

1989

Jeanette Osguthorpe v. Jerry Osguthorpe : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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BRIEF

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DOCKET NO.

890219-CA

IN THE COURT OF APPEALS

STATE OF UTAH

* * * * *

JEANETTE OSGUTHORPE,

Plaintiff and
Respondent,

v.

JERRY OSGUTHORPE,

Defendant and
Appellant.

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BRIEF OF APPELLANT

Case No. 890219-CA

District Ct. No. D87-4967

Priority Classification 14b

* * * * *

APPEAL FROM THE FINDINGS OF FACT,
CONCLUSION OF LAW AND DECREE OF DIVORCE
EXECUTED AND ENTERED BY THE
THIRD JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE HOMER F. WILKINSON, PRESIDING.

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IN THE COURT OF APPEALS

STATE OF UTAH

* * * * *

JEANETTE OSGUTHORPE,)	
)	BRIEF OF APPELLANT
Plaintiff and)	
Respondent,)	
)	
v.)	
)	
JERRY OSGUTHORPE,	)	Case No. 890219-CA
	)	District Ct. No. D87-4967
Defendant and)	
Appellant.	)	Priority Classification 14b

* * * * *

JURISDICTION

Jurisdiction to consider this appeal is vested in the Utah Court of Appeals pursuant to R. Utah Ct. App. 3 and 4, and Utah Code Ann. § 78-2a-3(2)(h) (1989).

NATURE OF PROCEEDINGS

This is an appeal from certain provisions of the Findings of Fact and Decree of Divorce executed and entered March 1, 1989, in the Third Judicial District Court for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson presiding, which terminated the marriage of the parties, in particular, those provisions which set an amount to be paid as child support; those provisions which awarded and set an amount as alimony; those provisions which divided the real property of the parties; and those provisions which awarded attorney fees to

the respondent.

STATEMENT OF THE ISSUES

I.

THE TRIAL COURT UNFAIRLY DIVIDED THE INCOME OF THE PARTIES AND AWARDED EXCESSIVE AMOUNTS AS ALIMONY AND CHILD SUPPORT, LEAVING THE APPELLANT INSUFFICIENT INCOME ON WHICH TO SUPPORT HIMSELF.

- A. The alimony and child support awards are based upon erroneous Findings of Fact.
- B. The trial court has inequitably allocated the parties' financial and material resources.

II.

THE RESPONDENT IS CAPABLE OF SELF-SUPPORT AND THE TRIAL COURT ERRED IN AWARDING HER ALIMONY.

III.

THE TRIAL COURT ERRED IN FAILING TO AWARD TO THE APPELLANT GIFTS GIVEN TO HIM BY HIS FATHER DURING THE COURSE OF THE MARRIAGE, WHILE RETURNING TO THE RESPONDENT PROPERTY WHICH SHE OWNED PRIOR TO THE MARRIAGE OF THE PARTIES.

IV.

THE TRIAL COURT ERRED IN ORDERING THE APPELLANT TO PAY ANY OF THE ATTORNEY'S FEES OF THE RESPONDENT, WHERE THE RESPONDENT FAILED TO MAKE A RECORD OF REASONABLENESS AND NEED AND WHERE THE TRIAL COURT AWARDED RESPONDENT THE MAJORITY OF THE PROPERTY AND INCOME OF THE PARTIES.

- A. Respondent failed to establish the reasonableness of her costs and attorney fees.
- B. Respondent failed to establish a need for an award of her costs and attorney fees.

DETERMINATIVE AUTHORITY

The following statutes are relevant to this case:

30-3-5. Disposition of property -
Maintenance and health care of
parties and children - Court to have
continuing jurisdiction - Custody
and visitation - Termination of
alimony - Nonmeritorious petition
for modification.

(1) When a decree of divorce is
rendered, the court may include in
it equitable orders relating to the
children, property, and parties.
The court shall include the
following in every decree of
divorce:

(a) An order assigning
responsibility for the payment
of reasonable and necessary
medical and dental expenses of
the dependent children; and

(b) If coverage is available
at a reasonable cost, an order
requiring the purchase and
maintenance of appropriate
health, hospital, and dental
care insurance for the
dependent children.

(2) The court may include, in an
order determining child support, an
order assigning financial
responsibility for all or a portion
of child care expenses incurred on
behalf of the dependent children,
necessitated by the employment or
training of the custodial parent.
If the court determines that the
circumstances are appropriate and
that the dependent children would
be adequately cared for, it may
include an order allowing the non-
custodial parent to provide the day

care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary.

Utah Code Ann. § 30-3-5(1)-(3) (1989).

STATEMENT OF THE CASE AND FACTS

The parties were married on August 26, 1974 (Transcript, hereinafter "T," at 33), and separated on January 7, 1988 (T.33, 308). Four children were born as issue of this marriage, ranging in age from 8 to 12 (T.33). Although the parties were married while the appellant was in veterinary school, his education was financed by appellant's father (T.90, 187, 280). After graduation in 1977 (T.99), appellant commenced employment as a consultant to his father's veterinary clinic, which employment continued to the present. (T. 99-100). Appellant is an independent contractor in his working relationship with his father and is paid \$2,000.00 per month for his services (T. 80, 92, 102, 125, 158, 260, 267-68, 287, 329). From that compensation, he must pay his own business expenses (T.222-23), but he receives no employee benefits (T.102,267). During the marriage, appellant was given the payments from a barn rental in Park City, Utah, of

\$350.00 per month, as a gift from his father (T.92-94, 160, 166, 329).

The appellant testified that he was thirty-seven years old at the time of trial (T.99). He further testified that he incurs \$154.89 a month for taxes and incurs business expenses of \$1,001.31 per month, leaving him with a net monthly income, including the barn rental gift, as long as it continues, of \$1,192.00 per month (T.92, 179). He had actual and anticipated living expenses of \$2,049.60 per month (Defendant's Exhibit 36).

The respondent was thirty-five years old at the time of trial and in good health (T.31-32, 86, 89). Despite an eye injury received prior to the marriage (T.32), she was an avid tennis player (T.86), and was able to assist her husband in maintenance of the parties' home and on the farm owned by appellant's father (T.42, 89-90, 185-86, 236-37, 306-07). She graduated from the University of Utah in 1975 with a Bachelor of Science Degree (T.35) and was two hours away from receiving a current teaching certificate (T.36, 87). She intended to secure a teaching position as soon as possible (T. 39).

Respondent had rental income in the sum of \$500.00 and expenses of \$340.00 per month against that rental, giving her a net rental income of \$160.00 per month (T.44). She was employed as an insurance claims processor with a net monthly wage of \$770.00 per month (T.31, 83, 86, 182). The court determined that she had living expenses of \$2,027.00 per

month (Findings of Fact, paragraph 6 at 4).

At trial, respondent sought \$175.00 per child per month as child support (T. 51). Respondent also sought alimony in the sum of \$250.00 per month, terminable upon her death, remarriage or cohabitation (T. 51). Appellant testified that the sum of \$125.00 per child per month was reasonable as child support (T. 136), and requested that child support be abated by fifty percent during extended visitation (T. 204). He testified that he believed that respondent should not be entitled to alimony because of her earning ability (T. 136, 195, 237-38).

The trial court ordered the appellant to pay child support of \$150.00 per month for each of the four minor children of the parties (T. 347), a total sum of \$600.00 per month. The appellant was also ordered to pay the respondent \$150.00 per month as alimony for five (5) years, at the end of which time alimony would reduce to \$1.00 a year for five (5) additional years, then terminate (T. 350). The total sum of alimony and child support awarded to respondent was \$750.00 per month. The court indicated that it believed that the appellant had more income than he was demonstrating, although the court did not know how much (T. 350).

The respondent had a home on Hillrise Circle which she owned before the marriage of the parties (T. 45, 56, 59, 135). During the marriage, the parties lived there and improved the home (T. 43, 89-90, 123, 184-85, 235-36, 352), then, bought a

home on Chris Lane (T.66). A real estate appraiser whose qualification was stipulated, testified that, in his opinion, the fair market value of the Hillrise home in August, 1974, was \$34,000.00 (T. 207, 209), and was \$61,500.00 in May, 1988 (T.210). He also testified that improvements made during the marriage by the parties on the Hillrise home would have enhanced the value of the home (T.218).

The father of the appellant gave the appellant a number of cash gifts during different years throughout the marriage (T. 90-91, 125-26, 168, 186-87, 194, 225-27, 239, 286, 357). The appellant's father made available a loan in the sum of \$18,500.00 which provided the downpayment on the Chris Lane home; later, Dr. Osguthorpe, Sr., paid off that obligation as a gift to his son (T. 67-70, 191-193, 281-85).

