

1980

Geneva Otero and the State of Utah, By and Through Utah State Department of Social Service v. Joe Williams : Appellant'S Brief In Support of Petition For Reconsideration

Utah Supreme Court

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TED CANNON; Attorneys for Plaintiffs-Respondents; BRIAN M. BARNARD, MARY C. CORPORON; Attorneys for Defendant-Appellant;

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

GENEVA OTERO and the
STATE OF UTAH, by and
through Utah State
Department of Social
Services,

Case No. 16819

Plaintiffs-Respondents,

vs.

JOE WILLIAMS,

Defendant-Appellant.

APPELLANT'S BRIEF IN SUPPORT
OF PETITION FOR RECONSIDERATION

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

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FILED

JUN 11 1980

IN THE SUPREME COURT
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FILED

MAY 27 1980

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

GENEVA OTERO and the	:	
STATE OF UTAH, by and	:	
through the Utah State	:	PETITION FOR REHEARING
Department of Social	:	
Services,	:	
	:	No. 16819
Plaintiffs-Respondents,	:	
vs.	:	
	:	
JOE WILLIAMS,	:	
	:	
Defendant-Appellant.	:	

Defendant-Appellant, Joe Williams, by and through his counsel of record, hereby petitions the Court for rehearing of the above

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Rule 76 (e). In support of said petition, Defendant-Appellant

2. The Defendant-Appellant desires oral argument in the above entitled action. He was never given notice that his appeal had been submitted to the Court on the briefs of the parties, and he was never afforded an opportunity formally to request oral arguments. It was error for the Court to render a decision in this matter without giving Defendant-Appellant notice that his appeal had been submitted upon the briefs and without giving him an opportunity for oral argument.

3. The Court erred in failing to consider the rehabilitative impact of its decision on the incarcerated Defendant-Appellant. The Defendant is currently confined at the Utah State Prison and earns an income of less than \$20.00 per month. If the Court's decision on the above entitled matter is allowed to stand, the Defendant-Appellant will be released from prison owing a debt of \$4,179.67. It is currently far beyond the ability of the Defendant-Appellant to pay this sum, and the trial court and this Court have

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CERTIFICATE OF MAILING

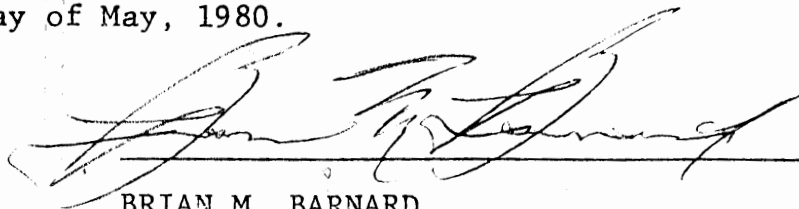
I hereby certify that I mailed a true and correct copy of the foregoing and attached Petition for Rehearing to Stephen G. Schwendiman, Attorney at Law, Attorney for Plaintiffs-Respondents, 150 West North Temple, Suite 234, Salt Lake City, UT 84103, postage prepaid in the United States Mails this 27 day of May, 1980.

Mary C. Coyner

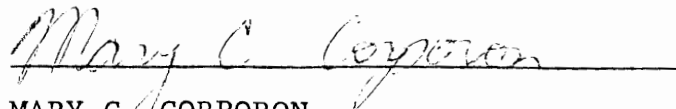
effect of fostering disrespect for the law in the Defendant and will have the effect of discouraging him from attempting to earn an honest living upon his release from prison. The effect of the Court's decision on the rehabilitation of the Defendant is a material issue in this case which the court has failed to consider.

WHEREFORE, the Defendant-Appellant petitions the Court for a rehearing of the above matter.

DATED this 27th day of May, 1980.

A handwritten signature in cursive script, appearing to read "Brian M. Barnard", written over a horizontal line.

BRIAN M. BARNARD
Attorney for Defendant-Appellant

A handwritten signature in cursive script, appearing to read "Mary C. Corporon", written over a horizontal line.

MARY C. CORPORON
Third Year Law Student for Defendant-
Appellant

I. The Court has erred in its interpretation of the relevant statute, U. C. A., 78-45-7(2) and (3), (1953), in that it has found that this statute does not require the consideration of an obligor's ability to earn when a court is determining support arrearages where no prior order for support exists. In making this decision, the Court has overlooked the decisions of this court in the cases of Roberts v. Roberts, 592 P.2d 597 (Utah, 1979), and Mecham v. Mecham, 570 P. 2d 123 (Utah, 1977). Specifically, the Court has overlooked the holding of the Roberts decision that U. C. A., 78-45-7(3), (1953) as amended by the Utah Legislature in 1977 would constitute a denial of due process to the obligor "if the court assessed the obligor for all public assistance benefits received by the obligee, without considering relevant factors such as the relative wealth and income of the parties; and the ability of the parties to earn income." (at page 599)

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Defendant-Appellant.

