IN THE UTAH SUPREME COURT

KIRKPATRICK MACDONALD, Appellant, v. LEE ANNE MACDONALD (NKA FAHEY), Appellee.	Supreme Court Case No. 20170789-SC Court of Appeals Case No. 20150785-CA Third District Court Case No. 104500031

BRIEF OF APPELLEE

ON WRIT OF CERTIORARI
FROM DECISION BY THE UTAH COURT OF APPEALS, NO. 20150785-CA,
AFFIRMING JUDGMENT ENTERED BY THE THIRD DISTRICT COURT,
HONORABLE KARA PETTIT, NO. 104500031

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Pursuant to Utah R. App. P. 24(a)(12)(B):

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CURRENT AND FORMER PARTIES

Appellee/Respondent Lee Anne MacDonald n/k/a Fahey is represented by Matthew A. Steward and Shannon K. Zollinger of Clyde Snow & Sessions.

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

There were no parties in earlier proceedings that are not parties to this appeal.

INTRODUCTION

This Court granted certiorari review of the "sole issue" presented in Husband's Petition, that is, whether the Court of Appeals correctly interpreted the phrase, "foreseeable at the time of divorce" for purposes of modifying alimony under Utah Code Ann. § 30-3-5(8)(i)(i) (or, the "Statute") (allowing modifications where there has been "a substantial material change in circumstances not foreseeable at the time of the divorce"). The Court of Appeals construed the pertinent term, "foreseeable," according to its plain and unambiguous meaning, i.e. "reasonably capable of being anticipated at the time the decree was entered[.]" *MacDonald v. MacDonald*, 2017 UT App 136, ¶12, 402 P.2d 178.

This Court need only review the Court of Appeals' application of the rules of statutory construction in order to affirm *MacDonald*. Husband ignores this controlling rule of statutory interpretation and instead argues that the plain meaning interpretation "upset" the "traditional test" of foreseeability, developed over "decades of case law." (Aplt. Br. at 1.) This "test," according to Husband, requires a showing that the change was "contemplated in the decree itself." However, this common law standard was

abrogated by the legislature's adoption of the "foreseeable" standard in 1995. This Court should reject Husband's purported standard of foreseeability because it is inconsistent with the Statute, which controls.

The entire premise of Husband's argument is also flawed. Prior to 1995, there was no consistently applied "traditional test" for foreseeability that was capable of being "disrupted" by *MacDonald*. And, contrary to Husband's claim, after 1995, the legislature did not implicitly adopt the "contemplated in the decree itself" standard, merely because some courts passively continued to cite to common law in lieu of, or as interchangeable with, the term "foreseeable." Indeed, none of these courts addressed the construction of the term "foreseeable," or reconciled this term with prior common law.

Furthermore, post-1995 case law has not consistently applied the "contemplated in the decree itself" standard. At least two appellate courts preceding *MacDonald* applied a plain language interpretation of "foreseeable," after which the legislature amended the alimony statute without disturbing this term. Husband cannot pick and choose which cases the legislature has implicitly approved of. His attempt to elevate disparate case law decisions above the plain language of a statute is unavailing.

As demonstrated herein, *MacDonald* addressed and resolved any confusion over the meaning of "foreseeable" by, first, setting forth a correct and deliberate construction of the term in light of the 1995 amendment, and second, acknowledging and accounting for seemingly inconsistent interpretations from other appellate panels. This Court should affirm this construction of "foreseeable," which is the "sole issue" before it.

The Court of Appeals also affirmed Judge Kara Pettit's (the "District Court") denial of Husband's Petition to Modify Decree of Divorce where it found, in its discretion and based on factual findings after a two-day trial, that Husband's alleged change in circumstances was, in fact, "foreseeable" under the "contemplated in the decree itself" standard. Thus, even if this Court reverses the Court of Appeals' interpretation of "foreseeable" in favor of the "contemplated in the decree itself" standard, it should summarily affirm the denial of Husband's Petition to Modify on *MacDonald*'s additional ground that the alleged change was contemplated in the "express terms" of the Decree. *MacDonald*, ¶19. Husband's principal brief seeks to challenge the factual underpinnings of this holding for the first time before this Court, which is outside the scope of certiorari review. Husband's arguments, to the extent the Court reaches them, are otherwise self-defeating because they do not defer to the applicable standard of review, and they are factually and legally without merit—as the courts have found twice already.

STATEMENT OF THE ISSUE FOR REVIEW

Issue: Whether the Court of Appeals correctly construed the phrase, "foreseeable at the time of the divorce" in Utah Code Ann. § 30-3-5-8(i)(i), which provides: "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."

Standard of Review: "On certiorari, [this Court] review[s] the decision of the court of appeals for correctness, giving no deference to its conclusions of law." *Pyper v. Bond*, 2011 UT 45, ¶13, 258 P.3d 575, 578.

Preservation: Pursuant to Utah R. App. 51(b)(4), the foregoing issue was the "sole issue" presented and preserved in Husband's Petition for Writ of Certiorari. (Petition for Writ of Certiorari, ("Cert. Petition") at 4.)[1]

STATEMENT OF THE CASE

I. Statement of Facts and Procedural History

Husband Petitioned for Divorce and the Parties Negotiated a Stipulated Agreement

Wife and Husband married on June 22, 1991. (R.19 at ¶2.) Husband filed a Petition for Divorce on February 10, 2010. (R.1-3.) On December 16, 2010, the parties engaged in a mediation with retired Judge Judith Billings (R.19 at ¶3), and thereafter reached an agreement on the terms of a mutual divorce, which were memorialized into a Stipulation and Settlement Agreement ("Agreement") signed by both parties. (R.18-24.)

Husband Agreed to Pay Alimony to Wife

The Agreement required Husband to pay alimony to Wife for a period of ten years, to expire in December 2020, provided that "[a]limony shall terminate upon the earlier of [Respondent's] remarriage, cohabitation or death." (R.21-22 at ¶15.) The Agreement set the amount of alimony at $2,000 per month until December 2012, at

[1] ("Question Presented: Whether the court of appeals erred in rejecting decades of case law interpreting the phrase "foreseeable at the time of divorce" in section 30-3-5 to mean contemplated in the divorce decree, where the legislature has amended section 30-3-5 numerous times without disturbing those judicial interpretations. In addressing ***this sole issue***, the court should clarify (i) when appellate courts should request supplemental briefing before deciding an issue the parties did not brief, (ii) that panels of the court of appeals must strictly follow the decisions of prior panels, and (iii) that whether "foreseeability" presents a question of law determined by the language of the decree or a question of fact concerning the circumstances at the time of divorce.") (Emphasis added.)

which time it increased to $6,000 per month, commencing January 1, 2013. (*Id*.) The amount of alimony was a negotiated and stipulated sum, as the Agreement contained no recitals, terms, conditions or references pertaining to Wife's purported needs with respect to the negotiated sum. (R.18-24.)

The Agreement Separately Provided for the Division of Real Property to the Parties

The Agreement separately provided for the award of real property to both parties. Wife was awarded all right, title and interest to three real property lots of the Preserve development in Summit County, consisting of Lot 1, Lot 49 and a yet-to-be-platted lot, collectively referred to as the "The Preserve Lots." (R.20 at ¶¶6-8.) This section of the Agreement made two explicit references to Wife's anticipated sale of Lot 1. (R.20 at ¶9, "[Husband] shall pay the Homeowner's Association fees and property taxes on The Preserve Lots [defined to include Lot 1, *see* (R.20 at ¶8)] 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***.") (Emphasis added.) Husband received all right, title and interest to all other real properties. (R.21 at ¶10.)

The Agreement Did Not Condition Alimony on the Real Property Division

There were no recitals, terms, conditions, or references in the Agreement conditioning alimony upon the parties' real property division in any respect. (R.18-24.)

The Real Property Division Did Not Purport to Be of Even or Equal Monetary Value

There were no recitals, terms, conditions or references in the Agreement with respect to the purported monetary value of Lot 1, The Preserve Lots, or the real property awarded to Husband. (R.18-24.) There were also no recitals, terms, conditions or references in the Agreement that the stipulated settlement terms were intended or agreed to represent an equal or even division of the monetary value of the parties' marital estate. (R.18-24.) Rather, Wife desired property that was free and clear of any encumbrances, liens, or claims and desired to avoid protracted litigation over disputes about assets in the marital estate. (R.186 at ¶¶9-10.) Husband confirmed that Wife desired "only unleveraged land[]" (R.115), and the Agreement thus awarded The Preserve Lots to Wife ". . . free and clear of any encumbrances, liens, or claims." (R.20 at ¶6.)

The Agreement was Integrated and Unambiguous

The Agreement provided: "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." (R.18-19 at ¶2.) The District Court later ruled that the Agreement was not "facially ambiguous" (R.1337:1-2) and recognized the "integration clause" in paragraph 2. (R.1337:8-10; *see also* R.1340:22-25; R.1341:1-4.)

Judge Kelly Incorporated the Agreement into the Decree of Divorce as a Fair and Equitable Division of the Marital Estate "Under the Circumstances"

On January 6, 2012, Judge Keith Kelly of Third District Court entered the Decree of Divorce and Findings of Fact and Conclusions of Law, incorporated by reference into the Decree. (R.38-47.) The final Decree incorporated all terms of the parties' Agreement.

(R.38-43, 45.) The Decree, mirroring the Agreement, did not purport to accept the Agreement as an equal or even division based on monetary values or the need of the parties, but rather as "fair and equitable under the circumstances." (R.45.)

Wife Sells Lot 1 of The Preserve Lots as Contemplated in the Agreement and Decree

On January 25, 2012, Wife sold Lot 1, as contemplated in the Decree and the Agreement, for a gross pre-tax sale price of $1,425,000. (R.547.) In December of 2011, Husband initially received the offer to purchase Lot 1 because the deed had not yet been transferred to Wife pending entry of the Decree; however, Husband acknowledged at the time that Wife owned Lot 1 and that Lot 1 was not his property to sell. (R.875:9-25; R.876:4-14, 25.) Wife received the proceeds from the sale of Lot 1 and has since used those proceeds to supplement her alimony income, as she expected to do. (R.1150:3-10.)

Husband Attempts to Undo the Agreement and Set Aside the Decree

On April 6, 2012, Husband moved to set aside the Decree, pursuant to Utah R. Civ. P. 60(b), on the grounds that the sale price of Lot 1 was different from its anticipated value. (R.131-40.) In response, Wife pointed out that the Agreement was not predicated on real property values, did not contain any stipulated values, and did not purport to be an equal distribution of assets. (R.164.) Wife also noted that any purported "mistake" about the expected sales price of Lot 1 is not a basis to set aside a stipulated property division under *Robinson v. Robinson*, 2010 UT App 96. (R.174-177.) Husband's motion was denied by Judge Ryan M. Harris of Third District Court. (R.454-55.) The minute entry for the hearing read: "*Robinson* does govern in this situation. The parties agreed to divide

specific assets, and both took a risk that the value of the properties might change. The motion is denied." (R.445.) Husband did not appeal that ruling.

