No. 20170789-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

KIRKPATRICK MACDONALD,
Appellant,
v.
LEE ANNE MACDONALD (NKA FAHEY),
Appellee.

BRIEF OF APPELLANT

On Writ of Certiorari to the Utah Court of Appeals

On appeal from the Third Judicial District Court, Summit County,
Honorable Kara Pettit, District Court No. 104500031

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Current and Former Parties

1. Parties to the Appeal

1.1 Appellant

Petitioner/Appellant Kirkpatrick MacDonald is represented by Troy L. Booher and Julie J. Nelson of Zimmerman Booher.

1.2 Appellee

Defendant/Appellee Lee Anne MacDonald nka Fahey is represented by Matthew Stewart of Clyde Snow & Sessions.

2. Parties Below Not Parties to the Appeal

None.

Table of Contents

Addenda

Table of Authorities

Cases

Statutes

Other Authorities

Introduction

This appeal concerns the scope of authority district courts have to modify alimony. Under Utah Code section 30-3-5(8)(i)(i), courts may modify alimony when there has been "a substantial material change in circumstances not foreseeable at the time of the divorce." Utah Code § 30-3-5(8)(i)(i).

For decades, appellate courts interpreted section 30-3-5(8)(i)(i) to allow courts to modify alimony for any substantial change in circumstance that was "not contemplated in the decree itself." *Bayles v. Bayles*, 1999 UT App 128, ¶ 12, 981 P.2d 403 (internal quotation marks omitted). That test both made sense and worked in practice. It made sense because even though an event is foreseeable in the broad sense—e.g., retirement or inheritance—spouses may lack information at the time of divorce to account for that anticipated change in the decree. The test also worked in practice, allowing courts to modify alimony whenever circumstances changed such that the decree operated unfairly.

The court of appeals' decision upset that test and the decades of case law interpreting section 30-3-5(8)(i)(i). *MacDonald v. MacDonald*, 2017 UT App 136, 402 P.3d 178. The decision precludes courts from modifying alimony for changes not contemplated in the decree, as long as the change was "reasonably capable of being anticipated at the time the decree was entered." *Id.* ¶ 12. A variety of changes—e.g., graduation—are capable of being anticipated, but courts traditionally had authority to modify alimony when such changes occurred.

In changing the test, the court of appeals not only unduly restricted the authority of district courts to modify alimony, it violated the bedrock principle that "where a legislature amends a portion of a statute but leaves other portions unamended, or re-enacts them without change, the legislature is presumed to have been satisfied with prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with its own intent." *Christensen v. Indus. Comm'n*, 642 P.2d 755, 756 (Utah 1982). After the legislature enacted the operative section in 1995, numerous courts interpreted that section to require only that the change not have been contemplated in the decree itself. And despite having amended section 30-3-5 six times since 1995, the legislature never changed the test for modifying alimony or otherwise expressed disagreement.

The court of appeals also erred in applying section 30-3-5(8)(i)(i). In this case, the parties ascribed values to various assets and debts to divide them as equally as possible. After the divorce, Wife received nearly double the anticipated price for a property awarded to her, later invested those proceeds, and thereby created a new stream of income. Even if the parties contemplated that Wife might sell her properties someday, the parties did not anticipate the windfall sale price right after the divorce during the Great Recession, let alone her subsequent investment that generates $45,000 per year in income. Because the change in income was not contemplated in the decree (or by the parties), the district court has authority to modify alimony.

Statement of the Issues

Issue 1: Whether the court of appeals erred in its construction and application of subsection 30-3-5(8)(i)(i) of the Utah Code.

Standard of Review: This court reviews the court of appeals' decision for correctness, affording it no deference. *Scott v. Scott*, 2017 UT 66, ¶ 12, --- P.3d ---. This court also reviews questions of statutory interpretation for correctness. *Id.*

Preservation: This issue is preserved. (R.258, 684-85, 819-24, 836-40, 1259.) The issue was presented in the petition for writ of certiorari.

Statement of the Case

Statement of Facts, Procedural History, and Disposition Below

Husband Kirkpatrick MacDonald and Wife Lee Anne Fahey were married for about twenty years. (R.1-3.) Husband filed for divorce in February 2010. (R.1-3.) In 2010 and 2011, the parties negotiated a settlement with the help of retired Judge Judith Billings. (R.114, 861:1,16.) Guided by Judge Billings and Wife's current counsel, Husband and Wife exchanged and examined spreadsheets that represented all aspects of the parties' assets and liabilities, including voluminous financial information regarding property values, formal and informal appraisals, brokerage statements, and bank statements. (R.114-15, 156-62.)

Wife's current counsel filed an affidavit that agreed that Wife participated in negotiations with and without Judge Billings. (R.86.) The settlement agreement states that parties "reached agreement on the terms set forth herein. Each party has consulted with attorneys and/or advisors of their choosing and has been duly advised regarding the terms of this Agreement." (R.19.)

The Parties Evenly Divide Marital Property - The basis for the settlement discussions was "seven major assets" and "five or six important liabilities." (R.861:22; 869:6-7.) According to Husband, the assets and liabilities "included several marital and premarital properties located in New York and Park City, as well as [his] IRA and small real estate business holdings in New York City." (R.157, 162; *see* 114-15.) Most of those assets had liabilities attached to them. (*Id*.)

Real Property - At the center of this lawsuit is real property in Park City, Utah. The parties owned three properties, collectively referred to as "The Preserve Lots." (R.20 at ¶6.) Those three lots were Lot 1, Lot 49, and a yet-to-be-platted lot. (R.20 at ¶¶6, 7, 8.) Husband indicated that the parties determined the property values consistent with county tax records. (R.157-58.) The tax records showed that Lot 1 was worth $637,000, and both Lot 49 and the unplatted lot were worth about $371,500. (R.115, 121, 157-58.) After discussing the values with Wife and her counsel, Husband rounded the values to $700,000 and $400,000. (R.158, 162.) The parties did not expect that the Preserve Lots could be sold until the market recovered from the Great Recession. (R.115, 158.)

To ensure that Wife would not be given assets with liabilities she could not service, "the only unencumbered assets" Wife could take were part of Husband's IRA and the three illiquid, unleveraged Preserve Lots. (R.114-15, 157, 187 (Wife declaring she "wanted to receive property free and clear without debt or entanglement").) Husband would retain the other real properties, some of which were premarital and all but one of which were leveraged. (R.21 at ¶10, 115, 157.) It is undisputed that Husband prepared numerous spreadsheets showing the assets and liabilities to value their estate. (R.158, 862:5-6,20.) As Husband indicated, the intended result of the property division and payments was "quite finely tuned" to achieve an equal division of marital property. (R.158.)

Settlement Agreement - On December 9, 2011, the parties submitted their stipulation and settlement agreement ("Settlement Agreement," attached at Addendum E), and a stipulated motion for entry of the decree. (R.18-25, 26-28.) The Settlement Agreement evenly divided the property as follows.

Wife received all rights, title, and interest to the Preserve Lots. (R.20.) The parties stipulated that Husband would convey the title to the yet-to-be-platted lot to Wife after it was conveyed to him. (R.20 at ¶7.) Wife later correctly characterized these properties as "three pieces of dirt that generated [no income]." (R.1077:4-6.)

The parties also agreed that Wife "shall have an option to receive a promissory note from [Husband] in the amount of $300,000 in exchange for her right to receive the [yet-to-be-platted] lot," and detailed that option. (R.20 at ¶7.) The Settlement Agreement explained that Husband would "pay the Homeowner's Association fees and property taxes on the Preserve Lots for a period of five years commencing January 1, 2011 or until [Wife] sells one of The Preserve Lots. [Husband]'s payment of the HOA fees and property taxes shall be treated as a loan to [Wife], and [Wife] shall reimburse him for those payments without interest at the time she sells one of The Preserve Lots." (R.20 at ¶9.)

Cash Payments – Under the Settlement Agreement, Husband paid to Wife $200,000, and would pay her an additional amount of $103,500 in monthly payments through 2011 and 2012. (R.21 at ¶¶12, 13.) The parties assumed all debt

in their own names. (R.21 at ¶14.) Husband received all other real properties and the associated debt. (R.162.)

Alimony - Because all of the Preserve Lots were illiquid, and given Wife's lack of income, Husband agreed to pay Wife $2,000 per month in alimony from January 2011 to December 2012. (R.21 at ¶15, 157.) Beginning January 2013, the same time that the property payments ended, the alimony would increase to $6,000 per month, ending December 2020. (R.21-22 at ¶15.) Alimony would terminate upon Wife's remarriage, cohabitation, or death, but would remain an obligation of Husband's estate should Husband die before 2020. (R.22 at ¶15.)

Divorce Decree - On January 6, 2012, the district court signed the Decree of Divorce. (R.38-48, attached at Addendum D.) The court's findings reflect the parties' Settlement Agreement. The court added only the following provisions:

> 1. This Court has subject matter jurisdiction over this matter and personal jurisdiction over the Parties.
>
> 2. The Parties' Agreement is fair and equitable under the circumstances and each party has been represented by their respective attorney.
>
> 3. The Parties shall be granted a Decree of Divorce from each other on the grounds of irreconcilable differences.
>
> 4. The Decree of Divorce shall incorporate by reference the terms of the Parties' Agreement and these Findings of Fact and Conclusions of Law.

(R.42-43.)

Wife's Windfall Proceeds - Sometime between the date that the parties submitted the signed Settlement Agreement and the date that the court entered the Decree of Divorce, the parties received an unsolicited opportunity to sell Lot 1 for double its previously assessed value. (R.115, 158, 875:9-19.) The property had not been listed, but a broker contacted Husband in early or mid-December 2011 with an offer. (R.875:9-25.) Husband was surprised because the offer came "quite unexpectedly" amid the Great Recession. (R.115, 158.)

The buyer offered $1,425,000, which was approximately twice the value the parties and the tax assessor had placed on the lot. (R.878:15-16; 157-58.) Wife and Husband agreed to sell the property and signed the contract after the parties filed their stipulation (R.18), and a day before the court entered the divorce decree. (R.38.) The sale closed later in January 2012. (R.52, 136.)

Wife Invests the Windfall Proceeds to Generate New Income - Because the Divorce Decree awarded Lot 1 to Wife, she received all the proceeds from its sale. After receiving the windfall of money, she wired it to her financial advisor. (R.1061:17-21.) The financial advisor was, at that time, managing the $200,000 cash settlement that Wife had received from Husband's IRA. (R.1061:17-21.)

According to the financial advisor, Wife deposited $1,240,000 in her trust account in February 2012, (R.1116:16-19), and in 2013, deposited another $498,000 that resulted from the sale of other property, again at a price much higher than

the parties' estimates. (R.1116:25-1117:1). Thus, by mid-April 2015, Wife's trust account had $1,740,000 in it. (R.1107:25-1108:5.)

The financial advisor stated that Wife earned, and he anticipated she would continue to earn, approximately $45,000 per year on her investments, before taxes, as income from stocks and bonds. (R.1108:23-1109:1; 1115:10-21.) Likely because Wife received alimony payments, Wife's earnings on her investments are generally reinvested into the capital, with the intention that she will keep her stocks until she dies. (R.1125:16-22.)

Petition to Modify - On January 29, 2013, Husband filed a petition to modify the decree and terminate alimony. (R.257-59.) He argued that the alimony was intended to "ensure [Wife] had funds to meet her needs," because she had minimal income prior to the divorce ($167/mo.). (R.258, 618.) But Wife no longer needed alimony due to a substantial change in circumstance—i.e., she was now capable of meeting her own needs with her liquid assets and new income from her investments. (R.258, 684-85, 836-40, 1259.)

The district court held a two-day trial. (R.832-1278.) Husband testified that the parties had arrived at an agreed valuation for the properties during their pre-settlement negotiations. (R.862:15.) Husband testified that the subsequent sale of the property "upset completely the calculations that we based—that, that we based our division of assets and liabilities on." (R.879:7-9.) Husband pointed to

two documents, Exhibits 15 and 16, which were a balance sheet of the parties' assets and liabilities. (R.863:12-22, 866:24-867:7; Pet.Ex.15, 16.)

Wife objected to the admission of this evidence, on the grounds that they violated rule 408 of the Utah Rules of Evidence and were parole evidence. (R.862:21; 864:14-18; 866:2-7; 868:6-9; 870:2-15; 879:16-880:2.) The district court considered the evidence to the extent that it was "being offered to show whether or not the change that's the subject of the petition was contemplated by the parties." (R.866:8-12). Said differently, the court allowed the evidence "for the baseline of what the understanding was and what was contemplated in arriving at the agreement that they did." (R.880:8-12; *see also* 868:12-15; 870:16-871:1; 880:3-881:11.) The district court excluded any evidence that went "to negotiations and were these negotiated values." (R.1037:22-24; 1039:14-15.)

The District Court Denies Husband's Petition to Modify - The district court denied Husband's petition. (R.816-24, attached at Addendum C.) The court ruled that Wife's new income stream did not constitute a substantial change in circumstances because the investment income was not "income" for purposes of altering alimony but was the same as the property liquidated to make the investment. (R.816-24.) In other words, the district court decided that the investment income was not income in the relevant sense, but was property divided as contemplated in the divorce.

The Court of Appeals Affirms on Alternative Grounds – Husband challenged on appeal the ruling that investment income was not income. The court of appeals apparently agreed that the investment income was new income for purposes of alimony because it chose to affirm on an alternative ground.

The court of appeals affirmed on the ground that the new income was foreseeable as a matter of law. *MacDonald v. MacDonald,* 2017 UT App 136, 402 P.3d 178 (attached at Addendum B). In doing so, the court changed decades of case law concerning the operation and meaning of section 30-3-5(8)(i)(i). The court did not remand for the district court to assess the evidence with regard to foreseeability or take new evidence under the new test that would demonstrate that the windfall proceeds, let alone the new investment income, were not foreseeable. Wife erroneously represented the contrary to the court of appeals, a representation the court appears to have accepted. *Id*. ¶ 17 n. 7.

Summary of the Argument

Beginning in 1995, the statute defining the authority of district courts to modify alimony states: "The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances *not foreseeable* at the time of the divorce." Utah Code § 30-3-5(8)(i)(i) (emphasis added). For 22 years, Utah courts consistently determined foreseeability by whether the change was "contemplated in the decree itself." *Christensen v. Christensen,* 2017 UT App 120, ¶ 20, 400 P.3d 1219 (internal quotation marks omitted). In doing so, the courts developed a body of law that guides courts and spouses in negotiating and drafting divorce decrees.

