# Affidavits: the good, the bad and the very ugly

## What are affidavits?

An affidavit is a written statement of relevant factual material that a party intends to rely on as evidence in court. In proceedings under the Family Law Act, affidavits usually contain the evidence in chief (or sometimes in reply) that a party wishes the court to consider when deciding their case. An. affidavit must be properly ‘sworn’ or ‘affirmed’ by the party that is relying on it.

In most Family Law Court proceedings all evidence (evidence in chief and other evidence in support of the orders sought) is given on affidavit unless the court directs otherwise.

Some evidence must be given orally in parenting disputes that proceed as ‘less adversarial trials’ (LAT) under Division 12A of the Family Law Act at the first day of hearing. This forms part of the evidence in the proceedings. However, evidence is given by affidavit on final hearing as each party is well aware of the what facts the other is relying upon.

## Rules of court

Each court sets out its own rules for practice and procedure. As the Family Court and the Federal Circuit Court operate under two different sets of rules, you need to be familiar with both when working in those jurisdictions. The forms and procedures are different and judicial officers may insist on the right rules being applied.

Any judicial officer can make directions that are inconsistent with the rules of court and may even choose to dispense with certain rules altogether. However it is essential for lawyers to follow the rules for their case to proceed efficiently. (See r. 1.3 Family Law Rules 2004 and r. 1.6 Federal Circuit Court Rules 2001).

## Lawyers’ obligations

Under the Family Law Rules 2004, lawyers must promote and achieve the main purpose of the rules:

1.04The main purpose of these Rules is to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case.

1.08 Responsibility of parties and lawyers in achieving the main purpose:

(1) Each party has a responsibility to promote and achieve the main purpose, including:

1. ensuring that any orders sought are reasonable in the circumstances of the case and that the court has the power to make those orders;
2. complying with the duty of disclosure (see rule 13.01);
3. ensuring readiness for court events;
4. providing realistic estimates of the length of hearings or trials;
5. complying with time limits;
6. giving notice, as soon as practicable, of an intention to apply for an adjournment or cancellation of a court event;
7. assisting the just, timely and cost-effective disposal of cases;
8. identifying the issues genuinely in dispute in a case;
9. being satisfied that there is a reasonable basis for alleging, denying or not admitting a fact;
10. limiting evidence, including cross-examination, to that which is relevant and necessary;
11. being aware of, and abiding by, the requirements of any practice direction or guideline published by the court; and
12. complying with these Rules and any orders.

(2) A lawyer for a party has a responsibility to comply, as far as possible, with subrule (1).

*Note* The court recognises that a lawyer acts on a party's instructions and may be unable to establish whether those instructions are correct.

(3) A lawyer attending a court event for a party must:

1. be familiar with the case; and
2. be authorised to deal with any issue likely to arise.

*Note* The court may take into account a failure to comply with this rule when considering costs (see subrule 19.10(1) and subclause 6.10(1) of Schedule 6).

## Rules of court relevant to affidavits

The rules relating to affidavits are in the rules about evidence. See Chapter 15, Family Law Rules 2004 and Part 15 of the Federal Circuit Court Rules (2001).

See particularly, the note under Part 15.2 Family Law Rules:

The filing of an affidavit does not make the contents of the affidavit evidence. It is only when the affidavit is relied upon by a party at a hearing or trial that it becomes, for that hearing or trial (subject to any rulings on admissibility), part of the evidence.

Affidavits are filed as prescribed by the rules, or as directed by the court or if leave is sought and given by the court. Although the rules do not state that all evidence of your client has to be in one trial affidavit, you will need leave of the court if you wish to rely on any affidavits your client has filed earlier in the proceedings (FLR 15.06).

Many judges will however, require all your client’s evidence to be in one document and so it is best practice to have only one affidavit for each witness.

Rules provide for how an affidavit is to be commenced and how it is to be attested (sworn of affirmed). The rules also state that the lawyer who prepared the document must be named on the document..

Similar rules apply in the Federal Circuit Court Rules.

It is important to follow the rules because some judicial officers may refuse to accept documents into evidence if they do not conform to the rules, use the correct format or contain numbered paragraphs. .Each paragraph must be a set out a separate fact/idea/matter.

