)%. Mr. Thielhorn's portion of the IRA is one-half of the sixteen (16)%, or eight (8)%, which amounts to \$5,103.71.
- 3) Mr. Thielhorn's Fidelity IRA. It had a balance of \$9,945.00 as of December 31, 2017, which is the figure closest to the date of separation provided to the Court. This is a community asset, and each party would be entitled to fifty (50)% or \$4,972.50.
- 4) Each party has a vehicle. Mr. Thielhorn has a 2006 Toyota Highlander, and Ms. Thielhorn also has a Highlander.
- 5) Two dogs, which the parties have agreed should go to Ms. Theilhorn.
- 6) Mr. Thielhorn's disability payment, which is currently \$1,768.00 per month. This is Mr. Thielhorn's separate property and no portion of it can be awarded to Ms. Thielhorn.
- 7) Bank accounts and personal property that have been divided by the parties. and were not addressed at trial.

The parties did not address either community or personal debt at trial.

The Court awards to Mr. Thielhorn the following as his separate property:

- 1) Sixty-two (62)% of his military retirement, which is currently \$2,320.00 per month.
- 2) Mr. Thielhorn's Fidelity IRA. The Court awards him the full amount of the IRA because his separate portion as of December 31, 2017 (almost two years after separation) was very close to his separate portion of Ms. Thielhorn's IRA nearer to the time of separation. Rather than divide up the individual IRAs, the Court is going to award each party the full amount of their IRAs.
- 3) The 2006 Toyota Highlander in his possession.
- 4) Mr. Thielhorn's disability payment, currently in the amount of \$1,768.00 per month.
- 5) All other community or personal property in his possession at the time of separation.
- 6) All property acquired since the date of separation in his name.

The Court awards to Ms. Thielhorn the following as her separate property:

- 1) Thirty-eight (38)% of Mr. Thielhorn's military retirement, which is currently \$1,328.00 per month.
- 2) Ms. Thielhorn's American Century Investments IRA. The Court is awarding her the full amount of her IRA for the reasons stated in awarding Mr. Thielhorn his full IRA.
- 3) The vehicle in her possession.
- 4) The two family dogs.
- 5) All other community or personal property in her possession at the time of separation.
- 6) All property acquired since the date of separation in her name.

Mr. Thielhorn shall pay the following community or separate liabilities:

- 1) Any debts or liabilities in his name at the time of separation or incurred since the date of separation.

Ms. Thielhorn shall pay the following community or separate liabilities:

- 1) Any debts or liabilities in her name at the time of separation or incurred since the date of separation.

The main issues in this case are those of spousal support and attorney's fees. RCW 26.09.090 is the statute that deals with spousal support and it tells us that an award of spousal support shall be in such amounts and for such periods of time as the Court deems just. The Court must consider all relevant factors, including but not limited to:

- The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently;
- The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
- The standard of living established during the marriage;
- The duration of the marriage;

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- The age, physical and emotional condition, and financial obligations of the spouse seeking spousal support; and
 - The ability of the spouse from whom spousal support is sought to meet his or her needs and financial obligations while meeting those of the spouse seeking spousal support.

Other factors the Court may consider include: education and employment histories of the parties, training and business or occupational experience, prospects of future earnings, age, health of economically disadvantaged spouse, the receipt of social security benefits, the availability of pension and retirement benefits, and the amount of property to be divided. In determining spousal support, the paramount concern is the economic condition in which a dissolution leaves the parties. The Court is governed strongly by the requesting party's need versus the other party's ability to pay the award.

In looking at these factors, there are some things the Court knows and several that it does not know. There is a known amount of income that each party is going to be entitled to once this decree of legal separation is entered and Mr. Thielhorn's military retirement is divided between the parties. Mr. Thielhorn will bring in \$4,088.00 per month in his military retirement and disability. Ms. Thielhorn will bring in \$1,328.00 per month in her portion of the military retirement. These amounts are subject to cost-of-living adjustments upwards.

Mr. Thielhorn is fifty-six (56) years old and Ms. Thielhorn is sixty-one (61) years old. They both can work, but both have had a hard time finding employment in the areas for which they have received education. Mr. Thielhorn has been employed for most of his adult life, except for 2013 and 2014 when he was looking for work but was not successful. He is now a part-time substitute teacher and is not looking for full-time employment. Ms. Thielhorn gave up her career to follow Mr. Thielhorn's military career. She did obtain an associate degree approximately fifteen years ago but has had a difficult time obtaining employment in her field of study. Each party testified about the difficulty in finding employment at their ages. Ms. Thielhorn described applying for over two hundred and forty (240) jobs without success. Their incomes for the foreseeable future are unknown.

