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Felix v. Sero : Brief of Petitioner on Writ of Certiorari to the Utah Supreme Court

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IN THE UTAH SUPREME COURT

Nancy Felix, Petitioner/Appellant v. Jonathan Sero, Respondent/Appellee	Case No. 20178791-SC

BRIEF OF PETITIONER

On Writ of Certiorari to the Utah Supreme Court

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Utah Cases.

Federal Cases.

State Cases.

Statutes

Rules

Constitutional Provisions

Secondary Sources

IN THE UTAH SUPREME COURT

Nancy Felix, Petitioner/Appellant v. Jonathan Sero, Respondent/Appellee	Case No. 20178791-SC

INTRODUCTION

This case turns on the great import of protecting and preserving the best interests of children. There are two questions for this Court to determine: (1) the extent to which a parent's right to travel should influence a custody determination, and (2) the extent to which one parent may avoid paying a share of childcare expenses by asserting an equitable defense of laches. Though both questions implicate the rights and interests of the parents, this Court's holding should come down to the best interests of the children.

The case arises from the parties' performance under a divorce decree and a recent attempt to modify that divorce decree. Nancy Felix and Jonathan Sero divorced in 2005. The initial divorce decree granted Mr. Sero sole physical custody of the parties' two children, ages one and three at the time. Shortly after the divorce, Ms. Felix began pursuing a Ph.D. in chemical engineering. In the years that followed, Mr. Sero served admirably as the children's primary caregiver and Ms. Felix made the most of her time

with the children while she continued to invest in their future by securing excellent childcare and education for the children and by pursuing an advanced degree that would create vast opportunities for the children.

Ms. Felix earned her Ph.D. in 2015 and subsequently secured an employment package that promised invaluable educational and experiential opportunities for the children. Because the position required Ms. Felix to relocate to South Carolina, Ms. Felix sought to modify the divorce decree to enable her and the children to pursue their new opportunities in South Carolina. Ms. Felix also sought reimbursement for Mr. Sero's unpaid share of the childcare expenses.

The district court did modify the divorce decree because it determined that the children's best interests would be served by pursuing the opportunities available to them in South Carolina. However, the court offered to maintain the existing custody arrangement if Mr. Sero would move with the children to South Carolina. Mr. Sero argued that the court had violated his constitutionally protected right to interstate travel, and the court of appeals agreed. But the panel erred when it held that a custody determination must weigh the competing constitutional rights of the parents, rather than prioritizing the best interests of the children.

Regarding the unpaid childcare expenses, the district court concluded that Ms. Felix's claim was within the applicable statute of limitation, but that it was barred by the equitable defense of laches. The court of appeals reluctantly agreed, signaling its belief that the controlling line of cases had been wrongly decided.

This Court should hold that a custody determination should be based on an "objective and impartial" determination of the best interests of the children, and that it likewise serves the best interests of the children to prohibit an equitable defense of laches against unpaid childcare expenses when the claim is brought within the applicable statute of limitation. *Elmer v. Elmer*, 776 P.2d 599, 603 (Utah 1989) (providing that a determination of custody based on the child's best interests is based on an objective and impartial comparison of the parenting skills, character, and abilities of both parents).

JURISDICTION

This Court has jurisdiction under Utah Code § 78A-3-102(3)(a). This Court also has jurisdiction under the Utah Child Support Act under Utah Code § 78B-12-110 ("Appeals may be taken from orders and judgments under this chapter as in other civil actions.").

ISSUES, STANDARD OF REVIEW, AND PRESERVATION

Issue 1: Whether the court of appeals erred by holding that a custody determination must balance the parents' competing constitutional rights to interstate travel, rather than prioritizing the best interests of the children.

Standard of Review: This Court reviews de novo a question of whether the district court applied the correct legal standard. This case raises the question of whether a unique legal standard applies to custody determinations that may infringe a parent's constitutional right to interstate travel and is reviewed de novo, without deference to the court of appeals. *Mawhinney v. City of Draper*, 2014 UT 54, ¶ 6, 342 P.3d 262.

Preservation: The panel addressed issue 1 at *Felix v. Sero*, 2017 UT App 723, ¶¶ 31–42, ---P.3d---. Issue 1 was presented in the questions for certiorari. *See* Addenda A; Addenda B.

Issue 2: Whether the court of appeals erred by holding that a party may assert laches to bar a claim for unpaid childcare expenses when the statute of limitations has not yet barred the claim and the Legislature has acted to bar similar claims for waiver and estoppel.

Standard of Review: This Court reviews a decision of the court of appeals for correctness. Whether laches is available when the applicable statute of limitations has not expired is a legal question and is reviewed for correctness. *Veysey v. Nelson*, 2017 UT App 77, ¶ 14, 397 P.3d 846; *Estes v. Tibbs*, 1999 UT 52, ¶ 4, 979 P.2d 823.

Preservation: The panel addressed issue 2 at *Felix v. Sero*, 2017 UT App 723, ¶¶ 43–50, ---P.3d---. Issue 2 was presented in the questions for certiorari. *See* Addenda A; Addenda B.

DETERMINATIVE LAW

"In determining any form of custody, including a change in custody, the court shall consider the best interests of the child . . . ." UTAH CODE § 30-3-10(a).

STATEMENT OF THE FACTS

This case arises from a divorce decree between Ms. Felix and Mr. Sero granting Mr. Sero sole physical custody of the parties' two children. (R. ¶ 4). Mr. Sero went above and beyond in providing excellent care for his and Ms. Felix's two children for the years

following Mr. Sero and Ms. Felix's divorce. (R. ¶ 4). However, ten years after the divorce, Ms. Felix has become a well-respected chemical engineer with a very lucrative and flexible job offer in South Carolina. (R. ¶ 16). Ms. Felix's professional opportunity will enable her to provide for the children in ways that Mr. Sero cannot. (R. ¶ 19). Specifically, Ms. Felix's job offer will enable her to spend more time with her children while providing financial security, access to unrivaled education, and opportunities to study abroad. (R. ¶ 19). However, Ms. Felix must move to South Carolina to take advantage of the offer. (R. ¶ 19).

Mr. Sero is aware that allowing the children to relocate to South Carolina with Ms. Felix will be extremely beneficial for the children: "I understand that this means she'll expose our kids to opportunities that I could never give them. Even if the money wasn't an issue, it's a fact of my life that I'm not going to be able to spend weeks at a time with my kids or put them in private schools . . . or send them to Europe in the summer." (R. ¶ 19). Still, Mr. Sero opposes a modified custody determination that will allow the children to take advantage of those benefits. (R. ¶ 21). Mr. Sero even opposes a custody determination that will allow him to remain the primary custodian because he is unwilling to relocate to South Carolina. (R. ¶ 21).

The Initial Divorce Decree

Ms. Felix and Mr. Sero divorced ten years prior to 2015, the year of the original district court action. (R. ¶ 4). Under the initial divorce decree, Mr. Sero was awarded sole physical custody of his and Ms. Felix's children. (R. ¶ 4). In the time since the divorce, Ms. Felix began investing in the children's future by pursuing a Ph.D. in chemical

engineering. (R. ¶ 10; ¶ 12). This meant that Ms. Felix had less flexibility and less time to spend with her children, though Ms. Felix has borne "the lion's share of costs associated with child care expenses." (R. ¶ 3; ¶ 12).

Additionally, though she had less time to devote to childcare, the court below found that "Ms. Felix's parenting was 'outstanding,' specifically saying that 'parents who juggle relationships with their children while pursuing advanced degrees have a uniquely difficult task in weighing the benefits of being present for day-to-day support against the value of laying the groundwork for a better future.'" (R. ¶ 12). The court went on to find that "Ms. Felix exercised good judgment in making those decisions and, despite how difficult it must have been, gave her children a level of attentiveness and support on par with a parent with fewer obligations or ambitions." (R. ¶ 12).

Unpaid Childcare Expenses

After the divorce, Ms. Felix acted to ensure the children had professional childcare while Ms. Felix was at school or Mr. Sero was at work. (R. ¶ 14). Ms. Felix enrolled the children in a well-reputed childcare center. (R. ¶ 14). Compared to the children's childcare center before the divorce, this childcare center provided a much higher quality of care, with a more "robust curriculum, smaller classroom sizes . . . and generally had a better reputation for providing quality childcare." (R. ¶ 14). Mr. Sero liked the new facility because of the higher quality of care and because it was closer to his home, making it easier to pick up and drop off the children. (R. ¶ 14).

The facility cost $400 per month more than the previous daycare facility. (R. ¶ 14). As the parties had agreed, Ms. Felix paid the childcare center and sought

reimbursement for a share of the expense from Mr. Sero. (R. ¶ 15). Ms. Felix provided written verification to Mr. Sero of the increased rates and asked Mr. Sero to pay his share but Mr. Sero never did. (R. ¶ 15). Mr. Sero testified that he was aware of the obligation but that he did not think it applied. (R. ¶ 15). Mr. Sero believed that, because Ms. Felix made the change without telling him first, he did not have to pay his share of the childcare expenses when Ms. Felix asked for reimbursement. (R. ¶ 15). Mr. Sero never paid his share of the childcare expenses, and the outstanding amount is now nearly $24,000 accumulated over the ten years since the divorce. (R. ¶ 26). Ms. Felix did not pursue the issue further after Mr. Sero did not pay his share of the expenses. (R. ¶ 15). Mr. Sero argued in the district court that if Ms. Felix had brought up the issue, then Mr. Sero could have challenged the obligation in court. (R. ¶ 26). Mr. Sero based this argument on his view that he was not required to pay because Ms. Felix did not tell him about the increased expenses before switching childcare facilities (R. ¶ 16).

Mr. Sero's Time as Caregiver

Following the divorce, Mr. Sero had primary custody of the children. (R. ¶ 5). The parties "very amicably and conscientiously handled Ms. Felix's visitation of her children," and adhered to "mutually acceptable" parenting plans throughout Mr. Sero's time as caregiver. (R. ¶ 5). Mr. Sero, in his capacity as sole physical custodian of the children, handled the greater share of the parenting responsibilities, and handled those responsibilities well. (R. ¶ 6).

Mr. Sero consistently puts the needs of his children before his own. (R. ¶ 6). For example, when Mr. Sero's brother won an all-expenses-paid trip to Bavaria and asked

Mr. Sero to join him, Mr. Sero arranged to have the children stay with his parents for the duration of the trip. (R. ¶ 7) However, upon further thought, Mr. Sero declined once it became clear that the trip was in conflict with his and Ms. Felix's daughter's ballet recital and their son's little league playoffs. (R. ¶ 7). On the second occasion, Mr. Sero's daughter was sick, and required several days of home care. (R. ¶ 8). Mr. Sero stayed home from work to provide that care, even though his employment did not provide for sick leave to cover the extended absence. (R. ¶ 8). The district court noted that such a sacrifice is "central to sound parenting." (R. ¶ 8).

Based on these examples and other accounts of Mr. Sero's sound parenting, the custody evaluator concluded that "Mr. Sero provided a 'stable, supportive, and positive growth environment for the children" and had balanced his career, childcare, and maintaining a positive relationship with an ex-spouse very well. (R. ¶ 9).

Ms. Felix's Justification for Moving the Children

Shortly after Ms. Felix published her graduate thesis, her investment in her children's future paid off (R. ¶ 10; ¶ 13). On the strength of Ms. Felix's technological breakthroughs in the field of chemical engineering, Ms. Felix was courted by several pharmaceutical manufacturers. (R. ¶ 13). Ms. Felix was offered high-level positions at any of the largest and most powerful pharmaceutical companies in the United States. (R. ¶ 16).

Though all of the offers would require Ms. Felix to relocate to the east coast, the offers would all provide significant financial freedom. (R. ¶ 16). Beyond financial freedom, Ms. Felix also negotiated a unique "quality of life" package with a South

Carolina company in order to "make up for lost time" with her children. (R. ¶ 17). The package entitles her to six two-week vacations per year to spend with her children. (R. ¶ 17). When she is not on leave, Ms. Felix will not be required to work more than 40 hours per week. (R. ¶ 17). This employment package also includes a "generous policy for sick-leave (above and beyond the scheduled leave)" in case health problems arise again for the children. (R. ¶ 17). The company also agreed to cover the costs of tuition and extracurricular activities at any of several private schools identified by the company (R. ¶ 17). Additionally, the company would provide free enrollment for the children to two different study abroad opportunities in Europe during summers while they are in high school. (R. ¶ 17).