## General requirements for court documents

Rule 24.01(1) sets out the general requirements for documents being filed in the court registry. Affidavits must:

* be singled sided
* be printed or handwritten in black ink
* have margins wide enough to allow documents to be bound and no wider than 2.5 cm
* have line spacing not be more than 1.5 lines
* have pages numbered consecutively
* be stapled or pinned or otherwise fastened
* bear appropriate identification (parties and court number as set out in the rules).

If this is not practical, affidavits need not comply with these requirements. Documents that are electronically filed have the same status as filed paper copy documents.

Numbering each page is very important. If possible, index and number the whole affidavit, including annexures. This makes it easier for specific matters to be referred to in court. .

Federal Circuit Court Rules require that any documents used in conjunction with an affidavit must be annexed or exhibited. If more than one annexure is relied on, each must be paginated consecutively with the page number referred to in the affidavit, for example, ‘Annexed and marked with the letter ‘G’ ( pages 72-81) is a copy of the agreement for sale’.

Exhibits are referred to in the affidavit but are exhibited separately (because of the kind of document or because of its length). The exhibit pages must be numbered and must include the title and number of the proceedings. Both annexures and exhibits must state that the person making the affidavit identified the particular annexure or exhibit at the time they were making the affidavit (See r. 15.28 FCC Rules and r. 15.12 FLR).

## What must be included in an affidavit

The Family Law Rules say that the affidavit must be confined to;

* facts about the issues in dispute and
* admissible evidence.

The affidavit must also be sworn/affirmed as described and properly witnessed. Any alterations must be initialled before the affidavit is dated and then filed.

Similar rules about numbering paragraphs, adding page numbers and using the proper forms are found in the Federal Circuit Court Rules (FCCR) (See rr. 15.26 and 15.26 FCCR). These rules also set out the use of exhibits and pagination of annexures.

Both sets of Rules state that objectionable material may be struck out (See r. 15.29 FCCR and r. 15.13 FLR).

The FCCR allow the judicial officer hearing the matter to allow an affidavit to be admitted into evidence even though the author is not available to be cross examined (r. 5.29A FCCR).

Under the FLR , notice that a witness is required for cross examination must be given.

Note: Always make sure parties have all their witnesses available for cross examination unless expressly told otherwise by your counsel.

## Only include the facts in affidavits

When preparing an affidavit always approach the task by thinking, ‘What am I trying to prove?’ Affidavits are **not** your client’s life story.

First, identify the issues as a matter of law and understand the legislation and the case law that relates to those legal issues.

The legislation and the case law will tell you what matters are relevant for the court to consider. You must then address the facts that relate to those particular matters by reducing them to writing and recording them in an admissible form.

### The best evidence rule

To comply with the law of evidence your task is to put before the court relevant factual information that is as pure as possible to provide the best evidence available to the court.

The best evidence is something that a party experiences, sees or hears, provided that it is relevant to the issues before the court.

A person can only give evidence of that which they have personal or expert knowledge.

Witnesses are not able to:

* say why someone acted in a particular way as it does not form part of their personal experience. For example, ‘he hit me because I told him I was leaving him’..
* draw a conclusion such as, ‘he was drunk’. They can only state the facts that they observed and allow the court to draw its own conclusion. For example, ‘he was slurring his speech and his eyes were bloodshot’.
* make a diagnosis unless they are an expert who is trained and qualified to give a diagnosis or opinion. For example, ‘David was depressed’.
* give evidence of a conversation between other people when the deponent was not there. This is hearsay. For example, ‘ James told me that he saw Jennifer standing by the child’. (This is only evidence that James had a conversation with the deponent, not of what James saw.)
* express an opinion about something. For example, ‘I believe the child is frightened of the mother’.
* make a submission about something. For example, ‘it is in the best interests of the children to be with me’.
* tell you what is in a document or what the document means if the documents can be presented. This is because the document speaks for itself.
* disclose anything their lawyer told them. This is privileged and the disclosure of what a person is told by their lawyer may be a waiver of legal professional privilege.
* mention anything that is highly prejudicial to the other party to the extent that the prejudice caused outweighs the probative value of the evidence given.

Lawyers should read the *Evidence Act* 1995 (Cth) in full, particularly the ‘Admissibility of Evidence’ in Chapter 3. This chapter codifies the law about:

* relevance
* hearsay (oral and in documents)
* opinion
* privilege
* credit and
* probative value.

When you are drafting or checking you affidavits, always ask:

* Is this fact relevant to the issue the court has to determine?
* Is that something that this witness can give evidence about?
* Should this evidence be coming from another source?

