No. 20150785-CA

THE UTAH COURT OF APPEALS

KIRKPATRICK MACDONALD,
Plaintiff and Appellant,

v.

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

REPLY BRIEF OF APPELLANT

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

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Oral Argument Requested

Table of Contents

Table of Authorities

Cases

Statutes

Introduction

The opening brief presents the narrow question of "[w]hether 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." (Op. Br. at 2, 12-13.) This issue is purely legal and concerns whether the court misidentified what sort of change can constitute a "change in income."

Ms. Fahey understandably wants the question to be factual. (Resp. Br. at 1, 23.) She asserts that this court "must accept" the factual findings because Mr. MacDonald has not marshalled evidence. (Resp. Br. at 21-23.) While this is true, it is beside the point because the opening brief presents a legal question of whether investment income generated after a divorce can warrant a change in alimony.

Under Utah law, a court may reopen alimony after a substantial change in circumstances, which "includes a change in income not anticipated in the divorce decree." *Busche v. Busche*, 2012 UT App 16, ¶12, 272 P.3d 748. At issue here is a new stream of income generated from investments made by selling property divided in the divorce. The parties did not anticipate the investment at the time of divorce, even if they did the property division. This issue focuses on the new income generated each year in dividends, not on the principal invested.

Ms. Fahey does not address that legal question, leaving nearly the entire response brief beside the point. This court should hold that new income generated after a divorce constitutes a substantial change in circumstances.

Argument

Ms. Fahey asserts that "Mr. MacDonald . . . makes a losing distinction between the value of Lot 1, and the income Ms. Fahey may derive from the sale of proceeds of Lot 1." (Resp. Br. at 28.) But that is not the distinction at issue. While the liquidated value received from the sale of Lot 1 could be "income," the argument here concerns the new income generated from the investment of the proceeds from the sale of Lot 1. Even if the liquidated principal is not new income, the dividends generated from the invested principal is new income.

Where the parties anticipate that a spouse receiving alimony will graduate from college and get a new job, the income generated from that job constitutes a substantial change in circumstances that can warrant a reduction in alimony. *Rayburn v. Rayburn*, 738 P.2d 238, 241 (Utah Ct. App. 1987). Investment income is no different. Even if the parties contemplated that Ms. Fahey would receive a windfall from the sale of Lot 1—a hotly contested issue that requires additional factual development—they did not contemplate that should would invest, rather than spend, that windfall. That new income, like a new job, constitutes a substantial change in circumstances.

In what follows, Mr. MacDonald first clarifies the distinction between a new stream of income and the principal used to generate that income. He then shows how the district court's failure to draw that distinction was prejudicial. Finally, he addresses some notable factual misstatements in the response brief.

1. Income from new investments is a type of "income" that constitutes a substantial change in circumstances

Under Utah law, "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; *see also Johnson v. Johnson*, 855 P.2d 250, 253-54 (Utah Ct. App. 1993); *Munns v. Munns*, 790 P.2d 116, 120-21 (Utah Ct. App. 1990). Utah courts have held that "income" in this context includes income generated from employment, as well as from social security payments. *Haslam v. Haslam*, 657 P.2d 757, 757-58 (Utah 1982); *Bolliger v. Bolliger*, 2000 UT App 47, ¶¶14-16, 997 P.2d 903.

Utah does not exclude from that analysis types of income, such as investment income, likely because there is no reasonable basis to do so. Such line drawing would be inconsistent with the "core function of alimony" which is "economic." *Roberts v. Roberts,* 2014 UT App 211, ¶14, 335 P.3d 378. "The purposes of alimony are (1) to get the parties as close as possible to the same standard of living that existed during the marriage, (2) to equalize the standards of living of each party, and (3) to prevent the recipient spouse from becoming a public charge." *Id.* (internal quotation marks omitted). All forms of new income are relevant to whether the former spouse can maintain the requisite lifestyle after the divorce.

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

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

Ms. Fahey asserts that the analysis differs if the investment capital comes from property distributed in the divorce. She cites a Connecticut case, but it does not stand for that proposition. (Resp. Br. at 29.) In *Denley v. Denley*, the court awarded to husband stock options, some of which he liquidated. 661 A.2d 628, 631 (Conn. App. Ct. 1995). His ex-wife argued that this constituted a substantial change in circumstances because his income was higher after *liquidating* assets. *Id.* at 629. She did not assert that the husband's income was higher because he began *generating income* from investing the stock options. *Id.* at 631. The court instead held that the "mere exchange of an asset awarded as property . . . for cash . . . does not transform the property into income." *Id.*

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

Under Utah law, a substantial change in circumstances includes any change in income not anticipated in the divorce decree. The phrase "change in income" includes any new income, including investment income. The district court erred when it conflated the principal invested, which was property awarded in the divorce, with the new investment income, which was neither awarded in nor contemplated during the divorce.