The district court gave no meaningful weight to Ms. Felix's compensation structure because, even if Mr. Sero maintained sole custody, the new wealth that Ms. Felix had worked to acquire would be redistributed to Mr. Sero under the terms of the divorce decree. (R. ¶ 19). However, the court's custody evaluator testified that the proposed structure was "perhaps the best conceivable approach to childhood development for teenagers." (R. ¶ 19). The custody evaluator testified that: "Putting teens in good schools positions them for future success. Participating in varied extra-curricular activities not only contributes to their happiness and growth, but also sets them up to succeed outside of a classroom. The study abroad experiences raise cultural awareness and instill in teenagers a sense of their role in the world . . . ." (R. ¶ 19). The custody evaluator also concluded that Ms. Felix's frequent and extended vacations are "likely to foster positive bonding" and that "there is no better recipe for a positive relationship." To

take advantage of these vast benefits, Ms. Felix and the children must move to South Carolina. (R. ¶ 18).

The Court's Attempts to Compromise with Mr. Sero

Mr. Sero is aware of the benefits his children stand to reap from the opportunities Ms. Felix can now provide. (R. ¶ 19). Likewise, the court could not ignore the benefits that the children would enjoy from Ms. Felix's employment, and the court was persuaded by the equity of giving Ms. Felix the opportunity to build the kind of relationship with the children that Mr. Sero had built over the last ten years. (R. ¶ 20). Still, the court offered to allow Mr. Sero to retain primary custody if Mr. Sero would move to South Carolina with his children and Ms. Felix. (R. ¶ 21). Mr. Sero refused, maintaining that there "is just no way I can leave my job, my family, my home, my friends, and the life I have built in Utah." (R. ¶ 21).

STATEMENT OF THE CASE

This case stems from divorce proceedings between Ms. Felix and Mr. Sero in 2005. (R. ¶ 1). In the initial divorce decree, Mr. Sero was awarded sole physical custody of their two children. (R. ¶ 1). Mr. Sero retained sole physical custody for ten years following the divorce. (R. ¶ 4). In early 2015, Ms. Felix earned a Ph.D. in chemical engineering and subsequently negotiated a lucrative and flexible employment package with a company in South Carolina. (R. ¶ 16; ¶ 17). Ms. Felix now seeks to modify the divorce decree. (R. ¶ 4). Ms. Felix brought this action in the district court and sought modification of the divorce decree to allow her to move with her children to South

Carolina to take advantage of the many benefits provided by her new professional opportunity. (R. ¶ 22).

At trial, Ms. Felix argued a number of issues but sought two main remedies. (R. ¶ 1). First, Ms. Felix sought sole custody of her children, in order to move with them to South Carolina. (R. ¶ 2); and second, Ms. Felix brought a claim for Mr. Sero's unpaid share of childcare expenses (R. ¶ 15). The district court agreed with Ms. Felix that it was in the best interests of the children to move with their mother to South Carolina. (R. ¶ 20). The court offered Mr. Sero a compromise offer, wherein he would retain sole physical custody if he would move to South Carolina with Ms. Felix and the children. (R. ¶ 20). Mr. Sero declined, citing his constitutional right to travel in order to stay in Utah. (R. ¶ 22). Additionally, Mr. Sero asserted laches to bar Ms. Felix's recovery of the unpaid childcare expenses, due to Ms. Felix's ten-year delay in bringing the claim (R. ¶ 26). On the issue of custody, the district court found that it would serve the children's best interests to pursue the opportunities in South Carolina and awarded sole physical custody to Ms. Felix. (R. ¶ 25). On the issue of laches, the district court held that the laches was available to bar Ms. Felix's claim for unpaid childcare expenses. (R. ¶ 27).

Both parties appealed the district court's decision. (R. ¶ 28). The court of appeals reversed the district court's award of sole custody to Ms. Felix on the grounds that the district court did not give due consideration to Mr. Sero's constitutional right to travel. (R. ¶ 28). On the laches issue, the court of appeals "reluctantly affirm[ed]" based on horizontal *stare decisis* supporting the use of laches to cut short the statute of limitations. (R. ¶ 28).

In this Court, the parties present the same two issues: First, whether a custody determination must balance the parents' competing constitutional rights to travel, rather than being based solely on the best interests of the children, and second, whether the defense of laches is available when the Legislature has acted to create a statute of limitations. *See* Addendum A.

SUMMARY OF THE ARGUMENT

For the reasons that follow, Petitioner is requesting that the Court rule on two issues: (I) whether a custody determination must balance the parents' competing rights to interstate travel rather than being based solely on the best interests of the children, and (II) whether a parent can assert laches to avoid paying outstanding childcare expenses when the applicable statute of limitations has not yet barred the claim. Both of these issues turn on the weight given to the best interests of children in divorce proceedings.

First, a parent's right to travel should not outweigh the best interests of the children. The Utah Legislature directs, "In determining any form of custody, including a change in custody, the court shall consider the best interests of the child . . . ." UTAH CODE § 30-3-10(a). The best-interests approach, which "has long been the bellwether indicator of custody determinations," *Felix v. Sero*, 2017 UT App 723, ¶ 55 (Zane, J. dissenting part and concurring in part), is constitutionally sound and produces desirable results.

Parents enjoy a fundamental right to interstate travel, as established by the United States Constitution. Because the right to travel is fundamental, any infringement on that right is subject to strict scrutiny. Thus, when a custody determination infringes a parent's

fundamental right to interstate travel, it will only survive strict scrutiny if it is narrowly tailored to achieve a compelling state interest.

States have a "duty of the highest order to protect the interests of minor children." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). When a custody determination is narrowly tailored to "protect the interests of [the] children," it is constitutionally sound despite any infringement on the parents' respective rights to interstate travel. *Id.*

In addition to following from precedent, the best-interests approach also produces desirable results. A custody determination that is grounded on the best interests of the children avoids harm to parents because it does not attempt to determine whether one parent's fundamental right to interstate travel is weightier than another parent's fundamental right to interstate travel. Moreover, the best-interests approach avoids harm to children because it does not yield an outcome that differs from a court's objective determination of the custody arrangement that would best serve the interests of the children.

Turning to the claims for unpaid childcare expenses, Mr. Sero should not be permitted to use the doctrine of laches to cut short the statute of limitations for two main reasons: First, the court's bar on defenses of waiver and estoppel should be read to include a bar on laches; and second, allowing laches to cut short the statute of limitations violates separation of powers principles.

First, when the Legislature barred claims for waiver and estoppel in certain actions for unpaid child support, the use of the terms "waiver and estoppel" created ambiguity. It is well understood that the doctrine of laches "may operate as an estoppel against the

assertion of a right." 31 Williston on Contracts § 79:11 (4th ed.). Given the close link in Utah case law between doctrines of laches, waiver, and estoppel, and the functional similarity of the two doctrines, it is unclear whether the court meant to bar claims for estoppel specifically, or all claims that operate as an estoppel. The court may resolve this ambiguity by looking to the absurd consequences canon, which encourages courts to adopt a reading that does not render a term of the statute a nullity. Reading the Legislature's bar on waiver and estoppel to allow laches creates a way to sidestep the bar on estoppel by asserting laches instead. In practice, this result nullifies the bar on estoppel. Therefore, the court should read the bar on estoppel to include a bar on laches.

Second, allowing laches to cut short the statute of limitations violates separation of powers principles. Utah courts have refused to give up their equitable powers absent a clear command from the Legislature. By barring defenses of waiver and estoppel, the Legislature issued a clear command to the courts to give up their equitable powers.

While Utah courts have abandoned the distinction between law and equity, when the Legislature has acted, a court still may only exercise their equitable powers when it is necessary to prevent injustice. Allowing laches is not necessary to prevent injustice here. .Mr. Sero owes Ms. Felix $24,000 in unpaid childcare expenses; those expenses are his responsibility and the funds would have been used for the benefit of the children. Using laches to punish Ms. Felix and vindicate Mr. Sero results primarily in reduced financial resources for children.

Moreover, the Legislature is in the best position to make broad determinations of the amount of time parents have to bring claims for unpaid child support. Allowing

laches to cut short the statute of limitations creates an imperative for ex-spouses to enter quick litigation, rather than trying to settle the problems themselves or waiting until after their children reach majority to sue one another. Forcing ex-spouses to litigate quickly or lose their claims ultimately results in familial strain injustice to the children.

ARGUMENT

I. A CUSTODY DETERMINATION IS PROPERLY BASED ON THE BEST INTERESTS OF THE CHILDREN BECAUSE THE BEST-INTERESTS APPROACH IS HARMONIOUS WITH COMPETING CONSTITUTIONAL CONCERNS AND AVOIDS HARM TO PARENTS AND CHILDREN.

A custody determination should be based on the best interests of the children in accordance with section 30-3-10 of the Utah Code, which provides: "In determining any form of custody, including a change in custody, the court shall consider the best interests of the child . . . ." UTAH CODE § 30-3-10(a). This approach is harmonious with competing constitutional concerns and avoids harm to both parents and children.

The United States Constitution protects a fundamental right to travel. *Saenz v. Roe*, 526 U.S. 489, 498 (1999). This Court has recognized that a right is fundamental when it "form[s] an implicit part of the life of a free citizen in a free society . . . ." *Utah Public Emp. Ass'n v. State*, 610 P.2d 1272, 1273 (Utah 1980). The right to interstate travel is one such fundamental right. *Id.* When this Court "has recognized a . . . right it deems 'fundamental,' it has consistently applied a standard of strict scrutiny to the protection of such a right." *Jones v. Jones*, 2015 UT 84, ¶ 26, 359 P.3d 603.

Under strict scrutiny, a state may not "infring[e] fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest."

Lawrence v. Texas, 539 U.S. 558, 593 (2003). To be sure, the "State has an urgent interest in the welfare of the child . . . ." *Lassiter v. Dep't of Soc. Serv. of Durham County, N.C.*, 452 U.S. 18, 27 (1981). Thus, a custody determination that infringes the parents' competing rights to interstate travel will survive when the determination is narrowly tailored to achieve the best interests of the children.

The best-interests approach is not only constitutionally sound, it also produces desirable outcomes because it avoids harm to parents and children. The best-interests approach avoids a determination that one parent's fundamental right to interstate travel is weightier than another parent's fundamental right to interstate travel and it avoids an outcome that undermines the best interests of the children.

This Court should hold that a custody determination is properly based on the best interests of the children because (A) the best-interests approach is harmonious with competing constitutional concerns that arise from the parents' respective rights to interstate travel and (B) the best-interests approach avoids harm to both parents and children.

A. The Best-Interests Approach is Harmonious with Competing Constitutional Concerns Because Parents Enjoy a Fundamental Right to Travel that Warrants Strict Scrutiny and States Have a Compelling Interest in Protecting the Welfare of Children.

A custody determination is harmonious with the competing constitutional concerns of the parents when it is narrowly tailored to achieve the best interests of the children. Implicit in such a custody determination is a recognition that (1) parents enjoy a fundamental right to interstate travel, *Saenz v. Roe*, 526 U.S. 489, 498 (1999), and (2) a

custody determination may only infringe those rights if it is narrowly tailored to achieve the best interests of the children, *Jones v. Jones*, 2015 UT 84, ¶ 27, 359 P.3d 603.

1. Parents enjoy a fundamental right to interstate travel and any infringement on that right warrants strict scrutiny.

Parents enjoy a fundamental right to interstate travel, as established by the United States Constitution, and that right may only be infringed by a custody determination if the determination survives strict scrutiny.

