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No. 53630-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the marriage of:

BEN M. THIELHORN,

Appellant,

and

CHERYL THIELHORN,

Respondent

BRIEF OF RESPONDENT CHERYL THIELHORN

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I. INTRODUCTION

In his Opening Brief, Appellant Ben Thielhorn (“Mr. Thielhorn”) ignores significant parts of the record below, including some of his own submissions to the trial court. He also fails to carefully read the trial court’s decisions and orders. These choices by Mr. Thielhorn clearly do not provide any basis for this Court to reverse the trial court’s decisions in this matter. Moreover, the trial court neither violated the law nor otherwise abused its discretion by awarding Respondent Cheryl Thielhorn (“Ms. Thielhorn”) lifetime maintenance in an amount intended to roughly equalize the expected future incomes of the parties. Apart from correcting a small math error, this Court should affirm the trial court in all respects, and also award Ms. Thielhorn her reasonable attorney’s fees and costs incurred on appeal.

II. MS. THIELHORN’S RESTATEMENT OF THE CASE

Mr. Thielhorn and Ms. Thielhorn began living together in 1991, and were married on June 13, 1992. CP 207 at ¶ 1; CP 313. They separated on March 15, 2016. CP 313. At the time of their separation trial in February 2019, Mr. Thielhorn was 56 years old, and Ms. Thielhorn 61. CP 319-320, CP 316.

Both parties had been employed prior to the marriage. Mr. Thielhorn had joined the Air Force in 1987, and he continued to serve there until he retired on December 31, 2007. EX 31. Ms. Thielhorn had worked as a secretary for approximately 15 years before the marriage. EX 47, EX 29 at p. 3. She continued working as a secretary for parts of the

first six years of the marriage. *Id.* Ms. Thielhorn then gave up her career to follow Mr. Thielhorn's military career. CP 316.

While serving in the Air Force during the marriage, Mr. Thielhorn obtained a Masters of Science in Aeronautical Science, and he retired from the Air Force at the rank of Major. CP 286, EX 8. When Mr. Thielhorn left the service, he was entitled to both military retirement pay and veterans disability benefits, with an initial disability rating of 60%. CP 251.¹ Despite his disability rating, Mr. Thielhorn was able to secure and hold a well-paying job for most of the first five years following his retirement from the military. CP 211, ¶¶ 11-12. EX 28, p. 3. He has most recently been working part-time as a substitute teacher. CP 277-78.

Ms. Thielhorn obtained an Associate of Arts degree in 2004 in Visual Communications. EX 47. From shortly before the parties separated until June 2017, she was able to secure employment as an on-line sales assistant at The Marksman. EX 47. Since being let go from that

¹ As explained below at pp. 30-32, Mr. Thielhorn's initial veterans disability rating of 60%, combined with the effect of 10 U.S.C. 1414(a), means that by the time the parties separated in 2016, there was no issue of having to waive retirement pay to receive disability pay. *See, e.g., Haddock v. United States*, 135 Fed. Cl. 82, 84–85 (2017) (explaining effect of 2004 amendment to 10 U.S.C. 1414(a)). *Cf. Howell v. Howell*, 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017) (involving waiver because disability rating was 20%), and *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989) (involving waiver, at least in part because the case was decided before 2004 amendment to 10 U.S.C. 1414(a)).

position, she has been unable to find employment, despite an extensive job search. EXs 40, 46, 47. At trial, both parties “testified about the difficulty of finding employment at their ages.” CP 316.

The separation trial in this matter covered parts of two days, with both Mr. and Ms. Thielhorn providing evidence. CP 310-312, 318-320. Approximately two weeks after the conclusion of the trial, the trial court issued its Letter Opinion dated February 26, 2019. CP 313-317. The trial court issued the Military Retired Pay Division Order, Findings of Fact and Conclusions of Law, and Final Decree of Separation on May 2, 2019. CP 166-169, 323-332. Mr. Thielhorn filed a timely Notice of Appeal on May 31, 2019. CP 341.

The separation was converted to a divorce by order entered November 4, 2019.² By operation of law, conversion of the separation to divorce started the running of Ms. Thielhorn’s one-year clock for continued receipt of federal health-care coverage through TriCare.³ The conversion also immediately terminated her dental insurance coverage.⁴

² The Order Converting Legal Separation Order to Final Divorce Order, entered by the trial court on November 4, 2019, has been designated in Ms. Thielhorn’s Supplemental Designation of Clerk’s Papers and Exhibits for Appeal, which was filed on December 18, 2019.

³ See 10 U.S.C. § 1072(2)(G) and (H) (the latter specifically setting a 1-year limit on medical benefit receipt after divorce by former spouse when the period of marriage has overlapped with at least 15 but less than twenty years of military service).

⁴ See www.benefeds.com at: <https://www.benefeds.com/Portal/EducationSupport?EnsSubmit=dental-vision-eligibility-uniformed-services&ctoken=hy1Hx4vT> (expanding link for “Unremarried former spouse”).

III. ARGUMENT

A. Summary of the argument.

The trial court did not abuse its discretion by awarding Ms. Thielhorn maintenance in an amount intended to roughly equalize the parties' expected future incomes. According to Mr. Thielhorn, the trial court did this *instead of* properly analyzing and applying the statutory factors set out by RCW 26.09.090.⁵ However, even a minimally careful review of the trial court's orders and the Opinion Letter shows that the decision to "equalize the . . . income stream[s] of the parties" was far from arbitrary. CP 316. Instead, the decision resulted from the trial court's thorough and proper analysis of both statutory and other permitted factors, as informed by the court's obligation to use its discretion to reach a just and equitable outcome.

In addition, Washington law expressly states that a trial court "may consider a spouse's entitlement to an undivided veteran's disability pension . . . 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."⁶ This is precisely what the trial court did here, and it did not abuse its discretion in doing so. Apart from correcting a small math error which the trial court made in Ms. Thielhorn's favor, this Court should affirm the trial court in all respects, and award Ms. Thielhorn

⁵ Appellant's Opening Brief, at pp. 11-12.

⁶ *Perkins v. Perkins*, 107 Wn. App. 313, 322-23, 26 P.3d 989 (2001).

her reasonable attorney's fees and costs incurred in defending against Mr. Thielhorn's appeal.

B. This Court should review the trial court's decision regarding maintenance for abuse of discretion.

This Court reviews a trial court's decision on an award of maintenance for abuse of discretion.⁷ A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.⁸ A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.⁹

Ultimately, when awarding maintenance the court's main concern must be the parties' economic situations post-dissolution.¹⁰ The only limitation on amount and duration of maintenance under the governing

⁷ *In re Marriage of Zahm*, 138 Wn.2d 213, 226, 978 P.2d 498, 505 (1999).

⁸ *In re Marriage of Valente*, 179 Wn. App. 817, 822, 320 P.3d 115, 117 (2014).

⁹ *Id.* In this case, because Mr. Thielhorn does not assign any error to the trial court's findings of fact, he cannot show that the orders on appeal were based on "untenable grounds." See Appellant's Opening Brief, at p. 1 (assigning no error to findings of fact) and p. 2 (asserting "there is no challenge to the underlying facts as found"). *But see id.* at p. 3 (seeking reversal based on alleged "untenable grounds").

