No. 20170789-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

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

REPLY BRIEF OF APPELLANT

On Writ of Certiorari to the Utah Court of Appeals

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

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Introduction

In the opening brief, Husband demonstrated that the court of appeals applied the wrong legal standard for determining when a change in circumstances is a basis to modify alimony. Decades of case law articulates the traditional test that a change in circumstances is a basis to modify alimony unless the change was contemplated in the decree—i.e., the original alimony award took into account the anticipated change in circumstances. *MacDonald* articulated a new test that a change in circumstances is a basis to modify alimony unless the change was foreseeable at the time of divorce—i.e., the original alimony award could have, but need not have, taken into account the change in circumstance.

The traditional test requiring that the decree take into account the future change has governed for decades, for good reason. A future change should be a basis to modify alimony only if the change was factored into the original alimony award. To use the language in the case law, a future change is a ground to modify alimony if the change was "not contemplated in the decree itself." *Bayles v. Bayles*, 1999 UT App 128, ¶ 12, 981 P.2d 403 (internal quotation marks omitted).

MacDonald rejects the traditional test because the statute since 1995 uses the word "foreseeable." Under *MacDonald*, a future change that could have been, but was not, factored into the original alimony award is not a ground to modify alimony. Under this standard, changes such as retirement or graduation no longer provide a basis to modify alimony because those events are "foreseeable," i.e., capable of being taken into account, even if they were not.

The logic of the traditional test perhaps explains why the Utah Legislature has amended the statute numerous times without disapproving of the traditional test's interpretation of "foreseeable." Regardless of the legislature's motive, its choice to leave the traditional test unchanged governs here: "where a legislature amends a portion of a statute but leaves other portions unamended, or re-enacts them without change, the legislature is presumed to have been satisfied with prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with its own intent." *Christensen v. Indus. Comm'n*, 642 P.2d 755, 756 (Utah 1982). The court of appeals applied the wrong standard.

In the response brief, Wife defends the new standard on three grounds. First, Wife asserts that *MacDonald* correctly overruled prior case law under the test in *Menzies*. Second, Wife asserts that *MacDonald* is consistent with the prior case law. Third, Wife asserts that *MacDonald* reflects the plain language of the statute and the 1995 legislature's intent. Wife is incorrect on each point.

First, *MacDonald* did not attempt to satisfy *Menzies'* standard for overturning precedent. Nor could it. The traditional test is workable, is not clearly erroneous, and, most important, has been relied upon by thousands of divorcing parties and district courts when drafting divorce decrees.

Second, *MacDonald* is inconsistent with decades of cases construing the statute to reflect the traditional test. The traditional test concerns whether a change is contemplated in the decree, whereas the *MacDonald* test concerns

whether it was capable of being contemplated. The difference can be seen by how many cases would have been decided differently under the new standard.

Third, the language "foreseeable" is ambiguous. It means different things in different legal contexts. And the 1995 legislative intent is beside the point. What governs are the amendments after 1995. As already noted, where the legislature amends a statute but leaves language unamended that has been interpreted by the courts, "the legislature is presumed to have been satisfied with prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with its own intent." *Christensen*, 642 P.2d at 756.

Wife's factual positions fare no better. In the opening brief, Husband showed that, consistent with common sense, the parties placed values on their assets before dividing them equally. It is difficult to understand how Wife can deny that the parties placed values on assets, especially when meeting with former Judge Billings to divide those assets equally. Were Wife correct, the stipulated decree would divide property arbitrarily. But of course it does not divide property arbitrarily, precisely because the parties divided their marital property equally, something they could do only by placing values on assets.

But even if Wife were correct that the parties placed no values on the properties, this only confirms that the parties did not contemplate Wife's ability to generate income from the sale of property during the period of alimony, let alone the sizable income she did later generate. This court should reverse.

Argument

In the response brief, Wife makes numerous legal and factual assertions that are incorrect. Husband will address each one below.

As an initial matter, Wife asserts that the application of the law to the facts is beyond the scope of this court's review. [Resp. Br. at 30-31.] But this court agreed to review the following question: "Whether the court of appeals erred in its construction *and application of* Subsection 30-3-5(8)(i)(i) of the Utah Code." [Order, 12/12/2017 (emphasis added).] The application of law to the facts is before the court, and it is dispositive under either test.

