NFLR NEVADA FAMILY LAW REPORT

A Publication of the Family Law Section of the State Bar of Nevada

Volume 1, Number 3 Winter, 1987

Young Children as Witnesses in the Family Court

By The Honorable Charles M. McGee

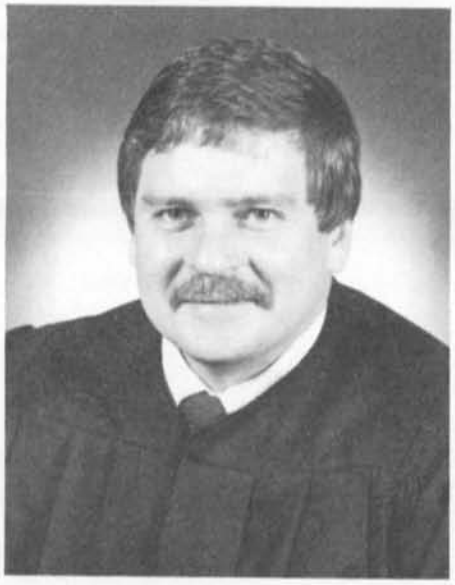
Introduction

Primarily as a result of the increased frequency of detection, intervention and prosecution in child sexual abuse cases, there has been something of a recent explosion of scholarly, legislative and judicial attention to problems relating to the child as a witness. Especially when viewed in the context of sexual victimization, the subject of young children testifying is as deep and disturbing as it is wide-ranging and multidisciplinary.

This short article, however, has a much more narrow and non-scholarly focus, as it discusses certain aspects of using the child as a witness in a family court matter.

In a domestic court setting, issues which relate to children and their testimony most often arise in a custody dispute, but they may also emerge in the context of a hearing on a petition for the termination of parental rights, a hearing on a preliminary injunction, a child protection hearing, and sometimes in a mediation or arbitration proceeding. The burden is almost always different than in a criminal case (i.e., clear and compellling, or a preponderance of the evidence versus beyond a reasonable doubt), and the traditional rules of evidence are often relaxed either by the Court in exercising its inherent discretion or pursuant to specific statutory authority such as NRS 432B.530(3).

In many cases, the ideas expressed in the article represent the personal views of the author. They should not be seen as the opinions or the practices of any other judges in the Second Judicial District



The Honorable Charles M. McGee

Court, or any other members of the Nevada judiciary. The article is designed, however, to assist the legal practitioner in weighing certain considerations before a child is asked to give testimony before any judge, referee or arbitrator. It also discusses a few techinques which may be helpful in preparing the child witness.

This article suggests that in many cases a three-step approach should be used by the attorney:

1. A first step to decide whether a young child should testify at all (The Assesment Interview); and if so,

2. A second step to convince the Court to listen to the child (the *Motion in Limine*); and

3. A third step to prepare the child for the experience (Courtroom Orientation).

The Assessment Interview

The threshold issue, of course, is whether the child should testify at all. For a number of cogent reasons, many trial judges are quite apprehensive about the prospect of children coming into court to testify. For example, some judges rightly feel that they should not give too much credence to the opinion of a child, especially a young child. Moreover, in many cases there is a suggestion that the parents have been "tampering with the evidence," so to speak, by trying to fashion or manipulate the child's testimony. Then, too, many judges feel that it may not be such a good idea to create a situation which allows the child to walk out of the courtroom with the perception that he or she played a fundamental role in the decision-making process, because that perception may produce a burden for the child which may not be in his or her best

Continued next page

In This Issue

NFLR

EDITOR
Ronald J. Logar

ASSOCIATE EDITOR
James L. Spoo

MANAGING EDITOR
Christine Cendagorta

ARTICLES EDITOR
Jim Jimmerson

ARTICLES EDITOR
Richard W. Young

ARTICLES EDITOR
John Ohlson

SUBSCRIPTION EDITOR
Sue Saunders

NEVADA FAMILY LAW REPORT is a quarterly publication of the Family Law Section of the State Bar of Nevada. Mailing address: 243 South Sierra Street, Reno, Nevada, 89501 (702) 786-5040.

SUBSCRIPTION PRICE FOR NON-SECTION MEMBERS is $35 payable in advance annually from January 1 to December 31. There are no prorations.

The *NEVADA FAMILY LAW REPORT* is intended to provide family law related material and information to the bench and bar with the understanding that neither the State Bar of Nevada, Family Law Section editorial staff nor the authors intend that its content constitutes legal advice. Services of a lawyer should be obtained if assistance is required. Opinions expressed are not necessarily those of the State Bar of Nevada or the editorial staff.