¹⁰ *In re Marriage of Williams*, 84 Wn. App. 263, 268, 927 P.2d 679, 681 (1996).

statute, RCW 26.09.090, is that the award must be just, in light of the relevant factors.¹¹

C. Although the record presented for review is not complete, it suffices to warrant affirmance of the trial court’s decisions on appeal.

Mr. Thielhorn did not provide a verbatim report of proceedings for the two-day trial in this matter. CP 319-320. In his Statement of Arrangements, Mr. Thielhorn asserted that “no transcript is necessary,” because his “challenge is to the reasoning behind the award, not to the facts as found.”¹² Ms. Thielhorn, in turn, did not take advantage of RAP 9.2(c) to file a timely Supplemental Statement of Arrangements.

Given the arguments actually raised by Mr. Thielhorn in his Opening Brief, the lack of a trial transcript is at least a minor impediment to evaluation of the trial court’s decisions. This is because even review for “manifest unreasonableness” or “untenable reasons” requires some knowledge of the evidence, and much of the evidence here took the form of the trial testimony of the parties.¹³ However, for the reasons explained below, Ms. Thielhorn believes that the trial court’s Letter Opinion and decisions on appeal, combined with the trial exhibits and the clerk’s papers, suffice to demonstrate that the trial court clearly did not abuse its discretion in awarding maintenance to Ms. Thielhorn. If this Court disagrees and believes that the record is inadequate to allow review, it

¹¹ *Bulicek v. Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394, 396 (1990).

¹² See Mr. Thielhorn’s Statement of Arrangements, filed with this Court on August 20, 2019.

¹³ *In re Marriage of Valente*, 179 Wn. App. at 822.

should either order Mr. Thielhorn to arrange for transcription of the trial proceedings or dismiss the appeal.¹⁴

D. The trial court did not abuse its discretion in awarding Ms. Thielhorn lifetime maintenance in an amount intended to roughly equalize the parties' expected future incomes.

1. The trial court properly divided the separate and community property of the parties.

After summarizing the basic facts about the parties' marriage, the Opinion Letter characterized the parties' property as separate or community, and divided that property among the parties. CP 314-315. Mr. Thielhorn does not assign error to the property division, but asserts that the trial court's treatment of his military pension was confusing.¹⁵ Contradicting himself, he then claims that the division of the military pension was "as called for by federal regulations."¹⁶ Finally, he also repeatedly characterizes the property division as involving a "grossly disparate" award in favor of Ms. Thielhorn.¹⁷ None of these contentions is correct.

¹⁴ See RAP 9.10 (stating in part that "[i]f the record is not sufficiently complete to permit a decision on the merits of the issues presented for review, the appellate court may . . . direct the supplementation or correction of, the report of proceedings"). See also *City of Seattle v. Torkar*, 25 Wn. App. 476, 477-78, 610 P.2d 379 (1980) (noting that a court is not required to order supplementation of an incomplete record, and dismissing appeal).

¹⁵ Appellant's Opening Brief, at pp. 7-8. See also *id.* at p. 1 (not assigning error to the property division).

¹⁶ *Id.* at p. 9.

¹⁷ See Appellant's Opening Brief, at p. 19 and 22 (alleging "grossly disparate award of property" in favor of Ms. Thielhorn). See also *id.* at p.

As part of his Statement of the Case, Mr. Thielhorn acknowledges that “Mr. Thielhorn’s separate property portion of the pension was 22% . . . [and] the community portion is 78%.”¹⁸ But he incorrectly suggests that he may not have been given either that separate portion of the pension or a fifty percent share of the community property part.¹⁹ Mr. Thielhorn’s error here is partially a matter of ignoring simple math, and partially a matter of failing to consider the Military Retired Pay Division Order (the “MRPDO”) and the Final Decree. CP 166-169, CP 328. The simple math is as follows: $.22 \times (\text{disposable military retired pay}) + \frac{1}{2} \times .78(\text{disposable military retired pay}) = (.22 + .39) \times (\text{disposable military retired pay}) = .61 \times (\text{disposable military retirement pay})$, or 61% of disposable military retired pay. This is *precisely* the percentage of disposable military retired pay the MRPDO and the Decree assign to Mr. Thielhorn. CP 167 at line 24, CP 328.²⁰ So Mr. Thielhorn was given 22% of the disposable military retired pay as his separate property, and he was given one-half of the 78% community property share, which *equals* 61% of the total disposable retired pay. His purported failure to understand this provides no reason for remand to the trial court.²¹

1 (assigning no error to the division of property, but referring to an allegedly “disparate award of community and separate property”).

¹⁸ *Id.* at p. 6 (citing to the Findings of Fact at CP 324-325). *See also* p. 7.

¹⁹ *Id.*

²⁰ The MRPDO awards *Ms.* Thielhorn 39% of the disposable military retired pay. But $1 - .39 = .61$, so it also *necessarily* awards Mr. Thielhorn 61 percent of that pay.

²¹ *Compare* Appellant’s Opening Brief, at p. 8 (suggesting that this Court “might send the case back for further findings or explanation”). The fact

Mr. Thielhorn may well understand the above analysis. Later on in his argument he repeatedly relies on a claim that contradicts his asserted confusion: that the trial court “awarded . . . Mr. and Mrs. Thielhorn their respective portions of the military pension *as called for by federal regulations*.”²² If the division was done as required by federal law, it can’t be confusing in any relevant sense.²³ But the claim that the trial court’s division of the military pension was done as required by federal law is also demonstrably incorrect. This is so because although federal law imposes certain requirements for direct federal payment of disposable retired pay to former spouses, it imposes no restrictions on how a state court divides disposable retired pay by other means.²⁴ What the trial court

that the Opinion Letter states that it is awarding Mr. Thielhorn **62** percent of the disposable rather than the **61** percent actually awarded by the MRPDO and the Decree, does not suggest any error by the trial court, but merely shows that it refined its numbers in the months between issuing the Opinion Letter and the entry of the Decree.

²² Appellant’s Opening Brief, at p. 9 (emphasis added). The claim that the division of *the pension* occurred in a manner required by federal law becomes important to Mr. Thielhorn’s argument about whether his *disability* benefits were improperly divided, which is discussed in detail below at pp. 33-34.

²³ Put slightly differently, however confusing federal law may be, if a party concedes that an action was performed in accordance with controlling federal law, there is no basis for remand for further explanation of that action.

²⁴ See 10 U.S.C. 1408(c)(1) (stating that subject to limitations which are not relevant here, “a court may treat disposable retired pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of the court”). See also *Perkins v. Perkins*, 107 Wn. App. 313, 320, 26 P.3d 989, 993 (2001) (quoting 10 U.S.C. Sec. 1408(c)(1)); *Mansell*, 490 U.S. at 584 (noting that the “Former Spouses’ Protection Act . . . authorizes state courts to treat

did here in terms of dividing the disposable military retirement pay was both clear and proper, but the precise division chosen was not required by federal law.

