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COURT OF APPEALS, DIVISION III,  
OF THE STATE OF WASHINGTON

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IN RE THE MARRIAGE OF BARBARA DANNENBRING AND  
SCOTT D. DANNENBRING

BARBARA DANNENBRING,

Respondent,

v.

SCOTT DANNENBRING,

Appellant.

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APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

The trial court's order on this most recent modification is fundamentally flawed for three reasons. First, this action was filed late because the payment duration of sixty months ordered in the prior two maintenance orders had passed. Petitioner continues rely on an obvious scrivener's error to assert a November 2015 end date, which is sixty-two months after the October 1, 2010, start date.

Second, the action is not supported by a substantial change in circumstances, which is required as a threshold before a modification may proceed. A substantial change in circumstances must be based, at least in part, on the increased need of the party receiving payments. Ms. Dannenbring's need has decreased from entry of the last order from a shortfall of from \$2635.92 per month to a shortfall of \$559.75 per month. In other words, her condition has vastly improved, which means there is no basis for a change in circumstances warranting a change in the order.

Finally, the order itself is simply unjust and unreasonable. It is a verity on this appeal that Mr. Dannenbring has income of \$13,992 per month and expenses of \$14,647, a shortfall of \$655 per month. However, he is ordered to pay an additional \$2000 in maintenance each month. While Ms. Dannenbring's need is a mere \$559.75 per month, she receives \$2000, which leaves her with a surplus income. There is no relationship between

her need and the maintenance ordered. Lastly, the term of maintenance requires Mr. Dannenbring to continue paying until he is 70, despite the fact that Ms. Dannenbring's request for maintenance was merely until Mr. Dannenbring was 65. The bases for these decisions are unsupported by the law or the record. Accordingly, Mr. Dannenbring asks the Court to vacate the trial court's order and dismiss this case.

## II. ARGUMENT

### A. The Petition Must Be Filed During the Payment Period

The hallmark case regarding the timeliness of a petition to modify an award of maintenance is *Brown v. Brown*, 8 Wn. App. 528, 507 P.2d 157 (1973). *Brown* stands for the proposition that a petition filed after the final scheduled payment of maintenance has been made is late. The order in *Brown* required the husband to pay \$500 per month for 30 months. *Id.* at 529. The final payment "was made on or around September, 1970." *Id.* Accordingly, the petition filed after that date was untimely. *Id.* at 530. As the *Brown* court noted, "if there is no modification during the term of the alimony award and no appeal to the failure to modify, the obligation is forever extinguished when met in full." *Id.*

Ms. Dannenbring ignores the "term of the alimony award" portion of the *Brown* ruling and instead focuses on the "met in full" portion. However, where *Brown* and the present case overlap, Mr. Dannenbring

acted the same as the husband in *Brown*. Like the husband in *Brown*, there is no dispute Mr. Dannenbring met his obligation as to every scheduled payment by paying the amount that was required at the time the payment was due. Accordingly, Mr. Dannenbring met his obligation in the same way the *Brown* husband did.

The *Brown* court was not faced with an issue of back maintenance as the result of an intervening modification. Accordingly, the impact of such a modification on *Brown's* holding is an open question before this Court.

Here there was a modification during the original term of maintenance that changed the payment obligation mid-stream. This same order also rejected Ms. Dannenbring's request to change her support obligation, thereby verifying her continuing obligation to pay for the parties' children's post-secondary support. CP at 32. Accordingly, Mr. Dannenbring was required to pay back maintenance at the same time Ms. Dannenbring had an outstanding balance of back post-secondary support. Those obligations were ultimately offset. CP at 416.

Under Ms. Dannenbring's argument, a party owing offset back support from a modification could wait with no deadline to file a modification. Ms. Dannenbring offers no point at which a petition to modify would have become untimely for her. In contrast, if the court

adheres to the payment model established in *Brown*, the modification becomes untimely after the last scheduled payment is made. Here, the last scheduled payment was made on September 15, 2015. Accordingly, the October 30, 2015, petition was untimely.