Wife also contends that Husband "does not acknowledge the rules of statutory construction." [Resp. Br. at 16.] She asserts that Husband overlooked the general rule that statutes are to be construed according to their plain language. [Resp. Br. at 14-16.] But Husband acknowledged that general rule and demonstrated why it does not govern. First, what the legislature meant by "foreseeable" is hardly plain. That term employs a different balancing of facts and law in different contexts, e.g., duty and proximate cause. Second, the legislature is presumed to have adopted courts' construal of statutory language when the legislature amends a statute but does not disturb the construed language. The legislature has adopted the traditional test by amending the statute here many times without expressing any disapproval with the courts'

application of the traditional test. This leaves Wife's assertions of plain language beside the point.

1. *MacDonald* Erred When It Overruled Dozens of Cases

Wife acknowledges that *MacDonald* changed the standard, but asserts that it correctly overruled those cases under the test set forth in *State v. Menzies,* 889 P.2d 393 (Utah 1994). Wife correctly notes that one panel of the court of appeals 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." [Resp. Br. at 17 (citing *Menzies*, 889 P.2d at 399 n.3 (internal quotation marks omitted)).] Wife then asserts that if *MacDonald* is "inconsistent with *Bolliger* or [dozens of] prior panel decisions as a practical matter, it was permitted to deviate." [Resp. Br. at 17.]

But that discussion in *Menzies* does not allow the court of appeals to create an inconsistency in its case law. Utah law is clear that "in accordance with horizontal stare decisis, the first decision by a court on a particular question of law governs later decisions by the same court." *State v. Tenorio,* 2007 UT App 92, ¶ 9, 156 P.3d 854 (internal quotation marks omitted).

Nor does *Menzies* articulate the current test for overturning precedent. As this court recently stated, "[o]ur decisions have identified two broad factors that distinguish between weighty precedents and less weighty ones: (1) the persuasiveness of the authority and reasoning on which the precedent was

originally based, and (2) how firmly the precedent has become established in the law since it was handed down. The second factor encompasses a variety of considerations, including the age of the precedent, how well it has worked in practice, its consistency with other legal principles, and the extent to which people's reliance on the precedent would create injustice or hardship if it were overturned." *Eldridge v. Johndrow*, 2015 UT 21, ¶ 22, 345 P.3d 553. Neither the court in *MacDonald* nor Wife attempts to satisfy this test.

In particular, Wife does not address whether "more good than harm will come by departing from precedent." *Id.* ¶ 64. This court has explained that it would consider "whether overturning a precedent would undermine the public's substantial reliance upon an established legal principle. . . . [P]eople should know what their legal rights are as defined by judicial precedent, and having conducted their affairs in reliance on such rights, ought not to have them swept away by judicial fiat." *Cope v. Utah Valley State College,* 2014 UT 53, ¶ 19, 342 P.3d 243 (internal quotation marks omitted). *MacDonald* disrupts the expectations of thousands of parties to divorce proceedings, as well as the courts that presided over those proceedings, who have drafted divorce decrees under the assumption that the traditional test applies, just as decades of case law say it does.

Wife has not shown that the court of appeals correctly deviated from its precedent applying the traditional test, even if stare decisis were the only consideration in play. But importantly, stare decisis is not the only consideration

in play because, under the *Christensen* test, the legislature has adopted the traditional test as correctly interpreting its statute that governs here. *Christensen v. Indus. Comm'n*, 642 P.2d 755, 756 (Utah 1982).

2. *Fish* and *Earhart* Did Not Change the Law

Inconsistent with Wife's discussion of stare decisis, Wife also contends that *MacDonald* "is not the outlier Husband portrays it to be." [Resp. Br. at 17.] As Wife did in the court of appeals, she cites *Fish v. Fish,* 2016 UT App 125, 379 P.3d 882, and *Earhart v. Earhart*, 2015 UT App 308, 365 P.3d 719. [Resp. Br. at 17-19.] Wife does not address Husband's demonstration that neither *Fish* nor *Earhart* overruled the traditional test. [Op. Br. at 27.] The court in *MacDonald* and Wife misinterpret *Fish* and *Earhart* as departing from the traditional test. They did not.

The court in *Fish* asked only whether every increase in income (there, $2 per hour) automatically constituted a substantial change in circumstances. 2016 UT App 125, ¶ 19. *Fish* held that the $2 per hour increase was not substantial. *Id.* ("The magnitude of [the wife's] alleged increase in income is therefore much smaller than that asserted by [the husband]."). The court correctly noted "an increase of income not actually contemplated by the divorce decree does not *automatically* require a finding that a 'substantial material change in circumstances not foreseeable at the time of the divorce' has occurred." *Id.* (emphasis added). Every future change need not be expressly set forth in the decree, because, were the law otherwise, some future changes like ordinary

raises and, as the court put it, "creeping inflation," would require revisiting alimony. *Id.* Neither the traditional test nor the new test require such a result.

