

IN THE UTAH COURT OF APPEALS

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Brad Russell Childs,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Petitioner and Appellee,	)	
	)	Case No. 20060141-CA
v.	)	
	)	F I L E D
Heather T. Childs,	)	(May 3, 2007)
	)	
Respondent and Appellant.	)	<span style="border: 1px solid black; padding: 2px;">2007 UT App 153</span>

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Third District, Salt Lake Department, 954901350  
The Honorable Tyrone E. Medley

Attorneys: Randy S. Ludlow, Salt Lake City, for Appellant  
Harry Caston, Salt Lake City, for Appellee

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Before Judges Greenwood, Davis, and McHugh.

DAVIS, Judge:

Respondent Heather T. Childs appeals the district court's order in favor of Petitioner Brad Russell Childs, in which the court offset amounts of child support that Ms. Childs had failed to pay against her "equitable" lien on the marital property. Ms. Childs argues that the trial court failed to consider Utah law regarding priority of claims when the court awarded offsets against the lien, which offsets had accrued after she had assigned the lien to her attorney in payment of attorney fees. We affirm and remand to the trial court for a determination of attorney fees incurred on appeal.

Ms. Childs argues that the trial court erred by relying on Utah Code section 70A-9-318, see Utah Code Ann. § 70A-9-318 (1997) (repealed 2001), part of the Uniform Commercial Code (UCC),<sup>1</sup> to determine that "the assignee of the equitable lien[]

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<sup>1</sup>Chapter 9 of the UCC was repealed and replaced with chapter 9a, effective July 1, 2001. See Act of Feb. 29, 2000, ch. 252, 2000 Utah Laws 866 (codified at Utah Code Ann. §§ 70A-9a-101 to -709 (2001)). Because the repealed version was effective at the relevant times of this case, we cite to that version.

takes the equitable lien subject to any claims or defenses against it." Although we recognize "that chapter 9 of the UCC does not apply to real property," Board of Equalization v. First Sec. Leasing Co., 881 P.2d 877, 879 n.1 (Utah 1994), general rules regarding assignment require the same result as was reached by the trial court.

The Utah Rules of Civil Procedure provide that "any claim, counterclaim, or cross-claim which could have been asserted against an assignor at the time of or before notice of such assignment, may be asserted against his assignee, to the extent that such claim, counterclaim, or cross-claim does not exceed recovery upon the claim of the assignee." Utah R. Civ. P. 13(j); see also Time Fin. Corp. v. Johnson Trucking Co., 23 Utah 2d 115, 458 P.2d 873, 876 (1969) ("[T]he debtor of the assignment . . . is entitled to all setoffs and defenses he may have or may acquire against the assignor, until he is notified of the assignment."). Thus, an assignor may not avoid an existing claim simply by assigning her right to another. And although the debtor is generally limited to asserting defenses or offsets which arose before he received notice of the assignment, this general rule is not without exception. "[W]here the equities and defenses arise out of facts existing at the time of assignment, they may be interposed even if they arise after notice of the assignment." 6A C.J.S. Assignments § 107 (2004) (emphasis added).

The divorce decree here created obligations on the part of each party. It required Ms. Childs to pay one-half of the children's insurance premiums, medical and dental expenses, and daycare expenses. She was also required to pay monthly child support. In return, as part of the court's equitable division, Ms. Childs was awarded temporary alimony and an "equitable" lien of \$34,000 on the marital home. The obligation secured by the lien was to become payable upon the occurrence of any one of several conditions, including Mr. Child's cohabitation. Ms. Childs assigned the lien to her attorney prior to the occurrence of any of the conditions which would have rendered the obligation secured by the lien due and payable. Thus, the facts existing at the time of the assignment were (1) the lien arose from part of an equitable division of marital property; (2) the obligation secured by the lien was not due and payable until the occurrence of one of the enumerated conditions; (3) under the divorce decree, Ms. Childs had a reciprocal duty to pay various amounts to Mr. Childs; and (4) the failure of Ms. Childs to pay any mandated amounts before the obligation secured by the lien became due and payable could result in an offset against the amount of

her equitable lien. Under these circumstances, the offset asserted by Mr. Childs arose from facts existing at the time of assignment, even if part of his claim accrued after he received notice of the assignment.

Further, it is clear that had Ms. Childs retained her lien on the marital home, the result would be the same. The lien was not due and payable until a triggering event occurred, at which point any delinquent payments for which she was responsible would have been offset from her claim secured by the lien. An assignment to her attorney cannot avoid this result. See SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc., 2001 UT 54, ¶16, 28 P.3d 669 ("'[T]he assignee is subject to any defenses that would have been good against the [assignor]; the assignee cannot recover more than the assignor could recover; and the assignee never stands in a better position than the assignor.'" (alterations in original) (quoting 6 Am. Jur. 2d Assignments § 144 (1999))).

Thus, because the offset applied by the trial court arose from facts that existed at the time Ms. Childs assigned the lien to her attorney, we determine such offset was entirely appropriate under the specific facts before us. We therefore affirm the decision of the trial court.

Mr. Childs argues that he should be awarded his attorney fees on appeal because the appeal was brought in bad faith and, thus, is necessarily frivolous. The definition of a frivolous appeal is "one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." Utah R. App. P. 33(b); see also Hunt v. Hurst, 785 P.2d 414, 416 (Utah 1990) ("A frivolous appeal is defined as '[o]ne in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed.'" (alteration in original) (quoting Black's Law Dictionary 601 (5th ed. 1979))). This appeal clearly is not so completely lacking in merit that it qualifies as a frivolous appeal. We therefore deny Mr. Childs attorney fees based on this argument.

Mr. Childs also argues that he should be awarded attorney fees on appeal because he was awarded attorney fees below and then prevailed on appeal. See Utah Dep't of Soc. Servs. v. Adams, 806 P.2d 1193, 1197 (Utah Ct. App. 1991) ("The general rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably

incurred on appeal."). We agree and remand to the trial court for a calculation of those fees reasonably incurred on appeal.

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James Z. Davis, Judge

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WE CONCUR:

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Pamela T. Greenwood,  
Associate Presiding Judge

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Carolyn B. McHugh, Judge