The court of appeals upended that precedent. *MacDonald v. MacDonald*, 2017 UT App 136, 402 P.3d 178. The court held that the statutory language "foreseeable at the time of divorce" did not mean the change was "contemplated in the decree." *Id.* ¶¶ 15, 16. Instead, the court created a new test—i.e., whether the change was "reasonably capable of being anticipated at the time the decree was entered." *Id.* ¶ 12. The court then held, as a matter of law, that the changes here—a windfall sales price for real property during the Great Recession followed by new investment income—were "reasonably capable of being anticipated." *Id.* ¶¶ 12, 19. The court's application of the new test suggests that its broad foreseeability test presents a question of law, not a question of fact.

The court of appeals erred in two ways.

First, the court erred in failing to interpret the statute as prior courts had. The problem is not stare decisis alone. Under Utah law, "where a legislature amends a portion of a statute but leaves other portions unamended, or re-enacts them without change, the legislature is presumed to have been satisfied with prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with its own intent." *Christensen v. Indus. Comm'n*, 642 P.2d 755, 756 (Utah 1982). That rule is dispositive here because the legislature amended the statute six times while expressing no dissatisfaction with the courts' interpretation. Moreover, *MacDonald* unravels a fully functioning, integrated part of the alimony scheme. Under prior Utah law, divorce decrees prospectively account for certain anticipated changes, but other changes, even if broadly foreseeable (e.g., retirement), are addressed in a petition to modify.

Second, the court of appeals erred when it applied section 30-3-5(8)(i)(i). The district court erred in failing to consider Wife's new income stream as "income" for purposes of the petition to modify. Seeming to recognize that error, the court of appeals affirmed on the alternative ground that the windfall sale of property, subsequent investment, and stream of income were foreseeable. That is incorrect, under either test. Neither the parties nor the divorce decree contemplated that Wife would sell property for twice its anticipated value during the recession, invest that windfall, and generate a $45,000 annual stream of income. Wife no longer needs alimony. This court should reverse.

Argument

1. The Court of Appeals Erred in Its Construction of Section 30-3-5(8)(i)(i)

The court of appeals changed the test for when courts have authority to modify alimony. In doing so, the court failed to follow decades of precedent and upset the traditional test that district courts and divorced parties have relied upon in drafting divorce decrees. While that is a sufficient reason to reverse, the problem is more pronounced. As explained below, the court of appeals also lacked authority to change the test for when courts may modify alimony because the legislature implicitly adopted the traditional test. This court should reverse.

1.1 Under Utah Law, the Legislature Presumptively Adopted the Traditional Test for Foreseeability

A bedrock rule of statutory construction governs here. Under Utah law, "where a legislature amends a portion of a statute but leaves other portions unamended, or re-enacts them without change, the legislature is presumed to have been satisfied with prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with its own intent." *Christensen v. Indus. Comm'n*, 642 P.2d 755, 756 (Utah 1982). Under this rule, prior judicial constructions are not merely precedent, they become conclusive of the legislature's intended meaning of the language in the statute.

That rule is well settled. In *Rocky Mountain Helicopter, Inc. v. Carter*, this court confirmed prior judicial constructions where the legislature had amended a statute to renumber a provision but had not otherwise made relevant changes.

652 P.2d 893, 896 (Utah 1982). This court noted that the legislature made extensive changes to a nearby section but "only slight modifications" to the section at issue. The court stated, "[w]e must assume that these changes were deliberate. . . . Under the rule of statutory construction, stated above, we hold that the legislature, by re-enacting this subdivision without substantial change, intended to approve and adopt the conclusive presumption found earlier by this Court. Had the legislature disapproved of that construction, it could have implemented its intention with further additions, deletions or modifications. It chose not to do so." *Id.*

This court also applied the *Christensen* rule in *Gutierrez v. Medley*, where the legislative amendments "constituted a significant overhauling of the Act," but not to the portions at issue. 972 P.2d 913, 916-17 (Utah 1998). This court stated that "at the time of the . . . amendments, the legislature knew that this court [had a certain judicial construction.] Because the legislature did not amend the Act to specifically state [otherwise], we conclude that this court's view . . . is consistent with legislative intent." *Id.*

Most recently, this court relied on the *Christensen* rule to leave intact the judicial construction of the Product Liability Act. *Bylsma v. R.C. Willey*, 2017 UT 85, ¶ 19, --- P.3d ---. This court noted that the principles described in that Act "have been specifically left untouched by the legislature." *Id.* The court noted

that the Act "has been amended and reenacted several times . . . . Thus, the legislative intent . . . is still relevant." *Id.* ¶ 19 n.24.

The *Christensen* rule governs here. Since 1999, the Utah Court of Appeals has interpreted the currently-numbered section 30-3-5(8)(i)(i) to provide district courts the authority to modify alimony when a substantial change in circumstances was not contemplated in the decree itself. *Christensen v. Christensen,* 2017 UT App 120, ¶ 20, 400 P.3d 1219; *Busche v. Busche*, 2012 UT App 16, ¶ 12, 272 P.3d 748; *Young v. Young*, 2009 UT App 3, ¶ 9, 201 P.3d 301; *Wall v. Wall*, 2007 UT App 61, ¶ 11, 157 P.3d 341; *Smith v. Smith*, 2005 UT App 275U, para. 3; *Diener v. Diener*, 2004 UT App 314, ¶ 7, 98 P.3d 1178; *Nelson v. Nelson*, 2004 UT App 254, ¶ 4, 97 P.3d 722; *Catten v. Catten*, 2002 UT App 380U, para. 2; *Charlton v. Charlton*, 2001 UT App 114U, para. 2; *Boyce v. Goble*, 2000 UT App 237, ¶ 14, 8 P.3d 1042; *Bolliger v. Bolliger,* 2000 UT App 47, ¶¶ 14-16, 997 P.2d 903; *Bayles v. Bayles*, 1999 UT App 128, ¶ 12, 981 P.2d 403.

After courts interpreted that section to require only that the change was not contemplated in the decree itself, the legislature amended that section six times with no indication that it was unsatisfied with the judicial construction of section 30-3-5(8)(i)(i).

- In 2001, the legislature amended subsections 4, 5, and 6, (2001 Utah Laws 1168-70);
- In 2003, the legislature added a new subsection 4 and renumbered accordingly, (2003 Utah Laws 825-26);

- In 2005, the legislature amended subsection 7, (2005 Utah Laws 865-66);

- In 2010, the legislature amended subsection 1, (2010 Utah Laws 1745-46);

- In 2013, the legislature significantly amended subsection 8 (the alimony provision), and renumbered accordingly, (2013 Utah Laws 1907-08);

- In 2017, before *MacDonald* was issued, the legislature amended subsection 8(a)(ii), (2017 Utah Laws ch. 31).

Under the rule in *Christensen*, then, "the legislature is presumed to have been satisfied with prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with its own intent." 642 P.2d at 756. The court of appeals erred when it changed the judicial construction of the statute. This court should reverse and reestablish the traditional test.

1.2 The Traditional Test Is One Part of the Long-Standing and Settled Alimony Scheme

MacDonald also disrupts the law governing alimony. The traditional test was part of a larger, integrated framework that developed over decades. Under that framework, courts and parties should include in the decree future events that will affect alimony as long as those events are certain to occur at a certain time with a certain impact on alimony. If future events are not certain in timing and impact, then the courts address those changes when they occur and their timing and impact become certain. The legislature wisely retained the traditional test because it tells spouses and court when they can, and should not, include future changes to alimony in a decree.

A discussion of the alimony framework confirms the wisdom of the legislature's choice to leave the traditional test in place. The primary purpose of an alimony award is to "enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge." *Paffel v. Paffel*, 732 P.2d 96, 100 (Utah 1986). That initial determination hinges on three primary factors, identified in section 30-3-5(8)(a)(i)-(iii) and also known as the *Jones* factors: (1) the financial condition and needs of the recipient spouse, (2) the recipient's earning capacity or ability to produce income, and (3) the ability of the payor spouse to provide support. Utah Code § 30-3-5(8)(a)(i)-(iii);[1] *see also Jones v. Jones,* 700 P.2d 1072, 1075 (Utah 1985); *Dahl v. Dahl*, 2015 UT 79, ¶¶ 94-95, --- P.3d ---.

Consistent with those guiding principles, "regardless of the payor spouse's ability to pay more, the [recipient] spouse's demonstrated need must . . . constitute the maximum permissible alimony award." *Roberts v. Roberts*, 2014 UT App 211, ¶ 14, 335 P.3d 387 (alteration and omission in original) (internal quotation marks omitted). Those principles apply both to initial alimony determinations and to modifications. *Nicholson v. Nicholson*, 2017 UT App 155, ¶ 7, 405 P.3d 749.

Whether certain events should be considered in the initial alimony determination is established by this court's decision, *Richardson v. Richardson,*

[1] Section 30-3-5(8) also identifies other factors that are not relevant to this discussion and are not considered "the *Jones* factors."

2008 UT 57, 201 P.3d 942. There, the divorce decree *prospectively* modified alimony based on certain known events. *Id.* ¶ 1. Specifically, it stated that as each of the parties' children turned 18 and child support automatically reduced, the husband's alimony payment to the wife should increase. *Id.* ¶ 3. This court stated that such a decision was within the court's discretion. *Id.* ¶ 12. This court applied the traditional test: "Where the future event is certain to occur within a known time frame, then prospective changes are appropriate." *Id.* ¶ 10.

In contrast, this court stated, "because of the uncertainty of future events, prospective changes to alimony are disfavored." *Id.* The "certainty" of the event was critical to this court's decision: due to its uncertainty, "a plan to retire, without actually retiring, would be insufficient to justify a prospective alimony reduction." *Id.* That makes sense because neither the "date" nor the "result" of retirement would be "certain" at the time of entering the divorce decree.

But the minor children's turning 18 was "certain to take place on specified dates," as was the corresponding "result of [the husband's child support] obligations ending." *Id.* ¶ 11. Thus, this court held that those "prospective changes to the amount of alimony . . . are appropriate." *Id.*

Richardson is consistent with the *Jones* factors. Under *Richardson,* events that have an ascertainable result on "the financial condition and needs of the recipient spouse," and "the ability of the payor spouse to provide support" can be included in the divorce decree. In contrast, events whose dates or impacts are not

ascertainable at the time of the divorce should not be included in the decree, even if the event is foreseeable in the sense it is likely to happen—e.g., retirement or graduation. Petitions to modify exist for such events. If the date and impact on alimony are certain, then the change should appear in the decree. If the date and impact are not certain, the court should address the impact in a petition to modify after it happens, even if the event is foreseeable in the broad sense.

The case law concerning modification reflects the practical reality of what parties and courts can account for in a divorce decree under *Richardson*. The traditional test stems from decisions of this court that were based on a pre-1995 version of section 30-3-5, which stated: "[t]he court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties . . . as is reasonable and necessary." Utah Code § 30-3-5(3) (1994); *see Land v. Land*, 605 P.2d 1248, 1250 (Utah 1980) (citing section 30-3-5 for proposition that "court retains continuing jurisdiction over the parties and may modify the decree due to a change in circumstances."); *see also MacDonald*, 2017 UT App 136, ¶ 12, n.4. In 1981, this court explained the purpose of petitions to modify: "Provisions in the original decree of divorce granting alimony, child support, and the like must be readily susceptible to alteration at a later date, as the needs which such provisions were designed to fill are subject to rapid and unpredictable change." *Foulger v. Foulger*, 626 P.2d 412, 414 (Utah 1981).

In 1983, this court stated that "[o]n a petition for modification of a divorce decree, the threshold requirement for relief is a showing of substantial change in the circumstances of the parties occurring since the entry of the decree *and not contemplated in the decree itself.*" *Lea v. Bowers*, 658 P.2d 1213, 1215 (Utah 1983) (emphasis added); *see e.g. Haslam v. Haslam*, 657 P.2d 757, 758 (Utah 1982) (substantial material change in circumstances where wife obtained employment, experienced an increase in income and savings, and husband retired).[2]

After the creation of the court of appeals in 1987, it required that "if a trial court knows that a party will be receiving additional future income it should make findings as to whether such additional income will affect the alimony award." *Johnson v. Johnson*, 855 P.2d 250, 253 (Utah Ct. App. 1993). But "[i]f the future income from [a source such as a] pension plan is too speculative at the time of trial to anticipate the effect it will have on a receiving spouse's financial condition and needs, the court may, in its discretion, delay the determination of how the future income will affect the alimony award." *Id.* at 254.

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[2] *See also Adams v. Adams*, 593 P.2d 147, 149 (Utah 1979) ("The Court may modify an award of alimony upon a showing that the circumstances of the parties have so changed since the time of the decree that, in equity, a change in the award is also required."); *Felt v. Felt*, 493 P.2d 620, 624 (Utah 1972) ("[A] divorce decree containing awards for support based on either expressed or assumed facts contemplated by the parties or the court or both, should not be modified when the contemplated facts are obvious or agreed to by the parties and in turn incorporated in the decree, in which even the continuous jurisdiction of the court to modify should not be used to thwart the expressed or obvious intentions of the parties and/or the court, unless such contemplated facts lead to manifest injustice or unconscionable inequity.").

In 1995, the legislature amended the statute governing alimony, section 30-3-5. It is true, as the court of appeals noted, that for certain provisions the 1995 amendment was a "'substantive change in the law.'" *MacDonald v. MacDonald*, 2017 UT App 136, ¶¶ 9-10, 402 P.3d 178 (quoting *Wilde v. Wilde,* 969 P.2d 438, 442-43 (Utah Ct. App. 1998)). But for the provision at issue here, the change was not significant. The legislative history gives very little attention to it at all, merely confirming that modifications would still be allowable after the amendment.[3] The language codified what had been the case law up to that point: "The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce." Utah Code § 30-3-5(7)(g)(i) (1995); *see* Utah Code § 30-3-5(8)(i)(i) (2017).

