

1980

# Geneva Otero and the State of Utah, By and Through Utah State Department of Social Service v. Joe Williams : Brief of Appellant

Utah Supreme Court

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TED CANNON; Attorney for Plaintiffs-Respondents; BRIAN M. BARNARD; Attorney for Defendant-Appellant;

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I N T H E S U P R E M E C O U R T  
O F T H E  
S T A T E O F U T A H

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GENEVA OTERO and the :  
STATE OF UTAH, by and :  
through Utah State :  
Department of Social :  
Services, :  
: :  
Plaintiffs-Respondents, :  
: :  
vs. :  
: :  
JOE WILLIAMS, :  
: :  
Defendant-Appellant. :  
: :  
:

Case No. 16819

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BRIEF OF APPELLANT

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AN APPEAL FROM THE ORDER GRANTING  
THE PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT  
IN THE THIRD JUDICIAL DISTRICT COURT,  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE, G. HAL TAYLOR, JUDGE PRESIDING

---

TED CANNON  
Salt Lake County Attorney  
DIANE W. WILKINS  
Deputy County Attorney  
243 East Fourth South, Lower Level  
Salt Lake City, Utah 84111  
Attorney for Plaintiffs-Respondents

BRIAN M. BARNARD  
Attorney for Defendant-Appellant  
MARY C. CORPORON  
Third Year Law Student for  
Defendant-Appellant  
214 East Fifth South  
Salt Lake City, Utah 84111

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the lower Court for a Summary Judgment as to the issue of back support. A judgment was granted in favor of Plaintiff for the welfare support previously paid by the State of Utah.

Defendant has appealed from that money judgment.

## II

### DISPOSITION IN LOWER COURT

The Plaintiffs' Motion for Summary Judgment was heard on November 14, 1979. After oral arguments, the Court below granted Plaintiffs' Motion for Summary Judgment, and awarded Plaintiffs a judgment in the amount of Four Thousand One Hundred Seventy-nine and 67/100 Dollars (\$4,179.67) for past welfare support paid. Said judgment was timely appealed by Defendant-Appellant herein.

## III

### RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment below and a determination that as a matter of law an indigent father is not liable for welfare payments made for the support of his child by the State of Utah.



## IV

STATEMENT OF THE CASE

This paternity action was filed in the Third Judicial District Court of Salt Lake County initially seeking a determination of paternity, a judgment for amounts paid by the State of Utah for support of the child, born March 30, 1978, and a continuing order for future support pursuant to U.C.A., §78-45a-1 et. seq. (1953).

The Defendant acknowledged paternity of the child in question by Stipulation. Plaintiffs filed a Motion for Summary Judgment based on Defendant's acknowledgment. Defendant opposed Plaintiffs' Motion establishing that he had been indigent at the time of the child's birth and at all times since, and contending that he should therefore not be held liable for the support payment made by the State of Utah.

Upon oral Stipulation of the parties in open court, the factual allegations of Plaintiffs' Complaint as to welfare amounts paid were admitted. The lower Court heard Plaintiffs' Motion for Summary Judgment on November 14, 1979. In an Order dated December 3, 1979, the Court below granted Plaintiffs' Motion for Summary Judgment and entered a money judgment for past support.

The Defendant filed a timely Notice of Appeal from the Summary Judgment.

## V

STATEMENT OF FACTS

On March 30, 1978, the co-Plaintiff, Geneva Otero, gave birth out of wedlock to a female child, Elisha Miera (R.30). At the time of co-Plaintiff Otero's pregnancy and confinement, she was receiving public assistance from the State of Utah. She continued to receive public assistance payments from the State of Utah for the child from April, 1978 through September, 1979. In all, Plaintiff Otero incurred Nine Hundred Eighteen Dollars and 67/100 (\$918.67) in benefits for medical expenses related to the birth of the child and Three Thousand Two Hundred Sixty-one Dollars (\$3,261.00) in monthly benefits for the child's support from April, 1978 through September, 1979. (R. 37)

The child in question was killed in an automobile accident in September, 1979. The matter of on-going future support is therefore not in issue.

