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## John Lavar Francks v. Reta L. Francks : Brief of Appellant

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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JOHN LAVAR FRANCKS,  
*Plaintiff and Respondent,*

vs.

RETA L. FRANCKS,  
*Defendant and Appellant,*

Case No.  
10886

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## BRIEF OF APPELLANT

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An Appeal from the Judgment of the Fifth District  
for Sanpete County  
Honorable Henry Ruggeri

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*Defendant and Appellant,*

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## BRIEF OF APPELLANT

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### PRELIMINARY STATEMENT

The parties will be referred to as they appeared in the lower court. The symbol "TR." will refer to the transcript of the trial held on January 18, 19 and 20, 1966.

### STATEMENT OF THE KIND OF CASE

This is an action for divorce, award of custody of three minor children and a division of property.

## DISPOSITION IN LOWER COURT

The Court granted a divorce to the plaintiff and awarded to him the custody of the three minor children.

## RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the award of custody of minor children to plaintiff.

## STATEMENT OF FACTS

Plaintiff and defendant were married June 28, 1954, and there were born as issue of said marriage three children, John Michael, age 11 (born June 19, 1955), Mickey Mischelle, age 7 (born July 30, 1959), and Mathew J., age 2½ (born August 1, 1964). (TR-12).

Plaintiff brought this suit for a divorce, custody of the three minor children and a division of the property accumulated during the marriage. (R-1). Defendant counterclaimed seeking the same relief. (R-3-8).

Before the matter came to trial, the trial court on an Order to Show Cause awarded temporary custody of the minor children to the plaintiff. (R-33-34). After a three-day trial, the lower court granted a divorce to plaintiff, awarded him custody of the minor children and made a division of the property. (R-63-66).

The only issue raised in this appeal is whether or not there was sufficient evidence to sustain the court in awarding custody of the minor children to the plaintiff father.

Plaintiff proceeded on the theory that the defendant was unfit. Evidence was introduced which the plaintiff claimed showed that the defendant mother was (1) a poor housekeeper, (2) that she was neglectful in the care and treatment of the children, (3) that she consumed liquor to an excess, and (4) that she had been in the company of other men. The allegations to sustain the above grounds were primarily based upon the testimony of the plaintiff. Such testimony was denied by the defendant.

In support of the complaint that the defendant was a poor housekeeper the plaintiff testified that the defendant allowed dishes to accumulate in the sink and garbage to collect on the back porch. (TR-39). The testimony was general and the record is unclear as to the frequency and the length of time that the above conditions existed. Other than this general charge, no evidence was tendered to show that these "so called" accumulations affected the general running of the house. The evidence was clear, however, that the house was in a general good condition and on Page 39 of the transcript, the plaintiff testified as follows:

"Our front rooms are immaculate. They are spotless. She keeps the front rooms very nice."

It is respectfully submitted the above reflects the total

evidence tendered to sustain the theory the defendant was a poor housekeeper. Evidence was introduced by the neighbors of the defendant, which will be discussed later, which proved she maintained the home in a proper condition. Nowhere in the record was there even an indication that the husband's complaint about these trivial matters affected the children in any manner whatsoever.

The evidence that the defendant was neglectful as to the children also involved insignificant complaints. For example, the plaintiff complained that the children's underclothing and shoes were poor, (TR-31) the ironing was not done, that defendant used slang phraseology in referring to the daughter, (TR-39, 40) that the daughter's hair was not combed properly, (TR-36) and that John Michael, age 11, was required, on occasion, to tend the smaller children, (TR-32, 35) and that the baby, Mathew, had diaper rash. (TR-30).

To offset imputations of being an unfit mother, the record is clear that she attended with great care Mickey Mischelle, who was born with a hip defect which required the little girl to be in splints and casts for fourteen months and an additional six to eight month convalescence necessitating constant care and attention. (TR-429, 430) The record is also clear that the mother supervised the children in their church and school activities. (TR-472) Plaintiff admitted that defendant was an efficient seamstress (TR-40) and did the laundry.

It is submitted that the above background does not support the contention that the mother was neglectful of the children. The evidence of the under-clothing, etc., was offset by plaintiff's own admission that defendant cared for and loved the children. It should be pointed out that there is no testimony that her attitude or actions in any way adversely affected the children. In fact, the record clearly and conclusively shows that the children were accepted in the community and were emotionally stable, normal children.