Husband Repackages His Failed Rule 60(b) Motion as a Petition to Modify Alimony

On January 24, 2013, Husband made a second attempt to disturb the Decree based on Wife's sale of Lot 1. He reformulated his Rule 60(b) motion as a Petition to Modify Decree of Divorce ("Petition to Modify"), this time claiming that the sale of Lot 1 resulted in a financial "windfall" to Wife, and her use of the sale proceeds constituted a substantial material change of circumstances such that Husband should avoid paying alimony as stipulated in the Agreement and ordered by the Decree. (R.257-59.)

The District Court Finds that the Parties Never Stipulated to, or Relied Upon, a Monetary Value of Lot 1 and Husband's Belief in this Regard Was Unilateral

Husband testified at the trial on his Petition to Modify that in the negotiations he speculated that Wife would not sell Lot 1 unless the sale price was $1.5 million, "which was $700,000 above what ***I thought*** it was worth." (R.877:2-5) (emphasis added.) To be clear, Wife never agreed on the value of Lot 1, and its value was not a predicate for the Agreement. (R.1149:17-25; R.1150:1-2.) Indeed, Wife testified that Husband's occasional claim at trial that the parties had agreed to certain values as a predicate for the Agreement was "not truthful," and that she never agreed because of the "difficulty" of "his values, and papers, and reams of his accounting and his papers." (R.1146:20-25; R.1147:1-4.) As she explained, "[I]n the files are papers where he says that the three lots that I received were valueless. Then they were worth a lot of money. Then they were worth a little bit of money. It moved all over the map, depending on what he thought he

wanted to take." (R.1147:5-9.) Thus, while Husband testified that ***he alone*** prepared spreadsheets of the parties' assets and liabilities for the mediation (R.862:5-6), a stipulation of the value of any asset, including Lot 1, was not included as part of the settlement and Decree. (R.1149:17-25; R.1150:1-2; R.18-24; R.45-47; R.186 at ¶8.)

Furthermore, at trial, and upon Wife's counsel objecting to Husband's purported testimony as to the values of the real properties, Husband's counsel clarified, on two occasions, that Husband's testimony as to values pertained only to "his understanding" of those values or values "he had in his mind"—not the parties' understanding. (R.879:20-21; R.862:14-24.) The District Court agreed, finding that the Agreement was facially unambiguous and integrated (R.1340:22-25; R.1341:1-4), that the Agreement did not set forth any expected sales price or income Wife was contemplated to derive from the sale of Lot 1 (R.819 at ¶11), and that any anticipated value or sales price of Lot 1 was the unilateral anticipation of Husband. (R.819 at ¶10; R.821 at ¶14.)

The District Court Denies Husband's Petition to Modify

Accordingly, after a two-day trial, Judge Kara Pettit of Third District Court denied Husband's Petition on June 27, 2015. (R.816-24.) The Order included the following:

> The legal standard applied by the District Court on Husband's Petition to Modify:
>
> ▪ The governing standard to modify alimony is set forth in Utah Code Ann. § 30-3-5(8)(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." (R.819 at ¶8.)

- Utah case law has interpreted that statute to require that in order for a change of circumstance to not be foreseeable it must be something that was "not contemplated." (*Id*. at ¶9.)

- To make the determination, the District Court looks to the language of the Decree itself and preferably provisions in the Decree that substantiate whether the change was contemplated. (*Id*. at ¶10.)

The change of circumstances alleged by Husband:

- The alleged change in circumstances was two-fold: (a) "that the sales price of Lot 1 was more than what [Husband] anticipated" and (b) "that [Wife's] income increased from the time of the Decree to the present time, or at the time of the [Petition], because of the sale of Lot 1 and her ability to invest those proceeds and earn income on those proceeds was not contemplated." (*Id*.)

The pertinent terms of the Decree:

- Despite whatever value Husband may have anticipated Lot 1 to be worth, "The Decree did not set forth an expected sales price for Lot 1 or any of the lots," and "also did not set forth an expected income number that [Wife] would derive due to her investment of the lot sales proceeds, or how much she might make on selling the lots." (*Id*. at ¶11.)

- Paragraph 9 of Agreement (incorporated by 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." (*Id*.)

and

The District Court's finding that sale was contemplated and was to have no effect on the stipulated alimony:

- "The Decree expressly contemplated that [Wife] 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." (R.822 at ¶17.)

II. Disposition Below

Husband filed a Notice of Appeal of the District Court's denial of his Petition to Modify on July 27, 2015. (R.825-26.) On June 9, 2016, after briefing concluded but prior

to oral argument, the Court of Appeals issued *Fish v. Fish*, 2016 UT App 125, 379 P.3d 882. Wife circulated the opinion as supplemental authority on the meaning of "foreseeable" in the Statute, as *Fish* clarified that the standard was whether the alleged change in circumstances was, in fact, "foreseeable," and "not whether the alleged change in circumstances was actually foreseen and accounted for in a divorce decree." (*See* Addendum A.) Wife's position was "thus stronger" than the purported standard that the change be contemplated in the divorce decree. (*Id.*)

On August 3, 2017, the Court of Appeals affirmed the decision of the District Court on two separate grounds: First, consistent with *Fish*, it applied the plain meaning of the term "foreseeable," as distinguished from "foreseen," and held that it was ". . . 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." *MacDonald,* ¶18. In this regard, "[i]t is hardly a stretch to foresee that if real property were liquidated the proceeds of that sale might be deposited in [Wife's investment] account for investment purposes." *Id.*

Second, the Court of Appeals agreed with the District Court that the alleged change in circumstances ***was also contemplated in the Decree itself***: "As the trial court noted, the express terms of the Agreement, and ultimately the Decree . . . leaves no doubt that the sale of the Property and its resulting proceeds, however they would be used in the future, were foreseeable." *Id.* ¶19. Thus, "[o]n these facts, the trial court did not exceed its discretion when it concluded that [Husband] failed to show an unforeseeable substantial material change in circumstances from the time of the Decree." *Id.*

On December 12, 2017, this Court granted Husband's Cert. Petition, which presented the "sole issue" of whether the Court of Appeals correctly interpreted the term "foreseeable" in section 30-3-5(8)(i)(i). (Cert. Petition, at 4.)

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly applied a plain language analysis to the term "foreseeable" and deemed its meaning to be unambiguous. At least two other recent Court of Appeals panels have "confirm[ed] this interpretation." *MacDonald*, ¶13. Husband asks this Court to disregard the term used in the Statute, in favor of the common law standard that the change was "contemplated in the decree itself."

Husband's favored interpretation fails for several reasons. First, his reliance on the "*Christensen* rule" of statutory construction is completely misplaced. The plain language controls, first and foremost, which Husband ignores. The *Christensen* rule applies where there have been prior, authoritative and deliberate judicial constructions of statutory terms—by this Court, for example, as it had done in *Christensen* and its progeny. That threshold showing is not met here because no such court has purported to analyze and construe "foreseeable" as equivalent in meaning to "contemplated in the decree itself." The *Christensen* rule is also inapplicable because at least two appellate decisions consistent with the *MacDonald* interpretation were issued before the legislature's most recent amendment. Under Husband's logic, the legislature must have now implicitly adopted the interpretation of these cases and *MacDonald*—not his alternative interpretation. Post-1995 case law has admittedly been inconsistent, which is why the

Christensen rule is not a helpful tool in this case and why the plain language of the Statute is the best evidence of its meaning.

Husband's favored interpretation is also not rooted in any consistent precedent. That is, there was no "traditional test" for foreseeability in alimony modifications before the 1995 codification, which is not surprising because the codification was intended to create a cohesive and formal statement to address the complex body of law that had developed in the courts. The legislature's 1995 addition of "foreseeable" created a new standard. The Floor Debates for the amendment reveal the origin and intent of the "foreseeable" addition as consistent with the *MacDonald* interpretation.

Husband's purported concerns that *MacDonald*'s plain language interpretation will disrupt the functioning of future decrees and petitions to modify are illusory and unfounded. *MacDonald* constructed the plain meaning of a statutory term. It relied on the District Court's factual findings to support its holding in this case, just as future cases will apply the plain meaning of "foreseeable" to the factual circumstances before them.

Finally, Husband's attempt to challenge the Court of Appeals' separate affirmance of the District Court under the "contemplated in the decree" standard should be swiftly rejected by this Court. Husband's Cert. Petition did not challenge the District Court's discretion and factual findings in this regard, or the Court of Appeals' affirmance of the District Court. Husband's substantive arguments otherwise fail to observe the correct standard of review, paying no deference to the District Court's discretion. Husband proceeds to rehash arguments he made to the District Court, relying on his self-serving and unsupported statements that directly contradict the District Court's findings in

denying the Petition to Modify, but which he represents to this Court as presumed fact. The most egregious example is Husband's repeated representations that the parties jointly anticipated or agreed to a value of Lot 1, and that the Decree was premised on an equal division of the marital estate or Wife's needs. He does so in order to make the claim that Wife's sale of Lot 1 was an unexpected "windfall." It was not, because the parties did not premise their settlement on a division of monetary values—this was a fact adjudicated by the District Court and affirmed as within its discretion. Husband's attempt to re-litigate facts is not properly before this Court.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONSTRUED THE PHRASE "FORESEEABLE AT THE TIME OF THE DIVORCE" IN UTAH CODE ANN. § 30-3-5(8)(i)(i).

The Court of Appeals correctly construed "foreseeable" according to its plain and unambiguous meaning, and ruled consistently with recent appellate panels. The sole extrinsic aid—the "*Christensen* rule"—relied on by Husband to undermine the plain meaning analysis is inapplicable and ultimately not helpful in this case. Similarly, Husband's claim that *MacDonald* will disturb an illusory "traditional test" for alimony modifications is entirely unfounded. In fact, the legislature adopted "foreseeable" as an entirely new term in 1995 and *MacDonald*'s interpretation is consistent with its intent.

A. The Court of Appeals, Consistent with Prior Panels *Fish* and *Earhart,* Correctly Construed "Foreseeable" According to the Plain and Unambiguous Meaning of the Term.

"[This Court's] 'primary responsibility in construing legislation is to give effect to the intent of the Legislature." *Camp v. Office of Recovery Servs. of Utah Dep't of Soc.*

Servs., 779 P.2d 242, 245 (Utah Ct. App. 1989) (quoting *Christensen v. Industrial Comm'n*, 642 P.2d 755, 756 (Utah 1982)). "The best indicator of legislative intent is the plain language of a statute." *Id*. (Internal citation omitted; finding the language in the statute at issue to be "unequivocal"). Moreover, "[t]he general rule of statutory construction is that ***where the statutory language is plain and unambiguous, we do not look beyond the language's plain meaning to divine legislative intent***." *Horton v. Royal Order of Sun*, 821 P.2d 1167, 1168 (Utah 1991) (emphasis added) (internal citations omitted).