Finally, Mr. Thielhorn repeatedly mischaracterizes the division of property as “grossly disparate” in favor of Ms. Thielhorn.²⁵ He even goes so far as to say that the “the court . . . [gave] Ms. Thielhorn *all* but \$9,945 of *all* the parties’ separate and community property.”²⁶ This is demonstrably incorrect, as it ignores both Mr. Thielhorn’s disposable retirement pay and the veterans’ disability benefits.²⁷ The trial court awarded Mr. Thielhorn all of his disability payments as his separate property. CP 324 at ¶ 10. And as discussed in detail above, it also awarded him 61 percent of the disposable retirement pay. As a result, there was in fact a substantial disparity in “resources and property . . . divided,” but this disparity was strongly in *Mr.* Thielhorn’s favor.²⁸

Exhibit 48 shows that the cash flow to Mr. Thielhorn from disability benefits, if continued over the next twenty-four and a half years, would be at least \$519,792. As the trial court noted, the actual cash flow

‘disposable retired pay’ as community property”), *and* Department of Defense Financial Management Regulation Volume 7B, at p. 371 of 715 (available online at: https://comptroller.defense.gov/Portals/45/documents/fmr/Volume_07b.pdf) (stating “[t]here is no requirement in Federal law that specifies how military retired pay is to be divided”).

²⁵ *See, e.g.*, Appellant’s Opening Brief, at p. 19 and p. 22.

²⁶ Appellant’s Opening Brief, at p. 19 (original emphasis removed, new emphasis added).

²⁷ *Id.* *See also id.* at p. 12 (focusing only on the IRA amounts).

²⁸ *Id.* at p. 12.

of disability benefits may well be greater than this, due to the possibility of upward cost-of-living adjustments. CP 316 (end of second full paragraph). This cash flow stream may also increase if Mr. Thielhorn is awarded a higher disability rating in the future.²⁹ One need not reduce these cash flow imbalances to present value, or consider the possible future increases in disability benefits, to realize that the cash flow imbalance in Mr. Thielhorn's favor dwarfs the approximately \$54,000 net additional IRA amount awarded to Ms. Thielhorn.

Ms. Thielhorn's point here is not that the trial court erred in its division of the parties' property. Rather, it is that Mr. Thielhorn's argument about the property division being confusing, his contradictory claim that the precise division of the disposable military retirement pay was required by federal law, and his assertion that the property award was "grossly disparate" in Ms. Thielhorn's favor are all demonstrably incorrect.

2. The trial court properly took the unequal property award in Mr. Thielhorn's favor into account in awarding maintenance to Ms. Thielhorn.

RCW 26.09.090(1)(a) lists "[t]he financial resources of the party seeking maintenance, including separate or community property apportioned to him or her" as a factor to be considered in awarding maintenance. Mr. Thielhorn claims that the trial court ignored this factor, asserting that "[i]f th[e] disparity of property award was considered by the

²⁹ See EX 38 (38 (showing potential increase to \$3,227.58 per month if Mr. Thielhorn's disability rating were to increase to 100%).

court, it's not apparent anywhere.”³⁰ Unfortunately for Mr. Thielhorn, this argument establishes only that he did not read the Opinion Letter, or is choosing to ignore it.

As noted above, the Opinion Letter first addresses the characterization and division of the parties' property. CP 314-315. Immediately after performing this task, the trial court turned to the issue of maintenance. CP 315. Having summarized RCW 26.09.090 and relevant non-statutory considerations bearing on a proper award of maintenance, the trial court stated as follows:

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 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.*

CP 316 (emphasis added). This statement clearly manifests the trial court's consideration of the unequal property division it had just performed. The fact that Mr. Thielhorn was assigned much *more* property than Ms. Thielhorn was clearly relevant to, and supportive of, the trial court's decision to award Ms. Thielhorn maintenance.³¹

³⁰ Appellant's Opening Brief, at p

³¹ The similarity in the factors relevant to property division, as set forth in RCW 26.09.080, and maintenance, as set forth in RCW 26.09.090, together with the overarching concern with justice, establish that—everything else being held constant—an unequal award of property supports an award of maintenance to the party disadvantaged by the property distribution. *See, e.g., Matter of Marriage of Rink*, 18 Wn. App.

3. The trial court also properly considered the other statutory factors which the parties' evidence and argument indicated were material.

Mr. Thielhorn's arguments do not improve as he addresses the remaining statutory factors. The second of these, RCW 26.09.090(1)(b), states in part that "[t]he 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" is relevant to maintenance. Mr. Thielhorn contends that "[t]here is no discussion or analysis of . . . how factor (1)(b) plays into the court's decision."³²

However, since there is no indication in the record that either party presented any evidence or argument to the trial court about necessary additional education, the trial court cannot be faulted for not specifically analyzing this factor. Nothing in RCW 26.09.090 requires a trial court to make specific factual findings on each of the given factors.³³ None of the

549, 552, 571 P.2d 210, 211 (1977) (rejecting argument "that the trial court does not have the discretion to make an unequal division of the property, with the thought in mind that it will then reduce the maintenance award to the party receiving the larger share of the property"). *See also In re Marriage of Washburn*, 101 Wn.2d 168, 182, 677 P.2d 152 (1984) (noting that "RCW 26.09.090 places emphasis on the justness of an award, not its method of calculation").

³² Appellant's Opening Brief at p. 13.

³³ *See, e.g., In re Marriage of Mansour*, 126 Wn. App. 1, 16, 106 P.3d 768 (2004) (finding no basis for reversing the maintenance award where the trial court failed to list the influence of each factor in its findings). Generally, "[a] trial court is not obligated to make findings of fact on every contention of the parties. Rather, it is required to find only the material facts of the case, that is, findings sufficient to inform us, on

trial exhibits deals with this topic, and Mr. Thielhorn's own trial brief indicates that he did not expect additional educational needs to be a matter of dispute. His trial brief states:

Petitioner will not have a need to improve his skills. The Respondent is a relatively healthy 61-year-old woman who is still capable of educating herself to find employment in areas of her skills and interests. However, she may choose to enter into work that is commensurate with her skills. It is expected that the Respondent will testify that she has already educated herself and is fully capable of working.

CP 285 at lines 16-22 (emphasis added). Consistent with Mr. Thielhorn's prediction about likely trial testimony, the trial expressly acknowledged that Ms. Thielhorn already holds an Associate's Degree. CP 316. It is also undisputed that Mr. Thielhorn has a Masters of Science in Aeronautical Science. EX 8 at p. 2.

Given this context, it is clear that when the trial court found that both parties "can work," it was implicitly (and properly) finding that neither party had established a need for *further* education or training. CP 316. Moreover, if either party were to have a need for such additional training it would be Ms. Thielhorn, as Mr. Thielhorn admits. CP 285 at lines 16-17. Thus, even if the trial court's analysis of this factor were

material issues, what questions the trial court decided and the manner in which it did so." *City of Tacoma v. Fiberchem, Inc .*, 44 Wn. App. 538, 541, 722 P.2d 1357 (1986) (citing *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 707, 592 P.2d 631 (1979)), *review denied*, 107 Wn.2d 1008 (1986).