This publication may be cited as 19__ NFLR _____.

Nevada Family Law Report is supported by the Family Law Section of the State Bar of Nevada, NFLR subscriptions, and the following corporate sponsors:

First Interstate Bank
Grant Thornton
The Baker Group

Seminar Huge Success!

The second annual Family Law Seminar, sponsored by the Family Law Section and the State Bar of Nevada, was held in Reno on December 5, 1986, and in Las Vegas on December 12, 1986. Attendance was 127 at both seminars.

The format was a hands-on approach, solving problems and issues most often occuring in family practice and tailored to the interest in each location. The presentation included panel discussions, examinations of the psychologist in child custody cases, and trial pointers from the court's perspective. The program materials were of high quality and covered the subject adequately. Both seminars were well-received. The overall evaluation by the attendees was good to excellent.

The Family Law Section wishes to thank each contributor and all the attendees. It is your membership in the Section and the support of its seminars that enables it to underwrite this publication (*Nevada Family Law Report*) and expand its services to the Bar.

NFLR Seeks Family Law Articles

The *Nevada Family Law Report*, published quarterly by the Family Law Section of the State Bar of Nevada, seeks to provide interesting and substantive family law material to educate both the bench and the bar. **NFLR needs articles for future issues.** If you are interested in writing critiques of pertinent cases, reports/opinions of family law legislation, or discussions of family laws trends and issues, please request author's guidelines from NFLR, 243 South Sierra Street, Reno, NV 89501, and contact an articles editor to discuss your idea.

Articles published in the NFLR are eligible for continuing legal education credits. Authors must request an application for approval of authorship in publication from Karen Bernhardt, executive director of the State Board of Continuing Legal Education, P.O. Box 12446, Reno, NV 89510. Telephone: 826-0273. The CLE Board then reviews the article and application.

interest.

So, I think that the first question that the practitioner asks is whether or not it is fair to the child to testify at all. The attorney should look to see whether the child has been programmed to say something, because in most cases a rehearsed testimony will be detected by the judge and deemed without value. Finally, the attorney should decide whether the evidence which he seeks from the child can be elicited from other sources or witnesses which might alleviate the problem altogether.

In my view, competency is probably one of the most misleading issues in this entire topic of children as witnesses.

Assuming the decision is made to allow the child to say something to the judge, referee or perhaps even a jury, the second issue which the attorney should address relates to competency. In my view, competency is probably one of the most misleading issues in this entire topic of children as witnesses. The traditional approach comes primarily from the 19th Century opinion of the United States Supreme Court in *Wheeler vs. U.S.*, 159 U.S. 523 at p. 524, 16 S.Ct. 93, 40 LED 244 (1885). In that decision the Court held that the admissibility of a child's testimony is dependent upon the "...capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as his duty to tell the former."

Most trial attorneys are familiar with the kind of *voir dire* which is conducted by the trial judge in this traditional approach. The child is asked if he knows how to distinguish between right and wrong; does the child know what a lie is; is it bad to lie?; where does he go to school?; who are the members of his family?; and so on.

I submit that this threshold inquiry is of very little value because the child is almost always going to give the expected answers, and few attorneys are going to even ask the judge to talk to children who do not possess a rudimentary capacity to inform.

In the judgment of this author, the far more important area of inquiry as to competency relates to the stage of development of the potential child witness. Most elementary teachers will confirm that even among individuals of exactly the same age

and roughly the same kind of background and upbringing, the child's stage of development varies dramatically among children of young ages, and depending upon the particular stage of development, and cognitive and expressive maturity, the interviewer must vary his approach to the questions he will ask.

Thus, it is necessary to test the child in advance of the hearing in an effort to determine a number of important factors, as follows:

1. First, try to determine the limits of the particular child's cognitive capacity; that is, the ability of the child to form impressions after observing events. This might be accomplished by asking the child to recount a recent experience. Or, the interviewer can set up a simple game where the child is asked to explain what he just saw, read or participated in.