B. The Final Payment Was Due and Paid on September 15, 2015, More than One Month Prior to the Filing of the Petition for Modification

It is uncontroverted that the decree ordered 60 months of maintenance. CP at 21. It is uncontroverted that the findings of fact concur in a 60-month award. CP at 7. It is further uncontroverted that the payments were to be made on the first and 15th of every month. CP at 21. Accordingly, Mr. Dannenbring was obligated to make 120 payments over the course of 60 months to satisfy his maintenance obligation. The first payment was due October 1, 2010. CP at 21. Accordingly, simple math dictates that the final payment was due on September 15, 2015. Just like the husband in *Brown*, making that final payment sets the time limit for modification. 8 Wn. App. at 530.

Ms. Dannenbring makes three arguments in support of the later November termination date: first, she argues that this Court must follow the trial court's interpretation of its own order; second, she argues that the scrivener's error regarding the final date was not preserved for appeal;

finally, she argues that the first maintenance modification changed the end date. All three arguments fail.

1. A court reviews the terms of an order de novo and does not need to pay any deference to the trial court's interpretation of its earlier order

Ms. Dannenbring argues that the court is bound by the trial court's interpretation of its earlier orders as described in footnote one of the trial court's February 16, 2016, order resolving the motion to dismiss. However, that is not in accord with Washington law, and Ms. Dannenbring has provided no valid authority to the contrary.

Determination of the meaning of a decree or order is a question of law that is reviewed de novo. *In re Marriage of Thompson*, 97 Wn. App. 873, 878, 988 P.2d 499 (1999). "A trial court does not have the authority to modify even its own decree in the absence of conditions justifying the reopening of the judgment." *Id.* "An ambiguous decree may be clarified, but not modified." *Id.* Modification occurs "when rights given to one party are extended beyond the scope originally intended." *Id.*

The findings of fact and conclusions of law filed after the original trial unambiguously state that the period of maintenance shall be sixty months. CP at 7. The decree of dissolution states that the period of maintenance shall be sixty months. CP at 21. The ambiguity, which exists

only in the decree, comes from the addition of specific months that exceed the timeframe ordered by the court. Specifically, the language at issue in the original decree is:

Maintenance shall be at \$3,500.00 per month for thirty (30) months, through April 30<sup>th</sup>, 2013, and then on May 1, 2013 the maintenance shall reduce to \$1,000.00 per month for an additional thirty (30) months, through November 30, 2015.

April 2013 is the 31st month of payment when payments began in October 2010. November 2015 is the 62nd month of payments when payments began in October 2010. Accordingly, the months were miscalculated and are a scrivener's error.

Contrary to Ms. Dannenbring's assertion, the trial court's footnote one in its order denying the motion to dismiss does not harmonize the conflict between the scrivener's error and the decree's clear sixty-month term. Instead, it effects a change in the original order. The original order directs payments "for an additional thirty (30) months, through November 30, 2015." The plain meaning of this provision is that the second thirty months of payments ends in November 2015. Given that November is beyond thirty months, it is an ambiguity subject to interpretation by this Court de novo. The footnote relied upon by Ms. Dannenbring, changes this November term not into a payment term but a retention of jurisdiction, a concept that was never raised in the original order. That extension of

jurisdiction constitutes a right given to a party beyond what was originally intended. *Thompson*, 97 Wn. App. at 878. Accordingly, it exceeded the trial court's authority and is error.

Interpretation of a decree is a question of law reviewed de novo. Ms. Dannenbring's cites to *Atlantic Coast L. R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970) in an attempt to import deference to the trial court's ruling. Not only is *Atlantic Coast* a federal case, which does not control an issue of state appellate law, but the citation to *Atlantic Coast* is to a two-justice dissent, not a majority opinion. Indeed, it is implied in the dissent that the majority rejects the dissent's preferred interpretation of the order at issue. *See id.* at 299 (explaining the content of an order entered in 1967 and contrasting that with the majorities' interpretation of the trial court's views) (Brennan, J. dissenting). In other words, the case cited to by Ms. Dannenbring actually implies the opposite of her contention. Accordingly, there is no basis to defer to the trial court's interpretation of its orders.