The court of appeals correctly found that the United States Constitution protects a fundamental right to travel that includes the right to choose one's state of residence. *Felix v. Sero*, 2017 UT App 723, ¶ 31,---P.3d---. The court recognized that the right is both "firmly embedded in [constitutional] jurisprudence," *Saenz v. Roe*, 526 U.S. 489, 498 (1999), and "notoriously difficult to pin down." *Felix v. Sero*, 2017 UT App 723, ¶ 31. The court traced the right's possible origins from the privileges and immunities clause, *Saenz*, 526 U.S. at 501–02, the due process clause, *Jones v. Helms*, 452 U.S. 412, 418–19 n.13 (1981), or the commerce clause, *United States v. Guest*, 383 U.S. 745, 758–59 (1966). *Felix v. Sero*, 2017 UT App 723, ¶ 31. Regardless of its origins, "[a]ll have agreed that the right exists." *Guest*, 383 U.S. at 759.

In the context of custody determinations, a parent's right to interstate travel is intertwined with a fundamental right to the "companionship, care, custody, and management of his or her children." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Indeed, the Supreme Court has proclaimed that the rights to conceive and raise one's children are "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and "basic civil rights,"

Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). In every custody determination, the parental rights at stake are numerous and weighty.

The deprivation of such rights in a custody determination is subject to strict scrutiny. *LaChapelle v. Mitten*, 607 N.W.2d 151, 163 (Minn. Ct. App. 2000). Under this exacting standard, "a fundamental right is protected except in the limited circumstance in which an infringement of it is shown to be 'narrowly tailored' to protect a 'compelling governmental interest.'" *Jones v. Jones*, 2015 UT 84, ¶ 27, 359 P.3d 603 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). This is, in effect, the standard that Utah courts have historically applied in custody determinations. *See Felix v. Sero*, 2017 UT App 723, ¶ 54 (Zane, J. dissenting part and concurring in part) ("I believe that rule is, in effect, the rule applied by the district court in this case . . . .").

The Utah Supreme Court has already contemplated the possibility of a new, intermediate standard in the context of child custody and visitation rights. *Jones v. Jones*, 2015 UT 84, ¶ 29, 359 P.3d 603. But the court noted that "the enterprise . . . of abandoning the usual standard for a lesser one that balances the relevant interests in a new way—is an uncomfortable venture for a lower court. Such a venture seems more an act of policymaking than of application of controlling law." *Id.* Thus, until the Supreme Court of the United States prescribes a different standard, any infringement on a parent's right to interstate travel in a custody determination is subject to strict scrutiny and may only survive if narrowly tailored to achieve a compelling state interest. *Jones v. Jones*, 2015 UT 84, ¶ 27, 359 P.3d 603.

2. States have a compelling interest in protecting the welfare of children, and a custody determination will survive strict scrutiny when it is narrowly tailored to achieve the best interests of the children.

States have a compelling interest in protecting the best interests of children, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), and a custody determination will survive when it is narrowly tailored to achieve the best interests of the children. *Jones v. Jones*, 2015 UT 84, ¶ 27, 359 P.3d 603.

In a custody determination, the "paramount consideration is the best interest of the child." *Hutchison v. Hutchison*, 649 P.2d 38, 40 (Utah 1982); UTAH CODE § 30-3-10(a) ("In determining any form of custody . . . the court shall consider the best interests of the child."). Indeed, the best-interests approach "has long been the bellwether indicator of custody determinations . . . ." *Felix v. Sero*, 2017 UT App 723, ¶ 55 (Zane, J. dissenting part and concurring in part). The best-interests approach, rooted in the wisdom of Utah courts and the Utah Legislature, represents a compelling state interest.

The Supreme Court of the United States has proclaimed that "[t]he State, of course, has a duty of the highest order to protect the interests of minor children." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). This Court has recognized that the objective of preserving the best interests of children is "among the most important of any in our society." *In re Adoption of J.S.*, 2014 UT 51, ¶ 74, 358 P.3d 1009. Thus, the state has a compelling interest in protecting the best interests of the children in custody determinations. "Were that not the case, every custody determination would be constitutionally infirm because every custody determination would limit parental rights

on some lesser showing [than a compelling interest]." *Felix v. Sero*, 2017 UT App 723, ¶ 54 (Zane, J. dissenting part and concurring in part).

In determining which situation will serve the best interests of the children, a trial court may consider "numerous factors, each of which may vary in importance according to the facts in the particular case." *Sanderson v. Tyson*, 739 P.2d 623, 627 (Utah 1987). Those factors may include "the parenting skills, character, and abilities of both parents in light of a realistic and objective appraisal of the needs of a child." *Elmer v. Elmer*, 776 P.2d 599, 603 (Utah 1989). For example, in the present case, the district court was persuaded by the custody evaluator's testimony that, "[w]here it's possible to structure parent-child interactions in the way Ms. Felix contemplates, our studies show there is no better recipe for a positive relationship." *Felix v. Sero*, 2017 UT App 723, ¶ 19 (majority).

Given the breadth of factors that a trial court may consider, it is difficult to imagine a custody dispute where the best interests of the children are equally served by awarding custody to either parent. Still, the court of appeals expressed serious concern about this slight possibility. *Felix v. Sero*, 2017 UT App 723, ¶ 39 (majority) ("[I]f a court concludes that the best interests of the children are going to be served equally well by either custody determination, then [the best-interests] approach would give as much weight to a coin toss as it would to the parents' rights."). However, in such a rare circumstance, applying strict scrutiny provides an adequate solution.

A custody determination that infringes a parent's right to interstate travel will only survive if it is both justified by a compelling interest *and* narrowly tailored to achieve that interest. If the best interests of the children will be equally served by either parent, a court may determine that a custody arrangement is narrowly tailored when it does the least harm to the parents' competing rights to interstate travel. Ultimately, however, trial courts are well-equipped to make difficult decisions based on the facts of each case. Any potential for difficult decision-making should not dissuade this Court from holding that the infringement of a parent's right to interstate travel warrants strict scrutiny, and that a custody determination will survive strict scrutiny when it is narrowly tailored to achieve the best interests of the children.

Because parents enjoy a fundamental right to interstate travel, any infringement on that right must be subject to strict scrutiny. Accordingly, a custody determination may only survive when it is narrowly tailored to achieve the best interests of the children. This approach is dictated by the United States Supreme Court, the Utah Supreme Court, and the Utah legislature. What's more, the best-interests approach produced desirable results because it avoids harm to both parents and children.

B. The Best-Interests Approach Avoids Harm to Parents and Children Because It Does Not Attempt to Value One Parent's Rights Over Another Parent's Rights and Does Not Yield an Outcome that Undermines the Children's Best Interests.

A custody determination that is based on the best interests of the children avoids harm to parents and children. It does not require courts to determine whether one parent's constitutional right to interstate travel supersedes another parent's constitutional right to

interstate travel. Moreover, it does not yield an outcome that undermines the best-interests of the children.

1. The best-interests approach avoids a determination that one parent's right to interstate travel is weightier than another parent's right to interstate travel.

If this Court embarks on an "enterprise . . . of abandoning the usual standard for a lesser one that balances the relevant interests in a new way," *Jones v. Jones*, 2015 UT 84, ¶ 29, 359 P.3d 603, district courts will be obliged to determine whether one parent's rights are weightier than another parent's rights. Specifically, the standard recommended by the Utah Court of Appeals would require district courts to balance each parent's right to interstate travel, against the right of each parent to "to maintain close association and frequent contact with the child," against the best interests of the children. *Felix v. Sero*, 2017 UT App 723, ¶ 40 (quoting *In re Marriage of Ciesluk*, 113 P.3d 135, 146 (Colo. 2005).

To be sure, courts frequently balance the rights and interests of relevant parties. *Matter of Adoption of Baby Q*, 2016 UT 29, ¶ 11, 379 P.3d 1231 (balancing the interests of parties to an adoption). In the adoption context, the Utah Legislature has made clear that the best interests of the child should govern the determination, and that "the rights and interests of all parties affected by an adoption proceeding must be considered and balanced in determining what constitutional protections and processes are necessary and appropriate." UTAH CODE § 78B-6-102(1), (3). The Legislature notes the varied rights and interests of the biological parents, the adoptive parents, and the state. *Id.* at § 78B-6-102(5). In accounting for these rights and interests, the Legislature specifies that courts

should determine what "constitutional protections and processes are necessary . . .." *Id.* at § 78B-6-102(3).

In custody determinations following divorce, the best-interests approach provides the necessary constitutional protection: strict scrutiny. To move further would be to work an injustice. Beyond subjecting the infringement of each parents' right to interstate travel to strict scrutiny, it is difficult to see how a court could determine that one parent's right is weightier than the other. *Felix v. Sero*, 2017 UT App 723, ¶ 55 (Zane, J. dissenting part and concurring in part). For example, while Mr. Sero enjoys a right to maintain a residence in Utah, Ms. Felix enjoys a right to seek opportunity in South Carolina. Both rights are fundamental and are protected equally by the Constitution of the United States. "Perhaps the [court of appeals] means that, on balance, one parent is less likely to be harmed by losing that right, but that seems to me to be poor justification for a constitutional infringement." *Felix v. Sero*, 2017 UT App 723, ¶ 55 (Zane, J. dissenting part and concurring in part). Any determination that one parent's right to travel is weightier than the other parent's right to travel would be constitutionally infirm because the state would not have a compelling justification for infringing one parent's right to travel if the custody determination is not based on the best interests of the children.

Holding that a custody determination should be governed by the best interests of the children will avoid the injustice of finding that one parent's fundamental right to interstate travel is weightier than the other parent's fundamental right to interstate travel. Instead, it provides the necessary constitutional protections by subjecting any infringement of the parents' respective rights to strict scrutiny. This approach not only

serves the interests of each parent, it avoids an outcome that is contrary to the children's best interests.

2. The best-interests approach avoids an outcome that undermines the best interests of the children.

A custody determination should be governed by the best interests of the children, in harmony with Utah Code section 30-3-10(a) and in accord with a long line of custody determinations wherein the "paramount consideration is the best interest of the child." *Hutchison v. Hutchison*, 649 P.2d 38, 40 (Utah 1982). Such a determination is "based on an objective and impartial comparison of the parenting skills, character, and abilities of both parents in light of a realistic and objective appraisal of the needs of a child." *Elmer v. Elmer*, 776 P.2d 599, 603 (Utah 1989). If this Court turns away from the best-interests approach and adopts a test that "balances the relevant interests in a new way," *Jones v. Jones*, 2015 UT 84, ¶ 29, 359 P.3d 603, district courts would be compelled to turn their focus away from the best interests of the children.

Any outcome that turns on the parents' right to interstate travel would necessarily undermine the best interests of the children and run contrary to the Legislature's directive in Utah Code section 30-3-10. It is possible that after weighing each parent's right to interstate travel, a court may well make a custody determination that is consistent with its "objective and impartial" determination of the children's best interests. *Elmer*, 776 P.2d at 603; *Felix v. Sero*, 2017 UT App 723, ¶ 42 (noting that, on remand, the district court may still award primary custody to Ms. Felix after balancing Mr. Sero's right to travel against Ms. Felix's right to travel).

However, if the predicted outcome ever changes after an evaluation of each parent's right to interstate travel, then the court has necessarily acted contrary to the children's best interests. Following a court's "objective and impartial" assessment of the children's best interests, any custody determination to the contrary, made in light of a parent's right to travel, does harm to the children. Any such determination runs contrary to the legislative directive set forth in Utah Code section 30-3-10 and violates the state's "duty of the highest order to protect the interests of minor children . . . ." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Thus, the best-interests approach avoids harm to children because it ensures outcomes that are consistent with a court's "objective and impartial" determination of the custody arrangement that will protect the children's best interests. Because the best-interests approach is harmonious with competing constitutional concerns and because it avoids harm to parents and children, this Court should hold that a custody determination is properly based on the best interests of the children.

II. LACHES MAY NOT BE USED TO CUT SHORT THE STATUTE OF LIMITATIONS BECAUSE SUCH A READING RENDERS A TERM OF THE STATUTE A NULLITY AND VIOLATES SEPARATION OF POWERS.