The trial court found that the Hillrise Circle home was the respondent's premarital property and awarded all interest in it to her (T. 352), despite the testimony concerning appellant's contributions to that property. The court found that the Chris Lane home was joint property, despite the testimony of the appellant's father that he had given gifts to just the appellant which the appellant put into the home (T. 195, 225-27, 280-82), and the equity of approximately \$43,000.00 was divided between the parties (T.72, 353). Other than the mortgages on the Hillrise Circle and Chris Lane homes, the parties had no debts (T. 178).

Respondent sought attorney's fees in this matter. Her

attorney proffered, following the close of the first day of a two-day trial, that he concentrated his practice in domestic relations law (T. 241). He also proffered that he believed his hourly rate of \$100.00 per hour was reasonable and offered to make available to the trial court his time records (T. 242). The estimated total of costs and attorney's fees incurred by respondent was \$7,869.30 (T. 311). Appellant did not agree that he should be responsible for those fees or that the amounts proffered were reasonable (T. 44-45, 312). The court awarded respondent \$3,939.65 of an estimated \$7,800.00 in attorney fees incurred by her and ordered the appellant to pay them (T. 241-245, 311, 359).

Appellant challenged the findings and decision of the trial court on February 28, 1989. The court affirmed its decision (T. of February 28th hearing at 2-14). Appellant also timely moved for relief from judgment, or, in the alternative, for a new trial which was denied by the trial court. The appellant pursues this appeal, challenging the trial court's findings and asserts that the trial court has not fairly and equitably divided the income and property of the parties.

STANDARD OF REVIEW

Trial courts have considerable discretion in adjusting the financial and property interests of parties in a divorce, and the decision of the trial court is presumed valid. Ruhsam v. Ruhsam, 742 P.2d 123, 124 (Utah App. 1987). This

presumption is overcome where appellant shows that the trial court misunderstood or misapplied the law resulting in substantial and prejudicial error; or that the evidence clearly preponderated against the findings; or that such a serious inequity results so as to manifest a clear abuse of discretion. Id. In determining whether an error has been made by the trial court, the appellate court may review both the facts and the law. Wiese v. Wiese, 699 P.2d 700, 701 (Utah 1985).

SUMMARY OF ARGUMENTS

On appeal, appellant challenges certain Finding of Fact by the trial court as being clearly erroneous in light of the evidence presented and the trial court's adjudication as to the financial affairs and properties of the parties is so inequitable that it manifests an abuse of discretion which should be corrected.

Specifically, appellant argues that the trial court misapplied Utah law regarding the equitable distribution of property acquired by one spouse as a gift from his father during the course of the marriage and the distribution of the enhanced value of premarital assets. These were unfairly distributed based upon erroneous Findings and Conclusions and the court failed to enter sufficient Findings of Fact with respect to respondent's need for, and reasonableness of, costs and attorney's fees.

ARGUMENT

I.

THE TRIAL COURT UNFAIRLY DIVIDED THE INCOME OF THE PARTIES AND AWARDED EXCESSIVE AMOUNTS AS ALIMONY AND CHILD SUPPORT, LEAVING THE APPELLANT INSUFFICIENT INCOME ON WHICH TO SUPPORT HIMSELF.

A. THE ALIMONY AND CHILD SUPPORT AWARD ARE BASED UPON ERRONEOUS FINDINGS OF FACT.

After conclusion of the trial in this matter, the trial court ordered appellant to pay to the respondent the sum of \$150.00 per month as and for alimony for a period of five years. At the end of five years, the alimony award was reduced to the sum of \$1.00 per year for an additional five-year period until such time as the respondent remarries, cohabits or dies. (Decree of Divorce, paragraph 7, at 4). The trial court also ordered appellant to pay to respondent the sum of \$150.00 per month as child support for each of the four minor children of the parties until each child reaches the age of eighteen or graduates from high school in his normal year of graduation, whichever occurs last. (Decree of Divorce, paragraph 6 at 4). The total sum of alimony and child support awarded to respondent was \$750.00 per month. This award left the appellant with a net income of \$442.00 per month on which to support himself.

The award to respondent of the sum of \$750.00 per month

as alimony and child support was based upon the trial court's Finding that, "[T]he Defendant receives more money by way of monthly income than was reflected on Defendant's Exhibit 36" (Findings of Fact, paragraph 6, at 5). The trial court indicated that it believed the appellant had more income than he was demonstrating, although the court did not know how much (T.350). Appellant challenged the Findings of Fact and Conclusions of Law of the trial court on February 28, 1989, but the decision was affirmed. (T. of February 28th hearing at 2-14).

On appeal, the Findings of Fact, "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a) (1989). The appellate court will overturn a factual resolution by the trial court if the appellant "marshals all the evidence supporting the trial court's finding and demonstrates that that evidence, when compared to the contrary evidence, is so lacking as to warrant the conclusion that a clear error has been committed." Newmeyer v. Newmeyer, 745 P.2d 1276, 1278 (Utah 1987). Likewise, the trial court's decision will be overturned if its Findings of Fact are not sufficiently detailed as to all factors contained in the statute for determination of the amount of support, Jeffries v. Jeffries, 752 P.2d 909, 911 (Utah App. 1988), unless "the facts in the record are clear, uncontroverted, and capable of

supporting only a finding in favor of the judgment." Anderson v. Anderson, 757 P.2d 476, 478 (Utah App. 1988).

The trial court made two substantial errors in entering its Findings of Fact upon which alimony and child support in this case were based. First, the trial court's finding as to appellant's income was clearly erroneous in light of the evidence presented. Second, the findings upon which alimony and child support were based do not sufficiently disclose whether the trial court took into account the crucial factors in setting that award. With regard to the first error, the trial court stated in rendering its decision:

Again, Mr. Kasting did bring out the situation as far as the amount of money that was left there as far as to support the family on, which was just not reasonable. So there is no question that there is more money in the home than the tax reports show as far as the amount of net income. I am not in the position to go through and to make a definite finding as to just what amount is present there. I know what the tax return says. I know what is taken off as far as -- and I looked them over -- as far as business expenses and so forth.

Well, that's between these two parties and the IRS, and that's what takes place. Therefore, I have nothing to say concerning that except they did have more money in the home to operate on. But I don't know how much. (T. at 349-350).

The only reasonable conclusion for the trial court to make given the evidence presented was that appellant had a gross income of approximately \$2,350.00 per month as long as

the barn rental gift continued. Trial of this case extended over two days, and the record is replete with evidence that bears upon the income issue and that supports that conclusion. The appellant testified that he was thirty-seven years old at the time of trial (T. 99), and that he worked as an independent contractor to his father's veterinary clinic earning \$2,000.00 per month (T. 80, 92, 102, 125, 158, 260, 267-68, 287, 329). From that, he must pay his own business expenses (T. 222-23), leaving him with a net monthly income, including \$350.00 per month from the barn rental, of \$1,192.00 per month (T. 92, 179).

During trial, respondent introduced the parties' tax return, arguing that appellant's total monthly income was actually \$2,350.00. But respondent also testified at trial that she prepared the parties' tax returns and that her husband grosses about \$2,000.00 a month, and has a net income of slightly over \$1,000.00 per month (T. at 92, 302).

The trial court's conclusion that appellant earned more than \$2,000.00 per month appears to be based upon a belief that the appellant should be earning a greater sum of money than the evidence reflected since appellant is in the veterinary profession (T. 348). Yet, the Utah Supreme Court has affirmed a trial court award of a nominal sum of child support based upon evidence that reflected an unusually low income. See, e.g., Jorgensen v. Jorgensen, 667 P.2d 22, 23 (Utah 1983).

The problem is compounded by the fact that since the trial court entered no finding as to appellant's income, the court failed to provide a baseline for modification purposes. See, e.g., Johnson v. Johnson, 771 P.2d 696, 699-700 (Utah App. 1989). In this case, the trial court should have based its findings on the evidence rather than speculating as to the doctor's income and making an award of alimony and child support based upon that speculation.

In the absence of any evidence contrary to appellant's testimony as to his earnings, any other conclusion as to the amount of appellant's earnings is merely conjecture. "Notwithstanding the equitable powers of the district court in interfamilial controversies in divorce matters, and the acknowledged broad latitude of discretion allowed therein, the court cannot act arbitrarily, or on supposition or conjecture as to facts upon which to justify its order." Iverson v. Iverson, 526 P.2d 1126, 1127 (Utah 1974). Similarly, the Utah Supreme Court has stated in King v. King, 478 P.2d 492, 495-496 (Utah 1970) that, "[w]e remain aware of the prerogatives and the broad discretion accorded the trial court in matters of divorce. Nevertheless, this certainly does not extend to an arbitrary and unreasoning power to disregard credible, uncontradicted evidence and make findings inconsistent therewith and issue an order based thereon."

Secondly, the trial court failed to enter findings of fact sufficiently detailed as to the statutory factors

considered in determining the level of alimony and child support awarded to respondent. The trial court's failure to consider the statutory factors set forth in Utah Code Ann. § 78-45-7 (3) (1989) for child support is an abuse of discretion. See Jeffries, 752 P.2d at 911. Likewise, in setting the level of alimony the court must consider, "the financial condition and needs of the spouse claiming support, the ability of that spouse to provide sufficient income for him or herself, and the ability of the responding spouse to provide this support." Stevens v. Stevens, 754 P.2d 952, 958 (Utah App. 1988).

