No. 20150785-CA

THE UTAH COURT OF APPEALS

KIRKPATRICK MACDONALD,
Plaintiff and Appellant,

v.

LEE ANNE MACDONALD (NKA FAHEY),
Defendant and Appellee.

BRIEF OF APPELLANT

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

Matthew A. Steward
CLYDE SNOW & SESSIONS
One Utah Center, 13th Floor
201 South Main Street
Salt Lake City, Utah 84111
mas@clydesnow.com

Attorneys for Appellee Lee Anne MacDonald

Troy L. Booher (9419)
Julie J. Nelson (9943)
ZIMMERMAN JONES BOOHER
Felt Building, Fourth Floor
341 South Main Street
Salt Lake City, Utah 84111
tbooher@zjbappeals.com
jnelson@zjbappeals.com
(801) 924-0200

Bart J. Johnsen (7068)
PARSONS BEHLE & LATIMER
201 S. Main Street, Suite 1800
Salt Lake City, Utah 84111
BJohnsen@parsonsbehle.com
(801) 532-1234

Attorneys for Appellant Kirkpatrick MacDonald

Oral Argument Requested

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Jurisdictional Statement

This court has jurisdiction pursuant to Utah Code section 78A-4-103(2)(h).

Introduction

Kirk MacDonald and Lee Anne Fahey were married for over 20 years, during which time they came to own numerous real properties through Mr. MacDonald's real estate business. At the end of their marriage, they negotiated a settlement agreement. They agreed upon alimony and the division of their real property. In determining alimony, the parties did not contemplate that either party would invest funds from the property division to generate income.

After they reached the settlement but before the court entered the decree, someone offered to buy one of the properties to be awarded to Ms. Fahey. The price for the property was nearly double what the parties had estimated. After the divorce decree was entered, the property was sold. Ms. Fahey received the entire cash sum in lieu of the property itself, a result Mr. MacDonald does not challenge because he accepts the stipulated division of property.

This appeal instead concerns Mr. MacDonald's petition to modify the alimony award based upon the fact that, after the divorce, Ms. Fahey invested the unexpected cash from the sale to generate a new stream of income totaling at least $45,000 per year. Because Ms. Fahey's income changed significantly after the divorce, the trial court erred in refusing to recognize the new income as a substantial and material change of circumstances that allows Ms. Fahey to satisfy her own financial needs and therefore affects her need for alimony.

Statement of the Issues

Issue 1: Whether income generated from investments made after a divorce qualifies as a substantial and material change in circumstances that was not contemplated in the divorce decree.

Standard of Review: Under Utah law, "when presented with a question of law regarding what constitutes a substantial change of circumstances," the court reviews it for correctness. *Davis v. Davis*, 2011 UT App 311, ¶6, 263 P.3d 520.

Preservation: This issue is preserved. (R.258, 684-85, 819-24, 836-40, 1259.)

Determinative Provisions

The following provision is set forth at Addendum B:

Utah Code § 30-3-5

Statement of the Case

1. Nature of the Case and Course of Proceedings

The parties entered into a settlement agreement concerning the division of marital assets and alimony. They submitted it to the court on December 9, 2011. The court entered a decree reflecting those terms on January 11, 2012.

Ms. Fahey was awarded property in the divorce decree. After the court entered the divorce decree, she sold some of the property for an unexpectedly high price, invested the unexpected proceeds, and began generating $45,000 a year in income from the investment. Mr. MacDonald petitioned to modify the alimony award because the new income stream is a substantial change in circumstances.

The district court denied Mr. MacDonald's petition to modify on the ground that, because the new income stemmed from an investment of money awarded to Ms. Fahey in the divorce, the new income cannot constitute a substantial change in circumstances.

2. Statement of Facts

Kirk MacDonald and Lee Anne Fahey were married for approximately twenty years. (R.1-3.) Mr. MacDonald filed for divorce in February 2010. (R.1-3.) Throughout 2010 and 2011, the parties negotiated a settlement. (R.860:24.) The parties consulted independent counsel during this time, and jointly hired retired Judge Judith Billings to help them with their settlement agreement. (R.861:1,16.)

The Settlement Agreement

The basis for the settlement discussions was "seven major assets" and "five or six important liabilities." (R.861:22; 869:6-7.) Mr. MacDonald prepared spreadsheets showing the couple's assets and liabilities. (R.862:5-6,20.) The parties determined the values of the real property based upon county tax records and without the benefit of an appraisal. (R.157-58.) On December 9, 2011, they submitted a Stipulation and Settlement Agreement ("Settlement Agreement," attached at Addendum D), and a Stipulated Motion for Entry of Decree. (R.18-25; 26-28.) The Settlement Agreement divided the property as follows.

(1) The Preserve Lots

The agreement provided Ms. Fahey all rights, title, and interest to three properties, collectively referred to as "The Preserve Lots." (R.20 at ¶6.) Those three lots included Lot 1, Lot 49, and a yet-to-be-platted lot. (R.20 at ¶¶6, 7, 8.) As to the yet-to-be-platted lot, the parties stipulated that Mr. MacDonald would convey its title to Ms. Fahey after it was conveyed to him. (R.20 at ¶7.)