The Utah Legislature enacted a statute of limitations for bringing a claim for unpaid child support expenses that runs "within four years after the date the youngest child reaches majority" or "eight years from the date of entry of the sum certain judgment . . . ." UTAH CODE § 78B-5-202 (6)(a)(i)–(ii). The Legislature also acted to foreclose

defenses of waiver and estoppel in most claims for unpaid child support.[1] UTAH CODE § 78B-12-109 (1)–(2). In *Veysey v. Veysey*, 2014 UT App 264, ¶ 18, 339 P.3d 131 ("*Veysey I*"), the Utah Court of Appeals refused to read the Legislature's bar on waiver and estoppel claims to also act as a bar on the related defense of laches. *Id.* In doing so, the court held that a party could assert laches to cut short the legislatively defined statute of limitations, regardless of the Legislature's bar on claims for estoppel. *Id.* ¶ 18 n.6. The Court of Appeals affirmed this decision in *Veysey v. Nelson*, 2017 UT App 77, ¶ 14, 397 P.3d 846 ("*Veysey II*").

This case is factually similar to *Veysey I* and *Veysey II*. Here, Ms. Felix makes several claims for unpaid childcare expenses that were not foreclosed by the statute of limitations (R. ¶ 15). Though the statute of limitations had not yet barred the claims, the district court and the court of appeals both found that Ms. Felix's claims were foreclosed by Mr. Sero's laches defense. (R. ¶ 43). Both courts were "bound by precedent" from *Veysey I* and *Veysey II* in reaching this decision. (R. ¶ 43).

We ask this Court to reconsider the holding that a party may use laches to cut short the applicable statute of limitations for two reasons: (A) the close link between estoppel and laches creates ambiguity, and reading the statute to allow laches but not estoppel renders the bar on estoppel a nullity, and (B) allowing parties to use laches to cut short

[1] In this section of the statute, the Legislature *only* allows defenses of waiver and estoppel "when there is no order already established by a tribunal if the custodial parent freely and voluntarily waives support specifically and in writing." UTAH CODE 78B-12-109 (1). Additionally, the court in *Veysey I* held that "variable daycare expenses constitute child support." *Id.* ¶ 15.

the statute of limitations violates separation of powers by overlooking a clear command from the Legislature and primarily resulting in limitation of financial resources for children.

A. Reading the Statute to Foreclose Waiver and Estoppel But Allow Laches Renders the Legislature's Bar on Estoppel a Nullity.

When interpreting a statute, the court's primary goal is to "give effect to the legislature's intent in light of the purpose that the statute was meant to achieve." *Garfield County v. United States*, 2017 UT 41, ¶ 15,--- P.3d ---; *State v. Martinez*, 2002 UT 80, ¶ 8, 52 P.3d 1276. In order to understand and give effect to the Legislature's purpose, courts often examine (1) whether, after a plain language analysis, a statute's terms remain ambiguous, or "susceptible to two or more reasonable interpretations" *State v. Rasabout*, 2015 UT 72, ¶ 22, 356 P.3d 1258; *Garfield*, 2017 UT 41, ¶ 15, and (2), where statutory language is ambiguous, whether utilizing established canons of statutory interpretation may eliminate ambiguity. *Marion Energy, Inc. v. KFJ Ranch Partnership*, 2011 UT 50, ¶ 15, 267 P.3d 863; *Utley v. Mill Man Steel, Inc.*, 2015 UT 75, ¶ 46, 357 P.3d 992.

1. The Legislature's use of "waiver and estoppel" is ambiguous as to whether it also prohibits the similar defense of laches.

In general, where a statute's plain language is "unambiguous and provides a workable result," the court may end its analysis there. *Garfield*, 2017 UT 41, ¶ 15. However, if after a plain language analysis, a term of the statute remains ambiguous, or "susceptible to two or more reasonable interpretations," the court may look to established canons of construction to resolve the ambiguity. *Rasabout*, 2015 UT 72, ¶ 22.

The doctrines of laches, waiver, and estoppel have been closely linked in Utah case law for years. This close link creates ambiguity. Many Utah cases refer to the doctrines of laches, waiver, and estoppel as a single unit. *See e.g.*, *State Bank of Southern Utah v. Troy Hygro Systems, Inc.*, 894 P.2d 1270, 1277 (Utah Ct. App. 1995) (referring to a bank's claims as being "barred by laches, waiver and estoppel."); *K.O. v. Denison*, 748 P.2d 588, 590 (Utah Ct. App. 1988) (providing that a party is barred from asserting a claim by "laches, waiver, and estoppel"); 20C AmJur Pl. & Pr. Forms Quieting title § 67 (referring to the doctrine as "estoppel by laches"); 6 McCarthy on Trademarks and Unfair Competition § 31:2 (5th ed.) (referring to the doctrine as "estoppel by laches"). The doctrines of laches, waiver and estoppel are so closely related that, in 31 Williston on Contracts § 79:11 (4th ed.), Samuel Williston described laches as "operat[ing] as an estoppel against the assertion of a right." *Id.* This quotation, in particular, suggests that laches is a subset of the broader doctrine of estoppel.[2]

Though laches and estoppel require parties to show different elements, the two doctrines are similar in the type of harm they redress and in the specific remedy they provide. Estoppel is defined as "a[n] act, or failure to act by one party inconsistent with a claim later asserted; reasonable action or inaction by the other party taken or not taken on

[2] One reason that laches was often treated as a subset of estoppel in Utah case law and national treaties is because they were generally brought as a tandem defense. *See e.g. Burmingham v. Burke*, 245 P. 977, 979–80 (Utah 1926) (providing an example of the defenses of estoppel and laches being asserted together). Indeed, in most cases where laches could be successfully asserted as a defense, estoppel would also apply. *Baggs v. Anderson*, 528 P.2d 141, 143 (Utah 1974) (discussing the defense of estoppel to a claim for unpaid child support).

the basis of the first party's . . . act, or failure to act; and injury to the second party that would result from allowing the first party to contradict or repudiate such . . . act, or failure to act." *CEOC Corp. v. Concrete Specialists, Inc.*, 772 P.2d 967, 969–70 (Utah 1989); while laches requires a party to show "[t]he lack of diligence on the part of plaintiff; [and a]n injury to defendant owing to such lack of diligence." *Papanikolas Bros. Enter. v. Sugarhouse Shopping Center Assoc.*, 535 P.2d 1256, 1260 (Utah 1975).

The difference in these two doctrines is slight. Estoppel is broader than laches, and can apply to actions as well as inactions, and estoppel does not require an unreasonable delay in time. Laches operates in a similar fashion, but only applies to the *inaction* of one party which injures another party. Moreover, the classic understanding is that laches is a defense which prevents parties from unreasonably delaying to bring a claim. *Borland ex rel. Utah State Dep't of Soc. Serv. v. Chandler*, 733 P.2d 144, 147 (Utah 1987). In most cases, parties can achieve the same remedy for the same harm using either laches or estoppel. Therefore, the slight differences between laches and estoppel do not serve to divide the doctrines, but rather to show that laches falls under the broad umbrella of estoppel.

Based on the close link between the doctrines of estoppel and laches, and the overlapping nature of the claims, the use of "waiver and estoppel" in the statute is ambiguous and requires additional interpretation beyond a plain language reading.

2. The absurd consequences canon inclines away from a reading that nullifies a term of the statute.

After identifying ambiguity in a statute, the next step is to look to accepted canons of construction. "When statutory language is ambiguous—in that its terms remain susceptible to two or more reasonable interpretations after we have conducted a plain language analysis—we generally resort to other modes of statutory construction" *Marion Energy*, 2011 UT 50, ¶ 14; *Rasabout*, 2015 UT 72, ¶ 22. One such mode of statutory construction is the absurd consequences canon. This canon provides that courts should preserve legislative intent and resolve ambiguity by reading a statute in a way that does not "render[] a provision a nullity." *Utley*, 2015 UT 75, ¶ 23.

Before moving forward, it is important to distinguish the absurd consequences canon from the absurdity doctrine. Both interpretive tools deal in absurd results, however the absurd consequences canon is a gentle tool, which steers ambiguous statutory language toward a reading that does not render any term of the statute null. *Utley*, 2015 UT 75, ¶ 46. (Durrant, C.J., concurring in part and dissenting in part). In contrast, the absurdity doctrine has been characterized as "strong medicine, not to be administered lightly" *Garfield*, 2017 UT 41, ¶ 44 (Voros, J., dissenting). The absurdity doctrine "has nothing to do with resolving ambiguities. Rather, we apply this [doctrine] to reform unambiguous statutory language where applying the plain language leads to results so overwhelmingly absurd no rational legislator could have intended them." *Utley*, 2015 UT 75, ¶ 46. In this case, we do not suggest that the Legislature's bar on waiver and estoppel

but not laches is "overwhelmingly absurd," but rather that it is ambiguous. *Id.* To resolve this ambiguity, we use the absurd consequences canon.

The policy behind the absurd consequences canon is to create a preference for interpretations of statutes that do not "invite[] confusion [or create] piecemeal litigation, a waste of judicial resources, [or] *gamesmanship in the payment of claims*." *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶ 73, 210 P.3d 263 (emphasis added). In *Encon*, the Utah Supreme Court used the absurd consequences canon in the judgment of a contractor's claim for unpaid work from a subcontractor. The court rejected an interpretation of the statute that would attach a separate statute of limitations to each individual piece of work a subcontractor completed for a contractor. *Id.* ¶ 74. The court noted that this "create[s] an unworkable standard" by creating a series of unpredictable timelines for bringing claims and encouraging gamesmanship in the payment of claims." *Id.* Therefore, the court adopted an interpretation of the statute that would avoid this confusion. *Id.*

The absurd consequences canon can help us avoid a similarly confusing result here. Given the facts in this case and the court of appeals' reading of the statute, Mr. Sero would be prohibited from asserting estoppel, however Mr. Sero achieved effectively the same result by claiming laches. The practical result in reading the statute to bar estoppel but not laches is the same as if the Legislature did not bar estoppel at all. As in *Utley*, the *Veysey II* court's interpretation of the statute as not barring laches in addition to estoppel renders the Legislature's bar on estoppel a nullity. *Utley*, 2015 UT 75, ¶ 23. Furthermore, allowing laches encourages "gamesmanship in the payment of claims," by encouraging

parties to strategically assert laches to avoid payment of unpaid childcare expenses. To avoid rendering the bar on estoppel a nullity, this Court should read the bar on estoppel to include laches.

B. Allowing Laches to Cut Short the Statute of Limitations Violates Separation of Powers by Overlooking a Clear Command From the Legislature and Creating Injustice For the Children.

Utah's Constitution provides for separation of powers in Article V, Section 1. "The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others . . . ." UTAH CONST. art. V, § 1. Regarding the roles of the distinct branches of Utah's government, the Utah Supreme Court provides, "It is the judiciary's role to interpret statutes and to ensure their constitutionality . . . It is not the judiciary's role to augment existing statutes to satisfy private parties . . . nor to enforce statutes where no judicial remedy for private parties is anticipated or provided for in the statute." *Alpine Homes, Inc. v. City of West Jordan*, 2017 UT 45, ¶ 39, ---P.3d--- (citations omitted).

Here, the application of laches to cut short the statute of limitations for bringing child support claims violates separation of powers for two reasons: (1) by creating a statute of limitations and barring claims for waiver and estoppel, the Legislature issued a "clear command" to the court to give up its equitable powers, and (2) the Legislature is in the best position to decide the amount of time a parent has to bring a claim for unpaid child support to avoid familial strain and injustice for children.

1. By creating a statute of limitations and barring claims for waiver and estoppel, the Legislature issued a "clear command" to the court to give up its equitable powers.

The court in *Veysey II* refused to "construe a statute to displace courts' traditional equitable authority absent the 'clearest command' or an 'inescapable inference' to the contrary." *Veysey II*, ¶ 7 n.4 (citing *Miller v. French*, 530 U.S. 327, 340 (2000)). However, the court in *Miller* used that standard to hold that the statutory mandate of an "automatic stay" to enjoin relief from substandard prison conditions, upon a motion to modify or terminate the relief, did in fact provide a clear command from Congress to displace the court's traditional equitable powers to grant injunctions. *Miller*, 530 U.S. at 340–41 (citing 18 U.S.C. § 3626 (e)(2)). Note that the *Miller* court did not require the Legislature to specifically include a provision barring the court from using its injunctive powers. *Id.* at 341. The court found that, by mandating an automatic stay rather than allowing courts to hear motions for injunctions, the Legislature issued a clear command for the court to give up injunctive powers.