2. The petition deadline issue was presented to the trial court and preserved for appeal

RAP 2.5 provides that the Court of Appeals "may refuse to review any claim of error which was not raised in the trial court." The purpose of the rule is to give a trial court an opportunity to address the issue before

raising it on appeal. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Mr. Dannenbring squarely presented the issue of the end date for maintenance in both of his motions to dismiss. Those motions were presented and argued to the trial court. Accordingly, the issue is preserved for appeal.

The two cases cited by Ms. Dannenbring are inapposite. In *Siedler v. Hansen*, 14 Wn. App. 915, 547 P.2d 917 (1976), the plaintiff (1) failed to object to a lack of timely notice under court rules of presentment of proposed findings; and (2) declined an opportunity for more time to argue against adoption of those findings. The court found that the plaintiff had waived any objection to the timeliness of notice. *Id.* at 918. No similar conduct exists here where the issue of the end date of maintenance was briefed and argued to the trial court.

Ms. Dannenbring's second case, *Goncharuk v. Barrong*, 132 Wn. App. 745, 133 P.3d 510 (2006), is similarly inapplicable. In *Goncharuk*, a party waived the right to challenge a court finding by stipulating to the content of the finding when it was entered. *Id.* at 749. Here, there was no such stipulation. Ms. Dannenbring has presented no requirement that a specific objection be made to every scrivener's error at the time of presentment.

The record shows that Mr. Dannenbring and his counsel were unaware at the time the decree was entered that the scrivener's error existed. Ms. Dannenbring cites to page 26 of the Report of Proceedings, but neglects to mention that Mr. Dannenbring's counsel states explicitly that he "[d]idn't catch the erroneous months put in there" at that time. RP at 26.

Furthermore, the modification order itself provides no explicit end date. CP at 32. It simply provides that the modified order shall be in effect "for the remainder of the second thirty (30) month period of the original order on maintenance." CP at 32. At the time that order was entered, both parties were aware and correctly communicated to the trial court that the start date of the second 30-month period was April 1, 2013. RP at 17. Accordingly, there was no reason for Mr. Dannenbring to object at modification when the parties were in accord that the start date of the reduced maintenance period was April and that the duration would last for thirty months.

Ms. Dannenbring's laches argument is new on appeal and should be disregarded. Additionally, the laches argument has no basis in the record as Ms. Dannenbring cannot establish knowledge of the decree's flaws until such flaws became apparent with Ms. Dannenbring's late-filed petition in October 2015.

3. The first modification order, by its plain language, did not change the end date for modification

Ms. Dannenbring asserts that the trial court changed the end date of maintenance in the first modification. However, the findings of fact and conclusions of law and the order entered after the first modification show otherwise. The findings state explicitly that the period is not being changed:

9. The way the Decree reads, Barbara Dannenbring's spousal maintenance was at \$3500.00 for thirty (30) months (2.5 years) and then \$1000.00 for an additional thirty (30) months (2.5 years).

10. Therefore while the Court does not agree that the spousal maintenance should remain at \$3500.00 per month for the second thirty (30) month period, it should also not be at \$1000.00 for the second thirty (30) month period.

11. The Court will order that the spousal maintenance will be increased from \$1000.00 to \$2500.00 per month for this second thirty (30) month period.

CP at 30. The order entered at the same time states "Spousal maintenance is increased to \$2500.00 per month with a start date of June 1, 2013 for the increase to begin and will continue for the remainder of the second thirty (30) month period of the original order on maintenance." CP at 32 (emphasis added). The plain language shows that there was no intent at the first modification to change the end date of maintenance.

C. The Trial Court's Finding of a Substantial Change in Circumstances Warranting Modification is Without Basis in the Record.