The parties also agreed that Ms. Fahey "shall have an option to receive a promissory note from [Mr. MacDonald] in the amount of $300,000 in exchange for her right to receive the [yet-to-be-platted] lot," and detailed that option. (R.20 at ¶7.) The Settlement Agreement also explained that Mr. MacDonald would "pay the Homeowner's Association fees and property taxes on The Preserve Lots for a period of five years commencing January 1, 2011 or until [Ms. Fahey] sells one of

The Preserve Lots. [Mr. MacDonald]'s payment of the HOA fees and property taxes shall be treated as a loan to [Ms. Fahey], and [Ms. Fahey] shall reimburse him for those payments without interest at the time she sells one of The Preserve Lots." (R.20 at ¶9.) Ms. Fahey later characterized these properties as "three pieces of dirt that generated [no income]." (R.1077:4-6.)

(2) Other Real Property

All other real properties were awarded to Mr. MacDonald. (R.21 at ¶10.)

(3) Financial Settlement

The Settlement Agreement stated that Mr. MacDonald had paid to Ms. Fahey $200,000, and that he would pay her an additional amount of $103,500 in monthly payments through 2011 and 2012. (R.21 at ¶¶12, 13.)

(4) Debts

The parties assumed all debt in their own names. (R.21 at ¶14.)

(5) Alimony

Mr. MacDonald agreed to pay Ms. Fahey $2,000 per month in alimony from January 2011 to December 2012. (R.21 at ¶15.) Beginning January 2013, the same time that the property payments ended, the alimony would increase to $6,000 per month, ending December 2020. (R.21-22 at ¶15.) Alimony would terminate upon Ms. Fahey's remarriage, cohabitation, or death, but would remain an obligation of Mr. MacDonald's estate should Mr. MacDonald die before 2020. (R.22 at ¶15.)

The Divorce Decree

On January 6, 2012, the district court signed Findings of Fact and Conclusions of Law and a Decree of Divorce, and the documents were entered into the court's docket on January 11. (R.38-48, attached at Addendum C.) The Findings of Fact corresponded exactly to the parties' Settlement Agreement. The Conclusions of Law added the following provisions:

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

(R.42-43.)

Sale of Lot 1

Sometime between December 5, 2011, when the parties submitted the signed Settlement Agreement, and January 11, 2012, when the court entered the Decree of Divorce, Mr. MacDonald was presented with the opportunity to sell Lot 1. (R.875:9-19.) The property had not been listed, but Mr. MacDonald was contacted in early or mid-December 2011 about a serious buyer. (R.875:9-25.) The buyer offered $1,425,000 for Lot 1, which was approximately twice what the parties had anticipated. (R.878:15-16; 157 at ¶10.) After some discussions, Ms.

Fahey and Mr. MacDonald agreed to sell the property and signed the Real Estate Purchase Contract after the day the parties filed their stipulation, December 9, 2011 (R.18), and before the day the judge entered the divorce decree, January 11, 2012 (R.38). The sale closed in January 2012. (R.52, 136.)

Ms. Fahey's Investment of the Proceeds from the Sale of Lot 1

Because Lot 1 was awarded to Ms. Fahey in the Divorce Decree, she received all the proceeds from its sale. Immediately after receiving the money from the sale of Lot 1, she wired it to her financial consultant and investment advisor, Fredrick Snyder. (R.1061:17-21.) Mr. Snyder was, at that time, also managing the $200,000 cash settlement that Ms. Fahey had received from Mr. MacDonald. (R.1061:17-21.)

According to Mr. Snyder, Ms. Fahey deposited $1,240,000 in her trust account in February 2012, (R.1116:16-19), and in 2013, deposited another $498,000 that resulted from the sale of other property (R.1116:25-1117:1). Thus, by mid-April 2015, Ms. Fahey's trust account had $1,740,000 in it. (R.1107:25-1108:5.) Mr. Snyder stated that Ms. Fahey earned, and he anticipated she would continue to earn, approximately $45,000 per year on her investments, before taxes, as income from stocks and bonds. (R.1108:23-1109:1; 1115:10-21.) Ms. Fahey's earnings on her investments are generally reinvested into the capital, with the intention that she will keep her stocks until she dies. (R.1125:16-22.)

Rule 60(b) Motion

On April 6, 2012, Mr. MacDonald filed a rule 60(b) motion to set aside the Decree of Divorce on the basis that the values of property were different from what the parties anticipated. (R.131-41.) The trial court denied this motion. (R.454-55.) Mr. MacDonald does not appeal that ruling.

Petition to Modify

On January 29, 2013, Mr. MacDonald filed a petition to modify the divorce decree. (R.257-59.) Specifically, he asked the court to terminate the alimony payments. (R.257-58.) He argued that the alimony agreement had been intended to "ensure [Ms. Fahey] had funds to meet her needs," because she had minimal income prior to the divorce ($167/mo.). (R.258, 618.) But Mr. MacDonald argued that it was no longer the case that she needed alimony because she was now capable of meeting her own needs with new income from her investments. (R.258.) Thus, he contended, a substantial and material change of circumstances had taken place. (R.258, 684-85, 836-40, 1259.)

The trial court held a two-day trial on the matter. (R.832-1278.) Ultimately, the trial court denied the petition on the basis that the new income stream did not constitute a substantial change in circumstances. (R.816-24, attached at Addendum A.) Mr. MacDonald appeals. (R.825-26.)

Summary of the Argument

Alimony awards are predicated on (i) the financial needs of the receiving spouse, (ii) the receiving spouse's earning capacity and ability to produce income, and (iii) the ability of the payor spouse to provide support. If those factors change substantially after the divorce, a party may petition to modify the award. The court will modify the award if "a substantial change in circumstances" has occurred after the divorce and was not foreseeable at the time of divorce.