Prior to the child's birth, the Defendant was arrested and incarcerated in the Salt Lake County Jail (R. 22). He was held continuously in the jail until April 2, 1979 when he was transferred to the Utah State Prison where he is still confined (R. 22). During his

incarceration in the jail from March 30, 1978 to April 2, 1979, the Defendant had no income from any source whatsoever (R. 22). From the time of his transfer to the Utah State Prison on April 2, 1979 until the present, the Defendant's income has never exceeded Twenty Dollars (\$20.00) per month (R. 23). The Defendant's present worldly assets are items of clothing and personal property with him at the Utah State Prison having a value of less than Two Hundred Dollars (\$200.00) (R. 27).

The Defendant acknowledged paternity of the child. The Defendant argued below that, owing to his extreme poverty during all the time the State of Utah paid support for the child, he should not be obligated to re-imburse the State of Utah for support payments made.

## VI

### ARGUMENT

#### Point I

WHERE THE STATE PROVIDES SUPPORT FOR  
A CHILD OF INDIGENT PARENTS, THE FATHER  
SHOULD NOT BE OBLIGATED TO RE-IMBURSE  
THE STATE.

The applicable statute in the instant case is U.C.A. §78-45-7 (1953) which provides as follows:

78-45-7. Determination of amount of support.--

(1) Prospective support shall be equal to the amount granted by prior court order unless there has been a material change of circumstance on the part of the obligor or obligee.

(2) When no prior court order exists, or a material change in circumstances has occurred, the court in determining the amount of prospective support, shall consider all relevant factors including but not limited to:

- (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.

(3) When no prior court order exists, the court shall determine and assess all arrearages based upon, but not limited to:

- (a) the amount of public assistance received by the obligee, if any;
- (b) the funds that have been reasonably and necessarily expended in support of spouse and children.

U.C.A., §78-45-7 (3), (1953), provides two express criteria to be used in determining support arrearages. These are: (1) the amount of public assistance received by the obligee; and (2) the amount reasonably and necessarily expended in support of spouse and children. The statute does not preclude the consideration of other factors.

The lower court interpreted the statute as dictating that the first criteria was the only criteria which need be used in determining the amount of support arrearages. The lower court did not receive any evidence as to the reasonableness of the funds expended, pursuant to U.C.A. §78-45-7 (3) (b), and the lower court ignored the prefatory clause of U.C.A., §78-45-7 (3), (1953), which provides:

Where no prior court order exists, the court shall determine and assess all arrearages based upon, but not limited to: ... (emphasis added)

By the language "not limited to" in U.C.A., §78-45-7(3), (1953), the legislature demonstrated its intent that other criteria should be reviewed by the Court in its equitable discretion.

An additional criteria which must be judicially incorporated into U.C.A., §78-45-7 (3), (1953), is the financial capacity of the obligor/defendant to pay support to the obligee, both during the time support is provided by the State and at the time of judgment. The legislature expressed the policy that no one should be legally obligated to pay an amount of support beyond his or her financial means by specifically listing ability to pay as a criteria for determining the amount of on-going

support pursuant to U.C.A., §78-45-7 (2), (1953). That subsection requires that the poverty or wealth of the obligor must be considered in determining support obligations. The statute requires the Court to consider the standard of living of the parties, the relative wealth and income of the parties, and the ability of the obligor to earn, in fixing the amount of a prospective support obligation. It is illogical to assume that the legislature required these elements to be ignored when determining arrearages for support where no prior order for support exists. The legislature provided that the criteria to be used in determining support arrearages are not limited to those expressly stated in U.C.A., §78-45-7 (3), (1953), indicating that other criteria such as those listed in the preceding subsection should be considered.