An obligee does not have the right to automatic review at the end of a term of maintenance. *In re Marriage of Spreen*, 107 Wn. App. 341, 350, 28 P.3d 769 (2001). Modification of maintenance shall only be had “upon a showing of a substantial change of circumstances.” RCW 26.09.170. The party seeking the modification bears the burden of showing a substantial change in circumstances. *Corson v. Corson*, 46 Wn.2d 611, 614-15, 283 P.2d 673 (1955). The change in circumstances must not have been in the contemplation of the parties at the time the previous order was entered. *In re Marriage of Ochsner*, 47 Wn. App. 520, 524, 736 P.2d 292 (1987). A court’s determination of a substantial change in circumstances is reviewed for abuse of discretion. *Id.* at 525.

Ms. Dannenbring continues to rely on the holdings of *Ovens v. Ovens*, 61 Wn.2d 6, 376 P.2d 839 (1962), and *Bowman v. Bowman*, 77 Wn.2d 174, 459 P.2d 787 (1969) as a basis to support a finding of substantial change of circumstances. She asserts that her alleged continued lack of self-support provides a basis to extend the maintenance award. However, the *Ovens* and *Bowman* decisions are not an automatic extension of maintenance. Instead, by their own terms, the *Ovens* and *Bowman*

decisions only apply when the court's most recent order on maintenance is conditioned on the expectation of self-support.

In *Ovens*, the trial court entered a two-year order of maintenance based on the belief that the party receiving maintenance "should be able to rehabilitate herself within a period of two years" to achieve gainful employment. 61 Wn.2d at 9. The appellate court noted that the court's finding was supported by the evidence and that failure for that expectation to arise could serve as a basis for modification later as a change in circumstances. *Id.*

*Bowman* simply applied the *Ovens* standard. Again, the trial court's original order was premised on the idea "to enable [the obligee] to become self-supporting by the end of that [two-year] period through additional training and work experience." *Bowman*, 77 Wn.2d at 176.

Here, Ms. Dannenbring can point to no finding or portion of the trial court's record to establish that the trial court's award of maintenance at the first modification was premised on an expectation that she would become self-supporting by the end of the term. Unlike the original decree, which was explicitly focused on education and future employability, the modification order is silent about any such expectation. In fact, both the trial court's oral ruling and written rulings on modification evidence that the

court was unconcerned with such an outcome because the court attempted to foreclose any further modifications.

Unable to find any supporting evidence at the trial court, Ms. Dannenbring relies exclusively on language from this Court's opinion in the prior appeal. However, Ms. Dannenbring reads too much into the Court's opinion. This Court's earlier opinion simply applied *Ovens* and *Bowman* to uphold the trial court's modification and declared that Ms. Dannenbring was not barred from bringing a new petition. *In re Marriage of Dannenbring*, 186 Wn. App. 1001, at \*3. While this Court stated that Ms. Dannenbring could petition for further modification, it did not say that she would necessarily succeed in showing a substantial change in circumstances. *See id.* at \*4.

*Ovens* and *Bowman* remain an exception to the basic test of: "Could and should the facts now relied upon as establishing a change in the circumstances have been presented to the court in the previous hearing?" *Lambert v. Lambert*, 66 Wn.2d 503, 509, 403 P.2d 664 (1965). A review is not automatically had at the end of a term of maintenance. *Spreen*, 107 Wn. App. at 350. Instead, a party is obligated to show a change in their need or a change in the other party's ability to pay. *Ochsner*, 47 Wn. App. at 524. Given that the obligor's change in his ability to pay, by itself, is not enough to establish a change of circumstances, *Gordon v. Gordon*, 44 Wn.2d 222,

228, 266 P.2d 786 (1954), the minimum threshold for modification is showing a change in need of the obligee.

*Ovens* and *Bowman* conform to this standard because they apply only where the court's maintenance order is explicitly based on an expected outcome in a fixed time period. When that outcome fails to arise, the anticipated need of the obligee is changed from the court's expectation to the new reality. It is important, however, that the court's expectation be explicit in the record because to hold otherwise would undermine the general rule: that an obligee seeking modification must show a change in their need. *Ochsner*, 47 Wn. App. at 524.