In Stevens, the trial court decision relating to alimony and child support was reversed by the court of appeals because the trial court made only limited, conclusory findings of fact regarding alimony and child support. 754 P.2d at 958. The court of appeals found that the trial court had failed to address the financial conditions, needs and abilities of each spouse. Id. at 958. Furthermore, the trial court had failed to make explicit findings regarding the statutory factors pertinent to a child support determination. Id.

In this case, the parties disputed the amount of appellant's income. The trial court found that with respect to alimony, "the defendant receives more money by way of monthly income than was reflected on defendant's Exhibit 36." (Findings of Fact, paragraph 6 at 5). The trial court rejected appellant's evidence as to income but did not

specifically determine the ability of appellant to provide support as required by Utah law.

With respect to child support, the trial court concluded that "Defendant should pay to the Plaintiff the sum of \$150.00 per month for each of the four minor children of the parties, as child support, for a total child support obligation of \$600.00 per month." (Findings of Fact, Paragraph 7 at 5). The trial court's Findings of Fact with respect to child support were as conclusory as the Findings regarding child support in Stevens and did not consider any of the factors enumerated by Utah law. See Jeffries, 752 P.2d at 911. Because the court believed that it was unable to discern appellant's ability to earn, the court necessarily could not determine an appropriate level of child support. The trial court's Findings of Fact with respect to alimony and child support in this case are insufficiently detailed, and are not supported by the evidence. Consequently, an award based upon the Findings of Fact as they now stand constitutes an abuse of discretion. This is compounded by the fact that the respondent keeps all of her earnings and all but approximately \$445.00 per month of appellant's earnings--a total of \$1,680.00 to appellant's \$442.00--which is clearly inequitable.

B. THE TRIAL COURT HAS INEQUITABLY ALLOCATED THE PARTIES' FINANCIAL AND MATERIAL RESOURCES.

The net effect of the order based upon the trial

court's erroneous and insufficient Findings of Fact has been exacerbated by an inequitable allocation of the parties' financial and property resources so that appellant is currently in distress because he has insufficient income on which to support himself.

The Court of Appeals is required to act because of the violation of the duty of the trial court, in marital dissolution proceedings, to render a decision permitting:

[T]he best possible allocation of the property and the economic resources of the parties so that the parties and their children can pursue their lives in as happy and useful a manner as possible. If it appears that the decree is so discordant with an equitable allocation that it will more likely lead to further difficulties and distress than to serve the desired objective, then a reappraisal of the decree must be undertaken.

Read v. Read, 594 P.2d 871, 872 (Utah 1979).

In this case, appellant will have the sum of \$442.00 per month upon which to relocate and set up a household, as well as pay his everyday expenses, while the respondent will have the sum of \$1,680.00 per month. In addition, the respondent was awarded both homes which were before the court for division, all of the household furnishings, the family vehicle and approximately \$4,000.00 in attorney's fees.

There is no indication that the trial court considered the fact that the respondent was awarded income-producing property in reducing or eliminating the need for alimony or child support as required in Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988); Noble v. Noble, 761 P.2d 1369, 1373 (Utah

1988); and Johnson v. Johnson, 771 P.2d 696 (Utah App. 1989). The Utah Supreme Court has stated that "the issues of alimony and property division are not entirely separable." Noble, 761 P.2d at 1373.

[N]either the trial court nor this Court considers the property division in a vacuum. The amount of alimony awarded and the relative earning capabilities of the parties are also relevant, because the relative abilities of the spouses to support themselves after the divorce are pertinent to an equitable determination of the division of the fixed assets of the marriage. Id.

Appellant requests that this court reverse the trial court's decision on the grounds that the net effect of the allocation of property and income between these parties will leave appellant unable to pursue his life happily and usefully.

II.

THE RESPONDENT IS CAPABLE OF SELF-SUPPORT AND THE COURT ERRED IN AWARDING HER ALIMONY.

Following the trial in this matter, the appellant was ordered to pay to the respondent \$150.00 per month as alimony for five years, at the end of which time alimony would reduce to \$1.00 a year for five additional years and then terminate. (T.350). In rendering a decision which awards alimony, the trial court must examine several relevant factors including the financial condition and needs of the spouse, the ability of each spouse to produce income, the length of marriage, the recipient spouse's education and employability. Boyle v. Boyle, 735 P.2d 669, 671 (Utah App. 1987).

Issues of alimony and property division are not entirely separable and the trial may consider the property division as well as the relative earning capabilities of the parties. Noble v. Noble, 761 P.2d 1369, 1373 (Utah 1988). "The fact that one spouse has inherited or donated property, particularly if it is income-producing, may properly be considered as eliminating or reducing the need for alimony by that spouse or as a source of income for the payment of child support or alimony (where awarded) by that spouse." Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988); See also Johnson v. Johnson, 771 P.2d 696 (Utah App. 1989).

The evidence in this case showed that respondent was thirty-five years old at the time of trial and in good health (T. 31-32, 86, 89). Despite an eye injury received prior to the marriage (T. 32), she was an avid tennis player (T. 86) and was able to assist her husband in the maintenance of the parties' home and on the farm owned by appellant's father (T. 42, 89-90, 185-86, 236-37, 306-07). Respondent graduated from the University of Utah in 1975 with a Bachelor of Science degree (T. 35). At the time of trial, she was two hours away from receiving a current teaching certificate and intended to secure a teaching position as soon as possible (T. 36, 39, 87). Respondent's earnings were approximately \$770.00 per month and she received an additional \$160.00 per month as net rental income (T. 31, 44, 83, 86, 182).

Appellant is an independent contractor in his working

relationship with his father and is paid \$2,000.00 per month as a consultant (T. 80, 92, 102, 125, 158, 260, 267-68, 287, 329). From that, he must pay his own business expenses (T. 222-23). He receives no employee benefits from his father (T. 102, 267). Appellant's net earnings after payment of business expenses are approximately \$1,192.00 per month (T. 92, 179).

The parties in this case were married approximately fourteen years (T. 33, 308). The trial court awarded respondent all of the household furnishings, the family car, the possession of the marital home for her use and the children's use and awarded her the entire equity in the home on Hillrise Circle which she held before the marriage of the parties and which was, at the time of trial, being utilized as income-producing property (T. 44). During the marriage, the parties had lived in the Hillrise Circle home, and appellant had contributed to numerous improvements on that home (T. 43, 89-90, 123, 184-85, 235-36, 352). Other than the mortgages on Hillrise Circle and Chris Lane homes, the parties had no debts (T. 178). The court also awarded respondent almost \$4,000.00 in attorney's fees. (T. 241-245, 311, 359). The net effect of the trial court's decision was to place appellant in the position of having substantial anticipated living expenses in establishing his own separate household, as well as having to pay over one-half of his net earnings for the support and maintenance of the respondent and children.

In a case remarkably similar to this case, the Utah Court of Appeals affirmed the trial court's decision not to award alimony following a seven-year marriage in view of the fact the wife was awarded most of the marital estate as well as her premarital assets. Boyle, 735 P.2d at 672. In Boyle, medical testimony was received regarding the wife's asthmatic condition which adversely affected her ability to become employed, as well as evidence of the fact that she was able to play golf frequently. Additionally, testimony was received concerning the unusually low level of earnings from the husband's professional law practice. Id. at 672. Finally, the appellate court noted that the wife was awarded most of the marital estate as well as the residue of her premarital assets. This case offers a more compelling reason than Boyle not to award alimony. Here, respondent was given the vast majority of marital property as well as her premarital assets, but, unlike the wife in Boyle, it is undisputed that she is capable of self-support.

Alimony should not have been awarded in this case given the similarity in the amount of net earnings of the parties, and the substantial amount of property awarded to respondent. The award of alimony by the trial court constitutes an abuse of discretion requiring this court to reverse the decision of the trial court.

III.

THE TRIAL COURT ERRED IN FAILING TO AWARD TO THE APPELLANT GIFTS GIVEN TO HIM BY HIS FATHER DURING

THE COURSE OF THE MARRIAGE, WHILE RETURNING TO THE RESPONDENT PROPERTY WHICH SHE OWNED PRIOR TO THE MARRIAGE OF THE PARTIES, AND BY FAILING TO AWARD APPELLANT INTEREST ON THE PROPERTY AWARD.

The court's ruling misapplied Utah law to this case in that the decision is inconsistent with Mortensen v. Mortensen, 760 P. 2d 304, 308 (Utah 1988) (emphasis added) where the Utah Supreme Court declared:

We conclude that in Utah, trial courts making "equitable" property division pursuant to section 30-3-5 should, in accordance with the rule prevailing in most other jurisdictions and with the division made in many of our own cases, generally award property acquired by one spouse by gift and inheritance during the marriage (or property acquired in exchange thereof) to that spouse, together with any appreciation or enhancement of its values unless (1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, ... or (2) the property has been consumed or its identity lost through combining or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse.