After the amendment, the court of appeals consistently applied the same test it had applied before the amendment: "[T]he moving party must first show that a substantial material change of circumstance has occurred since the entry of the decree and second, that the change was not contemplated in the decree itself." *Christensen v. Christensen,* 2017 UT App 120, ¶ 20, 400 P.3d 1219 (alteration and internal quotation marks omitted); *see also Busche v. Busche*, 2012 UT App 16, ¶ 12, 272 P.3d 748 ("In the alimony context, a substantial change in circumstances

[3] *See* House Floor Debates on H.B. 36, Revision of Alimony Standards, 1995 Leg., Gen. Sess., available at https://le.utah.gov/asp/audio/index.asp?House=H; Senate Floor Debates on H.B. 36, Revision of Alimony Standards, 1995 Leg., Gen. Sess., available at https://le.utah.gov/asp/audio/index.asp?House=5.

includes a change in income not anticipated in the divorce decree."); *Young v. Young*, 2009 UT App 3, ¶ 9, 201 P.3d 301 ("Courts may modify alimony based on such benefits when the entitlement and actual amounts of the benefits become definite" (internal quotation marks omitted)); *Wall v. Wall*, 2007 UT App 61, ¶ 11, 157 P.3d 341 ("On a petition for a modification of a divorce decree, the threshold requirement for relief is a showing of a substantial change of circumstances occurring since the entry of the decree and not contemplated in the decree itself. If a change in circumstances is reasonably contemplated at the time of divorce, then it is not legally cognizable as a substantial change in circumstances in modification proceedings." (alteration, citation, and internal quotation marks omitted)); *Smith v. Smith*, 2005 UT App 275U, para. 3 ("In order for a material change in circumstances to be contemplated in a divorce decree there must be evidence, preferably in the form of a provision within the decree itself, that the trial court anticipated the specific change." (alteration and internal quotation marks omitted); *Diener v. Diener*, 2004 UT App 314, ¶ 7, 98 P.3d 1178; *Nelson v. Nelson*, 2004 UT App 254, ¶ 9, 97 P.3d 722 (applying *Bolliger* and holding that petition to modify based on husband's retirement was not ripe for adjudication because he had not yet retired); *Catten v. Catten*, 2002 UT App 380U, para. 2 (applying *Bolliger*); *Charlton v. Charlton*, 2001 UT App 114U, para. 2 (same); *Boyce v. Goble*, 2000 UT App 237, ¶ 14, 8 P.3d 1042; *Bolliger v. Bolliger,* 2000 UT App 47, ¶¶ 11-13, 997 P.2d 903; *Bayles v. Bayles*, 1999 UT App 128, ¶ 12, 981 P.2d 403.

This traditional test is consistent with the *Jones* factors and *Richardson*. If the date and impact of a future change on alimony are certain, the court should include it in the decree. But district courts retain authority to modify alimony for any other type of change. To this end, *Richardson* expressly distinguished a party's "plan to retire" from a decrease in child support when a child turns 18 on the ground that the date and impact of the former were uncertain.

The traditional test makes sense. A person may anticipate retirement, but it might not be until retirement that she knows how much money she will have. A person may anticipate an inheritance, but it might not be until her parents die that she knows what her inheritance is. Or as happened here, a person may anticipate selling real property, but it might not be until the property is sold and a new income stream is generated that she knows whether and how much new income will be generated.

Thus, it is not until the date and impact are known that a court can re-evaluate the *Jones* factors in light of the new development: the financial condition and needs of the recipient spouse, the recipient's earning capacity or ability to produce income, and the ability of the payor spouse to provide support. Utah Code § 30-3-5(8)(a)(i)-(iii); 700 P.2d at 1075.

1.3 *MacDonald* Disrupts the Traditional Test

The traditional modification test functioned hand-in-hand with *Richardson* and the *Jones* factors. *MacDonald* unravels that. Now, under *MacDonald*, district courts lack authority to modify alimony if the change was "reasonably capable of being anticipated at the time the decree was entered." 2017 UT App 136, ¶ 12.

Consider retirement. *Richardson* described "a plan to retire, without actually retiring." 2008 UT 57, ¶ 10. Under *MacDonald,* that would be an event "reasonably capable of being anticipated at the time the decree was entered," which would preclude a modification when the person does retire. But reading *Richardson* together with *MacDonald,* there is now no way for divorcing spouses to account for the financial changes that will someday come with retirement. Under *Richardson*, divorcing parties cannot consider their prospective retirement when setting the divorce decree because, at the time the divorce court enters the divorce decree, the timing and impact are not certain. And under *MacDonald*, they cannot later modify an alimony award when they do retire because the event was "reasonably capable of being anticipated."

The *MacDonald* court explained that its reason for doing so is grounded in the plain language of the statute, which, it said, had never been interpreted correctly. *MacDonald,* 2017 UT App 136, ¶ 15 ("This approach is consistent with the plain language of the 1995 amendment and is the standard we apply today."). This is not correct. In 2000, the court of appeals addressed the 1995 amendment of the provision governing the modification of alimony in *Bolliger*.

There, the court stated in a footnote that the amendment did "not alter the efficacy of our jurisprudence requiring evidence that the change was foreseen at the time of the divorce to preclude a finding of changed circumstances." *Bolliger*, 2000 UT App 47, ¶ 11 n.3.

MacDonald cites only this first sentence of the *Bolliger* footnote, suggesting that the parties had agreed to this standard and as a result the "court did not address whether the 1995 amendment altered the applicable standard." *MacDonald*, 2017 UT App 136, ¶ 16. The court of appeals apparently overlooked the second sentence of the footnote, which adopts the position as a holding: "We agree and observe that said jurisprudence is sound and grounded in principles of res judicata." *Bolliger*, 2000 UT App 47, ¶ 11 n.3.

1.3.1 *Fish* and *Earhart* Did Not Change the Traditional Test

The *MacDonald* court asserts that the court of appeals had made this change in two cases, *Fish v. Fish*, 2016 UT App 125, 379 P.3d 882, and *Earhart v. Earhart*, 2015 UT App 308, 365 P.3d 719.[4] In fact, neither decision changed the law, claimed to change the law, or supports *MacDonald*'s interpretation of section

[4] The court of appeals stated "the two most recent decisions of this court reviewing a trial court's adjudication of a petition to modify alimony applied a foreseeability standard." *MacDonald*, 2017 UT App 136, ¶ 15. This was incorrect. On July 20, 2017, two weeks earlier, another panel issued a decision quoting the traditional test: "Thus, to succeed on a petition to modify, the moving party must first show that a substantial material change of circumstance has occurred since the entry of the decree and [second, that the change was] not contemplated in the decree itself." *Christensen v. Christensen*, 2017 UT App 120, ¶ 20 (alterations in original) (internal quotation marks omitted).

30-3-5(8)(i)(i). More important, even if *MacDonald* is consistent with *Earhart* and *Fish,* those cases present the anomaly, not the rule, and this court should overrule them as well.

The *MacDonald* court explained its reliance on *Fish* and *Earhart* as follows:

> [I]n *Fish* we expressly applied the foreseeability standard and construed the provision to encompass circumstances beyond those actually foreseen at the time. . . . Similarly, in *Earhart* . . . , this court affirmed a trial court's finding that certain substantial material changes in circumstances were unforeseeable and therefore provided a basis for modification of alimony.

MacDonald, 2017 UT App 136, ¶¶ 13-14.

This is not an accurate description of those cases. In *Fish*, a memorandum decision, the husband sought to modify the alimony he paid to his ex-wife because her pay had risen by $2 per hour. 2016 UT App 125, ¶ 20. The husband relied on the traditional test that the increase is "a change of circumstance not contemplated by the divorce decree itself." *Id.* ¶ 18 (internal quotation marks omitted). The *Fish* court held that the husband had not established that income should have been imputed to the wife, and that "[t]he magnitude of her alleged increase in income is therefore much smaller than that asserted by" the husband. *Id.* ¶ 19. In other words, the court held that the increase was not "substantial."

In *Fish,* the court also "noted" that section 30-3-5(8)(i)(i) "is concerned with whether the alleged change of circumstances was 'foreseeable,' not whether the alleged change of circumstances was actually foreseen and accounted for in a

divorce decree." *Id.* But the court in *Fish* did not attempt to reconcile this statement with the decades of case law requiring the change to be contemplated in the divorce decree. Instead, the *Fish* court stated: "It follows that an increase of income not actually contemplated by the divorce decree *does not automatically require* a finding that a 'substantial material change in circumstances not foreseeable at the time of the divorce' has occurred." *Id.* (emphasis added).

The *Fish* court explained: "We are not aware of any Utah authority *requiring* a district court to find that such a change has occurred simply because one party's income has increased and the divorce decree did not discuss possible increases in income. Were it otherwise, creeping inflation could necessitate recalculation of nearly all alimony awards on an annual or biennial basis." *Id.* (emphasis added). The court noted that such a rule would remove the discretion "to determine whether a substantial and material change has occurred." *Id.*

In other words, *Fish* stands for the proposition that no Utah authority *requires* a district court *to find a change occurred.* This does not warrant the court of appeals' new interpretation of section 30-3-5(8)(i)(i).

Fish relied on *Earhart*, a court of appeals decision that also did not purport to change the law. *Earhart* uses the terms "unforeseen" and "unforeseeable" interchangeably and uses "unforeseen" in its holding.

In *Earhart*, the husband's business suffered the unforeseen loss of its primary client, decreasing his income from $22,000 per month to $15,000 per

month. *Id.* ¶¶ 3, 5. The district court reduced his alimony obligation. *Id.* ¶ 4. The wife, as appellant, argued that the change in her husband's income was not "unforeseeable." *Id.* ¶¶ 1, 11. The court affirmed, holding that the district court's findings were adequate to supports its conclusion that "*an unforeseen*" change of circumstances had occurred. *Id.* ¶ 14 (emphasis added). *Earhart* does not set forth any test for change of circumstances, let alone alter the traditional test.

The court of appeals' decision in *MacDonald* assumes that those innocuous statements in *Fish* and *Earhart* upended the traditional test. But neither *Fish* nor *Earhart* purported to change the law. The court of appeals erred in concluding that they did. To the extent the court of appeals was correct that *Fish* and *Earhart* changed the test, this court should overrule them as well.

1.4 The Court of Appeals Should Have Treated the Question of Foreseeability as One of Fact, Rather than as One of Law

The court of appeals also erred in treating the question of foreseeability as a question of law, rather than remanding. Having changed the law, *MacDonald* did not remand for a factual determination of whether Wife's new income stream was foreseeable. It simply determined, apparently as a matter of law, that it was.[5]

First, the court of appeals stated that it was "foreseeable" that Wife would sell the real estate and invest the proceeds. *MacDonald*, 2017 UT App 136, ¶ 18.

[5] It is well settled that it is inappropriate for the court of appeals to make findings. *Bailey v. Bayles*, 2002 UT 58, ¶ 19, 52 P.3d 1158. Thus, to the extent the court of appeals decided foreseeability, it either erred in making a factual finding or decided the issue as a matter of law. Neither interpretation is appropriate.

And given that "[a] reasonable person will normally act in a prudent manner to protect his or her financial interests and security," the court of appeals then stated that "it is not merely foreseeable, but likely, that under the circumstances of this case, were a real property asset to be liquidated, the proceeds would not be frittered away or left to gather dust." *Id.*

The court of appeals went on. "[I]t would be unreasonable to expect that [Wife] would necessarily either dissipate [the cash she received from Husband] in the short term or that she would otherwise not handle these funds in a financially prudent manner. . . . It is hardly a stretch to foresee that if real property were liquidated the proceeds of that sale might be deposited in that same account for investment purposes." *Id.*

In short, the court of appeals decided that "the fact that [Wife] might have future income from investments was foreseeable under the specific facts of this case." *Id.* The court of appeals gave no guidance as to what other events would be "foreseeable" under the facts of another case, nor did it treat the question as a factual question requiring a remand. This is particularly confusing given that even *Fish* and *Earhart* treated the question as one of fact,[6] that foreseeability is a

[6] In *Earhart,* the court of appeals stated, "[a] district court's determination regarding whether a substantial change of circumstances has occurred is presumptively valid, and our review is therefore limited to considering whether the district court abused its discretion." 2015 UT App 308, ¶ 5. And in *Fish*, the court spoke of "findings," "requiring a district court to find that such a change has occurred," and stated that the rule proposed by the appellant "would conflict with the considerable discretion enjoyed by the district court to determine whether a substantial and material change has occurred." 2016 UT App 125, ¶ 19.

factual question in many other areas of the law,[7] and that it acknowledged it made the decision "under the specific facts of this case." Given the court of appeals' dearth of guidance, it is difficult to say what the law is going forward.

Consider inheritance. In many cases, it is "reasonably capable of being anticipated." But *MacDonald* makes no effort to consider whether particular litigants would anticipate receiving an inheritance, or, even if they anticipated *that* they would receive an inheritance, whether they would know *what* or *how much* they might inherit. In other words, the "date" and "result" of an inheritance are often not foreseeable, even where the fact of inheritance in the broad sense is foreseeable. *MacDonald* ignored this, instead focusing only on whether the event *itself* was foreseeable, and not whether the "date" or "result" were foreseeable.

In short, *MacDonald* changes a well-established, well-functioning test without any analysis as to the way forward. In conjunction with *Richardson,* it all but closes the door for divorcees to ever make changes to their decrees unless they know at the time of divorce the dates and impact of future events.

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[7] *E.g., B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶¶ 25-26, 275 P.3d 228 (foreseeability with respect to proximate cause presents a question of fact); *Hall v. Peterson*, 2017 UT App 226, ¶ 32, --- P.3d --- (foreseeability with respect to easement is a question of fact); *Gardiner v. York*, 2006 UT App 496, ¶ 13, 153 P.3d 791 (in contract context, "[w]hether expenses are foreseeable and therefore recoverable as consequential damages flowing from a breach of contract is a question of fact appropriately resolved by the district court.").

Most important, what *MacDonald* did not consider is the fact that, despite the courts' having employed the traditional test numerous times, the legislature has not amended the statute to express disagreement with those decisions. Under *Christensen v. Industrial Commission*—"where a legislature amends a portion of a statute but leaves other portions unamended, or re-enacts them without change, the legislature is presumed to have been satisfied with prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with its own intent"—the court of appeals misinterpreted section 30-3-5(8)(i)(i). 642 P.2d 755, 756 (Utah 1982). *MacDonald* was incorrect to change the test. This court should reverse and restore the pre-*MacDonald* test.