One of the primary goals of every maintenance order is that the obligee become self-supporting. *See Cleaver v. Cleaver*, 10 Wn. App. 14, 20, 516 P.2d 508 (1973). Accordingly, an argument exists in every case where need persists after the term of maintenance ends that maintenance should continue until that need is extinguished. Eroding the requirement in *Ovens* and *Bowman* that the court explicitly condition its award on an outcome will leave every obligee able to file for modification even where there has been no change whatsoever to their need. That would allow the *Ovens* and *Bowman* exception to swallow the general statutory requirement that a party seeking to modify maintenance show a substantial change of circumstances.

In the context of a modification, the explicit condition required by *Bowman* and *Ovens* must be in the findings and conclusions or oral record on modification. “A modification proceeding, although a continuation of the original action, is a separate proceeding, in that it rests upon new facts and presents new issues arising since the entry of the original decree.” *Lambert*, 66 Wn.2d at 507. Accordingly, a trial court is required to enter new findings of fact and conclusions of law at each modification. *Id.*

Here, the trial court not only declined to add findings regarding an expectation that Ms. Dannenbring would be self-supporting at the end of the second thirty-month term, but it explicitly provided that, irrespective of her condition, it would not entertain additional maintenance. CP at 30, 33; RP at 16-17. While the trial court could not deprive Ms. Dannenbring of her statutory right to petition for modification, I can certainly provide that it is not conditioning her award on some expected future outcome. Given the absence of explicit conditioning, there is no basis to modify the maintenance award under *Ovens* and *Bowman*. Accordingly, Ms. Dannenbring’s reliance on that argument must fail.

Ms. Dannenbring’s argument is essentially that her need remains, not that she has a change to her need. As noted above, that is not a basis to establish a substantial change in circumstances. She points to the trial court’s finding that Ms. Dannenbring has had to consume some funds she

was awarded in the decree to meet her expenses. However, where Ms. Dannenbring's income is lower than her expenses (i.e. where she has need), she must necessarily take on debt or consume other assets. Again, a change in circumstances must be based on facts not available to present at the last modification hearing. *Lambert*, 66 Wn.2d at 509.

Additionally, Ms. Dannenbring's need has decreased since the last modification based on her own financial declarations. Her July 15, 2013, financial declaration shows expenses alone of \$4025.92 per month. Her most recent declaration filed December 19, 2016, shows monthly expenses of \$3359.75. While her expenses were decreasing by \$666.17, her income doubled from \$1390 per month, CP at 419, to \$2800 per month, CP at 483. In other words, Ms. Dannenbring's own alleged need went from (\$2635.92) per month to (\$559.75) per month, or 21.2% of what it was at the last modification. CP at 483, 487. That downward shift in need is not a change that supports a modification to extend or increase maintenance.

Ms. Dannenbring asserts that two other findings establish a substantial change in circumstances warranting modification: her car accident and her knee surgery. However, these bases are insufficient to establish a change of circumstances because (1) they are discrete, temporary events; and (2) Ms. Dannenbring failed to present evidence that they have impacted her need since the last modification.

A substantial change in circumstances “should be based upon something more or less permanent or continuous, not merely transitory, variable, or temporary conditions.” *Van Tinker v. Van Tinker*, 31 Wn.2d 12, 15, 195 P.2d 96 (1948) (construing analogous child support modification requirements of changed circumstances); *See also Bauer v. Bauer*, 5 Wn. App. 781, 789, 490 P.2d 1350 (1971); 20 Scott J. Horenstein, *Washington Practice: Family & Community Property Law* § 35:13, at 456 (2d. ed. 2015).