Another unknown factor is when each party is going to start drawing Social Security. Mr. Thielhorn testified that he wants to retire at age 62 and start drawing Social Security at that time. Ms. Thielhorn testified that she does not want to start drawing Social Security until she reaches age 70. If the legal separation is converted to a decree of dissolution at some future date, Ms. Thielhorn will then have to pay for her own health insurance and Mr. Thielhorn's disability payment will be reduced. Mr. Thielhorn does not have to worry about obtaining health insurance on his own. The Court is aware that neither party may be able to follow their wishes as to when they begin drawing Social Security. They each will have choices to make regarding employment versus Social Security.

The Court believes that the fairest thing to do initially in its analysis is to equalize the known income stream of the parties. The parties were together for almost twenty-four (24) years. While this doesn't automatically make it a long-term marriage, the Court is treating it like a long-term marriage given the disparity in income that each was able to earn over the marriage and the impact on Ms. Thielhorn's career because of the constant moving. Mr. Thielhorn will have \$4,088.00 per month from his portion of the military retirement and his full disability payment, and Ms. Thielhorn will have \$1,328.00

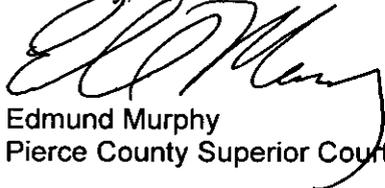
per month from her portion of the military retirement. Equalization of that income stream will necessitate a payment of \$1,380.00 per month in spousal support from Mr. Thielhorn to Ms. Thielhorn.

Per his paycheck stubs, Mr. Thielhorn earned \$8,008.00 in 2018, \$13,359.00 through seven months of 2017, and \$14,795.00 in 2016. That adds up to a monthly average salary of \$1,269.00 per month. Ms. Thielhorn is not working at this time and has worked very little over the years. She may have to start drawing Social Security at age 62 if she does not find employment. If she does, without additional income earned, she would be paid \$789.00 per month from Social Security. Equalization of those two income streams will necessitate a payment of \$240.00 per month in spousal support from Mr. Thielhorn to Ms. Thielhorn. The Court is therefore going to add \$1,380.00 to \$240.00 and award spousal support in the amount of **\$1,620.00 per month** from Mr. Thielhorn to Ms. Thielhorn for life.

Under RCW 26.09.140, the trial court has the discretion to award attorney's fees and should balance the needs of the spouse requesting fees with the ability of the other spouse to pay. Given the attempt to equalize the incomes of the parties going forward and the access that Ms. Thielhorn has had to the largest liquid asset, her IRA, the Court is going to order that each party is responsible for their own attorney's fees.

Please schedule the presentation of final documents for a Friday morning. Ms. Van Antwerp can assist you with selecting a date. If you can agree that the documents reflect the Court's decision and sign them, the documents can be presented to this Court ex parte.

Sincerely,



Edmund Murphy
Pierce County Superior Court Judge

cc: Pierce County Clerk for filing

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53630-7-II
Marriage of Thielhorn
Appendix

2. TRICARE Information

Disaster Alert in Place in Parts of California

There is a disaster alert in place for parts of California due to wildfires. [Click here to learn more about impacted areas and your health benefits.](#)



Plans

Learn about what TRICARE plan is right for you and your family.

[Home](#) > [Plans & Eligibility](#) > [Eligibility](#) > Former Spouses

Former Spouses

For unremarried former spouses, the Defense Enrollment Eligibility Reporting System (DEERS) reflects TRICARE eligibility using your own Social Security number (SSN), not your former sponsor's.

- Health care information is filed under your name and SSN
- You'll use your name and SSN to schedule appointments and to file claims.

You may be eligible for TRICARE if you fit into one of the following scenarios. In both scenarios, your sponsor must have at least 20 years of creditable service towards determining retirement pay. You'll need the following documents to establish your eligibility as an unremarried former spouse:

- Marriage Certificate
- Divorce Decree
- DD Form 214 or Statement of Service from the applicable [Service Personnel Component](https://www.tricare.mil/ContactUs/CallUs/ServicePersonnelComponents) (<https://www.tricare.mil/ContactUs/CallUs/ServicePersonnelComponents>).

Scenario 1: The "20-20-20" Rule

You are eligible for TRICARE as your own sponsor under your own Social Security Number as long as you meet the following criteria:

- 20 - Your sponsor has at least 20 years of creditable service towards determining retirement pay.
- 20 - You were married to the same sponsor/service member for at least 20 years
- 20 - All 20 years of marriage overlap the 20 years of creditable (Active or Reserve) service which counted towards your sponsor's retirement.