Here, there has been a substantial change in circumstances that occurred after the divorce and was not foreseeable at the time of divorce. After the divorce, Ms. Fahey began generating $45,000 in annual income that she was previously unable to generate. The income stream derived from investments she made after receiving proceeds from a sale of real property awarded in the divorce. The decree did not contemplate those investments made post-divorce.

The trial court ruled otherwise because it characterized Mr. MacDonald's argument as seeking to adjust the division of property, rather than the alimony award. But Mr. MacDonald's petition concerned alimony. And under Utah law, a recipient spouse's later income *can* constitute a substantial change in circumstances that warrants a modification of alimony. Because the trial court erred as a matter of law when it ruled that the new investment income does not constitute a "substantial change in circumstances," this court should reverse and remand for an appropriate adjustment to alimony.

Argument

The trial court erred when it denied Mr. MacDonald's petition to modify the alimony award. The trial court incorrectly determined that no substantial change of circumstances occurred when Ms. Fahey, after the divorce, began to generate $45,000 per year income. This court should reverse and remand for a recalculation of alimony based upon Ms. Fahey's current ability to meet some or all of her own needs.

1. General background concerning petitions to modify

Alimony awards are predicated on three primary factors, known as the *Jones* factors: "(i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to produce income; and (iii) the ability of the payor spouse to provide support." *Dahl v. Dahl*, 2015 UT 79, ¶¶94-95, --- P.3d ---; Utah Code § 30-3-5(8)(a). If something changes over time, either party may file a petition to modify the alimony award "based on a substantial material change in circumstances not foreseeable at the time of divorce." Utah Code § 30-3-5(8)(i)(i). And, critical here, "in the alimony context, a substantial change in circumstances includes a change in income not anticipated in the divorce decree." *Busche v. Busche*, 2012 UT App 16, ¶12, 272 P.3d 748. At all times, however, the recipient spouse's need for alimony determines the maximum permissible alimony award, regardless of whether the payor has the ability to pay more. *Roberts v. Roberts*, 2014 UT App 211, ¶14, 335 P.3d 378.

Courts retain authority to modify an alimony award even when the initial alimony award is a result of a stipulation. *Felt v. Felt*, 493 P.2d 620, 622 (Utah 1972). "[A]n agreement or stipulation between parties to a divorce suit as to alimony or payments for support of children is not binding upon the court in entering a divorce decree, but serves only as a recommendation, and if the court adopts the suggestion of the parties it does not thereby lose the right to make such modification or change thereafter as may be requested by either party, based upon change of circumstances warranting such modification." *Callister v. Callister*, 261 P.2d 944, 946 (Utah 1953). Indeed, "parties cannot by contract divest a court of its statutorily granted subject matter jurisdiction to make alimony modifications." *Sill v. Sill*, 2007 UT App 173, ¶17, 164 P.3d 415.

In contrast to alimony, courts rarely have authority to modify a division of real property. This is not because such modifications would be inequitable, but because a frequent change in title would be difficult *for titles*: "In the interest of promoting stability in titles, modifications in a decree of divorce affecting the disposition of real property are to be granted only upon a showing of compelling reasons arising from a substantial and material change in circumstances." *Whitehouse v. Whitehouse*, 790 P.2d 57, 61 (Utah Ct. App. 1990) (emphasis and internal quotation marks omitted). This stands in contrast to "[p]rovisions dealing with alimony [which] are more susceptible to alteration at a later date

because the needs that such provisions are intended to fulfill are subject to rapid and unpredictable change." *Id.*

2. The question presented

The trial court denied Mr. MacDonald's petition to modify on several grounds. None are legally correct, and all are based upon the same mistake. To begin, the trial court concluded that (i) Mr. MacDonald was asking the court to modify the property division set forth in the settlement agreement, not the alimony award, and (ii) Mr. MacDonald "received exactly what he bargained for." (R.821-22.) The court rejected Mr. MacDonald's distinction between property division and alimony and ruled that the fact that the property sold for more than the parties anticipated was not sufficient to establish a substantial change in circumstances for purposes of *alimony*. (R.822.)

The court was incorrect as a matter of law. The trial court had already rejected Mr. MacDonald's rule 60(b) motion to set aside the Divorce Decree on the ground that the property division was inequitable. (R.454-56.) The petition to modify the alimony award presented a different issue—whether Ms. Fahey's new income constituted a substantial change in circumstances. The trial court erred in failing to distinguish a request to alter a property division from a request to modify an alimony award based upon a new stream of income. (R.257-59.)

After failing to distinguish the division of marital property from the modification of alimony, the trial court ruled that there had been no substantial

material change in circumstances. (R.821.) Specifically, the court ruled that, because the Decree did not set forth the anticipated price of the property that Ms. Fahey would receive from its eventual sale, it was impossible to say whether, in fact, a change had taken place. (R.819-21.) That ruling was also in error.

Finally, the trial court ruled that the Decree expressly contemplated that Ms. Fahey would, someday, sell the lots, receive proceeds, and use those proceeds to "help pay her expenses and live." (R.819,823.) Thus, the trial court ruled that any change of circumstances that had occurred was foreseeable at the time of the divorce. (R.823.)

The trial court's fundamental mistake was failing to recognize that an alimony award is subject to change when a party's income changes substantially. *Busche*, 2012 UT App 16, ¶12. Thus, the question before the trial court was whether there was a substantial material change in circumstances because Ms. Fahey now has a new and substantial stream of income, whereas at the time of divorce, she did not. Said differently, the question was whether income generated from the investment of proceeds that result from the sale of property that was divided in a divorce constitutes "income." It does. The statute does not discriminate based upon the source of the new income, but instead balances the relative needs and abilities of the parties, including any new income.