See also RAP 2.5(a), which states in part that "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court."

inadequate (and it was not), the error benefited Mr. Thielhorn.³⁴ Mr. Thielhorn presents no evidence or argument to the contrary, and accordingly fails to show any abuse of discretion in the trial court's treatment of this factor.

Similarly, Mr. Thielhorn cannot now show error, or an "insufficient record" of analysis, with regard to the statutory factors implicating the parties' respective standards of living and comparative expenses.³⁵ Mr. Thielhorn offers no evidence, and doesn't even argue, that the parties "standard[s] of living established during marriage" differed from one another with regard to patterns of consumption.³⁶ To the extent the record on review shows any difference in standards of living or lifestyles during the marriage, it consists in the uncontested fact that Mr. Thielhorn worked outside the home during the bulk of the marriage, and Ms. Thielhorn did not. CP 286-287, EX 8, EX 47. The trial court properly took this into account as a factor relevant to Ms. Thielhorn's

³⁴ If Ms. Thielhorn needed additional education, this would tend to *increase* the amount of maintenance she should be awarded. *See, e.g., In re Marriage of Huston*, 3 Wn. App. 2d 1013, 2018 WL 1719516, at *7 (noting that in examining RCW 26.09.090(1)(b), "the trial court must consider the sacrifices and contributions one spouse has made so that the other could advance his education or career," and affirming award of maintenance based in part on fact that the ex-wife "had a temporary need for maintenance in order to transition to self-sufficiency").

³⁵ *See* Appellant's Opening Brief at pp. 13-14 (discussing application of RCW 26.09.090(1)(c and f).

³⁶ *See* RCW 26.09.090(1)(c).

post-separation earning potential, noting that “Ms. Thielhorn gave up her career to follow Mr. Thielhorn’s military career.” CP 316.³⁷

As for the related issue of the parties’ comparative expenses, Mr. Thielhorn complains that “[t]here are no findings about respective expenses of the parties.”³⁸ But—apart from the issue of health care expenses, treated separately below at pp. 18-19—the evidence in the record shows that the respective expenses of the parties *were roughly equal*. EX 41 at p. 5 and EX 42 at p. 5.³⁹ Mr. Thielhorn’s trial brief is also revealing on this point, as it claims that “the evidence will show that the parties were each capable of living on roughly about \$45,000 a year post separation.” CP 287. This clearly implies that the parties had equal necessary expenditures.⁴⁰

Having thus informed the trial court that the evidence would show no material differences in the parties’ necessary expenditures, Mr. Thielhorn cannot now claim the trial court erred by not elaborating on this

³⁷ See e.g., *In re Marriage of Huston*, 2018 WL 1719516, at *7 (noting as relevant to maintenance award to ex-wife the fact that her employment history “had been interrupted . . . by the family’s multiple relocations, brought on by [ex-husband’s] change of jobs, and career advancement”).

³⁸ Appellant’s Opening Brief, at p. 14.

³⁹ See also CP 205 (showing Ms. Thielhorn’s monthly expenses of \$3,570.20 without additional health care expenses) and CP 260 (showing Mr. Thielhorn’s monthly expenses as \$3,131.36).

⁴⁰ The rough equality of the parties’ expenditures is also consistent with the fact that they “did not address either community or personal debt at trial.” CP 314. See also CP 288 at lines 8-14 (Mr. Thielhorn’s trial brief: silent as to any personal debts of Mr. Thielhorn, and noting that “[i]t is expected that the Respondent will testify that she has very little debt”).

factor in its order.⁴¹ In fact, because the evidence in the record on appeal strongly suggests the rough equality of the parties' non-health care expenses, what Mr. Thielhorn intended to be a merely hypothetical concession—that equalizing incomes “would be fair perhaps, but only if the parties had roughly equal expenses”—is not just a hypothetical concession but a real one.⁴² Because of the fundamental importance of fairness and justice in determining an award of maintenance, this concession arguably suffices to defeat Mr. Thielhorn's factually unsupported argument that the maintenance award was improper.⁴³

Turning to the issue of health care expenses, Mr. Thielhorn implies that the case “[s]hould . . . also be remanded because the trial court

⁴¹ See, e.g., *City of Tacoma v. Fiberchem, Inc.*, 44 Wn. App. at 541 (noting that “[a] trial court . . . is required to find only the material facts of the case”). See also RAP 2.5(a) (stating in part that the Court of Appeals may choose not to consider claims of error raised for the first time on appeal).

⁴² See Appellant's Opening Brief, at p. 14 (asserting that “there is no discussion at all of relative need or ability to pay at all because the trial court simply ‘equalized’ incomes,” but going on to state that such equalization “would be fair perhaps, but only if the parties had roughly equal expenses.” As noted above, the record establishes that apart from Ms. Thielhorn's disproportionate health care costs, the parties do have “roughly equal expenses.”

⁴³ See, e.g., *Bulicek v. Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394, 396 (1990) (stating that “[t]he only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just”). See also *In re Marriage of Valente*, 179 Wn. App. 817, 821, 320 P.3d 115, 117 (2014) (stating that “[m]aintenance is “a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time” (emphasis added)). If the parties' necessary expenditures are roughly equal, as they are here, the most straightforward way to equalize standards of living is to equalize incomes.

erroneously believed Ms. Thielhorn would lose medical coverage if the separation were converted to divorce.”⁴⁴ But Mr. Thielhorn’s own Opening Brief makes it clear that he is once again attempting to create an error from nothing. Mr. Thielhorn concedes that after divorce, “Ms. Thielhorn is entitled to *one year* of TriCare healthcare services.”⁴⁵ As Mr. Thielhorn well knows, under federal law as applied to the facts of this case, Ms. Thielhorn is entitled to only one year of TriCare healthcare services after divorce.⁴⁶ Divorce also immediately terminates Ms. Thielhorn’s access to federal dental benefits.⁴⁷ Thus, the trial court did not err by concluding that “Ms. Thielhorn would lose medical coverage if the separation were converted to divorce.”⁴⁸ The trial court properly took the probable loss of health care benefits into account as an uncertain (or

⁴⁴ See Appellant’s Opening Brief, at p. 2. and p. 20. Cf. Letter Opinion, at CP 316 (middle of penultimate paragraph).

⁴⁵ Appellant’s Opening Brief, at p. 20 (emphasis added).

⁴⁶ Compare *id.* (noting that the parties’ marriage overlapped 15 years of military service), CP 207 (same), and 10 U.S.C. § 1072(2)(G) and (H) (the latter specifically setting a 1-year limit on medical benefit receipt after divorce when the period of marriage has overlapped with at least 15 but less than twenty years of military service). The TriCare web site provides a useful summary of what it calls the “20-20-15 rule.” See www.tricare.mil at:

<https://www.tricare.mil/Plans/Eligibility/FormerSpouses>.

⁴⁷ See www.benefeds.com at

<https://www.benefeds.com/Portal/EducationSupport?EnsSubmit=dental-vision-eligibility-uniformed-services&ctoken=hy1Hx4vT> (expanding link for “Unremarried former spouse”).