Ms. Dannenbring’s injury by her own evidence has been resolved by surgery, she returned to work after a three-month absence, and the only lingering impact is a \$25 monthly copayment that is captured in her financial declaration. CP at 486, 534, 538. She has failed to identify any further impacts on her employment or expenses due to the surgery. Indeed, her financial declaration filed after the surgery and her return to work shows substantially reduced need from her last modification prior to surgery. Accordingly, Ms. Dannenbring has failed to establish that this surgery was anything other than a temporary event and has failed to establish an adverse impact on her overall need.

Similarly, the car accident is a discrete event, and Ms. Dannenbring has failed to provide any evidence of its impact on her overall need. Again, her financial declaration was filed after the accident and showed that her

need is approximately one-fifth what it was at the time of the first modification. Accordingly, neither of these findings can serve as a basis to find a substantial change in Ms. Dannenbring's need warranting modification. Accordingly, when the court erred when it granted modification because the record is insufficient to establish a substantial change in circumstances.

D. The Trial Court Manifestly Abused Its Discretion in Awarding Maintenance of \$2000 per Month for Nine Additional Years

With her most recent petition, Ms. Dannenbring asked the court for "another approximately four to five years of a maintenance obligation," CP at 522, and provided a financial declaration asserting a need of \$559.75 per month, CP at 483, 487. In response, the trial court awarded nine years of maintenance at \$2000 per month. In other words, the court awarded twice the duration and four times the need proposed by Ms. Dannenbring. The trial court's decision leaves Ms. Dannenbring with a monthly surplus and Mr. Dannenbring with a monthly deficit. It also requires Mr. Dannenbring to keep paying maintenance until he is 70. In short, the trial court failed to balance the factors of RCW 26.09.090 and the resulting order is unjust.

Ms. Dannenbring takes issue with alleged omissions of evidence by Mr. Dannenbring. Specifically, she notes the absence in the record of the equity in Mr. Dannenbring's home in Enterprise, Oregon. Ms. Dannenbring

fails to identify what effect identification of this asset would have had on the trial court's ruling. The omission of home equity does not change Mr. Dannenbring's monthly budget shortfall. The omission of home equity only impacts Mr. Dannenbring's ability to the degree the trial court intended Mr. Dannenbring to liquidate his residence or take further debt against it to fund maintenance to Ms. Dannenbring. In other words, the omission has no impact on the analysis.

Ms. Dannenbring also notes the alleged absence of records regarding student loan debt. However, that student loan debt loan was the subject of a finding of fact that was challenged specifically in Appellant's assignments of error and that is based on the trial court's fundamental misunderstanding of how student loan disbursement works. Appellant relies on his articulation of that flaw, which is in the opening brief at pages 28 to 29.

Ms. Dannenbring's alleged omissions do not impact Mr. Dannenbring's monthly shortfall. The trial court found that Mr. Dannenbring had a monthly income of \$13,992 and monthly expenses of \$14,647. CP at 419. The income number explicitly includes the income from Mr. Dannenbring's rental home as offset by mortgage payments. CP at 419, n.5. That finding is not challenged on appeal and is a verity. *In re Marriage of Vander Veen*, 62 Wn. App. 861, 865, 815 P.2d 843 (1991).

Ms. Dannenbring misrepresents the trial court's findings in her argument. She states, without citation, that the court was concerned about income from other individuals in Mr. Dannenbring's home, yet the findings are silent on that issue. *See* CP at 418-422. This is a red herring not reflected in the record.

In her response, Ms. Dannenbring neglects to address the actual factors at issue in creating a just order of maintenance. It is error to order maintenance when the party ordered to pay has insufficient means to do so. *Bungay v. Bungay*, 179 Wash. 219, 223, 36 P.2d 1058 (1934) (reversing an award of spousal support that exceeded husband's ability to pay); see also RCW 26.09.090(1)(f). Here, it is a verity that Mr. Dannenbring's expenses exceed his income. CP at 419. Yet he is ordered to pay \$2000 per month in maintenance. That alone is reversible error.

Ms. Dannenbring fails to address the issues raised in Appellant's opening brief, namely that Mr. Dannenbring is ordered to pay maintenance past retirement age, that the \$2000 payment amount is not attached to any specific need of Ms. Dannenbring, that Ms. Dannenbring's cash accounts could satisfy all outstanding debt she has, leaving her with a stated financial need of a mere \$559.75.

