

1989

# Jeanette Osguthorpe v. Jerry Osguthorpe : Reply Brief

Utah Court of Appeals

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## Recommended Citation

Reply Brief, *Jeanette Osguthorpe v. Jerry Osguthorpe*, No. 890219 (Utah Court of Appeals, 1989).  
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**BRIEF**

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CKET NO. **890219-CA** IN THE COURT OF APPEALS  
STATE OF UTAH

JEANETTE OSGUTHORPE,	)	
	)	
Plaintiff/Respondent,	)	
	)	
v.	)	APPELLANT' S REPLY BRIEF
	)	TO RESPONDENT' S PETITION
	)	FOR REHEARING
JERRY OSGUTHORPE,	)	
	)	
Defendant/Appellant.	)	Trial Ct. No. D87-4967
	)	Ct. App. No. 890219-CA
	)	
	)	
	)	Priority Class. 14b
	)	

APPEAL FROM THE FINDINGS OF FACT,  
CONCLUSIONS 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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**FILED**

APR 25 1990

Mery T. Noonan  
Clerk of the Court  
Utah Court of Appeals

**DATE DUE**

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IN THE COURT OF APPEALS

STATE OF UTAH

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	)	TO RESPONDENT' S PETITION
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JERRY OSGUTHORPE,	)	Trial Ct. No. D87-4967
	)	Ct. App. No. 890219-CA
Defendant/Appellant.	)	Priority Class. 16
	)	
	)	

\* \* \* \* \*

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Appellant Jerry Osguthorpe, through counsel, responds to the Petition for Rehearing filed by the respondent pursuant to Rule 35 of the Utah Rules of Appellate Procedure:

DETERMINATIVE AUTHORITY

Rule 34. Award of Costs.

(a) To whom allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs shall be taxed against appellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court. Costs shall not be allowed or taxed in a criminal case.

SUMMARY OF ARGUMENTS

Respondent is not entitled to an award of attorney fees on appeal because: (a) appellant's claim of error by the trial court was based upon real and substantial grounds; and, (b) respondent has sufficient financial means with which to pay her attorney

fees in connection with this appeal.

#### ARGUMENT

##### RESPONDENT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL.

Respondent petitions this court for rehearing on the issue of an award of attorney's fees on appeal. She bases her claim on the argument that appellant's claims on appeal are without merit and on the argument that she is without sufficient financial means with which to pay her fees in connection with this appeal. (Petition for Rehearing at 2,5).

Rule 34(a) of the Utah Rules of Appellate Procedure permits this court to tax an appellant for costs incurred on appeal if a judgment is affirmed, unless otherwise ordered. The taxing of costs and attorney fees on appeal is discretionary. Costs are not levied as a punishment or threat to individuals who exercise their right to appeal, absent a showing of delay or of a frivolous claim. Cf, Riche v. Riche, 123 Utah Adv. Rep. 31, 33 (Utah App. 1989). In this case, good cause exists why appellant should not be required to pay respondent's costs and attorney fees incurred in this appeal.

##### A. APPELLANT RAISED IMPORTANT ISSUES HAVING BOTH FACTUAL AND LEGAL MERIT.

This court issued its opinion on March, 19, 1990, affirming the trial court. Although requested to do so by respondent, this court did not find appellant's appeal to be without merit and, consequently, did not impose costs and attorney's fees as permitted by Rule 33 of the Utah Court of Appeals. This

decision was just and proper. Appellant's claim, while unsuccessful, was based upon real and substantial grounds and was amply supported by a reasonable interpretation of both the law and facts of this case.

Appellant argued that the trial court erred in not awarding him 12% per anum interest on the \$22,500.00 lien against the Chris Lane home. The decision reached by the appellate court in this case resolved important issues concerning the trial court's discretion to modify or abate interest on an equitable lien. Inasmuch as this issue alone justifies an appeal from the decision of the trial court, appellant's claim had merit.

B. RESPONDENT HAS SUFFICIENT MEANS  
TO PAY HER COSTS AND ATTORNEY FEES ON APPEAL.

The trial court determined that respondent was capable of finding good, gainful employment and awarded her child support of \$600.00 per month and alimony in the sum of \$150.00 per month for five (5) years. (T. 350). The total sum of alimony and child support awarded to respondent was \$750.00 per month.

The trial court awarded respondent all of the household furnishings, the family car, use of all monetary gifts to the parties, possession of the marital home without interest until the home is sold, and 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). Other than the mortgages on Hillrise Circle and Chris Lane homes, the parties had no debts (T. 178). The court also determined that respondent could pay a portion of



her costs and attorney fees at trial, and awarded respondent approximately \$3,939.65 of the \$7,869.30 in requested attorney's fees. (T. 241-245, 311, 359).

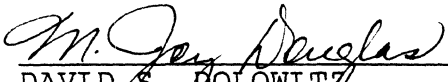
Appellant was awarded one-half of the equity in the marital home without interest, a boat, a vehicle owned by his employer and certain items of personal property. (Findings of Fact, paragraph 14). Appellant must find resources that will permit him to establish his own separate household since respondent was given all of the household furnishings and furniture, the family car and possession of both homes owned by the parties.

In light of the distribution of marital property by the trial court, it is just and proper that each party be required to pay his or her own costs and attorney's fees incurred on appeal.

#### CONCLUSION

Appellant's appeal to this court for relief from the trial court's decision was worthy of consideration. His appeal should not result in an award of costs and attorney fees in favor of the respondent who has the ability to pay these expenses and who has been awarded use of or ownership of most of the assets and income of the parties.


DATED this 24 day of April, 1990.

  
\_\_\_\_\_  
DAVID S. DOLOWITZ  
M. JOY DOUGLAS  
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25 day of April, 1990, four (4) true and accurate copies of the foregoing Reply Brief was caused to be mailed, first class, postage fully prepaid, in the United States mail, to the following:

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