AFFIDAVIT PREPARATION

A PRIMER FOR BEGINNERS; A REFRESHER FOR VETERANS

Presentation

1. Ours is a jurisdiction that conducts hearings whereby the primary evidence of every witness is given by affidavit.

2. A well-crafted affidavit is the primary method of advocacy for any hearing. The best advocates struggle to rescue poorly prepared material and may struggle to deal with a witness whose affidavit is sound.

3. When counsel prepares a witness to give evidence the usual approach includes stressing to the client the importance of speaking clearly and directly. The same applies to affidavits.

4. So for example FCCR 2.01 sets out the rules for the quality of affidavit presentation.[1] The aim is to achieve an easily readable document – the Rule refers to "durable white paper of good quality" line spacing of "not les than 8mm" and a type size of "at least 12 point".[2]

5. We ought bear in mind the lessons of the graphics and advertising industries. Presentation matters; though content has the greater importance.

6. So far as both courts are concerned an affidavit must be divided into consecutively numbered paragraphs "with each paragraph being as far as possible confined to a distinct part of the subject matter."[3]

7. The Family Law Rules also state that an affidavit must be

   [a] Confined to facts about the issues in dispute.[4]

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[1] There is a similar rule in *FCR* 24.01
[2] Incidentally I tend to use 13 point, the marginally larger size is an aid to reading
[3] FLR 15.08(a); FCCR 15.25

[b] Confined to admissible evidence. [5]

Those Rules also require that a reference to a date, number or amount or money "must be written in figures". [6]

8. The Federal Circuit Court Rules have nothing comparable to the matters referred to in paragraph 7 above though that is no reason not to adopt them when you prepare an affidavit for that Court.

9. Each Court has rules as to the pagination and indexing of exhibits or annexures to affidavits. [7] A document to be exhibited or annexed that is "more than 2.5cm thick" [8] or if it is "impractical" to annex it [9] must be filed as a separate document.

10. To these rules I would add the following:

[a] A complex and/or lengthy affidavit should commence with an index;

[b] Use headings;

[c] A judge must follow the statutory pathway in property and children's cases. So should your affidavit;

[d] You need to avoid, where possible, rivers of ink. Key requirements are:

(i) Relevance;
(ii) Brevity of expression;
(iii) Small paragraphs confined, as the rules say to a "distinct part of the subject matter";
(iv) The avoidance of exaggeration and an over-use of adjectives.

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[4] FLR 15.09(a)
[5] FLR 15.09(b)
[6] FLR 15.09(3)
[7] FLR 15.12; FCCR 15.28
[8] FLR 15.12(2)
[9] FCCR 15.28(2)

11. I make no apology for stressing matters that in other circumstances might be considered banal or simplistic. The lawyer's prime task is to persuade. A readable, tidy, relevant, and well-constructed affidavit demonstrates that you are skilled; it may encourage your opponent to settle; it might not attract every judge – but at least you won't have annoyed him or her. Command of language is essential:

> *To succeed in the profession of the law, you must seek to cultivate command of language. Words are the lawyer's tools of trade ... on the words you use, your client's future may depend ... The reasons why words are so important is because words are the vehicle of thought ... you must use words. There are no other means available. To do it convincingly, do it simply and clearly. If others find it difficult to understand you, it will often be because you have not cleared your mind upon it. Obscurity in thought inexorably leads to obscurity in language.* [10]

Content

12. It is misleading to say, as is so often heard, that "the rules of evidence do not apply in the family courts". Most of the *Evidence Act* continues to apply with only some aspects of the rules of evidence not applying and then only in some cases. In any event there can be no excuse for poor drafting.

13. First, *Family Law Act* s. 69ZT relates only to "child-related" proceedings. If the trial is a combined child and property case then two evidentiary rules will apply: [11]

    [a] Some rules of evidence will not apply for the child proceedings;

    [b] All the rules of evidence will apply for the property proceedings.

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[10] 'The Discipline of Law' Lord Denning MR, Butterworths, 1979 at page 5

[11] I assume for present purposes that the parties have not consented to s.69ZT applying to the property proceedings. See s. 69ZM

14. A medical report might say the child has autism and discuss its consequences for the day-to-day care of the child. For a child proceeding, it would be acceptable (though as I discuss below undesirable) to merely include it in the wife's affidavit. But if the purpose was to make a case that the wife's s. 75(2) component in the property settlement should be higher, then it ought be the subject of a separate affidavit by the medical practitioner.

