

1977

# Norma E. Green and State of Utah v. Craig E. Green : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

NORMA E. GREEN, and the )  
STATE OF UTAH, by and through )  
Utah State Department of )  
Social Services, )

Plaintiff and Appellant, )

-v- )

No. 14610

CRAIG E. GREEN, )  
Defendant and Respondent. )

BRIEF OF RESPONDENT

Appeal from the judgment of the District Court  
of the Third Judicial District of Salt Lake  
County, Honorable Bryant H. Croft, presiding.

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-v- )

CRAIG E. GREEN,

Defendant and Respondent. )

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Respondent agrees with the Statement of the Nature of the Case made by Appellant except that it should be added that the Order to Show Cause also requested that the defendant be held in contempt of court for failing to pay child support.

DISPOSITION OF THE LOWER COURT

Respondent agrees with Appellant's statement.

RELIEF SOUGHT ON APPEAL

Respondent agrees with Appellant's statement. Respondent seeks affirmation of the dismissal of the Order to Show Cause.

## STATEMENT OF FACTS

Respondent agrees with Appellant's Statement of Facts except that except that it should be added that the State also sought to have the defendant held in contempt of court for failure to pay child support even though an order had been entered relieving him of that duty.

## ARGUMENT

### POINT I

THE MODIFICATION OF THE DECREE OF DIVORCE WHICH RELIEVED DEFENDANT OF THE DUTY OF SUPPORT WAS VALID.

The State contends that the modification of the decree of divorce which relieved defendant of the duty of support was void from its inception and argues that the lower court and this court should simply ignore it, relying upon *Riding v. Riding*, 8 U. 2d 136, 329 P. 2d 878. It is true that in the *Riding* decision this court did refer to the order relieving the father of support as being void. However, the decision was not bottomed on the order being void, but was based on the fact that the order relieving the father of support was conditional, and that when the condition was not met, (viz. adoption) the order never took effect. The stipulation of the parties in the *Riding* case read:

"It is specifically understood and agreed that the said Melvin Jay Riding is hereafter released and discharged from any further obligation to support said child, subject of course, to the order of a court of competent jurisdiction permitting the said Glen Orrett to adopt said child".

Thus, the basis of the Riding decision was not that the order was void but that it was conditional upon the adoption taking place, and when the adoption was never granted, the order relieving the natural father of support simply failed. The reference to the order being void was dictum.

In the instant case, the order relieving the defendant, Graig Green, of the duty of support was not made conditional by its terms. It reads:

"The defendant Craig Edwin Green is relieved of any payment of any further support from and after the 31st day of July, 1973."

Since it was not conditional, it took effect immediately. Mrs. Green never took any appeal from that order and the time for appeal has long now expired. The State cannot now, years later, in effect appeal from that order under the guise that it was void from its inception. This court in a recent decision, Beverly Larsen (Higley) et al. v. Earnest Alan Larsen, No. 14593, decided March 18, 1977, had under consideration an order of support for only \$1.00 per year. The State in that case, like here, contended that the order was void from its inception.. Justice Maughan observed that this was a strange claim, and the court upheld the decree because there was no appeal from it and neither she nor the State had ever proceeded to obtain relief from the decree.

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**If this court agrees that the order relieving Craig Green**

of support was not void, then it stands and cannot now be altered.

POINT II.

IF THE ORDER RELIEVING DEF. OF SUPPORT CAN NOW BE MODIFIED, IT MUST BE DONE SO UPON A PETITION FOR MODIFICATION AND CANNOT BE RETROACTIVE IN ITS APPLICATION.

If this court does not agree with defendant in his Point and holds that the decree relieving him of support can now be overturned, then it must be modified upon petition of the plaintiff Mrs. Green or the State on her behalf. It cannot be done in the manner in which the State attempted to do so in the court below. The record shows that the State brought an Order to Show Cause for arrearages and to have the defendant Green found in contempt of court. (R.79) Judge Croft correctly ruled that under the decree, Green had no obligation to pay, and he was not in contempt, and there was no delinquency due. He left the door open for the plaintiff to petition the court for a modification of the decree upon the basis that the adoption never took place, and the child was being supported by public assistance. But in the proceedings below, no such action was taken by Mrs. Green or the State.

In the Riding case upon which the State so heavily relied the mother correctly petitioned the court to modify the decree. That was not done here in the instant case, and hence Judge Croft did not have that question before him. He only had the question

of arrearages and contempt before him, and he correctly ruled that plaintiff was not entitled to either judgment.

If, in a proper hearing, the decree should be modified and the duty of the defendant to support be reinstated, the order of support should not be made retroactive since there is no statutory basis for that procedure. Mr. Green has abided by the decree in good faith, even though it required him to pay nothing. He should not be now penalized because the proposed adoption of his child did not take place. He did not in any way prevent it from taking place. In *Larsen v. Larsen*, supra, this court refused to make an order for child support retroactive, stating "a periodic installment cannot be changed or modified after the installments have become due". This is true whether the installment was \$1.00 per year as in the *Larsen* case or whether the installment is nothing as in the instant case. The Legislature of this state has never authorized courts to make payments of child support retroactive. This is true whether it is the mother seeking the support or the State under a right of subrogation from the mother.

#### CONCLUSION

The lower court should be affirmed. The order relieving defendant from the duty of support was not void, and no appeal having been taken, it cannot now be disturbed. If this court

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overturns it, then the lower court should still be affirmed since only the matter of contempt and arrearages was before it. Child support cannot be made retroactive; thus, plaintiff was not entitled to any and defendant was not in contempt. He was under no order of support. Until the decree is modified, defendant has no duty of support.

Respectfully submitted:

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