Even if the court of appeals were correct in its interpretation of the statute, it erred when it did not remand for a factual determination under its new test. "It is inappropriate for an appellate court to disregard the trial court's findings of fact and to assume the role of weighing evidence and making its own findings of fact." *Bailey v. Bayles,* 2002 UT 58, ¶ 19, 52 P.3d 1158. If this court adopts the court of appeals' interpretation, it should remand so that the district court can make factual findings regarding foreseeability.

2. The Court of Appeals Erred in Its Application of Section 30-3-5(8)(i)(i)

The court of appeals also erred when it determined that it was "foreseeable" that Wife would sell the properties for a windfall, invest the money, and generate a new income stream of $45,000 per year. If these events do not constitute a "substantial change in circumstances" warranting a court revision of alimony, it is difficult to understand what would.

Under the traditional test, Wife's new income is a substantial change in circumstances that warrants the modification of alimony. The traditional test provides that "a party seeking modification of a divorce decree must demonstrate that a substantial change in circumstances has occurred since the entry of the decree, and not contemplated in the decree itself." *Bayles v. Bayles*, 1999 UT App 128, ¶12, 981 P.2d 403 (internal quotation marks and citations omitted). Thus, to modify alimony, a court must find that (i) a change in circumstances was "substantial"; (ii) the change occurred since the entry of the decree; and (iii) the change was not contemplated in the decree itself.

Each element is satisfied here. The district court erred in concluding otherwise, and the court of appeals erred in failing to correct the district court.

2.1 Wife's Investment Income Is A Substantial Change in Circumstances

The first question is whether there was substantial change in circumstances. The district court erred when it concluded that Wife's income was not a "change in circumstances," regardless of whether it was substantial. The

district court concluded that Wife's income was not "income" because its source was related to the real property she had received in the divorce. (R.816-24.) The court concluded that (i) Husband was asking the court to modify the property division, not the alimony award, and (ii) Husband "received exactly what he bargained for." (R.821-22.) The court rejected Husband's distinction between property division and income and therefore refused to recognize a substantial change in circumstances for purposes of *alimony*. (R.822.)

The district court erred in failing to distinguish a request to alter a property division from a request to modify an alimony award based upon a new stream of income. (R.257-59.) Utah does not exclude investment income as relevant to alimony, likely because there is no reasonable basis to do so. For decades, Utah law has held generally that "income" for purposes of alimony modification includes a variety of types of income, such as employment and social security payments. *Haslam v. Haslam*, 657 P.2d 757, 757-58 (Utah 1982); *Bolliger v. Bolliger*, 2000 UT App 47, ¶¶ 14-18, 997 P.2d 903 (noting that retirement and social security benefits were "income" for purposes of analysis). The law does not limit the question to the *source* of income. Such line drawing would be inconsistent with the "core function of alimony" which is "economic." *Roberts v. Roberts,* 2014 UT App 211, ¶ 14, 335 P.3d 378.

In other words, all forms of new income are relevant to whether the former spouse can maintain the requisite lifestyle after the divorce. Confirming this, in

Haslam, this court cited *Lepis v. Lepis,* 416 A.2d 45 (N.J. 1980) and "cases cited" therein. 657 P.2d at 758. *Lepis* gives a lengthy account of the policy behind, and examples of, substantially changed circumstances, recognizing that, as of 1980, traditional roles were quickly changing and the law needed to adapt. 416 A.2d at 50-55. One of the cases cited by *Lepis*, *Esposito v. Esposito*, particularly noted that the wife's income stream should include the income she will receive by investing the proceeds of a sale of property she was given in the divorce. 385 A.2d 1266, 1274 (N.J. Super. Ct. App. Div. 1978).[8]

It is worth noting that the district court erred because it appears to have misunderstood Husband's argument as asking to revisit the division of property, which is generally *not* allowed. *Jense v. Jense*, 784 P.2d 1249, 1252-53 (Utah Ct. App. 1989). Husband's petition to modify did not make that argument, but the

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[8] Other jurisdictions reach the same conclusion. In North Carolina, alimony is not "designed to allow [the wife] to increase her wealth at the expense of [the husband]." *Rowe v. Rowe,* 287 S.E.2d 840, 847 (N.C. 1982) (internal quotation marks omitted). After all, "the purpose of alimony is not to allow a party to accumulate savings." *Parsons v. Parsons*, 752 S.E.2d 530, 535 (N.C. Ct. App. 2013) (internal quotation marks omitted). Instead, the purpose is to ensure that a person has enough income to satisfy needs, and "[i]nvestment income is certainly an important component of a party's total income." *Id.*

Applying that rule, one court reduced alimony when the recipient began earning investment income because her "change in her financial holdings from a passive investment . . . to investments actively producing income was voluntary. When she did this, [she] changed her need for maintenance and support." *Rowe,* 287 S.E.2d at 847. The recipient was "not depleting her estate to meet her living expenses. Her income derives almost exclusively from interest earned on her investments." *Id.* Similarly, "[s]hould the wife's capital assets increase in value, through inflation, prudent investment or otherwise, and result[] in an increase in her income, [the husband] would, of course, be entitled to petition the court for modification of the alimony order.'" *Id.* (internal quotation marks omitted).

district court found that Husband was *effectively* making that argument: "I understand that [Husband]'s argument is slightly different here, i.e., that it is not just a change of property value but that it is income derived from the change in property value one party may have assumed. But that's really the same valuation here." (R.822.)

But it is not the same valuation. Husband was not seeking to alter the property settlement or to vacate a judgment. In fact, Husband agrees that Wife is entitled to all of the proceeds from sales of her properties. Husband makes no attempt to obtain any portion of the proceeds or to modify the property division.

Instead, Husband asked the district court to recognize a substantial change in circumstances concerning Wife's annual *income* from her new investments, i.e., Wife's "earning capacity or ability to produce income." (R.257-59, 682-697, 836-40, 1259.) Because her investment income constitutes "a change in income not anticipated in the divorce decree," *Busche v. Busche*, 2012 UT App 16, ¶ 12, 272 P.3d 748, the court should have considered the new income as a "change in circumstances" for purposes of a petition to modify.

Although the court of appeals did not directly address this issue, by affirming on alternative grounds it appears to have agreed with Husband.

2.2 The District Court Did Not Make Factual Findings From Which It Could Be Determined Whether Wife's New Change in Circumstances Was "Substantial"

Assuming that Wife's investment income is income for purposes of alimony, the next issue is whether the change was substantial.

This court has held that a substantial change in circumstances exists where a wife, unemployed at the time of divorce, obtains "employment, experienced a substantial increase in income [of $1,100 per month] and . . . accumulated some savings [of $12,000]." *Haslam*, 657 P.2d at 758. This is because "the combination of the supporting spouse's retirement, together with the dependent spouse's employment, earning of a substantial income, and accumulation of substantial savings subsequent to the original divorce decree, constitutes a substantial change of circumstances." *Id.*

Here, the change in circumstances was substantial because Wife's new stream of income exceeds $45,000 per year, whereas prior to the divorce she had at most a minimal income ($167/mo). On this point, the district court agreed: "the evidence is that the income has changed for [Wife] from the time of the Decree, where it was at or near zero, to the time of trial where the testimony was that it was $45,000 or $67,200 a year depending on the source of the testimony. So it has changed." (R.822-23.) Even considering that Wife may have earned $167 per month, the difference is sufficient to demonstrate that Wife's change in income was "substantial." Without touching the liquid principal, Wife's annual income has increased a minimum of 22.5 times.

It is worth noting again that, in this way, Wife's sale of the property and investment of the proceeds is like retirement or inheritance: even if she knew *that* she might someday receive money, she did not know until the event occurred *when* it would occur or *how much* she would receive. It is not until the event occurs and the result is known that it is possible for a district court to determine whether the change is "substantial." Here, once the sale occurred and Wife chose to invest the proceeds, the actual change in her circumstances was substantial: her income went from $2,004 per year to $45,000 per year.

2.3 The Change in Circumstances Occurred Since the Entry of the Decree

The second question under the traditional test is whether the change occurred after the divorce. *Bayles*, 1999 UT App 128, ¶ 12. The stipulation was agreed to in fall 2011, and the divorce decree was entered January 11, 2012. (R.45-46.) The transaction closed later. (R.52, 170, 1059.) The court of appeals correctly stated "MacDonald received the offer and approved the sale *before* the Decree was entered." *MacDonald*, 2017 UT App 136, ¶ 19 n.7 (emphasis in original).

Wife's investment adviser testified that in February 2012, Wife invested $1,240,000. (R.1116.) In the second quarter of 2013, she added $498,000. (R.1116-17.) The investment advisor invested the money and Wife began generating income. (R.1117.) Thus, the change in circumstances—i.e., Wife's new income—occurred after the entry of the decree.

2.4 The Change in Circumstances Was Not Contemplated in the Decree

Under the traditional test, the final question is whether the substantial change in circumstances was "contemplated" in the decree. *Bayles*, 1999 UT App 128, ¶ 12. It was not.

The court of appeals erred in failing to recognize not only that a quick sale at a windfall price was not contemplated, but that the amount of money Wife might generate was also not contemplated. Ignoring both of those problems, the court of appeals held that it was foreseeable as a matter of law that Wife could transform raw, illiquid land into so much cash so quickly during the Great Recession that she would then be able to generate a new stream of income. A sale some day at some price, and a subsequent investment of those proceeds to generate income, is not foreseeable under any test.

There was no factual foundation for the court of appeals' conclusion. The district court made no findings as to the foreseen sale price, the timing of the sale, or how much income Wife would generate, assuming she chose to generate income with the proceeds of the sale. Nor could it, because those things were not, in fact, contemplated.

2.4.1 The Price and Timing of the Sale Were Not Contemplated

Under *Richardson v. Richardson,* a prospective change may be written into a divorce decree when its date and impact are certain. 2008 UT 57, ¶¶ 10-11, 201 P.3d 942. Neither were true here. The court of appeals incorrectly stated, in affirming on an alternative ground, that "there was no evidence that the parties

agreed to the property distribution based on any mutual understanding of the value of the parcels involved." *MacDonald*, 2017 UT App 136, ¶ 19, n.7. The statement that there was "no evidence" flatly contradicts the record.

As stated above, during the divorce, guided by Judge Billings and Wife's current counsel, Husband and Wife divided the assets and liabilities equally. To do so, they exchanged and examined multiple spreadsheets that addressed all aspects of the parties' assets and liabilities, including an enormous amount of financial information regarding property values, formal and informal appraisals, and brokerage and bank statements. (R.114-15, 156-62.) And the district court admitted as evidence spreadsheets showing "what the understanding was and what was contemplated in arriving at the agreement that they did." (R.880:8-12.)

Wife did not want to receive encumbered assets, of which there were many. (R.187.) The parties negotiated, with Wife relying on her current counsel, and ultimately agreed that Wife would receive cash from the IRA and the unencumbered but illiquid assets of the Preserve Lots, while Husband would receive the other real properties along with their associated liabilities. (R.21, 114-15, 157-58.) And because all of the Preserve lots were illiquid, and given Wife's lack of income, Husband agreed to pay Wife $2,000 per month in alimony from January 2011 to December 2012. (R.21 at ¶15, 157.)

In other words, the court of appeals was incorrect when, in addressing an issue not at issue in the briefing, it stated that "no evidence" that the parties' settlement was based on their understanding of the property values. The

evidence *did* show that the settlement was based on their understanding of the property values. And under the court of appeals' new construction of the test, it should have remanded for the district court to make new factual findings, and if necessary, take new evidence under that test. If there is a remand on that issue, Husband will introduce ample evidence to demonstrate that the value of the properties, like the values ascribed to all assets and liabilities, drove the eventual property settlement reached by the parties.

Further, the language of the Settlement Agreement and Divorce Decree confirms that the parties did not realize how quickly the lot might sell. Paragraph 9 of those documents state that Husband would "pay the Homeowner's Association fees and property taxes on The Preserve Lots for a period of five years commencing January 1, 2011 or until [Wife] sells one of The Preserve Lots. [Husband]'s payment of the HOA fees and property taxes shall be treated as a loan to [Wife], and [Wife] shall reimburse him for those payments without interest at the time she sells one of The Preserve Lots." (R.20 at ¶9.) That provision would not have been necessary had the parties expected it would sell quickly.

Paragraph 9 does not obligate Wife to sell the lots, and there is no timeline — either as to when she must sell the lots, or when she would be able to sell the lots. She might not ever sell the lots, either because there was no buyer or because she chose not to. She might, for instance, pass them to her children. That would be acceptable under the Divorce Decree.

At times the court of appeals understood that there was no guarantee that Wife would sell the property at all: "[Husband] acknowledges that [Wife] was no under obligation to liquidate the Property, and that if she had simply held onto the Property until after the alimony obligation expires, she could have sold it with no effect on alimony." *Id.* ¶ 18 n.6. With that uncertainty, it cannot also have been "foreseeable" that she would sell the lots as quickly as she did.

As to price, the district court found that the price was not contemplated: "[w]hat wasn't originally contemplated one way or another was how much she was going to earn off the sale of the property she was awarded." (R.822). The parties did not contemplate what price the lots would sell for but did ascribe a value to each asset and liability to determine how property would be divided. This is consistent with the fact that, based on the tax assessments of $637,000, Husband estimated that Lot One was worth $700,000. (R.115, 121, 157-58, 162.) But that lot later sold for $1,425,000, approximately twice the value the parties had placed on the lot during their discussions. (R.878:15-16; 157-58 at ¶ 10.)

The court of appeals dismisses the difference as "easily foreseeable that the actual sale price for real estate may differ from what parties anticipate." *MacDonald*, 2017 UT App 136, ¶ 19 n. 7. This misses the point. It does not account for the *magnitude* of the discrepancy, which goes to whether the change was substantial. Had the property sold for 5% or 10% more than expected, the court might find that the "change in circumstances" insubstantial. But where, as here, the property sold for double the expectation, the district court would likely

conclude that the change was substantial. Either way, it is for the district court, and not the court of appeals, to make a factual finding as to whether the change exceeded the expectation such that it could be considered "substantial."

Above all, had either the timing or the price been contemplated, the entire division of assets may have been different. In particular, had Husband foreseen the sale, he would not have agreed to alimony because Wife could meet her own needs with those proceeds. Indeed, the size of the windfall is about equal to Husband's total alimony obligation.