The trial court's order is without basis and does not follow the factors. It awards maintenance in excess of Mr. Dannenbring's ability to

pay; it increases the duration of the award past the time when Mr. Dannenbring should be expected to work, in excess of Ms. Dannenbring's request; it is nearly quadruple Ms. Dannenbring's actual need of \$559.75; and it provides Ms. Dannenbring a monthly surplus of \$1440.25 while leaving Mr. Dannenbring with a monthly deficit of \$2655.39. The order is not reasonable in terms of duration or amount. Accordingly, the court abused its discretion and should be reversed.

E. Appellant's Challenges to the Trial Court's Findings of Fact are Well Supported

Appellant has identified each challenged finding of fact specifically and addressed his argument to each one specifically. Respondent has not identified any case law to support her position or provided any argument to support her position that the assignments of error are too general. Accordingly, Respondent's argument must fail.

The Appellant reasserts its arguments from its opening brief but will supplement as to the following arguments in reply to the issues raised by Ms. Dannenbring:

With regard to the amount of outstanding maintenance, the trial court in its January 18, 2017, findings identifies the outstanding amount as \$1750. CP at 421, 422.

With regard to the bank accounts, Ms. Dannenbring confirms that no accounts were filed. It is Ms. Dannenbring who has repeatedly cited to *In re Marriage of Gainey*, 89 Wn. App. 269, 948 P.2d 865 (1997), for the proposition that financial assertions must be supported by evidence. Here, there is no evidence outside of self-serving statements from an affidavit to support Ms. Dannenbring's position regarding the disposition of her bank assets. Those self-serving statements are contradicted by Ms. Dannenbring's own financial declaration. *See* CP at 483-488. Accordingly, the finding is not supported by substantial evidence.

With regard to the student loan documents, Appellant's opening brief and the cited declarations of Mr. Dannenbring and his two daughters make clear that the trial court fundamentally misunderstood how loans are disbursed. The "absent" records alleged by Ms. Dannenbring simply do not exist because Mr. Dannenbring never gained possession of the loan proceeds. Instead, loans are paid to the educational institution and then any overpayment is disbursed directly to the student. CP at 167, 458, 477. There is no disagreement that Mr. Dannenbring is liable for repayment of the loans. Further, there is no disagreement that Ms. Dannenbring has never paid her share of the student loans despite clear court order.

With regard to the standard of living issue, it is uncontested that Ms. Dannenbring has continued to decrease her need over time. CP at 419-20,

483-88 Nothing in the record supports the contention that Ms. Dannenbring's standard of living has decreased since the last modification.

F. Attorney Fees are Not Appropriate

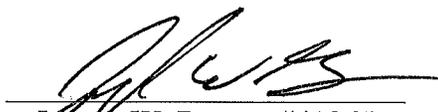
Fees were not awarded below and are not appropriate on appeal here. The uncontested record establishes that Mr. Dannenbring's expenses exceed his income. Accordingly, he does not have the ability to pay fees. Ms. Dannenbring has not established her need for fees, particularly given her substantial available cash assets.

III. CONCLUSION

Appellant respectfully asks this court to conclude that the petition for modification was filed late and/or that the modification was not supported by a substantial change in circumstances. Alternatively, Appellant asks the court to hold that trial court abused its discretion in setting the amount and duration of maintenance. Accordingly, the order should be vacated, and the case remanded for further proceedings. Attorney fees on appeal should be denied as they were below.

February 23, 2018.

Respectfully submitted,

  
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Joseph W. Brown, #41965  
Attorney for Appellant

**LAW OFFICE OF PAUL B. MACK**

**February 23, 2018 - 4:19 PM**

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**Appellate Court Case Title:** In re the Marriage of: Barbara Dannenbring & Scott D. Dannenbring  
**Superior Court Case Number:** 09-3-00189-0

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