The complaints that defendant used liquor to an excess and had improperly been in the company of other men was sharply disputed by defendant. The evidence revealed the parties obtained a ranch home which they used as a hideaway for the purpose of having dinner and drinks and to engage in sexual relations. (TR-28) The parties were in dispute as to who needed the liquor. (TR-438, 439) However, the record shows that liquor was primarily used at this hideaway. It was not even suggested that the children ever witnessed defendant using alcoholic beverages. In fact, the evidence was that the mother never consumed liquor in the sight of or in the presence of the children.

As to the charge that the defendant was indiscreet because she kept company with other men, the record discloses only two instances that the plaintiff could point to. One time involved an alleged advance by the defendant on the plaintiff's brother while both were attending a New Year's Eve party. (TR-224) This charge was



sharply denied by the defendant. (TR-451) However, it is clear that this incident occurred an appreciable time prior to the date of the divorce and there is no evidence that it affected in any way the marriage or the children. It should be pointed out the brother claimed that he immediately informed the plaintiff of this activity. (TR-221) Other than the instance mentioned above, which appears to be the only alleged indiscretion in twelve years, the plaintiff's biggest complaint regarding defendant being in company with "other men" seems to stem from a September 16, 1966 incident, which precipitated the break between the parties and led to the filing of the complaint in this case. (TR-19) It is the defendant's position that the facts surrounding that night, if believed by the finder of the fact, might be grounds for divorce, but certainly not grounds to deny the mother custody of her children.

There was admittedly a heated argument which the children witnessed. (It should be pointed out, however, that the plaintiff brought this to the children's attention by awakening the oldest boy and relating to him the alleged indiscretions of his mother.) (TR-21, 24) The evidence clearly shows that this type of activity and this sort of heated argument was not, in any manner, common to the household. On this evening the defendant was found in the presence of another man.

The above facts were the only evidence tendered by the plaintiff to sustain the theory that the defendant mother was unfit as to (1) being a poor housekeeper,

(2) being neglectful in her care and treatment of the children, (3) using liquor to an excess, and (4) being in company of other men. The evidence even from the plaintiff himself was conflicting. The defendant, however, presented five witnesses whose testimony was undisputed. This evidence showed that the defendant was a good housekeeper, a good mother and that the children were well cared for.

One neighbor, a Mrs. Barbara Jensen, testified that she had known the parties for at least ten years and that during the past five years she had been in the parties' home at least twice a month. She testified that the home was never unsightly or dirty and the children were always clean and properly dressed. She never smelled any liquor on defendant's breath and never observed defendant consume any liquor during these visits. From her observation she testified the defendant was an "*excellent mother and a fit person.*" (TR-192-201)

The librarian at the Ephraim Elementary School, Susan Hansen, had observed the parties' children. She testified that they appeared to be very neat, tidy and well groomed and it appeared to her that the children were conspicuous with their good appearance. She also corroborated the fact that the home was clean and kept in an orderly manner. She denied any knowledge of the defendant drinking, nor did she ever smell any liquor on her breath. (TR-313-323)

Another neighbor who resided across the street

from the parties, a Mrs. Joyce Parry, knew the family for five years. She saw the defendant practically every day and was in their home as often as three or four times a week. She described the children as being clean and neat. Her own children played with the Francks children for, in her opinion, the defendant was "a good mother". (TR-328-336)

Another neighbor, Ila Olson, corroborated these facts, (TR-340-348) and another neighbor and acquaintance of the family, Hazel Jensen, described the defendant as "a very competent little mother". (TR-350-353)

The trial court found the mother to be unfit and awarded the two minor children to the father. (R-63) The oldest child, John Michael, age 11, selected his father. (TR-297)

Defendant argued to the trial court and it is her contention now that the disputed evidence tendered by the plaintiff, reviewed in a light most favorable to plaintiff, does not sustain a finding that defendant is unfit. Dirty dishes in the sink versus a general good upkeep of the house; diaper rash, and one traumatic evening fail to warrant a finding of unfitness and the drastic consequence to both the children and the mother resulting from their separation. Defendant respectfully submits the trial court erred in awarding the two minor children to the father and that this order should now be reversed by this court.