15. Importantly, s. 69ZT excludes from operation merely a limited number of sections of the *Evidence Act.* For practical purposes the advantages most often derived from the section are that:

    [a] Evidence otherwise inadmissible by virtue of the rules relating to hearsay can be in an affidavit; and

    [b] There is a greater scope for less than skill-based opinion evidence.

16. However, the primary evidentiary rule – relevance – remains in place both for child and property cases.

17. *Evidence Act* s. 56 provides:

    (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

    (2) Evidence that is not relevant in the proceeding is not admissible.

18. Section 55 defines "relevance" as follows:

    (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

    (2) In particular, evidence is not taken to be irrelevant only because it relates only to:

(a) *the credibility of a witness; or*
(b) *the admissibility of other evidence; or*
(c) *a failure to adduce evidence.*

19. Relevance has importance, as well, because the Rules of both courts allow for an application to be made to bring an early end to a claim where there is no reasonable prospect of success. [12]

20. Far too often affidavits tend to be a stream of consciousness; with little thought as to the relevant issues and the facts necessary to support the client's case on those issues. How often do affidavits commence with a lengthy description of the breakdown of the relationship; his/her conduct of an affair; the inevitable arguments and unhappiness? Yet none of these matters, of themselves, have any relevance given that ours is a no fault system.

21. Similarly, if the property case comes at the end of a 25-year relationship of the usual kind, and there has been no weighty capital contribution by either side, why is it necessary to embark upon a lengthy dissertation about his or her domestic or wages contribution? We cling on to attempts to portray our client's contribution as "more important than his/hers" without heed to decisions as long ago as the Full Court's observations in *Re McLay* [13] where this passage appears

> *The reference to "normal range" in Ferraro and in her Honour's judgment is not a return to a presumption of equality as a starting point or any other presumption or starting point but is a practical recognition of the circumstance that in many marriages each party contributes in ways which might be described as the normal way in our society and that in any qualitative evaluation of those matters the likely outcome is one of equality. This is repeatedly recognised in the day to day experience of this court over many years in dealing with a very large number of s 79 cases. In many cases any*

[12] FLR 10.12; FCCR 13.10
[13] (1996) 20 FamLR 239

assessment of the facts readily makes it clear that an outcome of equality within pars (a) to (c) is most likely and that a lengthy trial in which those facts are examined in detail will produce no different result. It will only mean significant extra costs to the parties and an unproductive use of the time of the Court. Of course the other factors in s 79, especially the s 75(2) factors, may call for a different outcome but that is a separate matter.

22. Bear in mind *FLR* 15.13 which allows the court to strike out material which is "inadmissible, unnecessary, irrelevant, unreasonably long, scandalous or argumentative". *FCCR* 15.29 is in the same terms except that court substitutes "prolix" for "unreasonably long."

23. The most extreme example of which I am aware is recounted in *Sheehan & Sheehan.* [14] In a property settlement case after a 33 year marriage, the 135 page and 860 paragraph affidavit for the wife commenced by referring to the fact that the husband and wife had known each other since ages 9 and 10 when at primary school and recounted 50 years history up to the point of trial. The Court was not amused; the whole affidavit was struck out and the wife ordered to re-file.

24. When affidavits are unreasonably and/or irrelevantly long the court can exercise a costs jurisdiction – either to pay costs to the opponent or to refrain from charging your own client. [15] In *Ensabella & Ensabella,* [16] Fogarty J made an order for costs in favour of the husband as a result of his having to respond to an affidavit of some 43 pages in length. His Honour said:

> *... substantial portions of the affidavit dealt in inordinate and unnecessary length with matters which were only of marginal significance ... there has to be an outward limit to such matters and it seems to me that upon any reasonable test this affidavit was prolix and contained many matters of detail which it was unnecessary and unreasonable to include.*

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[14] (1983) FLC 91-352
[15] FLR 19.10; FCCR 21.07
[16] (1980) FLC 90-867

25. Some issues require detail to be given.

26. Thus it is important to ensure that you make yourself aware of the facts required to support each issue. For example if there has been an early capital contribution by one party and argument is to be advanced for a contribution advantage, the mere fact of the early contribution in not usually enough. In considering the weight to be given to the contribution "regard must be had to the use made by the parties of that contribution." [17] So the affidavit of one party needs to speak of those uses; the affidavit of the other needs to bring forward such facts as may diminish the weight.