The Court of Appeals adhered to the rules of statutory construction, acknowledging that "[w]e construe statutes according to their plain meaning if possible." *Id*. ¶10. In this regard, *MacDonald* quotes *Bagley v. Bagley*, 2016 UT 48, ¶10, 387 P.3d 1000 (alterations in original) (all internal citations and quotations omitted):

> 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. We also presume[ ] that the expression of one [term] should be interpreted as the exclusion of another[,].... [thereby] presuming all omissions to be purposeful. ***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.

(Emphasis added). *MacDonald* then sets forth the dictionary meaning of the term "foreseeable," distinguishes its "linguistic and structural position of [the] term in the statute" from the "past tense" of the term, "foreseen," and ultimately concludes: "[T]he intent of the 1995 amendment 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* [emphasis in original]—***as opposed to actually foreseen***—'at the time of the divorce.'" *Id*. ¶12 (quoting U.C.A. § 30-3-5(8)(i)(i)). (Emphasis added). There was no need, nor was it appropriate, to resort to extrinsic aids to divine legislative intent where the plain meaning of "foreseeable" was unambiguous. *See, e.g., Bagley, supra*; *Horton*, 821 P.2d at 1168-69 (court only required to resort to extrinsic aids for statutory interpretation, including the principle that legislative amendments reinforce legislative intent, where the statute is ambiguous).

Husband does not acknowledge the rules of statutory construction. Husband also does not dispute that the term "foreseeable" carries a plain and unambiguous meaning, as distinguished from its past tense, "foreseen." The Court of Appeals erred, according to Husband, by not blindly accepting a prior panel's presumption, without analysis in adopting the parties' agreement in that case, that the term "foreseeable" added by the legislature in 1995, did "not alter the efficacy of our jurisprudence requiring evidence that the change was '***foreseen***' at the time of the divorce . . ." (Aplt. Br. at 25-26, quoting *Bolliger v. Bolliger*, 2000 UT App 47, ¶11, n.3.) (Emphasis added.) Husband places special emphasis on the *Bolliger* court's conclusion, that ". . . said jurisprudence is sound and grounded in principles of res judicata." (*Id*.) However, apart from its summary conclusion, the court in *Bolliger* did not engage in a statutory construction analysis. It did not explain the rationale behind its conclusion that "res judicata" dictated the meaning of the term "foreseeable" adopted for the first time by ***statute*** in 1995, or at a minimum, acknowledge the lingual distinction between the terms "foreseeable" and "foreseen." *See*,

e.g., Bolliger. In short, ". . . the *Bolliger* court did not address whether the 1995 amendment altered the applicable standard." *MacDonald*, ¶16.

Conversely, *MacDonald* squarely addressed the meaning of the statutory addition of "foreseeable" in 1995, with supporting analysis and rationale. *See id*. ¶¶9-16. While horizontal stare decisis requires a court of appeals to follow its own prior decisions as a general proposition, "[the doctrine] does not, however, require that a panel adhere to its own or another panel's prior decisions with the same inflexibility as does vertical stare decisis." *State v. Menzies*, 889 P.2d 393, 399, n.3 (Utah 1994) (internal citations omitted). "Instead, although it may not do so lightly, a panel may overrule its own or another panel's decision where the decision is clearly erroneous or conditions have changed so as to render the prior decision inapplicable." *Id*. (Internal quotation and citation omitted). *MacDonald* did not deviate from prior, deliberate interpretations of the term "foreseeable," but where its interpretation is inconsistent with *Bolliger* or prior panel decisions as a practical matter, it was permitted to deviate.

In any event, *MacDonald* is not the outlier Husband portrays it to be, as "[r]ecent cases from this court confirm [the *MacDonald* panel's] interpretation." *MacDonald*, ¶13. *See also id*. ¶¶13-15 (citing and discussing *Fish v. Fish*, 2016 UT App 125, 379 P.3d 882 and *Earhart v. Earhart*, 2015 UT App 308, 365 P.3d 719).

In *Fish*, the husband moved to modify alimony based on an increase in the wife's income, relying on a pre-1995 standard that the increase was "not contemplated by the divorce decree itself." *Id*. ¶18. In response, the *Fish* court clarified 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." *Id*. ¶19 (citing U.C.A. § 30-3-5(8)(i)(i)). (Emphasis added). The court further distinguished the pre-1995 standard in holding that "[i]t follows that an increase in income ***not actually contemplated by the divorce decree*** does not automatically require a finding that a [change under the Statute] has occurred." *Id*. In other words, "contemplated by the divorce decree" is not the operative test; it is whether the alleged change is "foreseeable." Husband tries to limit *Fish* as only "stand[ing] for the proposition that no Utah authority *requires* a district court to *find a change occurred*." (Aplt. Br. at 28.) But *Fish*'s discussion as to whether a ***substantial change*** occurred is not mutually exclusive with its explicit clarification of the meaning of the term ***foreseeable***. Husband acknowledges this clarification. (Aplt. Br. at 27, quoting *Fish* ¶19.) His only criticism of the merits of *Fish* is that it did not "reconcile" the plain meaning of "foreseeable" with pre-1995 case law. (Aplt. Br. at 28.) Of course, *MacDonald* did exactly that. *See MacDonald*, ¶¶10-16.

MacDonald also properly cited *Earhart* as congruent with its interpretation of "foreseeable." In that case, the court reduced the husband's alimony obligation based on a drop in income caused by the sudden loss of a client. *Earhart*, ¶¶13-14. *Earhart*'s conclusion, based on the factual circumstances in that case, is entirely consistent with the interpretation of "foreseeable" in the Opinion, i.e. "not reasonably capable of being anticipated at the time the decree was entered." *MacDonald*, ¶12. Moreover, *Earhart* did not mention or affirm the pre-1995 "contemplated in the decree" standard in its analysis.

In sum, Husband cannot reconcile *Fish* and *Earhart* with the purported "traditional test" he advocates, because they clearly adhered to a plain meaning interpretation consistent with *MacDonald*. It is telling that Husband alternatively disregards both cases as an "anomaly" and claims this Court should overrule both opinions in addition to *MacDonald*. (Aplt. Br. at 27.) This Court should decline to do so because these cases properly interpreted "foreseeable" according to its plain and unambiguous meaning.

B. The *Christensen* Rule Does Not Support Husband's Favored Interpretation of "Foreseeable."

Assuming *arguendo* that it is appropriate to resort to other tools of statutory interpretation, Husband applies only one such rule: the "*Christensen* rule." According to Husband, *Christensen v. Indus. Comm'n*, 642 P.2d 755, 756 (Utah 1982) provides 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." (Aplt. Br. at 2, quoting *id*.)

Husband's reliance on the *Christensen* rule is misplaced for at least three reasons. First, Husband applies the *Christensen* rule without regard to the progressive framework of statutory construction, pointedly ignoring the obligation to first construe the plain meaning of "foreseeable." Second, the *Christensen* rule applies where there have actually been "prior judicial constructions" of the statutory language at issue. *See id*. at 756. *See, e.g., Christensen, supra* at 756-57 (noting that "this Court" had construed the statutory sentence at issue and two years after that decision, the legislature amended the statute

without altering the sentence construed in that decision).[2] This Court has not deliberately construed the term "foreseeable" in the Statute. Similarly, none of the post-1995 appellate cases Husband cites as applying the "contemplated in the decree itself" standard construed the statutory language. These cases either (1) summarily cited and proceeded under *Bolliger*[3] without further analysis of the term "foreseeable";[4] or (2) summarily cited and proceeded under standards in certain pre-1995 decisions without reference to the current Statute or an attempt to reconcile these common law standards with the plain

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[2] The cases Husband cites as applying *Christensen* follow suit. *See Rocky Mountain Helicopter, Inc. v. Carter*, 652 P.2d 893, 895-96 (Utah 1982) (this Court had "squarely addressed" and interpreted statutory section subsequently re-enacted by legislature without substantive change, indicating its intent to approve and adopt of "the conclusive presumption found earlier by this Court" under the rules of statutory construction); *Gutierrez v. Medley*, 972 P.2d 913, 916–17 (Utah 1998) (legislature amendments constituted a significant overhaul of the statute at issue and had incorporated prior decision by this Court, and, "Thus, [due to Supreme Court construction of the statute in a prior case], the legislature knew that this court viewed the use of the subpoena power as only occurring prior to the filing of formal charges. Because the legislature did not amend the Act to specifically state that the subpoena power could be used after the filing of charges, we conclude that this court's view that it could not be so used is consistent with legislative intent"); *Bylsma v. R.C. Willey*, 2017 UT 85, ¶¶18-20 (noting that statute is "wholly consistent with our traditional strict products liability doctrine," that such principles "have been specifically left untouched by the legislature[,]" and the "legislature's clearly expressed intent to preserve strict products liability as it was understood in our law").

[3] As explained above, the *Bolliger* court did not construe the term because the parties in *Bolliger* agreed to utilize a "foreseen" standard, which the court summarily accepted without analysis.

[4] *See Young v. Young*, 2009 UT App 3, ¶¶9-10, 201 P.3d 301; *Catten v. Catten*, 2002 UT App 380U, *1; *Smith v. Smith*, 2005 UT App 275U, *1; *Nelson v. Nelson*, 2004 UT App 254, ¶2, 97 P.3d 722; *Busche v. Busche*, 2012 UT App 16, ¶12, 272 P.3d 748; *Christensen v. Christensen*, 2017 UT App 120, ¶20, 400 P.3d 1219 (citing *Diener v. Diener*, 2004 UT App 314, ¶7, 98 P.3d 1178, which derived "not contemplated in the decree itself" from *Boyce v. Goble*, 2000 UT App 237, ¶14, 8 P.3d 1042 and *Bolliger*).

meaning of the term, "foreseeable."[5] Thus, there has been no deliberate construction by this Court, or the Court of Appeals, for the legislature to condone, approve of, or adopt.

Third, Husband's reliance on the *Christensen* rule is problematic even if knowledge of disparate judicial decisions in lower courts is imputed to the legislature. By definition, the *Christensen* rule relies on the ***absence*** of legislative action or expressions of intent in lieu of affirmative evidence. Husband argues that the legislature has implicitly approved of the interpretation of "foreseeable" to mean "foreseen" or "contemplated in the decree itself" solely because the legislature has amended the alimony statute ". . . six times with no indication that it was unsatisfied with the judicial construction of section 30-3-5(8)(i)(i)." (Aplt. Br. at 16.) The problem is that Husband cannot point to a consistent "judicial construction" of the Statute for the legislature to embrace. The most recent amendment, according to Husband, was in 2017. (*Id*. at 17.) The *Christensen* rule must necessarily be assumed to approve of the "foreseeable" interpretation in *Fish* and *Earhart*, decided in 2016 and 2015, respectively. As demonstrated above, these cases support *MacDonald*'s interpretation of "foreseeable"—not Husband's.

