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Nevada Supreme Court Clarifies Easement and Homeowners Association Laws

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By Andrew N. Wolf

The Nevada Supreme Court has the final word when it comes to determining real estate law in Nevada. In the past few months, the court has clarified some important issues that will undoubtedly return in other cases as Nevada's population grows and its urban areas expand. The following cases announced some straightforward but important rules.

I. Easements: *St. James Village, Inc. v. Cunningham*, 125 Nev. Adv. Op. No. 21 (June 25, 2009).

An easement is a right to use property owned by another party. Easements sometimes benefit a defined parcel or group of parcels of land. In that case, an easement is said to be "appurtenant" to the lands that enjoy use of the

easement. When an easement benefits a person, as opposed to a parcel of land, it is called an easement "in gross." When discussing easements appurtenant to land, the land that enjoys the easement is called the "dominant estate" whereas the land that is burdened with the easement is called the "servient estate."

In *St. James Village, Inc. v. Cunningham*, the court had to decide whether the servient estate owner has any authority to *unilaterally* relocate an easement burdening its property, provided that the relocation does not materially inconvenience the dominant estate owner.

To facilitate the development of its property in a planned community, appellant *St. James Village, Inc.*, asked the dominant estate owners if *St. James Village* could relocate an easement that traversed across a portion of its prop-

erty. The dominant estate owners refused to consent to the relocation. Accordingly, appellant filed a declaratory relief action in district court, seeking authorization to unilaterally relocate the easement, alleging that the relocation would not materially inconvenience the dominant estate owners. The Second Judicial District Court denied the requested relief and dismissed the lawsuit, reasoning that a 1969 Nevada case mandates that the dominant estate owners must consent to the relocation of the easement. The 1969 case had held that, "the location of an easement once selected, cannot be changed by either the landowner or the easement owner without the other's consent." *St. James Village* appealed and asked the Supreme Court to adopt a different rule, advanced by

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some legal scholars, which permits a servient estate owner to unilaterally relocate an easement so long as the relocation does not substantially affect the dominant estate's rights.

The Supreme Court concluded that when the document creating the easement does not define the easement by specific reference to its location or dimensions, the servient estate owner may unilaterally relocate the easement so long as the relocation does not materially affect the dominant estate's rights. However, when the creating instrument specifies the easement location or dimensions, it cannot be relocated without the express agreement of the owner of the dominant estate. In *St. James Village, Inc. v. Cunningham* the document that created the easement specified its location. Therefore, the court upheld the District Court's ruling that the easement could not be relocated without the consent of the dominant estate's owner.

Comment: This case will come into play in the future as rural lands in Nevada are

more intensively developed, and old easements over farms, forests and pastures interfere with new owners' planned developments. In our law practice, we have handled easement disputes and litigation. Careful drafting of easement paperwork is important because the creating document may become the center of a dispute years after the original parties have sold their properties or passed away, or when circumstances have changed.

II. Homeowners Associations -- Developer's Special Voting Power: *Boulder Oaks Community Association v. B & J Andrews*, 125 Nev. Adv. Op. No. 33 (August 20, 2009)

B & J Andrews Enterprises, LLC (Andrews), owns the Boulder Oaks R.V. Resort (the resort), a common-interest community that consists of 275 recreational vehicle lots. The resort is governed by covenants, conditions, and restrictions (CC&Rs). Andrews argued that the CC&Rs give it an exclusive right to rent the recreational vehicle lots when the lot owners are not

using them and that, pursuant to CC&R, the CC&Rs cannot be materially amended without its approval. Andrews moved for a preliminary injunction when the Association attempted to amend the CC&Rs to remove the exclusive rental provision without Andrews' approval. The district court granted the preliminary injunction, thereby prohibiting the Association from amending the CC&Rs to eliminate the exclusive rental provision. The homeowners association appealed this ruling.

Among other issues, the Nevada Supreme Court decided whether the applicable sections of the community's CC&Rs contravened NRS 116.2107(4), which prohibits units from constituting a class for the purposes of voting merely because they are owned by a declarant. The Supreme Court concluded that the CC&R violated NRS 116.2107(4) by creating an improper voting class in the declarant, making this part of the CC&Rs void. Thus, the Association was not required to obtain Andrews' consent before amending the CC&Rs, as

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the district court judge had ruled. The Supreme Court also ruled that it was proper for the Association to vote on the proposed amendment by mail, as opposed to voting at a meeting. Accordingly, the amendment was proper and the Association should not have been enjoined from enforcing it. Thus, the court reversed the district court's grant of the preliminary injunction.

