

1975

# State of Utah and Joann Lorraine Clark v. Mark Thomas Clark et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH and JOANN :  
LORRAINE CLARK, :  
Plaintiff and Appellant, :

-vs- :  
MARK THOMAS CLARK, :  
Defendant and Respondent. :  
and :

STATE OF UTAH and SHARON O. BOWEN, :  
Plaintiff and Appellant, :

CIVIL NOS.

-vs- :  
KIM P. BOWEN, :  
Defendant and Respondent. :  
and :

14132, 14133, 14134

STATE OF UTAH and MARY O. VIGIL, :  
Plaintiff and Appellant, :

-vs- :  
ALFONSO M. VIGIL, :  
Defendant and Respondent. :  
:

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BRIEF OF RESPONDENTS

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Appeal from the District Court of Weber County, State of  
Utah, the Honorable Calvin Gould, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH and JOANN	:	
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-vs-	:	
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Defendant and Respondent.	:	
and	:	
STATE OF UTAH and MARY O. VIGIL,	:	
Plaintiff and Appellant,	:	
-vs-	:	
ALFONSO M. VIGIL,	:	
Defendant and Respondent.	:	

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BRIEF OF RESPONDENTS

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff-Appellants, State of Utah and three named women, Joann L. Clark, Sharon O. Bowen and Mary O. Vigil, appeal from identical memorandum decisions rendered in the District Court of Weber County, State of Utah, granting summary judgment of dismissal of their complaints under the Uniform Civil Liability for Support Act, §§78-45-1 et seq. U.C.A. 1953, as amended (hereinafter UCLSA).

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### DISPOSITION IN THE LOWER COURT

Appellants brought separate actions in the District Court of Weber County, the Honorable Calvin Gould, presiding, for reimbursement of funds expended for the support of the three named woman Appellants, suit having been brought under the UCLSA, §78-45-9 U.C.A. 1953 (pre-1975 amendment version. All references to §78-45-9 herein are to the pre-1975 amendment version of said section.) All three cases were heard together on defendants' motions for summary judgment on the 30th day of April, 1975.

After hearing arguments on said motions, the Court granted summary judgment of dismissal to each of the three defendants. Judge Gould issued identical memorandum decisions in each case, holding that plaintiffs could not recover under the UCLSA and would not be entitled to a judgment for a sum certain without first obtaining an order for monthly support against defendants.

### RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the memorandum decisions and petition the Supreme Court to declare that for an order of support to be obtained under the Uniform Civil Liability for Support Act, either for prospective support or reimbursement for support already provided, a hearing must first be conducted pursuant to the criteria of §78-45-7 U.C.A.1953, as amended.

### STATEMENT OF FACTS

Respondents agree substantially with the STATEMENT OF FACTS in Appellants' Brief, except as hereinbelow indicated, and would make

one addition to the facts. The addition is that after the three defendant-obligors separated from their families, the three woman Appellant-Obligees applied for and received assistance for themselves and their children under §55-15a-1 et seq. U.C.A., the Utah Public Assistance Act of 1973, more specifically §55-15a-17(3)(a), U.C.A., Aid to Dependent Children Program (hereinafter ADC Program.)

Respondents' only disagreement with Appellants' Statement of Facts is with Appellants' conclusion, in discussing the example of the Bowen case, that the purpose of §78-45-9 U.C.A. is to give the State derivative rights to seek reimbursement from obligors "who fail to support their obligees and thereby force the State to assume the burden." p. 3, Appellants' Brief. Respondents respectfully submit that under that section the State is granted derivative rights to seek reimbursement of support money if the obligees are entitled to reimbursement of support money.

## ARGUMENT

### POINT I

"DUTY OF SUPPORT" AND "LIABILITY FOR SUPPORT" ARE NOT SYNONYMOUS.

Respondents do not dispute the contention that a father in the State of Utah has an absolute duty to support his wife and children. Respondents agree with Points I and II of Appellants' Brief to the extent that Appellants state that a prior court order of support is not a prerequisite to seeking either a prospective support order or an order directing reimbursement for support already provided. It is urged, however, that although the duty of the father to support remains constant,

liability for support exists only after a court has determined that liability and, furthermore, that in proceedings under the UCLSA, the determination of both prospective and retrospective support liability must be made by the District Court pursuant to the criteria set out in §78-45-7 U.C.A.