2.4.2 Wife's New Stream of Income Was Not Contemplated

Even if the timing of the sale and the price were foreseeable, the investment income was not. The court of appeals stated that Wife "likely" would invest the proceeds: "A reasonable person will normally act in a prudent manner to protect his or her financial interests and security. Therefore, it is not merely foreseeable, but likely, that under the circumstances of this case, were a real property asset to be liquidated, the proceeds would not be frittered away or left to gather dust." *Id.* ¶ 18. The court of appeals added, "It is hardly a stretch to foresee that if real property were liquidated the proceeds of that sale might be deposited in that same [investment] account for investment purposes." *Id.*

Wife's briefing to the court of appeals suggests otherwise. Wife conceded that she had no plan for any proceeds. In her brief, she stated that "the idea that [Wife] would take those sale proceeds and use them to her benefit . . . — to live

off, to invest, or to embark on a spending spree the day the sale closed — is obvious." (Ct. App. Resp. Br. at 25-26.) Husband agrees: it is obvious that she could have done any of those things, so the specific choice of investing the proceeds was not her plan, let alone a plan both parties contemplated.

Most important, the decree does not contemplate that Wife will convert the lots into an income-producing asset that produces enough income to live off. In fact, it is silent as to what she will do with the proceeds. All that it states is that when she sells the lots, she will repay Husband for the property taxes and Homeowner's Association fees that he will have paid in the meantime. (R.20 at ¶ 9.) It does not "contemplate" that she will invest the proceeds to generate a stream of income. The district court erred when it read Paragraph 9 to say that Wife would live off the proceeds,[9] and the court of appeals erred when it assumed that it was "likely" that she would invest the money and generate income off which she could live, even while her own brief laid out "a spending spree" as a viable option. *MacDonald*, 2017 UT App 136, ¶ 18.

Had the parties in fact contemplated that event, the Divorce Decree could have accounted for it. The *timing* and *magnitude* of the sale price— not just the

[9] The district court's view that the Settlement Agreement contemplates that Wife will live off the proceeds is odd given that the Settlement Agreement makes an adjustment in alimony. The parties agreed that, for 2011 and 2012, Husband would pay Wife a property settlement of $103,500 per year, and that during those years, he would pay $2,000 per month in alimony. (R.20-21.) But beginning in January 2013, Husband would pay $6,000 per month in alimony, with no property settlement. (R.21-22.) Had the divorce decree contemplated that Wife would sell the properties and live off the proceeds, it would have said so.

sale itself—coupled with the uncertain investment income generated by the sale alters the premise upon which the alimony in the decree was based.

In sum, because the parties had agreed to the lot 1 property value as about $700,000, and anticipated that the property was illiquid and would not sell for some time, it was not foreseeable or foreseen that Wife would sell the property in the middle of the Great Recession for more than double—$1.425 million—the previous estimates, and, in turn, generate income that was both higher-than-expected and sooner-than-expected. Nor do the Settlement Agreement and Divorce Decree suggest that Wife might invest the proceeds and generate a new stream of income that would enable her to meet her own needs. Both the court of appeals and the district court erred in concluding, without underlying factual findings, that the new income was not a substantial change in circumstances.

The court of appeals first should have concluded that Wife's new income was "income" for purposes of alimony. The court of appeals also should have concluded there was nothing in the decree that contemplated that Wife would be able to generate a stream of income that would enable her to meet her own needs so quickly. Given those two points, the court of appeals should have ultimately held that, because Wife now has a stream of income that enables her to meet her own needs, a petition to modify was proper. The court of appeals should have remanded the case to the district court for a new evaluation of the *Jones* factors in light of Wife's new stream of income. This court should do so now.

Conclusion

For the reasons describe above, this court should reverse the decision of the court of appeals and restore the traditional test. Under the correct test, this court should reverse the denial of Husband's petition to modify.

This court should remand with instructions to the district court to reopen the question of alimony. "Once a party has established that a substantial material change in circumstances not foreseen at the time of the divorce has occurred, the trial court must then consider what a reasonable alimony award is in light of that change." *Bolliger v. Bolliger,* 2000 UT App 47, ¶ 22, 997 P.2d 903.

On remand, the district court's next step is to determine "(i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to produce income; [and] (iii) the ability of the payor spouse to provide support." *Dahl v. Dahl*, 2015 UT 79, ¶¶ 94-95, --- P.3d ---. If Wife is unable to meet *all* of her needs, despite the income she can now produce, Husband will likely still be responsible for some alimony payment, but it will be lesser. This court should reverse and remand for a reopening of the alimony award.

DATED this 22nd day of January, 2018.

ZIMMERMAN BOOHER

/s/ Troy L. Booher
Troy L. Booher
Julie J. Nelson
Attorneys for Appellant Kirkpatrick MacDonald

Certificate of Compliance

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(1) because this brief contains 11,775 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 13 point Book Antiqua.

3. This brief complies with Utah R. App. P. 21(g) regarding public and non-public filings.

DATED this 22nd day of January, 2018.

/s/ Troy L. Booher

Certificate of Service

This is to certify that on the 22nd day of January, 2018, I caused two true and correct copies of the Brief of Appellant to be served on the following via first-class mail, postage prepaid:

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/s/ Troy L. Booher

Addendum A

West's Utah Code Annotated
Title 30. Husband and Wife
Chapter 3. Divorce (Refs & Annos)

U.C.A. 1953 § 30-3-5

§ 30-3-5. Disposition of property--Maintenance and health care of parties and children--Division of debts--Court to have continuing jurisdiction--Custody and parent-time--Determination of alimony--Nonmeritorious petition for modification

Currentness

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children including responsibility for health insurance out-of-pocket expenses such as co-payments, co-insurance, and deductibles;

(b)(i) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children; and

(ii) a designation of which health, hospital, or dental insurance plan is primary and which health, hospital, or dental insurance plan is secondary in accordance with the provisions of Section 30-3-5.4 which will take effect if at any time a dependent child is covered by both parents' health, hospital, or dental insurance plans;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders;

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services; and

(e) if either party owns a life insurance policy or an annuity contract, an acknowledgment by the court that the owner:

(i) has reviewed and updated, where appropriate, the list of beneficiaries;

(ii) has affirmed that those listed as beneficiaries are in fact the intended beneficiaries after the divorce becomes final; and

(iii) understands that if no changes are made to the policy or contract, the beneficiaries currently listed will receive any funds paid by the insurance company under the terms of the policy or contract.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) Child support, custody, visitation, and other matters related to children born to the mother and father after entry of the decree of divorce may be added to the decree by modification.

(5)(a) In determining parent-time rights of parents and visitation rights of grandparents and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a parent-time or visitation schedule a provision, among other things, authorizing any peace officer to enforce a court-ordered parent-time or visitation schedule entered under this chapter.

(6) If a petition for modification of child custody or parent-time provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(7) If a petition alleges noncompliance with a parent-time order by a parent, or a visitation order by a grandparent or other member of the immediate family where a visitation or parent-time right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation or parent-time.

(8)(a) The court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income, including the impact of diminished workplace experience resulting from primarily caring for a child of the payor spouse;

(iii) the ability of the payor spouse to provide support;

(iv) the length of the marriage;

(v) whether the recipient spouse has custody of minor children requiring support;

(vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or enabling the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining whether to award alimony and the terms thereof.

(c) “Fault” means any of the following wrongful conduct during the marriage that substantially contributed to the breakup of the marriage relationship:

(i) engaging in sexual relations with a person other than the party's spouse;

(ii) knowingly and intentionally causing or attempting to cause physical harm to the other party or minor children;

(iii) knowingly and intentionally causing the other party or minor children to reasonably fear life-threatening harm; or

(iv) substantially undermining the financial stability of the other party or the minor children.

(d) The court may, when fault is at issue, close the proceedings and seal the court records.

(e) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(f) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(g) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(h) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(i)(i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (8).

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(j) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

(9) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage or death of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and the payor party's rights are determined.

(10) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

Credits

Laws 1909, c. 109, § 4; Laws 1969, c. 72, § 3; Laws 1975, c. 81, § 1; Laws 1979, c. 110, § 1; Laws 1984, c. 13, § 1; Laws 1985, c. 72, § 1; Laws 1985, c. 100, § 1; Laws 1991, c. 257, § 4; Laws 1993, c. 152, § 1; Laws 1993, c. 261, § 1; Laws 1994, c. 284, § 1; Laws 1995, c. 330, § 1, eff. May 1, 1995; Laws 1997, c. 232, § 4, eff. July 1, 1997; Laws 1999, c. 168, § 1, eff. May 3, 1999; Laws 1999, c. 277, § 1, eff. May 3, 1999; Laws 2001, c. 255, § 4, eff. April 30, 2001; Laws 2003, c. 176, § 3,

eff. May 5, 2003; Laws 2005, c. 129, § 1, eff. May 2, 2005; Laws 2010, c. 285, § 1, eff. May 11, 2010; Laws 2013, c. 264, § 1, eff. May 14, 2013; Laws 2013, c. 373, § 1, eff. May 14, 2013; Laws 2017, c. 31, § 1, eff. May 9, 2017.

Codifications R.S. 1898, § 1212; C.L. 1907, § 1212; C.L. 1917, § 3000; R.S. 1933, § 40-3-5; C. 1943, § 40-3-5.

Notes of Decisions (1523)

U.C.A. 1953 § 30-3-5, UT ST § 30-3-5
Current through the 2017 General Session.

End of Document

Addendum B

402 P.3d 178
Court of Appeals of Utah.

Kirkpatrick MACDONALD, Appellant,
v.
Lee Anne MACDONALD, Appellee.

No. 20150785-CA
|
Filed August 3, 2017

Synopsis

Background: Former wife filed a petition to adjust alimony claiming that former husband's new income stream constituted a substantial material change in circumstances. The Third District Court, Silver Summit Department, Kara Pettit, J., denied the petition, and wife appealed.

[Holding:] The Court of Appeals, Mortensen, J., held that husband's increased income stream derived from real estate proceeds was foreseeable and thus did not warrant modification of wife's alimony.

Affirmed.

***179** Third District Court, Silver Summit Department, The Honorable Kara Pettit, No. 104500031

Attorneys and Law Firms

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Matthew A. Steward and Shannon K. Zollinger, Salt Lake City, Attorneys for Appellee.

Judge David N. Mortensen authored this Opinion, in which Judges Stephen L. Roth and Kate A. Toomey concurred. [1]

[1] Judge Stephen L. Roth participated in this case as a member of the Utah Court of Appeals. He retired from the court before this decision issued.

Opinion

MORTENSEN, Judge:

¶ 1 After roughly twenty years of marriage, Kirkpatrick MacDonald (MacDonald) and Lee Anne MacDonald (now Fahey) divorced after stipulating to alimony payments and the division of their property. Fahey sold some of the land awarded to her and invested ***180** the proceeds, which now provide her a substantial income stream. MacDonald petitioned the trial court to adjust the alimony that he stipulated to pay because, he claimed, Fahey's new income stream constitutes a substantial material change in circumstances. The trial court denied the petition and MacDonald appeals. We affirm.

BACKGROUND

¶ 2 Fahey and MacDonald married in June 1991. Irreconcilable differences arose and MacDonald filed for divorce in February 2010. The parties engaged in mediation, which resulted in an agreement in December 2010 (the Agreement). MacDonald and Fahey signed the Agreement in October and November 2011, respectively. The parties submitted the Agreement to the court in December 2011.

¶ 3 The Agreement awarded Fahey three pieces of real property in the Preserve Development in Summit County. One of these lots is the property at issue (the Property). The Agreement also provided that MacDonald "pay the Homeowner's Association fees and property taxes on [the Property] for a period of five years ... or until [Fahey] sells [the Property]." If sold, Fahey "shall reimburse [MacDonald] for those payments without interest." The Agreement further required that MacDonald pay Fahey alimony until December 2020 or earlier if she remarried, cohabited, or died. The parties stipulated that alimony payments would begin at $2,000 per month and increase to $6,000 per month beginning in January 2013. The Agreement contained no language specifically conditioning alimony upon any aspect of the parties' real property division, the subsequent disposition of the property, or upon Fahey's needs. MacDonald was awarded all real property from the marriage not specifically awarded to Fahey. [2] In addition,

MacDonald paid $200,000 in cash to Fahey before he signed the Agreement. He further agreed to pay monthly installments, described as an additional property settlement, for a total of $103,500, beginning with a payment of $4,500 per month and later decreasing to $4,000 per month. The trial court entered the Decree of Divorce and Findings of Fact and Conclusions of Law in January 2012, incorporating all terms of the Agreement.

2 This included a $6.5 million brownstone building and a $1.5 million apartment, both in New York City.

¶ 4 Sometime between the parties signing the Agreement and the court entering the Decree, a buyer offered MacDonald $1,425,000 to purchase the Property. According to MacDonald, this price was approximately twice what he anticipated the Property was worth. The parties agreed the Property should be sold and signed a sale contract before the Decree was entered. The sale closed in late January 2012, and Fahey deposited the proceeds, $1,240,000, into her trust account. Fahey's trust account was apparently set up prior to receiving the funds from the sale of the Property, and it already held the $200,000 cash settlement MacDonald had paid Fahey as part of the Agreement. In 2013, Fahey deposited another $498,000 from the sale of other property. As of April 2015, Fahey's trust account contained $1,740,000 and she was expected to earn $45,000 per year on her investments.

¶ 5 In January 2013, MacDonald filed a petition to modify the Decree, asking that the trial court terminate his alimony obligations. MacDonald argued that Fahey's investment of funds from the sale of the Property and the subsequent interest income generated by that investment constituted a substantial material change in circumstances.

¶ 6 The court denied the petition after a two-day trial, concluding that the sale of the Property and the investment of the sale proceeds did not constitute a substantial material change in circumstances. The trial court ruled "that [MacDonald] ha[d] not shown a substantial change of circumstances from the time of the Decree that was not foreseen or contemplated by the Decree, and therefore denie[d] the Petition to Modify on those grounds." Further, the trial court found that "the parties, in their Agreement, which contained both the property division and the setting of alimony, contemplated that [Fahey] was going to sell those lots and was ***181** going to use the proceeds of the sale of those lots to pay expenses." MacDonald appeals the trial court's order.