2. In the same process it is a good idea to try to gain some idea of the vocabulary which the child has developed. Many young children have a vocabulary of less than than a couple of hundred words, and perhaps the most common mistake an attorney makes in questioning a child is by using "adult" words or, even worse, compound questions and legal nomenclature in forming a question for the child to answer. When the interviewer has an idea of what words the child understands, he should use those words — and the answer is likely to be much more straightforward and of evidentiary value. At the same time that the interviewer is checking for vocabulary limitations, he can acquire some impression of the child's ability to organize his thoughts.[1]

3. In the same preparatory interview, the interviewer should reach some judgment as to the child's temperament and excitability, which also vary widely. Talk to the child about what excites him or makes him sad. It may be difficult to tease these things out of the child, but one technique which often produces results is to get out from behind the desk and sit down right next to the child so that the interviewer is at the child's level when the youngster is recounting events which have meaning to him.

4. Finally, you probably want to make a pre-assessment as to whether the particular child is the kind of child who could stand up to cross-examination; would be better in talking to the judge alone in chambers; or, perhaps, would be better off if discreetly videotaped.

There is an important caveat to the attorney who is preparing the child for a possible court appearance. If the attorney is dealing in an area of trauma and he is trying to retrieve testimony relating to the events that gave rise to the trauma, the attorney probably should not even broach the issue until he has received some advice from a qualified professional. Psychiatrists and psychologists are gradually beginning to develop some standard interviewing techniques for traumatized children. For example, it is currently very popular to use sexually explicit dolls in interviewing children regarding possible child sexual abuse, but these are not techniques for the lay person or amateur. And even so-called "professionals" should be carefully questioned to see that they do in fact have some genuine training and experience in these areas before they are permitted to evaluate the child. There is no frustration more poignant to a trial judge than to arrive at a conclusion that the testimony of a child on an important traumatic event or series of events has been contaminated by reason of post-trauma suggestions inserted into the child's memory process by a parent or therapist, because for evidentiary purposes, the events may be hopelessly confused or forever lost.

...perhaps the most common mistake an attorney makes in questioning a child is by using "adult" words or, even worse, compound questions and legal nomenclature in forming a question for the child to answer.

Using a *Motion in Limine*

Many attorneys make the mistake of simply asking the Court a few minutes before the hearing or at a recess whether or not he or she wishes to hear any testimony from the young child, and many judges by instinct will respond that they do not.

If instead, the attorney files a *motion in limine* well in advance of the hearing (or at least, with the Trial Statement), then the Court is given ample time to reflect on the issue and there is less chance of a precipitous rejection. The motion should contain a carefully thought-out statement for the rationale behind the request that the Court hear testimony from the child. If the attorney is armed with information that shows that the particular young child is cogent, knowledgeable, relatively relaxed and that certain concerns about the child's age, stage of development and truthtelling ability have already been addressed and accommodated, the attorney is much more likely to find that the judge would be inclined to hear from the child.

In fact, it might even be a good idea to substitute the *motion in limine* for the competency *voir dire* — using experts as necessary. The attorney might take the opportunity to explain to the opposing attorney, as well as to the judge, in chambers and outside the presence of the young child, his evaluation, or the expert's opinion, of some of the factors relating to vocabulary limitations and stage of expressive development discussed earlier.

Courtroom Orientation

Once the decision has been made to go forward, a number of practical considerations must be then addressed. Almost all people unfamiliar with the legal system are intimidated by its environment. The courtroom does not, however, have to be an intimidating place for the child, as most children readily accept representations or procedures which mitigate what otherwise might be a strange and even hostile place to them.

I believe that young children pick up on adult sensibilities, especially those of their parents. If a parent is uptight, even if he or she doesn't say anything untoward to the young child, the young child will intuitively sense and sometimes adopt or mimic a parent's apprehensions. To alleviate problems in this area, an attorney might consider selecting a third person known and trusted by the young child who will bring the young child to the courtroom and, hopefully with the Court's help, walk the young child through the courtroom surroundings as if they were on some kind of learning adventure. In other words, the young child should be introduced to the bailiff, to the Sheriff's Officer, if one is present, to the Judge in his black robe; to the court reporter, to the Clerk, and to the other attorney. And if the young child is particularly apprehensive after this orientation process, it may be a good idea to ask the third person, *not* the parent, to act as something of a courtroom guardian for the young child so that the child knows that his trusted friend is present and is going to be very pleased to hear the young child

Continued next page

tell the Court or the jury the truth.

Conclusion

Great care should be exercised by an attorney in reaching the decision to offer testimony from a young child as a witness in Court in a Family Court type of proceeding. Most judges will consider the best interests of the child an overriding obligation. Nonetheless, if the Court can be assured that the child will not be intimidated or made to feel that his testimony has caused harm to his parents or others, then the attorney can proceed with caution.