## ARGUMENT

### POINT I

#### THE TRIAL COURT ERRED IN AWARDING THE CUSTODY OF THE TWO MINOR CHILDREN TO THE FATHER.

As outlined above in the Statement of Facts, the claimed misconduct of defendant was trivial and does not meet the quantum of proof necessary to support a finding that she is unfit. This court has announced on many occasions, generally speaking, that minor children of tender years should be in the care of their mother, and the burden is on the father to establish by substantive and reliable evidence that the mother is an unfit person in order to uproot the mother's right to custody. The two minor children in this case, Mickey Mischelle and Mathew J., are children of tender years.

This court stated in *Chase v. Chase*, 15 Utah 2d 81, 387 P.2d 556, as follows:

“It is a universally recognized principle, well grounded in reason and experience, that a child of such tender years should be in the care of his mother unless there is some substantial and compelling reason to deprive her of his custody.”

The issue in this appeal, therefore, is what evidence was presented showing that there was a “substantial and compelling reason” to deprive the mother of custody of her children. It is respectfully submitted that the unmeaningful complaints of the father do not meet the legal criteria set by this court.

In *Steiger v. Steiger*, 4 Utah 2d 273, 293 P.2d 418, this court reviewed a trial court's decision declaring the plaintiff mother unfit. In reviewing the record, this court summarized the case against the mother and stated that the testimony of the witnesses indicated (1) that she drank intoxicating liquor two or three times to the point of mild intoxication, (2) that she was frequently seen with a man other than her husband, and (3) that she was not a good housekeeper. The court in this case stated as follows:

“All of this testimony, however, came from defendant's witnesses and was rebutted or explained by plaintiff and her witnesses. Reading the record as a whole, it appears that plaintiff has been in the past careless and indiscreet, but that her love for the child has caused her to work to provide for him . . .”

This court in reversing the award of the child to the father held that the evidence did not support a finding that she was unfit.

In applying the foregoing to the case at hand, the evidence shows that the drinking of Mrs. Francks was primarily limited to the private ritual between her and her husband. This practice was performed outside the confines of the home and with her husband. There is a dispute as to who initiated the liquor into this sojourn; but it was undisputed that there was never liquor in the home or used in the sight or presence of the children. It is clear that in accordance with the *Steiger* ruling the use of liquor itself could not be sufficient grounds to declare her to be unfit.

In the *Steiger* case, supra, the plaintiff mother was frequently seen in company with a man not her husband. In the case at bar the evidence of the defendant being in the company of other men could not be described as "frequently".

Also in the *Steiger* case, supra, the court in summarizing the evidence found that the plaintiff mother was not a good housekeeper. It is the position of defendant that the evidence in the instant case does not rise to this finding. Even if it did, this court in the *Steiger* case held that this fact alone, i.e, that the mother was not "a good housekeeper", was insufficient to support a finding that the mother was unfit.

Plaintiff proceeded on the theory of unfitness based upon the fact that the defendant was in the company of other men. As mentioned above, even believing the plaintiff and totally disbelieving the defendant, the record shows that she was indiscreet on only two occasions.

The brother of the plaintiff testified that at a New Year's Eve party, while she appeared intoxicated to him, she made advances to him. On the night of September 16, the plaintiff found the defendant in his automobile with another man. There is no evidence in the record where even an inference can be made of any additional impropriety and there is no evidence that promiscuity existed at all.

In reviewing a similar problem, this court had before it a fact situation certainly more raw than that

appearing in the case at bar in *Dearden v. Dearden*, 15 Utah 2d 105, 388 P.2d 230, where the lower court had deprived the mother of a child of tender years on the basis of the mother's transgressions. Before the lower court a witness testified that plaintiff and her alleged paramour were caught with their clothes disarranged. Further the paramour was observed by a private detective in the mother's apartment and was seen arriving in the evening and leaving in the morning and both were seen through the window clothed in their bathrobes. Notwithstanding the above, this court reversed the decision granting custody to the father and held that the record was void of anything "base or depraved or erratic in plaintiff's attitude toward or treatment of her daughter or in her relationship with her". The court therefore stated that the proper rule in weighing this issue of unfitness based upon immorality is how widespread it was and most important of all, how it affected the children. In other words, a mother's immorality must be of such degree as to affect the welfare of the children.