Liability for support, by which is meant judicial determination of the amount of support, should be based in part on the obligor's (usually the father's) actual current ability to provide it. Utah's case law is in agreement with this view. In Hulse v. Hulse, 111 Utah 193, 176 P.2d 875 (1947), the Utah Supreme Court declared that, "the father of a child has a legal duty to support his minor child, if he has the capacity to do so." 176 P.2d 875 at 876 (emphasis added). Among the other Utah decisions supporting the Hulse view are Rockwood v. Rockwood, 65 Utah 261, 236 P.457 (1925); Cooke v. Cooke, 248 P.83 (Utah 1926); Anderson v. Anderson, 110 Utah 300, 172 P.2d 132 (1946); and Ottley v. Hill, 21 Utah 2d 396, 446 P.2d 301 (1968). In each of these cases the Utah Supreme Court used slightly different wording, but conveyed the same principle, i.e., that liability for support exists only where the father has the ability to provide support. Thus in Rockwood, supra, the standard for determining liability to pay support was "if he [father] is able to do so," 236 P.457 at 460; in Cooke, supra, support liability would be imposed if providing support was "within his [father's] means," 248 P.83 at 109; Ottley v. Hill, supra, would order the father to provide support "if he is able to do so," 446 P.2d 301 at 302.

Anderson v. Anderson, supra, cited at pp.18-19 of Appellants' Brief, is instructive. In Anderson there was a variance between the



findings and decree with respect to alimony and support money in a divorce action. After clarifying this variance, the Utah Supreme Court held:

. . . The criterion for determination of support money is the need of the persons supported and the defendant's [father's] ability to pay. 172 P.2d 132 at 136.

The courts of other jurisdictions have adopted this view. Thus, in Commonwealth v. Testa, 226 Pa.Super.585, 323 A.2d 199 (1974), a Pennsylvania Superior Court observed:

. . . At the hearing ... there was no evidence regarding the husband's earning power. Nor was there evidence to show that the husband had any assets. For our court to sustain a support order, there must be sufficient evidence of the husband's ability to pay. The court below cannot base its decision on a conjectured ability to pay. 323 A.2d 199 at 200-201.

For another Pennsylvania case whose holding is in accord with Commonwealth v. Testa, supra, see Commonwealth v. Beckham, 186 Pa.Super.74, 140 A.2d 471 (1958). In Beckham, the court construed a statute similar to but with some distinctions from the UCLSA. The Beckham court held that the purpose of the Pennsylvania statute was:

. . . to secure a reasonable allowance for the support of the wife, but only to the extent that it is consistent with the husband's property, income and earning capacity. 140 A.2d 271 at 472.

The New York case of Rensselaer County Dept. of Social Serv. v. Cossart, 327 N.Y.S. 2d 117, 38 A.D.2d 635 (1971) is very much like the instant case. Appellant father had been directed by a New York Family Court to pay \$75.00 per week as support for his wife and child, the right to proceed against the father having been assigned to the county department

of social services. The New York Appellate court stated:

. . . The only basis for the award made is the unsworn statement made by attorneys for the Department of Social Services in the course of colloquy between the court and counsel that respondent's [mother's] public assistance budget was \$325.00 per month ... it [the unsworn statement] is contrary to the wife's ... statement that she was receiving \$56.00 per week, \$26.00 from the Department of Social Services and \$30.00 from appellant. Accordingly, this proceeding must be remanded to the Rennselaer County Family Court with direction that a proper support proceeding be initiated and conducted so as to resolve all the issue here in dispute. 327 N.Y.S. 2d 117 at 118.

New York, it should be noted does not have the Uniform Civil Liability for Support Act. However, the court's reasoning in the Cossart case, supra, indicates that liability for support must be determined on a case-by-case basis, relative to the obligee's needs and the obligor's ability to provide support.