There is no frustration more poignant to a trial judge than to arrive at a conclusion that the testimony of a child on an important traumatic event or series of events has been contaminated by reason of post-trauma suggestions inserted into the child's memory process by a parent or therapist, because for evidentiary purposes, the events may be hopelessly confused or forever lost.

The practitioner should conduct a prepatory inquiry which goes beyond questions of mere competence to testify, and causes the attorney to become sensitive to the emotional development and intellectual and expressive limitations which the child manifests. A *motion in limine* is an excellent tool to attempt to convince the Court of the propriety of a child testifying, and if the Court does grant permission, steps should be taken to orient the child to the Courtroom and his expected role so that the child is made to feel as comfortable as possible.

While psychiatrists and other professionals from disciplines outside the legal system may offer valuable insight in some areas, these common-sense techniques do not require great sophistication or expertise, and yet they may go a long way in protecting the child from being harmed by the system.

The Honorable Charles M. McGee presides in the Second Judicial District Court, Department 2, and is a recognized authority in Family Court matters.

NOTES

[1] For a good, general discussion of these issues, see Elizabeth Loftis' "Memory-Changes and Eyewitness Accounts" (1982) in Trankell, a., ed., Reconstructing the Past, page 189; Marc Lindberg, "Is Knowledge-Based Development a Necessary and Sufficient Condition for Memory Development?" (1980) 30 Journal of Experimental Child Psychology, page 401.

Awarding the Family Business to the Wife

By Ronald J. Logar

It is difficult to convince the trial court to set aside the family business to the wife. The reasons for denying such relief are persuasive: the husband has been the operating spouse, with wife having little if any participation in its operation; where the husband has the special skill and training, the wife does not have experience in the field. Simply, the operating spouse is favored to continue in the sole management of the family business after dissolution.[1]

The presence of other factors, however, may support the wife's position. A recent case provides certain guidelines to follow. *In re: MARRIAGE OF KOZEN* (9/29/86).[2]

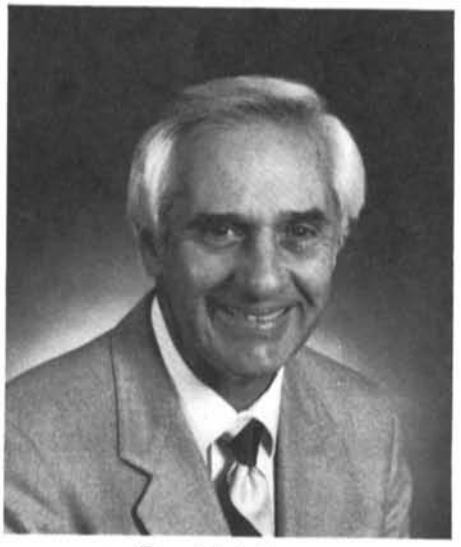
In *KOZEN*, the parties owned two Burger King franchises in Southern California — one "highly profitable" in Hollywood and another newer operation in Burbank, owned with a partner. The husband had been solely responsible for their management. Wife, during the 13-year marriage, had been a homemaker and mother to their children. The Hollywood Burger King was valued at $1,187,000, and their residence at $700,000.

The *KOZEN* decision provides certain guidelines to be applied where both parties seek the family business.

Wife decided to become the Burger Queen of Hollywood by requesting that the larger and more profitable Hollywood franchise be set aside to her. A representative of Burger King testified that the franchisor maintained a management training program available to all franchisees, that the wife could satisfactorily complete the program, and that the company would accept her as an owner-franchisee.

Much to husband's dismay, the trial court awarded the Hollywood franchise to wife; awarded the residence and Burbank franchise to husband; required wife to make an equalizing payment to husband; and ordered husband to assume the remaining debt on the Hollywood Burger King.

The trial court explained that wife carried the burden of proving that she could operate the business profitably. It found that she could learn the business with no prior experience, much like the husband did when the first franchise was developed. Further, the court pointed out that wife could support herself and the children from the profits, without relying upon the husband in a dissolution given to acrimony between the two parties. Husband's motion for reconsideration and a new trial was denied. On appeal, the decision was affirmed — the appellate court distinguishing the many cases cited by the husband as authority for overruling the trial court, as being inopposite.



Ronald J. Logar

In *In re: MARRIAGE OF BURLINI* (1983),[3] the family business was a coin laundry operation consisting of washers and dryers located at various apartment complexes. The court denied wife's request for one-half of the business since only the husband had the skill and experience to service the machines, which was necessary to prevent the destruction of the business.