Similarly, *Earhart* neither overruled nor purported to overrule the traditional test. *Earhart* uses both terms, "unforeseen" and "unforeseeable." 2015 UT App 308, ¶¶ 1, 3, 11, 365 P.3d 719. But it uses the term "unforeseen" in its holding — a detail the court in *MacDonald* overlooked. *Id.* ¶ 14. In short, neither *Fish* nor *Earhart* departed from the traditional test.

The consistency of the case law prior to *MacDonald* is confirmed by *Christensen v. Christensen,* a case issued two weeks before *MacDonald*. 2017 UT App 120, 400 P.3d 1219. That case expressly cited the traditional test: "to succeed on a petition to modify, the moving party must first show that a substantial material change of circumstance has occurred since the entry of the decree and [second, that the change was] not contemplated in the decree itself." *Id.* ¶ 20 (internal quotation marks and bracket omitted).

MacDonald changed the law. But it failed to find that the cases applying the traditional test were clearly erroneous, that conditions had changed, or that the public has not relied upon the traditional test. This court should reverse.

3. Stare Decisis Is Beside the Point Because the Legislature Amended the Statute Many Times Without Disapproving of the Traditional Test

In the opening brief, Husband demonstrated that, under *Christensen v. Industrial Commission,* 642 P.2d 755, 756 (Utah 1982), the legislature adopted the traditional test when it reenacted section 30-3-5(8)(i)(i) numerous times without

disturbing the many cases interpreting that section as reflecting the traditional test. [Op. Br. at 14-17.] In the words of *Christensen*, "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." 642 P.2d at 756.

Wife asserts that *Christensen* does not apply because Utah appellate courts have never "construed" the statute. [Resp. Br. at 19-20.] Wife asserts that "none of the post-1995 appellate cases Husband cites as applying the 'contemplated in the decree itself' standard construed the statutory language." [Resp. Br. at 20.] Wife contends that, rather than "construing" the statute, the cases either "summarily cited and proceeded under *Bolliger*" or "summarily cited and proceeded under standards in certain pre-1995 decisions." [Resp. Br. at 20-21.]

It is difficult to understand how these cases fail to construe the language of the statute, and then repeatedly apply that construal to the facts of their case. "Construction" means "[t]he act or process of interpreting or explaining the meaning of a writing (usu. a constitution, statute, or other legal instrument); the ascertainment of a document's sense in accordance with established judicial standards." *Black's Law Dictionary* (10th ed. 2014). The court of appeals construed the statute as reflecting the traditional test, even when citing *Bolliger*.

And the court in *Bolliger* was clear that the new statute reflects the traditional test, even though the legislature changed its wording. 2000 UT App 47, ¶ 11 & n.3, 997 P.2d 903. The court cited the 1995 statute, acknowledged the statutory amendment in a footnote, and then devoted the bulk of its analysis to describing and applying the case law applying the traditional test. *Id.* ¶¶ 11-24. In fact, rejecting the possibility that "foreseeable" might mean what Wife now contends, *Bolliger* quoted a pre-1995 case, saying "'[w]e do not believe it makes for good law or sound policy to have parties arguing years after the fact over what a trial court may or may not have considered when making an alimony award.'" *Id.* ¶ 19 (quoting *Johnson v. Johnson*, 855 P.2d 250, 253 (Utah Ct. App. 1993)). The court retained the traditional test that a change be "'*contemplated in the decree itself.*'" *Id.* ¶ 11 (quoting *Durfee v. Durfee*, 796 P.2d 713, 716 (Utah Ct. App. 1990)).

The court's construal of statutory language to embody the traditional test has driven the result in numerous cases. Had *Bolliger* adopted *MacDonald*'s construal of "foreseeable," it would have come out differently. In *Bolliger*, the trial court found no substantial, material change in circumstances because "[t]he alleged changes of [the husband]'s retirement and the parties' receipt of social security benefits are foreseeable events." 2000 UT App 47, ¶ 6. The court of appeals reversed on the ground that retirement and receipt of social security benefits were not "foreseen." *Id.* ¶ 20. The court stated that "[w]hile it is

axiomatic that the parties to a divorce decree will experience some type of economic change after the original divorce decree is entered, the change, if substantial, will support a modification to the decree only if it was not *foreseen* at the time of the divorce decree." *Id.* (emphasis added). Had the court meant "foreseeable," the result would have been different because retirement and social security are "foreseeable," i.e., capable of being taken into account.