In this case, we have a similar statutory instruction. Utah Code § 78B-12-109 provides that "waiver and estoppel" shall not apply to most claims for child support. This provision is analogous to the provision in *Miller* that limits a court's traditional equitable powers. *Miller*, 530 U.S. at 333. Both provisions restrict courts' ability to use certain traditional equitable powers: injunctions for *Miller*, and estoppel in our case. The *Miller* court found that the Legislature's express instructions on how to handle injunctions in cases falling under the statute was a sufficient command to the court to displace its traditional equitable powers. *Id.* at 341. Likewise, this Court should hold that the

Legislature's express prohibition on defenses of estoppel constitutes a clear command for the court to give up the equitable power of estoppel, as well as any equitable powers which may be used to achieve the same substantive result. *See infra* (A)(i).

Moreover, in light of the canon of constitutional avoidance, reading the statute to include laches in the definition of estoppel is a practical choice. The canon of constitutional avoidance allows the court to "[reject] one of two plausible constructions of a statute on the ground that it would raise grave doubts as to its constitutionality." *Nevares v. M.L.S.*, 2015 UT 34, ¶ 38, 345 P.3d 719. Reading the statute, as Mr. Sero urges, to allow a party to assert laches to cut short the statute of limitations raises separation of powers questions. Laches is meant to be used as a gap-filler in order to effectuate Legislative intent. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962, 1973 (2014). When laches is used to alter statutory timelines, it creates grave concerns as to whether the court is taking on a Legislative function. The canon of constitutional avoidance provides an additional ground for reading the bar on estoppel as a bar on laches as well—to avoid the constitutional problem that comes with the use of an equitable doctrine to effectively rewrite a statutory mandate.

Therefore, the Legislature's bar on defenses of estoppel constitutes a clear command from congress to relinquish the court's equitable powers. This Court should read the statute to also bar laches to avoid overlooking a clear command from congress and ultimately creating a constitutionally questionable reading.

2. The Legislature should decide the amount of time a parent has to bring a claim for unpaid child support to avoid familial strain and injustice for children.

The Utah Supreme Court in *Carter v. Lehi City*, 2012 UT 2, ¶ 33, 269 P.3d 141 provides, "Our understanding of the legislative power is informed by its placement in relation to—and separation from—the executive and judicial power." *Id.* In *Alpine Homes, Inc. v. City of West Jordan*, 2017 UT 45, ---P.3d--- , the court noted that "it is the judiciary's role to interpret statutes and to ensure their constitutionality. It is not the judiciary's role to augment existing statutes to satisfy private parties . . . where no judicial remedy for private parties is anticipated or provided for by the statute." *Id.* ¶ 39.

The line between Legislative and Judicial power is not a bright one. Utah, like most other jurisdictions, has abolished the distinction between law and equity. *Borland*, 733 P.2d at 146. However, the blending of law and equity does not create a presumption that allowing principles of equity to alter statutes will always be proper. *Borland* goes on to note that "[i]t is well established that equitable defenses may be applied in actions at law and that principles of equity apply wherever necessary *to prevent injustice*." *Id.* (emphasis added). Therefore, the rule allowing equitable principles to apply at law is a permissive one, and one that allows the Judiciary to reach into the Legislative realm only when necessary to prevent injustice.

Additionally, the court in *Insight Assets, Inc. v. Farias*, 2013 UT 47, ¶ 20, 321 P.3d 1021 held that "the doctrine of laches may apply in equity, whether or not a statute of limitation also applies and whether or not an applicable statute of limitation has been satisfied." *Id.* ¶ 18. However, *Insight Assets* authorized a court to allow laches to prevent

injustice based on weighing the equities for two parties in a business transaction, where the equities may be reduced to dollar-amount damages.

In this case, the determination of equities and injustice is more complicated. Injustice is a matter of perspective. The equities in divorce cases are dissimilar to the equities in *Insight Assets*, in that courts in divorce actions must consider what is fair and equitable for the children above what seems unfair to a parent. The Utah Legislature addressed this issue in statute: "In determining any form of custody, including a change in custody, the court shall consider the best interests of the child . . . ." UTAH CODE § 30-3-10(a) Moreover, Utah courts have long held that "the determining factor [in divorce where children are involved] is the best interests and welfare of the child." *Walton v. Coffman*, 169 P.2d 97, 100 (Utah 1946); *Kielkowski v. Kielkowski*, 2015 UT App 59, ¶ 21, 346 P.3d 690. Mr. Sero argued below that the injustice in this case, which justified the defense of laches, was that "Ms. Felix's lack of diligence . . . by waiting nearly ten years to do anything about the unpaid amounts . . . had allowed the outstanding amount attributable to Mr. Sero to rise to nearly $24,000." (R. ¶ 26). While this is certainly a hardship for Mr. Sero, it does not rise to the level of injustice that would allow the court to override the statute of limitations. Here, allowing Mr. Sero to assert laches to cut short the statute of limitations is not necessary to prevent injustice, and actually creates injustice from the perspective of his children for three reasons.

First, allowing laches to cut short the statute of limitations creates a mandate that parents must sue each other as quickly as possible to avoid having laches asserted against them, barring their recovery. This policy forces parents to litigate rather than giving them

time to settle overdue child support claims outside of court. The statute of limitations considers the problems that come with forcing parents of young children to sue each other or risk losing their claim, by allowing parents to wait until their children reach majority to bring claims for unpaid child support. UTAH CODE § 78B-5-202. Forcing divorced couples to litigate or lose their claim in an uncertain amount of time due to laches ultimately results in injustice to the children of divorce, who then have to watch their parents sue each other over which parent has to pay for the child.

Second, the timelines for bringing claims for payment of child support is a matter of public policy and should be decided by the Legislature. In the context of real estate development, the court in *Alpine Homes* held that where "the right to a refund of unspent impact fees, or [the existence of] an enforcement provision, or if they do not like the ways that impact fees are calculated or may be expended, they can seek legislative modification of the statute." *Id.* ¶ 40. These matters are analogous to provisions for child support actions. If parties believe that the timelines for bringing child support claims are unfair, it is the role of the Legislature to modify the statute of limitations, not the role of the court to cut short the statute of limitations in individual cases.

Third, it is well-established that the purpose of laches is to punish "those who slumber on their rights." *Insight Assets*, 2013 UT 47, ¶ 17. However, when laches is used to prevent a claim for overdue child support, the punishment primarily affects the children. Children have a right to child support from both parents, and, until they reach majority, are not capable of "sleeping" on these rights as *Insight Assets* suggests.

Allowing a parent to avoid paying child support for their child is not an appropriate remedy for one parent's delay.

For these reasons, allowing laches to cut short the statute of limitations creates injustice for the children in these divorce actions. Injustice, which ultimately leads to a strained home life, and a limitation of financial resources for children of divorce. In light of the clear legislative act here, allowing laches to alter the statute of limitations violates separation of powers by creating serious injustice for the most important parties: Mr. Sero's and Ms. Felix's children.

CONCLUSION

For the foregoing reasons, this Court should reverse the court of appeals decision that a custody determination must balance the parents' competing rights to interstate travel. Instead, this Court should hold that a custody determination should turn on the best interests of the children. Additionally, this Court should overturn court of appeals precedent in *Veysey I* and *Veysey II* by holding that the defense of laches is not available to cut short an applicable statute of limitations. These holdings will serve the best interests of children in divorce cases, both on a broad public policy level, and in the specific factual circumstances of this case.

SUBMITTED this 23rd day of February, 2018.

/s/ Team #2470
Team #2470
Attorneys for Petitioner/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the requirements of UTAH R. APP. P. 24(a), we certify that this brief contains all of the sections required by the Utah Rules of appellate procedure. Pursuant to UTAH R. TRAYNOR P. (3)(a) we certify that this brief is less than 40-pages, excluding the table of contents, table of authorities, statement of the issues presented, and addenda. We certify that this brief uses a proportionally spaced Book Antiqua 13-point font using Microsoft Word 2017, and In compliance with the typeface requirements of UTAH R. APP. P. 27(b).

/s/ Team #2470
Team #2470
Attorneys for Petitioner/Appellant

Addendum A

IN THE UTAH SUPREME COURT

---ooOoo---

Nancy Felix, Petitioner / Appellant v. Jonathan Sero, Respondent / Appellee.	)	Case No. 20178791-SC

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on May 31, 2017.

IT IS HEREBY ORDERED, pursuant to Rule 51 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted as to the following issues.

1. Whether a custody determination must take into account a parents' right to interstate travel, as established by the United States Constitution.

2. Whether the existence of an applicable statute of limitations forecloses a party from asserting laches as a defense, where the period for establishing laches is shorter than the applicable statute of limitations.

For the Court

Dated: June 10, 2017

_____

John G. Roberts
Chief Justice

Addendum B

IN THE UTAH COURT OF APPEALS

---ooOoo---

Nancy Felix, Petitioner / Appellant & Cross-Appellee, v. Jonathan Sero, Respondent / Appellee & Cross-Appellant.	)	OPINION Case No. 20152311-CA F I L E D (May 22, 2017) 2017 UT App 723

Third District, Salt Lake Department, 19896424
The Honorable F. Leslie Manker
Attorneys: J.D. Carpenter, Jr., Salt Lake City, for Appellant
Archibald Cox, Salt Lake City, for Appellees

Before Judges Sutherland, Marshall, and Zane.

SUTHERLAND, Judge:

¶ 1 This case presents two issues arising from the parties' performance under a divorce decree and a recent attempt by the petitioner, Ms. Felix, to have that decree modified in light of changed circumstances. Ms. Felix and Mr. Sero were married from 1996 to 2005, when they divorced and sole physical custody of their two children was awarded to Mr. Sero. A number of features of the parties' relationship and performance under the divorce decree were raised below, but only two issues are presented on appeal.

¶ 2 First, we address an issue of constitutional concern arising from the district court apparently conditioning Mr. Sero's custody of his children on his willingness to relocate to South Carolina. In the years since the parties' divorce was finalized, Mr. Sero has had primary physical custody of his children and, by all accounts, has provided stellar care for his children. Nonetheless, circumstances have changed such that the district court concluded that it is in the children's best interests to award primary custody to their mother, Ms. Felix, who will be moving with the children to South Carolina. The district court offered to preserve the current custody arrangement were Mr. Sero to move to South Carolina to live within one hour of Ms. Felix, but Mr. Sero declined that offer. Mr. Sero appealed the portion of the judgment granting custody to Ms. Felix, arguing that it infringes his right to interstate travel under the United States Constitution. We agree

with Mr. Sero and reverse the portion of the district court's judgment awarding sole physical custody to Ms. Felix.

¶ 3 Second, we address the relationship between the doctrine of laches and an applicable statute of limitations. Although the parties' divorce decree provides for an equal distribution of child care expenses, Ms. Felix has borne the lion's share of costs associated with child care expenses. This is because, shortly after the decree was finalized, Ms. Felix transitioned the children into a daycare that cost more each month than the daycare the children had been attending when the parties were married. Ms. Felix notified Mr. Sero of the transition and asked that he pay his share of the increased portion of expenses, but Mr. Sero never made those increased payments. When Ms. Felix brought this action to modify the decree, she also raised the issue of the unpaid amounts for child care expenses. Relying on recent precedent from a panel of this court, the district court concluded that Ms. Felix's claims for unpaid childcare expenses are barred by the doctrine of laches. Although we disagree with that rule and urge the Utah Supreme Court to consider the issue, the district court did not err in adhering to that precedent. We affirm the judgment of the district court with respect to the laches issue.