## How to draft an affidavit

1. Consider the orders you are seeking on behalf of this client. Are the orders interim or final? Remember your obligation to the court (r.1.08(a) FLR).

Ensure that any orders sought are reasonable in the circumstances of the case and that the court has the power to make those orders.

Judicial officers will not tolerate applications made without merit. You must ensure that your client has realistic expectations about what they can achieve. This will not always be what they want.

1. What evidence do you need to persuade the court to make the orders your client seeks?

You will need to consider the legislation and case law to know what matters the court will take into account and what matters carry greater weight than others.

1. Create a list of headings for all matters you need to consider, including any relevant issues about the timing of your application.
2. Take instructions from your client based on these headings you have made. This requires more than just taking a chronological history from the client.

You will need to direct clients in relation to matters which may not be part of their thinking. Remember you are the one who makes a forensic determination about what is relevant and what needs to be addressed.

1. Play devil’s advocate. Do a ‘reality test’ about some of the assumptions and allegations that the client makes. Critically question your client as if you are cross examining them in relation to matters that you consider to be a weak point in their case to tease out what is really going on and to highlight to the client the weak points. Is there anything that the client can do to remedy the situation?
2. Is there anything in your client’s past or present? This must be dealt with in their affidavit. Question your client about their criminal record, drug history, any period of detention and be up front about the fact that it is better for you to disclose all these things in the affidavit rather than risking the court (or you) learning about it in cross examination.
3. Keep checking to see if you are on track. Are you collecting evidence about the matters that you need to prove your case? Have you distinguished between those matters that are interesting as opposed to strictly relevant?

## Using annexures and exhibits

A document attached to an affidavit may be inadmissible.

The same rules of evidence about admissibility apply to annexures and exhibited documents as they do to other evidence in the affidavit. Often annexed documents are hearsay statements (that is, someone else making a statement that you seeking to rely on as if it is your own). Hearsay evidence may carry limited weight or may even be inadmissible. Just because a document is annexed to an affidavit does not mean it will be admissible.

### Exceptions to the hearsay rule

There are exceptions to the hearsay rule in the Commonwealth *Evidence Act* 1995 that may be helpful when using annexures.

See s. 59, The hearsay rule – exclusion of hearsay evidence

59(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

History

s. 59(1) amended by No 135 of 2008, Sch 1 Pt 1 item 17, commenced 1 January 2009.

[CCH Note: For transitional provisions see note in s 4(1).]

s. 59(2) Such a fact is in this Part referred to as an asserted fact.

s. 59(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

Note: Subsection (2A) was inserted as a response to the decision of the Supreme Court of NSW in R. v Hannes (2000) 158 FLR 359.

### History

Section 59(2A) inserted by No 135 of 2008, Sch 1 Pt 1 item 18, commenced 1 January 2009.

For example, if you have a letter from your client’s employer stating that your client is employed at that place and the employer will allow your client to work flexible hours so they can be available to collect children after school, that letter is a previous representation made by the employer making certain assertions about your client’s conditions of employment. It is a hearsay document. Attaching it to your client’s affidavit does not cure its hearsay nature. You can fix this by attaching the letter to an affidavit by the employer or by getting the employer to recite the same facts in an affidavit. Remember that the employer must be available for cross examination in final proceedings if you do this.

If the court is looking for the best and most reliable evidence, that would be the evidence of the maker of the statement, unless the document falls within one of the exceptions to the hearsay rule.

## Exceptions to the hearsay rule

The Evidence Act has a number of exceptions to the hearsay rule. The exceptions that most often arise in general drafting of family law affidavits are:

1. Non Hearsay purpose; that is you want to use the hearsay representation to prove something other than the asserted fact;
2. Where the maker of the representation is not available and appropriate notice is given under section 67;
3. Where the maker of the previous representation is available but due to undue expense , undue delay or would not be reasonably practical for that person to give evidence provided that appropriate notice is given under s67;
4. Is a contemporaneous statement made about a persons health , feelings, sensations, intentions, knowledge or state of mind;
5. Is a business record however note the limitations of the use of the business record exemption.
6. Representations as to age, marital status, cohabitation status, family history or relationships at a particular point in time;
7. Interlocutory (interim) proceedings; the hearsay rule does not apply to evidence if the party who is adducing the evidence also discloses evidence of the source of the information.

Note: Hearsay rules are different in interim or interlocutor proceedings. This affects what can be put into an affidavit in support of interim orders.

