

1989

# Jeanette Osguthorpe v. Jerry Osguthorpe : Petition for Rehearing

Utah Court of Appeals

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Kent M. Kasting; Dart, Adamson and Kasting; Attorney for Respondent.

David S. Dolowitz; M. Joy Douglas; Cohne, Rappaport and Segal; Attorneys for Appellant.

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## Recommended Citation

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IN THE COURT OF APPEALS OF THE STATE OF UTAH  
DOCKET NO. 890219-C4

JEANETTE OSGUTHORPE, :  
 :  
 Plaintiff/Respondent, :  
 :  
 v. : Case No. 890219-CA  
 :  
 JERRY OSGUTHORPE, : District Court No. D87-4967  
 :  
 Defendant/Appellant. : Priority 14(b)

AN APPEAL FROM A JUDGMENT AND DECREE OF DIVORCE  
OF THE THIRD JUDICIAL DISTRICT,  
SALT LAKE COUNTY, UTAH  
THE HONORABLE HOMER WILKINSON  
JUDGE PRESIDING

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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JEANETTE OSGUTHORPE,	:	
	:	
Plaintiff/Respondent,	:	
	:	
v.	:	Case No. 890219-CA
	:	
JERRY OSGUTHORPE,	:	District Court No. D87-4967
	:	
Defendant/Appellant.	:	Priority 14(b)

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RESPONDENT'S PETITION FOR REHEARING  
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AN APPEAL FROM A JUDGMENT AND DECREE OF DIVORCE  
OF THE THIRD JUDICIAL DISTRICT,  
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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES . . . . .	ii
PRELIMINARY STATEMENT AND CERTIFICATION. . . . .	1
STATEMENT OF FACTS . . . . .	2
ARGUMENT	
POINT I . . . . .	2
POINT II. . . . .	4
CONCLUSION . . . . .	5
ADDENDUM . . . . .	7

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>UTAH CASES CITED</u>	
<u>Carter v. Carter</u> , 584 P.2d 904 (Utah 1978)	2-3
<u>Ehninger v. Ehninger</u> , 596 P.2d 1104 (Utah 1977)	3
<u>Maughn v. Maughn</u> , 770 P.2d 156 (Utah App. 1989)	3
<u>Richie v. Richie</u> , 123 Utah Adv. Rpt. (Utah App. filed Dec. 13, 1989.)	4
<u>UTAH STATUTES CITED</u>	
Rule 35 <u>Rules of the Utah Court of Appeals</u>	1

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IN THE COURT OF APPEALS OF THE STATE OF UTAH  
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JEANETTE OSGUTHORPE,	:	
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Plaintiff/Respondent,	:	
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v.	:	Case No. 890219-CA
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JERRY OSGUTHORPE,	:	District Court No. D87-4967
	:	
Defendant/Appellant.	:	Priority 14(b)

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RESPONDENT'S PETITION FOR REHEARING  
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The Respondent, Jeanette Osguthorpe, through her counsel on appeal Kent M. Kasting, Esq., of Dart, Adamson & Kasting, petitions this Court pursuant to Rule 35 of the Rules of the Utah Court of Appeals for a rehearing of an issue raised by Respondent in her brief on appeal based upon the reasons set forth below.

PRELIMINARY STATEMENT AND CERTIFICATION

This Petition is based on the fact that this Court's opinion in the above matter fails to address and overlooks an issue raised by Respondent in Point VIII of her Brief.

Counsel for Respondent hereby certifies that this Petition is brought in good faith and not for delay.

## STATEMENT OF FACTS

Dr. Osguthorpe appealed the trial court's decision and claimed at least five errors. Mrs. Osguthorpe responded to each of those claims of error arguing that each was without merit and further requesting that she be awarded her attorney's fees and costs on appeal. On March 19, 1990, this Court issued its per curiam opinion affirming the trial court's decision in all respects. The opinion, however, does not address Mrs. Osguthorpe's request for her attorney's fees on appeal as raised in Point VIII of her Brief. A copy of the Court's Opinion is included in the Addendum to this Petition.

## ARGUMENT

### POINT I

#### **MRS. OSGUTHORPE IS ENTITLED TO AN AWARD OF HER ATTORNEY'S FEES AND COSTS INCURRED IN SUCCESSFULLY DEFENDING DR. OSGUTHORPE'S APPEAL**

Dr. Osguthorpe's appeal has now been determined to have no merit. The trial court's decision was affirmed in all respects. Point VIII of Mrs. Osguthorpe's Brief requested that this Court award her her attorney's fees and costs associated with the appeal.