Other cases also would have come out differently under the *MacDonald* test. For example, in *Young v. Young*, the substantial change in circumstances was the husband's receiving social security benefits — an event "not expressly foreseen in the original divorce decree." 2009 UT App 3, ¶ 3, 201 P.3d 301. Under the *MacDonald* test, social security benefits are "foreseeable."

Wife also contends that the *Christensen* analysis fails because the legislature amended the statute since *Fish* and *Earhart.* She states, "The problem is that Husband cannot point to a consistent 'judicial construction' of the Statute for the legislature to embrace." [Resp. Br. at 21.] But this is not a problem. Neither *Fish* nor *Earhart* changed the law, and so the steady, repeated application of the traditional test without legislative disapproval governs.

4. The 1995 Legislative History Does Not Govern

Wife also discusses the legislative history surrounding the 1995 amendment. For instance, Wife states there was no "benchmark standard" for alimony modifications and quotes language asserting that trial courts were

inconsistent statewide. [Resp. Br. at 23-24, quoting House Floor Day 8.] But that assertion comes from the beginning of the legislature's discussion concerning the entire amendment. [*Id.*; compare Resp. Br. at 25, quoting Senate Floor Day 32.] In other words, the discussion concerning inconsistent decisions was not directed at petitions to modify alimony. It was directed at the significant changes.

In fact, the petition to modify provision was a minor point. Wife states that Husband "either deliberately misstates, or in his review has missed, the legislative history" concerning the petition to modify provision. [Resp. Br. at 25.] Neither is true. Husband pointed out that the legislative history "gives very little attention to it at all, merely confirming that modifications would still be allowable after the amendment." [Op. Br. at 22.] The quotation Wife provides confirms this point. The entire bill, House Bill 36, was the product of a three-year Task Force, and the amendments to the bill required two conference committees. The bill was debated on the floor of the House four times and on the floor of the Senate five times, with nearly two total hours of discussion.[1] Of that time, Senator Hillyard's statement regarding foreseeability lasted just over one minute.

The foreseeability language likely received little attention because the change was not significant. As Husband explained in his opening brief, the pre-1995 statute allowed alimony modifications: "The court has continuing

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

jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties . . . as is reasonable and necessary." Utah Code § 30-3-5(3) (1994). And Husband cited a series of cases from the 1970s, 1980s, and early 1990s that applied this statute. [Op. Br. at 20-21 & n.2.]

Interpreting that statute, this court stated in 1972 that "expressed or assumed facts contemplated by the parties" must nonetheless be "incorporated in the decree" in order to allow subsequent modification. *Felt v. Felt*, 493 P.2d 620, 624 (Utah 1972). In 1983, this court used the phrase that carried through the decades: "On a petition for modification of a divorce decree, the threshold requirement for relief is a showing of substantial change in the circumstances of the parties occurring since the entry of the decree *and not contemplated in the decree itself.*" *Lea v. Bowers*, 658 P.2d 1213, 1215 (Utah 1983) (emphasis added).

Those cases governed at the time of the amendment. Senator Hillyard added the word "foreseeable" because it was common in the child support context, not to change the test for alimony modification. He did not suggest that the traditional test was incorrect or that the amendment would change the law, which is precisely what the court of appeals noted in *Bolliger*.

It is notable that, in the quotation Wife provides, the only example Senator Hillyard provides is consistent with the traditional test: "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." [Resp. Br. at 25 (emphasis added).] If the alimony was "projected," and the recipient "was planning on getting" training, the petition to modify would fail under the traditional test.

Senator Hillyard explained "the current law on child support" required "a substantial change in circumstances" and "that it's not foreseeable at the time of the divorce." [Resp. Br. at 25.] An examination of the case he cites, *Dana v. Dana*, 789 P.2d 726 (Utah Ct. App. 1990), and the state of the law at the time, confirms that he did not intend to depart from the traditional test.

Dana is a child support case. *Id*. at 729. The case concerns whether a change is substantial, not foreseeable, because the change was contemplated in the decree. There, the wife earned only $3,000 during the marriage, but "at the time of the divorce decree, *the court anticipated* [she] would increase her earnings from $10,000 to $12,000 shortly after the divorce, by finding outside employment." *Id.* at 729 (emphasis added). When she earned $17,000 instead, the court of appeals held that because of the court's "reasonable anticipation of [the wife]'s earnings" of $10,000 to 12,000, the additional income (up to $17,000) was not "substantial." *Id.* Because the decree anticipated that she would increase her income, the question of foreseeability was not at issue. Thus, the facts of *Dana* support Husband's arguments, not Wife's: "foreseeable" goes to whether the change was contemplated in the decree. Senator Hillyard did not assert otherwise.