⁴⁸ Appellant’s Opening Brief, at p. 2. An Order Converting Legal Separation Order to Final Divorce Order was entered by the trial court on November 4, 2019. See Respondent’s Supplemental Designation of Clerk’s Papers.

“unknown”) factor which clearly supports its award of maintenance to Ms. Thielhorn, since “Mr. Thielhorn does not have to worry about obtaining health insurance on his own” for the rest of his life. CP 316.

Finally, Mr. Thielhorn cannot plausibly claim that the trial court ignored the statutory factors referenced in RCW 26.09.090(1)(d) and (e) regarding the age of the parties and the duration of the marriage. The trial court clearly identified each of these factors, and gave them both substantial weight in its decision to equalize the known income streams of the parties. CP 316.

First, the trial court noted that “Mr. Thielhorn is fifty-six (56) years old and Ms. Thielhorn is sixty-one (61) years old.” *Id.* Crucially, it then linked the parties’ ages to their future employment prospects by stating:

They both can work, but both have had a hard time finding employment in the areas for which they have received education Each party testified about the difficulty in finding employment at their ages.

CP 316.⁴⁹ Because Ms. Thielhorn is five years older than Mr. Thielhorn, it makes sense that the trial court also gave particular weight to the evidence that Ms. Thielhorn “appl[ied] for over two hundred and forty (240) jobs without success.” *Id.*⁵⁰ It is clear from the context that the trial

⁴⁹ Mr. Thielhorn’s purported inability to grasp the distinction between the ability to work (both parties “can work”) and ability to find employment is another example of either a failure to read the Opinion Letter with a modicum of care, or a willingness to disregard the trial court’s clear meaning. See Appellant’s Opening Brief at p. 1 (last paragraph), p. 10, p. 13, and p. 22.

⁵⁰ See also EX 40, 44, and 47, and CP 150-158.

court found there was a substantial likelihood that Ms. Thielhorn would not be able to find work in the future.

The trial court also emphasized that the parties were together as a married couple for almost twenty-four years. CP 313 (last paragraph); CP 316 (last paragraph).⁵¹ The Letter Opinion goes on to state:

While this [almost 24 year duration] 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.

CP 316. This decision to treat the marriage as a long-term marriage was clearly within the court's discretion.⁵² Moreover, when a long term marriage ends in divorce, the trial court has broad discretion to distribute property and award maintenance so as to leave the parties in roughly equal financial positions.⁵³ Indeed, at the end of typical long term marriage, *"the court's objective is to place the parties in roughly equal financial positions for the rest of their lives."*⁵⁴

Here, the parties had conceded that their living expenses (apart from health insurance) and standards of living established during marriage

⁵¹ The parties had also lived together for a year before being married. CP 207.

⁵² See, e.g., *VonAllmen v. VonAllmen*, 198 Wn. App. 1042, 2017 WL 1397147 at * 1, (unpublished) (affirming determination that there was a long term marriage where the parties "began living together in 1989," married in 1992, and "filed to dissolve the marriage in November 2014").

⁵³ *Id.*

⁵⁴ *In re Marriage of Wright*, 179 Wn. App. 257, 262, 319 P.3d 45, 48–49 (2013) (emphasis added) (citing to *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572, 575 (2007))

were roughly equivalent.⁵⁵ Therefore, in calculating maintenance to “place the parties in roughly equal financial positions,” it was entirely appropriate for the trial court to “initially . . . equalize the known income streams of the parties.”⁵⁶ CP 316. Contrary to Mr. Thielhorn’s implicit argument, this was not the arbitrary starting point of the trial court’s analysis.⁵⁷ Rather, it was a provisional conclusion that emerged after careful consideration of the relevant statutory factors identified by RCW 26.09.090(1), including the division of separate and community property, the standard of living established during marriage, the parties’ ages, and the duration of the marriage.

4. The trial court did not abuse its discretion either by distinguishing between “known” and “unknown” factors, or by considering relevant non-statutory factors.

In conducting its analysis of maintenance, the trial court emphasized that “there are some things the Court knows and several that it does not know.” CP 316. Given the state of the evidence, this was an appropriate and thoughtful comment. Having just listed the statutory factors, the trial court clearly knew what they were. CP 315-316. What was unknown to the trial court was not the existence of the factors, but (for some of them) their extent or magnitude and their resulting relevance to this case. As discussed above, the court proceeded to give a thoughtful

⁵⁵ See *supra*, at pp. 16-18.

⁵⁶ *In re Marriage of Wright*, 179 Wn. App. at 262.

⁵⁷ See Appellant’s Opening Brief, at p. 11.

analysis of the evidence which rendered some factors material and others not.

As part of this analysis, the trial court also considered factors not specifically mentioned in RCW 26.09.090. Chief among these was the uncertainty surrounding when each of the parties would begin drawing Social Security. CP 316 (last full paragraph). Under Washington law, consideration of the parties' receipt of Social Security benefits is clearly relevant to the determination of maintenance.⁵⁸

Here, the record on review puts it beyond dispute that Mr. Thielhorn has "earned enough credits to qualify for [Social Security] benefits." EX 28 at p. 2. Moreover, Mr. Thielhorn's earning history makes it highly likely, if not certain, that his eventual monthly Social Security benefits will substantially exceed Ms. Thielhorn's. *Compare* EX 28, at p. 2 (scenarios for Mr. Thielhorn based on his earnings continuing at their current rate) with EX 29, at p. 2 (similar scenarios for Ms. Thielhorn).⁵⁹

⁵⁸ See, e.g., *In re Marriage of Rockwell*, 141 Wn. App. 235, 244–45, 170 P.3d 572, 577 (2007) (noting, in the context of a discussion of the division of property, that "the possibility that one or both parties may receive Social Security benefits is a factor the court may consider"). See also *In re Marriage of Zahm*, 138 Wn.2d 213, 227, 978 P.2d 498, 505 (1999) (holding that "Petitioner's social security benefits were an appropriate element for the court to factor into its consideration of respondent's maintenance award").

⁵⁹ These exhibits show that Mr. Thielhorn's *lowest* projected monthly benefit is greater than Ms. Thielhorn's *highest* projected monthly benefit. In addition, Mr. Thielhorn has earned enough credits to qualify for additional Social Security disability payments, should he ever meet the

However, because Mr. Thielhorn is only 56 years old, and cannot draw Social Security until he is 62, the trial court exercised its discretion conservatively, in a manner advantageous to Mr. Thielhorn, by not crediting him with any future Social Security income. CP 316-317. Instead, the trial court credited Mr. Thielhorn with \$1,269 per month in future earned income, based on an average of his monthly earnings over a period covering 2016, part of 2017, and 2018. CP 317. Significantly, the trial court found that Mr. Thielhorn “can work” despite his veteran’s disability rating, a factual determination to which no error has been assigned on appeal. CP 316.⁶⁰

In view of Mr. Thielhorn’s prior education and earnings history, the amount of future earnings the trial court imputed to him was clearly a conservative estimate. EX 8, EX 28 at p. 3. The amount of attributed future income is less than the lowest estimated monthly Social Security benefit for Mr. Thielhorn. EX 28 at p. 2 (showing expected monthly benefits of \$1,563 per month if Mr. Thielhorn retires at age 62).

criteria for Social Security disability. EX 28, at p. 2. By contrast, Ms. Thielhorn has not earned enough credits for receipt of Social Security disability. EX 29, at p. 2.