See also Preston v. Preston, 646 P.2d 705 (Utah 1982).

While there are exceptions to the declared rule, none are applicable to the instant case. Accordingly, the trial court erred in failing to award to the appellant the \$18,500.00 gift given to him by his father, plus the increase in value attributable to that gift after purchase of the Chris Lane home.

The appellant's father testified that he gifted only to his son the funds for the Chris Lane home. The court rejected this testimony without a valid basis for its action.

Ironically, the court understood the basic legal principle as can be seen by the decision regarding the Hillrise Circle property. While the Mortensen decision supports the court in its ruling in the Hillrise Circle property, it demonstrates that the court did not correctly apply that doctrine to the Chris Lane property. Appellant's father made available to the parties a loan in the sum of \$18,500.00 which the parties used as a downpayment for the Chris Lane home. In January, 1981, appellant's father paid off the balance on the \$18,500.00 loan (T. 68). Rational application of the Mortensen decision requires that all equity in the home of the parties at Chris Lane be awarded to the appellant as it was acquired by means of gifts from his father. The award of the Chris Lane property to appellant would then return to him the gifts given to him by his father. Pursuant to Mortensen and Preston, interest on and the natural enhancement of his contributions during the marriage should apply toward the enhancement of the value of respondent's premarital property and the gifts given to him by his father. Interest should apply on the judgment pursuant to Marchant v. Marchant, 743 P.2d 199, 206-07 (Utah App. 1987).

The trial court also erred in its ruling in regard to the financial gifts to appellant by his father. Despite hearing testimony of Dr. Osguthorpe, the appellant's father, that the gifts were intended for his son and not the parties jointly, the trial court rejected his testimony and ignored

the intent or the donor. The Court of Appeals has ruled previously in Smith v. Smith, 738 P.2d 655 (Utah App. 1987) that the trial court should hear and consider the testimony of a parent giving a gift to his/her child, although apparently giving a gift put in both names. This Court should effect the gift given by Dr. Osguthorpe to his son, the appellant, and reform the decision heretofore made in this matter accordingly.

Finally, the trial court decreed that respondent's interest in the Chris Lane home is, "subject to a non-interest bearing equitable lien in the Defendant for one-half of the present equity in the home," (Decree, paragraph 12, at 5 and, further, that this lien, "shall be paid to Defendant when the Plaintiff remarries, cohabits, sells the home or moves from the home, or when the youngest child reaches the age of majority, whichever is first to occur." (Id. at 5-6). The trial court erred in its failure to award appellant interest on the property award in an amount of 12% per annum as required by law. See Marchant, 743 P.2d at 206-207.

IV.

THE TRIAL COURT ERRED IN ORDERING THE APPELLANT TO PAY ANY OF THE COSTS AND ATTORNEY FEES OF THE RESPONDENT WHERE THE RESPONDENT FAILED TO MAKE A RECORD OF REASONABLENESS AND NEED, AND WHERE THE TRIAL COURT AWARDED RESPONDENT THE MAJORITY OF THE PROPERTY AND INCOME OF THE PARTIES.

- A. RESPONDENT FAILED TO ESTABLISH THE REASONABLENESS OF HER COSTS AND ATTORNEY FEES.

To establish the right to an award of costs and attorney's fees, it is well settled that the evidence presented at trial must reflect both financial need and reasonableness. Rasband v. Rasband, 752 P.2d 1331, 1336 (Utah App. 1988). In this case, the trial court erred in ordering the appellant to pay any of the costs and attorney's fees of respondent where the respondent failed to make a record of the reasonableness of fees or of her financial need, particularly in light of the fact that the trial court awarded respondent the majority of the property, as well as alimony and child support measuring more than one-half of appellant's earnings.

The reasonableness of attorney's fees is not measured by what an attorney actually bills or the number of hours spent on the case. Rasband, 752 P.2d at 1336. Rather, in determining the reasonableness of attorney's fees:

A court may consider, among other factors, the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and the experience of the attorneys involved. Id.

The trial court may not award attorney's fees, "where there is nothing in the record to sustain the award either by way of evidence or by stipulation of the parties as to how the court may fix it." Delatore v. Delatore, 680 P.2d 27, 28 (Utah 1984). The issue of reasonableness of attorney's fees is a question of fact to which respondent bears the burden of

proof. Failing to prove the reasonableness of attorney's fees has the same effect as would the failure to offer proof as to any other controverted issue.

In this case, respondent's attorney proffered following the close of the first day of a two-day trial that he concentrated his practice in domestic relations law (T. 241). He also proffered that he believed his hourly rate of \$100.00 per hour was reasonable and offered to make available to the trial court his time records (T. 242). Appellant did not agree that he should be responsible for those fees or that the amounts proffered were reasonable (T. 44-45, at 312). In fact, appellant argued that respondent had attempted throughout the proceedings to create marital assets out of property clearly belonging to appellant's father (T. 332). Respondent offered nothing by way of argument as to the difficulty of the litigation or the efficiency of her attorney. Instead, her attorney simply offered to make available to the trial court his time records (T. 242).

Respondent's offer to produce time records, without more, constitutes a failure of proof sufficient to entitle her to an award of costs and attorney's fees. In Talley v. Talley, 739 P.2d 83, 84 (Utah App. 1987), the Utah Court of Appeals held that the evidence in that divorce action was insufficient to support an award of attorney's fees to the wife where evidence was absent regarding the reasonableness of the fees requested. The appellate court reasoned:

At the close of plaintiff's case, her counsel proffered testimony and produced an exhibit itemizing the time and costs expended by him, his associate, and his clerk, and the hourly rates charged for each. Conspicuously absent is any evidence "regarding the necessity of the number of hours dedicated, the reasonableness of the rate charged in light of the difficulty of the case and the result accomplished, and the rates commonly charged for divorce actions in the community." Id. (quoting Kerr v. Kerr, 610 P.2d 1380, 1384-85 (Utah 1980)).

Similarly, in Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279, 1287 (Utah 1982), the appellate court held that there was inadequate evidence to support an award of attorney's fees where the parties stipulated to presentation of detailed billing records to the court as the evidentiary basis upon which the court could determine the reasonableness of the fee award for the prevailing party. In Mueller, the record indicated that the trial court's award of attorney's fees was not based on the evidence of the billing records, but rather was derived wholly from the post-trial statement of counsel. Because the award was made without adequate evidence to support it, the appellate court determined that the trial court's award of attorney's fees constituted an abuse of discretion which must be overruled.

B. RESPONDENT FAILED TO ESTABLISH A
NEED FOR AN AWARD OF HER COSTS AND
ATTORNEY FEES.

The second prong in determining whether the trial court's award of attorney's fees should be sustained is whether there has been presented evidence of need and the relative ability of the respective parties to shoulder the

expenses of the litigation. Kerr v. Kerr, 610 P.2d 1380, 1384 (Utah 1980). Like the facts in Kerr, at no point in these proceedings did respondent address the issue as to whether she would be able to cover the cost of litigation or the fact that she would be in a better position than her husband, in light of the substantial property settlement in her favor, to furnish her counsel with compensation.

The evidence shows that respondent was working and earning a net income of \$770.00 per month (T. 31, 83, 86, 182), and had a net rental income of \$160.00 per month (T. 44). Her total net income of \$930.00 should be contrasted to that of the appellant's net income of \$1,192.00 which will be further reduced to the sum of \$442.00 per month after he pays the alimony and child support that was awarded for the benefit of respondent and the children. Additionally, appellant has been ordered to pay respondent's attorney's fees, as well as find resources that will permit him to establish his own separate household since respondent was given all of the household furnishings and furniture, the family car and possession of both homes owned by the parties.

Because the respondent failed to produce evidence as to the reasonableness of her costs and attorney's fees, as well as financial need, the trial court abused its discretion in ordering that appellant pay any of respondent's attorney's fees and that portion of the decision should be reversed.

CONCLUSION

The trial court committed numerous errors in this case. The Findings of Fact entered by the trial court as to appellant's income were clearly erroneous and, consequently, the award of alimony and child support are not supported by the evidence. The respondent is clearly capable of self-support, yet was given alimony, all of her premarital assets, the overwhelming majority of the marital assets, and over one-half of the attorney's fees she requested.

The trial court misapplied Utah law by failing to award the appellant gifts given to him by his father during the course of the marriage, by refusing to award the appellant any share in his efforts to enhance the value of his wife's premarital property, or any interest on the judgment that was entered in his favor.

Finally, the trial court erred in awarding the respondent her costs and attorney's fees based upon her failure to bear her burden of proof.