Additionally, the court ruled that Andrews' consent to amend the CC&Rs was not required under the CC&Rs or NRS 116.2117(4). While the CC&Rs state that Andrews' lots are to be used for the purpose of maintaining a sales and rental office, removing the *exclusive rental provision* in Andrews' favor does not mean that Andrews can no longer rent lots at the resort. Rather, the amendment means that Andrews is not the *only* entity that can rent lots. Therefore, because the amendment does not change the manner in which Andrews can use its lots, its consent was not required. But Andrews was not allowed to keep his ex-

clusive rental franchise that had been inserted in the CC&Rs out of obvious self-interest. Therefore, because more than 67 percent of eligible members voted to amend CC&Rs and its exclusive rental agreement, and because Andrews' consent was not necessary, the court concluded that the amendment was proper.

In a last-ditch effort to keep its exclusive rental franchise, Andrews asserted that the amendment to the CC&Rs was improperly made because the declaration does not allow for an amendment to be made without a meeting. The Association countered that the mail-in vote was permitted according to the Association's bylaws. There are no provisions within NRS Chapter 116 stating that CC&Rs may only be amended at a meeting. Further, NRS 82.326 (1), which governs the action of nonprofit corporation members by written ballot in lieu of a meeting, states that, "unless prohibited or limited by the articles or bylaws, an action that may be taken at a regular or special meeting of members . . . may be taken without a meeting if the corporation mails or deliv-

ers a written ballot to every member entitled to vote on the matter." Here, the Association's bylaws stated that an action that otherwise would be taken at a meeting, can be, "taken without a meeting, without notice and without a vote, if a consent in writing, setting forth the action so taken, is signed by the Members with the percentage of the voting power required to take such action." The Nevada Supreme Court ruled that this voting procedure was valid and the amendment was, therefore, properly approved.

Comments: This case will be a useful tool for lot owners within common interest communities where developers retain various exclusive franchises for sales, rentals and other services, and who retain veto powers over CC&R amendments and other association business. This case is the road map for the unit owners to undo self-serving CCR provisions inserted by a developer when the unit owners control enough units and thereby have enough voting power to do so.

"The Supreme Court also ruled that it was proper for the Association to vote on the proposed amendment by mail, as opposed to voting at a meeting. "

"There are no provisions within NRS Chapter 116 stating that CC&Rs may only be amended at a meeting. "

The Law of Joint Custody: *Rivero* Rewritten

By: **Jamie L. Winter**

In the winter 2008/2009 issue of our newsletter, we highlighted a recently published Nevada Supreme Court decision, *Rivero v. Rivero*, 124 Nev. Adv. Op. 84, 195 P.3d 328 (2008). In the opinion, the Nevada Supreme Court answered two family law questions previously unanswered by the Court. However, instead of providing clarity to the law of joint physical custody, the decision was confusing at best and highly controversial from the start. Not surprisingly, the Nevada Supreme Court welcomed the opportunity to rewrite its opinion after *Elvis Rivero*, the father in *Rivero v. Rivero*, petitioned the state's high court for rehearing.

The facts underlying *Rivero* can be summarized as follows: Mr. and Mrs. Rivero stipulated to a divorce decree which provided that the parties would share joint physical custody of their child, Mrs. Rivero five days per week and Mr. Rivero two days per week. Neither party was to pay the other child support. Less than two months after the entry of the decree, Mrs. Rivero

moved to modify child support. The district court denied her request. Less than one year later, Mrs. Rivero sought primary physical custody and child support claiming that Mr. Rivero failed to spend time with the minor child and failed to provide suitable accommodations and care for the child. Mr. Rivero opposed the request and sought enforcement of the 5/2 timeshare arrangement or, in the alternative, a 50/50 timeshare. The district court concluded that despite conflicting testimony, the parties intended an equal timeshare and the court entered an order granting equal physical custody. The court denied Mrs. Rivero's request for child support.

As outlined in our previous article on *Rivero*, the Nevada Supreme Court's first opinion provided a definition for joint physical custody and a new child support formula to be applied in joint physical custody/unequal timeshare cases. The Court characterized joint physical custody as a shared custody situation where a child resided with or was under the care and supervision of each of the

parents a "significant, but not necessarily equal" period of time. The Court then modified a child support formula adopted in 1998 for cases involving equal time share (*see Wright v. Osburn*, 114 Nev. 1367 (1998)) to be applied in cases involving unequal time share (see footnote 1).

