

FILED
Court of Appeals
Division II
State of Washington
2/28/2020 8:00 AM

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 REPLY BRIEF

J. Mills
WSBA# 15842
Attorney for Appellants
705 South 9th, Suite 201
Tacoma, Washington 98405
(253) 226-6362
jmills@jmills.pro

TABLE of CONTENTS

Math calculations relating to the pension are not critical to the case and there's no math error.	1
If the property award was not disparate in favor of Ms. Thielhorn, that would be based on speculation.	3
The trial court did not base its decision by reference to a disparity in "property" arising from the pension division.	5
Conclusion	6

Math calculations relating to the pension are not critical to the case and there's no math error.

There's a lot of mathematical explanations about the pension division. Both parties come to essentially the same conclusion about what happened.

Insofar as it was expressed in the opening brief that the division was "confusing," the point merely was to try and walk the appellate court through what everyone agrees is the thinking of the trial court.

Everyone agrees that Mr. Thielhorn's separate portion of the pension was 22%. But, the trial court opinion didn't award that separately or separately divide the community portion. Instead, the trial court jumped to a division of 62% to Mr. Theilhorn; 38% to Ms. Thielhorn. The point of the math was to show how those numbers were arrived at. We agree Mr. Thielhorn's award was his separate portion plus $\frac{1}{2}$ of the community portion. We agree that Ms. Thielhorn's was awarded $\frac{1}{2}$ of the community portion of the pension.

The "minor math error" complained of by Ms. Thielhorn is likewise not an error, and really not a substantial issue on appeal.

Ms. Thielhorn says:

\$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 $.61 \times (\$3,648 - \underline{\$237.32}) = \$2,080.51$.⁶⁷ The trial court thus overstated Mr. Thielhorn's

See page 26 of the response brief.

The calculations outlined in Mr. Thielhorn's brief show slightly different numbers which conclude with the numbers actually used by the court. The difference is because she isn't accounting for the \$240 SBP payment.

On account of having elected to continue pension payments beyond Mr. Thielhorn's death, the military deducts \$240 a month under the Survivor's Benefit Plan, or "SBP." That allows benefits to flow to a spouse (or ex-spouse) after the pensioner's death. Without that payment, Ms. Thielhorn's pension payments would terminate on Mr. Thielhorn's death.

In the calculation outlined at the top of this page, Ms. Thielhorn says that her "correct" community portion

payment to be split should be \$2,320; the court split \$2,080.

The difference is the \$240 SBP payment.

Thus starting with the gross military pension, to arrive at the community portion, one deducts \$1,328 (Mr. Thielhorn's separate portion) **and also** \$240 (the SBP payment of \$240) leaving \$2,080 to divide, not \$2,320 to divide.

Again, all of this is a bit confused because the trial court didn't explain precisely its calculation. The parties stipulated that the calculation by the pension administrator was correct and the court just awarded the pension administrator's numbers.

If the property award was not disparate in favor of Ms. Thielhorn, that would be based on speculation.

Ms. Thielhorn asserts that the property award was not disparate in favor of her, but rather very disparate in favor of Mr. Thielhorn.

That depends of course on what's counted in the "property award."

No one disputes that the existing liquid assets (aside from minor personal effects and cars) were the two IRA accounts. Ms. Thielhorn got the bulk of all that.

She asserts, however, that if you count all **future pension payments** as assets, Mr. Thielhorn received vastly more than she did. She arrives at that conclusion referencing Exhibit 48 and pointing out that if Mr. Thielhorn's pension and disability benefits "continued over the next twenty-four and a half years," he would receive "at least \$519,792 which "dwarfs the approximately \$54,000 net of IRA awarded to Ms. Thielhorn. See response brief at pages 10-11.

That math is correct, but based entirely on speculation about how long possible future payments will go on.

One might as well run the math by assuming Mr. Thielhorn dies in five years and Ms. Thielhorn continues to receive pension benefits under the SBA plan for an additional 40 years. Were that the case, Ms. Thielhorn's total pension payments would dwarf that of Mr. Thielhorn.

No one knows how long either party might live and accordingly arguing about the property award by counting future and uncertain pension payments is simply arguing based on speculation.

What's known is that, of all ***the liquid assets*** available right now today, Ms. Thielhorn received the vast bulk of the assets – a \$54,000 real differential.

Future pension payments and disability payments are all wrapped up in the court's effort to "equalize future income" and that's the essential subject of the dispute on appeal.

The trial court did not base its decision by reference to a disparity in "property" arising from the pension division.

The trial court could have, but did not, indicate that it was awarding maintenance based on what it perceived to be a gross imbalance of property in favor of Mr. Thielhorn.

Were it to do that, for reasons outlined above, such a "property" disparity would be entirely speculative. However, the court didn't say that was its intent.

Ms. Thielhorn quotes from CP 316 at page 12 "*There is a known amount of income that each party is going to be entitled to once this decree of legal separation is entered . . . Ms. Thielhorn will bring in \$1,328.00 per month in her portion of the military retirement.*" Importantly, the court discusses "income" not a disparate "property" award.

Elsewhere, the trial court expressly says: “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. Then, the court explains how it will equalize income.

To now contend that maintenance was based on a disparate **property** award is simply to argue at odds with what was the court’s express intent.

Conclusion

In other respects, the response brief appears to require no further argument; the case is mostly dependent on how the Court of Appeals interprets the trial court’s intent in making its maintenance award. Mr. Thielhorn believes the court’s intent is clear from the face of the opinion letter and for this and reasons set out in the Opening Brief, this case should be remanded with instructions to re-evaluate the maintenance award in light of the appropriate statutory factors.

DATED this 24th day of February, 2020.



J. Mills
WSBA# 15842
Attorney for Mr. Thielhorn

J. MILLS, LAWYER

February 27, 2020 - 5:01 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

The following documents have been uploaded:

- 536307_Briefs_20200227165751D2440573_9222.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Brief FOR FILING.pdf
- 536307_Motion_20200227165751D2440573_7339.pdf
This File Contains:
Motion 1 - Extend Time to File
The Original File Name was Motion to Accept Late Filed Brief.pdf

A copy of the uploaded files will be sent to:

- david@davidcorbettlaw.com
- davidcorbettlaw@gmail.com

Comments:

Sender Name: John Mills - Email: jmills@jmills.pro
Address:
705 S 9TH ST STE 201
TACOMA, WA, 98405-4622
Phone: 253-226-6362

Note: The Filing Id is 20200227165751D2440573