This appellate court should rectify this gross miscarriage of justice by:

(1) Determining that respondent is not entitled to alimony;

(2) Returning to appellant the Chris Lane property;

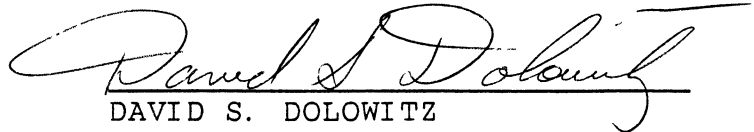
(3) Reversing the award of costs and attorney's fees;

and by,

(4) Remanding this case to the trial court to reset

child support in accordance with applicable child support guidelines.

DATED this 20 day of October, 1989.




DAVID S. DOLOWITZ
M. JOY DOUGLAS
Attorneys for Appellant

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the above and foregoing Appellant's Brief, postage prepaid, this 20 day of October, 1989, to:

Kent M. Kasting
DART, ADAMSON & KASTING
Attorney for Respondent
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101



DAVID S. DOLOWITZ
M. JOY DOUGLAS

FILED DISTRICT COURT
Third Judicial District

KENT M. KASTING (1772)
DART, ADAMSON & KASTING
Attorneys for Plaintiff
310 South Main, Suite 1330
Salt Lake City, Utah 84101
Telephone: (801) 521-6383

FEB 28 1989

By *S. A. Childs*
SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----oOo-----
JEANETTE CRAWFORD OSGUTHORPE, : *2146174*
 : *3-1-89-816 am*
Plaintiff, : DECREE OF DIVORCE
 :
v. :
 : Civil No. D87-4967
JERRY SILVER OSGUTHORPE, :
 : Judge Homer Wilkinson
Defendant. :
-----oOo-----

The above-entitled matter came on regularly for trial on the 17th and 18th days of August, 1988. The Plaintiff appeared in person and was represented by her counsel, Kent M. Kasting, Esq., and the Defendant appeared in person and was represented by his counsel, David S. Dolowitz, Esq., the parties were sworn, testimony was taken of the parties and other witnesses, documentary evidence was introduced and the matter was argued to the Court. The Court considered all of the foregoing and ruled from the bench. Being fully advised in the matter, the Court made Findings of Fact and Conclusions of Law,

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. Jurisdiction. The Plaintiff and Defendant are residents of Salt Lake County, State of Utah, and have been so for more than three months immediately prior to the filing of this action for divorce.

2. Marriage Information. The Plaintiff and Defendant were married on the 26th day of August, 1974, in Salt Lake City, Utah, and separated on the 26th day of December, 1987.

3. Decree of Divorce. During the course of this marriage, irreconcilable differences have arisen between the parties to the extent that the parties no longer desire to live together or to continue the marriage relationship, and the Court finds that each of the parties is awarded a Decree of Divorce from the other, which Decree is final upon signing and entry.

4. Injunction. Each party is permanently enjoined and restrained from in any way bothering, harming or annoying the other; from in any way making disparaging remarks about the other in front of the children or any third parties; and from coming on or to the residential premises of the parties.

5. Child Custody and Visitation. Four children have been born as issue of this marriage, namely, Jeffrey, born July 12, 1976; John, born April 30, 1978; and twins, Julie and Jennifer, born October 9, 1980. Plaintiff shall be and

is awarded the permanent care, custody and control of these children, subject to Defendant's reasonable rights of visitation, which rights of visitation should include the following:

- A. Alternating weekends;
- B. One evening each week until 8:00 o'clock p.m.
- C. Alternating red-letter holidays;
- D. Christmas visitation beginning Christmas Day at noon, until December 26th at 8:00 o'clock p.m., and one-half of the Christmas vacation then remaining;
- E. Thanksgiving in odd-numbered years;
- F. Defendant's birthday;
- G. Father's Day;
- H. One-half of each child's birthday, when that birthday falls on a non-school day; or 6:00 o'clock p.m. to 8:00 o'clock p.m., if that birthday falls on a school day; or at such other times as the parties may agree between them;
- I. Six weeks each summer, not necessarily consecutive, and as may be agreed upon by the parties.

6. Child Support. Commencing with the month of September, 1988, Defendant shall pay to the Plaintiff the sum of \$150.00 per month for each of the four minor children of the parties, as child support, for a total child support obligation of \$600.00 per month. This child support shall continue until each child reaches the age of eighteen or graduates from high school in his normal year of graduation, whichever occurs last.

7. Alimony. Commencing with the month of September, 1988, the Defendant shall pay to the Plaintiff the sum of \$150.00 per month, as and for alimony, for a period of five years. At the end of five years, that alimony award shall be reduced to the sum of \$1.00 per year for an additional five-year period, or until such time as the Plaintiff remarries, cohabits or dies, whichever of the four events is first to occur.

8. Health Insurance. Defendant shall provide such health insurance on each child during each child's respective period of minority. Defendant shall cooperate with the Plaintiff to assist her in converting their present health insurance coverage to individual coverage for the Plaintiff under the provisions of Cobra. Plaintiff shall be responsible for her own health insurance premiums and medical expenses.

9. Uninsured Medical Expenses. Any medical, dental, optometric and orthodontic expenses of the children not covered by insurance shall be shared equally by the parties.

10. Life Insurance. The Defendant presently has a life insurance policy on his life, with a face value of \$90,000.00, and Defendant shall continue in force that life insurance policy, with the Plaintiff and each of the four minor children to be named as equal beneficiaries thereunder, for so long as the Defendant has obligations of alimony and child support to the Plaintiff.

11. Hillrise Circle Home. The Hillrise Circle home, and any appreciation related to this home, belongs to the Plaintiff and is awarded to her free and clear of any claim of the Defendant. Defendant shall execute a Quit-Claim Deed in the Plaintiff's favor in relation to this property.

12. Chris Lane Home. The parties have an interest in a home and real property located at 7049 Chris Lane, Salt Lake City, Utah. The Plaintiff and the four minor children of the parties are in need of this residence Plaintiff is awarded the exclusive use and occupancy of the same. However, Plaintiff's interest in this home shall be subject to a non-interest bearing equitable lien in the Defendant for one-half of the present equity in the home, as found by the Court, to-wit: the lien amount should be \$22,500.00. This lien shall

be paid to Defendant when the Plaintiff remarries, cohabits, sells the home or moves from the home, or when the youngest child reaches the age of majority, whichever is first to occur. Plaintiff shall assume and pay the outstanding mortgage obligation on this house and real property, and hold Defendant harmless from it, and any future appreciation or depreciation related to this home and real property shall have no affect on the Defendant's lien, as established above, which shall remain fixed at \$22,500.00.

13. Personal Property. The personal property of the parties shall be distributed in the following manner:

A. Plaintiff shall be awarded the following items of personal property, free and clear of any claim of the Defendant:

(1) The 1983 Jeep automobile, valued at \$9,800.00. In this regard, the Plaintiff is awarded the automobile, first on the grounds that the Defendant has been awarded other property which offsets the value of this automobile, and second on the grounds that the Plaintiff is in need of dependable, reliable transportation for her and the children's use and benefit.

(2) All household furnishings presently in the home, for the use and benefit of herself and the parties' children, including the television and VCR, except that the Defendant may be awarded the VCR if he purchases a replacement VCR for the use of the family at a reasonable cost of \$200.00 to \$300.00, and except for those items specifically awarded to the Defendant in paragraph B below.

(3) Her own sports equipment, including water skis, bicycle and tennis ball machine.

(4) Her personal effects and clothing.

B. Defendant shall be awarded the following items of personal property, free and clear of any claim of the Plaintiff:

(1) The 1988 Dodge truck, valued at \$1,6500.00. The Court is unable to determine whether the Defendant has an interest in this vehicle based on

conflicts in Defendant's testimony and documentary evidence which was admitted.

(2) The Cordova boat, valued at \$7,000.00, together with any boating accessories and the hibachi.

(3) Three snowmobiles, valued at \$1,825.00.

(4) 2-track Skidoo, valued at \$550.00.

(5) His own sports equipment, including water skis and bicycle.

(6) Video camera.

(7) Veterinarian tools and equipment, books and periodicals related to his profession.

(8) The stereo which was a birthday gift to Defendant.

(9) Chinese rug.

(10) Freezer.

(11) The tools, except that Plaintiff should be allowed to retain a sufficient amount for normal repairs on the home.

(12) Lionel train.

(13) Coisant vase.

(14) Lladro.

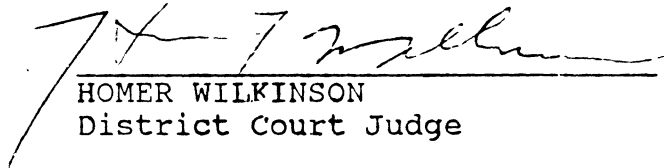
(15) His personal effects and clothing, including his jewelry box.

14. Attorney's Fees. The Court awards Plaintiff the sum of \$3,939.65, as and for the Defendant's contribution towards the Plaintiff's attorney's fees and costs and judgment is entered against the Defendant accordingly.