In *Rivero II*, the Nevada Supreme Court abandoned its earlier definition of joint physical custody instead concluding that, "each parent must have physical custody of the child at least 40 percent of the time to constitute joint physical custody. . . . If a parent does not have physical custody of the child at least 40 percent of the time, then the arrangement is one of primary physical custody with visitation." *Rivero*, 125 Nev. Adv. Op 34 at 17.

The Court went on to define primary physical custody and contrasted such custody with joint physical custody. The Court concluded that primary physical custody arrangements, "may encompass a wide array of circumstances," but, "the determination of who has

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"the Nevada Supreme Court answered two family law questions previously unanswered by the Court. However, instead of providing clarity to the law of joint physical custody, the decision was confusing at best and highly controversial from the start. "

The Law of Joint Custody: *Rivero* Rewritten

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primary physical custody revolves around where the child resides.” *Id.* at 20. An example of a primary physical custody arrangement offered by the Court was a situation in which one party has primary physical custody while the other party has limited or no visitation.

The *Rivero II* opinion went on to withdraw the joint physical custody/unequal timeshare support formula outlined in *Rivero I* concluding that the original *Wright* formula without modifications should control. The Court reasoned that, “[b]ecause joint physical custody requires a near-equal timeshare . . . it is unnecessary to utilize a third formula for cases of joint physical

custody with an unequal timeshare.” *Id.* at 32. The Court determined that in primary physical custody cases, the statutory support formula would still control.

Finally, in *Rivero II*, the Nevada Supreme Court and concluded that a district court does not have authority to modify a child support order except upon finding that there has been a change in circumstances since the entry of the order and the modification is in the best interest of the child. *See id.* at 25.

Unlike *Rivero I*, the revised opinion more clearly delineates the different types of custody arrangements and the application of child support formulas based on such arrangements. What a

difference a year makes.

Footnote 1:

1. Calculating the amount of child support each parent must pay pursuant to NRS 125B.070;
2. Considering any support-able adjustments under NRS 125B.080(9);
3. Calculating the percentage of time each parent has with the child(ren);
4. Determining the difference in the percentage of time each parent has with the child(ren);
5. Multiplying each parent’s calculated child support by the time difference;
6. Subtracting the adjusted child support amount from the parent who has the child(ren) more of the time and adding the adjusted child support amount to the parent who has the child(ren) less of the time;
7. Subtracting the smaller number from the larger number; and
8. Applying the statutory caps.

“In Rivero II, the Nevada Supreme Court abandoned its earlier definition of joint physical custody...”

“Among the reasons to consider gifting now is that assets that have appreciated significantly, but are now in decline, can be transferred at less tax cost than when they were riding high.”

Is This a Good Time For Gifting Property?

By John Rogers

Some experts in the field suggest that when values are down from record highs, gifting of assets should be considered. Why? Among the reasons to consider gifting now is that assets that have appreciated significantly, but are now in de-

cline, can be transferred at less tax cost than when they were riding high. This applies to both real estate and personal property such as stocks and appreciated collectables (e.g. stamps, coins, art, etc).

If investors and collectors have confi-

dence that their investments will again appreciate, gifting now could save substantial gift and estate taxes. If the purpose of such gifts is to transfer wealth at a lower tax cost, then now is a time to consider making those gifts.

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Is This a Good Time For Gifting Property?

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One popular way to transfer assets is through family limited partnerships (FLPs) and family limited liability companies (FLLCs). These entities are desirable, among other reasons, because value reductions can be calculated for minority interests (lack of control) and lack of marketability. The entities own the assets, not the partners or LLC members. An interest in one of these entities is rarely considered a controlling interest. Because it is not a controlling interest, it has less value. Also, often there is no market for minority interests, and there are usually restrictions on transfer of interests in a FLP or FLLC. Collectively, these restrictions reduce the value of the entity interests.

In recent years the IRS has had success challenging some of these gifting plans. Of course the IRS picks and chooses to litigate the plans that are the weakest. If the IRS wins, it can scare others away from the beneficial aspects of gifting through FLPs and FLLCs. Often, poor planning results in losses for the taxpayers. Recently, however, a taxpayer had great success. The taxpayer's estate ob-

tained a substantial estate tax refund because the planning was legitimate and well carried out, and expert valuations resulted in substantially lower values in the estate.

The issue for taxpayers is: Will gifting plans succeed in moving assets away from the taxpayers' estate? Or, will the gifting plan fail resulting in the gifted property being included in the taxpayers' estate, resulting in taxation at much higher tax rates?