2. The divorce decree does not "anticipate" that Ms. Fahey would generate investment income

Had the district court focused on Ms. Fahey's "change in income," the remaining question was whether that "change in income [was] anticipated in the divorce decree." *Busche*, 2012 UT App 16, ¶12. Here, the parties did not contemplate the change in income.

Ms. Fahey, like the district court, cites the correct test but then misapplies it. Under Utah law, "[i]n 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." *Durfee v. Durfee,* 796 P.2d 713, 716 (Utah Ct. App. 1990) (emphases added). Said differently, "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; (Resp. Br. at 24). The purpose of this test is to reduce the likelihood that "parties [will] argu[e] years after the fact over what a trial court may or may not have considered when making an alimony award." *Johnson*, 855 P.2d at 253.

Thus, the issue is whether the parties contemplated the *specific* change. If there is no evidence they did—if the record is "bereft" of evidence that Ms. Fahey would generate income from her investments—then the change in income was not anticipated, and the court should have reopened the alimony determination.

Ms. Fahey asserts that the parties anticipated that she would sell property, invest the proceeds, and generate income. (Resp. Br. at 24.) But the record says otherwise.

In making her assertion, Ms. Fahey refers to portions of the decree that say nothing about whether she would generate income. The portions cited imply, at most, that Ms. Fahey might someday sell property to liquidate it to cash. There is no mention of a new income stream from investing that liquidated cash, as opposed to spending the cash on, for example, a new fixed asset. In fact, she concedes that there was no plan as to what she would do with any proceeds when she states that "the idea that Ms. Fahey would take those sale proceeds and use them to her benefit . . . — to live off, to invest, or to embark on a spending spree the day the sale closed — is obvious." (Resp. Br. at 25-26.) It is obvious that she could have done any of those things, so the specific choice of investing the proceeds was not her plan, let alone a plan both parties contemplated.

Ms. Fahey also cites the district court's statement that "[t]he Decree expressly contemplated that Ms. Fahey would sell the lot(s) and would thereby receive proceeds and be able to invest those proceeds and live off of those *in addition* to the alimony." (R.822.) But the court's statement is demonstrably incorrect, and even it were not, it states only that Ms. Fahey had the option of investing the income.

The district court's statement is incorrect. In making that statement, both the district court and Ms. Fahey cite paragraph 9 of the decree, which says nothing about generating income. (Resp. Br. at 25; R.20, 820.) It states only that if or when Ms. Fahey sells a property, she will reimburse Mr. MacDonald for the homeowner fees he fronted:

> [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.)

The district court confused the fact that Ms. Fahey might sell the properties and repay Mr. MacDonald with the parties' contemplating that she would invest the proceeds to generate a new stream of income. The two are distinct.

Rather than demonstrating that the divorce decree anticipated the new income, Ms. Fahey's argument relies on a series of inferences about what Ms. Fahey could do with the cash from the sale of the property. Apart from addressing principal rather than new income generated from the principal, a series of inferences is not adequate under Utah law. Utah law instead requires that the decree expressly reference the anticipated change in circumstances: "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. . . . [T]he trial court *must* make findings indicating that the future income has not been considered in making the present award." *Johnson*, 855 P.2d at 253-

54 (emphasis added); *see also Durfee,* 796 P.2d at 716 ("[t]here must be evidence, preferably in the form of a provision within the decree itself, that the trial court anticipated the *specific* change." (emphasis added)).

In fact, the district court made two statements that highlight the lack of evidence regarding Ms. Fahey's anticipated stream of income. First, the district court agreed that Ms. Fahey's income had changed, stating 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.822-23.) The district court also stated that the decree did not specify a future income stream: "[t]he Decree also did not set forth an expected income number that Ms. Fahey would derive due to her investment of the lot sale proceeds, or how much she might make on selling the lots." (R.819.) Taken together, these statements show that (i) Ms. Fahey did have a "change in income" and (ii) the parties did not anticipate the "change in income" in the decree.

In short, Ms. Fahey points to no evidence—because there is none—that the parties, much less the divorce decree, anticipated that she would sell a property, invest the income, and generate new income to meet her own needs. Her statement that she could do whatever she wanted if she sold the property, including embark on a spending spree, (Resp. Br. at 25-26), illustrates the point.