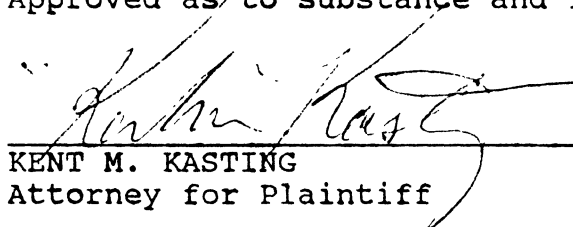
15. Compliance. Each of the parties is ordered to do all things necessary to carry out and achieve each and every provision of this Decree.

DATED this 25 day of ^{Feb.} ~~January~~, 1989.

BY THE COURT:


HOMER WILKINSON
District Court Judge

Approved as to substance and form:

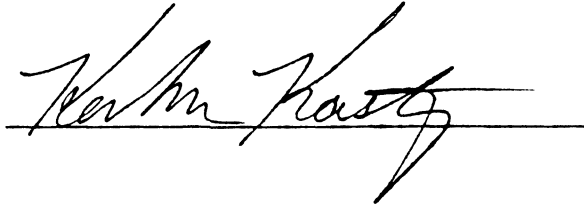

KENT M. KASTING
Attorney for Plaintiff

Date

CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 30 day of January, 1989, a true and correct copy of the foregoing Decree of Divorce was hand-delivered to the following:

David S. Dolowitz, Esq.
Cohne, Rappaport & Segal
525 East 100 South
Salt Lake City, Utah 84147-0008

A handwritten signature in cursive script, appearing to read "Kevin Kasey", is written over a horizontal line.

FEB 28 1989

KENT M. KASTING (1772)
DART, ADAMSON & KASTING
Attorneys for Plaintiff
310 South Main, Suite 1330
Salt Lake City, Utah 84101
Telephone: (801) 521-6383

By S. W. Shields
SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----oOo-----

JEANETTE CRAWFORD OSGUTHORPE,	:	
	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW
	:	
v.	:	
	:	Civil No. D87-4967
JERRY SILVER OSGUTHORPE,	:	
	:	Judge Homer Wilkinson
Defendant.	:	

-----oOo-----

The above-entitled matter came on regularly for trial on the 17th and 18th days of August, 1988. The Plaintiff appeared in person and was represented by her counsel, Kent M. Kasting, Esq., and the Defendant appeared in person and was represented by his counsel, David S. Dolowitz, Esq., the parties were sworn, testimony was taken of the parties and other witnesses, documentary evidence was introduced and the matter was argued to the Court. The Court considered all of the foregoing and ruled from the bench. Being fully advised in the matter, the Court now makes the following:

FINDINGS OF FACT

1. Jurisdiction. The Plaintiff and Defendant are residents of Salt Lake County, State of Utah, and have been

so for more than three months immediately prior to the filing of this action for divorce.

2. Marriage Information. The Plaintiff and Defendant were married on the 26th day of August, 1974, in Salt Lake City, Utah, and separated on the 26th day of December, 1987.

3. Decree of Divorce. During the course of this marriage, irreconcilable differences have arisen between the parties to the extent that the parties no longer desire to live together or to continue the marriage relationship, and the Court finds that each of the parties should be entitled to a Decree of Divorce from the other, which Decree should be final upon signing and entry.

4. Injunction. The Court finds that the parties have had altercations between themselves in terms of fights, arguments and other unacceptable behavior. Based on that, each party is permanently enjoined and restrained from in any way bothering, harming or annoying the other; from in any way making disparaging remarks about the other in front of the children or any third parties; and from coming on or to the residential premises of the parties.

5. Child Custody and Visitation. Four children have been born as issue of this marriage, namely, Jeffrey, born July 12, 1976; John, born April 30, 1978; and twins, Julie and Jennifer, born October 9, 1980. The parties stipulated

that Plaintiff would be awarded the permanent care, custody and control of these children. The Court finds that Plaintiff is a fit and proper person to be awarded such permanent care, custody and control of these minor children, subject to Defendant's reasonable rights of visitation, which rights of visitation should include the following:

- A. Alternating weekends;
- B. One evening each week until 8:00 o'clock p.m.
- C. Alternating red-letter holidays;
- D. Christmas visitation beginning Christmas Day at noon, until December 26th at 8:00 o'clock p.m., and one-half of the Christmas vacation then remaining;
- E. Thanksgiving in odd-numbered years;
- F. Defendant's birthday;
- G. Father's Day;
- H. One-half of each child's birthday, when that birthday falls on a non-school day; or 6:00 o'clock p.m. to 8:00 o'clock p.m., if that birthday falls on a school day; or at such other times as the parties may agree between them;
- I. Six weeks each summer, not necessarily

consecutive, and as may be agreed upon by the parties.

6. Present Income and Expenses. The Plaintiff has rental income on pre-marital property of \$500.00 per month and expenses related to that rental income of \$340.00 per month, leaving a net monthly income from that property of \$160.00 per month. At the time of trial, Plaintiff was employed at Utah Farm Bureau, with a net monthly income of \$770.00. The Plaintiff's estimated actual and anticipated monthly expenses for herself and the four children, as reflected on Plaintiff's Exhibit 9 received by the Court, was \$2,027.00.

The Defendant testified that he received \$2,000.00 per month from his employment as a doctor of veterinarian medicine and an additional \$350.00 per month from barn rental on a barn in Park City, which he testified was a gift from his father, for a total monthly income, according to his testimony, of \$2,350.00. He further testified he had income taxes of \$154.89 and business expenses of \$1,002.31, leaving him total monthly deductions of \$1,157.20 and a net monthly income of \$1,192.80, as was reflected on the information contained on Defendant's Exhibit 31. The Defendant further testified that he had estimated actual and anticipated monthly expenses of \$2,049.60, as reflected on Defendant's

Exhibit 36. The Court considered each parties' testimony, the Exhibits referred to above and the tax returns filed by the parties and accepted into evidence (Plaintiff's Exhibits 1 through 6), all of which were admitted as evidence.

Based upon the review of all of those documents and the testimony on the parties, the Court finds that the Defendant receives more money by way of monthly income than was reflected on Defendant's Exhibit 36. The Court further finds that the Defendant is employed by his father and has been so since the start of the marriage, and that based on the Defendant's testimony as to what he was paid at the start of this relationship and what he is presently paid, the Court finds that Defendant was either overpaid when he started the relationship or is underpaid at the present time. The Court finds that it is the Defendant's intention to continue the employment relationship with his father and that the Defendant has substantial ability as a doctor of veterinarian medicine. Based upon the foregoing, the Court finds it is reasonable for the Defendant to pay the following sums by way of child support and alimony.

7. Child Support. Commencing with the month of September, 1988, Defendant should pay to the Plaintiff the sum of \$150.00 per month for each of the four minor children of the parties, as child support, for a total child support

obligation of \$600.00 per month. This child support shall continue until each child reaches the age of eighteen or graduates from high school in his normal year of graduation, whichever occurs last.

8. Alimony. The Court finds that the Plaintiff has a college education with a teaching certificate, but that her certificate is not presently renewed. At the time of trial, the Plaintiff was employed at Utah Farm Bureau, but it was expected that that employment was due to end on August 19, 1988. However, the Court finds that the Plaintiff is capable of finding good, gainful substitute employment.

The Defendant has chosen to be employed by his father at a salary which appears to be less than he could make in another independent employment situation, and it appears that the Defendant has the ability to earn more than he presently does. The Court further received conflicting testimony as to whether or not the tax returns of the parties accurately reflected the amount of monies available to meet the family's financial needs, and the Court finds that the tax returns appear to understate the actual net income that was available to the parties during the marriage for family and living expenses.

The Court further finds that the Plaintiff did assist the Defendant in completing his education in veterinarian

school by her employment, by her caring for the home and raising the children.

Based on the foregoing, the Court finds it to be reasonable that commencing with the month of September, 1988, the Defendant shall pay to the Plaintiff the sum of \$150.00 per month, as and for alimony, for a period of five years. At the end of five years, that alimony award should be reduced to the sum of \$1.00 per year for an additional five-year period, or until such time as the Plaintiff remarries, cohabits or dies, whichever of the four events is first to occur.

9. Health Insurance. The Court finds that the Defendant has available to him or is able to obtain adequate health insurance coverage for the benefit of the minor children of the parties. It is reasonable that the Defendant should provide such health insurance on each child during each child's respective period of minority. It is further reasonable that the Defendant cooperate with the Plaintiff to assist her in converting their present health insurance coverage to individual coverage for the Plaintiff under the provisions of Cobra. It is further reasonable that the Plaintiff shall be responsible for her own health insurance premiums and medical expenses.

10. Uninsured Medical Expenses. It is reasonable that any medical, dental, optometric and orthodontic expenses of the children not covered by insurance should be shared equally by the parties.