27. Similarly, if a *Kennon* claim is to be made, it is necessary to prove first the necessary facts of domestic violence and secondly that such violence "is demonstrated to have had a significant impact upon that party's contribution to the marriage." [18]

28. Material concerning unsatisfactory conduct or misconduct derives relevance only if it is rationally linked to an issue such as the imposition of equal shared parental responsibility, the unacceptable risk of abuse, pervasive domestic violence, property pool wastage and so on. If so, a number of considerations arise:

    [a] Serious issues require a serious approach; weighty evidence. Hearsay evidence might be admissible in a children's case but if it is a controversial matter why not prove the facts directly through affidavit evidence of witnesses who actually saw the event(s) or it's aftermath? If you can prove your client's case in the 'old-fashioned' way then you should. The evidence will carry more weight with a judge.

    [b] Serious issues require proper detail. In every case *Evidence Act* ss. 135 and 136 apply. The Court has a general power to exclude or limit the use of evidence where it is unfairly prejudicial, misleading or confusing and may also exclude evidence where it may cause or result in undue waste of time.

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[17] *Pierce* (1999) FLC 92-844

[18] *Kennon v Kennon* (1997) FLC 92-757.

Vague and poorly particularised allegations are an obvious target for these sections or for a costs application. In *Mahoney v CP White of HLB Mann Jubb (No 2)* [19] McInnis FM made an indemnity costs order against the solicitor for a party where, on the facts of that case, his failure to file adequate affidavit evidence constituted "improper conduct or misconduct" within the meaning of FCCR rule 21.07.

[c] Avoid exaggeration though, notwithstanding the siren call of dramatic language. In *Dwyer v Brent & Anor* [20] Riethmuller FM made a costs order against the solicitor where a Notice Of Risk of Abuse was seriously exaggerated compared to the facts subsequently sworn.

[d] If the issue is serious enough – such as a sexual abuse allegation in a child case – *Family Law Act* s.69ZT will or may not assist you to take the "short-cut" of hearsay evidence. The Court may apply the rules of evidence otherwise excluded where there are "exceptional circumstances." [21]

29. Let me go back to the medical example in paragraph 14. If the purpose of the medical report, in a child case, is to argue for a significant restriction upon the father's time with the child, why not produce it by way of sworn affidavit from the medical practitioner. It has more weight. The father's lawyers must make a difficult election as to cross-examination or not.

Documents

30. Linked to my concerns as to the importance of producing weighty evidence is the olden times 'best evidence rule'. Broadly speaking this meant that it was not sufficient to say in oral evidence or by affidavit that "I entered into a contract with Mr. Smith and it says that he should pay me $1,000." The contract had to be produced. It was the 'best evidence' of what had been agreed between the

[19] [2005] FMCA 1578
[20] [2010] FMCAfam1224
[21] s. 69ZT(3)(a)

parties. Long ago the rule fell out of fashion, Lord Denning MR with his usual admirable precision stating:

> *Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight and not to admissibility.* [22]

31. However in contests of credibility, judges frequently turn to the contemporaneous documents of the parties or others as a means of resolving factual dispute. In this modern world of instantaneous communication people don't pause to think. Text messages, Instagram, Facebook and the like can reveal more of the stuff of a person's soul (or lack of it) than any affidavit. Edward R. Murrow reminds us:

> *The newest computer can merely compound, at speed, the oldest problem in the relations between human beings, and in the end the communicator will be confronted with the old problem, of what to say and how to say it.*

32. There is a tendency for affidavits to include extracts of letters, emails, SMS messages, Facebook posts and so on rather than copies of such material being exhibited or annexed. In my view you need to think through carefully whether the material should be recounted in the affidavit or whether the documents should be annexed. Different cases will produce different answers to that proposition.

33. If you are going to take the short-cut of reciting extracts of text messages or such-like in the affidavit then do it properly. I see frequent examples in affidavits like this

> *He sent me an abusive text message shortly after contact changeover.*

That is objectionable as merely recounting an opinion about the words rather than setting out the actual words transmitted. More importantly, it is an allegation without content or weight. You need to set out the words that were spoken.

