

2016

**Andrew Veysey, Petitioner/Appellee vs. Alexis Veysey,
Respondent/Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ANDREW VEYSEY,
Petitioner/Appellee

vs.

ALEXIS VEYSEY,
Respondent/Appellant.

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REPLY BRIEF OF APPELLANT

Court of Appeals Case No. 20150609

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY,
JUDGE BARRY LAWRENCE

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ORAL ARGUMENT / PUBLISHED OPINION REQUESTED FILED
UTAH APPELLATE COURTS

APR 20 2016

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frivolity. To the contrary, the present appeal is firmly rooted in Utah law, having been necessitated first by Veysey's failure to comply with the 1999 court order, and also by instances of misapplication of Utah law by the lower court. "[I]t is hard to see why a parent should be relieved of any of the burdens of child-rearing costs by virtue of not having contributed to them in a timely manner." *State of Utah v. Irizarry*, 910 P.2d 425, (Utah 1997)(Durham, C., dissenting)(caselaw not relevant since decided prior to enactment of Utah Child Support Act).

I. LAW OF THE CASE DOES NOT APPLY.

A. *VEYSEY I* HELD THAT THERE WERE NO FINDINGS TO SUPPORT A DETERMINATION THAT LACHES APPLIED IN THIS CASE, AND THAT THE DISTRICT COURT'S PREVIOUS DETERMINATION THAT LACHES APPLIED WAS ERRONEOUS.

"Under the law of the case doctrine, issues resolved by this court on appeal bind the trial court on remand, and generally bind this court should the case return after remand." *Gildea v. Guardian Title Company of Utah*, 2001 UT 75 at ¶ 9, 31 P.3d 543 (Utah 2001). However, "[a]s confessed dicta, [a] musing on the potential outcome of a hypothetical situation is not binding upon this court." *Jones v. Barlow*, 2007 UT 20, ¶ 28, 154 P.3d 808, 815 (Utah 2007).

Here, the Court of Appeals proceedings did not result in a final judgment on the merits with respect to the issue of laches. Rather, the Court held that the "commissioner's recommendation contains no findings supporting a determination that

laches applies in this case . . . Without specific findings supporting a determination that laches applied in this case, the commissioner’s recommendation – and, accordingly, the district court’s adoption of that recommendation – was erroneous.” *Veysey v. Veysey*, 2014 UT App 264, ¶ 17 (Utah Ct. App. 2014).

The Court further conjectured that “[i]f supported by adequate findings, a determination that some portion of Mother’s claims are barred by laches would not necessarily be inappropriate.” *Id.* at ¶ 18. This situation, however, was just one of four different scenarios that the Court hypothesized. Indeed, the Court also opined that “the district court may conclude that all of Mother’s claims are reimbursable because they were brought within the statute of limitations.” *Id.* In any case, the Court was careful to note that each of these hypothetical situations was purely speculative, and that “additional findings [were] needed to support the district court’s determination.” *Id.*

This portion of the Court’s opinion constitutes an expression that “[goes] beyond the facts before [the] court and therefore [encompasses] individual views of [the] author of [the] opinion,” which, by definition, is non-binding “obiter dictum.” *Black’s Law Dictionary*, p. 454. This is precisely the type of “musing on the potential outcome of a hypothetical situation” that the Utah Supreme Court has expressly held does **not** invoke the law of the case doctrine. See *Jones*, 154 P.3d at 815.

The question of whether Utah law precludes laches as a defense to an action to enforce a child support order brought within the applicable statute of limitations has never been presented to nor considered by this Court. Accordingly, the law of the case

doctrine does not apply and this Court's consideration of the issue is needed to resolve the matter.

B. IF THE COURT IN *VEYSEY I* HAD HELD THAT LACHES APPLIED, THAT HOLDING WOULD BE CLEARLY ERRONEOUS AND WOULD WORK A MANIFEST INJUSTICE TO NELSON AND HER CHILDREN, THEREBY PRECLUDING ENFORCEMENT OF THE LAW OF THE CASE DOCTRINE.

The law of the case doctrine "is not applied inflexibly. Indeed, this court need not apply the doctrine to promote efficiency at the expense of the greater interest in preventing unjust results or unwise precedent. Accordingly, the doctrine will generally not be enforced . . . when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice." *Gildea v. Guardian Title Company of Utah*, 2001 UT 75 at ¶ 9, 31 P.3d 543 (Utah 2001).