In affidavits in support of interim or interlocutory proceedings where you can often only rely upon your client’s affidavit and you are time poor in relation to preparation you can use hearsay representations provided that the source is identified.

If we consider the example of the employer’s letter, on an interim application it would be admissible it would then become an issue about the weight the court would give that evidence.

## Drafting – the KISS principle

Translating your instructions into an affidavit takes care and lots of editing.

Think about how and in what order you are going to address the issues that you identified as being the matters that the court will require evidence on in order to be persuaded to make the orders that your client seeks.

How you arrange an affidavit becomes a matter of personal style but remember the judicial officer is looking for very specific things when they read your documents: matters that are relevant to the issues they have to determine.

The length of the document can be a real issue. If too short, it may miss significant matters, if too long , any relevant matters risk being smothered by the irrelevant matters.

Federal Magistrate Halligan in the unreported decision of Symes and Glover [2011] FMCAfam 735 at paragraphs 1 and 2 commented recently as follows;-

*‘1.* The mother has sought to rely on an affidavit of five volumes in these parenting proceedings. I challenged the mother’s counsel about the appropriateness of an affidavit of this size, as much of the content on a cursory examination appeared arguably to be irrelevant, repetitive or in the nature of submission, debate or commentary on the evidence. I ultimately called on the mother’s counsel to show cause as to why the affidavit should not be struck out.

2. Having heard the mother’s counsel, I intend to strike this affidavit out. It is outrageous that an affidavit of such length and content should ever have been filed. The gross inappropriateness of the affidavit is demonstrated by the fact that when I challenged it, counsel for the mother-and I hasten to add counsel is not the drafter of this document and is not responsible for it- advised me that this tome could be reduced from 130 pages to 20, from 744 paragraphs to approximately 120’.

By way of interest the annexures to the affidavit ran through the alphabet 4 times and the fifth time ran as far as ‘VVVVV’ comprising in total 603 pages. His Honour went on to say:-

*4 In my view, it is an abuse of process. In my view , it is oppressive, in the sense of being seriously and unfairly burdensome, prejudicial and damaging to the respondent and the Independent Children’s lawyer, and vexatious, in the sense of productive of serious and unjustified trouble and harassment to the father and the Independent Children’s lawyer. Is casts a ridiculous burden upon the Court to try and deal with a document of that magnitude where so much of its content should never have been included.’*

## Rules for drafting affidavits

1. Use short sentences.
2. Have one idea or issue per paragraph;
3. Use language that your client understands ( they are going to read it and swear to its truthfulness so they need to understand it);
4. Check, check and recheck the document to ensure that what you have presented is the ‘best evidence’. Make sure it is admissible (even if the rule of evidence do not strictly apply).
5. Make sure your client understands everything in document.
6. Make sure your client knows that they may be asked questions about it later by the other party (even the affidavit is for interim proceedings, it may be used in cross examination at final hearing, particularly if the story changes between affidavits, or if it is not accurate.
7. Consider if the document needs to be read to your client because their level of literacy is low or if English is not their first language.
8. Check that the document ticks each of the boxes you first identified as matters you need to cover in order to support the orders that you seek on behalf of your client.
9. Ensure that your client warrants the truth of the document, often really obvious facts will be overlooked in the rush of checking an affidavit by a client, particularly if they are stressed by the process. The full names and dates of birth of children will frequently be incorrect.
10. Check to make sure all the material in the affidavit relevant to the case you are trying to prove.
11. Make sure you have addressed all of the contentious issues previously raised by the other side, together with any issues that are raised by the material produced on subpoena.
12. Are all the paragraphs and annexures relevant to the case you need to run (this is a legal question for you and not a question of whether your client thinks it is relevant).
13. If no other evidence was filed or relied upon in the proceedings, by the other party, would you client be granted the orders sought based on the affidavit, family or expert reports and documents that you know are available on subpoena?
14. Finally consider are you happy to have the court know that this is your work, as you name also goes onto the document as its author and judicial officers will note who prepares the documents. Remember you are leading the evidence in chief in the case!

## Swearing the affidavit

It is very important to make sure that the document is properly sworn or affirmed. Your client must feel an overwhelming sense of obligation to tell the truth in their documents and swear to the same. Giving evidence in an affidavit is the same as giving that evidence from the witness box under oath or affirmation.

Each state has its own legislation in relation to who can swear documents. Generally a Justice of the Peace or lawyer are authorised to do this. .