ISSUE AND STANDARD OF REVIEW

[1] ¶ 7 MacDonald appeals the trial court's determination that he failed to show a substantial material change in circumstances, not foreseeable at the time of the divorce. As we have explained, this court generally will "review a district court's determination to modify or not to modify a divorce decree for an abuse of discretion." *Fish v. Fish*, 2016 UT App 125, ¶ 5, 379 P.3d 882; *see Earhart v. Earhart*, 2015 UT App 308, ¶ 5, 365 P.3d 719 ("A district court's determination regarding whether a substantial change of circumstances has occurred is presumptively valid, and our review is therefore limited to considering whether the district court abused its discretion.").

ANALYSIS

¶ 8 MacDonald contends that the trial court's determination that the facts did not warrant a modification of alimony was an abuse of discretion. He argues that Fahey's new income stream from her interest earned on investments constitutes "a substantial change in circumstances that occurred after the divorce and was not foreseeable at the time of divorce." MacDonald relies on *Bolliger v. Bolliger*, 2000 UT App 47, 997 P.2d 903, which requires "evidence that the change was foreseen at the time of the divorce to preclude a finding of changed circumstances." *Id.* ¶ 11 n.3. We disagree and affirm.

I. The Foreseeability Standard

[2] ¶ 9 The standard to be applied to a petition to modify an award of alimony is set forth in the Utah Code, which reads:

> The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

Utah Code Ann. § 30-3-5(8)(i)(i) (LexisNexis 2013). This provision, amending section 30-3-5, was added in 1995 and has been the controlling statute for alimony modifications since.[3] *See Wilde v. Wilde*, 969 P.2d 438, 441 n.1 (Utah Ct. App. 1998). Accordingly, the language of this provision controls the question presented in this appeal.

3 We note that this case solely concerns modification of an award of alimony under a decree of divorce. The "change in circumstances required to justify a modification of a divorce decree varies with the type of modification sought." *Haslam v. Haslam*, 657 P.2d 757, 758 (Utah 1982).

[3] [4] [5] [6] [7] [8] ¶ 10 We construe statutes according to their plain meaning if possible.

> The primary objective of statutory interpretation is to ascertain the intent of the legislature. Since [t]he best evidence of the legislature's intent is the plain language of the statute itself, we look first to the plain language of the statute. In so doing, [w]e presume that the legislature used each word advisedly.... When we can ascertain the intent of the legislature from the statutory terms alone, no other interpretive tools are needed, and our task of statutory construction is typically at an end.

Bagley v. Bagley, 2016 UT 48, ¶ 10, 387 P.3d 1000 (alterations in original) (citations and internal quotation marks omitted).

> When we interpret a word within a statute, we first consider its plain meaning. In looking to determine the ordinary meaning of nontechnical terms of a statute, our starting point is the dictionary. If not plain when read in isolation, [a word] may become so in light of its linguistic, structural, and statutory context.

Nichols v. Jacobsen Constr. Co., 2016 UT 19, ¶ 17, 374 P.3d 3 (alteration in original) (citations and internal quotation marks omitted). "We also presume that when the legislature amends a statute, it intended the amendment to change existing legal rights." *Olsen v. Samuel McIntyre Inv. Co.*, 956 P.2d 257, 261 (Utah 1998) (citation and internal quotation marks omitted). Indeed, after section 30-3-5 was amended, this court held that the 1995 amendment "regulates a party's right to receive alimony and is a substantive change in the law." *See Wilde*, 969 P.2d at 442–43.

¶ 11 The dictionary defines "foreseeable" as "being such as may reasonably be anticipated." ***182** *Foreseeable*, Webster's Third Int'l Dictionary 890 (1971). From the linguistic and structural position of this term in the statute, and assuming that the legislature used not only the word but its form advisedly, we conclude that the legislature purposely did not use the verb "foresee" in its past tense, "foreseen." This distinction is important. If the provision required that the changed circumstances warranting modification were not actually foreseen, then a petitioner would bear the burden of showing that when the decree was entered the parties or the court had not actually contemplated that such a change would occur. Instead, the legislature employed the adjective "foreseeable," which includes not only those circumstances which the parties or the court actually had in mind, but also circumstances that could "reasonably be anticipated" at the time of the decree.

¶ 12 Thus, the intent of the 1995 amendment[4] is unambiguous—a change in circumstances, even a substantial one, can only form the basis for the modification of alimony if that circumstance was not *foreseeable*—as opposed to actually foreseen—"at the time of the divorce." *See* Utah Code Ann. § 30-3-5(8)(i)(i). Accordingly, we conclude that, as it pertains to alimony, only a substantial material change in circumstances not foreseeable, i.e., not reasonably capable of being anticipated at the time the decree was entered, qualifies as a basis for modification.

4 Prior to the 1995 amendment, the statute provided:

> The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health,

> and dental care, or the distribution of the property and obligations for debts as is reasonable and necessary.
>
> Utah Code Ann. § 30-3-5(3) (Michie Supp. 1994); *see Wilde v. Wilde*, 969 P.2d 438, 441 & n.1 (Utah Ct. App. 1998) (discussing the 1995 amendment). Thus, before 1995 a single standard applied to the continuing power of the district court to modify ("make subsequent changes or new orders") a decree as to alimony ("the support and maintenance of the parties"), child support ("the custody of children and their support"), and property and debt distribution. *See* Utah Code Ann. § 30-3-5(3). The law was changed. Now alimony and child support modification are controlled by separate statutory provisions. *See id.* § 30-3-5(8)(i)(i) (LexisNexis 2013) (controlling modification of alimony); *id.* § 78B-12-210(8)–(9) (2012) (controlling modification of child support).

¶ 13 Recent cases from this court confirm this interpretation. In *Fish v. Fish*, 2016 UT App 125, 379 P.3d 882, a husband "filed a petition seeking to terminate or reduce" alimony based upon an alleged two-dollar-an-hour increase in his wife's income. *Id.* ¶ 3. The trial court denied the petition. *Id.* The husband appealed, asserting, among other grounds, that the trial court failed "to find that an unforeseen material substantial change in circumstances warranted modification of the decree." *Id.* ¶ 4. The husband claimed that because the divorce decree was devoid of language referring to an increase in income by the receiving spouse, any increase would be a "change of circumstance not contemplated by the divorce decree itself." *Id.* ¶ 18 (internal quotation marks omitted). This court disagreed and affirmed the trial court, stating:

> We next note that the statute is concerned with whether the alleged change of circumstances was "foreseeable," not whether the alleged change of circumstances was actually foreseen and accounted for in a divorce decree. *See* Utah Code Ann. § 30-3-5(8)(i)(i). It follows that an increase of income not actually contemplated by the divorce decree does not automatically require a finding that a "substantial material change in circumstances not foreseeable at the time of the divorce" has occurred. *See id.* We are not aware of any Utah authority requiring a district court to find that such a change has occurred simply because one party's income has increased and the divorce decree did not discuss possible increases in income.

Id. ¶ 19. Thus, in *Fish* we expressly applied the foreseeability standard and construed the provision to encompass circumstances beyond those actually foreseen at the time. We further noted:

> Were it otherwise, creeping inflation could necessitate recalculation of nearly all alimony awards on an annual or biennial basis. And such a rule would conflict with the considerable discretion enjoyed by the ***183** district court to determine whether a substantial and material change has occurred.

Id. Consequently, this court agreed with the trial court that although the receiving ex-spouse's income had increased somewhat in the intervening time between the decree and the petition to modify, that increase was foreseeable and a petition to modify alimony could not be granted. *Id.* ¶ 20.

¶ 14 Similarly, in *Earhart v. Earhart*, 2015 UT App 308, 365 P.3d 719, this court affirmed a trial court's finding that certain substantial material changes in circumstances were unforeseeable and therefore provided a basis for modification of alimony. *Id.* ¶¶ 11, 14. Mr. Earhart's annual income at the time the decree was entered was $264,000, but some months later, his business "suffered the unforeseen loss of its primary client," and as a result his annual income dropped to $180,000. *Id.* ¶¶ 3, 11. In its findings, the trial court noted that the evidence was essentially uncontroverted that a significant client had been lost, the financial records of the company confirmed that the revenue historically flowing from this client had evaporated, and "the change in clientele and income was unforeseeable." *Id.* ¶¶ 11, 13. This court affirmed, concluding that, even though the evidence was mixed, sufficient evidence existed to support the trial court's findings, "which in turn are adequate to support its conclusion that an unforeseen and involuntary change of circumstances had occurred." *Id.* ¶ 14.

¶ 15 In sum, the two most recent decisions of this court reviewing a trial court's adjudication of a petition to modify alimony applied a foreseeability standard. This approach is consistent with the plain language of the 1995 amendment and is the standard we apply today.

¶ 16 MacDonald relies on *Bolliger v. Bolliger*, 2000 UT App 47, 997 P.2d 903, to argue that only where the alleged change in circumstances was expressly anticipated in the decree itself is a petition to modify alimony precluded. [5] Although the court in *Bolliger* quoted an earlier version of Utah Code section 30-3-5(8)(i)(i), *see Bolliger*, 2000 UT App 47, ¶ 11, 997 P.2d 903, it does not appear that the court applied the foreseeability analysis that the plain language of the statute requires. Instead, *Bolliger* applied a standard for modification of alimony that requires the moving party to show that "a substantial material change of circumstances has occurred since the entry of the decree and *not contemplated in the decree itself*." *Id.* ¶ 11 (citation and internal quotation marks omitted). This is likely because the parties in *Bolliger* did not argue that the 1995 amendment substantively changed the prior standard. In fact, the *Bolliger* court noted:

> The parties agree that this provision, added in 1995, does not alter the efficacy of our jurisprudence requiring evidence that the change was foreseen at the time of the divorce to preclude a finding of changed circumstances.

Id. ¶ 11 n.3. As a result, the *Bolliger* court did not address whether the 1995 amendment altered the applicable standard. As our analysis above shows, however, the standard did change and we apply that standard today.

5 Both parties in this case have cited *Bolliger* as controlling case law.

II. The Foreseeability Standard Applied

[9] **[10]** ¶ 17 Consistent with the statute's plain language, and as applied in our decisions in *Fish* and *Earhart*, we hold that the standard to be applied in determining whether a substantial change in circumstance warrants a modification of alimony is whether the circumstance was foreseeable at the time of divorce. Where the circumstances are foreseeable, or may be reasonably anticipated, modification is not permitted.

¶ 18 In the present matter, we cannot say that it was unforeseeable that Fahey would sell some of the real estate and invest the proceeds. A reasonable person will normally act in a prudent manner to protect his or her financial interests and security. Therefore, it is not merely foreseeable, but likely, that under the circumstances of this case, were a real property asset to be liquidated, the proceeds would not be frittered away or left to gather dust. [6] Moreover, the fact that Fahey might have future income from investments was foreseeable under the specific facts of ***184** this case. Prior to entry of the Decree MacDonald paid Fahey $200,000 in cash. As part of the stipulated Decree, MacDonald agreed to pay $103,500 over time with an initial payment amount of $4,500 per month. It would be unreasonable to expect that Fahey would necessarily either dissipate more than $300,000 in the short term or that she would otherwise not handle these funds in a financially prudent manner. The record reflects that Fahey put the $200,000, which was paid prior to the execution of the Agreement, in an investment account. It is hardly a stretch to foresee that if real property were liquidated the proceeds of that sale might be deposited in that same account for investment purposes.

6 Indeed, MacDonald acknowledges that Fahey was under no obligation to liquidate the Property and if she had simply held onto the Property until after the alimony obligation expires, she could have sold it with no effect on alimony.

¶ 19 As the trial court noted, the express terms of the Agreement, and ultimately the Decree, discussed certain obligations that would arise if and when Fahey sold the Property. This express provision leaves no doubt that the sale of the Property and its resulting proceeds, however they would be used in the future, were foreseeable. [7] As the trial court noted, the Decree expressly provided that certain expenses would be paid from the proceeds flowing from the sale of the awarded real property. On these facts, the trial court did not exceed its discretion when it concluded that MacDonald failed to show an unforeseeable substantial material change in circumstances from the time of the Decree.

7 MacDonald also claims that the sales price materially differed from what he anticipated. This fact, if true, is not determinative. Although MacDonald received the offer and approved the sale *before* the Decree was entered, it is easily foreseeable that the actual sale price for real estate may differ from what parties anticipate. Moreover, there was no evidence that the parties agreed to the property distribution based on

any mutual understanding of the value of the parcels involved.

CONCLUSION

¶ 20 The trial court's findings adequately support its conclusion that MacDonald failed to show a substantial change in circumstances that was not foreseeable at the time the Decree was entered. The trial court therefore did not exceed its discretion.

¶ 21 Affirmed.

All Citations

402 P.3d 178, 844 Utah Adv. Rep. 60, 2017 UT App 136

Addendum C

The Order of Court is stated below:
Dated: June 27, 2015 09:49:31 AM
/s/ Kara Pettit
District Court Judge

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DISTRICT COURT OF THE STATE OF UTAH
THIRD JUDICIAL DISTRICT
SUMMIT COUNTY

KIRKPATRICK MacDONALD, Petitioner, vs. LEE ANNE FAHEY (formerly MacDonald), Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Case Number 104500031 Judge Kara Pettit Commissioner T. Patrick Casey

This matter came before the Court for a bench trial before the Honorable Kara Pettit on April 21st at 9:00 a.m. continuing until approximately 12:00 p.m. on April 22nd. The following matters were before the Court: 1) Petitioner's Verified Petition to Modify the Decree of Divorce regarding alimony; 2) Respondent's Motion for Contempt for unpaid alimony; 3) Respondent's Motion for Contempt for failure to timely deliver the deed to the Preserve Lot 1; 4) Respondent's Motion for Summary Judgment; and 5) Each party's request for an award of attorney's fees and costs.

Bart J. Johnsen of Parsons Behle & Latimer appeared on behalf of Petitioner who

was present. Matthew A. Steward of Clyde Snow & Sessions appeared on behalf of Respondent who was present. Kirkpatrick MacDonald is referred to herein as “Petitioner” or “Mr. MacDonald.” Lee Anne Fahey is referred to herein as “Respondent” or “Ms. Fahey.”

The Court received testimony from three witnesses: Petitioner, Respondent, and Mr. Fred Snyder who is Respondent’s investment consultant. The Court received a number of exhibits from Petitioner and Respondent which exhibits are a matter of the trial record. The Court also received considerable legal argument from counsel in opening and closing statements regarding the applicable law. Based upon the evidence received and applicable law the Court makes the following findings of fact and conclusions of law with respect to each matter before the Court. Given that the matters before the Court are to some degree mixed questions of law and fact, the findings of fact and conclusions of law are setforth together.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent’s Motion for Summary Judgment.