The divorce decree did not contemplate any particular use for the windfall in cash, which makes its investment an unanticipated change in circumstance.

This court should clarify that (i) any new stream of "income"—even new income stemming from the liquidating and investing of property received in the divorce decree—constitutes "a change in income" for determining a substantial change in circumstances; and (ii) the divorce decree here did not anticipate that Ms. Fahey would invest the windfall in cash and generate new income.

3. Ms. Fahey is incorrect that "need" is irrelevant because parties cannot, by contract, divest a court of jurisdiction to reconsider alimony

Ms. Fahey argues that "need" is irrelevant when determining alimony. (Resp. Br. at 31.) In doing so, she attempts to circumvent any future alimony analysis. She asserts that need "had no application at the time of the parties' divorce, and had no application in deciding the Petition." (*Id.*) She contends that "[t]his is because the alimony payments in the Decree were not fixed by a court on a need-based analysis [but instead] constituted a negotiated and stipulated obligation of Mr. MacDonald." (*Id.* at 31-32.) She concludes that "'[n]eed' was never determined in this case by design of the parties." (*Id.* at 32.)

While somewhat confusing, Ms. Fahey appears to contend that no alimony evaluation will be appropriate in this case because the parties contracted away the "need" component of alimony. If that is her contention, she is incorrect. Utah law is clear that parties cannot contract away a court's ability to modify alimony on the basis of "need" or any other consideration.

Alimony ensures that each spouse has adequate financial resources to satisfy their needs. For that reason, the fundamental calculation in any alimony consideration considers "the payor spouse's ability to pay and the recipient spouse's need and ability to produce income." *Hansen v. Hansen*, 2014 UT App 96, ¶6, 325 P.3d 864 (internal quotation marks omitted) (citing Utah Code § 30-3-5(8)(a)). Consistent with that guiding principle, "regardless of the payor spouse's ability to pay more, the [recipient] spouse's demonstrated need must ... constitute the maximum permissible alimony award." *Roberts*, 2014 UT App 211, ¶14 (internal quotation marks omitted) (alteration and omission in original); *see also Jensen v. Jensen*, 2008 UT App 392, ¶13, 197 P.3d 117; *Bingham v. Bingham*, 872 P.2d 1065, 1068 (Utah Ct. App. 1994).

This court has stated that "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. To the contrary, "the court has continuing jurisdiction to raise or lower alimony irrespective of any agreement of the parties, if there [is a] chance of circumstances warranting such modification – a principle which consistently we have espoused." *Felt v. Felt*, 493 P.2d 620, 622 (Utah 1972).

In other words, the parties' agreeing to a settlement does not obviate the court's obligation to review Ms. Fahey's need. "[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). Ms. Fahey cannot circumvent that fundamental legal principle by arguing that the parties stipulated to an alimony amount without regard to her "need."

Thus, the issue is not whether the parties agreed to the correct amount of alimony that covers Ms. Fahey's "needs." Under any alimony analysis, the issue is whether the alimony recipient can satisfy some or all of her own needs with not only her liquidated assets but also any newly acquired income. On remand, that will be an issue properly before the district court.

Ms. Fahey contends otherwise by citing *Wall v. Wall*, 2007 UT App 61, 157 P.3d 341 (Resp. Br. at 13-15). But *Wall* reaffirms that the test is whether a change in circumstances justifies reopening alimony. In *Wall*, as here, the parties stipulated to alimony without the court's determining the parties' needs. *Id.* ¶15. The husband later petitioned to modify alimony based upon a change in circumstances. *Id.* ¶10. This court agreed that a change in circumstances had occurred, but determined that the change was anticipated in the divorce decree. *Id.* ¶18. The court held that modification was not appropriate. *Id.* The case says nothing about whether the court can consider need where there is an unanticipated change in circumstances.

Additionally, Ms. Fahey opines on possible outcomes should this court remand. (Resp. Br. at 33-34.) Besides having no basis in the record, those possibilities are not before the court. The issue here is whether Ms. Fahey's new income from invested principal qualifies as "income" that could justify a modification of alimony, and, if so, whether the new income was anticipated at the time of divorce. If the change in income was not anticipated in the divorce decree, this court should remand and let the district court address needs.

4. The "Value of Lot 1" is not relevant and Ms. Fahey has misrepresented the settlement discussions concerning the value of Lot 1

While not relevant to the issues before the court, Mr. MacDonald feels that it is necessary to correct the assertions in the response brief concerning the "value of Lot 1." (Resp. Br. at 17-24.) Ms. Fahey asserts that "[t]he first change alleged by Mr. MacDonald is that Lot 1 sold for what he believed to be double its value when entering into the Agreement." (Resp. Br. at 17.) Her assertion is beside the point because it says nothing about the new income at issue on appeal.