BACKGROUND

¶ 4 This case arises from Ms. Felix's petition seeking to modify a divorce decree that has remained unchanged since it was issued in 2005. Under that decree, Mr. Sero was granted sole physical custody of the parties' two children. The district court found, and we agree, that Mr. Sero did an exceptional job as the custodial parent of his children for the ten years following the entry of that decree. But in early 2015, circumstances between the parties changed when new professional opportunities presented themselves to Ms. Felix.[1]

The Parties' Divorce and Mr. Sero's Time as Caregiver

¶ 5 Following a marriage that lasted nearly ten years, Mr. Sero and Ms. Felix (Mrs. Sero at the time) divorced in 2005. This case arises from Ms. Felix's petition, seeking to modify the divorce decree and related orders regarding custody and childcare expenses. Pursuant to the initial decree and related orders, Mr. Sero was granted sole physical custody of the parties' two children, who were ages one and three at the time

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[1] We pause here to note that, while the record developed in the district court was voluminous, the two issues raised on appeal are quite narrow compared to the scope of the proceedings below. Accordingly, we confine our recitation of facts to matters that are germane to the disposition of this appeal and that are clearly set forth in the district court's factual findings, none of which has been contested by either party.

of divorce. In the years following their divorce, the parties very amicably and conscientiously handled Ms. Felix's visitation of her children, adhering to mutually acceptable parenting plans that are consistent with the standards set forth in the applicable provisions of the Utah Code.

¶ 6 Nevertheless, in his role as the physical custodian of the children, Mr. Sero indisputably handled the greater share of the parenting responsibilities. And it is clear that Mr. Sero handled that responsibility very well. The district court found that Mr. Sero "consistently acted in the best interests of his children, always putting their needs ahead of his own." We note two recent examples of such actions cited by the district court as being persuasive when making that finding.

¶ 7 First, in 2013, Mr. Sero's brother won an all-expenses-paid trip to Bavaria for himself and a guest, and asked Mr. Sero to join him as the guest. Mr. Sero declined when it became clear that the trip would conflict with his daughter's ballet recital and his son's little league baseball playoffs. Mr. Sero testified that "I had arranged for the kids to stay with my parents, and I knew that if I went on the trip, the kids would be fine, but I also knew that sometimes the most important thing to a kid is to look out in the audience and know that your dad is there to support you."

¶ 8 Second, in 2014, Mr. Sero's daughter was sick and, after a short stay in the hospital, required several days of attentive home care. Mr. Sero missed work to provide that care, which created a hardship because his employment did not provide for sick leave to cover the extended absence. Mr. Sero traded shifts with co-workers, worked from home when possible, and navigated that difficult time while fulfilling his obligations to his employer and to his family. The district court found that "such delicate balancing of professional and parenting obligations is not glamorous, but is central to sound parenting."

¶ 9 Citing these, and other similar acts, a court-ordered custody evaluator concluded that it was beyond dispute that Mr. Sero provided a "stable, supportive, and positive growth environment for the children" and had, "as well as any parent [she had] ever encountered, balanced the competing obligations of career, child care, and maintaining positive relationships with an ex-spouse." The district court credited the evaluator's conclusion and indicated that it would take a "strong showing" by Ms. Felix to justify disrupting that positive status quo.

Ms. Felix's Professional Opportunity

¶ 10 Ms. Felix was generally present and supportive as her children grew and very actively parented when called for under the parties' visitation plans. But it is fair to say that the parents took different approaches to providing for their children's well-being. While Mr. Sero was frequently engaged in the difficult day-to-day effort that comes

along with being the primary caregiver, Ms. Felix was, in her words "investing in the children's future."

¶ 11 Mr. Sero agreed that Ms. Felix always "did what she said she would do, even if it was hard to get her to ever go above and beyond, like when [our daughter] got sick." Mr. Sero also testified that "[Ms. Felix] has been a good mom, and she makes the most of the time she spends with our kids; I'm not going to dwell on whether she could have done some things differently, because we always talked about how to balance things and she always at least did what she said she would do." He also said, "so, while I guess I did a lot more over the last ten years, I won't complain because that's how we always shared the load."

¶ 12 There was a justifiable reason for Ms. Felix's different approach to parent-time: she was pursuing an advanced degree in chemical engineering. That pursuit resulted in her having less flexibility to respond to unanticipated events and substantially limited her availability compared to Mr. Sero. That said, the court-appointed custody evaluator testified that Ms. Felix's parenting was "also outstanding," specifically saying that "parents who juggle relationships with their children while pursuing advanced degrees have a uniquely difficult task in weighing the benefits of being present for day-to-day support against the value of laying the groundwork for a better future; Ms. Felix exercised good judgment in making those decisions and, despite how difficult it must have been, gave her children a level of attentiveness and support on par with a parent with fewer obligations or ambitions."

¶ 13 Ms. Felix's pursuit has now yielded the benefits she always hoped it would. She was awarded her Ph.D. in 2015 and, on the strength of the technological breakthroughs described in her graduate thesis, was courted by several pharmaceutical manufacturers. Her new professional opportunities were the catalyst for her bringing this case.

Childcare Expenses

¶ 14 Important for this appeal, the parties relied on professional childcare providers to watch their children while they were at work or, in Ms. Felix's case, in classes or the laboratory pursuing her degree. At the time of their divorce, the children were enrolled at a daycare center near the facility where Ms. Felix worked at the time. Following the divorce, Ms. Felix transitioned the children to a daycare center that offered a more robust curriculum, smaller classroom sizes, more stringent accreditation standards, and generally had a better reputation for providing quality childcare. The new facility also cost $400/month more than the previous facility. Mr. Sero liked the new facility not only because of the higher quality of care, but also because it was closer to his home, making it easier to pick up and drop off the children, which was most frequently his responsibility.

¶ 15 The parties' practice for dividing up expenses had Ms. Felix paying the daycare and seeking reimbursement from Mr. Sero. Immediately following the transition, Ms. Felix provided written verification to Mr. Sero of the increased rates and told him to start paying more to cover his share, but Mr. Sero never did so. Mr. Sero testified that he received that notice and was aware of the obligation,[2] but did not think it applied when Ms. Felix made the change without consulting him. Notably, until she sought reimbursement in these proceedings, Ms. Felix never pressed the matter—she covered the increased costs without ever receiving the additional contributions from Mr. Sero. She testified in the district court that "there were always a lot of things that weren't running perfectly—payment for this expense or that, swapping weekends even when it wasn't convenient—and it just wasn't always feasible to turn those issues into a fight or go to court every time something came up."

The Justification for Relocating the Children

¶ 16 Following publication of her thesis, Ms. Felix garnered substantial attention from employers in the pharmaceutical industry. Within a few weeks, she received competing job offers from four different pharmaceutical manufacturers. The specific job responsibilities and financial compensation varied slightly from offer to offer, but generally speaking, Ms. Felix had her choice of high-level positions at any of the largest and most powerful pharmaceutical companies in the United States. All of those offers would have required her to relocate to a state on the East Coast.

¶ 17 One of these companies was willing to entertain a unique "quality of life" package that Ms. Felix carefully negotiated, in her words, to "make up for lost time." By conceding some financial benefit, she was able to obtain significant benefits related to the children and her ability to spend time with them. First, the offer entitles her to substantial periods of leave and a structured work schedule. Until the children graduate high school, Ms. Felix may take leave for two weeks at a time, six times per year. And when she is not on leave, Ms. Felix will be required to work no more than 40 hours per week. The negotiated employment arrangement also included a generous policy for sick-leave (above and beyond the scheduled leave), in case health problems arise again for either of the children. Second, the company also agreed to cover the costs of tuition and extra-curricular activities at any one of several private schools identified by the company. Third, the children would be entitled to free enrollment for two different study-abroad experiences during summers when they are in high school.

¶ 18 The key limitation to this offer is the requirement that Ms. Felix must relocate to South Carolina to take advantage of these benefits. The company's ability to cover tuition costs results from certain contractual relationships that it has entered into with private schools near its headquarters. The study-abroad experiences require attendance,

[2] Mr. Sero concedes the notice was adequate under Utah Code section 78B-12-214.

in person, at weekly training sessions with group leaders and fellow travelers for the eight weeks leading up to the departure of the trip at the beginning of each summer. And while the company does not prohibit Ms. Felix from traveling during her two-week leave periods, they "strongly encourage" her to remain in the immediate vicinity of their headquarters because of the possibility—however unlikely—that she will be required to assist with highly technical, and highly time-sensitive, chemistry.[3]

¶ 19 The district court's findings gave "no meaningful weight" to the compensation structure Ms. Felix had negotiated, on the basis that modifications to the parties' child support order could effectuate a redistribution of this new wealth, regardless of which parent was awarded custody. But the district court found the other aspects of the new arrangement to weigh heavily in favor of modifying the custody arrangement. The court relied on two key pieces of testimony. First, the court was persuaded by the custody evaluator's testimony that the proposed structure was perhaps the best conceivable approach to childhood development for teenagers:

> Based on our current understanding of the developmental needs of teenagers, I urge the court to grant custody to Ms. Felix. Putting teens in good schools positions them for future success. Participating in varied extra-curricular activities not only contributes to their happiness and growth, but also sets them up to succeed outside of a classroom. The study abroad experiences raise cultural awareness and instill in teenagers a sense of their role in the world, at a time in their lives when that understanding will have a meaningful impact. And as to cultivating the mother-child relationship, all of our science shows that nothing is more likely to foster positive bonding than frequent and prolonged periods of time together. Where it's possible to structure parent-child interactions in the way

[3] The court pressed Ms. Felix on this issue, because it was concerned that the two-week leave periods were "illusory if you're always being called back to the office." Ms. Felix explained the scientific reasons why this kind of urgent need would be unlikely to arise, but why it would be catastrophic if it did and she could not personally report to the lab for mitigation. She explained that, to her, the strong encouragement of her employer meant that no negative consequences would result merely because she travelled, but that if she were to travel and something were to go wrong that could have been prevented by her quick intervention, it would cost her the job. The court credited her explanation and concluded that the limitation is reasonable and also not likely to interfere with the leave time that has been offered. For purposes of this appeal, it suffices to say that no one has challenged the district court's conclusion.

> Ms. Felix contemplates, our studies show there is no better recipe for a positive relationship.

If the court had been ambivalent at that point, additional testimony from Mr. Sero pushed the court's reasoning along. Mr. Sero testified that:

> I'm not a fool. I understand that this means she'll expose our kids to opportunities that I could never give them. Even if the money wasn't an issue, it's a fact of my life that I'm not going to be able to spend weeks at a time with my kids or put them in private schools like these, or send them to Europe in the summer.

¶ 20 The district court, stating that it was struggling with the difficulty of the decision at hand, presented Mr. Sero with a "compromise offer." The court indicated that it could not ignore the benefits that the children would enjoy from their mother's new arrangement, or the equity of now giving Ms. Felix the opportunity to build the kind of relationship with the children that Mr. Sero had been building for ten years. The court stated that, "after years of effort to build this better life for her children, it would be very unfortunate if the court gave so much weight to the status quo that it would not position the family to take advantage of the new benefits being made available or the chance for the children to build an even stronger relationship with their mother." The court nevertheless expressed its reluctance to disrupt the current custody arrangement, which had "provided a positive and stable environment for the children."

¶ 21 The court then stated: "We could resolve this very easily if you would be willing to move to South Carolina and live a short distance from Ms. Felix and the children. Then all of these benefits would be made available, but you could also remain the primary custodian." Mr. Sero responded by saying that there "is just no way I can leave my job, my family, my home, my friends, and the life I have built in Utah." The district court then inquired "what if that's the only way that it makes sense for you to retain custody of the children, is it something you could do?" Mr. Sero stated, "even then, your honor, I don't know how I would make it work because it would be such a financial disruption and it would make it impossible for me to have relationships with people in Utah and, besides, I can't imagine being in a position where, if she moves again, I'd have to pick up and move just to stay close to her and the kids."

The Decision Below

¶ 22 In their arguments before the district court, the parties each presented the issues that are raised on appeal. Mr. Sero's counsel argued that "the constitution requires the court to give some extra level of consideration to Mr. Sero's choice not to relocate," and that "there's a fundamental right to interstate travel, and that includes the right to choose where to settle and find a job, or the right not to be compelled to resettle and

find a new job, at least not without a showing of compelling circumstances and narrow tailoring." Counsel continued that "the other side of the coin is Mr. Sero's constitutional interest in being a parent to his children, which is also infringed if the court takes that right away just because of his exercise of his constitutional rights regarding travel."