California is one of four states to have enacted the UCLSA, Cal. Civil Code §§241 et seq. In Smith v. Workmen's Compensation Appeals Board, 53 Cal. Rptr. 816 (Cal. App. 1966), the California Appellate Court was called upon to construe §3501 of the California Labor Code. Minor children in their father's custody sought recovery, under California's Workmen's Compensation Act, for their mother's death. The mother had been contributing to the children's support, even though no court had ordered her to do so. The California appellate court addressed itself to the question of who was supporting the children, at the time of the mother's death, within the meaning of §3501 of the California Labor Code? The Court held that there must be a presumption under §3501:

which differentiates between the legal duty of the

parent to support the child and the current legal liability under that duty to support the child. Although the duty to support is constant, liability thereunder exists only when the obligee is in need of support and the obligor is able to support. 53 Cal. Rptr. 816 at 821-822.

What emerges from the cases discussed thus far is that there is a difference between the unliquidated duty to support and a liquidated sum certain representing liability for support. This difference is attributable to the myriad possibilities involved in determining the relative standard of the obligee's needs and the obligor's ability to meet those needs. Respondents submit that the determination of support liability, how much and how it is determined, is solely a matter of state law and, as will be seen in the next part of this Brief, that the Uniform Civil Liability for Support Act was enacted to facilitate application of the particular state's law of support liability, not to establish a new standard which ignores the relative needs of obligees and ability of obligors to support those needs.

## POINT II

UNDER THE UNIFORM CIVIL LIABILITY FOR SUPPORT ACT, SUPPORT LIABILITY IS DETERMINED BY THE SUPPORT LAW OF EACH STATE.

Appellants, in their Brief at p.7, state that a basic purpose of the Uniform Civil Liability for Support Act is the establishment of a statutory duty of support to be used in conjunction with the Uniform Reciprocal Enforcement of Support Act (hereinafter URESA), which latter Act has been adopted by every state except Nevada. See §§77-61a-1 et seq. U.C.A. 1953, as amended, for Utah's URESA. This statement that the two

Acts should be read in conjunction requires close scrutiny.

In the Commissioners' Prefatory Note to the UCLSA, Uniform Laws Annotated, Master Edition, Volume 9, the purpose of the UCLSA is set forth at p.133:

The purpose of this act is to promote and facilitate the use of the Uniform Reciprocal Enforcement of Support Act ... Already the use of the Reciprocal Enforcement of Support Act to collect family support money across state lines has substantially lessened the burden on the public purse of supporting thousands of destitute families ... the Act [URESA] can operate most efficiently only when the duties of support are clearly and definitely stated in each state.

The commissioners go on to observe that there has been confusion among the states as to what constitutes the duty of support, some states not having a statutory duty, some with both common law and statutory duties, others having conflicting standards. To facilitate the use of URESA, the Uniform Civil Liability for Support Act was drafted for the purpose of creating a definite statutory duty to support in the drafting state. The Prefatory Note continues:

The Uniform Reciprocal Enforcement of Support Act provides in section 9 that "all duties of support are enforceable by action..." and in section 7 that "Duties of support applicable under this law (act) are those imposed or imposable under the laws of any state where the obligor was present during the period for which support is sought . . .

Under these sections then the recovery by the destitute obligee is to be measured by the duty of support set out in the law of the state where the obligor is present . . .

There is nothing in the Commissioners' Prefatory Notes to either the UCLSA or the URESA concerning the obligor's liability for support, the Prefatory Notes to the two acts speak only to an obligor's duty to support. It is submitted that this omission of a commentary on support liability is

attributable to a very basic intention to not establish an arbitrary standard for determining support liability without regard to obligees' ability to provide, but rather to facilitate enforcement of the right to receive support once liability for support has been determined and fixed at a sum certain under the law of the particular state. The Uniform Civil Liability for Support Act sets out clearly what constitutes the duty to support; once this duty is established, liability thereunder should be determined at a hearing, using as guidelines the general criteria of §78-45-7 U.C.A.