Case No. 16819

APPELLANT'S BRIEF IN SUPPORT
OF PETITION FOR RECONSIDERATION

Defendant-Appellant submits the following Brief in support of his petition for reconsideration:

POINT I

THE COURT HAS ERRED IN ITS DETERMINATION THAT U.C.A., 78-45-7 (2) AND (3), (1953) DOES NOT REQUIRE CONSIDERATION OF AN OBLIGOR'S ABILITY TO PAY A SUPPORT OBLIGATION.

U.C.A., 78-45-7, (1953) reads 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 circumstance 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.

The Court has found, in rendering its decision in this matter, that the above statute does not require consideration of an obligor's ability to earn or ability to pay when determining an order for arrearages where no prior order for support exists. (page 3 of the Court's unpublished opinion)

This determination is error because it is in direct conflict with prior Court decisions. The Court has previously held that as a general principle, an obligor's ability to pay must be considered in making determinations of child support. Forbush v. Forbush, 578 P. 2d 518 (Utah, 1978). The decision of the Court in the instant case is contrary to its ruling in Forbush.

Moreover, the Court has specifically found in a prior case that U.C.A., 78-45-7 (3), (1953) must be construed so as

to include consideration of an obligor's ability to earn. Roberts v. Roberts, 592 P 2d, 597 (Utah, 1979). In that case, the State of Utah sought reimbursement for support payments made to a wife and her minor child during the pendency of a divorce action. In assessing the defendant husband's liability for support arrearages paid by the State, the Court analyzed U.C.A., 78-45-7 (3) (1953), and concluded that this section required consideration of an obligor's ability to earn when assessing support arrearages where no prior order for support exists.

. . . This amendment [§78-45-7 (3)] indicates an intent by the Legislature that the State be allowed to recover all sums expended by the State on behalf of an obligee spouse and children prior to a court order. Here, the State was made a party before the court's order fixing the amount of child support to be paid, and should be reimbursed for sums expended on behalf of the child.

However, the above amendment would constitute a denial of due process to the obligor spouse if the court assessed the obligor for all public assistance benefits received by the obligee, without considering relevant factors such as the relative wealth and income of the parties; and the ability of the parties to earn income. Under 78-45-7 (2) seven such factors are required to be considered in determining the amount of prospective support. Under the Public Support of Children Act, which provides an administrative procedure for obtaining reimbursement for assistance payments made on behalf of minor children, similar factors must be considered in the hearing to determine the extent of the parent's liability for child support. The assessment of arrearages under 78-45-7 (3) must also be subject to consideration of the same factors.

(at page 599, footnotes ommitted).

This analysis by the Court in 1979 is exactly the analysis presented to the Court by Defendant-Appellant's brief in the instant case. Yet, in the present case, the Court has directly contradicted its holding in Roberts by finding that U.C.A., 78-45-7(3), (1953) does not require the consideration of an obligor's ability to earn.

The decision in the instant case is contrary to prior Court decisions, and Defendant-Appellant's Petition for Rehearing should be granted.

POINT II

THE RECORD IN THE INSTANT CASE DOES NOT SUPPORT THE CONCLUSION THAT THE LOWER COURT CONSIDERED THE DEFENDANT-APPELLANT'S ABILITY TO PAY IN ESTABLISHING HIS SUPPORT OBLIGATION.

This Court has stated in its opinion that the record in the instant case does not support Defendant-Appellant's claim that the court below did not consider his financial circumstances in setting his support obligation.

It is error for the Court to conclude that the lower Court did consider Defendant-Appellant's financial circumstances. It is logical to infer from the files and records of this case that the court below did not consider his financial means in rendering its decision. The lower Court held no evidentiary hearing as to Defendant-Appellant's ability to earn subsequent to his release from prison. Instead, it grante

Plaintiff-Respondents' Motion for Summary Judgment in the full amount prayed for in the Complaint, or one-hundred and fifty dollars (\$150.00) per month in support during all the months the minor child in issue was alive. The court below made no adjustment in the amount of support prayed for. It is error to conclude that Defendant-Appellant's ability to pay was considered.

Moreover, even if the lower court did consider Defendant-Appellant's financial circumstances in establishing his obligation for support arrearages, it committed reversible error in setting the obligation of the indigent Defendant so high. The lower court, in effect, granted a judgment for support at the rate of one-hundred and fifty dollars (\$150.00) per month against an obligee earning less than twenty dollars (\$20.00) per month during all the time the support obligation accrued. It did so without making any finding that he would ever be able to pay support at the rate at which it had accrued against him. The imposition of a support obligation so grossly disproportionate to an obligee's financial means is reversible error, whether or not the trial court judge purports to consider the obligor's financial means in rendering his decision.