⁶⁰ This factual determination is also clearly supported by substantial evidence, including: (1) the VA’s determination that Mr. Thielhorn is not unemployable, EX 31 (under “VA Benefits Information”); and (2) the evidence that Ben had high employment earnings from 2008 through 2012, despite retiring from the military with a 60% disability rating effective 12/31/2007. *See* EX 31 (military discharge date of 12/31/2007); EX 28 at p. 3 (showing Mr. Thielhorn had “taxed Social Security earnings” for 2008 through 2012 of at least \$68,000 per year); *and* CP 251(60% disability rating effective 1/1/2008).

By contrast, the trial court credited Ms. Thielhorn with the future receipt of \$789 per month in Social Security benefits. CP 317. This number was not—as Mr. Thielhorn suggests—pulled out of thin air, but instead comes directly from EX 29, p. 2.⁶¹ Given the fact that Ms. Thielhorn is 61, and that the trial court had good reason to doubt that Ms. Thielhorn would be able to find employment soon, the trial court did not abuse its discretion by imputing this amount of future monthly income to her in lieu of earnings.⁶²

5. The trial court made a small math error in calculating the amount of maintenance necessary to leave the parties in roughly equal financial circumstances.

Having properly considered the statutory and non-statutory factors relevant to maintenance, and having decided to place the parties in roughly equal financial positions, the final stage in the trial court’s analysis was to calculate the monthly amount of maintenance required to achieve that goal. CP 316-317.

⁶¹ Giving, as of April 24, 2017, an estimated benefit of \$789 per month if Ms. Thielhorn were to continue working until age 62 at her current earning rate. Since Ms. Thielhorn has not worked since losing her job at The Marksman on June 3, 2017 (EX 46), this is likely an *overestimate* of Ms. Thielhorn’s monthly Social Security benefit if she begins to draw those benefits at age 62. Compare Appellant’s Opening Brief at p. 14, note 1 (asserting that it is “entirely unclear why the court would assign to her” \$789 per month in imputed Social Security income).

⁶² In particular, the trial court reasonably credited Ms. Thielhorn’s evidence that she had “appl[ied] for over two hundred and forty (240) jobs without success” (CP 316 and EXS 40 and 44) as well as her testimony about “the impact [of the marriage] on [her] career because of the constant moving” (CP 316).

Of course, on the facts evidenced in the record here, the trial court could have calculated the monthly maintenance amount by totaling its reasonable estimates of all future monthly income for Mr. Thielhorn, subtracting from that amount its analogous estimates for Ms. Thielhorn, and dividing by two.⁶³ Instead the trial court proceeded by first determining the amount necessary to equalize what it called known future income streams (disposable military retirement pay and disability benefits), and then adding to it an amount necessary to equalize its reasonable estimates of other future income streams (employment earnings for Mr. Thielhorn; Social Security benefits for Ms. Thielhorn). Because each party's total expected future income stream is the sum of its known and unknown future earnings streams, the trial court did not err by proceeding in this matter.⁶⁴

However, the trial court did make a small mathematical error in calculating the amount of maintenance necessary to equalize the parties' known future income streams. Having appropriately given Ms. Thielhorn 39% of the *disposable* military retirement pay as part of the property division (CP 167, CP 328), the trial court followed Mr. Thielhorn's

⁶³ To repeat, this procedure makes sense when the parties' necessary expenditures are roughly equal, as was demonstrably the case here, *except* for Ms. Thielhorn's higher future health insurance expenditures.

⁶⁴ Put in abstract mathematical terms, let each parties' total expected future monthly income (T) equal Known (K) plus Unknown (U) components: $T = K + U$. The amount necessary to equalize the expected total monthly income streams = $\frac{1}{2}(T_{ben} - T_{cheryl})$. But $\frac{1}{2}(T_{ben} - T_{cheryl}) = \frac{1}{2}((K_{ben} + U_{ben}) - (K_{cheryl} + U_{cheryl})) = \frac{1}{2}(K_{ben} - K_{cheryl}) + \frac{1}{2}(U_{ben} - U_{cheryl})$. The trial court did not err by choosing to perform this last calculation.

calculations and correctly determined that this amounted to approximately \$1,328 per month. CP 315, CP 281.⁶⁵ But it then evidently calculated the amount of Mr. Thielhorn's share of disposable retirement pay by subtracting \$1,328 from the *gross* retirement pay: $(\$3,648 - \$1,328) = \$2,320$. CP 314 at (1).⁶⁶ This was a mistake, since Mr. Thielhorn's 61% share of disposable retirement pay is properly calculated as $.61 \times (\$3,648 - \$237.32) = \$2,080.51$.⁶⁷ The trial court thus overstated Mr. Thielhorn's disposable military retirement pay by \$239.49 $(\$2,320 - \$2,080.51 = \$239.49)$. This also led to a roughly \$121 overstatement of the monthly maintenance amount due to Ms. Thielhorn to equalize the parties' known future incomes. The correct monthly amount necessary to equalize what the trial court called the parties' "known income streams" is \$1,259, as opposed to the \$1,380 mistakenly calculated by the trial court. CP 317.⁶⁸

⁶⁵ The precise calculation is $(\$3,648 \text{ gross military retired pay} - \$237.32 \text{ SBP}) \times .39 = \$1,330.16$. The first two figures in this calculation are derived from EX 32, and are essentially the same as those used in Mr. Thielhorn's trial brief at CP 281. But Mr. Thielhorn's calculation in his trial brief worked with a proposed share to be awarded to Ms. Thielhorn of 38.96%, rather than the flat 39% ultimately awarded by the trial court. CP 281.

⁶⁶ That Mr. Thielhorn's *gross* monthly military retired pay is \$3,648 is confirmed by EX 32.

⁶⁷ One gets the same result by subtracting Ms. Thielhorn's share of the disposable military retired pay from the total of disposable military retirement pay: $\$3,410.68 - \$1,330.16 = \$2,080.52$. "Disposable [military] retirement pay" as defined by 10 U.S.C. Sec. 1408(a)(4)(A) to exclude the SBP amount.

⁶⁸ The calculation, using the variables defined in footnote 65 *supra*, is as follows: $K_{\text{Ben}} = \$2,080.51 + \$1,768 = \$3,848.51$. $K_{\text{Cheryl}} = \$1,330.16$ (see footnote 66, *supra*). The amount necessary to equalize these known income streams is therefore $1/2 (\$3,848.51 - \$1,330.16) = \$1,259.17$.