Legal commentator William Brockelbank agrees with the principle that support liability depends on all the relative circumstances of the obligees and obligors, and that the purpose of UCLSA and URESA is to facilitate enforcement of liability, not to dictate an arbitrary standard for support liability determination. In his treatise Interstate Enforcement of Family Support, 2nd Edition 1971, Mr. Brockelbank, in discussing the URESA, refutes two misconceptions, one that the URESA's purpose is to effect the greatest amount of support liability possible, the other that the standard of support liability should be uniform throughout the various states:

Sometimes some of those who are most intimately involved with the enforcement of [URESAs] reason that since [URESAs] was meant to recover more and more relief money for more and more destitute families, the older text is to be preferred because it is the most severe [emphasis original]. This becomes at times a sort of sadistic cry "let's soak the fleeing pappy." But this is an unworthy objective. No law should ever "soak" anybody. The purpose of law is to do even-handed justice. To take sides in favor of the plaintiff in any controversy is to throw justice to the winds. The amount of the judgment he [support obligor] has to pay must take into

account all the circumstances. One of these is the fact that, as of rights, he is now living in another state which may require less of him than the state he left. [Emphasis added]. Brockelbank, supra, chapter III, p.35.

As mentioned above, it is urged that the Uniform Civil Liability for Support Act fixes the existence of a duty to support in the enacting state, but, that once this duty has been established, liability for support must be ascertained pursuant to the criteria of §78-45-7 U.C.A. Appellants contend, in their Brief at p.16, that §78-45-7 U.C.A. "apparently applies only to prospective support." Respondents submit that said section applies with equal force to both prospective and retrospective support liability. Clearly, liability for support, past or future, is a matter of individual state law, see Brockelbank, supra, p.9 of this Brief. Some states may allow a retrospective support order after a hearing to determine the amount due; others may bar recovery for any period during which the duty to support obtained but no hearing to fix support liability was held. Respondents believe that, under the law of Utah, there need not be a prior court order of support for a court to conduct a hearing to determine liability for support already provided. The duty to support exists in Utah independant of the UCLSA. Rees v. Archibald, 6 Utah 2d 264, 311 P.2d 788 (1957); §30-2-9 U.C.A. 1953, as amended. However, under the Utah Uniform Civil Liability for Support Act, support liability must be determined, whether for future or already furnished support, pursuant to the mandate of §78-45-7 U.C.A. To hold otherwise would be to attach untoward significance to the UCLSA's one-time use of the word "reimbursement" and to create a situation so illogical that it could not have been the intention of the Utah Legislature

to do so. This position is addressed in the next Point of Respondents' Brief.

### POINT III

THE UNIFORM CIVIL LIABILITY FOR SUPPORT ACT WAS ENACTED FOR THE PURPOSE OF OBTAINING SUPPORT FOR NEEDY OBLIGEEES, NOT FOR PROVIDING THE STATE OF UTAH, ACTING AS A THIRD PARTY, WITH A RIGHT TO REIMBURSEMENT FOR NECESSARIES FURNISHED.

A hypothetical example will help to illustrate Point III. Suppose that father is married to mother and that they have a minor child. After five years of wedded bliss, father and mother separate, with mother retaining custody of the child. Father remains within the state, but does not contribute any support to mother and child. Upon separation, mother immediately applies for and receives a grant under the ADC Program, receiving \$200.00 per month from the state. After three years of the separation, mother, through the welfare department, brings an action for support under the UCLSA. Suppose furthermore that during the entire three year period before mother brought the UCLSA action, and for three years after she brought it, the father's ability to contribute support to mother and child remains the same, and mother continues to receive an ADC grant in the amount of \$200.00 per month.

According to the arguments advanced in Appellants' Brief, the welfare department is entitled to reimbursement of an amount equal to \$200.00 per month for three years (the period during which existed no court order fixing support liability at a sum certain), but is entitled to only that amount ordered by the district court under §78-45-7 U.C.A.

after the UCLSA hearing, even though the mother continues to receive the identical ADC grant. Appellants' interpretation is sound if during the entire period the father was possessed of sufficient ability to contribute \$200.00 per month as support. But how can the district court which conducts the UCLSA hearing know for a fact that the father had this ability to contribute support, unless competent evidence of that ability is presented to the court? Using Appellants' interpretation of the UCLSA, for the period between separation and the UCLSA hearing, all the state need do is prove willful failure of the obligor to provide support, and reimbursement is measured by that amount which the state furnished. Appellants' argue that there need not be any determination under §78-45-7 for retrospective support orders, yet contend at p.16 of their Brief, that the prospective support order entered against the father at the UCLSA hearing is governed by the standard of §78-45-7 U.C.A., which standard is:

78-45-7. Determination of amount of support.--When determining the amount due for support the court shall consider all relevant factors including but not limited to:

- (1) the standard of living and situation of the parties;
- (2) the relative wealth and income of the parties;
- (3) the ability of the obligor to earn,
- (4) the ability of the obligee to earn;
- (5) the need of the obligee;
- (6) the age of the parties;
- (7) the responsibility of the obligor for the support of others.