Certainly the alleged indiscretions on the part of the mother in the case at bar were not in any way comparable to the acts and conduct of the mother in the *Dearden* case. Therefore, in accordance with the ruling of that case, the alleged impropriety of the defendant in the case at bar most certainly does not support a finding that she is an unfit mother.

See also *Smith v. Smith*, 9 Utah 2d 157, 340 P.2d

419, wherein this court in reversing an award to the father of custody of a child of tender years, stated:

“From the record in this case it appears that neither the plaintiff nor the defendant really was a bad person. There is nothing to indicate that the claimed indiscretions of the plaintiff, based partly on contradictory and self-serving evidence, tinged with bitterness on all sides, were committed in the presence of the children, or if she were indiscreet, she intended or intends to commit them in the presence of the children. About the only fact that stands out in bold relief is that the divorce here was caused by the actions of both, not just one of the parties . . . ”

The defendant respectfully submits that the cases cited above are controlling and clearly indicate that plaintiff did not sustain his burden of establishing that defendant was unfit. We contend, without fear of contradiction, that there is no authority in the books that would support a contention that dirty dishes in a sink would be considered grounds for holding that a mother is unfit to have the custody of her children. We submit that under the facts of this case and the law which is applicable thereto, the defendant was entitled to be awarded the custody of her two minor children. The trial court failed to do so and its decision must now be reversed.

## POINT II

THE TRIAL COURT ERRED IN FINDING  
IT WAS IN THE BEST INTEREST OF THE



## CHILDREN TO BE AWARDED TO THEIR FATHER.

It is defendant's contention that the trial court committed further error in ruling that it was in the best interest of the children they be awarded to their father. In rendering its decision, the trial court stated:

"The Court finds John LaVar Francks is also a fit and proper person to be awarded the care, custody and control of Mickey Mischelle Francks and Mathew J. Francks, the other two minor children of the defendant and plaintiff, that in the opinion of the court, after listening to the witnesses who have testified in this case, that it will be for the best benefit of these children to be awarded to the father—all of them."

The fundamental reason for the legal presumption that the best interests of minor children of tender years demands that they be awarded to their mother, can be found in the natural way of life present in every American family. The mother awakens her children in the morning, sees to it that they are clean and dressed and fed a good breakfast before leaving for school. She cleans the household in their absence, makes their beds, washes their clothes and is waiting for them at Noon when they come home for lunch and again sees them off for their afternoon of schooling. She takes them to the doctor for annual and periodic checkups. She sees to it that their dental requirements are met and she furnishes them love and affection in the process. She is the one who attends P.T.A. meetings and

discusses their school problems with the school adviser. On the other hand, the father usually leaves for work in the morning with little, if any, relationship with the children. He works during the course of the day, comes home tired at night and retires for the evening and has very little time available to spend in ministering to the routine and numerous daily needs of minor children of tender years.

In this case there is no evidence that the defendant had not performed the above duties to her minor children and that she would not perform these duties throughout their minority if allowed to do so by a finding of this court. On the other hand, the way the situation now is, the father must seek outside help to furnish the needs of his minor children. The record indicates that he has sought the aid of his mother, the grandmother of the children. We are not claiming that the grandmother doesn't also have good qualities. We are claiming, however, that a grandmother and if she should die or be not available, a hired maid or household servant, or just anybody who happens to be available for a few dollars a day, cannot possibly hope to match in any respect whatsoever the services to these little children, not to mention the love of a good mother. We need hardly point out that this mother wouldn't be bringing this case before this Honorable Court almost on her knees, begging for the right to have her children, if she was anything other than a very good mother. As previously stated, even conceiving that this mother, in some isolated instance or instances, has not

been perfect, we must also say in all candor that neither has the father been perfect and neither is anyone perfect. We fundamentally believe that this case epitomizes the proposition that all people and any person is the sum total of his or her existence and this mother should not be judged on the basis of a few moments of time, taken out of context, from her life's existence.

We respectfully submit that the best interest of these children requires a reversal of the trial court's decision and that it would be unthinkable to do otherwise. We further respectfully submit that the authorities cited in this brief sustain our position to the very hilt.

## CONCLUSION

We respectfully submit that it is vital and necessary that the injustice perpetrated upon both the children and the mother by the trial court's decision awarding said children to the plaintiff should be reversed and the trial court should be ordered to modify its decision accordingly.

Respectfully submitted,

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