The *Christensen* rule as a tool of statutory interpretation, in this instance, is not only unnecessary and inappropriate under the rules of statutory construction, it is ultimately not helpful to ascertaining legislative intent. The plain and unambiguous meaning of "foreseeable" applied by the *MacDonald* panel is the correct interpretation,

[5] *See Wall v. Wall*, 2007 UT App 61, ¶¶11-12, 157 P.3d 341; *Charlton v. Charlton*, 2001 UT App 114U, *1; *Bayles v. Bayles*, 1999 UT App 128, ¶12, 981 P.2d 403.

and it is dispositive where Husband cannot dispute that the term "foreseeable" is unambiguous. Utah law requires no further analysis.

C. *MacDonald* Did Not "Disrupt" a "Traditional Test" For Alimony Modifications Because the Legislature Adopted the "Foreseeable" Standard for the First Time in 1995.

Even though *MacDonald* merely construed the plain language of the Statute, Husband repeatedly claims that the *MacDonald* decision "disrupts the law governing alimony." (Aplt. Br. at 17.) Husband's definition of the "law governing alimony" is not rooted in any consistent test, and even his definition of it constantly shifts in his brief.

Husband begins by abstractly referencing a "traditional test," claims that it "developed over decades," and represents to this Court, citing no support, that "[t]he legislature wisely retained the traditional test [in its 1995 amendment] because it tells spouses and court when they can, and should not, include future changes to alimony in a decree." (*Id*.) This "traditional test," in Husband's view, is as follows: "[i]f 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." (*Id*. at 20.) (Emphasis added.) Thus, according to Husband, ***even if the alleged change is "foreseeable"—the very term used in the Statute***, alimony modifications are nonetheless appropriate unless the certainty, timing and impact of the alleged change has been expressly etched in the divorce decree.

Despite outright rejecting the Statute's chosen language, Husband proceeds to make the nonsensical conclusion that by selecting this term in 1995 the legislature made a

". . . choice to leave the traditional test in place." (Aplt. Br. at 18.) Husband cites no support for this claim. He simply presumes that the legislature codified "[t]he traditional test, [which] stems from decisions of this court that were based on a pre-1995 version of section 30-3-5[.]" (Aplt. Br. at 20, quoting Utah Code Ann. § 30-3-5(3) (1994).) However, the predecessor statute did not include any test, standard or language as to foreseeability. *See id*. As a result, the pre-1995 case law is predictably inconsistent as to this factor, and certainly did not adopt any cohesive "test."[6] This is likely because there was no benchmark standard at that time for alimony modifications. Pre-1995 case law underscores the ***lack*** of a "traditional test" for the foreseeability factor in alimony modifications, prior to the codification and adoption of the "foreseeable" standard for the first time in 1995. The Floor Debates for H.B. 36 ("Revision of Alimony Standards"), the bill that codified the law of alimony in 1995, confirm that the intent of the bill was to create a formal law on alimony and resolve inconsistencies in alimony standards being applied in different parts of Utah:

> The bill really . . . has been put together on the basis of taking case law that exists in the state and codifying it into a formal statement on how to handle alimony. ***Currently, under the law right now, a person can get a ruling on alimony at one end of the state and yet have another ruling at another***

[6] (*See* Aplt. Br. at 20-21 & fn.2, citing pre-1995 case law, which use inconsistent standards and terminology governing an alleged change in circumstances, including: "equitable considerations" in *Land v. Land*, 605 P.2d 1248, 1250 (Utah 1980), or "rapid and unpredictable change" in *Foulger v. Foulger*, 626 P.2d 412, 414 (Utah 1981), or "contemplated in the decree itself" and "equitable considerations" in *Lea v. Bowers*, 658 P.2d 1213, 1215 (Utah 1983), or "in equity" in *Adams v. Adams*, 593 P.2d 147, 149 (Utah 1979), or "expressed or obvious intentions of the parties and/or the court" in *Felt v. Felt*, 493 P.2d 620, 624 (Utah 1972), or "too speculative" versus if a court "knows" a party will be receiving additional income post-divorce in *Johnson v. Johnson*, 855 P.2d 250, 253-4 (Utah Ct. App. 1993).)

> ***place. So people cannot, in essence, determine whether they're going to get the same conditions whether they're in Provo or Logan or in Salt Lake because people use certain parts of the code***.

(Emphasis added.) (*See* House Floor Debate H.B. 36, Revision of Alimony Standards—Day 8, 1/23/1995, Part 1, at 53:51. Available at: http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=9294&meta_id=405409.) (*See also* Senate Floor Debate H.B. 36—Day 32, 2/16/1995, at 23:15. Available at: http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=15582&meta_id=477350):

> We have a ***complex body of case law that's developed over the years and deals with the subject of alimony***. This is intended, in part, to codify some of that case law. There are ***some changes that [] exist in this bill that are different from present case law***.

(Emphasis added.) The Statute, and only the Statute, sets forth the governing standard—not Husband's formulation of a "test" from inconsistent case law.

As the panel in *MacDonald* concluded, the 1995 codification of alimony law effected a "substantive change in the law." *Id*. at ¶10. And, "[w]e also presume that when the legislature amends a statute, it intended the amendment to change existing legal rights." *Id*. (quoting *Olsen v. Samuel McIntyre Inv. Co*., 956 P.2d 257, 261 (Utah 1998)). Husband agrees that the 1995 codification effected a "substantive change in the law." (Aplt. Br. at 22, quoting *MacDonald*, ¶10.)

Yet, Husband concludes that the addition of "foreseeable" was "not significant" and that the "[t]he legislative history gives very little attention to [the foreseeable provision] at all, merely confirming that modifications would still be allowable after the

amendment." (Aplt. Br. at 22, fn.3, citing House and Senate Floor Debates on H.B. 36.) Husband either deliberately misstates, or in his review has missed, the legislative history because the Floor Debates do explain the origin and intent of "foreseeable" to the Statute:

> [Senator Hillyard]: My next amendment would be on page 4, line 6.[7] As indicated by Senator Taylor, the current law on child support is that you need a substantial change in circumstances to increase the child support or decrease it once the order's set in place, but another condition is that it's not foreseeable at the time of the divorce. Again the situation, I won't share the case that I had, the *Dana* case decided by the Court of Appeals, [] established that, ***so I'd add at the end of that line, 'not foreseeable at the time of the divorce.'*** 'Not foreseeable at the time of the divorce.' So if I went back to change my alimony order, or to make it higher or lower, depending which side I was in, I'd have to show a substantial material change in circumstances [that] also was not foreseeable at the time of the divorce. Because if it is foreseeable, if you projected alimony may be less, or more, for two years and then reduced, because the woman should have the occupational training that she's planning on getting, then that is clearly foreseeable and ***its [sic] fairly standard now established by the courts on the issue of child support and I'd have that same standard in the issue of alimony*** and I don't think Senator Taylor has any objection to that.

(*See* Senate Floor Debate H.B. 36—Day 32, 2/16/1995, at 46:32; amendment passed, at 47:50. Available at:

http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=15582&meta_id=477350.)

(Emphasis added.) Senator Hillyard's amendment reveals that the intent of the amendment was to adopt, ***for the first time***, a "foreseeable" standard for alimony modifications. The proposed amendment described a scenario where a spouse receiving alimony, at the time of divorce, who is "planning" on getting occupational training and may thereby reduce a future need for alimony, as "clearly foreseeable." *See id*. Unlike

[7] This draft provision then-stated: "The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances."

Husband's proposed "test," the legislature did not indicate any intent that "foreseeable" future changes need be actually foreseen to a certain time and impact, and prospectively etched in the decree itself, in order to be "foreseeable" under the statute. The Floor Debate scenario instead looked to the factual circumstances at the time of the divorce to determine if a change was "foreseeable" at that time, taking cues from the child support modification case law the amendment was modeled after.

In the *Dana* decision referenced by Senator Hillyard, the court received testimony as to what the court anticipated "at the time of the divorce decree," applied a "reasonable anticipation" standard for modifications to the decree, and observed the court's "reasonable anticipation" that the wife would find outside employment after the parties were divorced. *Dana v. Dana*, 789 P.2d 726, 729 (Utah Ct. App. 1990) ("A change in circumstances reasonably contemplated at the time of the divorce is not legally cognizable as a substantial change in circumstances in modification proceedings.") (citing *Fullmer v. Fullmer*, 761 P.2d 942, 947 (Utah Ct. App. 1988)). The wife did not know for certain if, when and how much she might gain from outside employment, but the factual circumstances at the time of the divorce anticipated this may occur and therefore were not a basis to modify. *Dana* relies on *Fullmer*; which case also mirrors *MacDonald*'s interpretation of "foreseeable." In *Fullmer*, the court rejected a request to modify child support because it found that the alleged change in circumstances was "***within the reasonable contemplation of*** the respondent at the time he stipulated to the custody arrangement and thus not legally cognizable." *Id*. at 947. In its analysis, the *Fullmer* court did not look to see what was actually foreseen by the parties, but rather

what was reasonably within their contemplation based on factual circumstances as they existed at the time of the divorce:

> [The parties] stipulated that appellant should be awarded physical custody of [the child]. Merely sixteen months later, respondent filed his petition for modification to reopen the child custody issue. ***It is reasonable to assume that at the time the stipulation was entered*** both appellant and respondent knew that appellant would have to work full-time and place [the child] in day care as it would be impossible for her to support herself and [the child] on $150 per month in child support and $200 per month in alimony. ***It is also reasonable to assume*** that respondent would remarry soon after the parties' divorce and have another child as Lynda, his second wife, was pregnant with respondent's child before the parties' divorce was final. ***Given respondent's awareness of the circumstances at the time he voluntarily entered into the stipulation*** which awarded appellant custody, we find his petition to modify custody the very type of litigation and harassment from which our supreme court has attempted to protect custodial parents.

Id. at 947–48. (Emphasis added). *MacDonald*'s plain meaning construction of "foreseeable" is consistent with *Fullmer* and *Dana*, as that which "may reasonably be anticipated." *MacDonald*, ¶11. These authorities are squarely at odds with Husband's preferred construction, where he argues that "[a] person may anticipate retirement," or "anticipate selling real property," but that is not "foreseeable" unless the certainty, date and impact are known and accounted for in the decree itself. (Aplt. Br. at 24.)

The construction applied by *MacDonald* is consistent with the legislature's understanding of how the "foreseeable" standard should be applied when it added this standard for the first time in 1995. As noted above, none of the post-1995 case law on alimony modifications cited by Husband construed the new "foreseeable" standard in light of the amendment. *See also MacDonald*, ¶16 (". . . [T]he *Bolliger* court did not

address whether the 1995 amendment altered the applicable standard. As our analysis above shows, however, this standard did change and we apply that standard today").