Ability to pay must be a criteria for assessing support arrearages by virtue of prior court decision. This court has previously held that the principal consideration in making determinations of child support are the needs of the child and the ability of the parents to provide support. Forbush v. Forbush, 578 P2d 518 (Utah, 1978). These Court enunciated considerations should be incorporated into U.C.A., §78-45-7 (3) when determining an obligor's liability for past support.

The uncontroverted affidavits of the Defendant in this case prove that he lacked the ability to pay support or to earn money during the time the State of Utah supported the child and that he lacked the ability, the resources, or the assets to pay the arrearages at the time judgment was entered against him. Pursuant to U.C.A. §78-45-7 (1953), the financial capacity of an obligor to pay support must be considered in determining support arrearages, and the Defendant, because of his extreme poverty, should not be required to re-imburse the State of Utah for past support paid.

#### Point II

THE TIME WHEN AN ACTION FOR SUPPORT ARREARAGES IS COMMENCED SHOULD NOT BE DETERMINATIVE OF AN OBLIGOR'S LIABILITY FOR SUPPORT, OF THE CRITERIA FOR DETERMINING LIABILITY, OR OF THE AMOUNT OF SUPPORT.

The Plaintiffs argued and the Court below found that the ability of an obligor to pay support is an appropriate factor to consider only in determining the amount of on-going support. In effect, Plaintiffs and the lower court have concluded that if there were a question of Defendant's liability for on-going support, the issue of his poverty would become relevant pursuant to U.C.A., §78-45-7 (2), (1953).



The present action for child support could have been brought at any time after Plaintiff Otero conceived. If this action had been brought prior to the child's birth, and if Defendant had acknowledged paternity at or before birth, the court below would have considered only Defendant's obligation for on-going support, since no support arrearages would have accrued. The lower court then would have determined Defendant's liability based on the criteria set forth in U.C.A., §78-45-7 (2), (1953), including Defendant's wealth (or lack thereof) and ability to earn. Instead, this action for support was brought only after substantial arrearages had accrued. The judgment was obtained months later after still more arrearages had accrued. When the support at issue became arrearages rather than future support, the lower court found that the criteria of Subsection (2) (wealth, earning ability, etc.) were no longer to be considered in determining Defendant's liability. The lower court determined Defendant's arrearages based solely on the express criteria of U.C.A., §78-45-7 (3), and found that Defendant's poverty could not be considered in imposing liability for support arrearages.



The time at which an action is brought should not be determinative of the outcome of the action. Not one relevant factor changed during the course of the instant case. The Defendant remained incapable of providing support, the minor child continued to be in need of support, and the State of Utah continued to pay support for the benefit of the child in need. Yet, the Court below has found that mere passage of time, the mere changing of support from a future event to a past event, has somehow made it improper to consider Defendant's poverty in determining his liability for support.

If the Plaintiffs' Motion for Summary Judgment based on Defendant's acknowledgment of paternity had come on for hearing at the time of the child's birth, the lower Court would have been required to consider the factors outlined in U.C.A., §78-45-7 (2), (1953). It is inequitable not to consider those elements in the instant case simply because the issue has become one of arrearages.

The Court is not limited to consideration of the criteria expressly mentioned in U.C.A., §78-45-7 (3), (1953), in determining Defendants liability. The Court must also consider the criteria of U.C.A., §78-45-7 (2), (1953), since these are the same criteria which would have been

considered had the action been brought earlier. In light of the Defendant's extreme poverty, the Defendant should not be liable to the State of Utah for past support paid.

### Point III

THE STATE SHOULD NOT IMPOSE A SUPPORT OBLIGATION ON A PARENT WHICH IS FAR IN EXCESS OF THE PARENT'S ABILITY TO PAY SUPPORT.