Based upon the Court’s ruling, Respondent’s Motion for Summary Judgment is moot.

Respondent’s Motion for Contempt for Unpaid Alimony.

Respondent’s motion for contempt for unpaid alimony was withdrawn by Respondent at the close of evidence and is therefore moot.

Respondent’s Motion for Contempt for Failure to Timely Deliver the Deed to Lot 1.

1. Respondent’s alleges that that there was a violation of Paragraph 6 of the Parties Stipulation and Property Settlement Agreement dated November 7, 2011 (the “Agreement”) which was incorporated then into the Decree of Divorce dated November 11, 2012 (the “Decree”). (The Findings of Fact and Conclusions of Law and the Decree of Divorce, both of which were entered January 11, 2012 are matters of record and are not restated in their entirety herein but rather made part of these Findings of Fact and Conclusions of Law by reference).

2. Paragraph 6 states that, “Kirk shall deliver clear title and conveys these lots free and clear of any encumbrances, liens, or claims.” *Agreement at* ¶6.

3. The evidence presented to the Court establishes that that Mr. MacDonald conveyed the deeds to lot at issue by delivering the same to Summit Escrow & Title in or around May of 2011 the recordation of which was conditioned to certain terms and conditions provided for in the Agreement.

4. There was no evidence presented from which the Court could find that Mr. MacDonald violated the Decree by failing to timely covey Lot 1 because there was not sufficient evidence presented from which the court could find that Mr. MacDonald instructed Summit Escrow & Title to not record the deeds after the satisfaction of the conditions set forth in the Agreement.

5. Based upon the foregoing, the Court concludes that Respondent has not satisfied her burden that Petitioner should be held in contempt for violating the Decree by failing to timely deliver title to Lot 1.

Petitioner’s Verified Petition to Modify the Decree of Divorce Regarding Alimony.

6. The Decree orders Petitioner to pay Respondent alimony in the amount of $6000 per month through December 2020. *Decree* ¶2*, Agreement at* ¶*15*.

7. Petitioner filed a Verified Petition to Modify the Decree of Divorce (“Petition to Modify”) on January 24, 2013, alleging specifically that:

a. “Respondent sold one of the parcels of property (Lot 1) for twice the value relied upon in settlement negotiations for one of her lots and received $1,425,000.00.”

b. “It was not contemplated that she would not sue such proceeds to meet her needs and given that she has received proceeds of $1,425,000.00, Respondent has no need for alimony and the alimony award should be vacated.” *Petition to Modify at* ¶6.

8. The threshold question and requirement for relief on the Petition to Modify is a showing of substantial change of circumstances. Pursuant to Utah Code §30-3-5(a)(i)(i) "[t]he court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

9. Utah case law has interpreted the statute to require that in order for a change of circumstance to be not foreseeable it must be something that was "not contemplated." *Wall v. Wall*, 2007 UT App 61, ¶ 11, 157 P.3d 341 (quoting *Moore v. Moore*, 872 P.2d 1054, 1055 (Utah Ct. App. 1994)). *See also e.g., Moon v. Moon*, 1999 UT App 12, 973 P.2d 431. Therefore, the change has to be something not contemplated by the Decree.

10. The Court looks to the language of the Decree itself and, preferably, there are provisions in the Decree that substantiate whether the circumstance was something that was contemplated or in the record itself. It is very clear under the law that if the circumstance is in the Decree and is contemplated by the terms of the Decree, then it's not a change that would be sufficient to support a petition to modify. The alleged changes, as the Court understands them, are two-fold: 1) that the sales price of Lot 1 was more than what Mr. MacDonald anticipated; and 2) that Ms. Fahey's income increased from the time of the Decree to the present time, or at the time of the Petition to Modify, because of the sale of Lot 1 and her ability to invest those proceeds and earn income on those proceeds was not contemplated.

11. The Decree did not set forth an expected sales price for Lot 1 or any of the lots. The Decree also did not set forth an expected income number that Ms. Fahey would derive due to her investment of the lot sale proceeds, or how much she might make on selling the lots. (Because the Agreement was incorporated into the Decree when the Court references a provision of the Agreement it also means the Decree and vice versa.) However, the Decree did expressly contemplate that she would sell the lots and would use the proceeds

of the sales of those lots to pay her expenses. Specifically, the Court notes that Paragraph 9 of the Agreement, which was incorporated into the Decree, provides that Mr. MacDonald was going to pay the Homeowners' Association fees and property taxes on The Preserve Lots for a period of five years commencing January 1, 2011 or until Lee Anne sells one of the Preserve lots. Those payments were to be treated as a loan and Ms. Fahey was obligated to reimburse Mr. MacDonald. The provision states: "Lee Anne shall reimburse him for those payments without interest at the time she sells one of the Preserve lots." Based upon the foregoing, the Court finds that it is clear that the parties, in their Agreement, which contained both the property division and the setting of alimony, contemplated that Ms. Fahey was going to sell those lots and was going to use the proceeds of the sale of those lots to pay expenses.

13. The Court understands the position of Mr. MacDonald to be that it is not the sale of Lot 1 or the fact that Ms. Fahey earned income from the sale, but rather the degree, i.e., the amount of the proceeds from the sale, that was not anticipated. The problem with that position is that there is not any provision in the Decree or the Agreement that sets forth what the parties agreed were the respective values of any of the various properties that were divided; which is something that the Decree clearly could have done if intended. For example, if the property was sold for X% more or less than what the parties had agreed the value was, then there could possibly be some kind of reallocation. Moreover, the Decree does not have a requirement for any accounting after the sale of an asset, e.g. once an asset sells you report back to the other person and then, if it's different than anticipated, there should be some modification of the property division or the alimony. For instance, when Mr. MacDonald sold the 71st Street property, he received a different price then was assumed in the spreadsheet he offered as evidence, and when Ms. Fahey sold Lot 49, the sales price was also different than shown on the spreadsheet. Again, the Decree contained no mechanism or reporting for either party to true up the values of the assets or change

alimony based on the sales price being different than was assumed by either Petitioner or Respondent.

14. The Court finds that what appears to have happened here is that Mr. MacDonald thought he was entitled to a share of the proceeds of Lot 1 mostly because he was directly involved in and responsible for the sale, which is not the basis for a substantial change in circumstance warranting modification of the Decree. He also he alleges that the sales price was higher than he had anticipated. However, the Court finds the evidence shows that Mr. MacDonald knows that real estate values fluctuate and can fluctuate quickly. He testified that markets change and the evidence showed that one piece of real estate appreciated by $500,000 in a matter of months.

15. The Utah Court of Appeals in *Jense v. Jense,* 784 P.2d 1249, 1253 (Utah Ct. App. 1989) stated that to allow a plaintiff to come back later and ask the Court to modify the property settlement on the basis of a decline in value occurring subsequent to the decree is to ask the Court to overturn his bad bargain. *Jense* cites to the Utah Supreme Court case, *Lea v. Bowers*, 658 P.2d 1213 (Utah 1983), which states:

> [W]hen a Decree is based upon a property settlement agreement, forged by the parties and sanctioned by the court, equity must take such agreement into consideration. Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made. Accordingly, the law limits the continuing jurisdiction of the court where a property settlement agreement has been incorporated into the decree, and the outright abrogation of the provisions of such an agreement is only to be resorted to with great reluctance and for compelling reasons. *Id.* at 1215 (quoting *Land v. Land,* 605 P.2d, 1250-51 (Utah 1980).

16. These decisions inform the Court that there should be a compelling reason based upon a substantial change of circumstance to go back in and reassess the need for alimony. The Court finds that there has not been such a compelling reason or substantial change of circumstance shown here. Mr. MacDonald, as in *Jense*, received exactly what he bargained for - the property division as contemplated. He can sell the properties that he was awarded for whatever sales price he can achieve, and he does not have to share

proceeds with Ms. Fahey if he ends up selling one of his parcels for more than what was anticipated by him or her at the time the Decree was entered. Similar to Mr. MacDonald not being able to seek a modification based on a valuation differential between what was assumed at the time of the Decree and the sales price, Ms. Fahey cannot seek a modification for more alimony based on an increase in income that Mr. MacDonald might have as a result of selling property for more than may have been anticipated at the time of the Agreement or the Decree.

17. As the *Jense* Court stated as well,

> For this court to rule otherwise would open a Pandora's box permitting parties who are divorced to seek subsequent modification of property settlements every time the property they received in the decree changed in value. This we are unwilling to do. The principles of *res judicata* mandate that, absent compelling reasons, the parties to a property settlement set forth in the decree of divorce be able to rely on the finality of that judgment, we hold that subsequent changes in property value without additional compelling reasons do constitute a substantial change of circumstances upon which the trial court may enter a modification of the decree of divorce. *Jense* at 1253.

I understand the Petitioner's argument is slightly different here, i.e., that it is not just a change of property value but that it is income derived from the change in property value one party may have assumed. But that's really the same valuation here. The Decree expressly contemplated that Ms. Fahey would sell the lot(s) and would thereby receive proceeds and be able to invest those proceeds and live off of those *in addition* to the alimony. What wasn't originally contemplated one way or another was how much she was going to earn off the sale of the property she was awarded. The Court finds that is not sufficient to establish a substantial change in circumstances.

18. The other case that the Court finds informative is *Wall v.* Wall, 2007 UT App 61, where the mere fact that the Respondent's income increased since the time of the decree was not enough to meet the substantial change of circumstance requirement. Here the evidence is that the income has changed for Ms. Fahey from the time of the Decree, where it was at or near zero, to the time of trial where the testimony was that it was $45,000 or

$67,200 a year depending on the source of the testimony. So it has changed. But as in the *Wall* case, the mere fact that it's changed is not sufficient to show a substantial change of circumstances sufficient to support a petition to modify because the change was contemplated at the time of the Decree. Paragraph 9 of the Agreement specifically contemplated that Ms. Fahey would sell the lots and use those proceeds to help pay her expenses and live. The Court also reviewed *Bollinger v. Bollinger*, 2000 UT App 47, and finds that case is distinguishable for that very reason. In *Bollinger*, the decree and the agreement before the court did not demonstrate that the parties contemplated the change that was argued there. Whereas here, it was contemplated that Ms. Fahey would sell those lots, receive proceeds, and be able to use those proceeds to live. This was contemplated at the time that the parties also agreed to the alimony award.

19. Based on the foregoing and the applicable law, the Court finds that Mr. MacDonald has not shown a substantial change of circumstances from the time of the Decree that was not foreseen or contemplated by the Decree, and therefore denies the Petition to Modify on those grounds.

Request for Attorney's Fees and Costs.

20. The final issue before the Court is each party's request to be awarded their attorneys' fees and costs. The Court finds that the evidence establishes that each party has the financial ability to pay their own attorneys' fees so the Court will not award fees to either side at this point in time.

ORDER

Based upon the Court's findings of fact and conclusions of law, and for good cause appearing therefore, the following is the Court's order:

1. Respondent's Motion for Summary Judgment is moot.
2. Respondent's Motion for Contempt for unpaid alimony was withdrawn by Respondent at the close of evidence and is therefore moot.
3. Respondent's Motion for Contempt for failure to timely deliver the deed to Lot 1 is denied.

4. Petitioner's Verified Petition to Modify the Decree of Divorce regarding alimony is denied.
5. Each party shall pay their own attorney's fees and costs.

ENTERED BY THE COURT ON THE DATE AND AS INDICATED BY THE COURT'S SEAL AT THE TOP RIGHT-HAND CORNER OF THE FIRST PAGE

Approved as to form:

PARSONS BEHLE & LATIMER:

/s/ Bart J. Johnsen
BART J. JOHNSEN
Attorneys for Petitioner

(electronically signed with permission of counsel)

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2015, I caused to be served via email the foregoing [PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER to the following:

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Attorneys for Petitioner

/s/ Matthew Steward

Addendum D

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Attorneys for Respondent

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

KIRKPATRICK MacDONALD, Petitioner, v. LEE ANNE MacDONALD, Respondent.	: : : : : : : : :	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 104500031 Judge Keith Kelly

On or about October 3, 2011, Petitioner, Kirkpatrick MacDonald (Kirk"), and Respondent, Lee Anne MacDonald ("Lee Anne"), (collectively the "Parties") entered into a Stipulation and Settlement Agreement (the "Agreement") in full and final resolution of the issues in this action. The Parties have jointly moved the Court for the entry of Findings of Fact and Conclusions of Law and a Decree of Divorce incorporating the terms of this Agreement. Based on the Agreement and for good cause appearing, the Court now makes the following:

FINDINGS OF FACT

Provisions Relating to Jurisdiction

1. Petitioner is a bona fide and actual resident of Summit County, State of Utah, and has been for more than three months prior to the commencement of this action.

2. Respondent and Petitioner are husband and wife, respectively, having been married on June 22, 1991 in Orange County, New York.

Provisions Relating to Grounds

3. The Parties have experienced irreconcilable differences which prevent the continuation of the marriage, and the parties should be awarded a mutual divorce from the other on those grounds.

4. No children have been born as issue of the marriage and none are expected.

Provisions for Property Division and Financial Settlement

5. The Parties have acquired substantial assets, including real property, personal property, and business interests during the course of the marriage which should be divided as set forth below.

Real Property Awarded to Lee Anne

6. Lee Anne shall be awarded all right, title and interest to the real property identified as Lot 1 and Lot 49 at The Preserve development in Summit County. Kirk shall deliver clear title and convey these lots free and clear of any encumbrances, liens, or claims.

7. Lee Anne shall also be awarded all right title and interest to the yet to be platted lot in The Preserve to which Kirk is entitled free and clear of any encumbrances, liens, or claims. Kirk shall convey clear title to this lot to Lee Anne as soon as the lot is conveyed to Kirk. Lee Anne shall have an option to receive a promissory note from Kirk in the amount of $300,000 in exchange for her right to receive the lot. If such an election is made then the promissory note shall be secured by trust deed or mortgage on residence located in Cornwall, New York. The note shall be due and payable upon the earlier of January 1, 2014 or the sale of the Cornwall residence. The note shall bear interest at a rate of 2% per annum which interest shall commence on the date the option is exercised. Kirk shall be entitled to refinance the existing debt on Cornwall so long as he informs Lee Anne in writing of his intent to do so and the refinance does not result in an increase in the principal amount of the debt encumbering that property.