As set forth below, under Utah law, laches cannot be applied as a defense to court-ordered child support. It was clear error for this Court to suggest otherwise, and would work a manifest injustice to Nelson if erroneously applied to deprive her of thousands of dollars expended to cover the portion of daycare expenses that Veysey had been court-ordered to pay. Moreover, application of laches to the present case would work a manifest injustice to the children as well as to Nelson. Indeed, "it is hard to see why a parent should be relieved of any of the burdens of child-rearing costs by virtue of not having contributed to them in a timely manner. It is simply unrealistic to suggest . . . that the money in question . . . is now the custodial parent's money, not the children's. The

children's household is their custodial parent's household; her lifestyle is their lifestyle, and her gains and losses are theirs." *State of Utah v. Irizarry*, 910 P.2d 425 (Utah 1997)(Durham, C., dissenting)(caselaw not relevant since decided prior to enactment of Utah Child Support Act).

Therefore, even if the Court in *Veysey I* had held that laches applied, the law of the case doctrine should not be enforced since that holding would have been clearly erroneous and would work a manifest injustice to Nelson and her children.

II. LACHES IS AN EQUITABLE DEFENSE ONLY APPLICABLE TO CASES SEEKING EQUITABLE RELIEF.

"[I]t is the practically invariable rule that laches cannot be a defense before the statutory limitation has expired." *Insight Assets v. Farias*, 321 P.3d 1021, 1025-26 (Utah 2013)(quoting *F.M.A. Fin. Corp. v. Build Inc.*, 404 P.2d 670, 672 (1965)). Recently, the Utah Supreme Court has clarified the circumstances under which the laches defense may be invoked. Particularly, the "doctrine of laches is an equitable defense which arises in cases where the plaintiff seeks equitable relief . . . However, where the plaintiff's claims are based in the law, the statute of limitations, not the doctrine of laches, governs the timing surrounding a plaintiff's filing of a complaint." *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 845 (Utah 1996)(citing *American Tierra v. City of West Jordan*, 840 P.2d 757, 763 (Utah 1992)). Based on this analysis, the Court in *DOIT* held that "[i]n the present case, because plaintiffs' claims against C & L are based in the law, the trial

court's supplemental dismissal of these claims on the basis of the equitable doctrine of laches was incorrect." *Id.*

Veysey correctly notes that that the Court in *DOIT* considered the earlier case of *Borland v. Chandler*, 733 P.2d 144 (Utah 1987). In *DOIT*, however, the Court carefully construed *Borland*'s holding as: "A defendant may successfully assert this defense [of laches] when a plaintiff *seeking equity* unreasonably delays in bringing an action and this delay prejudices the defendant." *DOIT, Inc.*, 926 P.2d at 845 (Utah 1996) (citing *Borland v. Chandler*, 733 P.2d 144, 147 (Utah 1987)(emphasis added)).

Likewise, the subsequent 2013 Utah Supreme Court decision in *Insight Assets* noted a singular exception to the rule that "laches cannot be a defense before the statutory limitation has expired." Particularly, "the doctrine of laches may apply *in equity*, whether or not a statute of limitations also applies[.]" *Insight Assets*, 321 P.3d at 1025-26. Based on this analysis, the *Insight Assets* Court held that "[b]oth the Purchase Money Rule and mortgage foreclosure actions *are equitable in nature and therefore subject to the equitable defense of laches[.]*" *Id.* (emphasis added).

Here, Veysey's arguments are wrongheaded because they fail to distinguish between equitable actions for setting child support or establishing paternity in the first instance, and legal actions for enforcing child support already established by court order. This is an important distinction in this case, since the equitable defense of laches is prohibited as applied to legal actions for enforcing child support already established by court order. See *Insight Assets, Inc. v. Farias*, 321 P.3d 1021, 1025 (Utah 2013)("The

doctrine of laches may apply in equity[.]”); see also *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 845 (Utah 1996)((“The doctrine of laches is an equitable defense which arises in cases where the plaintiff seeks equitable relief . . . [W]here the plaintiff’s claims are based in the law, the statute of limitations, not the doctrine of laches, governs the timing surrounding a plaintiff’s filing of a complaint.”(citing *American Tierra v. City of West Jordan*, 840 P.2d 757, 763 (Utah 1992))).

While initially setting child support or establishing paternity requires a balancing of the equities (as was the case in the paternity action of *Borland v. Chandler*, 733 P.2d 144 (Utah 1987)), enforcing an existing child support order is a purely legal exercise. Veysey has specifically conceded this point. (R. 992, ¶ 5). This premise is also highly consistent with the decision in *Veysey I*, where this court recognized that child support is “the money legally owed by one parent to the other for the expenses incurred for children of the marriage[.]” and held that “variable daycare expenses constitute child support.” *Veysey*, 2014 UT App 264 at ¶¶ 14-15 (quoting Black’s Law Dictionary 274 (9th ed. 2009); see also *Hammond v. Hammond*, 14 P.3d 199, 201 (Wyo. 2000)(“Laches does not apply to child support collection actions because suits for monetary judgments for child support arrearages are legal rather than equitable.”).