For the reasons described below, this court should reverse the trial court's conclusion that no substantial change in circumstances occurred, and remand for a reopening of the alimony analysis.

3. The trial court erred when it concluded that the case concerned dividing property, not alimony

The trial court incorrectly conflated Mr. MacDonald's petition to modify *alimony* with a request to modify a property division. This mistake infected the court's entire analysis.

Utah law rarely permits a divorce court to revisit a division of real property on the ground that values in the real property have changed subsequent to the divorce decree. *Jense v. Jense*, 784 P.2d 1249, 1252-53 (Utah Ct. App. 1989). Mr. MacDonald's petition to modify did not make that argument, but the trial court found that Mr. MacDonald was *effectively* making that argument: "I understand that [Mr. MacDonald]'s argument is slightly different here i.e., that it is not just a change of property value but that it is income derived from the change in property value one party may have assumed. But that's really the same valuation here." (R.822.) As demonstrated below, however, the trial court was incorrect. It is not "really the same valuation."

To understand the underlying principle, it is helpful to examine *Jense v. Jense*, a case the trial court cites. 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 2/3 the price the parties expected. *Id.* at 1250, 1252.

The husband 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. This court 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.* Nor, importantly, did the fact that the parties had mis-estimated the value of the marital home. *Id.* In fact, the court found that "the final selling price . . . was partially due to [the husband's] lack of diligence in selling the . . . home immediately after the decree." *Id.*

This court stated that the husband "received exactly what he bargained for," and that "for [him] 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." *Id.* at 1252-53. The court held that "subsequent changes in property value, without additional compelling reasons, do not constitute a substantial change in circumstances upon which the trial court may enter a modification of a decree of divorce." *Id.* at 1253. The

reason for the rule, the court explained, is that, "[f]or this court to rule otherwise would open a Pandora's box, permitting parties to a divorce to seek subsequent modification of property settlements every time the property they received in the decree changed in value. . . . The principles of res judicata mandate that, absent compelling reasons, the parties to a property settlement set forth in a decree of divorce be able to rely on the finality of that judgment." *Id.*

The trial court here compared Mr. MacDonald to the husband in *Jense,* concluding that both had "received exactly what he bargained for." (R.821.) But this is incorrect. Mr. MacDonald's situation is not the same. Unlike the husband in *Jense,* Mr. MacDonald has not asked the court to change a property settlement or to vacate a judgment against him. In fact, Mr. MacDonald agrees that Ms. Fahey is entitled to all of the proceeds from sales of her properties. Mr. MacDonald makes no attempt to obtain any portion of the proceeds or to modify the property division in the divorce decree, and his petition to modify is not based upon the changed value of the real property that was sold.

Instead, Mr. MacDonald 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* Ms. Fahey receives from her new investments, Ms. Fahey's "earning capacity or ability to produce income" has changed. (R.257-59; 682-697; 836-40; 1259.) That is a relevant consideration upon which to modify alimony: "[i]n the alimony context, a substantial change in circumstances

includes a change in income not anticipated in the divorce decree." *Busche v. Busche*, 2012 UT App 16, ¶12, 272 P.3d 748. Thus, *Jense* is beside the point. It does not matter that the capital Ms. Fahey invested came from the sale of Lot 1.

The trial court's next statements encapsulate its misunderstanding. The trial court improperly compared Mr. MacDonald's ability to earn increased income without affecting the alimony award, to Ms. Fahey's ability to earn increased income without affecting the alimony award. The court wrote: "[Mr. MacDonald] 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." (R.821-22.)

The first statement, that Mr. MacDonald can sell his properties without sharing proceeds, is true. But the second statement neither logically follows nor is consistent with Utah law. The court states that Ms. Fahey cannot request *more* alimony based on Mr. MacDonald's selling property at a higher-than-anticipated value. This is also true under most circumstances—but it has nothing to do with

whether Mr. MacDonald sells his properties for more than expected. Instead, Ms. Fahey is precluded from requesting more alimony because "regardless of the payor spouse's ability to pay more, the [recipient] spouse's demonstrated need must ... constitute the maximum permissible alimony award." *Roberts v. Roberts*, 2014 UT App 211, ¶14, 335 P.3d 378 (alterations in original) (internal quotation marks omitted). In other words, so long as the award of alimony satisfies Ms. Fahey's demonstrated need, she cannot ask for increased alimony, regardless of whether Mr. MacDonald could pay more.[1]

The trial court erred when it compared Ms. Fahey's inability to petition to modify the divorce decree to receive more alimony—which she cannot do if the current award meets her needs—to Mr. MacDonald's inability to petition to modify to reduce the alimony award if Ms. Fahey no longer has that need. The trial court therefore erred when it refused to consider Ms. Fahey's changed need for alimony in considering a petition to modify alimony.

Because the issue was not a petition to modify the property settlement, but a petition to modify the alimony, which is an analytically distinct issue, the trial court should have considered the petition to modify on the merits. The two are

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[1] By contrast, had Mr. MacDonald's income subsequently *decreased* such that he was no longer able to meet his alimony obligations, he would have been able to petition the court to modify the alimony award on the basis that a substantial change in circumstances had taken place. *Earhart v. Earhart*, 2015 UT App 308, ¶13, --- P.3d ---. Likewise, if Mr. MacDonald was initially not able to meet Ms. Fahey's needs but subsequently became able to, through increased earned income, investment income, or another source, Ms. Fahey would be able petition the court for increased alimony.

analytically distinct and the trial court should have limited its analysis to whether Ms. Fahey's change in income constituted a substantial material change in circumstances. As described below, the trial court erred in this analysis as well.