The IRS applies Section 2036 of the tax code to claim that the value of gifted property remains in the taxpayers' estate. Thus, the two issues of greatest concern to the taxpayer are: (1) showing that the gifts were valid and excepted from Sec. 2036, and (2) showing through competent valuation appraisals that the value of the assets is lower than what the IRS claims.

If FLPs and FLLCs are involved, the taxpayer must also prove that they were validly organized for purposes *other than* saving taxes.

The case of the *Estate of Charles H. Murphy, Jr.* (Case No. 07-CV-1013, filed October 2, 2009) emphasizes successful planning and the stakes in-

volved for both the taxpayer and the IRS. The result, in the taxpayer's favor, yielded a \$40 million dollar tax refund! The case also highlights the importance of careful planning and valuations by capable experts. The entities involved were a FLP (where the taxpayer reserved a 95% limited partner interest), and a FLLC which served as the general partner of the FLP (the taxpayer held a 49% member interest).

Without reviewing the details of the 50 page opinion, here are some of the planning highlights:

Valid non-tax purposes for the FLP:

- Pooling "legacy" assets into one entity (FLP) to be centrally managed consistent with the taxpayer's long-term business philosophy.
- Two of taxpayer's children independently invested in the FLP at formation and had separate counsel during the formation process.
- Each partner received a proportionate interest in the FLP based on the value each contributed.
- Contributions were properly accounted for in

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Is This a Good Time For Gifting Property?

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partnership records. Capital accounts were properly kept, and distributions were made according to partner interests.

- The children had active roles in management.
- The FLP has involved in various business transactions since formation.
- The decedent (“taxpayer”) retained significant assets outside the FLP to cover living expenses.
- The taxpayer did not treat the FLP assets as his own and did not commingle assets.

Section 2036 Exception: Bona fide sale:

- The court found there was a “bona fide sale” which was an exception to 2036. Value was given for entity interests – the interests were not simply gifted.
- The court found that

there was adequate and full consideration for transfer of interests to the partners. Note particularly that two of the children contributed their own funds for interests in the partnership.

The court held that the exception to Section 2036 applied, and the assets transferred by the taxpayer, plus their substantial growth, would not be included in the taxpayer’s taxable estate.

Additionally, the court accepted the taxpayer’s expert’s valuation of the FLP and FLLC interests. Pursuant to the taxpayer’s expert, lack of control and lack of marketability valuation adjustments (discounts), combined for the FLP, totaled 45% and for the FLLC, 50%. When these discounts were applied to the assets in the estate, the value of the estate was reduced by nearly

50% for these assets.

The lessons from this case give encouragement to taxpayers who carefully plan and carry out a gifting or wealth transfer program. If you consider this type of gifting as part of your estate plan, consider: Include family members in the planning and management; organize early enough to establish a history of business investments and activity; follow all formalities when forming and funding your entities; clearly establish non-tax purposes for the entities, and plan for appropriate appraisals when assets are contributed, and excellent valuation appraisals to support discounts on your gift or estate tax return.

If you would like to discuss this case further, please contact the author or your financial or other tax advisors.

“Include family members in the planning and management; organize early enough to establish a history of business investments and activity”

What Happened to Loan Modifications?

By Cassell von Baeyer

We have all heard of the “Hope for Homeowners” and the Obama Administration’s “Making Home Affordable Plan” which was supposed to create incentives for lenders to modify existing loans to

help homeowners keep their homes by reducing payments or principal loan amounts. So what happened? Where are all those loan modifications? Why are banks apparently choosing to foreclose rather than modify loans?

One would assume that it makes more financial sense for a bank to modify a loan then to take back the property and sell it at a loss. However, a recent study by the Federal Reserve Bank of Boston ([Why](#)

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“re-default rates and the high percentage of loans which ‘self-cure’ often make foreclosure a more economically sensible choice for lenders.”

What Happened to Loan Modifications?

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Don't Lenders Renegotiate More Home Mortgages? Redefaults, Self-Cures and Securitization, Federal Reserve Bank of Boston, July 6, 2009) suggests that re-default rates and the high percentage of loans which "self-cure" often make foreclosure a more economically sensible choice for lenders.

The Federal Reserve Bank of Boston study finds that lenders rarely renegotiate home loans. The study found that fewer than 3% of the seriously delinquent borrowers received loan modifications in the year following the first serious delinquency (i.e. more than 60 days in arrears) which *reduced* their monthly payment. Looking at all modifications, including those that did accomplish a modification but may not have lowered monthly payments, approximately 8.5% of seriously delinquent borrowers received

any kind of modification. One finding of note is that the majority of loan modifications actually increased the principal balance of the mortgage (likely due to adding past due payments to the principal balance of the note) which often increases the monthly obligation. Of course we have to wonder, what exactly is the point of a loan modification that does not lower the monthly payment, at least temporarily?