Because of the purely legal nature of enforcing existing child support orders, “[e]ach payment or installment of child . . . support under any support order . . . is, on and after the date it is due: (a) a judgment with the same attributes and effect of any judgment

of a district court . . . [and] (c) not subject to retroactive modification by this or any jurisdiction[.]” Utah Code Ann. § 78B-12-112(3)(a).

All of Nelson’s claims seek to enforce the existing child support order established in 1999. Accordingly, Nelson’s “claims are based in the law [such that] the statute of limitations, not the doctrine of laches, governs the timing surrounding [the] filing of a complaint.” *DOIT, Inc.*, 926 P.2d at 845. Nelson’s complaint was filed well within the established statute of limitations, which does not expire for another six years. (R. 714). It was thus clear error for this Court to opine that “[i]f supported by adequate findings, a determination that some portion of Mother’s claims are barred by laches would not necessarily be inappropriate.” *Veysey*, 2014 UT App 264 at ¶ 18.

To the contrary, under Utah law, laches cannot be applied as a defense to court-ordered child support. If this Court were to hold otherwise, it would work a manifest injustice to Nelson and her children by unfairly depriving them of thousands of dollars expended to cover that portion of daycare expenses that Veysey was court-ordered to pay.

III. THE NOTIFICATION REQUIREMENT CODIFIED AS UTAH CODE ANN. § 78B-12-214(3) IS NOT APPLICABLE, AND DOES NOT STATUTORILY AUTHORIZE A LACHES DEFENSE TO COURT-ORDERED CHILD SUPPORT.

In this case, the district court expressly found that “Utah Code Ann. § 78B-12-214 [is] **not** dispositive of this case.” (R. 966, ¶ 6) (emphasis added). Accordingly, Veysey’s arguments with respect to the same are misplaced.

Veysey also incorrectly asserts that the notification requirement codified as Utah Code Ann. § 78B-12-214(3) (“Section 214(3)”) statutorily authorizes a laches defense to court-ordered child support. This is simply not true. Rather, Section 214(3) provides a very narrow statutory exception to Utah Code Ann. § 78B-12-214(2)(a) (“Section 214(2)(a)”), which states that “[i]f an actual expense for child care is incurred, a parent shall begin paying his share on a monthly basis immediately upon presentation of proof of the child care expense.”

The exception of Section 214(3) hinges exclusively on Utah Code Ann. § 78B-12-214(2)(b) (“Section 214(2)(b)”), which provides that “[i]n the absence of a court order to the contrary, a parent who incurs child care expenses shall provide written verification of the cost and identity of a child care provider to the other parent upon initial engagement of a provider and thereafter on the request of the other parent.” Section 214(3) does not contemplate a laches defense to a claim for court-ordered child support. Instead, it provides an extremely narrow opportunity for a court to statutorily deny a parent “the right to receive credit for the expenses or to recover the other parent’s share of the expenses if the parent incurring the expenses fails to comply with Subsection 2(b).” Utah Code Ann. § 78B-12-214(3).

Importantly, however, Nelson’s claims have **not** been denied under Section 214(3). Indeed, the “Court found [that] Utah Code Ann. § 78B-12-214 [is] **not** dispositive of this case.” (R. 966, ¶ 6)(emphasis added). The sole reason the district

court even mentioned this Section was to support its equitable laches analysis, specifically “with respect to the reasonableness of [Nelson’s] actions.” (R. 966, ¶ 6).

Veysey goes to great lengths to analogize *SCA Hygiene Products Aktiebolag v. First Quality Baby Prod. LLC*, a Federal Circuit patent case, to the present case. Contrary to Veysey’s analysis, however, the *SCA Hygiene* case is simply not analogous here.

There, the court held that because “Congress codified a laches defense in 35 U.S.C. § 282(b)(1) that may bar legal remedies . . . [the court had] no judicial authority to question the law’s propriety.” *SCA Hygiene Products Aktiebolag v. First Quality Baby Prod. LLC*, 807 F.3d 1311, 1315 (Fed. Cir. 2015)(en banc). Here, on the other hand, Section 214(3) absolutely does not authorize a laches defense, or any other equitable defense, to court-ordered child support. In fact, Utah Code Ann. § 78B-12-109 (“Section 109”) of the Utah Child Support Act specifically prohibits waiver and estoppel, also equitable defenses, when there is an “order already established by a tribunal.” The existence of this Section 109 thus strongly suggests that the intent of the legislature was actually to prohibit application of equitable defenses to court-ordered child support.

Notably, none of the cases from “sister states” in Veysey’s string cite of footnote 7 is relevant here, as none originates from our Tenth Circuit, and Veysey has failed to discuss how Florida, Ohio, Nevada, or New York law is even comparable to Utah law. See *Brief of Appellee*, p. 25, fn. 7.