D. *MacDonald* Does Not Otherwise Disturb the Law on Alimony and Correctly Applied the "Foreseeable" Standard in This Case.

Husband also argues that *MacDonald*'s interpretation disrupts the law on alimony under *Richardson v. Richardson*, 2008 UT 57, 201 P.3d 942. As a threshold matter, *Richardson* did not discuss the "foreseeable" standard in the Statute, or its interpretation. *See, e.g., id*. *Richardson* involved the discrete issue of whether, in that case, it was appropriate for the trial court to make prospective increases in the alimony order even though, "generally," prospective changes are "disfavored." *Id*. ¶10. *MacDonald* did not involve, in any respect, the issue of prospective changes to alimony in a decree.

Specifically, *Richardson* rejected the petitioner's argument that, under this general standard, "*any* prospective increase in alimony exceed[ed] the district court's discretion." *Id*. ¶9. This Court declined to draw a bright line rule, and held that there are contexts ". . . where the certainty of a future event is such that prospective changes are appropriate." *Id*. ¶10. In doing so, it reiterated the general rule that prospective changes should not be done "speculatively." *Id*. ¶9.

From this holding, Husband leaps to the separate issue of alimony modifications under the "foreseeable" standard, arguing that *Richardson* requires a future change in circumstances under the "foreseeable" standard to have been foreseen, in the decree, with both its certainty and timing and impact explicitly set forth therein. This proposition is a gross misstatement of *Richardson* and is facially inconsistent with the Statute. Husband

then surmises that under *MacDonald*, "speculative" events would nonetheless be deemed "foreseeable," so that parties planning retirement, for example, could not put this event in the decree under *Richardson* because it is not sufficiently certain, but later if retirement occurs, *MacDonald* would necessarily dictate that it was foreseeable at the time of the divorce. (Aplt. Br. at 19, 25.)

Husband's concerns are unfounded. First, *MacDonald* did not disturb or affect *Richardson*'s narrow ruling as to prospective changes in a decree. Second, *MacDonald* did not draw a bright line legal test as to foreseeability for petitions to modify under section 30-3-5(8)(i)(i). *MacDonald* did not deem ***any*** change in circumstances to be foreseeable based on abstract and endless hypotheticals. The panel held that the standard is to be applied based on facts existing at the time of the divorce that would make it reasonable to assume the parties contemplated the change at ***issue in that case***. If an event is truly "speculative" at the time of the divorce, it will not later be deemed "foreseeable" under *MacDonald* under the standard for petitions to modify. *See also Fullmer*, 761 P.2d at 947-48 (finding alleged change "within the reasonable contemplation" of the parties at the time of the decree, based on factual circumstances existing at the time of the divorce).

Husband incorrectly frames the *MacDonald* decision as treating the "foreseeable" standard as a pure question of law without regard to the facts existing and within the contemplation of parties at the time of the divorce. (Aplt. Br. at 29-32.) Confusingly, Husband also accuses the Court of Appeals of improperly "weighing evidence" and making factual findings in its application of the corrected legal standard to this case. (*Id*.)

MacDonald did not "weigh evidence" or make new findings based on disputed facts in its opinion. It cited and relied on the District Court's findings in the record in affirming its ruling under the correct standard of foreseeability. *See MacDonald*, ¶18.

Husband protests that *MacDonald* failed to ***also*** consider and address hypothetical inheritance scenarios, for example, or how the standard would operate under the "the facts of another case[.]" (Aplt. Br. at 30-31.) Again, *MacDonald* did not purport to formulate or create a question of law, or change the law for other scenarios. It interpreted a statutory term within the scope of its authority and obligation to do so, and then applied that term to the facts of the ***case before it***. There was no reason to speculate on future petitions to modify in future, unrelated cases to be decided on their own facts.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT UNDER THE "CONTEMPLATED IN THE DECREE" STANDARD, THE REVIEW OF WHICH IS OUTSIDE THE SCOPE OF THIS COURT'S GRANT OF CERTIORARI.

This Court's review is ". . . circumscribed by the issues raised in the petitions." *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 856 (Utah 1998) (internal citations omitted). This Court granted certiorari review on Husband's Cert. Petition, which presented the "sole issue" of whether the Court of Appeals correctly construed the statutory meaning of the phrase, "foreseeable at the time of the divorce" in section 30-3-5(8)(i)(i). (*See* footnote 1, above, quoting Cert. Petition, at 4.) Yet, half of Husband's opening brief is devoted to a new issue, i.e. whether the District Court erred in denying his Petition to Modify under the "contemplated in the decree" standard. (Aplt. Br. at 33-

43.)[8] This issue is not properly before this Court because Husband's Cert. Petition is devoid of any reference or challenge to the propriety of the District Court's denial of his Petition to Modify under the "contemplated in the decree" standard, or *MacDonald*'s affirmance of the denial under that standard. Husband failed to cite to where this issue was presented in his Cert. Petition, as required by Utah R. App. P. 51(b)(4). Instead, Husband's brief cites to the record in the District Court for the "preservation" of this new issue. (Aplt. Br. at 3.) That is not the standard on certiorari review, where this Court limits its review to issues presented in the Cert. Petition.

Thus, even if this Court does not affirm the Court of Appeals' plain meaning interpretation of "foreseeable," it should summarily affirm the denial of Husband's Petition to Modify because *MacDonald* also affirmed the District Court under the "foreseen" or "contemplated in the decree" standard and Husband did not properly request certiorari review on this issue.

A. The Court of Appeals Correctly Affirmed the District Court's Exercise of Discretion to Find that the Alleged Change in Circumstances Was Contemplated by the Decree.

To the extent this Court reviews *MacDonald*'s affirmance of the District Court under the "contemplated in the decree" standard, Husband's Petition to Modify was

[8] In denying Husband's Petition to Modify, the District Court pinpointed provisions in the Decree that expressly contemplated that Wife would sell Lot 1 and use those proceeds to live on, and referenced *Bolliger* with respect to the "contemplated" standard. (R.823 at ¶18.) This holding was affirmed as within the District Court's discretion. *MacDonald*, ¶19 (finding that "***the express terms***" of Decree "discussed certain obligations that would arise if and when Fahey sold the Property" and "***[t]his 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***"). (Emphasis added).

properly denied by Judge Pettit after a two-day trial, and properly affirmed by *MacDonald* under an abuse of discretion standard of review. *MacDonald*, ¶7. This Court only reviews the decision of the Court of Appeals affirming the District Court under this standard. *Richardson v. Richardson*, 2008 UT 57, ¶5, 201 P.3d 942, 943 ("On a writ of certiorari, [this Court] review[s] the decision of the court of appeals, not that of the [district] court."). *See also Pyper v. Bond*, 2011 UT 45, ¶ 25, 258 P.3d 575 (noting that under an abuse of discretion standard of review, to reverse the trial court's conclusion as to the facts in the case, ". . . the court of appeals would have been required to find that, given the applicable law and facts, the trial court's decision was unreasonable") (internal citation and quotation omitted). Husband ignores the applicable standard of review. Instead, he proceeds to present a *de novo*-type argument to this Court. He pays no deference to the District Court's findings, and he acknowledges the Court of Appeals' decision only insofar as he says it erred in "failing to correct the [D]istrict [C]ourt." (Aplt. Br. at 33.) Husband's challenge summarily fails because he does not provide proper deference to the lower courts' findings, much less overcome them.

1. The Court of Appeals Correctly Affirmed the District Court's Discretion to Find That Wife's Sale of Lot 1 Was Not a Change in Circumstances Because It Was Contemplated in the Decree.

Husband was unsuccessful in convincing Judge Harris to set aside the parties' property division under Utah R. Civ. P. 60(b), so he repackaged that motion as a Petition to Modify Alimony before Judge Pettit, based on the same triggering event - Wife's sale of Lot 1. The District Court found that Husband did not show a change in circumstances

because it was contemplated by the Decree, and pinpointed the provisions in the Decree where the sale of Lot 1 and the use of those proceeds to "help pay her expenses and live" was contemplated. (R.823 at ¶18.) Husband cannot dispute these express terms, so he claims Judge Pettit misunderstood that he was attacking the property division: "It is worth noting that the [D]istrict [C]ourt erred because its appears to have misunderstood Husband's argument as asking to revisit the division of property, which is generally *not* allowed." (Aplt. Br. at 35.) Husband argues that the District Court failed to recognize the distinction between the sale of the asset and its proceeds, with Wife's use of those proceeds to generate income. (*Id*. at 36.) But the District Court did acknowledge this purported distinction, and promptly rejected it:

> I understand [Husband's] argument is slightly different [from a motion to revisit a property division in *Jense*], i.e., that it is not just a change in 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 [Wife] 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.

(R.822 at ¶17) (emphasis in original.) The District Court's finding was within its discretion. It is the same valuation. Wife merely converted an asset awarded to her in the Decree from real property into liquid funds. *See, e.g.*, *Felt v. Felt*, 493 P.2d 620, 623 (Utah 1972) (on husband's motion to delete alimony provision from divorce decree, divorced wife's equity in home and insurance policies awarded to her in divorce decree were deemed "facts quite impertinent and inadmissible here"); *see, e.g.*, *Denley v.*

Denley, 661 A.2d 628, 631 (Conn. App. 1995) (reversing trial court's denial of petition to modify alimony; trial court erred, when determining husband's income, by including profits generated from the conversion of stock options granted to him in the divorce: "The mere exchange of an asset awarded as property in a dissolution decree, for cash, the liquid form of the asset, does not transform the property into income" for purposes of a change in financial circumstances to be considered in modification action. Moreover, "***the fact that the asset, when converted into cash, produced a profit is irrelevant because only in cases of fraud can a modification be based on an increase in the value of assets***.") (Emphasis added). (Internal citation and quotation omitted).[9]

Regardless of how Husband labeled his effort to rescind the deal, at its core he was pursing the same asset awarded in the divorce. And, as the District Court keenly observed, this a party cannot do "every time the property [the parties] received in the decree changed in value." (R.822 at ¶17, quoting *Jense v. Jense*, 784 P.2d 1249, 1253

[9] The only case Husband cites that even peripherally involves proceeds from an asset awarded in the divorce is *Esposito v. Esposito*, 385 A.2d 1266 (N.J. Super. Ct. App. Div. 1978). (Aplt. Br. at 35.) The wife complained that alimony fashioned by the court to meet her needs was inadequate. The court relied on values affixed to the marital property to make the property division and alimony award, and in so doing had contemplated that she would use proceeds from the sale of the house to supplement her alimony. *See id.* at 1274. Here, Husband and Wife did not premise their settlement on Wife's needs, so *Esposito* is inapposite. Husband also cites cases that involved different sources of income that arose ***outside*** of the stipulated division of assets in the divorce decree. *See, e.g.*, *Haslam v. Haslam*, 657 P.2d 575, 757-58 (Utah 1982) (husband's retirement and wife's unexpected employment); *Bolliger*, ¶11 (wife's social security and husband's unexpected early retirement). This is a material distinction, because what the Petition to Modify was really trying to do was unwind the property settlement in the decree, not account for income originating outside of assets in the Decree.