An analysis of the judgment rendered in this case indicates that the lower court did not consider Defendant-Appellant's financial means in rendering its judgment. Even if the lower court did purport to consider the Defendant-Appellant's

ability to earn, it committed reversible error in granting a judgment for support so grossly disproportionate to what the evidence presented indicated Defendant-Appellant could pay.

POINT III

IT WAS ERROR FOR THE COURT TO DECIDE THE INSTANT CASE ON THE BRIEFS OF THE PARTIES WITHOUT GRANTING DEFENDANT-APPELLANT AN OPPORTUNITY FOR ORAL ARGUMENT.

The instant case was submitted to the Court solely on the briefs of the parties. The files and records in this matter indicate that Defendant-Appellant was never given notice that his case had been submitted for decision on the briefs, and he was never given an opportunity to request oral arguments.

Defendant-Appellant and his counsel of record desire oral arguments in the present case. The Court should grant the Petition for Rehearing in order to correct the error of rendering the decision herein without giving notice to Defendant-Appellant that his case had been submitted to the Court on the briefs, and without affording Defendant-Appellant the opportunity for oral argument.

POINT IV

THE COURT ERRED IN FAILING TO CONSIDER THE REHABILITATIVE IMPACT OF ITS DECISION ON THE DEFENDANT-APPELLANT.

The Defendant-Appellant, as noted in the Courts decision, is an inmate currently confined in the Utah State

Prison having an income of less than twenty dollars (\$20.00) per month. The lower court has ruled, and this Court has affirmed the decision, that the Defendant-Appellant should be released from prison owing a debt of four-thousand and one-hundred and seventy-nine dollars and sixty-seven cents (\$4,179.67)

The decision of the court below was entered upon a Motion For Summary Judgment without a trial, evidence, or findings regarding Defendant-Appellant's capacity to earn or pay the support arrearages in issue upon his release from prison. Defendant-Appellant will be released from prison with a debt hanging over his head which he does not now have the capacity to pay and which no court has found he will have the capacity to pay.

It is detrimental to Defendant-Appellant's rehabilitation for the Court to impose such a debt. First, in asking Defendant-Appellant to pay what he simply cannot pay, the Court will foster a disrespect for the law in Defendant-Appellant (and in others). Second, by imposing on him an obligation so onerous in comparison to the Defendant-Appellant's means, the Court has made it difficult for him to function upon his return to society.

The Court has erred in its decision in the instant case in failing to consider the impact of its decision on Defendant-Appellant's rehabilitation.

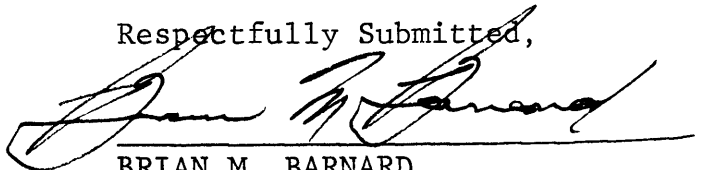
CONCLUSION

The Court has found that U.C.A., 78-45-7 (3), (1953), does not require a court to consider obligor's ability to pay in determining liability for support arrearages where no prior order for support exists. Such a determination is directly contrary to prior decisions of this Court that a court must always consider an obligor's ability to pay when fixing any support obligation. (Forbush and Roberts, supra)

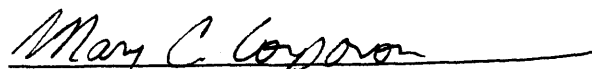
The decision of the Court is also error in that it was rendered without affording Defendant-Appellant an opportunity for oral argument, and does not consider the effect of the debt imposed on Defendant-Appellant's rehabilitation.

The Defendant-Appellant's Petition For Rehearing should be granted, and upon rehearing, the decision of the lower court should be reversed. In the alternative, the case should be remanded for determination and consideration of Defendant-Appellant's ability to earn and pay his support obligations in accordance with the Roberts decision.

Respectfully Submitted,



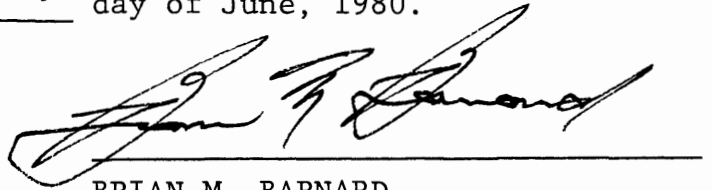
BRIAN M. BARNARD
Attorney at Law



MARY C. CORPORON
Third year law student

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Appellant's Brief in Support of Petition for Reconsideration to Diane W. Wilkins, Deputy Courty 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 11th day of June, 1980.

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

BRIAN M. BARNARD
Attorney for Defendant-Appellant