It is not the policy of the State of Utah to impose child support obligations on a parent in excess of the parent's ability to pay. This is demonstrated by the criteria listed in U.C.A., §78-45-7 (2), (1953), which require that a parent's wealth or poverty, standard of living, and ability to earn be considered in fixing support obligations. Moreover, the Utah State Legislature has recognized that there are some circumstances under which adults are incapable of supporting themselves and/or their children. The legislature has provided for these circumstances by creating a program for public assistance in Utah U.C.A., §55-15a-1, (1953) et. seq. U.C.A. §55-15a-1, (1953) states the purpose of the public assistance act as follows:

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.

The existence of the public assistance program acknowledges that some people need financial help. This State will assist its citizens when its citizens cannot assist themselves.

The Defendant in this case has proved his extremely impoverished condition through two uncontroverted affidavits submitted to the Court below. It would be a violation of the intent expressed in U.C.A., §78-45-7 (2), (1953), to impose any obligation for support, either past or future, on a man who literally is not and never has been able to pay. It would contradict the policy of public assistance in this State to impose an obligation for past support on the Defendant. The situations and circumstances of all the parties in this case are exactly the circumstances and situations which the public assistance program was designed to take care of. The Defendant was not able to support the child from the time of her birth until the time of her death, and he is still not able to re-imburse the State which supported the child. Since the Plaintiff Otero qualified for and received public assistance for herself and the child, it can be presumed that she was also incapable of supporting her child during the time in question. The child could not support herself. Since no one with a duty to support the child could do so, the State of Utah, in keeping with its policy of aiding its indigent citizens,

supported the child. It would be incongruent if the State of Utah were now permitted to go against the indigent Defendant father for support monies paid.

It would be arbitrary and unreasonable to impose a duty on the Defendant beyond his ability. When the law imposes an obligation on a person beyond that person's ability to meet that obligation, when the law requires a higher standard of performance than a person is capable of giving, it fosters disregard for the law. No citizen will respect the law when the law expects him to do what he simply cannot do.

The Court should not impose a duty on the Defendant to pay what he could not and can not pay. Such a ruling would only cause disrespect and distrust of our laws and legal processes.

#### Point IV

THE PLAINTIFF OTERO MUST SHARE THE BURDEN  
OF SUPPORT FOR THE CHILD.

The State of Utah imposes an equal duty on both parents to support their children. A mother has a duty to support her minor child equal to a father's duty to support his minor child U.C.A., §78-45-3 and 4, (1953).

In this case, the co-Plaintiff Otero had a legal duty to support her daughter. She shirked this duty by failing to provide support, and the State of Utah provided that support instead. It can be argued that co-Plaintiff Otero was too poor to support her child, and that this fact should relieve her duty of support and should also relieve her of any obligation to re-imburse the State for support monies paid. Since the Plaintiff State of Utah apparently has not attempted to obtain a judgment against co-Plaintiff Otero for past support paid for the child, it can be assumed that this is the position adopted by Plaintiffs, and tacitly adopted by the lower Court.

However, the argument applies equally as well to Defendant. He could not support the child, so the State of Utah supported her instead. Defendant was in just as dire a financial condition as Plaintiff Otero when the State performed his support duty. In fact, since Plaintiff Otero was free to seek gainful employment while Defendant was incarcerated during the time in question, Plaintiff Otero was in a better position to support her daughter than was the Defendant. The same theory which renders co-Plaintiff Otero not liable to re-imburse the State for past support paid should also relieve the Defendant of the same obligation. Payment of child support by a non-custodial parent is not

to be a payment of all amounts needed to support a child. The custodial parent has an obligation to provide some financial assistance for the benefit of the child as well as providing the emotional and nuturing needs of the child.

To say simply by rote that a non-custodial parent must re-imburse the State for all assistance payments made denies the mutual obligations of parents to support their child. The Complaint asks that the Defendant alone be ordered and obligated to re-imburse the State for the monthly grant of public assistance. It would be inequitable to grant Plaintiffs a judgment against Defendant under the instant facts when both Defendant and Plaintiff Otero had a duty to support their child, when both of them failed to perform that duty out of poverty, and when the State of Utah stepped in to perform that duty instead.