Similarly, in *In Re: MARRIAGE OF SMITH* (1978),[4] the husband had performed the technical work for the family's custom sign-making business while the wife performed the clerical and bookkeeping duties. Again, the business was awarded to husband since his technical knowledge and experience were necessary to the business.

In *KOZEN*, the evidence clearly showed that wife could do as good a job as the husband at running the business even though the husband had formed and developed it. There was no showing that the husband had any special training when the franchise was acquired years ago. There was no reason that the wife could not perform the same functions as the husband — and as well — such as "interfacing" with the franchisor, restaurant managers, purveyors, equipment manufacturers and the insurance company.

The *KOZEN* decision provides certain guidelines to be applied where both parties seek the family business. First, if it is the husband who has operated the business, then the wife must provide proof that she possesses the necessary skills to run the business, or that she can learn the skills without substantial impairment of its operation. An expert witness should be used for this purpose. Second, show that the income from the business is necessary to support the wife, children or another legitimate need. Third, establish that the wife needs to be self-sufficient without dependence upon the husband. (This latter consideration is relevant where the divorce has been acrimonious or where husband's income fluctuates.)

KOZEN can serve the practitioner well by providing guidelines for reasonable consideration of the wife's request for the family business.

Ronald J. Logar is a member of the Washoe County Bar, practicing principally in the area of Matrimonial Law. He is a fellow of the American Academy of Matrimonial Lawyers, chairman of the Family Law Section of the State Bar of Nevada and editor of the Nevada Family Law Report.

NOTES

[1] *GOSS V. EDWARDS*, 68 CA 3.d 264, 137 CR 252 (1977).

[2] California Court of Appeals, 2 Civil B008375 and B009412 (DIV.4) _____ CA 3.d _____, 230 CR 304.

[3] 143 Cal. App. 3.d 65, 70-71, 191 Cal. RPTR. 541.

[4] 79 Cal. App. 3.d 725, 748-751, 145 Cal. RPTR. 205.

Forrest: Revisited

By Theodore Schroeder

The Nevada Supreme Court's decision in *Forrest*,[1] aptly analyzed by James J. Jimmerson, Esq., and Lynn M. Hansen, Esq., in the inaugural edition of *Nevada Family Law Report*, raises two issues:

- Was the *Forrest* decision foreseeable?
- Should *Forrest* be the law of the State of Nevada?

Background

Forrest holds that statutorily[2] each party to a marriage has a continuing interest in community property. Thus, even though husband and wife separate, assume residency elsewhere and perhaps commence new relationships, they continue to accrue an interest in the earnings, pension and other community efforts of the other.

Forseeable

Forrest is not a surprise. The Nevada Supreme Court in *Ellett*[3] and *Haws*[4] foreshadow the *Forrest* decision. In *Ellett* our court recognizes the wife's continuing interest in the husband's retirement plan after the separation of the parties and indeed after a partial decree terminating the marriage. In *Haws*, the court refers to the legislative effect on California law[5] — leading one to conclude that since Nevada has no similar legislation, a separated party in Nevada has a continuing interest. *Forrest* validates this conclusion.

Question

The question is whether *Forrest* should be the law of the State of Nevada. I think our law needs changing. The *Forrest* holding is loaded with too many problems.

For example, husband and wife separate and assume separate residence. Husband owns as separate property an unimproved lot on which he decides to build his home. Wife manifests no interest in the home and contributes no help or dollars. Husband builds the home using his construction skills and wages. The parties, not realizing the legal consequences, do not enter into a written separation agreement. Husband would not have improved his separate property if he believed his estranged spouse was legally capable of gaining a financial interest in the home. The husband's thinking does not match the Nevada Supreme Court's as witnessed by the *Sly*[6] decision. *Sly* gives the wife an interest in the home even though the husband improved his separate property with his efforts and wages after the parties' separation. Thus, the *de facto* separation of the parties fails to terminate the *de jure* effect of our community property law.

Theodore Schroeder

The *de facto* separation, as exemplified by the *Forrest* decision, is fraught with legal ramifications which will continue to haunt litigants.

Law v. Reality

How then can we deal with the reality of a *de facto* separation when faced with the *Forrest* decision?