11. Life Insurance. The Court finds that the Defendant presently has a life insurance policy on his life, with a face value of \$90,000.00, and it is reasonable that the Defendant should continue in force that life insurance policy, with the Plaintiff and each of the four minor children to be named as equal beneficiaries thereunder, for so long as the Defendant has obligations of alimony and child support to the Plaintiff.

12. Hillrise Circle Home. The Court finds that the home and real property on Hillrise Circle was obtained by the Plaintiff prior to the marriage of the parties. The home was purchased by her prior to the marriage with certain personal injury proceeds also received by her prior to the marriage. The Court further finds that Plaintiff and Defendant have both invested labor and expense in maintaining the home, but also finds that both benefitted from the income which this home generated as rental property and which was received during the marriage and was used by both of the parties for day-to-day normal and necessary family expenses. Based on that, the Court finds that the Hillrise Circle home, and any

appreciation related to this home, belongs to the Plaintiff and should be awarded to her free and clear of any claim of the Defendant. Defendant should execute a Quit-Claim Deed in the Plaintiff's favor in relation to this property.

13. Chris Lane Home. The Court finds that the parties have an interest in a home and real property located at 7049 Chris Lane, Salt Lake City, Utah. The home has a fair market value of \$92,000.00 and a present mortgage obligation of approximately \$47,000.00, for a net equity of \$45,000.00. The Court finds that the Plaintiff and the four minor children of the parties are in need of this residence and should be awarded the exclusive use and occupancy of the same. However, Plaintiff's interest in this home shall be subject to a non-interest bearing equitable lien in the Defendant for one-half of the present equity in the home, as found by the Court, to-wit: the lien amount should be \$22,500.00. This lien shall be paid to Defendant when the Plaintiff remarries, cohabits, sells the home or moves from the home, or when the youngest child reaches the age of majority, whichever is first to occur. It is reasonable that the Plaintiff should assume and pay the outstanding mortgage obligation on this house and real property, and hold Defendant harmless from it, and any future appreciation or depreciation related to this home and real property should

have no affect on the Defendant's lien, as established above, which shall remain fixed at \$22,500.00.

14. Personal Property. The Court finds that during the course of the marriage the parties have acquired certain items of personal property, which should be distributed to the parties in the following manner:

A. Plaintiff should be awarded the following items of personal property, free and clear of any claim of the Defendant:

(1) The 1983 Jeep automobile, valued at \$9,800.00. In this regard, the Plaintiff is awarded the automobile, first on the grounds that the Defendant has been awarded other property which offsets the value of this automobile, and second on the grounds that the Plaintiff is in need of dependable, reliable transportation for her and the children's use and benefit.

(2) All household furnishings presently in the home, for the use and benefit of herself and the parties' children, including the television and VCR, except that the Defendant may be

awarded the VCR if he purchases a replacement VCR for the use of the family at a reasonable cost of \$200.00 to \$300.00, and except for those items specifically awarded to the Defendant in paragraph B below.

(3) Her own sports equipment, including water skis, bicycle and tennis ball machine.

(4) Her personal effects and clothing.

B. Defendant should be awarded the following items of personal property, free and clear of any claim of the Plaintiff:

(1) The 1988 Dodge truck, valued at \$1,6500.00. The Court is unable to determine whether the Defendant has an interest in this vehicle based on conflicts in Defendant's testimony and documentary evidence which was admitted.

(2) The Cordova boat, valued at \$7,000.00, together with any boating accessories and the hibachi.

(3) Three snowmobiles, valued at \$1,825.00.

(4) 2-track Skidoo, valued at \$550.00.

(5) His own sports equipment, including water skis and bicycle.

(6) Video camera.

(7) Veterinarian tools and equipment, books and periodicals related to his profession.

(8) The stereo which was a birthday gift to Defendant.

(9) Chinese rug.

(10) Freezer.

(11) The tools, except that Plaintiff should be allowed to retain a sufficient amount for normal repairs on the home.

(12) Lionel train.

(13) Coisant vase.

(14) Lladro.

(15) His personal effects and clothing, including his jewelry box.

15. Gifts During the Marriage. The Court finds that during the course of the marriage, various sums of money were given to the parties by the Defendant's father, including an \$18,500.00 down payment on the Chris Lane home. The Court further finds that during the time these gifts were made, Defendant was employed by his father and was never paid more than \$2,000.00 per month as a doctor of veterinarian medicine. Based upon the testimony of the parties, the testimony of the Defendant's father and the documents received into evidence related to these contributions, the Court finds that any such gifts were intended by Defendant's father as a gift to both parties, with those monies being contributed to the marital estate and used in connection with the maintenance of the family during the course of this marriage. The Court finds that the money so transferred by the Defendant's father are not separate property of the Defendant, but rather were given to both parties for their mutual use and benefit during the marriage, and the Court has considered those monies in the overall property distribution set forth in the Findings.

16. Attorney's Fees. Plaintiff presented evidence that her attorney had expended or would expend in connection with the final document preparation and post-trial Motions the total sum of \$7,879.30 in attorney's fees and costs

(Plaintiff's Exhibit 39). The evidence reflects and the Court finds those fees to be reasonable and necessary. The Court further finds that Plaintiff does not have sufficient funds to pay her lawyer and that the Defendant has the ability to pay a portion of Plaintiff's attorney's fees and costs. The hourly rate charged by Plaintiff's counsel is reasonable and consistent with the hourly rates charged in the community for similar services and the hours expended by Plaintiff's counsel in connection with this case were necessary.

Based upon the foregoing, the Court finds that a reasonable award of attorney's fees in this case is the sum of \$3,939.65, as and for the Defendant's contribution towards the Plaintiff's attorney's fees and costs and judgment may be entered against him accordingly.

17. Contributions of the Plaintiff Towards the Education of the Defendant. The Court finds that the Plaintiff did assist the Defendant in completing veterinarian medical school. The Court finds that Plaintiff did not give him the money, nor did she pay for tuition and books, but that she cared for the home, worked during the summer and worked during school. She further bore the four children and has been the primary caretaker and raised the children while the Defendant went to school and thereafter, while he has

worked as a doctor of veterinarian medicine. Based on those contributions, the Court finds that it is reasonable to consider these contributions of the Plaintiff and the Court has done so in connection with its award of alimony, as set forth in paragraph 8 of these Findings.

18. Court's Ruling. The Court hereby incorporates by reference each and every aspect of its ruling from the bench made at the conclusion of trial in this matter, to-wit: August 17, 1988, and specifically makes that ruling a part of these Findings of Fact.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. Each of the parties are entitled to a Decree of Divorce, one from the other, on the grounds of irreconcilable differences, which Decree shall be final upon signing and entry.

2. Each party is permanently enjoined and restrained from in any way bothering, harming or annoying the other; from in any way making disparaging remarks about the other in front of the children or any third parties; and from coming on or to the residential premises of the parties.

3. Plaintiff is awarded the permanent care, custody and control of the minor children of the parties, subject to

Defendant's reasonable rights of visitation, as more particularly set forth in paragraph 5 of the Findings of Fact.

4. Plaintiff is awarded child support from the Defendant in the amount and upon the terms provided in paragraph 7 of the Findings of Fact.

5. Plaintiff is awarded alimony from the Defendant in the amount and upon the terms provided in paragraph 8 of the Findings of Fact.

6. Defendant is ordered to provide health insurance coverage for the benefit of the minor children of the parties, as provided in paragraph 9 of the Findings of Fact.

7. Any uninsured medical, dental, optometric and orthodontic expenses of the children not covered by insurance shall be shared equally by the parties.

8. Defendant is ordered to continue in force the current life insurance policy, as provided in paragraph 11 of the Findings of Fact.

9. The real and personal property of the parties is awarded, as provided in paragraphs 12, 13, 14 and 15 of the Findings of Fact.

10. Defendant shall pay to Plaintiff the sum of \$3,939.65, as and for Defendant's contribution towards the

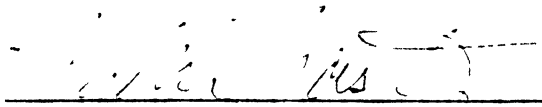
Plaintiff's attorney's fees and costs and judgment shall be entered against him accordingly.

DATED this 25 day of Feb ~~January~~, 1989.

BY THE COURT:


HOMER WILKINSON
District Court Judge

Approved as to substance and form:


KENT M. KASTING
Attorney for Plaintiff

Date

CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 30 day of January, 1989, a true and correct copy of the foregoing Findings of Fact and Conclusions or Law was hand-delivered to the following:

David S. Dolowitz, Esq.
Cohne, Rappaport & Segal
525 East 100 South
Salt Lake City, Utah 84147-0008



FILED
DISTRICT COURT

JAN 11 1967

S. ...
BY _____ DEPT. ...

DAVID S. DOLOWITZ (0899)
of and for
COHNE, RAPPAPORT & SEGAL
Attorneys for Defendant
525 East 100 South, Suite 500
P. O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

JEANETTE OSGUTHORPE,)	
)	
Plaintiff,	)	OBJECTIONS TO PROPOSED
	)	FINDINGS OF FACT AND
v.	)	DECREE
)	
JERRY OSGUTHORPE,	)	Civil No. D87-4967
	)	Judge Homer F. Wilkinson
Defendant.)	