4. The trial court erred when it determined that no substantial material change in circumstances had taken place

Utah law permits a modification of alimony when there has been "a substantial material change in circumstances not foreseeable at the time of the divorce." Utah Code § 30-3-5(8)(i)(i). Said differently, "a party seeking modification of a divorce decree must demonstrate that a substantial change in circumstances has occurred since entry of the decree, and not contemplated in the decree itself." *Bayles v. Bayles*, 1999 UT App 128, ¶12, 981 P.2d 403 (internal quotation marks and citations omitted). Thus, three elements must be considered: (i) whether the change in circumstances was "substantial"; (ii) if so, whether the change in circumstances occurred since the entry of the decree; and (iii) whether the change in circumstances was contemplated in the decree itself.

As detailed below, each of these elements was satisfied and the trial court therefore erred as a matter of law when it refused to reevaluate alimony.

4.1 The change in Ms. Fahey's circumstances was substantial

Mr. MacDonald demonstrated that a "substantial change in circumstances" occurred. Specifically, he showed that Ms. Fahey now has a stream of income that exceeds $45,000 per year, whereas prior to the divorce she had at most a minimal income ($167/mo).

The phrase "substantial change in circumstances" is used throughout divorce law, but "[t]he 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). Relevant here, "[i]n the alimony context, a substantial change in circumstances includes a change in income not anticipated in the divorce decree." *Busche v. Busche*, 2012 UT App 16, ¶12, 272 P.3d 748. This is, of course, consistent with the second of the *Jones* factors, which takes into consideration "the recipient's earning capacity or ability to produce income." *Dahl v. Dahl*, 2015 UT 79, ¶¶94-95, --- P.3d ---. The law does not limit the question to the *source* of income.

The Utah Supreme Court held that a substantial change in circumstances existed in *Haslam*, 657 P.2d at 757. In *Haslam*, the wife was unemployed at the time of divorce. *Id.* at 757. Subsequently, she "obtained employment, experienced a substantial increase in income [of $1,100 per month] and . . . accumulated some savings [of $12,000]." *Id.* at 758. The husband petitioned to modify the alimony award but the trial court denied the petition. *Id.* The Utah Supreme Court reversed, holding that a substantial material change in circumstances had occurred: "the combination of the supporting spouse's retirement, together with the dependent spouse's employment, earning of a substantial income, and

accumulation of substantial savings subsequent to the original divorce decree, constitutes a substantial change of circumstances." *Id.*[2]

This court relied on *Haslam* when it held that a substantial change in circumstances had occurred in *Bolliger v. Bolliger,* 2000 UT App 47, ¶¶14-16, 997 P.2d 903. In *Bolliger,* this court determined that a wife's receipt of social security, along with the husband's unexpected early retirement, constituted a substantial change in circumstances. *Id.* ¶29. In reaching that conclusion, this court relied not only on *Haslam* but on *Munns v. Munns*, 790 P.2d 116 (Utah Ct. App. 1990), and *Johnson v. Johnson*, 855 P.2d 250 (Utah Ct. App. 1993), for the proposition that future unearned income *could* constitute a substantial material change in circumstances. *Id.* ¶¶14-20.

In *Bolliger,* this court characterized *Munns* as "approv[ing] the concept that a receipt of social security or retirement benefits could amount to a substantial change of circumstances warranting a modification." *Bolliger*, 2000 UT App 47, ¶18 (citing *Munns*, 790 P.2d at 122). The *Bolliger* court similarly grounded its decision in *Johnson v. Johnson,* a case in which this court held that

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

the wife's receipt of future income could affect her need for alimony. *Bolliger*, 2000 UT App 47, ¶19 (citing *Johnson*, 855 P.2d at 253).

And in fact, the trial court agreed that Ms. Fahey's income "has changed." (R.822-23.) The trial court stated that "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." (R.823.) Even considering that Ms. Fahey may have earned $167 per month, the difference is sufficient to demonstrate that Ms. Fahey's change in income was "substantial." Without even touching the principal, Ms. Fahey's income has increased a minimum of 22.5 times annually.[3] Thus, Mr. MacDonald demonstrated that a substantial change has taken place.

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[3] It is worth noting that "for purposes of [child support], a substantial change in circumstances may include: (i) material changes in custody; (ii) material changes in the relative wealth or assets of the parties; (iii) material changes of 30% or more in the income of a parent; (iv) material changes in the employment potential and ability of a parent to earn; (v) material changes in the medical needs of the child; or (vi) material changes in the legal responsibilities of either parent for the support of others." Utah Code § 78B-12-210(9)(b). And in *Busche v. Busche*, this court held that a father's decrease in income of 35% constituted a "substantial change in circumstances" for both his child support *and* alimony obligations. 2012 UT App 16, ¶13, 272 P.3d 748.

4.2 The change in circumstances occurred since the entry of the divorce

The second consideration in an analysis of whether a substantial change in circumstances has taken place asks whether the change occurred after the divorce. *Bayles*, 1999 UT App 128, ¶12.

