Alimony in Consideration of *MacDonald* and *Armendariz*

***MacDonald v. MacDonald*, 2018 UT 48**

Facts: The wife was awarded substantial property in the divorce decree, as well as alimony. The decree expressly discussed certain obligations that would arise if and when the wife sold the property. When she sold the property, immediately after the divorce in an apparent windfall, she invested the proceeds and her annual interest income went up to approximately $45,000 per year. The husband argued that her change in income, and therefore her unmet need, was a substantial and material change. The district court disagreed and denied the modification.

Holding: The property sell was foreseeable, as evidenced by the record, and therefore there was no substantial change in circumstance. The court then dives into a deep analysis of the foreseeability standard.

Analysis: The husband argues that the previous cases had established that "foreseeable" meant "contemplated." The Supreme Court declines that standard and holds that "foreseeable" means "foreseeable," but that the analysis must turn on the information on the record. The Court finds that "foreseeability should be assessed on the basis of information either in the divorce decree or at least in the record of the court that entered it."

In this case, the amount and timing of the property sell may have been unknown, but they are not alleged to be material to the question at hand. The relevant circumstances are the fact that the property would be sold and that the proceeds would be invested. Both of these facts were foreseeable, as evidenced by the record, at the time of divorce.

The previous caselaw, since the statutory change in 1995, used a "contemplated" framework; however, none of those cases dove into the analysis of the language since the statute had changed in 1995. So, the court is undertaking that analysis for the first time.[1] The court repudiates the previous "contemplated" standard and turns to how to conduct a foreseeable standard. It finds that it is not enough to say that something is foreseeable if it "can be reasonably anticipated."

Note that, the ability to build into a decree every possible change is tempered by *Richardson v. Richardson,* 2008 UT 57, 201 P.3d 942. That case states that "a decree can be prospectively modified (within the decree itself) only as to future events that are certain to occur within a known time frame." *Id. MacDonald* does not dive into how this standard dovetails with the new *MacDonald* standard.

[1] See, e.g., Young v. Young, 2009 UT App 3, ¶ 9, 201 P.3d 301 (citing the alimony modification statute and holding that "social security benefits can constitute a substantial material change in circumstances for alimony modification purposes, so long as not expressly foreseen in the original decree of divorce" (emphasis added)); Wall v. Wall, 2007 UT App 61, ¶ 11, 157 P.3d 341 (noting that a substantial change of circumstances must not be "contemplated in the decree itself" but further stating that a change "reasonably contemplated at the time of divorce . . . is not legally cognizable as a substantial change in circumstances" (quoting Moore v. Moore, 872 P.2d 1054, 1055 (Utah Ct. App. 1994), and Dana v. Dana, 789 P.2d 726, 729 (Utah Ct. App. 1990))); Nelson v. Nelson, 2004 UT App 254, ¶ 2, 97 P.3d 722 (quoting the alimony modification statute and then quoting the contemplated in the decree standard); Bolliger v. Bolliger, 2000 UT App 47, ¶ 11, 997 P.3d 903 (quoting the alimony modification statute and then quoting the contemplated in the decree standard).

***Armendariz v. Armendariz*, 2018 UT App 175**

Facts: Husband, Gary, retired early at the age of sixty-one (61) from Hill Airforce Base. He claimed that physical pain prevented him from continuing to work in a position that he held during the marriage. He petitioned to modify the Decree. The modification was denied because the retirement was *foreseeable* at the time of divorce and so there was not a material and substantial change of circumstances. The appellate court affirmed.

Holding: The fact that Gary was going to retire was foreseeable and was actually considered in this case because his retirement was addressed in the retirement section of the Decree. Neither that section, nor any other, stated that the considered retirement would impact alimony. Therefore, there was no material change in circumstance.

Analysis: Like *MacDonald*, handed down two (2) days earlier, *Armendariz* turns on the definition of the word "foreseeable" in U.C.A. § 30-3-5(8)(i)(i). That statute states "[t]he court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances **not foreseeable** at the time of the divorce." The court looks to *MacDonald v. MacDonald*, 2018 UT 48, which said "it is not enough to simply note that something is foreseeable if it can be reasonably anticipated…[t]he inquiry of foreseeability is therefore **limited to the universe of information that was presented in the record** at the time of the district court entered the decree of divorce." *Id.*

Warning to Family Law Practitioners: The *Armendariz* speaks to how family law practitioners must handle retirement in regard to alimony going forward. It must be addressed in the Decree. The court recognizes that in most situations, the need of the spouse receiving retirement will go down upon retirement and the payor spouse's ability to pay will also diminish. However, this is not going to be a reason for modification going forward. The court says "[f]amily law practitioners need only recognize that in all but a handful of divorce cases, retirement is inevitable, and thus a foreseeable, event. As such, it should routinely be dealt with explicitly in the divorce decree." The concurrence cautions practitioners as well stating "I urge family law practitioners and district court judges, when negotiating and drafting alimony provisions in decrees of divorce, to make a practice of taking into account the parties' likely future retirement, and making appropriate *ex ante* adjustments to the payor spouse's future payment obligations to account for significant foreseeable post-retirement changes in the parties' financial situation."

Concurrence: Judge Harris writes to agree with the result but to suggest a change to the statute. He discusses the statutory change in 1995, as discussed in *Bolliger v. Bolliger,* 2000 UT App 47, 997 P.2d 903. The previous statute specifically stated that a party's retirement or receipt of social security, "unless expressly foreseen" may amount to a material change in circumstances. The current statute no longer has that provision. Judge Harris' concern is that the current language of the statute could result in a payor spouse not being able to realistically meet the alimony needs following retirement. He suggests a change to the statute.

How to Handle Previous Divorce Decrees

The *MacDonald* court gives some direction for handling divorce decrees that were drafted before the law was updated or clarified. This will be helpful language for our cases that we did before these decisions were handed down. The court says:

> If a divorce decree was handed down at a time when an earlier legal regime was in place, the parties might well have expected that their decree would be governed by the law in place at that time. *See State v. Clark*, 2011 UT 23, ¶ 13, 251 P.3d 829 ("[W]e apply the law as it exists at the time of the event regulated by law in question.").

Impossible Results

Keyes v. Keyes, 2015 UT App 114 will be a helpful case when the rules established by *MacDonald* and *Armendariz* create an impossible result. In *Keyes*, the court found that even though the district court properly conducted a deficit analysis, it left the husband without any money left over to meet any of his needs. The court gives several examples of where an unequal result would be allowed, but then found that the *Keyes* court went too far. The court remanded to make findings that the husband actually could or could not meet his own needs.

Possible Changes to the Statute

Current Statute UCA § 30-3-5(8)(i)(i):

(i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.
(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.
(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (8).

Issue A – Clarifying the Statute

Suggestion #1 (Anything not listed could qualify for modification)

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

Suggestion #2 (Retirement is foreseen, order is not modifiable for normal retirement)

(i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not

foreseeable at the time of the divorce. Retirement at the age of sixty-five (65) is a foreseeable event and does not, by itself, constitute a substantial material change in circumstances.

Suggestion #3 (Retirement is not foreseen and can trigger modification)

(i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce. Retirement is not a foreseeable event unless expressly foreseen in the language of the alimony section of the applicable court order at the time of the divorce.

Issue B – Cases Entered Before *Armendariz*

Suggestion #1

(iv) In regard to alimony modification, the law of the case is that of the time the order was signed.