Dana relied on *Fullmer v. Fullmer,* 761 P.2d 942 (Utah Ct. App. 1998). *Fullmer* was primarily a *custody* case. Its alimony analysis is not helpful. And given that child custody differs so widely from alimony, its custody analysis is not helpful either. *Id.* at 946. But to address Wife's brief in full, Husband responds as follows.[2]

In custody matters, changes in circumstances are viable only if the changes are to circumstances "upon which the previous award was based." *Id.* at 946 (internal quotation marks omitted). In *Fullmer,* the father asserted that the court should reexamine the custody award, which awarded primary custody to the mother. *Id.* at 943. The father asserted two substantial changes in circumstances since the divorce: (1) the mother had begun working full-time, whereas she previously had worked part-time; and (2) the father had remarried, had another child, and thereby created a stable home environment. *Id.* at 945.

The court of appeals held that there had been no change in circumstances because the original custody decision took both of those facts into account. *Id.* at 947. The court concluded that the father was "aware[] of the circumstances at the time he voluntarily entered into the stipulation." *Id.* Specifically, he was aware

[2] *MacDonald* acknowledges that the "change in circumstances required to justify a modification of a divorce decree varies with the type of modification sought." 2017 UT App 136, ¶ 9 n.3 (quoting *Haslam v. Haslam*, 657 P.2d 757, 758 (Utah 1982)); *see also Blocker v. Blocker,* 2017 UT App 10, ¶ 12, 391 P.3d 1051 (same); *Jones v. Jones*, 2016 UT App 94, ¶ 10, 374 P.3d 45 (same); *Busche v. Busche,* 2012 UT App 16, ¶ 12, 272 P.3d 748 (same). Wife does not address whether *MacDonald* also overruled those cases.

that (1) there was no economic way for the mother to support herself without working full-time, so it was "reasonable to assume" that she would do so immediately; and (2) the father was engaged to his girlfriend, who was already pregnant with his child, so it was "reasonable to assume" that he was shortly going to have a new wife and another child. *Id.* at 947-48. The court determined that "the alleged change of circumstances relied upon by the trial judge were within the reasonable contemplation of the respondent at the time he stipulated to the custody arrangement and thus not legally cognizable." *Id.* at 947.

Wife states that *Dana* and *Fullmer* allow for changes that "may reasonably be anticipated," the language in *MacDonald.* [Resp. Br. at 27 (quoting *MacDonald,* 2017 UT App 136, ¶ 11 (quoting dictionary)).] But neither *Dana* nor *Fullmer* stands for that proposition. In both cases, the change was contemplated in the decree or already occurring and therefore foreseen.

Finally, Wife asserts that Husband's hypotheticals, that "[a] person may anticipate retirement" or "anticipate selling real property," are "squarely at odds" with *Dana* and *Fullmer.* [Resp. Br. at 27.] That is true — but only because events that are not contemplated in the decree are "squarely at odds" with those that are. *Dana* and *Fullmer* both involved changes that were incorporated into the underlying decree. Prospective retirement or anticipation of a future sale of real property could be contemplated in the decree, but if they are not, they should remain eligible for future modification.

5. The *Richardson* Standard Confirms the Traditional Test

Wife also asserts that *Richardson v. Richardson,* 2008 UT 57, 201 P.3d 942, is beside the point. [Resp. Br. at 28-30.] But Husband demonstrated that the combination of *Richardson* and *MacDonald* created an unworkable framework.[3]

In response, Wife asserts that *Richardson* addresses changes *in the decree* and *MacDonald* addresses changes *after the decree.* But that is the point. *Richardson* and *MacDonald* are bookends. *Richardson* governs which prospective changes may be addressed at the time of the divorce, and *MacDonald* governs which changes may be addressed after the divorce. The two need to be compatible, so parties know what future changes they must account for in the divorce decree.

As described in the opening brief, *Richardson* states that certain events may be considered in the initial alimony determination if the event is "certain to occur within a known time frame." 2008 UT 57, ¶ 10. In contrast, if an event is "uncertain[]," then "prospective changes to alimony are disfavored." *Id.* This court distinguished a child's turning 18 from retirement – a child's turning 18 is an event that is certain to occur at a certain time, but retirement is not. Thus, prospective changes can be built into, or correctly implied to be in, the divorce decree where the "date" and "result" are known. But where the "date" and "result" are unknown, those changes may support a petition to modify.