When an appeal is shown to be without merit, the Respondent has the right to request this court to award her attorney's fees and costs on appeal. As the Utah Supreme Court properly concluded in Carter v. Carter, 584 P.2d 904 (Utah 1978):

However, the defendant argues that inasmuch as the plaintiff was unwilling to abide by the trial court's judgment and that she has been put to the necessity of defending

this appeal, the plaintiff should have to bear the costs thereof, including reasonable attorney's fees for her counsel. We agree with the reasonableness and propriety of her request [Id. at 906]

See also Ehninger v. Ehninger, 596 P.2d 1104 (Utah 1977).

Likewise, the Utah Court of Appeals has regularly been willing to award a spouse fees on appeal when that spouse is required to defend an appeal which is found to be without merit. In Maughn v. Maughn, 770 P.2d 156 (Utah App. 1989), the wife Paulette, was required to defend an appeal filed by her husband. She requested an award of attorney's fees on two basis. First, that the appeal was frivolous and second, that she could not afford to respond to the appeal. This court rejected her claim that the appeal was frivolous, however, accepted her argument that her need justified an award of her fees on appeal. In so doing, this Court stated:

Although not particularly well articulated, Paulette suggests an alternative basis for awarding her fees and costs incurred on appeal. She claims she cannot afford to respond to the appeal and that since the trial court awarded her attorney fees, we should do likewise. Attorney fees on appeal may be granted in the discretion of the court in conformance with statute or rule Management Services Corp. v. Development Assoc., 617 P.2d 406, 408 (Utah 1980). Utah Code Ann. Section 30-3-3 (1984) provides that either party to a divorce action may be ordered to pay the adverse party to prosecute or defend the action. This includes attorney fees incurred on appeal. See, e.g., Carter v. Carter, 584 P.2d 904 (Utah 1978); Marks v. Marks, 98 Utah 400, 100 P.2d 207 (1940); Hendricks v. Hendricks, 91 Utah 564, 65 P.2d 642, 643 (1937). In view of our affirmance and the record evidence of her financial need, we exercise our discretion and award Paulette attorney fees on appeal.

The judgment of the trial court is

affirmed. The case is remanded for the purpose of determining and awarding to Paulette attorney fees reasonably incurred on appeal.

Id. at 162, 163.

See also Richie v. Richie, 123 Utah Adv. Rpt. (Utah App. filed Dec. 13, 1987.)

Here, the record reflects Mrs. Osguthorpe does not have substantial assets and has a very limited income. On the other hand, Dr. Osguthorpe is a successful doctor of veterinary medicine, has access to substantial assets sufficient to allow him to purchase new vehicles, pay his own attorney's fees and pursue this appeal. Fairness requires that Mrs. Osguthorpe not be required to deplete her limited assets in demonstrating that this appeal is without merit. She requests that this court grant her Petition for Rehearing, award her attorney's fees on appeal, and remand the matter to the trial court for a determination of those fees and an appropriate entry of judgment against Dr. Osguthorpe.

#### POINT II

THE FEES AND COSTS WHICH MRS. OSGUTHORPE  
INCURRED ON APPEAL WERE SUBSTANTIAL AND SHE  
DOES NOT HAVE THE MEANS TO PAY THEM

The following is a summary of the attorney's fees and costs which Mrs. Osguthorpe incurred in connection with this appeal:

#### Attorney's Fees

33.6 hours partner time at \$100 per hour = \$3,360.00

5.0 hours clerk/paralegal time at \$40 per hour = \$200.00

\$3,560 Total attorney's and  
clerk/paralegal fees  
through March 19,  
1990, the date of

this Court's Opinion  
and does not include  
fees incurred in  
connection with this  
Petition for  
Rehearing.

Costs

Printing - Respondent's Brief	\$158.61
Trial and Hearing Transcript	<u>309.00</u>
Total costs	<u>\$467.61</u>

Mrs. Osguthorpe received minimum amounts in terms of alimony and child support, i.e., \$150 per month alimony for five years and \$600 per month child support (\$150 per child). She has limited means to support herself and four minor children. She was awarded only half of the attorney's fees she requested at trial. Dr. Osguthorpe has paid nothing toward those fees. She now should not be required to also bear all of the fees necessary to demonstrate that Dr. Osguthorpe's appeal was without merit. The record presently before this court reflects the requisite need to justify an award of Mrs. Osguthorpe's attorney's fees and costs on appeal.