The divorce decree was entered January 11, 2012. (R.45-46.) The transaction closed after that. (R.52,170,1059.) Ms. Fahey's investment adviser testified that in February 2012, Ms. Fahey invested $1,240,000. (R.1116.) In the second quarter of 2013, she added $498,000. (R.1116-17.) The investment advisor invested the money and Ms. Fahey began generating income. (R.1117.) Thus, the change in circumstances—i.e., Ms. Fahey's change in income—occurred since the entry of the decree.

4.3 The change in circumstances was not contemplated in the decree

The final consideration is whether the substantial change in circumstances was "contemplated" in the decree. *Bayles*, 1999 UT App 128, ¶12. Before addressing that issue, it is important to understand the general law concerning the term "contemplated."

4.3.1 If the trial court contemplates a change in circumstances, it must make specific findings concerning the change

"In order for a material change in circumstances to be contemplated in a divorce decree there must be evidence, preferably in the form of a provision within the decree itself, that the trial court anticipated the specific change."

Bolliger, 2000 UT App 47, ¶13. For this reason, this court requires that a trial court make findings regarding foreseeable changes in circumstances. *Id.*

Trial courts are required to make findings regarding foreseeable changes even when the change is entirely predictable, such as when a party is currently in medical school but will soon become a doctor, or when a party will eventually be able to access pension income. "Where the future event is certain to occur within a known time frame, then prospective changes are appropriate." *Richardson v. Richardson*, 2008 UT 57, ¶10, 201 P.3d 942. In those circumstances, the certainty of future changes should be included in a divorce decree. "Utah appellate courts have consistently required that trial courts make adequate findings on all material issues of alimony to reveal the reasoning followed in making the award. Consequently, if a trial court knows that a party will be receiving additional future income it should make findings as to whether such additional income will affect the alimony award." *Johnson*, 855 P.2d at 253 (citations omitted).

In contrast, if "the future income from [a source such as a] pension plan is too speculative at the time of trial to anticipate the effect it will have on a receiving spouse's financial condition and needs, the court may, in its discretion, delay the determination of how the future income will affect the alimony award." *Id.* at 254. In fact, "because of the uncertainty of future events, prospective changes to alimony are disfavored." *Richardson*, 2008 UT 57, ¶10.

If the trial court chooses to delay its determination, it should nonetheless "make findings indicating that the future income has not been considered in making the present award." *Johnson,* 855 P.2d at 254. If the trial court does not do so, it will have "abused its discretion by failing to expressly indicate whether the future [income was] considered in making the alimony award." *Id.*

When a divorce decree does refer to anticipated changes, it should not later be modified. *Bolliger*, 2000 UT App 47, ¶12. In other words, "evidence that the change was foreseen at the time of the divorce . . . preclude[s] a finding of changed circumstances." *Id.* ¶11 n.3. Thus, in *Dana v. Dana*, no substantial change in circumstances occurred where the trial court anticipated at the time of the divorce that the recipient spouse would find employment soon after the divorce. 789 P.2d 726, 728-30 (Utah Ct. App. 1990).

But "if both the divorce decree and the record are bereft of any reference to the changed circumstance at issue in the petition to modify, then the subsequent changed circumstance was not contemplated in the original divorce decree." *Bolliger,* 2000 UT App 47, ¶13. Significantly, "[t]he fact that the parties may have anticipated [a substantial change in circumstances] in their own minds or in their discussions does not mean that the decree itself contemplates the change." *Id.* (second alteration in original) (internal quotation marks omitted).

As explained below, "both the divorce decree and the record are bereft of any reference to the changed circumstance at issue." The trial court erred when it determined that Ms. Fahey's ability to generate income was "contemplated."

4.3.2 The trial court erred when it concluded that Ms. Fahey's ability to generate income was contemplated in the divorce decree

The trial court found 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." (R.819.) In particular, the court referred to Paragraph 9 of the Agreement, and concluded that it contemplates that Ms. Fahey will sell the lots and use those proceeds to help her pay her expenses and live. (R.819-20,822-23.) In contrast, the trial court stated, "[w]hat wasn't originally contemplated one way or another was *how much* she was going to earn off the sale of the property she was awarded. The Court finds that is not sufficient to establish a substantial change in circumstances." (R.822 (emphasis added)). The trial court compared the case to *Wall v. Wall*, in which the wife was in school at the time of the divorce with the intention of increasing her future earnings. (R.822.)

This characterization is incorrect for the following four reasons. First, Paragraph 9 does not contemplate that Ms. Fahey will sell the properties, convert them into an income-producing asset, and live off the proceeds. Second, the trial

court's comparison to *Wall v. Wall* is inapt because in *Wall*, the wife's future income was contemplated. Third, the trial court improperly confused the value of the property to Ms. Fahey's ability to earn income. And fourth, no other evidence in the divorce decree or record indicates that the trial court "contemplated" the change.

4.3.2.1 Paragraph 9 does not contemplate that Ms. Fahey will sell the properties and thereby generate income

First, the trial court's analysis does not track the Agreement. It is true that the Agreement references Ms. Fahey's selling the lots, but not as the court says. Paragraph 9 states:

> [Mr. MacDonald] 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 [Ms. Fahey] sells one of The Preserve Lots. [Mr. MacDonald]'s payment of the HOA fees and property taxes shall be treated as a loan to [Ms. Fahey], and [Ms. Fahey] shall reimburse him for those payments without interest at the time she sells one of The Preserve Lots.

(R.20 at ¶9.)

Under Paragraph 9, Ms. Fahey is under no obligation to sell the lots, and certainly there is no timeline — either as to when she must sell the lots, or when she would be able to sell the lots. She might not ever sell the lots, either because there was no buyer or because she chose not to. She might pass them to her children. She might use the proceeds to gamble or buy a non-income generating

asset. She might do any number of things, all of which are acceptable under Paragraph 9.