(Utah Ct. App. 1989).) The Court of Appeals affirmed the District Court's discretion in this regard. *MacDonald*, ¶19.

2. The Court of Appeals Correctly Affirmed the District Court's Discretion to Find that the Alleged Change in Circumstances Was Not "Substantial" Because It Was Contemplated.

Because the change in circumstances was contemplated, it is irrelevant whether Wife change in income was "substantial" or whether it occurred before or after the divorce. Husband nonetheless argues that Wife's proceeds from Lot 1 effected an increase in her income, and she received this income after the Decree was entered. (Aplt. Br. at 37-38.) The District Court agreed with Husband that Wife's income changed. (R.822-23 at ¶18.) But the District Court also found that "the mere fact that [Wife's income] 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***." (R.822-23 at ¶18.) (Emphasis added.) This finding, again, renders the change in income moot.[10]

[10] Also rendered moot by the District Court's finding is "when" the alleged change occurred. In any event, Husband is factually incorrect. He claims the alleged change occurred after the divorce, as required in order to support a change in circumstances. (Aplt. Br. at 38.) Husband claims that Wife generated income after the Decree. However, the basis for the Petition was that Lot 1 ***sold*** for double what Husband anticipated it was worth, resulting in a "windfall" to Wife. (R.258 at ¶5(a)-(b).) Husband testified at trial that Lot 1 went under contract for the sales price ***before*** the Decree was signed. (R.878:22-25; R.879:1-2.) Husband began negotiating the sale a month prior. (R.875:9-25; R.878:12-16.) Thus, the "change" occurred prior to the Decree and despite having knowledge of the proceeds coming to Wife, Husband made no issue of it at the time. As an afterthought, Husband filed the Rule 60(b) motion attacking the sale proceeds (and, when that failed, the Petition to Modify), apparently because he thought he was entitled to a commission from Wife. (R.882:9-13.) The District Court found that this was insufficient to modify the Decree. (R.821 at ¶14, "[Husband] thought he was entitled to a

Even if the change was not contemplated by the Decree, there was no baseline or mechanism for the District Court to make any finding that Wife's change in income was "substantial," because the parties' Agreement and Decree were not premised, in any respect, on the parties' levels of income, standard of living, or Wife's "needs" under the so-called "*Jones* factors." (R.18-24; 45-47.) These factors apply when courts are making a judicial determination of a request for alimony in fixing a decree. They had no application at the time of the parties' divorce, and had no application in when the District Court decided the Petition to Modify, because the alimony payments in the Decree were not fixed by a court on a need-based analysis. They constituted a negotiated and stipulated obligation of Husband. "Need" was never determined in this case by design of the parties. *Wall v. Wall*, 2007 UT App 61, 157 P.3d 341 is illustrative:

> We conclude that simply because the parties stipulated to $800 per month alimony does not mean that they implicitly agreed $800 would sufficiently meet Mrs. Wall's needs. Instead, the stipulation indicates that they implicitly agreed that Mr. Wall has a legal obligation to pay alimony. Parties settle on alimony amounts for various reasons, including to balance a budget or to avoid extensive litigation.

Id. ¶16.[11] Yet, Husband's arguments to this Court rely on this illusory "needs" standard that had no application to the Decree in this case. (Aplt. Br. at 45, arguing that the Court

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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.")

[11] Even if the change was not contemplated by the Decree, and this Court were to deviate from its scope of review, make factual findings that Wife's increase in income was "substantial" without any benchmark for that determination, and remand to the District Court to conduct a needs-based analysis, the District Court would not be able to do so without completely unwinding and reconstituting the premise for the original stipulation.

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" and it should have remanded to the District Court for a "new evaluation" of Wife's needs under *Jones v. Jones*, 700 P.2d 1072 (Utah 1995); *see also* Aplt. Br. at 35, fn.8, relying on case law where investment income justified reduction in alimony based on changes in the court's prior "needs" analysis for the wife.) The District Court therefore acted in its discretion to find that Husband could not show a "substantial" change in circumstances, even if the change was not contemplated. (R.820 at ¶13; R.822-23 at ¶¶18-19.)

It is also likely that Husband would have to pay ***more*** alimony if the premise of their settlement was restructured to newly reflect, first, an "equal" property division, and second, the standard of living Wife enjoyed when they were married, compared to her current lifestyle pending resolution of Husband's efforts to rescind the parties' deal. At the time of trial, Husband lived in a multi-million-dollar brownstone in the Upper West Side of Manhattan (R.982:1-13) with other properties including a weekend home on the Hudson (R.986:18-25; R.987:1-5), and private club memberships in Utah, California and New York (R.1007:17-19; R.1000:12-22; R.1008:15-17; R.1009:13-21), whereas Wife lives in a one-floor cottage on a farm in Kentucky that she does not own on a month-to-month lease for a thousand dollars a month. (R.1055:3-14; R.1093:7-9; R.1132:7-25.)

As to an "equal" division of real property based on values, Husband's award included a five-story brownstone in the Upper West Side of New York City, which he testified he believed to be worth about $6.5 million. (R.980:2-6; R.982:1-4, 11-13.) Husband also received an apartment located at 25 West 71st Street in New York City, which sold after the divorce for $1,550,000, an amount that he testified to be approximately $550,000-$750,000 greater than the value he believed it to be worth at the time the parties entered into the Agreement. (R.978:19-25; R.979:10-21.)

It would therefore be impossible for a court to refashion alimony without discarding the Agreement, and re-starting the divorce proceedings from scratch.

3. The Court of Appeals Correctly Affirmed the District Court's Discretion to Find that the Parties Did Not Condition their Stipulated Agreement and the Decree on the Sale Price of Lot 1.

Husband cannot dispute that the express terms of the Decree contemplated the sale of Lot 1 and Wife's use of those proceeds—including generating future income from those proceeds. So Husband pivots. He argues that the ***sale price*** itself was a "windfall" to Wife that both the parties did not contemplate because they stipulated to a lower value of Lot 1 as part of the settlement. Husband makes this factual assertion repeatedly in his brief. It is false. The District Court, after a two-day trial, received testimony from both Husband and Wife and unequivocally found that the parties did not agree or premise their Agreement on any mutual understanding as to the value of the real properties, including Lot 1. Specifically, the District Court found that the Agreement was facially unambiguous and integrated. (R.1340:22-25; R.1341:1-4.) And, "[t]he Decree [incorporating the Agreement in full] did not set forth an expected sales price for Lot 1 or any of the lots," and "also did not set forth an expected income number that [Wife] would derive due to her investment of the lot sales proceeds, or how much she might make on selling the lots." (R.819, ¶11.) The District Court elaborated on this finding:

> The Court understands the position of [Husband] to be that it is not the sale of Lot 1 or the fact that [Wife] earned income from the sale, but rather the degree, i.e., the amount of 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 . . . 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 [Husband] or [Wife].

(R.820, ¶13.)

The Court of Appeals affirmed the District Court's finding: "[Husband] also claims that the sales price materially differed from what he anticipated. This fact, if true, is not determinative . . . Moreover, there was no evidence that the parties agreed to the property distribution based on any mutual understanding of the value of the proceeds involved." *MacDonald*, n.7. It held correctly. *See Bailey v. Bayles*, 2002 UT 58, ¶19, 52 P.3d 1158 ("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."). Accordingly, Husband's argument that the District Court erred in not making specific findings as to a foreseen sales price, timing of the sale, and other illusory premises, and how they would affect the alimony award (Aplt. Br. at 39-45), is irrelevant because none of these considerations were relevant to the Decree.

Based on the foregoing, it is not well taken, and frankly incredible, that Husband repeatedly represents to this Court, as fact, that "the parties" agreed to a value for Lot 1 and relied on spreadsheets as to the real property values to arrive at an "even" or "equal" settlement. (*See* Aplt. Br. at 4, 5, 6, 9, 40, 42, 45.) Husband's assertions rely on self-serving, unsupported and contradictory claims by Husband in the trial court proceedings[12], or his trial testimony where his counsel clarified, twice, that his purported

[12] (1) Husband relies on his *pro se* "Preliminary Response to [Wife's] Memoranda and Motions of 12 January 2012," which is a self-serving declaration from Husband that makes unsupported characterizations of the parties' negotiations (R.114-115), (2) an email drafted by Husband to the escrow agent for the sale of Lot 1, explaining that he was refusing to deliver the deed to close the sale of Lot 1 (which was Wife's property) until Wife paid him a commission or additional money, and in which he makes an unsupported

testimony as to agreed or contemplated values were his unilateral understanding—not the parties'.. Moreover, Wife testified that she did not rely on or trust Husband's spreadsheets and that value were never a premise or agreement for the settlement. (R.1146:20-25; R.1147:1-9.) The integrated Agreement, which is devoid of any findings in this regard, conclusively supported Wife's trial testimony and the Court of Appeals' acknowledgement that there was no evidence of a stipulated value. The District Court was well within its discretion to make its finding on this point, and Husband pays no deference to its discretion in this regard. He also fails to marshal the evidence to mount a serious challenge to this finding. *State v. Nielsen*, 2014 UT 10, ¶¶41-42, 326 P.3d 645, 653 (while the failure to marshal evidence is not a technical deficiency meriting a default, a party "challenging a factual finding . . . will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal"). Husband simply concludes that the Court of Appeals was "incorrect" in affirming the District Court on this finding. (Aplt. Br. at 40.) The record, the standard of review, and the proper scope of review by this Court do not support Husband's demanded relief. The District Court and Court of Appeals acted properly and should be affirmed under the "contemplated in the decree" standard.

CONCLUSION

Based on the foregoing, Wife respectfully requests that this Court (1) affirm the Court of Appeals' interpretation of "foreseeable" under section 30-3-5(8)(i)(i); and (2)

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statement that the parties' "mutually agreed" to the value of Lot 1 in the Agreement (R.121), and (3) a self-serving and unsupported affidavit filed by Husband in support of his unsuccessful motion to set aside the property division (R.156-59.)

summarily affirm the Court of Appeals affirmance of the District Court's denial of Husband's Petition to Modify, irrespective of whether this Court declines to adopt the Court of Appeals' interpretation of "foreseeable," because the change in circumstances alleged by Husband was also contemplated in the express provisions of the Decree.

Respectfully submitted this 21st day of February, 2018.

/s/ Matthew A. Steward_____
Matthew A. Steward
Shannon K. Zollinger

Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the type-volume limitation of Utah Rule of Appellate Procedure 24(g)(1) because it contains 12,315 words (including headings, footnotes and quotations) in 13 point Times New Roman font, excluding the parts of the Brief exempted by Rule 24(g)(2), as calculated by Microsoft Word, the word processing system used to prepare the Brief. This Brief complies with Utah R. App. P. 21(g) regarding public and non-public filings.