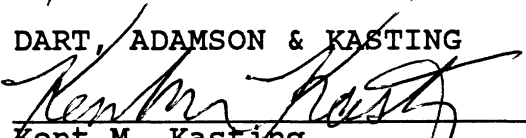
CONCLUSION

Mrs. Osguthorpe was the successful party on appeal. She was required to respond to Dr. Osguthorpe's appeal and demonstrate that the trial court committed none of the errors that Dr. Osguthorpe claimed had occurred. She has limited means to support herself and her four children and, consequently, she should be awarded the fees and costs which she has now incurred in connection with the original appeal as well as the fees and costs she has now incurred

in connection with the filing of this Petition for Rehearing and the matter should be remanded to the trial court for a determination of those fees and entry of judgment against Dr. Osguthorpe for all such fees.

Respectfully submitted this 29 day of March, 1990.

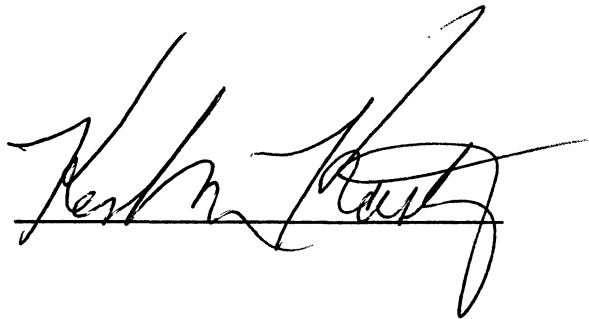
DART, ADAMSON & KASTING

  
Kent M. Kasting  
Attorneys for Plaintiff/  
Respondent

**CERTIFICATE OF SERVICE**

I hereby certify I caused four true and correct copies of the Petition for Rehearing and/or Clarification to be hand-delivered to the following counsel of record on the 29 day of March, 1989:

David S. Dolowitz, Esq.  
Joy M. Douglas, Esq.  
Cohne, Rappaport & Segal  
525 East 100 South  
Salt Lake City, Utah 84102



**ADDENDUM**

Utah Court of Appeals OPINION

Osguthorpe v. Osguthorpe, Court of Appeals No. 890219

Filed March 19, 1990

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IN THE UTAH COURT OF APPEALS

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Jeanette Osguthorpe, )  
 )  
Plaintiff and Respondent, )  
 )  
v. )  
 )  
Jerry Osguthorpe, )  
 )  
Defendant and Appellant. )

MEMORANDUM DECISION  
(For Publication)

Case No. 890219-CA

FILED

MAR 19 1990

*Mary T. Noonan*  
Mary T. Noonan  
Clerk of the Court  
Utah Court of Appeals

-----  
Third District, Salt Lake County  
The Honorable Homer F. Wilkinson

Attorneys: David S. Dolowitz and M. Joy Douglas, Salt Lake  
City, for Appellant  
Kent M. Kasting, Salt Lake City, for Respondent

-----

Before Judges Garff, Billings, and Davidson.

PER CURIAM:

Defendant, Jerry Osguthorpe, appeals from the trial court's findings of fact, conclusions of law and divorce decree. On appeal, he claims the trial court's findings of fact regarding alimony and child support are unsupported by the evidence and the trial court erred in allocating the parties' resources, failing to award him the gifts his father gave to him during the marriage, and requiring him to pay plaintiff's attorney fees. We affirm.

The parties were married in 1974 and separated in 1988. Four children, who at the time of the divorce ranged in age from eight to twelve, were born as issue of the marriage. Prior to the marriage, both parties essentially completed their undergraduate degrees. In 1974, defendant began veterinarian school, and his father paid for tuition and books. While defendant was in school, plaintiff worked as a waitress and cashier. In 1977, defendant received his degree and began working in his father's veterinary clinic. At trial, defendant testified that he was a consultant for his father and received \$2,000 per month. Additionally, defendant stated that he

receives \$350 per month rental income. After taxes and business expenses, defendant testified that his net income was \$1,192 per month and his monthly living expenses were \$2,049.60.