One possibility is to enact legislation allowing the law and reality to meet. The State of California has such legislation.[7] California sets over to each spouse the "community property" earned by the respective spouse *after* separation. California judicial interpretation of such legislation is supportive. For example, the California case of *Lopez*[8] gives to the separated husband his law practice earnings after the separation of the parties. California does distinguish between the separated spouse's earnings and monies flowing from previously held community property. In one case the wife was allowed to retain gambling winnings because the money for the winning sweepstakes ticket was her separate earnings. In another case, the husband's casino winnings were held to be community property because the *source* was community property. Thus, the wife was allowed to share in the winnings.[10] Draw your own inferences as to the ability of the California courts to "do equity."

Another possible solution is to wait for a similar case and then submit a Brandeis-type brief[11] to the Nevada Supreme Court. Such a brief would fully set forth the background, supported by facts and figures and request a change in order to make the laws meet reality.

Another possible solution is to educate the public. The Family Law Section, in conjunction with the State Bar, could publicize the pitfalls of a *de facto* separation. The reality of this matter would be brought home to the public and the situation changed. But such a solution is expen-

Continued next page

sive and complete communication is highly unlikely.

Another solution is for members of the Bar to be more inventive in *de facto* separation situations. If the *de facto* separation is thoroughly analyzed, perhaps legal propositions are present which avoid the imposition of the *Forrest* thinking. For instance, while our statute reads that community property is to be equitably divided[12], perhaps with sharper analysis during the preliminaries the issue of dividing assets acquired after separation could be resolved in a more equitable manner.[13]

Another solution is to find an oral agreement at the time of separation of the parties as to after-acquired property.[14] There is also the possibility of finding an estoppel.[15]

In summary, there are other possibilities, but the easiest is through legislation.

Conclusion

The *de facto* separation, as exemplified by the *Forrest* decision, is fraught with legal ramifications which will continue to haunt litigants. To simply accept the situation as it exists does not, except in rare cases, comport with the reality of the situation, nor does it render to divorce litigants a truly equitable division of their property.

Theodore Schroeder is a Reno attorney and member of the Family Law Section.

NOTES

[1] *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).
[2] N.R.S. 123.220.
[3] *Ellett v. Ellet*, 94 Nev. 34, 573 P.2d 1179 (1978).
[4] *Haws v. Haws*, 96 Nev. 727, 615 P.2d 978 (1980).
[5] California Civil Code §5118.
[6] *Sly v. Sly*, 100 Nev. 236, 679 P.2d 1260 (1984).
[7] Civil Code, supra.
[8] *In Re Marriage of Lopez*, 38 Cal.App. 3d 93, 113 Cal.Rptr. 201 (1972).
[9] *In Re Marriage of Wall*, 29 Cal.App. 3d 76, 105 Cal.Rptr. 629 (1981).
[10] *In Re Marriage of Shelton*, 118 Cal.App. 3d 811, 173 Cal.Rptr. 629 (1981).
[11] Novak, Rotunda & Young, *Constitutional Law*, p. 438 (West, 1983).
[12] N.R.S. 125.150(b).
[13] But see *Schick v. Schick*, 97 Nev. 352, 630 P.2d 1220 (1981) which defines equitable as equal.
[14] *Schreiber v. Schreiber, 99 Nev. 453, 663 P. 2d 1189 (1983) and In Re Marriage of Jafeman*, 29 Cal.App. 3d 244, 105 Cal.Rptr. 483 (1972).
[15] *In Re Marriage of Stephenson*, 162 Cal.App. 3d 1057, 209 Cal.Rptr. 383 (1984).

This issue marks the end of the 1986 subscription year.

1987 Section dues and subscriptions are now due.

APPLICATION FOR MEMBERSHIP
FAMILY LAW SECTION
STATE BAR OF NEVADA

Enclosed is my check for $20.00 payable to the State Bar of Nevada for 1987 annual Section dues. Section members receive the Nevada Family Law Report and a discount for Section-sponsored seminars.

NAME: _____
FIRM: _____
ADDRESS: _____
_____
TELEPHONE: _____
Family Law Specialist: _____ Yes _____ No

Please check desired committee assignment:

_____ Officer
_____ Council member
_____ NFLR editorial staff
_____ Article and topic publication
_____ Seminar speaker

TO: **State Bar of Nevada**
Family Law Section
243 South Sierra St.
Reno, NV 89501

NFLR Subscription Only Order Form

Enclosed is my check for $35. payable to the Family Law Section of the State Bar of Nevada for a one-year subscription to the NFLR.

Name _____
Firm _____
Mailing Address _____
_____
_____

TO: **State Bar of Nevada**
Family Law Section
243 South Sierra St.
Reno, NV 89501

NFLR
State Bar of Nevada
Family Law Section
243 South Sierra Street
Reno, NV 89501