If the affidavit is not being sworn in your office, make sure you give detailed instructions about how to swearing/affirming the affidavit, including before whom the document can be sworn or affirmed.

Each page of the affidavit and the attestation clause must be signed and witnessed. The witness must also sign all annexure pages. Make sure the annexures are attached before swearing/affirming..

Make sure the attestation clause bears the date and place of swearing. If this is not done, the whole affidavit may invalid.

Remember that your name will be on the affidavit.

## Post swearing

Before the deponent checks that the affidavit is correctly sworn or affirmed, complete the date on of swearing on the front of the document. Copy and arrange for filing.

If you file on the portal make sure that documents have their filing date noted on them. In the Family Court, judges tend to identify documents using the dates when they were filed. In the Federal Circuit Court some judges refer to the date of swearing. Ensure both dates appear.

After filing, arrange for the documents to be served on all parties and on the Independent Children’s Lawyer (ICL).

Clients must re-read their affidavit before coming to court. No only does this remind the client of what they actually said in their affidavit but clients will often identify errors they did not see when they swore or affirmed the document (no matter how many times you go through the document with them).

## WORKSHOP 1

Take up the judicial pen and mark up the following affidavit noting admissibility, the weight that can be given to matters set out in the affidavit , how this document sits with the case that is to be proved.

### The background facts

The application is to vary an existing interim order, made only a few months ago pending a final hearing which will take place within the next 6 months. The current interim orders provide for the child Jane to spend time with her father for a block of 5 days in January 20XX and then each alternate weekend from the commencement of the new school term from Friday after school until Monday before school.

The mother by a further interim application seeks to vary these orders to reduce the father’s time to from 10am Saturday until 10am Sunday each alternate weekend.

This is her affidavit in support of the further interim application.

Assume the affidavit is correctly sworn.

1. I am the respondent wife in this proceeding and I make this affidavit further to my affidavits sworn on 15 January 200X, 16 February 200X, 23 March 200X and in support of my response filed 15 January 200X and my Response to the husband’s Initiating Application filed herewith.
2. My daughter Jane spent time with the husband from Wednesday 25th January 20XX to 29 January 20XX as specified in the court orders. She has never been separated from me for more than two days in her life, either before or after separation from the husband. She was extremely concerned about this and didn’t want to go for so many nights, but she had to comply with court orders. I asked the husband via email if he would bring her back earlier on the Sunday morning for a birthday party and he refused. I later asked the husband if he would bring her back earlier on the Sunday afternoon to see her friend from interstate and he refused. She spends time with the husband from 8.30am on Wednesday 25th January 2009. On Thursday 26 January 2009 about 11am I attempted to speak to my daughter by phone .When I rang the grandmother answered, sho was minding the child while the husband was working , I was told I could not speak to my daughter because she was not there. She was clearly at the house and her father had left her again to go and golf with his mates. When my daughter returned from her 5 nights away from me she was quite distressed. She told me that she had missed me and cried for the first 3 nights. She had begged the husband to let her call me and he refused. She asked him for the first three nights but did not ask after that because she knew he would not let her call me. She was so traumatised by this experience that she had nightmares and disturbed sleep for the next three nights. She has told me that she is physically frightened on the husband because he has threatened to smack her. I believe that the husband is punishing the child for daring to love me. I fear for her emotional safety. I do not believe that is it in her best interest to spend more than one night with the husband because he is denying her access to speak to me when she requires comfort. She is in an extremely vulnerable emotional state. Attached is a letter from my Dr setting out how vulnerable she is. (W1).
3. I believe that the husband’s son from his first marriage Tom has robbed my house he then lied to the police about the incident the then went to the magistrate’s court and lied to the magistrate. He does not like me and wants to hurt me and my daughter.
4. I believe that the husband‘s motivation in this separation to extract vengeance on me and he is using my child to injure me. He has always threatened to take the child away from me and he uses this to intimidate me. The child has said to me ‘Daddy has lost his mind’ and I believe that this is true.

Proper annexure note duly signed and dated.

**Dr Havagoodgo,**

**A Wonderful Hospital**

**Wonderland, Aus, XXXX**

*To whom it may concern.*

*Jane is sick with a medical condition and can’t go to school today. Her mother tells me that Jane has been sick since she returned from her father’s place.*

*The mother believes father’s place is making Jane sick.*

*Dated.*

*Signed.*

*Dr Havagoodgo.*