Romano v. Romano: Another Seismic Shift in Nevada Family Law

BY KEITH PICKARD, ESQ.

Litigants and attorneys alike sometimes feel that they are climbing mountains made from awesome – and sometimes unrelenting – tectonic forces. This feeling is especially true for domestic cases in Nevada, where our decisional law has undergone a number of seismic shifts over the past several decades.

The application of law in domestic cases is often dependent on the interpretation of nuanced facts, not on a black-and-white interpretation of an unambiguous contract or statute. This situation creates issues that are more prevalent in family law than many other practice areas. For instance, it means that a lack of family-law experience on the appellate bench can lead to opinions that miss nuance and lead to confusion in practical terms. And when policy decisions are made without the crucible of experience and legislative debate, it can lead to unexpected outcomes and leave family-law courts and family-law practitioners wrestling with the ensuing application. (Of course, appellate courts must focus on the issues in front of them and make decisions based on their understanding of the existing state of the law.)

In 2022, Nevada witnessed yet another seismic shift in family law. In *Romano v. Romano*,[1] the Nevada Supreme Court significantly modified the standard to be used when considering a modification of joint physical custody. In an attempt to clarify the standard, the court reviewed its decades-long "inconsistent" approach to modifications of custody.[2]

In the 1968 *Murphy v. Murphy* decision, the Nevada Supreme Court affirmed a long line of prior cases, creating the standard for considering whether modification was warranted: when "(1) the circumstances of the parents have been materially altered; and (2) the child's welfare would be substantially enhanced by the change."[3]

Custody modification cases were largely determined under this standard until 1994, when the *Truax* court noted the distinction between primary physical custody (when one parent retains the majority of the parenting timeshare) and joint physical custody (when the timeshare is more equally divided).[4] *Truax* held that the "simple facts" of the *Murphy* case and "the plain language" of the statute considered were focused solely on primary physical custody cases, not the joint physical custody found in the *Truax* case. The *Truax* court then (intentionally or not) created a lesser burden by finding the lower court's mere consideration of

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the "best interest of the child" was sufficient in joint physical custody cases. This finding made sense to many practitioners given the facts supporting a joint physical custodial arrangement – which was only starting to become commonplace – meant that neither parent was deemed superior, then so too should the test to modify the arrangement be easier to overcome.

Then, the Nevada Supreme Court strengthened its stance with *Ellis v. Carucci*, where it continued the timeshare distinction and established a slightly, but significantly, different two-pronged test to modify primary physical custody that turned the focus from the circumstances of the parents to solely the circumstances of the child.[5] The *Ellis* test determined that support for a change from a primary custodial arrangement – where one parent had been shown to be the appropriate caregiver – needed to be significant, whereas the *Truax* test was merely a review of the child's best interests when all other things were thought equal.

Subsequently, several seminal cases were handed down dealing with modification of custody, including principally *Rivero v. Rivero* (establishing a 40 percent timeshare bright-line rule for determining which label – primary or joint – should apply)[6] and *Bluestein v. Bluestein* (abrogating *Rivero's* 40 percent rule for a simple, but less predictable, "best interest" consideration.) [7]

In the midst of this back and forth, the Nevada Legislature poked its head up when it passed Assembly Bill 263 in 2015. In a partial response to *Bluestein*, the measure reasserted the *Rivero* 40 percent threshold, but it did so in a practical, prospective way.[8] Per *Bluestein*, no longer would a trial court be looking at past (and now-irrelevant) mutual decisions made by the parents when they were together, but now the court will prospectively consider whether a parent is unable to exercise 40 percent of the time. This consideration applies in both initial and modification cases.

So, to say that the courts' approach to modification of child custody has been inconsistent is a bit of an understatement, but in all cases, the courts remain focused on the "best interests of the child."

Now *Romano*.

The Supreme Court's logic in approaching *Romano* is straightforward. No modification of custody should occur unless and until there has been a change of such magnitude that justifies the change, and the change requested must be shown to be in the child's best interest.[9] Fair enough. But the court went much further by abrogating the *Truax* test for joint physical custody, applying for the first time (and without warning) the *Ellis* test meant for changing from primary physical custody to all modification cases.

Of course, *Truax* said that any change of joint physical custody should be dictated by the best interest of the child, and *Ellis* also pointed to the best interests, though setting a higher standard for changing from primary physical custody. In an effort to find consistency, *Romano* standardized the test for all cases – at the higher bar. Now, only a significant change in the child's circumstances which is *negatively* affecting that child will justify a change in joint custody, even if the parties themselves had informally adopted the changed arrangement for the benefit and *improvement* of the children.

Additionally, the appellate courts' shifting tectonics came up again on the heels of *Romano*. In *Monahan v. Hogan*, the Court of Appeals considered one parent's request to relocate with the children over the objection of the other parent. There, the court rightly held that application of the child's best interests under NRS 125C.0035(4) applied as part of the overall analysis set forth in the two-part test for child relocation cases adopted by AB263 (2015).[10] In *Monahan*, the parents had joint physical custody and a change was required to accommodate the relocation.

When looking at these two cases, an argument can be made that one seeking relocation must now demonstrate a significant change in the life of the child, not the parent's relocation, as a prerequisite to relocation. However unlikely that was the intent of the *Romano* court, it will be interesting to see whether this new clarification works to settle the ever-shifting standards of the appellate courts in custody cases.

ENDNOTES:

1. 238 Nev., Adv. Op. 1, 501 P.3d 980 (2022).
2. *Id.* at 4, 501 P.3d at 982.
3. *Murphy v. Murphy*, 84 Nev. 710, 711, 447 P.2d 664, 665 (1968).
4. *Truax v. Truax*, 110 Nev. 437, 439, 874 P.2d 10, 11 (1994).
5. *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007) ("modification is appropriate when (1) there has been a substantial change in circumstances

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affecting the welfare of the child, and (2) the child's best interest is served by the modification.") This test resulted in a shift from a generalized change in family circumstances to a focused look at the child's changed circumstances that could be shown to be negatively affecting the child. No longer were parents' changed circumstances considered.

6. 125 Nev. 410, 216 P.3d 213 (2009). There are several other important cases that the *Romano* court mentions, but these two are included simply to further illustrate the inconsistency the *Romano* court discussed.
7. 131 Nev. 106, 113, 345 P.3d 1044, 1049 (2015).
8. AB 263 intended to do much more than respond to *Bluestein*, but for purposes of this article, the rest will be left for another time. *See also* Keith Pickard, *AB 263—The Parental Rights Protection Act of 2015: Legislative History*, 28 Nev. Fam. L. Rep. 6 (2015).
9. Interestingly, the *Romano* court cites *Family Law and Practice* § 32.10[1] (Arnold H. Rutkin ed. 2020) ("The legal principles governing modification of child custody are well settled. First, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests."). But the prior discussion shows that, in Nevada, the principles are anything but "well settled."
10. Also interesting was the effort the Court of Appeals took to parse the difference between the "best interest" and "best interests" language used by the Legislature. *Monahan v. Hogan*, 138 Nev., Adv. Op. 7, 507 P.3d 588, 592–93 (Nev. App. 2022). Though the court concluded that the terms were essentially interchangeable, it is yet another example of how legislators (and judges) must be careful in the language they choose – some might think there's a difference to take note of.

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