Plaintiff testified that she had a college education with an outdated teaching certificate. She worked as a cashier and waitress while defendant was in veterinarian school and was a housewife and mother from 1977 until the parties' separation. At the time of trial, she was employed as an insurance claims processor, earning a net wage of \$770 per month. She testified that she earned \$160 from rental property and her monthly living expenses were \$2,027.

During the marriage, defendant's father provided the parties with \$18,500 for a downpayment on their home on Chris Lane. He also gave them various cash gifts, including a \$10,000 Christmas gift in both 1982 and 1983, a \$5,000 Christmas gift in 1985, and a \$1,000 Christmas gift in both 1986 and 1987.

The court found that defendant's testimony indicated a net monthly income of \$1,192.80, including \$350 per month from rental property. However, based on a review of all the documents, the court found that defendant understated his income or was underemployed. The court also found plaintiff had a net rental income of \$160, and a net monthly salary of \$770 due to her employment as an insurance claims processor. Plaintiff's monthly expenses, the court found, were \$2,027. The court noted that it had received conflicting testimony regarding whether the parties' tax returns accurately reflected the amount of money available to meet the family's needs and found that the tax returns understated the actual net income available to the parties during the marriage for family and living expenses. The court also found that plaintiff assisted defendant in completing his education by working, caring for the home and raising the children. Based on those facts, the court ordered defendant to pay plaintiff \$150 alimony per month for a period of five years, and \$1 per year for an additional five year period, or until such time as plaintiff remarries, cohabits or dies, whichever occurs first. In addition, the court ordered defendant to pay child support of \$150 per month per child.

With regard to the parties' property, the court awarded plaintiff the home on Hillrise Circle which plaintiff purchased prior to the marriage. In addition, plaintiff was awarded exclusive use and occupancy of the parties' home on Chris Lane,

subject to defendant's non-interest bearing equitable lien in the amount of \$22,500. The court further found that defendant's father's cash gifts, including the \$18,500 downpayment on the Chris Lane home were intended by defendant's father as a gift to both parties for their mutual use and benefit during the marriage. Lastly, the court ordered defendant to pay \$3,939.65 of plaintiff's attorney fees.

## I. ALIMONY

Defendant claims the trial court's alimony award is based on erroneous findings of fact regarding defendant's income. Defendant asserts the trial court erred in failing to enter a specific finding regarding defendant's income and in finding defendant was undercompensated or underemployed. Defendant contends that instead of entering an alimony award based on speculation, the court should have made a finding and entered an alimony award based on the evidence. He also claims his alimony and child support award leave him with \$442 per month, an insufficient amount on which to support himself.

Trial courts have broad discretion in awarding alimony. Davis v. Davis, 749 P.2d 647, 649 (Utah 1988). We will not disturb the trial court's alimony award so long as the trial court exercises its discretion within the standards set by the court. Id. In determining alimony, the trial court must consider three factors: 1) the financial conditions and needs of the receiving spouse; 2) the ability of the receiving spouse to produce a sufficient income for him or herself; and 3) the ability of the responding spouse to provide support. Schindler v. Schindler, 776 P.2d 84, 90 (Utah Ct. App. 1989). If the trial court considers these factors, this court will not disturb the alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion. Id.

With regard to plaintiff's financial conditions and needs, the court found that plaintiff had a net monthly income of \$770, received \$160 per month from rental property, and had \$2027 in monthly expenses. The court also reviewed plaintiff's ability to produce a sufficient income for herself in stating that plaintiff assisted defendant in completing veterinarian school by working and caring for the house and children. The court also found that plaintiff has a college education with a teaching certificate but that her certificate was not presently renewed. At the time of trial, although plaintiff was employed, her employment would soon end. However, the court

found that but she is capable of finding good, gainful substitute employment.

Regarding defendant's ability to provide support, the trial court found that defendant testified he received \$2,000 per month from his employment as a veterinarian and an additional \$350 per month from barn rental. After taxes and business expenses, defendant claimed to have a net monthly income of \$1,192.80 and monthly expenses of \$2049.60. The court reviewed the testimony and the tax returns of the parties and found that defendant receives more monthly income than that reflected on his exhibit. Further, the court found that defendant is employed by his father and was either overpaid when he began his employment or underpaid at present. In determining the amount of alimony to award, the court stated that defendant has the ability to earn more than his present income and has chosen to be employed by his father at a lower salary. Also, the court stated that the tax returns, which indicated a yearly adjusted gross income of between \$15,000 and \$21,000 from 1982 to 1987, appear to understate the parties' income during the marriage. Based on these facts, the court awarded plaintiff \$150 monthly alimony for five years. After five years the court reduced alimony to \$1 per year for five years, until plaintiff remarries, cohabits or dies, whichever occurs first.