[3] To be clear, contrary to Wife's misstatement, Husband did not argue that *MacDonald* "disturb[ed] or affect[ed]" *Richardson*'s holding. [Resp. Br. at 29.]

Richardson, issued in 2008, is compatible with decades of case law, before and after 1995, which allows petitions to modify when a substantial change has occurred that was "not contemplated in the decree itself." *Christensen v. Christensen*, 2017 UT App 120, ¶ 20, 400 P.3d 1219 (internal quotation marks omitted); *Wall v. Wall*, 2007 UT App 61, ¶ 11, 157 P.3d 341 (internal quotation marks omitted); *Bayles v. Bayles*, 1999 UT App 128, ¶ 12, 981 P.2d 403; *Lea v. Bowers*, 658 P.2d 1213, 1215 (Utah 1983). This created a predictable system in which, if the date and significance of a future change are known at the time of divorce, then it can be taken into account in the decree. Changes that were contemplated in the decree could not later justify modification.

MacDonald disrupts this balance. As the court articulated in *Bolliger v. Bolliger*, the policy implications of that disruption are significant: "We do not believe it makes for good law or sound policy to have parties arguing years after the fact over what a trial court may or may not have considered when making an alimony award." 2000 UT App 47, ¶ 19, 997 P.2d 903 (internal quotation marks omitted). This policy remains true, which perhaps explains why the legislature adopted *Bolliger* as reflecting the statute.

This court should reverse *MacDonald* to restore the predictability that allows parties to make deliberate decisions regarding their divorce decrees and courts to know what future changes should impact current alimony awards.

6. Under Its New Test, the Court of Appeals Should Have Remanded

Even under *MacDonald*'s new characterization of the test, the court of appeals erred when it did not remand for a factual determination. Having established "foreseeability" as the test, the court of appeals erred when it decided, on its own, that the income here was foreseeable. The court assumed that the question of foreseeability is a question of law. But as argued in the opening brief, the question of foreseeability, if that is the test, is a question of fact. At a minimum, *MacDonald* should have remanded for the trial court to determine whether Wife's income was foreseeable.

And as explained in the opening brief, the trial court could not have found that the future income, as opposed to the sale of property, was foreseeable. Recall that the period of alimony was only a few years. It was not certain that Wife would sell the property during that period. Had she sold the property towards the end of the period, the effect would have been minimal. As it was, she sold it very early in the alimony period and invested the proceeds to generate a significant stream of income, directly impacting her need for alimony as anticipated by the parties and the court when setting alimony.

Relatedly, the foreseeability of the price is significant. Had Wife sold the property for the price the parties placed on the property when dividing the property equally, she would not have had as much principal to invest. And had she spent the proceeds, rather than invested them, she would not have earned a substantial income from them. Had she invested only some of the proceeds, or

deposited them in an interest bearing account, rather than an investment account, the income she drew may not have been "substantial," even if it was a "change in circumstances."

In short, once the question of new income is the focus, the trial court's ruling cannot support the court of appeals' decision to affirm without remand. For these reasons, under the new test the court should have remanded for determination of whether the stream of income was foreseeable.

7. Under the Traditional Test, the Court of Appeals Should Have Remanded

Additionally, as demonstrated in the opening brief, had *MacDonald* retained the traditional test, it should have reversed and remanded.

Under the traditional test, Wife's ability to sell the land for a windfall and to begin to generate significant income from the proceeds were not "contemplated in the decree itself." Wife contends otherwise, pointing to phrases in the divorce decree suggesting that someday Wife might sell the property. [Resp. Br. at 33.]

Husband has not asserted that it was unforeseen that Wife might *ever* sell the property *at any price.* What was unforeseen was that Wife would sell the property quickly, at a substantial sum, invest the proceeds, and generate significant income during the period in which the decree contemplated the need for alimony. Nothing in the divorce decree contemplated those changes in circumstances. In other words, the idea that Wife might someday sell the

property at some price is not determinative. Husband agrees that the mere liquidation of property received in a divorce would not constitute income. Husband instead contends that Wife's investment of those proceeds and ability to generate income from those investments do constitute income. Rather than change the test for petitions to modify, *MacDonald* should have reversed on the ground that the substantial change in circumstances that affected income (the investment) was not contemplated in the divorce decree.