/s/ Shannon Zollinger_____

CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the foregoing Brief of Appellee to be served via U.S. Mail to the following this 21st day of February 2018:

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Addendum A

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July 1, 2016

VIA HAND DELIVERY

Lisa Collins, Clerk of Court
Utah Court of Appeals
450 South State Street
Salt Lake City, UT 84114

Re: *MacDonald v. MacDonald*
Appellate Case No. 20150785-CA
Third District Court Case No. 104500031

Dear Ms. Collins:

Pursuant to Utah R. App. P. 24(j), Appellee Lee Anne Fahey ("Appellee") requests that this letter discussing supplemental authority be circulated to the Court.

On June 9, 2016, after the Brief of Appellee was filed ("Brief"), the Court of Appeals filed its Memorandum Decision ("Decision") in *Fish v. Fish*, 2016 UT App 125, Appellate Case No. 20150040-CA. A copy is enclosed and is pertinent to the pending appeal, as follows:

• The Decision, at ¶ 17, reaffirms that the appropriate standard of review for a petition seeking modification of a divorce decree based on a substantial change in circumstances is ***abuse of discretion***: "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." *Id.* (quoting *Earhart v. Earhart*, 2015 UT App 308, ¶ 5, 365 P.3d 719).

(*See* Brief at pp. 1-2, abuse of discretion standard of review, rather than correctness, applies where the district court made factual findings that the purported change in circumstances was contemplated at the time of the divorce.)

- The Decision, at ¶ 19 (citing Utah Code Ann. § 30-3-5(8)(i)(i)), clarifies the meaning of "foreseeable" regarding an alleged change in circumstances: "We next note that the statute is concerned with whether the alleged change in circumstances was 'foreseeable,' not whether the alleged change of circumstances was actually foreseen and accounted for in a divorce decree."

(*See* Brief, at pp. 24-27, the sale of Lot 1—and use of its sales proceeds by Appellee—***was*** contemplated by the Decree.) Appellee's position is thus stronger than the required standard for foreseeability, but the Decision clarifies in any event that even if an alleged change was not "actually contemplated by the divorce decree," it does not "automatically" require a finding that it was not foreseeable. As argued in the cited portions of the Brief, Appellee's sale of Lot 1 and use of the sales proceeds to pay expenses was both contemplated in the Decree and otherwise foreseeable.

Thank you for your attention in this regard. If you have any questions regarding the foregoing, please do not hesitate to contact me.

Very truly yours,

Matthew A. Steward

Enclosure

cc: Troy L. Booher
Julie J. Nelson
Bart J. Johnsen

2016 WL 3221156

Court of Appeals of Utah.

Diane Fish, Appellee,

v.

Jeffery J. Fish, Appellant.

No. 20150040–CA

Filed June 9, 2016

Second District Court, Ogden Department, The Honorable Ernest W. Jones, No. 074901990

Attorneys and Law Firms

Robert L. Neeley, Ogden, Attorney for Appellant.

Richard H. Reeve, Attorney for Appellee.

Judge Michele M. Christiansen authored this Memorandum Decision, in which Senior Judge Pamela T. Greenwood concurred. Senior Judge Russell W. Bench concurred in the result. [1]

Memorandum Decision

CHRISTIANSEN, Judge:

*1 ¶ 1 Jeffery J. Fish appeals the district court's order denying his motion to modify his decree of divorce from Diane Fish. [2] We affirm.

¶ 2 Diane and Jeffery married in 1980. In 2007, Diane filed for divorce. The divorce decree was entered in 2009, and Jeffery was ordered to pay alimony of $800 per month. He appealed, arguing that the district court erred by failing to impute income to Diane, by imputing income to him, and in calculating the amount of alimony. *See Fish v. Fish*, 2010 UT App 292, ¶ 11, 242 P.3d 787. This court remanded the case back to the district court, concluding that the range of income imputed to Jeffery did not support the amount of the alimony award, that the district court had failed to make adequate findings regarding the parties' earning capacities, and that the district court failed to consider whether maintaining the marital standard of living remained a realistic goal. *Id.* ¶ 31. On remand, the district court held an evidentiary hearing and entered supplementary findings of fact and conclusions of law. The court found that Diane's monthly income was $2,233 and that her needs were $2,997. It therefore again ordered Jeffery to pay alimony of $800 per month.

¶ 3 In 2012, Jeffery filed a petition seeking to terminate or reduce the alimony award based on an alleged change in Diane's income. The district court conducted a bench trial in 2014, finding that from 2009 to 2014, Diane's monthly income had risen by $264 and that her monthly reasonable and necessary expenses had risen by $492 over that same time period. The court determined that, because this was not a material change in circumstances, there were no grounds to modify the divorce decree. The court also awarded attorney fees to Diane after finding that she was the prevailing party and that Jeffery had the financial ability to pay those fees. The district court stated its findings in a memorandum decision and directed Diane's counsel to prepare a final order for the court to sign. After the order was prepared, signed, and entered, Jeffery filed a motion seeking to have the court amend its findings or grant a new trial, which motion the district court denied.

¶ 4 Jeffery appeals, contending that the district court erred (1) by what he characterizes as modifying the divorce decree by increasing Diane's monthly expenses, (2) by "failing to follow the law of the case that [Diane] is capable of working 36 hours per week," (3) by failing to find that Diane was voluntarily underemployed, (4) by failing to find that an unforeseen material substantial change in circumstances warranted modification of the decree, (5) by denying Jeffery's motion to amend findings of fact or to grant a new trial, and (6) by failing to award attorney fees to Jeffery.

I.

¶ 5 Jeffery first contends that the district court erred "in modifying the decree of divorce increasing [Diane's] monthly expenses by addressing needs that did not exist at the time the decree was entered." We generally review a district court's determination to modify or not to modify a divorce decree for an abuse of discretion. *Snyder v. Snyder*,

2015 UT App 245, ¶ 9, 360 P.3d 796. However, we review for correctness any challenges to the legal adequacy of findings of fact or to the legal accuracy of the district court's statements underlying such a determination. *See id.*; *Van Dyke v. Van Dyke*, 2004 UT App 37, ¶ 9, 86 P.3d 767.

*2 ¶ 6 Utah law generally prevents a district court from modifying an alimony award to account for new needs:

> 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.

Utah Code Ann. § 30–3–5(8)(i)(ii) (LexisNexis 2013). Jeffery asserts that the district court's denial of his petition to modify the divorce decree was in fact a modification of the divorce decree and that the modification was based on needs that did not exist at the time the decree was entered.

¶ 7 Jeffery claims that the court "did modify the Decree of Divorce [by] entering an order entitled Modification of Decree of Divorce." But it is the substance of an order rather than its caption that governs its interpretation. *Cf. Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1310 n.2 (Utah Ct. App. 1994) ("[T]he substance, not caption, of a motion is dispositive in determining the character of the motion."); *Color Process Co. v. Northwest Screenprint Co.*, 417 S.W.2d 934, 935 (Mo. 1967) (treating a court's order as quashing service because, although being captioned "Judgment of Dismissal," the substance of the order "did no more than quash the service"). The district court's order, prepared by Diane's counsel and signed by the court, stated that "IT IS HEREBY ORDERED, ADJUDGED AND DECREED: 1. [Jeffery's] Petition to Modify the Divorce Decree is denied. 2. Alimony shall remain at $800 per month." Accordingly, despite counsel's decision to caption the order "Modification of Divorce Decree," the substance of the motion was denial of the petition to modify.

¶ 8 Jeffery also argues that the order constituted a modification because "the trial court made a substantial change to the decree [by] increasing [Diane's] monthly expenses to $3,489 per month by reason of purchasing a home after the divorce." It is true that the district court's memorandum decision found that Diane's monthly expenses had risen by $492 from 2009 to 2014. But that finding was not included in the court's order denying Jeffery's petition to modify. Moreover, making a finding of fact does not change or modify a divorce decree. Rather, the making of findings of fact is a part of the process by which a court determines whether modification is appropriate. [3]

¶ 9 Because the district court's order did not change the amount of alimony or modify the divorce decree, it was neither a modification of alimony nor a new order of alimony, and the order therefore did not run afoul of section 30-3-5(8)(i)(ii).

II.

¶ 10 Jeffery next contends that the district court erred by "failing to follow the law of the case that [Diane] is capable of working 36 hours per week." "Depending on the procedural posture of a case ..., the district court may or may not have discretion to reconsider a prior decision it has made." *IHC Health Servs. v. D&K Mgmt., Inc.*, 2008 UT 73, ¶ 27, 196 P.3d 588. "While a case remains pending before the district court prior to any appeal, ...the court remains free to reconsider that decision;" thus "reconsideration ... is within the sound discretion of the district court." *Id.* However, under the mandate-rule branch of the law-of-the-case doctrine, "a prior decision of a district court becomes mandatory after an appeal and remand." *Id.* ¶ 28. It is not obvious which branch of the law-of-the-case doctrine Jeffrey seeks to apply here. However, because he asserts that the district court "erred" and does not attack the district court's reconsideration as being an abuse of discretion, we assume that he means the mandate rule. [4] We review the application of the mandate rule for correctness. *See Robinson v. Robinson*, 2016 UT App 32, ¶ 17, 368 P.3d 147.

*3 ¶ 11 Jeffery asserts that in 2011, the district court found that Diane was capable of working thirty-six hours per week. He notes that, at the 2014 modification trial, Diane's accountant testified that Diane worked slightly over thirty hours per week in 2013. Jeffery further notes that Diane's employer testified that he trusted Diane to schedule her own hours as long as the total was under forty hours per week. Jeffery therefore concludes that the district court was required to impute income to Diane by

multiplying her hourly wage by thirty-six hours per week, rather than accepting her W–2, which reflected about thirty hours per week.

¶ 12 It is not clear that the district court's factual finding ("The Court finds [Diane] was working 36 hours a week.") amounted to a decision for the purposes of the law-of-the-case doctrine. *See* Decision, Black's Law Dictionary (10th ed. 2014) ("A judicial or agency determination *after consideration of the facts* and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case." (emphasis added)). Nor is it clear that the court's 2011 finding as to the number of hours Diane was actually working in 2009 is relevant to the court's implicit determination of the number of hours Diane was capable of working in 2014. In any event, the mandate-rule branch of the law-of-the-case doctrine only "dictates that a prior decision of a district court becomes mandatory *after* an appeal and remand"; "[w]hile a case remains pending before the district court *prior* to any appeal ... the court remains free to reconsider that decision." *IHC Health Servs.*, 2008 UT 73, ¶¶ 27, 28 (emphases added). In this case, no appeal was taken between the 2011 entry of the district court's findings of fact and the 2014 order denying Jeffery's petition.