Her related assertions are incorrect, and worth correcting. Ms. Fahey asserts that Mr. MacDonald "unilateral[ly]" determined the value of the property, rather than Mr. MacDonald and Ms. Fahey together. (Resp. Br. at 18, 22.) Referring primarily to Mr. MacDonald's Statement of Facts, she asserts he misstated the facts; she contends that it was Mr. MacDonald alone, rather than the parties together, who determined the numbers used in the settlement agreement. (Resp. Br. at 22.) She asserts that Mr. MacDonald "ignor[es] the[trial court's] findings and repeatedly and casually misstat[es] that the parties – not Mr. MacDonald – jointly agreed to or contemplated the value of Lot 1 at the time of the Decree." (Resp. Br. at 22.)

Apart from being irrelevant, it is incorrect, and contrary to the position Ms. Fahey's counsel took at trial. Ms. Fahey was involved in reaching the settlement, which included dividing the properties. The settlement agreement itself states that "[t]he Parties mediated this matter . . . and reached agreement on the terms set forth herein. Each party has consulted with attorneys and/or advisors of their choosing and has been duly advised regarding the terms of this Agreement." (R.19.) She does not disagree. (Resp. Br. at 6.) Nor could she: her current counsel filed an affidavit with the district court that agreed that Ms. Fahey had participated in mediation negotiations with and without Judge Billings. (R.86-87.)

At trial, the question of negotiations *was* an issue, contrary to Ms. Fahey's assertion. (Resp. Br. at 23.) Mr. MacDonald testified that the parties had arrived at an agreed valuation for the properties during their pre-settlement negotiations. (R.862:15.) Mr. MacDonald pointed to two documents, Exhibits 15 and 16, which were a balance sheet of the parties' assets and liabilities. (R.863:12-22, 866:24-867:7; Pet. Ex. 15, 16.) Mr. MacDonald testified that the subsequent sale of the property "upset completely the calculations that we based—that, that we based our division of assets and liabilities on." (R.879:7-9.)

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

In contrast, Ms. Fahey testified that she was awarded "[t]hree pieces of dirt that generated nothing" in terms of income. (R.1077:6.) She testified that "[w]ho knows if they would ever sell and what they were really worth. But I knew someday they would be of value." (R.1077:21-22.) In fact, she also testified that she "had plans to sell one or both of the lots when it was possible." (R.1059:12.) She testified that she knew that, several years earlier, someone had made an offer "[i]n the 700, 800-thousand-dollar range." (R.1061:9.) But she also indicated that she expected the property to sell for $1,425,000 "or more." (R.1059:21.) She expected such a high price because "it was always known, and we had always talked about it, that Lot 1 was the premier lot at The Preserve. . . So I felt it was always going to be the – you know, a really valuable lot, to the right buyer." (R.1059:21-1060:15.)

In short, Ms. Fahey misses the mark both legally and factually when she contends that "the Decree never set a stipulated value or sales price for Lot 1, or conditioned the other provisions in the Decree—including alimony—on the sale proceeds or income realized from the sale proceeds of the real property divided between the parties." (Resp. Br. at 23.) The point is not relevant. As explained above, this case is not about the parties' property division or the proceeds that Ms. Fahey acquired after selling that property. The case is about the narrow question of whether income she derived from her investments qualifies as "income" for purposes of asking whether she had a "change in income," and, if so, whether that income was anticipated in the divorce decree. Ms. Fahey has provided no reasonable argument that distinguishes investment income from any other, or that demonstrates that her investment income was anticipated in the divorce decree.

Conclusion and Relief Requested

The district court erred when it ruled that Ms. Fahey's stream of income—rather than the principal invested to generate that stream of income—was anticipated in the divorce decree. This court should conclude as a matter of law that income generated from the investment of proceeds that result from the sale of property received in a divorce is "income." This court should further conclude that nothing in the divorce decree anticipates that Ms. Fahey will generate income and use it to support herself. This court should reverse and remand with instructions to recalculate alimony in light of Ms. Fahey's new income.

DATED this 25th day of May, 2016.

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Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 4,162 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

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 2010 in 13 point Book Antiqua.

DATED this 25th day of May, 2016.

Certificate of Service

This is to certify that on the 25th day of May, 2016, I caused two true and correct copies of the Reply Brief of Appellant to be served on the following via first-class mail, postage prepaid:

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