If the [Service Personnel Component](https://www.tricare.mil/ContactUs/CallUs/ServicePersonnelComponents) (<https://www.tricare.mil/ContactUs/CallUs/ServicePersonnelComponents>)

determines that you meet the 20-20-20 eligibility criteria, you will be issued a new ID card with your own name and your Social Security number listed as the "sponsor Social Security number" the first time you renew your card after the divorce/annulment effective date.

Scenario 2: The "20-20-15" Rule

You will be listed under your Social Security Number as long as you meet the following criteria:

- 20 - Your sponsor has at least 20 years of creditable service towards determining retirement pay.
- 20 - You were married to the same sponsor/service member for at least 20 years
- 15 - 15 of those years overlap the 20 years of creditable (Active or Reserve) service which counted towards your sponsor's retirement.

If you fall into this scenario, your coverage was/is determined by the date your marriage ended.

Before April 1, 1985	You're eligible for care received on or after January 1, 1985, or the date of the divorce/annulment, whichever is later. Your eligibility continues as long as you meet eligibility requirements (also see below).
April 1, 1985 – September 28, 1988	You were eligible for care received from the date of the divorce/annulment until December 31, 1988, or two years from the date of the decree, whichever was later.
On or after September 29, 1988	You're TRICARE eligible for one year from the date of the divorce/annulment.

Health Plan Options

When you qualify for TRICARE, you're covered with the same benefits as a retired family member, and you have the following health plan options depending on where you live:

- TRICARE Prime
(<https://www.tricare.mil/Plans/HealthPlans/Prime>).
- TRICARE Select
(<https://www.tricare.mil/Plans/HealthPlans/TS>).
- US Family Health Plan
(<https://www.tricare.mil/Plans/HealthPlans/USFHP>).
(in specific U.S. locations)
- TRICARE For Life
(<https://www.tricare.mil/Plans/HealthPlans/TFL>).
(with Medicare Part A & B)
- TRICARE Select Overseas
(<https://www.tricare.mil/Plans/HealthPlans/TSO>).

Losing Eligibility

You can lose your TRICARE eligibility under either scenario if you:

1. Re-marry, even if the remarriage ends in death or divorce (unless you gain eligibility under your new spouse).
2. Purchase and are covered by an employer-sponsored health plan.
3. Were the former spouse of a North Atlantic Treaty Organization or Partners for Peace nation member.

You need to verify your eligibility as recorded in the in Defense Enrollment Eligibility Reporting System (DEERS) and contact the appropriate [Service Personnel Component](https://www.tricare.mil/ContactUs/CallUs/ServicePersonnelComponents) (<https://www.tricare.mil/ContactUs/CallUs/ServicePersonnelComponents>) or the Defense Manpower Data Center Support Office at 1-800-538-9552 if you have eligibility questions or concerns.

Last Updated 11/22/2017

Your Contacts

DMDC/DEERS Support Office (DSO)

Toll-free: 1-800-538-9552

TTY/TTD: 1-866-363-2883

Fax: 1-800-336-4416 (Primary) or 1-502-335-9980 (Alternate)

[Update DEERS Online](https://www.dmdc.osd.mil/milconnect/)

(<https://www.dmdc.osd.mil/milconnect/>)

[View More Contacts](https://www.tricare.mil/ContactUs/CallUs/)

(<https://www.tricare.mil/ContactUs/CallUs/>)

J. MILLS, LAWYER

October 25, 2019 - 4:02 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53630-7
Appellate Court Case Title: Ben M. Thielhorn, Appellant v. Cheryl Thielhorn, Respondent
Superior Court Case Number: 18-3-00259-1

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4 **IN THE COURT OF APPEALS STATE OF WASHINGTON**
5 **DIVISION II**

6 BEN THIELHORN,
7 Petitioner/Appellant,
8 and
9 CHERYL THIELHORN,
10 Respondent/Appellee.

No. **53630-7-II**

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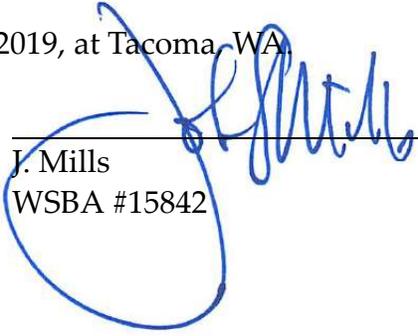
11 **CERTIFICATE OF SERVICE**

12 I certify under penalty of perjury that I served a copy of these documents
13 on all parties or their counsel of record on the date below as follows:

- 14 US Mail Postage Prepaid
15 ABC/Legal Messenger
16 Email (which is our customary means of communication).

17 I certify under penalty of perjury under the laws of the state of Washington
18 that the foregoing is true and correct.

19 DATED this 24th day of October, 2019, at Tacoma, WA.

20 
21 _____
22 J. Mills
23 WSBA #15842

J. MILLS, LAWYER

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