#### Point V

THE DECISION OF THE LOWER COURT MANDATES  
UNJUST AND UNREASONABLE RESULTS IN FUTURE  
CASES.

The decision of the Court below mandates extremely inequitable results. For example, suppose two seriously physically handicapped people incapable of ever working were to marry and have a child. Suppose the wife were then to desert the husband, but not seek a divorce, and live seperatel

from the husband and child. Suppose the State of Utah then paid public assistance to support the father, the child, and the mother. Under the decision of the lower court, the State of Utah could sue the mother two years or five years later for all support monies paid for the child over the period. According to the Court below, it would be inappropriate to consider the standard of living, wealth, or ability to earn of the mother. All that could be considered would be the amount of support arrearages paid by the State.

The decision of the lower Court that a Court may not consider the financial circumstances of a non-custodial parent in determining the amount owed for support arrearages where no prior order for support exists mandates unreasonable and inequitable results. For this reason, the judgment of the Court below should be vacated.

## VIII

### CONCLUSION

The Plaintiffs have obtained a judgment against Defendant for past support paid by the State of Utah. This judgment should be vacated and a judgment entered that Defendant is under a legal obligation to re-imburse the Plaintiffs for past support paid only in accordance with



his current and past ability to pay. The new judgment should further provide that since the Defendant had no ability to pay at the time in question, he has no legal duty to reimburse the State for past support paid.

Defendant should be granted such relief because of his extreme poverty during the time support was paid and at the time of judgment. The Defendant's indigency should be considered as the controlling factor in determining the amount of back support owed pursuant to U.C.A., §78-45-7 (3), (1953). The criteria listed in U.C.A., §78-45-7 (2), (1953) should be considered since they would have been controlling had the instant action been brought at the time Defendant's support obligation first arose.

Plaintiffs should not be granted a judgment against Defendant for past support paid, since it would be unreasonable to expect persons to support themselves or others when they are not capable of doing so, as expressed in U.C.A., §78-45-7 (2), (1953), and as expressed by the existence of the public assistance program in Utah. It is arbitrary, capricious and unreasonable to require Defendant to do what he cannot and has not been able to do.



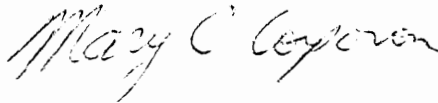
It is inequitable to grant Plaintiffs a judgment for all past support paid against Defendant when both Plaintiff Otero and Defendant were under an equal duty to support their child and both were unable to perform that duty owing to their poverty.

The decision of the lower Court mandates unreasonable results. Plaintiff's judgment should be vacated, and a determination made that the Defendant is liable for arrearages only to the extent of his ability to pay.

Respectfully submitted,



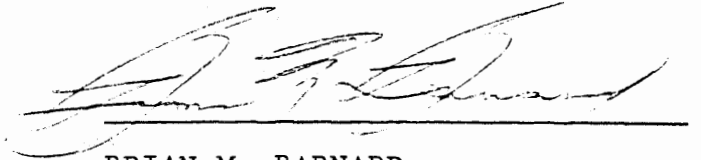
BRIAN M. BARNARD  
 Attorney for Defendant-  
 Appellant  
 214 East Fifth South  
 Salt Lake City, Utah 84111



MARY C. CORPORON  
 Third Year Law Student for  
 Defendant-Appellant  
 214 East Fifth South  
 Salt Lake City, Utah 84111

## CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief of Appellant to Diane W. Wilkins, Deputy County Attorney, Attorney for Plaintiffs-Respondents, at 243 East Fourth South, Lower Level, Salt Lake City, Utah, postage prepaid in the United States Postal Services this 5th day of January, 1980.

A handwritten signature in black ink, appearing to read "Brian M. Barnard", is written over a solid horizontal line.

BRIAN M. BARNARD  
Attorney for Defendant-Appellant