In her response brief, Wife tries to blur the distinction between property and income. [Resp. Br. at 33-35.] But as Husband explained in his opening brief, it was not the division of property or sale of the property that was the change in circumstances. The change in circumstances was the timing of the sale, combined with the unexpected price, combined with the investment of the proceeds, combined with the significant income generated. [Op. Br. at 33-36.]

The cases Wife cites do not help her position. Wife cites *Felt v. Felt,* 493 P.2d 620 (Utah 1972). Wife quotes the following passage: "the wife's equity in the home and about insurance policies awarded to her in the decree [were] facts quite impertinent and inadmissible here," *id.* at 622. But that quote describes the information that was not "found in the court's written Findings." *Id.* at 622. The alleged change in circumstances in *Felt* was an increase in the wife's wages, a decrease in the husband's wages, and the husband's remarriage. *Id.* at 623-24. And *Felt,* more than twenty years before the 1995 amendment, stated: "we affirm

our previous pronouncements that a divorce decree containing awards for support based on either expressed or assumed facts contemplated by the parties or the court or both, should not be modified when the contemplated facts are obvious or agreed to by the parties and *in turn incorporated in the decree.*" *Id.* at 624. *Felt* supports Husband's argument.

Wife also cites to a Connecticut case from 1995, *Denley v. Denley*, 661 A.2d 628 (Conn. App. Ct. 1995). But it also does not help Wife. There, the court awarded to the husband stock options, some of which he liquidated. *Id.* at 631. The wife argued that this constituted a substantial change in circumstances because his income was higher after *liquidating* assets. *Id.* at 631. She did not assert that the husband's income was higher because he began *generating income* from investing the stock options. *Id.* The court held that the "mere exchange of an asset awarded as property . . . for cash . . . does not transform the property into income." *Id.* This is correct, but beside the point here.

Here, Wife had a change in income because she invested the cash and *began* generating annual income from that windfall from the sale of Lot 1. Put differently, it is not the principal that is at issue, it is the new income generated from that principal after it was liquidated and invested.

Similarly, Wife's reliance on *Jense v. Jense*, 784 P.2d 1249 (Utah Ct. App. 1989) is misplaced. [Resp. Br. at 34-35 (quoting R.822).] In *Jense*, the parties stipulated to the value of the marital home and agreed that the husband would

receive the home and the wife would receive cash. 784 P.2d at 1252. The cash setoff was to be paid after the husband received an anticipated bonus. *Id.* But things did not play out as anticipated. The husband did not receive the bonus, but instead lost his job and sold the house for two-thirds the price the parties expected. *Id.* at 1250, 1252. He petitioned to modify the cash set-off, which by that time had been reduced to a judgment, on the ground that the decline in value of the real property constituted a change in circumstances. *Id.* at 1250-51.

The court of appeals refused, explaining that the division represented an equal "distribution of the marital estate as it existed on the date of the decree." *Id.* at 1252. Although the husband's loss of his bonus and job reduced his ability to *pay* the judgment, neither changed the value of the marital estate on the day of divorce. *Id.* The court of appeals confirmed that changes in property settlements are strongly disfavored. *Id.* at 1252-53. Alimony was not at issue.

The trial court here compared Husband to the husband in *Jense,* concluding that both had "received exactly what he bargained for." [R.821.] But unlike the husband in *Jense,* Husband has not asked the court to change a property settlement or to vacate a judgment against him. Husband agrees that Wife is entitled to all of the proceeds from sales of her properties.

Instead, Husband asked the trial court to recognize that a substantial change in circumstances occurred for purposes of alimony because, as a result of the annual income Wife receives from her new investments, Wife's "earning

capacity or ability to produce income" has changed. (R.257-59;682-697;836-40;1259.) Thus, *Jense* is beside the point.

Moreover, the trial court acknowledged that Wife's income changed: "the evidence is that the income has changed for [Wife] from the time of the Decree, where it was at or near zero, to the time of trial where the testimony was that it was $45,000 or $67,200 a year depending on the source of the testimony. So it has changed." [R.822-23; *see also* R.1108:23-1109:1;1115:10-21 (Wife's accountant testifying her earnings were $45,000 per year).] Wife's financial declaration indicated she earned $167 from work and $441 from an actor's pension, and otherwise her income was entirely from investments and alimony. [R.618.]

None of the cases cited by Wife support affirming.

Factual Assertions – In what remains, Husband addresses various factual assertions in the response brief, which are either incorrect or beside the point.