In particular, Paragraph 9 does not "contemplate" that Ms. Fahey will convert the lots into an income-producing asset that will produce enough income for her to live off. In fact, it is silent as to what she will do with the proceeds and whether she must use them to generate a stream of income. All that it states is that when she sells the lots, she will repay Mr. MacDonald for the property taxes and Homeowner's Association fees that he will have paid in the meantime. It does not "contemplate" that she will invest the proceeds to generate a stream of income.

It would have been easy enough for the court to make findings that Ms. Fahey's alimony payments were dependent on her *not* selling the property. It could have, for example, stated that she would receive $6,000 per month *until* she sold the properties. But the Divorce Decree does not say that, because what she would do with the properties was not contemplated. The trial court therefore erred when it read Paragraph 9 to say that Ms. Fahey would live off the proceeds.[4]

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[4] The trial court's view that the Settlement Agreement contemplates that she will live off the proceeds is particularly odd given that the Settlement Agreement actually does make one clear adjustment in alimony. The parties agreed that, for the years 2011 and 2012, Mr. MacDonald would pay Ms. Fahey a property settlement in the amount of $103,500 per year, and that during those years, he would also pay her $2,000 per month in alimony. (R.20-21.) But beginning in January 2013, Mr. MacDonald would pay her $6,000 per month in alimony, with no property settlement. (R.21-22.) Had the divorce decree actually contemplated that Ms. Fahey would eventually sell the properties and live off the proceeds, it would have said so.

4.3.2.2 The trial court's comparison to *Wall v. Wall* is inapt because in *Wall*, the wife's future income was contemplated

Second, the trial court compared the case to *Wall v. Wall,* 2007 UT App 61, 157 P.3d 341. (R.822.) Specifically, the court stated that, in *Wall,* "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." (R.822.) But that is not what *Wall* says.

In *Wall,* the parties divorced while the wife was primarily the children's caretaker but was also attending college. 2007 UT App 61, ¶2. The parties agreed that the husband would pay $800 per month in alimony, which was not adequate to meet the wife's needs. *Id.* ¶¶2, 5. Years later, when the wife had graduated and begun working, the husband petitioned to reduce the alimony award. *Id.* ¶3. The trial court denied the petition. *Id.* ¶5. It found that the wife's "completion of college and getting a job were contemplated by the parties at the time of divorce, and therefore she did not experience a substantial change in circumstances." *Id.*

In support of that conclusion, the trial court relied on two pieces of information. First, in its findings of fact at the time of the divorce, the trial court had found that the wife "is a full-time student with limited recent work experience." *Id.* ¶13. And second, in her divorce complaint, the wife herself had stated that "she was attending college at the time of the divorce in an attempt to obtain skills which would allow her sufficient income to support herself." *Id.* (alteration and internal quotation marks omitted). This court agreed with the

trial court that "[t]hese references, made at the time of divorce, provide sufficient record evidence to support the trial court's conclusion that Mrs. Wall's graduation from college and subsequent employment were contemplated at the time of divorce." *Id.*

Here, the trial court found that, like the divorce decree in *Wall* contemplated that the wife would graduate and earn income, the divorce decree in this case contemplated that Ms. Fahey would sell the property and live off its proceeds. (R.822-83.) But *Wall* is distinguishable because the parties knew that the wife's income would increase in the near future, the trial court found that she was a full-time student, and her divorce complaint stated that she intended to graduate from college so she could support herself. 2007 UT App 61, ¶13. Here, the parties knew only that, if Ms. Fahey someday sold the lots, she would receive an unknown amount of proceeds and repay Mr. MacDonald's loan.

Thus, the trial court's characterization of *Wall*—as holding that "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"—is not accurate. Instead, *Wall* merely stands for the uncontroversial proposition that if a change in the divorce decree is contemplated, it cannot be the basis for a future petition to modify. In *Wall*, the wife's income was contemplated and therefore was not a "change." Here, Ms. Fahey's future income was not contemplated and therefore *is* a change.

Similarly, although the fact that one party will eventually receive retirement benefits or social security payments can hardly be characterized as "unforeseeable," this court has repeatedly held that, unless the specific change is mentioned in the divorce decree, the future receipt of that type of predictable income *does* constitute a substantial change in circumstances. In *Bolliger*, this court stated, speaking of retirement and social security benefits, "[w]hile it is axiomatic that 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." 2000 UT App 47, ¶20.

Accordingly, in *Young v. Young*, this court affirmed the trial court's finding of a substantial change in circumstances when the husband became eligible for social security benefits the year after the divorce decree was entered. 2009 UT App 3, ¶¶2-3, 25, 201 P.3d 301. This court determined that "[c]ourts may modify alimony based on such benefits when the entitlement and actual amounts of the benefits become definite." *Id.* ¶9 (internal quotation marks and citations omitted).

Thus, a petition to modify is barred if future income is known at the time of the divorce. But where it is not — as it was not here — the court retains authority to modify alimony when the future income has become certain.