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[22] *Garton v Hunter* (1969) 2 QB 37

34. However whilst I am not suggesting that every SMS, email, or Facebook post should be copied and added to the every growing pile of paper with which our judges are confronted, there will be some cases where the 'best evidence' rule should be applied. Why not include at least some examples of the real thing where there are egregious examples of misbehavior. This is particularly the case where modern technology allows for photographs, symbols, and emojis to be embedded in a text message or Facebook post – annexing a few colour copies of the abusive use of technology can have a devastating effect upon the opponent.

35. Similar comments apply to video or voice recording. Sometimes it is not the words used; it is the tone of voice that matters. Playing out aloud the abusive message is so much to be preferred to stating:

> *She left an abusive message on my answering machine.*

36. In that example it is much better to have the affidavit say:

> *She left a message on my answering machine. She shouted down the phone line. Amongst other things she said "so long as you have that slut girlfriend living with you I'll never let you see my son". I have instructed my solicitors to provide a copy of the recording to Ms. Smith's solicitor and will have the original recording with me at the interim hearing.*

37. This leads me to the vexing problem of dealing with the way in which clients so often voice or video-record their children and former partners and/or contact changeover, voice record telephone calls, and video record Skype calls.

38. First, as my colleague Terry Betts makes clear in his companion paper such 'documents' must be disclosed in Family Court proceedings and will most often end up being disclosable in FCCA proceedings.

39. I agree with Betts that we tend to think less about disclosure in children's cases than we do in property cases.

40. Further it is my experience that, far too often, members of the profession do not take the time to listen to or watch these recordings. Though the client mentions them or gives to the solicitor an extract of a message how often does the lawyer say – "hand over your phone I need to read all the messages"? Clients invariably tell you only about the "good" stuff and avoid mentioning his or her embarrassments. Even as I draft this paper my colleague Janice Mayes and I recall the difficulty we experienced last Monday in re-formulating our advocacy when, on the morning of an interim hearing, our respective clients fessed up to the extent of their appalling SMS messages.

41. Read the client's SMS messages, email trail, Facebook page. Listen to the recordings; watch the videos. You need to know if this material is helpful or not; and you can only do that by a complete examination of the material. If the parties are using a communication book then get it in and read it – usually there are gems to be found for one side or the other – and read it <u>early</u>. If you are reading the opponent's trial affidavit and learn for the first time about your client's appalling language in the communication book whose fault is that? Your client's fault for not telling you sooner? Or yours for not inquiring sooner?

42. If the recordings are helpful then include transcripts of examples in the trial affidavit and state something to this effect:

> *I have instructed my solicitor to provide a copy of all the recordings to Mr. Smith's solicitor and will have the original recordings with me at the trial.*

43. If the recordings are unhelpful, then difficult choices arise. I'm not a fan of silence. It is usually inevitable that your client will be cross-examined about her or his mistakes. It is better, in my view, to advance your client's version of events and explanation by affidavit; even if you can do no more than cravenly apologise and (hopefully) make the point that similar behavior has not re-

occurred over the last several months. The alternative is to have it all dragged out by a painful cross-examination.

Cheer squads

44. It happens less often nowadays but appending character references to the client's affidavit or securing what we call 'cheer squad' affidavits still occurs. But as Justice Cronin pungently observed recently in respect of a supportive affidavit provided by the father's parish priest

> *... his affidavit like the other two, was unashamedly a character reference and must have been intended so because it was drawn by the father's then lawyers. It is trite to say that it was not the father's character that was in issue but his parenting capacity.* [23]

45. If you are to use a witness who might be too easily dismissed as of the cheer squad variety [24] then you need to so draw the affidavit that the trial judge might say this:

> *Very often, adult friends of parents in child cases are referred to casually as "cheer squad " witnesses, who in that capacity might not have insight or objectivity. Each of Ms OW and Ms E however, in quite separate and individual ways, struck me as sensible and sensitive women who gave evidence as to their own observations concerning the child from a genuine perspective beyond the " cheer squad " perspective.* [25]

The benefits and perils of cut and paste

46. Over the course of a long matter with several interim applications prior to trial there will have been several affidavits and/or financial statements sworn by the client. When preparing a trial affidavit you need to refer back to those prior affidavits so as to make sure

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[23] SCVG & KLD [2015] FamCA 110 at [232]

[24] type "cheer squad" into the AUSTLII search engine and be surprised by the number of hits you get

[25] per O'Reilly J in *Darcy & Cameroon (No. 9)* [2010] FamCA 1102

that the trial affidavit is not inconsistent. One of the first things an advocate does is to check for inconsistency and then cross-examine the witness about any inconsistency.