¶ 23 The district court rejected Mr. Sero's arguments, concluding that "the constitutional right to travel does not require specialized consideration in child custody cases." The court stated that the relevant statutes require consideration "of the children's best interests, not the parents' preferences regarding residence or relationships." The court also stated that it was "ironic that Mr. Sero would cite a right to travel in support of his desire to stay in one place" and that it "[could] not conclude that a constitutional right to travel operates in the way Mr. Sero claims it should."

¶ 24 The district court found that the best interests of the children would be served by granting Ms. Felix sole physical custody. The court explained its decision as follows:

> Mr. Sero, I very reluctantly transition physical custody away from you and to Ms. Felix. The court is keenly aware of the powerful bond you have formed with your children and the high quality of care that you have provided for most of their lives. And absent profound changes in circumstances like those presented here, I imagine we'd be discussing a different outcome.
>
> But there is no denying just how substantially circumstances have changed. You yourself credited the unique opportunities being presented by Ms. Felix's new situation. And the custody evaluator explained how positive the transition promises to be for your children.
>
> I'm also crediting the fact that your children are old enough to process the change, and that they told the custody evaluator that although they are anxious at the prospect of relocating, changing schools, and not being able to live primarily with you, they are also excited by the prospect of suddenly having much more time to spend with their mother and doing so in a new environment with new opportunities.
>
> This is the closest of calls, but on balance the court cannot ignore the benefits that will flow to your children by virtue of this new situation.

¶ 25 The court modified the existing custody order to award sole physical custody to Ms. Felix. Citing "confidence arising from the parties' ability to work well together in

the past," the court directed the parties to work out a mutually acceptable plan for visitation that would "entitle Mr. Sero to at least as much time with the children as Ms. Felix had enjoyed under the old order."

¶ 26 With respect to the issue of unpaid childcare expenses, Mr. Sero argued that Ms. Felix should be barred by the doctrine of laches from attempting to recover payments after waiting nearly ten years to bring the issue to the court's attention. Mr. Sero argued that he had been injured by Ms. Felix's lack of diligence because, by waiting nearly ten years to do anything about the unpaid amounts, she had allowed the outstanding amount attributable to Mr. Sero to rise to nearly $24,000. If Ms. Felix had pursued the issue sooner, Mr. Sero argued, he could have invoked the court's continuing jurisdiction over the child support order and sought a redistribution of the obligation based on the fact that Ms. Felix unilaterally elected to incur the expense. Ms. Felix argued that, where a statute of limitations has been enacted by the legislature, the statute of limitations should control, and equitable defenses should not be available.

¶ 27 The district court, citing Veysey v. Veysey, 2014 UT App 264, 339 P.3d 131 (referred to herein as Veysey I), and Veysey v. Nelson, 2017 UT App 77, 397 P.3d 846 (referred to herein as Veysey II) reluctantly agreed with Mr. Sero. The court explained that, like Ms. Felix, the court believed the legislative intent that led to the adoption of the statute of limitations should control the time period for bringing a claim. But, the district court concluded, if the defense of laches was available—as this court's precedent makes clear that it is—then Mr. Sero had met the elements for asserting laches as a defense. Noting Ms. Felix's disagreement with the standard being applied, the court stated that she should "raise [her] concerns with the higher courts."

¶ 28 Both parties appealed. Mr. Sero claims the district court erred in awarding custody to Ms. Felix without giving due consideration to his constitutional right to travel. Ms. Felix claims that the Veysey cases were wrongly decided with respect to laches, and that laches should not have been a defense available to Mr. Sero in opposing her claims for unpaid childcare expenses. We reverse the district court's opinion with respect to the constitutional issue, but reluctantly affirm with respect to the availability of the laches defense.

STANDARD OF REVIEW

¶ 29 It is true that the district court's determination of what is in the best interests of children in a custody dispute is entitled to deference and overturned only if we determine that the district court abused its discretion. Davis v. Davis, 749 P.2d 647, 648 (Utah 1988). But Mr. Sero does not argue that the district court abused its discretion in undertaking that difficult examination in this case; he argues that a unique legal standard applies when the district court undertakes that inquiry in the face of a potential infringement on a custodial parent's rights to interstate travel. That raises the question of whether the district court applied the correct legal standard, which is a

question we review de novo, without deference to the district court. See Mawhinney v. City of Draper, 2014 UT 54, ¶ 6, 342 P.3d 262.

¶ 30 The question of whether the defense of laches is available and the application of a statute of limitations is a legal question that we review for correctness. Veysey II, 2017 UT App 77, ¶ 5, 397 P.3d 846; Estes v. Tibbs, 1999 UT 52, ¶ 4, 979 P.2d 823.

ANALYSIS

I. The Constitutional Right to Interstate Travel Requires Special Analysis in Certain Child Custody Cases

¶ 31 We agree with Mr. Sero that the United States Constitution protects a fundamental right to travel, which includes the right to choose one's state of residence, and that the district court erred by not giving due weight to Mr. Sero's constitutional right.[4] The constitutional right to travel is both "firmly embedded in [constitutional] jurisprudence," Saenz v. Roe, 526 U.S. 489, 498 (1999), and notoriously difficult to pin down. In different contexts, the United States Supreme Court has found support for the right in the privileges and immunities clause, the due process clause, the commerce clause, or some other implicit right that is "so elementary . . . [as] to be a necessary concomitant of the stronger Union the Constitution created." Shapiro v. Thompson, 394 U.S. 618, 630–31 (1969); see also Saenz, 526 U.S. at 501–02 (privileges and immunities clause); Jones v. Helms, 452 U.S. 412, 418–19 & n.13 (1981) (citing Williams v. Fears, 179 U.S. 270, 274 (1900)) (due process clause); United States v. Guest, 383 U.S. 745, 758–59 (1966) (commerce clause). We need not distill the source of the right any more clearly than has the United States Supreme Court. We take our direction from that Court's pronouncement that "[a]lthough there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists." Guest, 383 U.S. at 759.

¶ 32 We also agree with Mr. Sero that the right includes the right to be free from state interference in choosing where to reside. A long line of cases has limited states' ability to enact residency requirements that would inhibit an attempt by a citizen of one state to settle in a new state. See Saenz, 526 U.S. at 502. And although those cases apply to citizens seeking to change their state of residence, we cannot fathom that the rule would not also protect a citizen seeking to be free from state interference in his desire to remain in his established state of residence. Where the Supreme Court has stated that "a citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship there[]," we take the Court at its word. Id. at 503–04 (quoting Slaughter-House Cases, 83 U.S. 36, 48 (1872)).

¶ 33 Applying the foregoing precedent, a number of state courts have enacted rules for analyzing the impact of a parent's right to travel when analyzing custody

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[4] We note that this issue was raised in a factually similar case, but was not resolved because it had not been preserved by the appellant in that case. Vanderzon v. Vanderzon, 2017 UT App 150, ¶¶ 30–31, 402 P.3d 219. The conclusion of the court of appeals in that case, that the right was not so clearly established that the district court's failure to account for it constituted plain error, does not impact our analysis in this case, where the issue is preserved. Id. ¶¶ 32–36.

determinations, or have concluded that their respective custody-determination statutes require consideration of the right. Fredman v. Fredman, 960 S.2d 52 (Fla. Dist. Ct. App. 2007); In re Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005); LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000); Jaramillo v. Jaramillo, 823 P.2d 299 (N.M. 1991); Braun v. Headley, 750 A.2d 624 (2000). We agree with Mr. Sero that the United States Constitution requires that the courts of Utah accommodate his fundamental right when making determinations regarding the custody of his children. The district court failed to do so. In fact, the district court appears to have required Mr. Sero to forfeit his right to travel, expressed through Mr. Sero's choice regarding where to reside, in order to maintain custody of his children. This was error that requires reversal.

¶ 34 Having concluded that the district court erred, we are compelled to offer some guidance regarding how to handle this inquiry on remand. As the parties have pointed out to us in their briefing, states take varying approaches to analyzing this issue. We here examine the various approaches and explain why we think the rule in Utah should be that the district court must weigh the parents' rights to travel against the best interests of the children as a means of harmonizing competing constitutional concerns and the statutory standard for making custody determinations.

¶ 35 We find the analysis of the Supreme Court of Colorado to be very helpful both in surveying the competing approaches to this issue and also in setting a workable rule. In In re Marriage of Ciesluk, 113 P.3d at 137–38, the mother and primary custodian of the couple's child sought modification of the applicable parenting time order in order to allow her to relocate out of state with the parties' child. The father opposed the change. Id. The district court in that case rejected the proposed change, which would have had the effect of forcing the mother not to relocate, or to undertake the move and forego the parenting time to which she was entitled under the plan. Id. at 138. The mother argued that the decision, and the way the competing interests were weighed, violated her constitutional right to travel. Id.

¶ 36 The Colorado Supreme Court surveyed three different state approaches before settling on the rule that would apply in Colorado. First, the court noted that at least one state protects the parent's right to travel above competing interests. The court described the "Wyoming Approach" as one where the "right to travel is absolute," such that a parent seeking to modify a custody determination to prevent the custodial parent from moving out of state with the couple's child could not rely on the changed circumstances resulting from the move as a basis for modifying the divorce decree. Id. at 143 (citing Watt v. Watt, 971 P.2d 608 (Wyo. 1999)). The Colorado Supreme Court rejected the approach, concluding that it fails to adequately account for the rights of the non-custodial parent and replaces the fact-driven inquiry into a child's best interests with a presumption in favor of continuing custody for the relocating parent. The Wyoming Supreme Court has since overruled Watt. Arnott v. Arnott, 293 P.3d 440 (Wyo. 2012).

We reject the approach easily—in its attempt to honor the custodial parent's right to travel, it disregards the competing right of the non-custodial parent.

¶ 37 Second, the court noted that at least one state disregards the parent's right to travel and focuses solely on the best interests of the child. In re Marriage of Ciesluk, 113 P.3d at 143–45 (citing LaChapelle, 607 N.W.2d at 163–64). The court described the Minnesota approach as one where the best interests of the child are deemed to constitute a compelling state interest. Id. at 144. In light of constitutional jurisprudence that permits the subjugation of even fundamental rights in service of a compelling state interest, this approach reflects the determination that parental rights must always yield to what is in a child's best interests. Id. The Colorado Supreme Court declined to adopt this approach. Id. at 145. Its decision was based, in part, on unique features of Colorado's custody determination statutes, but it also found persuasive the United States Supreme Court's statement that "'in th[e] highly sensitive constitutional area'" of fundamental rights "'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" Id. at 144–45 (quoting Sherbert v. Verner, 374 U.S. 398, 406 (1963)).

¶ 38 We find the Minnesota approach appealing in its simplicity, but this very case demonstrates how that rule also falls short of the necessary level of constitutional protection. Certainly, the Minnesota approach is easy to administer; the analysis requires no inquiry into the parent's constitutional rights because the court's determination of what is in the child's best interests will always justify infringing the right to travel. There is some analytical appeal in the approach as well. In Utah, many facets of parental rights are fundamental, such that they can be overcome only upon a showing of a compelling state interest. Jones v. Jones, 2015 UT 84, ¶ 26 & n.5, 359 P.3d 603. By implication, then, whenever a custody determination limits one parent's rights because of a best-interests determination, that determination must have reflected a compelling interest.

¶ 39 But although we find the Minnesota approach superficially appealing, we ultimately conclude it is inadequate to balance very substantial constitutional concerns. For instance, if a court concludes that the best interests of the children are going to be served equally well by either custody determination, then the Minnesota approach would give as much weight to a coin toss as it would to the parents' rights. There is no conceivable justification in that hypothetical situation for not analyzing whether one parent's right to travel is weighty enough to tip the otherwise balanced scales. It follows that if, as in this case, the best-interests determination is the "closest of calls," a showing by one parent of a particularly weighty interest in the right to travel may outweigh the marginal difference between how a child's best interests will be served in competing custody situations.