One must conclude from Appellants' above-mentioned arguments that the UCLSA has two purposes: the first to provide a means, under §78-45-7 U.C.A., of obtaining prospective support orders against support



obligors; the second to provide the state with a method of obtaining reimbursement based not on §78-45-7 U.C.A., but on the amount of support furnished by the state. This position is not logically consistent. One reason for this inconsistency is that welfare grants are based upon criteria different from those set out in §78-45-7 U.C.A. See Plaintiff's Answers to Defendants' Interrogatories, Answers 2(a), 2(b), contained in the Record on Appeal in the instant case. These welfare grants do not consider the obligor-husband at all, and determination of the amount of the grant is made unilaterally, i.e., only the obligees' needs are considered. It may be that a court, under either the UCLSA or as an incident of a divorce proceeding, would order an obligor to pay an amount approximately equal to the ADC grant; but that would be a fortuitous occurrence, since the court would employ different criteria in determining support liability. Therefore, support liability, by which is meant liquidation of the duty to support to an order against an obligor to pay a sum certain for support, is determined by criteria different than those used to determine the amount of grants furnished to ADC recipients. This supports Respondents' position that the measure of reimbursement is to be determined under §78-45-7 U.C.A. And a close look at §78-45-9 U.C.A., the meaning of which is at issue in this appeal, supports Respondents' position that the UCLSA deals only and exclusively with the question of support, not with reimbursement of a third party for necessities furnished.

The UCLSA defines "obligor", "obligee", and state as:

78-45-2. Definitions.--As used in this act:

- (1) "State" includes any state, territory or possession of the United States, the District of Columbia and the Commonwealth of Puerto Rico.
- (2) "Obligor" means any person owing a duty of support.

(3) "Obligee" means any person to whom a duty of support is owed.

Enforcement of the duty of support is governed by:

78-45-9. Enforcement of right to support - Powers of the state department of public welfare. - The obligee may enforce his right of support against the obligor and the state department of public welfare may proceed on behalf of the obligee to enforce his right of support against the obligor. Whenever the state department of public welfare furnished support to an obligee, it has the same right as the obligee to whom the support was furnished, for the purpose of securing reimbursement and of obtaining continuing support. [Emphasis added]

In §78-45-9, the word "support" is used five times; the word "reimbursement" is used once. Appellants, in their Brief at p.16, state that, "As to the former [reimbursement] the legislature must have assumed the commonly accepted meaning of 'reimbursement' was so clear that there could be no dispute as to it." Respondents submit, in view of the absence of legislative history of the meaning of "reimbursement", as used in §78-45-9 U.C.A., and the obvious intention of the UCLSA to deal with support, that "reimbursement", as used in §78-45-9 U.C.A., means reimbursement of support, not reimbursement of necessities furnished by a third party, as will be seen below.

Under §78-45-9 U.C.A., the state department of public welfare's rights are derivative, i.e., the agency may proceed "on behalf of the obligee" and has "the same right as the obligee to whom support was furnished, for the purpose of securing reimbursement and of obtaining continuing support." See Memorandum Decisions of Judge Gould, dated May 7, 1975; Summary Judgments dated May 21, 1975; Plaintiff's Answer to Request for Admission #3, all in the Record on Appeal of this case.

The State of Utah, therefore, in a proceeding under the UCLSA, has no rights greater than or other than those of the obligee to whom the State is subrogated. It is urged that these "rights of the obligee" are those concerning support only, and that the Utah law on obtaining support orders governs as to what amount, if any, to which the State is entitled.

Respondents contend that the Utah law on determining the amount of support due from an obligor is governed by those criteria under which alimony and child support are decreed in actions for divorce and separate maintenance, §§30-3-1 et seq. U.C.A. 1953, as amended, and furthermore submit that these same criteria are embodied in §78-45-7 U.C.A. In 27 B, C.J.S., Divorce §319 (5) it is stated:

The amount of the allowance for the support of the minor children of divorced parents is generally within the sound discretion of the court [Buller v. Bullen, 71 Utah 63, 262 P.292 (1928); Tsoufakis v. Tsoufakis, 14 Utah 2d 273, 382 P.2d 412 (1963); Bader v. Bader, 18 Utah 2d 407, 424 P.2d 150 (1967)], and all the circumstances of the particular case should be considered in fixing it [McBroom v. McBroom, 14 Utah 2d 393, 384 P.2d 961 (1963)]; but such discretion is limited to the conditions and financial ability existing at the time of the order.