* * * * *


Defendant objects to plaintiff's proposed Finding of Fact No. 13 on page 9 of the Findings of Fact in that it fails to include as an event which would trigger the defendant being able to secure his equity from the home with the youngest child of the parties attaining majority.

The defendant further objects to paragraph 15 of the plaintiff's proposed Findings of Fact on pages 12 and 13 in that it is contrary to the testimony and the decision of the

Supreme Court of the State of Utah in Mortenson v. Mortenson,
760 P.2d 304 (Utah 1988).

Defendant objects to Paragraph 12 (page 5) of the
plaintiff's proposed Decree of Divorce in that it does not
properly include, as an event requiring payment of the lien
awarded to the defendant, the youngest child attaining
majority. The award is contrary to the evidence and violates
the principles of law articulated by the Supreme Court of Utah
in Mortenson v. Mortenson, 760 P.2d 304 (Utah 1988).

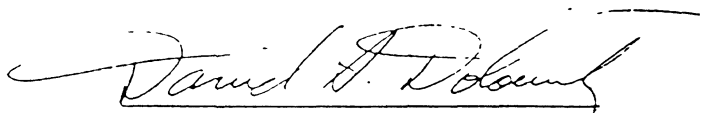
DATED this 23 day of January, 1989.


DAVID S. DOLOWITZ
Attorney for Defendant

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be hand-delivered a
true and correct copy of the above and foregoing Objections
this 23 day of January, 1989, to:

Kent M. Kasting
Attorney at Law
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101


DAVID S. DOLOWITZ

4/6/89

DAVID S. DOLOWITZ (0899)
of and for
COHNE, RAPPAPORT & SEGAL
Attorneys for Defendant
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P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

JEANETTE OSGUTHORPE,)	
)	
Plaintiff,	)	OBJECTIONS TO AMENDED
	)	PROPOSED FINDINGS OF
v.	)	FACT AND DECREE
)	
JERRY OSGUTHORPE,	)	Civil No. D87-4967
	)	Judge Homer F. Wilkinson
Defendant.)	

* * * * *

Defendant objects to the revised Findings of Fact submitted by the plaintiff, as follows:

1. Paragraph 6, page 5, wherein it states, in lines 6 through 9, that:

. . . [T]he court finds that the Defendant receives more money by way of monthly income than was reflected on Defendant's Exhibit 36.,

as there is no evidence to support that Finding.

2. The defendant objects to the language in proposed

Paragraph 15, on page 13:


. . . [T]he court finds that such gifts were intended by Defendant's father as a gift to both parties, with those monies being contributed to the marital estate and used in conjunction with the maintenance of the family during the course of the marriage.,

on the grounds that said Finding is directly contrary to the evidence in this matter.

3. Defendant further objects to the Findings in Paragraph 13 on pages 9 and 10, wherein the court failed to apply the decision of the Utah Supreme Court in Mortenson v. Mortenson, 760 P.2d 304 (Utah 1988), in failing to return gifts given to the defendant by his father during the marriage which were expended on the Chris Lane home to the defendant.

4. Defendant objects to Paragraph 12, pages 5 and 6 of the Decree of Divorce, wherein the gifts given to the defendant by his father during the course of the marriage and placed in the Chris Lane home are not returned to him in violation of the principles articulated by the Supreme Court of Utah in Mortenson v. Mortenson, 760 P.2d 304 (Utah 1988).

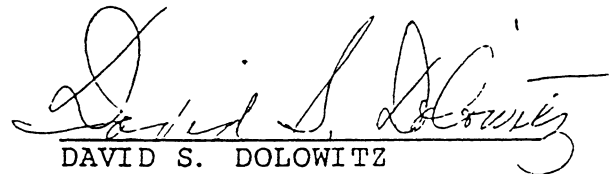
DATED this 6 day of February, 1989.


DAVID S. DOLOWITZ
Attorney for Defendant

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be hand-delivered, a true and correct copy of the above and foregoing Objections this 6 day of February, 1989, to:

Kent M. Kasting
Attorney at Law
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101


DAVID S. DOLOWITZ

7/29/88

FILED IN CLERKS OFFICE
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BY _____

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

* * * * *

JEANETTE CRAWFORD OSGUTHORPE,)	
)	
Plaintiff,	)	MOTION FOR RELIEF
	)	FROM JUDGMENT
v.	)	OR, IN THE ALTERNATIVE
	)	FOR A NEW TRIAL
)	
JERRY SILVER OSGUTHORPE,	)	Civil No. D87-4969
	)	Judge Homer F. Wilkinson
Defendant.)	

* * * * *

The defendant, by and through his attorney, moves this court pursuant to Rules 59 and 60 of the Utah Rules of Civil Procedure for relief from judgment, or, in the alternative, for a new trial on the issue of the gifts to defendant during the course of the marriage by his father on the grounds that the court's ruling is inconsistent with the ruling of the Supreme Court of the State of Utah issued on August 16, 1988, in Mortensen v. Mortensen, 89 Utah Adv. Reports 7, ____ P.2d

_____ (August 16, 1988), in that the Utah Supreme Court declared:

We conclude that in Utah, trial courts making 'equitable' property division pursuant to Section 30-3-5 should, in accordance with the rule prevailing in most other jurisdictions and with the division made in many of our own cases, generally award property acquired by one spouse by gift and inheritance during the marriage (or property acquired in exchange thereof) to that spouse, together with any appreciation or enhancement of its values, 89 Utah Adv. Rep. at 9.

(A copy of the full decision is attached to this Motion for the convenience of the court.)


While there are exceptions to the declared rule, none are applicable to the instant case. Accordingly, this court should either reform its judgment and grant the defendant the \$18,500.00 gift given to him by his father, plus the increase in value after purchase of the Chris Lane home a reasonable rate of interest, or award a new trial on that issue.

Defendant would further move the court to rule that rational application of the Mortensen decision requires that all equity in the home of the parties at Chris Lane should be awarded to the defendant.

While the Mortensen decision supports the court is correct in its ruling in the Hillrise Circle property, it

demonstrates that the court did not fully apply the doctrine and now must amend its judgment accordingly. Defendant would also point out to the court that its ruling in regard to the gifts, after hearing the testimony of Dr. Osguthorpe, the defendant's father, is contrary to the ruling of the Utah Court of Appeals in Smith v. Smith, 738 P.2d 655 (Utah App. 1987), (copy attached for the convenience of the court), where the Court of Appeals ruled the trial court should hear and consider the testimony of a parent giving a gift to a couple that, even if the gift was put in both names for some reason, if the intent is to give it to only one of the children, that intent should be considered by the court. That decision read in conjunction with the Mortensen decision requires this court to effect the gift given by Dr. Osguthorpe to his son, the defendant, and reform the decision heretofore made in this matter accordingly.

DATED this 29 day of Sept., 1988.


DAVID S. DOLOWITZ
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true copy of the above and foregoing Motion this 29 day of September, 1988, to:

Mr. Kent Kasting
Attorney at Law
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101


DAVID S. DOLOWITZ

2/28/89

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

JEANETTE OSGUTHORPE,)	
	)	NOTICE OF APPEAL
Plaintiff,)	
)	
v.)	
)	
JERRY OSGUTHORPE,	)	Civil No. D87-4967
	)	Judge Homer F. Wilkinson
Defendant.)	

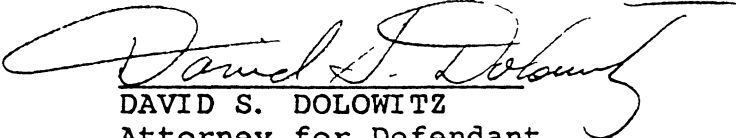
* * * * *

Defendant hereby give notice of his appeal of certain provisions of the Decree of Divorce executed in this matter on the 1st day of March, 1989, and entered by the clerk on the 1st day of March, 1989, in particular, the defendant appeals the provisions of paragraph 6 which sets an amount to be paid as child support; paragraph 7 which awards alimony; paragraph 11 which awarded the Hillrise Circle home to the plaintiff; Paragraph .12 which awarded the Chris Lane home to the

plaintiff; and failed to properly account for the gifts to the defendant by his father during the course of the marriage; and Paragraph 14 which awarded attorney's fees on behalf of the plaintiff.

The defendant does not appeal any provision of the Decree of Divorce which is not specifically designated herein.

DATED this 28 day of March, 1989.


DAVID S. DOLOWITZ
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Notice of Appeal, postage prepaid, this 29 day of March, 1989, to:

Kent M. Kasting
Attorney at Law
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101


DAVID S. DOLOWITZ