47. From that perspective the computer driven 'cut and paste' is both a costt saver and a mechanism for preserving consistency in evidence given by subsequent affidavits.

48. But care is required.

49. Sometimes a fact alleged in a prior affidavit will have been proved wrong by the subsequent production of a document through disclosure or subpoena; by fresh evidence; by an admission in solicitor's correspondence. Repeating the 'wrong' facts opens up the client to crosst examination and you to embarrassment.

50. Sometimes a fact alleged is no longer relevant because the issue has been dealt with by interim order. Repeating no longer relevant facts just makes the affidavit longer and will annoy the decisiont maker.

51. Sometimes even the spelling and grammatical errors will be repeated. A young practitioner in Townsville (and now working in another State) filed many affidavits which continuously mis-spelt Judge Coker's name.

52. Cut and paste can also be a problem when preparing affidavits by two or more witnesses who were present at an event in dispute. In *Ganem & Ganem* [26] this result occurred:

> *In their affidavits, in relation to an earlier event on the same day, the paragraph dealing with that event in each of their affidavits was almost identical. Their description of the event involving J was also almost in identical terms.*

[26] [2014] FamCA 1177

It may be that they are describing the same words and actions but one would not expect them to use the identical phraseology. The use of identical words and phrases may be nothing more than an over-zealous use of cut and paste by the person who drafted the affidavits but even that robs the evidence of weight.

Contravention proceedings

53. Separate consideration is required in respect of this issue. You may (or will) have only one chance to get it right.

54. The contravention sections of the *Family Law Act* are within Part VII of the Act and therefore still "child related proceedings" for the purposes of the application of s. 69ZT.

55. However the standard of proof varies:

    [a] the usual rule is proof on the balance of probabilities; [27]

    [b] but if you seek the imposition of a higher degree of penalty such as community service, a fine or imprisonment then proof beyond reasonable doubt is required. [28]

56. Whichever penalty is to be sought, my view is that real evidentiary precision is required. That is especially because FLR 21.02(2) says that when filing the application it must be accompanied by an affidavit that

    ... states the facts necessary to enable the court to make the orders sought in the application.

57. There is an identical rule for the Federal Circuit Court. [29]

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[27] *Family Law Act* s. 70NAF(1)
[28] *Family Law Act* s. 70NAF(3)
[29] FCCR 25B.02(2)(a)

58. If the affidavit is not sufficient, "to make the orders sought" it will expose your client to a preliminary application to be struck out. [30]

Conclusion

59. Think of the cost consequences to your client and likely professional consequences for you if this passage in *Sheehan* [31] were to said in one of your cases:

> *I do not propose to set out in detail and thereby compound the approach made by the draftsman, the whole of the irrelevancies and unreasonable detail included in the affidavit. It included unreasonable and unwarranted innuendoes of malpractice on the part of the husband and other persons. The drafting of an affidavit must to some extent depend upon the subjective judgment of the draftsman, but there must, in my view, be a limit beyond which it must be apparent that the affidavit is becoming unnecessarily prolix and oppressive.*
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> *If these affidavits allowed to stand, then the husband is faced with their contents, knows that the contents are intended to be used, would go to trial not knowing how they were to be used, but only that they were to be thrown at his head in the hope of something being made out of them. He would necessarily be put to great expense in being required to plead to each of the allegations made. Even if it is decided not to plead and to admit the specific allegations made, unnecessary time and expense must be involved. I think that the affidavits are embarrassing both from the excessive length at which the statements of fact are set out, both those that are necessary and those that are unnecessary, and the husband is put in a position of not easily understanding whether he is to be affected by all or any of those matters or not. He ought not to be embarrassed by having to deal with them.*
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> *It is, of course, open to the Court to go through each and every*

[30] *Biddell & Ervin* [2012] FMCAfam 926
[31] see paragraph 23 of this Paper

one of the 860 separate paragraphs and delete therefrom material which should be deleted either pursuant to the subregulation or under the inherent power of the Court because it constitutes the whole or part of oppressive material. But, in my view, the proportion of that material which should be excised from the affidavits is so great that if the matter is to be disposed of with any regard to convenience, it is clearly right that the whole of those affidavits should be removed from the file rather than by seeking, by expunging the offending material, to put the affidavits in order.

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