Adding in the \$240 per month required to equalize the “unknown” (but reasonably expected) future income streams, the correct monthly maintenance amount, consistent with the trial court’s findings and conclusions, is \$1,499 ($\$1,259 + \$240 = \$1,499$), and not the \$1,620 it actually ordered. CP 317. This Court has the inherent power to correct this math error, and need not remand to the trial court for this purpose.⁶⁹

Apart from this minor clerical error, the trial court’s determination of the maintenance due to Ms. Thielhorn followed from a careful analysis of Washington law, and the proper application of that law to the facts as found by the trial court. The trial court did not commit a manifest abuse of discretion in awarding Ms. Thielhorn an amount of maintenance designed to equalize reasonable estimates of the parties’ expected future income streams.⁷⁰

6. The trial court did not abuse its discretion by awarding lifetime maintenance.

Mr. Thielhorn devotes a subsection of his Opening Brief to arguing that the trial court abused its discretion by awarding maintenance for life.⁷¹ However, his argument here is largely a repeat of his previous

Thus, the trial court overstated the equalizing amount by $\$1,380 - \$1,259 = \$121$.

⁶⁹ See, e.g., *Callihan v. Dep't of Labor & Indus.*, 10 Wn. App. 153, 156, 516 P.2d 1073, 1076 (1973) (noting that “[a]n appellate court may itself correct a clerical error in a judgment appealed from without remanding the judgment to the trial court for that purpose”).

⁷⁰ See, e.g., *Washburn v. Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152, 158 (1984) (stating that a trial court’s award of maintenance “will not be overturned on appeal absent a showing of manifest abuse of discretion”).

⁷¹ Appellant’s Opening Brief, at pp. 21-24.

assertions that the trial court did not consider the statutory factors, or failed to sufficiently explain its consideration of them.⁷² For the reasons explained above, this general argument fails. Mr. Thielhorn’s refusal to carefully consider the trial court’s Opinion Letter is not evidence of that court’s failure to fairly apprise this Court of the basis for its decision.

In fact, the Opinion Letter makes it clear that the trial court based its award of maintenance for life on its express findings about the length of the marriage and the parties’ respective ages, as well as its implicit finding that Ms. Thielhorn is unlikely to find future employment. CP 316.⁷³ Although the trial court found that the employment earnings for both parties “for the foreseeable future are unknown,” it also expressly noted that Mr. Thielhorn “can work,” but—in clear contrast to Ms. Thielhorn—“is not looking for full-time employment.” CP 316. Combined with the undisputed evidence that the expenses of the parties are roughly equal (apart from Ms. Thielhorn’s higher future health insurance costs), the trial court’s findings and analysis clearly support its

⁷²*Id.*

⁷³ The trial court particularly noted that “Ms. Thielhorn described applying for over two hundred and forty (240) jobs without success.” *Compare In re Marriage of Mathews*, 70 Wn. App. 116, 124, 853 P.2d 462, 467 (1993) (noting that “courts have approved awards of lifetime maintenance in a reasonable amount when it is clear the party seeking maintenance will not be able to contribute significantly to his or her own livelihood”). As Mr. Thielhorn acknowledges, the trial court ameliorated any conceivable unfairness to Mr. Thielhorn by imputing \$789 per month in Social Security benefits to Ms. Thielhorn, even though it acknowledged that she does not wish to draw such benefits until she turns 70. CP 316. *See also* Appellant’s Opening Brief, at p. 14, note 1.

decision to equalize the parties expected future income streams for life.⁷⁴ EX 41 at p. 5, EX 42 at p. 5. Crucially, Mr. Thielhorn does not show—or even really argue—that the trial court’s decision “left him in an inferior position to Ms. [Thielhorn] for the rest of their lives.”⁷⁵ The trial court’s award of maintenance for life was not an abuse of discretion.⁷⁶

E. The trial court did not illegally divide or distribute Mr. Thielhorn’s veteran’s disability benefits.

The law controlling the treatment of veterans’ disability benefits in marital dissolution proceedings was succinctly stated in *Perkins v.*

Perkins, 107 Wn. App. 313, 26 P.3d 989 (2001):

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.⁷⁷

⁷⁴ See, e.g., *In re Marriage of Wright*, 179 Wn. App. 257, 262, 319 P.3d 45, 48–49 (2013) (that at the end of a long term marriage, “the court's objective is to place the parties in roughly equal financial positions for the rest of their lives”) (citing to *Rockwell*, 141 Wn. App. at 243).

⁷⁵ *In re Marriage of Wright*, 179 Wn. App. at 263.

⁷⁶ It is also worth noting that although the trial court awarded Ms. Thielhorn maintenance for life, that award remains modifiable as per RCW 26.09.170 in the event of any substantial change in circumstances. See, e.g., *Matter of Marriage of Aldrich*, 198 Wn. App. 1072, 2017 WL 1927931 at * 2 (unpublished) (noting that “[i]n order to provide relief from unintended hardships caused by lifetime maintenance, our laws allow for modification”).

⁷⁷ *Perkins*, 107 Wn. App. at 322–23. See also *In re Marriage of Kraft*, 119 Wn.2d 438, 451, 832 P.2d 871, 877 (1992) (holding that “the trial court in a marriage dissolution action may consider military disability

Contrary to Mr. Thielhorn's argument, application of this law to the facts of this case strongly supports the trial court's award of maintenance.

In *Perkins*, the trial court confronted a situation where the former service member had waived a portion of his military retirement benefits in order to receive an equal (but tax free) award of disability benefits.⁷⁸ Because this waiver reduced the disposable military retirement pay available for division with the ex-spouse, the trial court in *Perkins* ordered the former service member to pay "compensatory maintenance" in an amount expressly calculated to offset the impact of the waiver.⁷⁹ It was this decision *to use maintenance for the purpose of awarding the spouse a precise share of the service member's disability benefits* that the Court of Appeals found violated federal law.⁸⁰

retirement pay as a source of income in awarding spousal or child support").

⁷⁸ *Perkins*, 107 Wn. App. at 315-316. The two leading U.S. Supreme Court decisions regarding the division of military disability pay incident to divorce also involve issues of waiver. *See Mansell*, 490 U.S. at 594-95 (holding that "the Former Spouses Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits"), and *Howell*, 137 S.Ct. at 1402 (holding that a state court may not "increase, pro rata, the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver").

⁷⁹ *Perkins*, 107 Wn. App. at 316 (quoting trial court as ruling that "[t]he wife is losing \$216 per month in military retirement due to the change to 40% of the retirement to disability. The wife should receive this difference as compensatory spousal maintenance").

⁸⁰ *Id.* at 323-324. *See also In re Marriage of Kraft*, 119 Wn.2d at 444 (noting that in *Mansell* "the Court addressed the question whether state courts may treat, as property divisible upon divorce, *military retirement*

However, although the Court of Appeals held that the federal prohibition on treating disability benefits as community property could not be circumvented merely by “chaning maintenance,” it also emphasized that “[n]othing said herein means that . . . the trial court may not award maintenance after considering the existence of an *undivided* disability pension as one factor (among many) bearing on the husband's ability to pay, and after entering proper findings of fact under RCW 26.09.090.⁸¹

This context helps explain why the *Perkins* decision supports the trial court’s decision regarding maintenance for Ms. Thielhorn. First of all, in the Thielhorns’ case there is no issue of any waiver of retirement pay. The post-*Perkins* amendment of 10 U.S.C. 1414(a), combined with Mr. Thielhorn’s initial disability rating of 60%, resulted in Mr. Thielhorn’s being entitled to full concurrent receipt of both his retirement pay and his disability benefits by the end of 2014.⁸² The facts that led the trial court in *Perkins* to make an illegal award of “compensatory maintenance” simply don’t exist here.

pay waived by the retiree in order to receive veterans' disability benefits . . . [and] held that state courts may not do so”) (emphasis added).