All of Nelson's claims are thus reimbursable under the Utah Child Support Act, since Section 214(3) does not apply, and no provision thereof statutorily authorizes laches as a defense to court-ordered child support.

IV. THE FINDINGS OF FACT ARE INSUFFICIENT TO SATISFY BOTH ELEMENTS OF A LACHES DEFENSE.

"[T]he question of laches presents a mixed question of law and fact." *Johnson v. Johnson*, 2014 UT 21, ¶ 8, 330 P.3d 704 (Utah 2014). "Pure questions of law . . . are reviewed for correctness." *Doyle v. Doyle*, 2009 UT App 306, ¶ 6, citing *Huish v. Munro*, 2008 Ut. Ct. App. 283, ¶ 19, 191 P. 3d 1242 (Utah Ct. App. 2008). "[T]he determination of whether a party was prejudiced for purposes of the doctrine of laches is a legal conclusion that we review for correctness." *Anderson v. Doms*, 984 P.2d 392, 396 (Utah Ct. App. 2003). However, "we will not set aside a trial court's findings of fact underlying that conclusion [of prejudice] unless they are clearly erroneous." *Id.*

Here, no finding of fact is in dispute with respect to the laches element of reasonableness. The findings of fact are only indirectly disputed with respect to the laches element of prejudice, since several findings conflict with each other based on an arbitrary cutoff date. Veysey thus misstates the standard of review for this issue. See *Brief of Appellee*, p. 25. In fact, Nelson contends only that the findings of fact do not support the district court's legal conclusion that both elements of laches were satisfied. This is purely a legal issue requiring de novo review.

Specifically, no finding of fact supports the legal conclusion that Nelson acted unreasonably in deciding to file her complaint when she did. The district court found that Nelson “believed the statute of limitations had not yet run.” (R. 966, ¶ 5). The district court also found that “all of [Nelson’s] claims for reimbursement fall within the applicable statute of limitations.” (R. 966, ¶ 2). All remaining findings of fact regarding the element of reasonableness are irrelevant, since reliance on a statute of limitations is per se reasonable in a case of court-ordered child support, as set forth in Nelson’s *Brief of Appellant*, p. 19-20. (R. 966, ¶¶ 5-12). Nelson thus submits that the district court’s conclusion that Nelson’s conduct was unreasonable is incorrect and should be reversed.

Similarly, no finding of fact supports the legal conclusion that Veysey was prejudiced with respect to expenses incurred prior to April, 2005, but not prejudiced with respect to expenses incurred after that date. Under Utah law, “[l]aches is not mere delay, but delay that works a disadvantage to another.” *Papanikolas Bros. Ent. v. Sugarhouse Shopping Center Assoc.*, 535 P.2d 1256, 1260 (Utah 1975). The only finding of fact made to support this cutoff date is that “[Veysey] does not strenuously object to those costs.” (R. 966, ¶ 16). While this finding of fact is not disputed, it is legally insufficient to support a cutoff date that is identical to that initially provided by the Commissioner, which was later determined to be based on an erroneous statute of limitations.

Moreover, the findings of fact with respect to the district court’s finding of prejudice are in conflict with each other. Specifically, the findings of fact made to support the finding of prejudice prior to April, 2005 (R. 966, ¶¶ 13-15) do not comport


with the finding of fact made to support the finding of no prejudice after April, 2005 (R. 966, ¶ 18). As argued in detail in Nelson's *Brief of Appellant*, the findings of fact regarding prejudice hinge primarily on whether Nelson's calculations were reasonably accurate. See *Brief of Appellant*, pp. 21-24. Since the findings are based on identical evidence but are nevertheless blatantly disparate in this regard, they are legally insufficient to support a finding of prejudice, even prior to the April, 2005 cutoff date.

Nelson thus submits that the findings of fact, while largely undisputed, do not support the legal conclusion that both elements of laches have been satisfied, as required by Utah law. Accordingly, the district court's decision should be reversed and Nelson should be awarded judgment on all claims, plus interest.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision in its entirety, and hold that all of Nelson's claims for child care expense arrearages from 2002-2006 are reimbursable, plus interest.

SIGNED and DATED this 20th day of April, 2016.

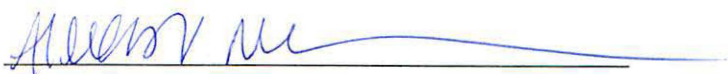


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CERTIFICATE OF MAILING

I hereby certify that I submitted the Original and Seven Copies (eight copies total), with attachments, of the foregoing Reply Brief of Appellant to the clerk of the Appellate Court, and that I mailed two true and correct copies, postage pre-paid, of the foregoing Reply Brief of Appellant, with attachments, on this 20th day of April, 2016, to the following:

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A handwritten signature in blue ink, appearing to read "Hatch", is written over a horizontal line.