4.3.2.3 The anticipated values of the property are irrelevant to the legal question

The trial court also raised concerns that the settlement agreement does not list the anticipated values of the properties. The trial court wrote, "[t]he Court understands the position of Mr. MacDonald to be that it is . . . the amount of the proceeds from the sale[] that was not anticipated." (R.820.) The court went on, "[t]he 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." (*Id.*)

But the trial court misconstrues the situation. The *value* of the lots has no significance. What was not anticipated was that Ms. Fahey would be able to generate enough income to meet all or some of her own needs. And because an alimony payment is intended to ensure that the recipient can meet her own needs, the payment may be modified downward when the recipient becomes able to meet her own needs. Thus, it is not "a problem" that the Decree does not set forth the predicted values. Indeed, according to Ms. Fahey, all that she got in the Decree itself was "three pieces of dirt." (R.1077.) Now that she has transformed one of the pieces of dirt into an income-producing investment, she is able to meet all or some of her own needs.

The trial court erred when it confused the value of the lots with Ms. Fahey's ability to meet her own needs. Whether she produced income from the

investment of the proceeds from a property sale or from some other unforeseen circumstance, the important factor for analysis is that Ms. Fahey is now generating an unforeseen income stream that enables her to meet her needs and reduces her need for alimony.

4.3.2.4 No other evidence demonstrates that the divorce decree or record "contemplated" Ms. Fahey's future ability to generate income

Finally, there is no other evidence in the divorce decree or record that the trial court contemplated the specific change at the time it entered the divorce decree. It is worth noting that the property turned out to be worth much more than the parties anticipated when they constructed their Settlement Agreement and, therefore, the size of the asset was not even contemplated. Thus, not only was Ms. Fahey's ability to generate income not contemplated, but the amount that she was able to generate was not foreseen. In any event, for a change in circumstance to be "contemplated" by the decree, there has to be evidence that the *trial court* contemplated the change, as opposed to the parties, because "[t]he fact that the parties may have anticipated [a substantial change in circumstances] in their own minds or in their discussions does not mean that the decree itself contemplates the change." *Bolliger*, 2000 UT App 47, ¶13 (alteration in original) (internal quotation marks omitted). There is no evidence that the divorce decree itself contemplates the change.

Additionally, there is no evidence in the record that would support a conclusion that the parties contemplated the change when they drafted and submitted their Settlement Agreement. Unlike, for example, in *Wall*, where the divorce complaint itself alerted the court to future changing circumstances, the divorce petition here merely states that the parties wish to divorce and have the court divide their property equitably. (R.1-3.) The next substantive documents in the record are the Settlement Agreement and Stipulated Motion for Entry of Decree. (R.18-25,26-28.)

Thus, the trial court erred when it concluded that any substantial change in circumstances had been contemplated and did not justify a modification of the alimony award.

Conclusion and Relief Requested

The trial court erred when it refused to recalculate the appropriate amount of alimony when adjudicating Mr. MacDonald's petition to modify the alimony award. The trial court erred when it equated a petition to modify alimony based upon Ms. Fahey's new ability to generate income with a petition to modify the distribution of real property based upon changing values. The latter does not constitute a substantial material change in circumstances, but the former does. The trial court also erred when it determined that no substantial change in circumstances had taken place, in part because the trial court incorrectly determined that Ms. Fahey's ability to generate income was contemplated in the

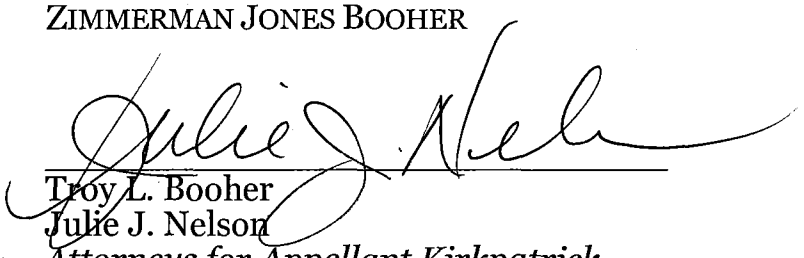
divorce decree. This court should reverse the trial court's denial of Mr. MacDonald's petition to modify as a matter of law.

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

Thus, on remand, the trial court's next step is to determine "(i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to produce income; [and] (iii) the ability of the payor spouse to provide support." *Dahl v. Dahl*, 2015 UT 79, ¶¶94-95, --- P.3d ---. If Ms. Fahey is unable to meet *all* of her needs, despite the income she can now produce, Mr. MacDonald will likely still be responsible for some alimony payment, but it will be lesser. By contrast, if it appears that Ms. Fahey has been able to meet her own needs for some time, she will likely be obligated to disgorge the excess money she has been receiving from Mr. MacDonald. This court should reverse and remand for a reopening of the alimony award.

DATED this 16th day of February, 2016.

ZIMMERMAN JONES BOOHER



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

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I hereby certify that:

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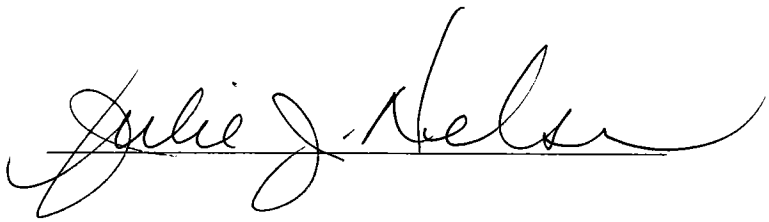

Certificate of Service

This is to certify that on the 16th day of February, 2016, I caused two true and correct copies of the Brief of Appellant to be served on the following via first-class mail, postage prepaid:

Matthew A. Steward
CLYDE SNOW & SESSIONS
One Utah Center, 13th Floor
201 South Main Street
Salt Lake City, Utah 84111-2216
Attorneys for Appellee Lee Anne MacDonald