8. Lots 1, 49 and the yet to be platted lot are referred to collectively as "The Preserve Lots."

9. Kirk shall pay the Homeowner's Association fees and property taxes on The Preserve Lots for a period of five years commencing January 1, 2011 or until Lee Anne sells one of The Preserve Lots. Kirk's payment of the HOA fees and property taxes shall be treated as a loan to Lee Anne, and Lee Anne shall reimburse him for those payments without interest at the time she sells one of The Preserve Lots.

Real and Other Property Awarded to Kirk

10. Except as specifically provided above, all right, title, and interest in any other real property, however titled, shall be awarded to Kirk free and clear of any claim of interest by Lee Anne.

11. Except as set forth below, each party shall be awarded all other property in their name including any business interests, bank accounts, retirement accounts, vehicles, personal property, furniture, furnishings and the like.

Financial Settlement Payment to Lee Anne

12. Kirk has paid Lee Anne the sum of $200,000 without tax obligation or liability to Lee Anne.

13. Kirk shall pay Lee Anne an additional property settlement of $103,500 to be paid in monthly installments commencing on January 1, 2011 and paid on the 1st day of each month. The monthly payment shall be $4500 through March 2012 and then shall decrease to $4000 on April 1, 2012 and shall continue at that level until the last payment in December 2012. As of the date of this Agreement, Kirk is current in such payments.

Debts

14. Each Party shall assume, pay and hold the other harmless on any and all debts in that party's name.

Provisions for Alimony

15. Kirk has been paying and continues to pay Lee Anne alimony in the amount of $2,000 per month since January 1, 2011 on the 1st day of the month and shall continue at that level through December 2012. Commencing January 1, 2013, alimony shall increase to $6000 per month as a result of the loss of monthly payments from the property settlement and shall continue to be paid at that level by automatic bank transfer on the 1st day of the month for a period of ten (10) years from January 1, 2011 (final payment in December 2020). Alimony shall terminate upon the earlier of Lee Anne's remarriage, cohabitation or death. Any unpaid alimony

shall be an obligation of Kirk's estate in the event he predeceases Lee Anne. In the future the Parties may make agreements about whether the alimony shall be taxable to Lee Anne.

Miscellaneous Provisions

16. In the event of Kirk's death prior to satisfying any and all of the obligations set forth in this Agreement, any unsatisfied obligations shall become the obligations of his estate.

17. In the event of a dispute regarding any provision of this Agreement the Parties shall attempt at least one mediation session with Judith Billings or another mutually agreed upon mediator prior to seeking relief from the Court. The expense of the mediator shall be divided equally.

18. Each party shall execute and deliver to the other deeds to be held in escrow pending the entry of the Decree of Divorce.

19 Respondent shall be restored to her former name of Lee Anne Fahey if she so desires.

20. Each party shall mutually released from their marital vows.

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over this matter and personal jurisdiction over the Parties.

2. The Parties' Agreement is fair and equitable under the circumstances and each party has been represented by their respective attorney.

3. The Parties shall be granted a Decree of Divorce from each other on the grounds of irreconcilable differences.

4. The Decree of Divorce shall incorporate by reference the terms of the Parties' Agreement and these Findings of Fact and Conclusions of Law.

DATED this 6 day of Jan, 2012 ~~2011~~.

BY THE COURT

Keith Kelly

Honorable Keith Kelly
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SUMMIT COUNTY

Approved as to form and content:

Kirkpatrick MacDonald
Petitioner Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2011, I caused to be served via email the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** to the following:

Kirkpatrick MacDonald
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Park City, UT 84060

Kari J Peck

Matthew A. Steward (#7637)
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Attorneys for Respondent

THIRD DISTRICT COURT
2012 JAN 11 AM 7:53
FILED BY

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

KIRKPATRICK MacDONALD, Petitioner, v. LEE ANNE MacDONALD, Respondent.	:	**DECREE OF DIVORCE** Civil No. 104500031 Judge Keith Kelly

This matter was commenced by Petition on February 8, 2010. It now comes before the Court without hearing pursuant to Utah Code Ann. § 30-3-4 and the Joint Motion for Entry. The Court has previously found that on or about October 3, 2011, Petitioner, Kirkpatrick MacDonald, and Respondent, Lee Anne MacDonald (collectively the "Parties"), entered into a written Stipulation and Settlement Agreement (the "Agreement") in full and final resolution of the issues in this divorce action and the Court has endorsed the Agreement as fair and equitable under the circumstances. The Court has considered the testimony of Petitioner by way of affidavit as to jurisdiction and grounds for this divorce. Based on the foregoing and the previously entered Findings of Fact and Conclusions of Law, the Court does now ORDER, ADJUDGE and DECREE as follows:

DIVORCE

1. Each party is awarded a divorce from the other the on the grounds of irreconcilable differences to become final and effective upon the entry of this Decree of Divorce.

ALIMONY

2. Alimony is ordered and shall be paid pursuant to the express terms of the Agreement.

PROPERTY AND DEBT DISTRIBUTION

3. The real and personal property, assets, debts, and obligations of the parties shall be divided between them as set forth in the Agreement.

4. Each party shall be awarded the personal property currently in his or her possession except as provided for in the parties' Agreement or by subsequent agreement of the Parties.

MISCELLANEOUS PROVISIONS

5. The parties shall execute such documents as may be necessary to transfer the property as awarded by the Court to the party entitled thereto.

6. That this Decree of Divorce shall be final upon its entry herein and any and all waiting periods have expired.

DATED this 6 day of Jan, 2012 ~~2011~~.

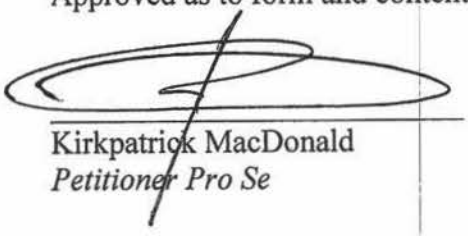
BY THE COURT

Keith Kelly

Honorable Keith Kelly
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SUMMIT COUNTY

Approved as to form and content:



Kirkpatrick MacDonald
Petitioner Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2011, I caused to be served via email the foregoing **DECREE OF DIVORCE** to the following:

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Park City, UT 84060

Petitioner

Kari J Peck

Addendum E

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

KIRKPATRICK MacDONALD, Petitioner, v. LEE ANNE MacDONALD, Respondent.	: : : : : : : : :	**STIPULATION AND SETTLEMENT AGREEMENT** Civil No. 104500031 Judge Keith Kelly

Petitioner, Kirkpatrick MacDonald (Kirk"), and Respondent, Lee Anne MacDonald ("Lee Anne"), (collectively the "Parties") hereby enter into this Stipulation and Settlement Agreement ("Agreement") in full and final resolution of the issues in the above named matter and hereby jointly move the Court for the entry of Findings of Fact and Conclusions of Law and a Decree of Divorce incorporating the terms of this Agreement.

RECITALS

1. The Parties enter into this Agreement freely and voluntarily and with the intent to be bound thereby.

2. This is the final and only agreement between the Parties, and no other

representation, oral or in writing, shall be binding upon them unless presented to and ordered by this Court.

3. The Parties mediated this matter on December 16, 2010 with retired Judge Judith Billings and reached agreement on the terms set forth herein. Each party has consulted with attorneys and/or advisors of their choosing and has been duly advised regarding the terms of this Agreement.

STIPULATION

Provisions Relating to Jurisdiction

1. Petitioner is a bona fide and actual resident of Summit County, State of Utah, and has been for more than three months prior to the commencement of this action.

2. Respondent and Petitioner are husband and wife, respectively, having been married on June 22, 1991 in Orange County, New York.

Provisions Relating to Grounds

3. The Parties have experienced irreconcilable differences which prevent the continuation of the marriage, and the parties should be awarded a mutual divorce from the other on those grounds.

4. No children have been born as issue of the marriage and none are expected.

Provisions for Property Division and Financial Settlement

5. The Parties have acquired substantial assets, including real property, personal property, and business interests during the course of the marriage which should be divided as set forth below.

Real Property Awarded to Lee Anne

6. Lee Anne shall be awarded all right, title and interest to the real property identified as Lot 1 and Lot 49 at The Preserve development in Summit County. Kirk shall deliver clear title and convey these lots free and clear of any encumbrances, liens, or claims.

7. Lee Anne shall also be awarded all right title and interest to the yet to be platted lot in The Preserve to which Kirk is entitled free and clear of any encumbrances, liens, or claims. Kirk shall convey clear title to this lot to Lee Anne as soon as the lot is conveyed to Kirk. Lee Anne shall have an option to receive a promissory note from Kirk in the amount of $300,000 in exchange for her right to receive the lot. If such an election is made then the promissory note shall be secured by trust deed or mortgage on residence located in Cornwall, New York. The note shall be due and payable upon the earlier of January 1, 2014 or the sale of the Cornwall residence. The note shall bear interest at a rate of 2% per annum which interest shall commence on the date the option is exercised. Kirk shall be entitled to refinance the existing debt on Cornwall so long as he informs Lee Anne in writing of his intent to do so and the refinance does not result in an increase in the principal amount of the debt encumbering that property.

8. Lots 1, 49 and the yet to be platted lot are referred to collectively as "The Preserve Lots."

9. Kirk shall pay the Homeowner's Association fees and property taxes on The Preserve Lots for a period of five years commencing January 1, 2011 or until Lee Anne sells one of The Preserve Lots. Kirk's payment of the HOA fees and property taxes shall be treated as a loan to Lee Anne, and Lee Anne shall reimburse him for those payments without interest at the time she sells one of The Preserve Lots.

Real and Other Property Awarded to Kirk

10. Except as specifically provided above, all right, title, and interest in any other real property, however titled, shall be awarded to Kirk free and clear of any claim of interest by Lee Anne.

11. Except as set forth below, each party shall be awarded all other property in their name including any business interests, bank accounts, retirement accounts, vehicles, personal property, furniture, furnishings and the like.

Financial Settlement Payment to Lee Anne

12. Kirk has paid Lee Anne the sum of $200,000 without tax obligation or liability to Lee Anne.

13. Kirk shall pay Lee Anne an additional property settlement of $103,500 to be paid in monthly installments commencing on January 1, 2011 and paid on the 1st day of each month. The monthly payment shall be $4500 through March 2012 and then shall decrease to $4000 on April 1, 2012 and shall continue at that level until the last payment in December 2012. As of the date of this Agreement, Kirk is current in such payments.

Debts

14. Each Party shall assume, pay and hold the other harmless on any and all debts in that party's name.

Provisions for Alimony

15. Kirk has been paying and continues to pay Lee Anne alimony in the amount of $2,000 per month since January 1, 2011 on the 1st day of the month and shall continue at that level through December 2012. Commencing January 1, 2013, alimony shall increase to $6000

per month as a result of the loss of monthly payments from the property settlement and shall continue to be paid at that level by automatic bank transfer on the 1st day of the month for a period of ten (10) years from January 1, 2011 (final payment in December 2020). Alimony shall terminate upon the earlier of Lee Anne's remarriage, cohabitation or death. Any unpaid alimony shall be an obligation of Kirk's estate in the event he predeceases Lee Anne. In the future the Parties may make agreements about whether the alimony shall be taxable to Lee Anne.

Miscellaneous Provisions

16. In the event of Kirk's death prior to satisfying any and all of the obligations set forth in this Agreement, any unsatisfied obligations shall become the obligations of his estate.

17. In the event of a dispute regarding any provision of this Agreement the Parties shall attempt at least one mediation session with Judith Billings or another mutually agreed upon mediator prior to seeking relief from the Court. The expense of the mediator shall be divided equally.

18. This Agreement and the resulting Decree of Divorce were prepared by the attorney for Lee Anne solely as a matter of convenience, and in the event of ambiguity, neither party shall be entitled to any presumption or because of this.

19. Each party shall execute and deliver to the other deeds to be held in escrow pending the entry of the Decree of Divorce.

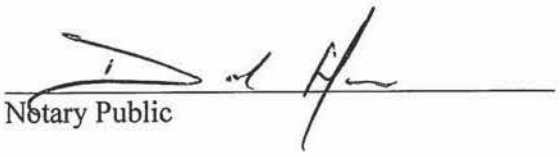
20. Respondent shall be restored to her former name of Lee Anne Fahey if she so desires.

21. Each party shall mutually released from their marital vows.

Dated this 18th day of October, 2011.

Kirkpatrick MacDonald, Petitioner

SUBSCRIBED AND SWORN before me, a notary public, this 18th day of October, 2011.



Notary Public

DAVID HAN
Notary Public - State of New York
NO. 01HA6243917
Qualified in Queens County
My Commission Expires 6/27/2015

Dated this 3rd day of November, 2011.

Lee Anne MacDonald

Lee Anne MacDonald, Respondent

SUBSCRIBED AND SWORN before me, a notary public, this 3rd day of November, 2011.

ED ALLENDORF
Commission # 1944569
Notary Public - California
San Francisco County
My Comm. Expires Jul 17, 2015

Ed Allendorf

Notary Public

Dated this 4th day of November, 2011.

CLYDE SNOW & SESSIONS

Matthew A. Steward
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2011, I caused to be served via first class mail, postage prepaid, the foregoing **STIPULATION AND SETTLEMENT AGREEMENT** to the following:

Kirkpatrick MacDonald
3407 Big Spruce Way
Park City, UT 84060

Kari J Peck

Matthew A. Steward (#7637)
CLYDE SNOW & SESSIONS
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Attorneys for Respondent

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

KIRKPATRICK MacDONALD, Petitioner, v. LEE ANNE MacDONALD, Respondent.	: : : : : : : : :	**STIPULATED MOTION FOR ENTRY OF DECREE** Civil No. 104500031 Judge Keith Kelly

Petitioner and Respondent, by and through their counsel, move the Court for entry of the (i) Findings of Fact and Conclusions of Law and (ii) Decree of Divorce submitted herewith.

DATED this 5th day of December, 2011.

CLYDE SNOW & SESSIONS

MATTHEW A. STEWARD
Attorneys for Respondent

DATED this 5th day of December, 2011.

KIRKPATRICK MacDONALD
Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2011, I caused to be served via email the foregoing **STIPULATED MOTION FOR ENTRY OF DECREE** to the following:

Kirkpatrick MacDonald
3407 Big Spruce Way
Park City, UT 84060

Petitioner

Kari J Peck