¶ 40 That brings us to the third approach analyzed by the Colorado Supreme Court, which was articulated by the New Mexico Supreme Court's decision in Jaramillo. In re Marriage of Ciesluk, 113 P.3d at 145–47 (citing Jaramillo, 823 P.2d at 307–09). That approach requires courts to balance "the majority time parent's right to travel and the state's concerns in protecting the best interests of the child, but also the minority parent's right to maintain close association and frequent contact with the child." Id. at 146. The Ciesluk court quoted approvingly the New Mexico Supreme Court's conclusion that shifting burdens and creating presumptions "does violence to both parents' rights [and] jeopardizes the true goal of determining what in fact is in the child's best interests." Id. at 146 (quoting Jaramillo, 823 P.2d at 305). The better approach, the Ciesluk court concluded, requires that the district court undertake the "admittedly difficult task of determining, on the facts, how best to accommodate the interests of all parties before the court, both parents and children." Id. (quoting Jaramillo, 823 P.2d at 305).

¶ 41 We find the New Mexico approach, which was adopted by the Colorado Supreme Court and has also been adopted in Maryland, to establish the appropriate standard. Id.; Braun, 750 A.2d 624. We are persuaded that this approach provides the appropriate means of accounting for competing constitutional interests, because it is the best mechanism for analyzing the rights of both parents to travel in the context of the best interests of the child.

¶ 42 Notably, when undertaking this evaluation, the court may very well reach the same result it has already reached in this case. Although the constitutional right to travel was asserted by Mr. Sero, Ms. Felix also enjoys that right. Here, she seeks to exercise that right to take advantage of a new job opportunity in another state. It may be that, in light of all the facts and circumstances, exercise of the right by Ms. Felix is as important to her as Mr. Sero's right to stay in Utah is to him. But there is a meaningful chance that it is not—after all, the job opportunities that catalyzed Ms. Felix's decision to move were presented to her with little searching. Perhaps she is willing to keep looking for something closer to Mr. Sero. Perhaps she is simply not as tied to this job opportunity as Mr. Sero is tied to Utah. Or perhaps she even prefers to stay in Utah but is undertaking the change very reluctantly. The fact that these issues were not developed below is a symptom of the district court applying the wrong standard. Rather than analyze Mr. Sero's and Ms. Felix's constitutional rights to travel, the district court appears to have disregarded them. In fact, it seems to have suggested that Mr. Sero could retain custody only if he was willing to give up his right to travel. This constitutes error that requires remand and reconsideration of the various interests at hand, in a manner consistent with the test we have outlined here.

II. While Veysey May Have Been Wrongly Decided, We Are Bound by Stare Decisis to Affirm

¶ 43 We are bound by precedent to affirm the district court's decision that the doctrine of laches forecloses Ms. Felix's claims for unpaid child support, even though such claims would not be foreclosed by the applicable statute of limitations.[5] Our decision rests on application of the doctrine of horizontal stare decisis.

¶ 44 This court is "bound by [its own] previous decisions as well as the decisions of the Utah Supreme Court." State v. Tenorio, 2007 UT App 92, ¶ 9, 156 P.3d 854. The Utah Supreme Court has provided clear direction regarding both "vertical" stare decisis and "horizontal" stare decisis. With respect to the former, "[v]ertical stare decisis . . . compels a court to follow strictly the decisions rendered by a higher court." Id. (quoting State v. Menzies, 889 P.2d 393, 399 n.3 (Utah 1994)). With respect to the latter, horizontal stare decisis requires that "the first decision by a court on a particular question of law governs later decisions by the same court." Id. (quoting State v. Thurman, 846 P.2d 1256, 1269 (Utah 1993)). This court also has little latitude to overrule its own prior decisions. While the Utah Supreme Court may, in certain carefully measured circumstances, overrule its prior decisions, one panel of this court does not have the power to overrule another panel unless the earlier decision was "clearly erroneous or conditions have changed so as to render the prior decision inapplicable." State v. Menzies, 889 P.2d at 399 n.3.

¶ 45 The precise question raised here—whether the defense of laches may be raised in a case where the claims asserted would not be barred by the applicable statute of limitations—was clearly presented to and decided by a panel of this court in Veysey I, 2014 UT App at 264, ¶ 18. There, the court stated that, if facts supported application of the doctrine of laches "a determination that . . . claims are barred would not necessarily be inappropriate," even where the statute of limitations would not bar the claims.[6] Id.

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[5] Perhaps because she is aware of the deference we would afford the district court, Ms. Felix does not challenge the trial court's factual findings related to the laches issue, or the trial court's conclusion that, in light of those facts, the elements necessary to sustain the laches defense have been met. Rather, Ms. Felix challenges the purely legal determination that laches is available as a defense in this case.

[6] We do pause at the court's use of the phrase "not necessarily," which might be read to suggest that there are at least some circumstances where laches should be unavailable. Veysey I, 2014 UT App at 264, ¶ 18. But if there was uncertainty about the breadth of that holding, it was resolved when the case was presented to the court again after remand. In Veysey I, this court rejected the application of the laches defense because it was not supported by adequate factual findings. Id. On remand, the district court made the contemplated factual findings. Veysey II, 2017 UT App 77, ¶ 14. When the availability of the laches defense was presented as an issue again in the appeal following remand, the court of appeals spoke with much more clarity, holding that "because laches may apply in situations where the statute of limitations has not yet run,

¶ 46 Notably, the facts in this case track quite closely the facts in the Veysey series of cases. As in this case, those cases involved a parent seeking recovery of child care expenses based on daycare costs having increased several years before the filing of a claim. Veysey I, 2014 UT App 264, ¶¶ 2–3. We can find no principled basis for applying a legal rule in this case that differs from the one announced by this court in the Veysey decisions. The issues are the same and the factual circumstances are closely analogous, so that the rule is being applied in precisely the manner contemplated in the Veysey decisions. We must affirm.

¶ 47 Despite the foregoing, we have our doubts about the holding in Veysey II. The appellant in Veysey II raised a number of persuasive arguments against the availability of a laches defense. For instance, Utah Code section 78B-12-109 states that the defenses of waiver and estoppel are not available in certain actions for the payment of child support, a rule that applied in Veysey I due to the posture in that case. Id. ¶ 18 n.6. The appellant in Veysey I argued that that statute foreclosed application of the laches defense. Id. The court disagreed, recounting the legal distinction between estoppel and laches, and "decline[d] to read" estoppel and waiver "more broadly" to include "laches." Id. Yet, is it not "the primary objective of statutory interpretation to ascertain the intent of the legislature?" Bagley v. Bagley, 2016 UT 48, ¶ 10, 387 P.3d 1000 (internal quotation marks omitted). We are not as persuaded as this court's prior panel that the legislature intended the definition of estoppel to be so narrow that it would not include the doctrine of laches. See, e.g., 20C AmJur Pl. & Pr. Forms Quieting Title § 67 (referring to the doctrine as "Estoppel by laches"); 6 McCarthy on Trademarks and Unfair Competition § 31:2 (5th ed.) (same).

¶ 48 Relatedly, the appellant in Veysey II argued that the application of laches where the legislature has established a statute of limitations violates the separation of powers doctrine. Veysey II, 2017 UT App 77, ¶ 7 n.4. This court refused to relinquish its traditional equitable powers "absent an inescapable inference to the contrary." Id. But if the meaning of Utah Code section 78b-12-109 is not as narrow as the court's interpretation, it seems to us that that statute is the "inescapable inference" that gives rise to separation of powers concerns.

¶ 49 Finally, the Veysey II court cites case law from the Utah Supreme Court in a way that suggests that it felt its conclusion was inescapable as a matter of precedent. Id. ¶ 7. While we see no basis for distinguishing this case from Veysey II, we certainly think the holding in the Veysey decisions is distinguishable from the cases upon which those decisions relied. For instance, the panel in Veysey II cites Insight Assets v. Farias, for the

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the existence of a statute of limitations does not . . . automatically preclude application of the laches doctrine." Id. ¶ 7.

rule that "[t]he doctrine of laches may apply in equity, whether or not a statute of limitation also applies and whether or not an applicable statute of limitation has been satisfied." Veysey II, 2017 UT App 77, ¶ 7 (quoting Insight Assets v. Farias, 2013 UT 47, ¶ 18, 321 P.3d 1021). But that language from Insight Assets relates to the application of the purchase money rule in a mortgage foreclosure action, which the court points out are "equitable in nature and therefore subject to the equitable defense of laches." Insight Assets, 2013 UT 47, ¶ 18. Veysey II also quotes Borland v. Chandler for the proposition that Utah has "abolished any formal distinction between law and equity." Veysey II, 2017 UT App 77, ¶ 7 (quoting Borland v. Chandler, 733 P.2d 144, 146 (Utah 1987)). But Borland was decided in 1987 and yet, in 2013, the Utah Supreme Court referred to that very distinction in its decision in Insight Assets, leaving us unsure whether something beyond the "formal distinction" might still be at work in the interplay between equitable doctrines and statutory rules.

¶ 50 Were we deciding this issue in the first instance today, free of the binding force of the Veysey decisions, we have some doubt about whether we would reach the same result. Those doubts are undoubtedly cold comfort to Ms. Felix. Perhaps by taking the time in this case to call attention to our own uncertainty, we will better position Ms. Felix or some future litigant to obtain review of this issue by the Utah Supreme Court.

CONCLUSION

¶ 51 We affirm the district court's decision that Ms. Felix's claim for unpaid childcare expenses was barred by the doctrine of laches. But we reverse the district court's order granting sole physical custody to Ms. Felix, on the basis that the court's determination failed to account for Mr. Sero's constitutional right to travel. Accordingly, we reverse and remand for additional proceedings consistent with the standard we have set forth in this opinion.

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George Sutherland,
Judge

¶ 52 I CONCUR:

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Thurgood Marshall, Associate Presiding Judge

Zane, J., (dissenting in part and concurring in part):

¶ 53 I dissent with respect to the majority's conclusion that the district court's analysis of the custody matter was constitutionally infirm. I concur with the majority's decision insofar as the majority holds that the doctrine of laches was available to Mr. Sero as a defense in this case. But I write separately because I do not share the majority's doubts regarding whether Veysey was correctly decided.

¶ 54 With respect to the constitutional question, I would affirm on the basis that the Minnesota approach, where the best interests of the children are the paramount consideration, is the better rule. See LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000). And because I believe that rule is, in effect, the rule applied by the district court in this case, I would affirm the district court's judgment. In particular, I am persuaded that the best interests of the children is a compelling interest that is adequate to override the competing interests of the parents. Were that not the case, every custody determination would be constitutionally infirm because every custody determination would limit parental rights on some lesser showing, which the Utah Supreme Court instructs us is not allowed. See Jones v. Jones, 2015 UT 84, ¶ 26, 359 P.3d 603.

¶ 55 Further, I cannot see how any court can weigh the value of one parent's right to travel against the other parent's right to travel. How is one parent's right weightier than the other? Perhaps the court means that, on balance, one parent is less likely to be harmed by losing that right, but that seems to me to be poor justification for a constitutional infringement. I am persuaded that the best-interests determination that has long been the bellwether indicator of custody determinations is a sufficiently adequate means of advancing the state's interest in protecting children in custody disputes that that determination, without more, is constitutionally adequate.

¶ 56 Regarding Veysey, I believe the majority in this case strains to find hyper-technical and artificially limited ways of parsing language from prior cases in order to sow doubt where none need exist. It is beyond dispute that the old distinctions between law and equity have been abolished. Borland v. Chandler, 733 P.2d 144, 146 (Utah 1987) (citing Utah R. Civ. P. 2). The fact that Utah courts might sometimes refer to the original nature of certain causes of action, as was the case in Insight Assets v. Farias, 2013 UT 47, ¶ 18, 321 P.3d 1021, does not change the fact that the distinctions are no longer operative.

¶ 57 I think Veysey was rightly decided, but even if reasonable minds could differ with respect to that conclusion, I see no basis for broadcasting doubts about whether it should be followed, or taking the unusual step of urging the Utah Supreme Court to overrule this very case.

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Charles S. Zane, Presiding Judge