In an Annotation, "Alimony-Retrospective Modification," 6 A.L.R. 2d 1277, §25 st p.1331, it is stated:

Where the court has granted a decree for alimony, separate maintenance, or support, it is generally held that the court does not have the power, or ought to refuse, to modify the decree by making an additional allowance for expenses incurred in the past.

This A.L.R. position is supported by the Utah case of Openshaw v. Openshaw, 144 P.2d 528 (Utah 1943) in which a divorce decree had been entered previously and the recipient of the decree award sought to have

the decree modified. The Utah Supreme Court said:

In Openshaw v. Openshaw, last cited, we held that the right of the trial court to modify an alimony or support money award does not extend to installments which have already accrued and which are past due, because the right to collect such installments becomes vested upon their due date . . . 144 P.2d 528 at p.530.

Thus, in the normal course in Utah, child support and alimony or separate maintenance are determined in proceedings under §§30-3-1 U.C.A., which embodies basically the same criteria as those set out in §78-45-7, U.C.A. Under these criteria, the ability of the obligor to actually provide support is always considered. Should the obligor be denied a chance to be heard as to his ability to provide support simply because the obligee and the State elect to bring an action under the UCLSA and claim a right to reimbursement of an amount not previously decreed? To read §78-45-9 U.C.A. as Appellants suggest it should be read is to bypass the long established criteria and procedures for determining support in favor of procedures not heretofore tested.

Appellants in their Brief cite cases from other jurisdictions in which an order of reimbursement was entered based on the amount provided by the State and in which no prior order of support had been entered. The cases are Los Angeles County v. Frisbie, 19 Cal. 2d 634, 122 P.2d 526 (1942), cited at p.8 of Appellants' Brief; and Langevin v. Hillsborough County, 320 A.2d 635 (N.H. 1974). Respondents feel that these cases are distinguishable.

In the Frisbie case, supra, the support statute in question was not the UCLSA, which California had not then enacted, but another statute which was quite different from the UCLSA. The California statute

to which Appellants refer was §2576 of the California Welfare and Institutions Code, St. 1937. Unlike §78-45-9 U.C.A., the California statute specifically stated:

. . . Upon failure of such [responsible] kindred to support the indigent, the county may extend aid, and such kindred in the order above named and to the extent of their ability shall reimburse the county for the support of the indigent . . .

The board of supervisors shall, in the case of aid granted by institutional care, fix a reasonable charge therefor, which shall be the measure of reimbursement to the county, and the existence of the order fixing the charge shall constitute prima facie evidence of its reasonableness.

The Frisbie case, therefore, actually supports Respondents' position, since the statute involved took into account the obligors ability to pay. Furthermore, the statute clearly and unequivocally states that the obligor shall reimburse the county, a far cry from §78-45-9's conferring of a right to seek reimbursement.

Respondents will dispose of Appellants' citation to the Langevin case, supra, by mentioning the key distinction. Appellants' statement that the New Hampshire statute there in question was similar to the Utah UCLSA is somewhat misleading, since New Hampshire had, at the time the Langevin case was litigated, adopted the UCLSA. The Langevin case was, therefore, decided under a different statute, New Hampshire RSA 169:11 and 166:20, which statutes gave the town a specific right of action in its own right against the obligor, and not a subrogated right, as does §78-45-9 U.C.A. The Langevin case is, therefore, inapposite.

Further credence is given to Respondents' position that the UCLSA, §78-45-9 U.C.A. is not intended to give the State of Utah an independent right to reimbursement, by resort to the law of restitution. In the

Restatement of the Law Of Restitution - Quasi Contracts and Constructive Trusts, Chapter 5 - Benefits Voluntarily Conferred, §113, p.464 (American Law Institute 1937), it is stated:

PERFORMANCE OF ANOTHERS NONCONTRACTUAL DUTY TO  
SUPPLY NECESSARIES TO A THIRD PERSON.