We find no error in the trial court's failure to make a specific finding regarding defendant's income in this circumstance. The trial court found that defendant was not being candid as to his actual current income or was purposefully underemployed. We defer to the trial court's assessment of the credibility of the witnesses. Utah R. Civ. P. 52(a); Riche v. Riche, 123 Utah Adv. Rep. 31, 31 (Ct. App. 1989). Given the evidence in the record, it was well within the court's discretion to determine that defendant was either earning more than the evidence indicated or had the ability to earn more money. We therefore will not disturb the trial court's alimony award.

## II. CHILD SUPPORT

Similarly, defendant argues the trial court erred in awarding plaintiff monthly child support of \$150 per child without entering a specific finding regarding defendant's income. Defendant claims the trial court failed to consider all of the factors set forth in Utah Code Ann. § 78-45-7 (Supp. 1989) in accordance with Jefferies v. Jefferies, 752 P.2d 909, 911 (Utah Ct. App. 1988).

Under Utah Code Ann. § 30-3-5 (1989), the trial court has broad equitable power to order child support, taking into account the needs of the children and the ability of the parent to pay. Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985). The trial court's finding of fact will not be overturned unless they are clearly erroneous. Jefferies, 752 P.2d at 911. "Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.'" Acton v. J.B. Deliran, 737 P.2d 996, 999 (Utah 1987) (quoting Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983)). Further, section 78-45-7 enumerates the following material factors that the court must consider in setting prospective support:

- (a) the standard of living and situation of the parties;
- (b) the relative wealth and income of the parties;
- (c) the ability of the obligor to earn;
- (d) the ability of the obligee to earn;
- (e) the need of the obligee;
- (f) the age of the parties;
- (g) the responsibility of the obligor for the support of others.

Jefferies, 752 P.2d at 911.

Defendant claims the trial court erred in failing to make specific findings on all of the factors. However, the court made findings regarding the relative wealth and income of the parties, their respective abilities to earn, and the children's mother's monthly expenses to provide for the children's needs. Further, the evidence in the record indicates that defendant was thirty-seven at the time of trial, while plaintiff was thirty-five. Defendant again claims the court erred in failing to enter a specific finding regarding defendant's income. Without such a finding, defendant claims, the court cannot determine an appropriate level of child support. We disagree. The trial court considered the evidence and assessed the credibility of defendant's testimony. Given the evidence, the court determined that defendant was either understating his actual income or had chosen employment which paid less than he could otherwise earn. We defer to the trial court's assessment that defendant had an ability to earn more than he purported to earn and find no abuse of discretion in the court's award of child support in accordance with that assessment.

### III. GIFTS

Defendant also contends the trial court erred in failing to award him gifts his father gave to him during the marriage while returning to plaintiff her premarital property. Defendant claims entitlement to various cash gifts and an \$18,500 loan his father made available to the parties for a downpayment on the Chris Lane home. Because defendant's father testified that the gifts were intended for his son and not the parties jointly, defendant claims the court should have awarded him those gifts.

There is no fixed formula for determining a division of property in a divorce action. Naranjo v. Naranjo, 751 P.2d 1144, 1146 (Utah Ct. App. 1988). The trial court has wide discretion in adjusting financial and property interests, and its actions are entitled to a presumption of validity. Id. Absent a showing of a clear and prejudicial abuse of discretion, we will not interfere with a property award. Throckmorton v. Throckmorton, 767 P.2d 121, 123 (Utah Ct. App. 1988).

Section 30-3-5 (1989), provides: "When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties." In making an "equitable" division, trial courts should generally award property acquired by one spouse by gift and inheritance during the marriage to that spouse together with any appreciating or enhancement of its value unless: 1) the other spouse has contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, or 2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse had made a gift of an interest in the property to the other spouse. Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988). However, in making equitable orders pursuant to section 30-3-5, the court has consistently concluded that the trial court is given broad discretion in dividing property, regardless of its source or time of acquisition. Burke v. Burke, 733 P.2d 133, 135 (Utah 1987).