According to the study, 30% of delinquent loans "self-cure", i.e. are paid current by the borrower after a serious delinquency without modification. This lends itself to the conclusion that lenders view that 30% of the money spent on loan modification is wasted. Further, 40-50% of all loan modifications re-default within six months of modification. Of this redefault rate, somewhere around half of the redefaults occur on loans that

did actually reduce the monthly payment.

The authors of the study conclude that it is these self-cure and redefault risks that substantially increase the cost to lenders of loan modification. As a result, lenders see that they are more likely to mitigate their losses with a foreclosure than with a loan modification.

Despite this very disappointing news, we still encourage homeowners to seek a loan modification, *if it will actually provide enough relief for you to make payments on a long term basis*. The Federal Reserve Bank of Boston study does, however, lead us to encourage homeowners seeking modification to carefully weigh the cost/benefit analysis of hiring a loan modification company and/or pursuing a loan modification that ultimately will not provide the relief that you need on a long term basis.

"the majority of loan modifications actually increased the principal balance of the mortgage (likely due to adding past due payments to the principal balance of the note) which often increases the monthly obligation."

"California Court of Appeals held that the constitutional right of privacy regarding medical records is not absolute"

Privacy Rights in Child Custody Matters

By Stacey F. Herhusky

A recent California case appears to be opening the door wider to the possibility of discov-

ery of private medical records of parents when relevant in child custody proceedings. On September 22, 2009, in *Manela v. Superior Court*, the Cali-

fornia Court of Appeals held that the constitutional right of privacy regarding medical records is

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Privacy Rights in Child Custody Matters

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not absolute and held that the state has a compelling interest in promoting the best interests of the child, which must be the primary concern of the court in making child custody orders.

In *Manela*, the Father evidently suffered from a seizure disorder. When he filed a motion for joint custody, he made no mention of the disorder in his moving papers. In Mother's response to the motion, she claimed that Father suffered from seizures which were "loud and frightening" and caused Father to temporarily lose his ability to speak. She attached copies of his prescriptions for an anti-seizure medication to her Declaration. She requested that he be denied joint custody and that he only see the children during the day and that he be restricted from driving with the children. In response, Father denied that he had a seizure disorder and indicated he only has a "tic" which is easily controlled with medication. He attached a Declaration from his physician confirming this and rendering the opinion that there was no neurological reason to restrict his abil-

ity to drive an automobile or to prevent him from caring for his son.

Mother then subpoenaed "all medical records" pertaining to Father. Father filed a Motion to Quash, asserting the physician-patient privilege. In response to Father's motion, Mother also claimed that he had tendered the issue of his alleged disorder, making it ripe for discovery. The Trial Court granted Father's motion and Mother appealed.

The Court of Appeals went into detail as to which records should have been produced and which records were properly quashed as follows:

1. The Court found that Father waived his physician-patient privilege regarding any consultations that occurred during the marriage when Mother was present at the consultations.
2. The Court found that records regarding physicians that the Father consulted when he was a child were protected because, at that time, Father reasonably believed he could fully and freely discuss his medical

condition.

3. The Court made it clear that the records to be disclosed were only those records relative to the tic/disorder.
4. The Court further ordered that the trial court should take steps to minimize the disclosure including *in camera* review or issuing a protective order to limit the dissemination of the records.
5. The Court did agree with Father that he had not tendered the issue since it was Mother who first raised the issues, therefore, the prior case law allowing for discovery of issues once tendered by the party claiming the privilege did not apply.

Courts have been reluctant in the past to tamper with the physician-patient privilege and this case shows considerable movement in this regard which may be useful to parties in future cases where medical conditions of parents have potential impact on their ability to adequately care for their children.

"The Court further ordered that the trial court should take steps to minimize the disclosure including in camera review or issuing a protective order to limit the dissemination of the records."

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From left to right: John C. Rogers, Esq.; Catrina Jenkins; Jamie L. Winter, Esq.; Heidi Shaughnessy; Cassell von Baeyer, Esq.; Stacey F. Herhusky, Esq.; Vicki Munns; Angelina Calafiore; Willow Cornelius; Andrew N. Wolf, Esq.; not pictured: Vera Ann Struc, Esq., of counsel