⁸¹ *Perkins*, 107 Wn. App. at 324, 327. See also *In re Marriage of Kraft*, 119 Wn.2d at 447–48 (holding that “when . . . awarding spousal support in a dissolution proceeding, the court may regard military disability retirement pay as future income to the retiree spouse and, so regarded, consider it as an economic circumstance of the parties”).

⁸² See, e.g., *Haddock*, 135 Fed. Cl. At 84–85 (explaining evolution of 10 U.S.C. 1414(a) and the phase-in of concurrent receipt of benefits for military retirees with a disability rating of 50% or more).

Moreover, the court below clearly adhered to federal and state law by expressly finding that “Mr. Thielhorn’s disability payment . . . is Mr. Thielhorn’s separate property and no portion of it can be awarded to Ms. Thielhorn.” CP 314.⁸³ And as both the Opinion Letter and the analysis above makes clear, the trial court awarded Ms. Thielhorn maintenance only “after considering the existence of an undivided disability pension as one factor (among many) bearing on the husband’s ability to pay, and after entering proper findings of fact under RCW 26.09.090.”⁸⁴ The trial court did not violate the legal principles enunciated in *Perkins*, and its award of maintenance to Ms. Thielhorn complies with both state and federal law.

Mr. Thielhorn’s arguments to the contrary are clearly incorrect, based as they are in large part in either ignoring or distorting the trial court’s consideration of the statutory factors in its Opinion Letter.⁸⁵ It is demonstrably false to assert that “the trial court did not analyze the factors pertinent to maintenance” and that “the court has already given Ms. Thielhorn *all* but \$9,945 of *all* the parties’ separate and community property.”⁸⁶ And it is absurd to assert, as Mr. Thielhorn does, that the trial

⁸³ See also CP 324, 327.

⁸⁴ *Perkins*, 107 Wn. App. at 327.

⁸⁵ See Appellant’s Opening Brief, at pp. 17-20 (stating, *inter-alia*, that “the trial court did not analyze the factors pertinent to maintenance” and that “the court has already given Ms. Thielhorn *all* but \$9,945 of *all* the parties’ separate and community property”) (emphasis added). It is absurd to assert, as Mr. Thielhorn does, that the trial court “*expressly said* that . . . it’s [sic] plan” was to “improperly divide[] the pension and disability.” *Id.* at p. 19 (emphasis in original).

⁸⁶ See Appellant’s Opening Brief, at p. 17, p. 20.

court “*expressly said* that . . . it’s [sic] plan” was to “improperly divide[] the pension and disability.”⁸⁷ At the risk of some repetition, the trial court’s “plan” was to treat the parties justly, which in view of the statutory factors, the evidence, and the antecedent division of property required equalization of the parties expected future incomes. CP 314-317.

It is also not true that the magnitude of the maintenance award demonstrates that the award was illegal.⁸⁸ Based on the property division, Mr. Thielhorn’s 61% share of the disposable retirement pay is \$2,080.51. Mr. Thielhorn could pay \$1,620 per month of maintenance (or the corrected amount of \$1,499 per month) from his disposable retirement pay alone, without touching *either* his disability pay *or* his imputed future earnings. Mr. Thielhorn’s argument here owes whatever superficial plausibility it has to his unwarranted lumping together of both disposable retirement pay and disability pay as subject to a prohibition on division or distribution.⁸⁹ But as previously established, neither state nor federal law restricts how a family court may divide disposable retirement pay, apart from the state-law requirement that the division be just in light of the relevant statutory factors.⁹⁰ Because Mr. Thielhorn’s argument based on

⁸⁷ *Id.* at p. 19 (emphasis in original).

⁸⁸ *Cf. id.*, at p. 18.

⁸⁹ *Id.* at p. 18 (first and last sentences of first full paragraph, and last sentence of last paragraph), and p. 9 (incorrectly stating that the trial court “awarded . . . Mr. and Mrs. Thielhorn their respective portions of the military pension *as called for by federal regulations*”) (emphasis added).

⁹⁰ *See supra* at pp. 8-9 and notes 22-24. *See also Perkins*, 107 Wn. App. at 322–23.

the magnitude of the award relies on the false premise that both disposable retirement pay and disability benefits are subject to the same federal restrictions on division, it fails as a matter of law.

F. The Court should award Ms. Thielhorn her reasonable attorney's fees and costs incurred on appeal.

Pursuant to RAP 18.1(b), Ms. Thielhorn requests that this Court award her the reasonable attorney's fees and costs incurred in this appeal. Ms. Thielhorn bases this request on RCW 26.09.140, which provides in part that a court "after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees." Ms. Thielhorn believes that Mr. Thielhorn appeal lacks merit, and that she can establish both her a present need for an award of fees, and Mr. Thielhorn's ability to pay.⁹¹ She will provide this Court with a timely affidavit of financial need in accordance with RAP 18.1(c).

IV. CONCLUSION

The trial court here properly considered the statutory factors which the evidence and the argument of the parties showed to be material to the issue of maintenance. Having given particular weight to the age of the parties, the duration of the marriage, the rough equality of the parties'

⁹¹ See, e.g., *Bower v. Reich*, 89 Wn. App. 9, 20, 964 P.2d 359, 365 (1997), as amended on denial of reconsideration (1998) (noting that "[f]actors considered with respect to such an award include the arguable merit of the issues on appeal and the financial resources of the respective parties").

necessary expenditures apart from health insurance expenses, and the low probability of Ms. Thielhorn having any substantial future employment earnings, the Court followed Washington law and did its best to “place the parties in roughly equal financial positions for the rest of their lives.”⁹² Achieving this equality necessarily required considering Mr. Thielhorn’s veteran’s disability payments as “one factor (among many) bearing on the husband’s ability to pay,” and the trial court did not abuse its discretion by doing so.⁹³ Apart from correcting the small math error identified above, this Court should affirm the trial court in all respects, and award Ms. Thielhorn her reasonable attorney’s fees and costs incurred on appeal.

DATED this 31st day of December 2019.

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⁹² *In re Marriage of Wright*, 179 Wn. App. 257, 262, 319 P.3d 45, 48–49 (2013).

⁹³ *Perkins*, 107 Wn. App. at 327.

CERTIFICATE OF SERVICE

I certify that on December 31, 2019, I emailed the foregoing Brief of Respondent Cheryl Thielhorn to Mr. J. Mills, counsel for Appellant Ben Thielhorn, at his email address of jmills@jmills.pro. Mr. Mills has previously agreed to accept service by email in this matter.

Dated this 31st day of December 2019.

By: David J. Corbett
David Corbett

DAVID CORBETT PLLC

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