First, Wife contends that it is impossible to determine whether Wife's change in income is "substantial" because there was no baseline finding of "need." [Resp. Br. at 36.] This is incorrect. Wife's need, without investment income, is set forth in the decree. And the trial court could calculate Wife's need after generating new income because she filled out a financial declaration in which she indicated her expenses. [R.619,625.] But the trial court did not calculate her need because it stopped its analysis at the preliminary step of whether a change had occurred at all. Wife's "need" and "income" are fact

questions appropriate for review by the trial court, once it has been properly instructed that a change in circumstances exists. Wife also asserts that Husband may end up having to pay "more" to sustain Wife at her marital standard of living. [Resp. Br. at 36-37, n.11.] Again, this statement confirms that the question must be presented to the trial court.[4]

Second, Wife cites to the *MacDonald* footnote that "there was no evidence that the parties agreed to the property distribution based on any mutual understanding of the value of the parcels involved." [Resp. Br. at 39 (citing *MacDonald*, 2017 UT App 136, ¶ 19, n.7).] But as stated in the opening brief, "[t]he statement that there was 'no evidence' flatly contradicts the record." [Op. Br. at 40.] Wife asserts that the evidence to which Husband cited was "self-serving." [Resp. Br. at 39,40.] "Self-serving" means supports the position of an opponent, hardly a charge that undermines its value, let alone supports the court's erroneous footnote that there was no evidence. In other words, Wife acknowledges the evidence, but attempts to minimize its impact by noting that the evidence undermines her position. Regardless, there is evidence.

Third, and most important, Wife repeatedly asserts that the trial court "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

[4] Wife also states that Husband was awarded several properties. [Resp. Br. at 37.] That is true, but irrelevant, because those properties were his premarital separate property, and most had liabilities attached to them. [R.157,162,114-15.]

1." [Resp. Br. at 38.] In support, Wife cites a factual finding 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." [Resp. Br. at 38; R.820.] While those numbers are not set forth in the decree itself, that fact hardly shows that the parties did not assign values to assets when dividing assets. Unless the parties randomly assigned assets to each party, they had discussions—in fact, they had extensive negotiations with former Judge Billings— of how to divide their assets. And for those discussions to contribute to an agreement as to why the division was equitable, the parties necessarily assigned values to the marital assets.

It is difficult to understand how Wife and her counsel can maintain that they participated in negotiations for the division of marital assets with no understanding of the value of those assets, to which Husband acting pro se managed to assign values. [R.86.] As explained in the opening brief, the parties' negotiations were based on values for the lots based on appraisals and county valuations, as well as extensive spreadsheets that both parties saw. [R.114-15,156-62,862,867.] Wife cannot argue now she did not understand; she stated in the stipulation that she "reached agreement . . . [and] has consulted with attorneys and/or advisors of [her] choosing and has been duly advised." [R.19.]

Further, Wife declared she only wanted to receive property free and clear without debt or entanglement. [R.187.] As a result, according to Wife, what she

got in the decree was "three pieces of dirt." [R.1077.] She transformed one of the pieces of dirt into an income-producing investment, and now she is able to meet some or all of her own needs, precisely the type of change for which alimony should be modified.

In short, the trial court erred when it confused the value of the lots (a property division issue) with Wife's ability to meet her own needs (an alimony issue). Whether Wife produced income from the investment of the proceeds from a property sale or from some other unforeseen circumstance, the important factor is that Wife is now generating an unforeseen income stream that enables her to meet her needs and reduces her need for alimony. This court should remand for findings under the proper standard.

Because the trial court erred under the traditional test, the court of appeals should have clarified that Wife's change in income constituted a substantial change in circumstance with regard to income, not property division. This court should clarify the standard and remand for the trial court to apply the standard to determine whether Wife's new stream of income is a basis to modify alimony under that standard.

Conclusion

This court should reverse and restore the traditional test for when a substantial change in circumstance is an eligible basis to modify alimony. Under the traditional test—or the new test articulated by the court of appeals—this

court should reverse and remand so the trial court can determine whether the new income here is a basis to modify alimony.

DATED this 23rd day of March, 2018.

ZIMMERMAN BOOHER

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Certificate of Compliance

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(1) because this brief contains 6,975 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

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

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

DATED this 23rd day of March, 2018.

/s/ Troy L. Booher

Certificate of Service

This is to certify that on the 23rd day of March, 2018, I caused two true and correct copies of the Reply Brief of Appellant to be served via first-class mail, postage prepaid, with a copy by email, on:

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