¶ 13 We conclude that the district court did not err, because the mandate rule has no application here.

III.

¶ 14 Jeffery next contends that the district court erred by failing to find that Diane was voluntarily underemployed. He asserts that Diane was working thirty hours per week, and that the district court "tacitly approved [Diane] only working approximately 30 hours per week in determining her present monthly income." Jeffery again argues that the district court should have instead multiplied Diane's hourly pay by the number of hours she had been working in 2009 (thirty-six hours per week) and imputed to her that amount of income.

¶ 15 Jeffery does not cite any authority relevant to his argument. *See* Utah R. App. P. 24(a)(9). It is true that a court may impute income to a former spouse for purposes of calculating alimony after finding that the former spouse is voluntarily unemployed or voluntarily underemployed. *See Connell v. Connell*, 2010 UT App 139, ¶ 16, 233 P.3d 836. "However, a finding of voluntary underemployment does not require a court to impute the higher income; it merely allows [the court] to do so." *Id.* ¶ 17. Because Jeffery fails to cite any authority regarding what standards a court should employ for determining when it is appropriate to impute income, he necessarily fails to convince us that the district court erred by failing to impute income to Diane. Moreover, as noted above, the district court's statement that Diane was working thirty-six hours per week in 2011 does not appear relevant to the apparent determination that working thirty hours per week in 2014 was reasonable. Accordingly, there is no support for Jeffery's claim that income should be imputed to her for thirty-six hours per week. He therefore cannot show that the district court erred or abused its discretion by not imputing income to Diane.

*4 ¶ 16 Because Jeffery has not shown that the district court should have imputed income to Diane, let alone proven the amount it should have imputed, we conclude that this claim is inadequately briefed and do not consider it further.

IV.

¶ 17 Jeffery contends that the district court erred by failing to find that there was a substantial change of circumstances, not foreseeable at the time of the divorce, that justified a modification of alimony. "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). "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." *Earhart v. Earhart*, 2015 UT App 308, ¶ 5, 365 P.3d 719.

¶ 18 Jeffery does not explain why or in what way he believes the district court abused its discretion. Rather, he asserts that the district court erred. Jeffery begins by estimating Diane's reasonable income; multiplying Diane's hourly wage by the number of hours he believes she should be working. [5] He then adds a "typical" annual bonus and the military retirement monies that she receives. Because the total he arrives at is greater than the amount

Diane was earning in 2009, he asserts that a substantial change of circumstances has occurred. He further claims that because the divorce decree is devoid of language referring to an increase in income, any increase is "a change of circumstance not contemplated by the divorce decree itself." On this basis, Jeffery concludes that "there has been a material substantial change of circumstances not contemplated in the decree of divorce."

¶ 19 As explained above, Jeffery has not established that the court should have imputed more income to Diane than she was actually earning. Accordingly, we assume that Diane's reasonable income was the amount she was receiving from her employment and the military retirement. The magnitude of her alleged increase in income is therefore much smaller than that asserted by Jeffery. 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. 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 district court to determine whether a substantial and material change has occurred. *See Earhart*, 2015 UT App 308, ¶ 5.

*5 ¶ 20 In short, Jeffery argues that because Diane's 2014 income (as calculated using the number of hours per week he believes the court should have imputed to her) is higher than her income at the time of the divorce decree, the district court was required to find that a substantial, material, and unforeseeable change in circumstances had occurred. We disagree. Contrary to Jeffery's contention, this is a question of discretion, not correctness. The district court had discretion to determine, as it did, that in light of all the circumstances, Diane's $2 per hour increase in pay over a five-year period was not such a change.

V.

¶ 21 Jeffery next contends that the district court erred by denying his motion to amend its findings of fact or to grant a new trial. He challenges both the adequacy of the findings made by the court and the sufficiency of the evidence to support those findings. A district court's determination must be based on adequate findings, and the court's findings must be derived from sufficient evidence. *See Roberts v. Roberts*, 2014 UT App 211, ¶ 10, 335 P.3d 378.

¶ 22 Findings are adequate when they contain sufficient detail to permit appellate review to ensure that the district court's discretionary determination was rationally based. *Barnes v. Barnes*, 857 P.2d 257, 259 (Utah Ct. App. 1993); *Hall v. Hall*, 858 P.2d 1018, 1021 (Utah Ct. App. 1993). "Unstated findings can be implied if it is reasonable to assume that the trial court actually considered the controverted evidence and necessarily made a finding to resolve the controversy, but simply failed to record the factual determination it made." *Hall*, 858 P.2d at 1025.

¶ 23 We consider first the district court's discretionary determination that there was not a material change in circumstances. The findings supporting this ruling were that, from 2009 to 2014, Diane's income increased by $264 per month and her expenses increased by $492 per month. The court calculated these increases by comparing its earlier findings about her financial situation in 2009 with the amounts the court found she was reasonably earning and spending in 2014.

¶ 24 Jeffery asserts that these findings were inadequate to support the determination that there was not a material change in circumstances. He argues that the district court's findings were inadequate because they did not include a finding that Diane was underemployed.[6] However, the court actually made a finding to the contrary. By finding that Diane was reasonably earning $2,497 per month, the court implicitly rejected Jeffery's underemployment argument that sought imputation of additional income. *See Hall*, 858 P.2d at 1025. The district court further found that "this is not a significant material change in income for Diane" and therefore concluded that there was "not a material change in circumstances." We reject Jeffery's inadequacy claim; as a matter of logic, a district court's findings are not inadequate to support its ultimate

determination simply because they are unfavorable to the losing party's position. [7]

¶ 25 Jeffery also challenges the sufficiency of the evidence to support the court's findings. "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous ...." Utah R. Civ. P. 52(a) (2014). "An appellant who challenges the sufficiency of the evidence supporting a finding of fact has the burden of combing the record for and compiling all of the evidence that supports the finding of fact and explaining why that evidence is legally insufficient to support the finding of fact." *Wilson Supply, Inc. v. Fradan Mfg. Corp.*, 2002 UT 94, ¶ 21, 54 P.3d 1177; *see also Nielsen v. Nielsen*, 2014 UT 10, ¶ 42, 326 P.3d 645 (explaining that, while marshaling is not an absolute requirement, "a party challenging a factual finding or sufficiency of the evidence to support a verdict will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal"). Jeffery's arguments, however, appear to attack the content of the court's findings rather than any perceived deficiency in the evidence supporting them.

*6 ¶ 26 Jeffery first argues that the court's "findings are insufficient" because the court "failed to make findings as to the recipient's earning capacity or the ability to produce income." He refers to Utah Code section 30–3–5(8)(a)(ii), which states, "The court shall consider at least the following factors in determining alimony: ... the recipient's earning capacity or ability to produce income." But Jeffery ignores the fact that the court here was considering whether to modify alimony at all rather than how much to modify alimony by. The district court's section 30–3–5(8)(a)(ii) duty to calculate the appropriate amount of alimony is only triggered in a modification proceeding once the court has determined that, pursuant to section 30–3–5(8)(i)(i), modification is appropriate "based on a substantial material change in circumstances not foreseeable at the time of the divorce." As a result, because the court here determined that no such change had occurred, it was under no duty to enter new findings as to Diane's earning capacity. [8]

¶ 27 Jeffery next argues that the district court's findings were insufficient because "[the] court erroneously increased [Diane's] monthly expenses by addressing needs that did not exist at the time the divorce was entered." His complaint appears to be that the district court found Diane's increased monthly expenses reasonable. But he does not explain why the evidence in support of that finding was insufficient. Rather, he simply repeats his argument that the district court should not have considered Diane's increased housing expense as reasonable. "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...." Utah Code Ann. § 30–3–5(8)(i)(ii). But here, the court did not modify or issue a new order of alimony. *See supra* ¶¶ 7–9.

¶ 28 Jeffery also argues that the district court's findings were insufficient because "[t]he trial court failed to find there had been a material substantial change of circumstances regarding [Diane's] increase in income that was not foreseeable at the time of the divorce." Failure to rule in favor of one party neither renders the evidence insufficient to support the findings nor the findings inadequate to support the ruling.

¶ 29 We conclude that the district court did not err by entering findings that supported its ruling, and the fact that Jeffery sought a different ruling does not undermine the sufficiency of the evidence supporting those findings. We reject Jeffery's attempt to inject alternative findings favorable to his preferred outcome under the guise of an adequacy-of-the-findings or sufficiency-of-the-evidence challenge.

VI.

¶ 30 Jeffery next contends that the district court erred by failing to award attorney fees to him. Specifically, he argues that he is the prevailing party because he has shown that the district court should have reduced or terminated his alimony obligation. "Generally, when the trial court awards fees in a domestic action to the party who then substantially prevails on appeal, fees will also be awarded to that party on appeal." *Kimball v. Kimball*, 2009 UT App 233, ¶ 52, 217 P.3d 733 (citation and internal quotation marks omitted).

¶ 31 Jeffery did not prevail below and has not prevailed on appeal. The district court therefore did not err in failing to award attorney fees to him below, and we do not award attorney fees to him on appeal. [9]

¶ 32 We affirm in all respects.

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

Troy L. Booher, Julie J. Nelson, and Bart J. Johnsen, Salt Lake City, Attorneys for Appellant.

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

End of Document

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:

Bart J. Johnsen
PARSONS BEHLE & LATIMER
201 S. Main Street, Suite 1800
Salt Lake City, UT 84111
BJohnsen@parsonsbehle.com
Attorneys for Petitioner

/s/ Matthew Steward

Addendum D

2012 JAN 11 AM 7:53

FILED BY

Matthew A. Steward (#7637)
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Telephone (801) 322-2516
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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
3407 Big Spruce Way
Park City, UT 84060

Kari J Peck

Matthew A. Steward (#7637)
CLYDE SNOW & SESSIONS
One Utah Center, 13th Floor
201 South Main Street
Salt Lake City, Utah 84111-2216
Telephone (801) 322-2516
Facsimile (801) 521-6280

Attorneys for Respondent

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, ~~2011~~ 2012.

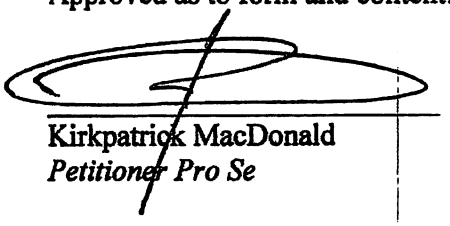
BY THE COURT

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:

Kirkpatrick MacDonald
3407 Big Spruce Way
Park City, UT 84060

Petitioner

Kari J Peck

Addendum E

Matthew A. Steward (#7637)
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Facsimile (801) 521-6280

Attorneys for Respondent

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, 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

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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201 South Main Street
Salt Lake City, Utah 84111-2216
Telephone: (801) 322-2516
Facsimile: (801) 521-6280
Email: mas@clydesnow.com

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