Defendant claims that because the gifts were intended for him, the trial court erred in failing to award him those gifts in accordance with Mortensen. However, the trial court found the gifts were intended for both parties and we will not overturn the court's factual findings unless they are clearly erroneous. Utah R. Civ. P. 52(a). The record indicates that although defendant's father testified that the \$18,500 downpayment and the other cash gifts given during the marriage were solely for his son, plaintiff testified that she always

believed the gifts were for both parties. In addition, both defendant and his father testified that, with one exception, the gifts were made in the form of checks made payable jointly to both defendant and plaintiff. The one check that was made out to defendant only was made at about the time of the parties' separation. The trial judge stated from the bench that the past history of gift giving as compared to the gift given at the time of the separation indicated that defendant's father intended the previous gifts to be for both parties. In light of the evidence in the record, the court's finding that the cash gifts were intended for both parties is not clearly erroneous. Thus, Mortensen, which sets forth a test for gifts given to one spouse during the marriage, is inapplicable. Further, we find no abuse of discretion in the trial court's decision not to award defendant those gifts.

#### IV. INTEREST

Defendant also claims the trial court failed to award him interest on his equitable lien on the Chris Lane property pursuant to Utah Code Ann. § 15-1-4 (1986).

According to section 15-1-4 (1986), all judgments, other than those rendered on a lawful contract, shall bear interest at the rate of 12% per annum. In addition, the trial court in a divorce proceeding cannot stay statutory accrual of interest on a judgment for unpaid child support. Stroud v. Stroud, 758 P.2d 905, 906 (Utah 1988). However, an equitable lien, unlike a judgment, only gives the lienholder a right to collect the debt out of the charged property. Citizens Bank v. Elks Bldg., N.V., 663 P.2d 56, 58 (Utah 1983). A judgment, on the other hand, is "the final consideration and determination of a court on matters submitted to it in an action or proceeding." Crofts v. Crofts, 21 Utah 2d 332, 445 P.2d 701, 702 (1968).

The decree awarded plaintiff exclusive use and occupancy of the Chris Lane home subject to a non-interest bearing equitable lien in favor of defendant for one-half of the present equity in the home. The court stated that the lien amount should be \$22,500 and should be paid to defendant when plaintiff remarries, cohabits, sells the home, moves from the home, or when the youngest child reaches the age of majority, whichever occurs first. The equitable lien awarded defendant has not yet been reduced to judgment. Thus, defendant was awarded an equitable lien to which interest does not attach under section 15-1-4. We therefore affirm the trial court's award to defendant of a non-interest bearing equitable lien on the parties' property for \$22,500.

## V. ATTORNEY FEES

Finally, defendant maintains the trial court erred in awarding plaintiff attorney fees because there was insufficient evidence of need and reasonableness. To recover attorney fees in a divorce proceeding, the movant must demonstrate that the award is reasonable and that the need of the requesting party compels the award. Sorensen v. Sorensen, 769 P.2d 820, 832 (Utah Ct. App. 1989). Factors for determining reasonableness include the necessity for the number of hours utilized, the reasonableness of the rate charged in light of the difficulty of the case and the result accomplished and the rates commonly charged for similar services in the community. Id.

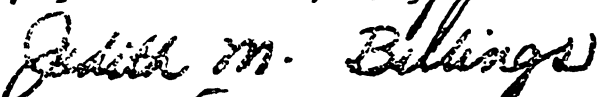
In this case, there is sufficient evidence to demonstrate plaintiff's need, given her income and financial responsibilities. In addition, plaintiff's attorney proffered that he had been practicing in the area of domestic relations law for fifteen years and was familiar with the rates charged in domestic actions. He also stated that his hourly rate was \$100 per hour and he considered that to be reasonable. He itemized the rates charged for associates, paralegals and clerks and stated that those rates were reasonable in his professional opinion. Plaintiff's attorney reviewed his time records and estimated the total fee and cost award would be \$7,869.30. The court found that plaintiff's evidence of attorney fees in the amount of \$7,879.30 was reasonable and necessary. The court further found that plaintiff does not have the ability to pay the fees and that defendant has the ability to pay a portion of plaintiff's fees and costs. Finally, the court found that the hourly rate is reasonable and consistent with the rate for similar services in the community and the hours expended were necessary.

In light of the evidence in the record, we find sufficient evidence of reasonableness and need regarding the attorney fees. Accordingly, we affirm the award of attorney fees.

Affirmed.

ALL CONCUR:

  
Regnal W. Garff, Judge

  
Judith M. Billings, Judge

  
Richard C. Davidson, Judge