A person who has performed the noncontractual duty of another by supplying a third person with necessities which in violation of such duty the other had failed to supply, although acting without the other's knowledge or consent, is entitled to restitution therefor from the other if he acted unofficiously and with intent to charge therefor.

This would appear to be the basis for Appellants' citation of Baggs v. Anderson, \_\_\_ Utah \_\_\_, 538 P.2d 141 (1974), at p.13 of their Brief.

In Baggs v. Anderson, Justice Henriod, in his dissent, sounded a warning:

that the hallmark of the main opinion considerably is based on the gratuity that if anybody, -just anybody, -pays a decreed amount for X, beneficiary of a judgment, -has some kind of an immutable right to collect from the judgment debtor . . .

Such a concept allows an interloper, not particeps to a debts, and not a litigant ... to muscle in on a contract or debt or judgment and collect on a voluntary payment of someone else's obligation, - when the latter may be subject to a legal defense ... 528 P.2d 141 at 145.

Justice Henriod apparently was concerned that the doctrine of reimbursing third parties, as set out in the Restatement of Restitution, supra, was being stretched to cover situations for which its use was never intended.

Justice Henriod's warning has applicability to the instant case. The Utah State Department of Social Services was already under its own duty to provide support for the named female plaintiffs before the instant proceedings were brought. §§55-15a-1 et seq. U.C.A. 1953, as amended, are the Public Assistance Act of Utah, one portion of which

is the ADC Program. The relevant sections of said Act are:

55-15a-1. Purpose of act. -"Person in need" defined.  
-It is the purpose of this act to provide assistance to any person in Utah in need. A person is in need and entitled to assistance if sufficient resources are not available for his use within the limitations set forth herein and who otherwise qualifies.

55-15a-17.

Assistance shall be provided under this act for individuals who qualify as follows:

(3) Persons in need, that

(a) are children under the age of 21 . . . and who have been deprived of natural or step-parent support or care, and

(b) are natural or step-parents or relatives who have the custody and control of such needy children.

[By 1975 amendment, this section is now §55-15a-17

(3) (a), (b)]

55-15a-24. . . . Assignment of alimony or support payments . . .

The office [of Assistance Payments] is authorized to accept an assignment of court ordered alimony or child support from any recipient of assistance. An assignment of alimony or support shall include payments ordered, decreed, or adjudged by an court within the State of Utah or any other state or territory of the United States and is not in lieu of or to supersede or alter any other court order, decree or judgment. No assignment may be used as a requirement to establish eligibility for assistance . . .

The State of Utah, being already under an affirmative duty to provide assistance to "persons in need", cannot be deemed to be acting "unofficially and with intent to charge therefor" within the meaning of the Restatement of Restitution, supra. Moreover, the right to reimbursement conferred by §78-45-9 U.C.A. on the State is the right the obligee has, not the right of a third party. The obligees in the instant case did not furnish the support; therefore the State has no independent third party right to reimbursement.

## CONCLUSION

Respondents feel that adoption of the views they express herein will not harm the citizenry of Utah. Respondents do not contend that because there was no prior order of support, that they have been relieved of either their duty to provide it or their potential liability. Rather, they ask only that the Supreme Court of Utah declare that in proceedings under the UCLSA, §78-45-9 U.C.A., for both prospective and retrospective support orders, a hearing must first be had under §78-45-7 U.C.A. so that the proper amount of liability can be fixed.

It is clear that the trial court was correct in ordering summary judgment. Appellants have, in their Brief, misconstrued Judge Gould's decision to the extent that they interpret his holding that "the [welfare] agency cannot obtain a judgment for a sum certain without first obtaining an order for monthly support" to mean that because they had not obtained such a prior order, they are forever barred from obtaining reimbursement. Judge Gould's decisions can and should be read to mean that the State can seek reimbursement; but that in order to obtain judgment for a sum certain as reimbursement, the State must first establish the amount to which it is entitled at a hearing pursuant to the Uniform Civil Liability for Support Act, §78-45-7 U.C.A. 1953, as amended. Affirmance of the lower court will relieve the taxpayers of a burden; it will not impose a greater one.

Respectfully submitted,

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