

DRAFTING FAMILY LAW AFFIDAVITS
Marbury Chambers CPD Seminar presentation
26 March 2017: Summary

[Passages quoted in italics are from papers listed on the last page of this summary.]

An affidavit is a document setting out the **evidence in chief** of a witness, **made under oath**.

Preparing an affidavit is among the most important tasks in litigation.

An affidavit is an account of what the witness
saw
heard
did
experienced

that is **relevant to the issue(s) for determination**.

Every affidavit should **assist the trier of fact**. Therefore strive to produce a clear, ordered document. Aim for:

- Short paragraphs, numbered, preferably not with multi-level numbering of paragraphs extending over pages;
- all pages, including annexures, numbered consecutively and clearly;
- material organised so that essential facts can be readily identified.

Justice Bryson: ...try to place yourself in the position of the reader who has not seen the document before, and who is proceeding in some haste to read it.

- a final document that will not be ripped apart because of successful objections.

Justice Thackray: There is no more salutary experience for a practitioner than to have his or her client squirming while the judge knocks out slabs of their affidavit until all that remains is the client's name, address and occupation.

Obtaining instructions:

- Explain the function of the affidavit to the client; emphasise the necessity to be truthful.

Justice Emmett: those who swear affidavits [must understand] that the obligation of the oath is as serious when making an affidavit as it is when making statements in the witness box.

- **Use relevant legislation as a checklist; this is what the court needs to know to determine the matter;** attempt to focus discussion accordingly.

Justice Thackray: It is imperative that the practitioner has in mind the relevant provisions of the legislation to ensure he or she has addressed each of the matters which the court is obliged to take into account.

- Explain the requirement to attend court for cross-examination; *reality-test about this.*

DO:

- Obtain instructions in a timely manner; start as early as possible.
- Avoid asking questions in leading form.
- Ask open questions: Who? What? When? Where? Why?

Justice Bryson: A witness giving oral evidence is sworn to tell the truth, the whole truth and nothing else, and is then taken through his evidence without being asked questions which suggest the answer desired.

- Read affidavits filed earlier in the proceedings; be alert for discrepancies; cross-examination is not limited to matters contained in the affidavit upon which the witness formally relies.

- Attempt to contain a client's desire to compose an opus; apply the **test of relevance**.
- Keep **chronology** in mind; when referring to dates, always include the year.
- Confine each paragraph to one event/subject.
- Face the weaknesses in the client's case and address them with evidence going to likely issues.

Justice Thackray: You should bring your own weaknesses forward before somebody else does.

- Compile an index of annexures; if annexures are voluminous, prepare a separate 'Exhibits' bundle. (Check whether there are any Rules about this).
- Be alert for inconsistencies, internal in the paragraphs, or *cf* proposed annexures or exhibits.
- Ensure that annexures are legible when copied; if annexing photographs, they should be clear copies, in colour if the originals are coloured.
- Check that annexures are correctly referred to in the final draft.

Justice Bryson: I find myself being told that a letter is Annexure Q, that is about 12 pages from the back of the affidavit, and sometimes it emerges that the copy of the affidavit given to the judge has page numbers on it, but that no-one else in court has a copy with page numbers, or they have different numbers.

Justice Bryson: A sheet containing nothing but a certificate [annexure note] about some document other than the sheet itself is of no value.

- Provide the initial draft to the client, noting any further questions arising; emphasise necessity to read/check carefully.

- If the affidavit will be sworn by someone other than the solicitor:
 - ensure that the client understands he/she must swear the affidavit *in the presence of the witness*.
 - Check Rules about persons qualified to witness (e.g. a Notary Public if the affidavit will be sworn in a foreign country.)
- Remember, and remind the client: the final document is likely to be subjected to intense scrutiny.

Justice Thackray: [referring to propensity for clients to sign whatever is put in front of them]: Little does the witness realise that a few weeks later, he will be cross-examined within an inch of his life on the tiniest details of the document.

- After first draft, remove superfluous detail
repetition
emphasis
- Check, then double check, the final draft.

DO NOT:

- Allow another likely or possible witness to be present while taking instructions.
- Ask the client to ‘write it down and email it’; caution against anyone else doing so on the client’s behalf.
- Have your secretary/paralegal take instructions/draft the affidavit. *You would not send your secretary or paralegal to court to adduce oral evidence from a witness.*

- Include reference to content of legal advice.
- Include content of discussions/disclosures during mediation or settlement discussions.
- Repeat the words of one witness in the affidavit of another witness.

Justice Emmett: If two witnesses are going to give evidence as to the same matter for the purposes of corroboration, the evidence of each witness should be the evidence of that witness and no-one else.

- Employ hyperbole i.e. overstatement.

Justice Thackray: A recurrent error in drafting affidavits is overstatement – ‘the husband never did anything to help with the children or the housework’. Such claims leave the witness wide open to cross-examination.

- Include opinion evidence that the witness is not qualified to give: *Evidence Act (1995) Cth:*

S 75 (1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

S 79: exception: opinion based on specialized knowledge acquired during training, study or experience.

- Include propositions that can be objected to as argumentative.

Justice Bryson: This [objection] usually means that as well as stating the facts which are the foundation for an inference, the affidavit goes on to draw the inference, a process which should be left to the court.

- Take shortcuts e.g. by annexing a letter in which the details of certain events have been related; rather, set out the facts in the body of the affidavit.
- Rely on affidavits filed in earlier proceedings.

- Counter contested evidence with ‘*I do not know and cannot admit.*’

Justice Emmett: The practice of filing affidavits in which a subsequent deponent deals with each assertion made in an earlier affidavit line by line can lead to intolerable complexity in endeavouring to work out what is in dispute and what is not. Further, after rulings on objections, it is often very difficult to determine what is in evidence and what is not.

Justice Thackray: an example giving rise to judicial frustration: ‘As to paragraph 6, I deny the first, second, fourth, fifth, sixth, seventh, eighth, eleventh, twelfth and thirteenth sentences.’

Justice Bryson: It might be a relevant fact that the deponent did not know those facts, but otherwise there is no need to tell the court about his ignorance; the use the court will make of the first affidavit will not be influenced by knowledge that the deponent to the second affidavit did not know the fact, so leave it out.

- Do not be party to the filing of an affidavit that you know to be false or that conceals facts so as to mislead the court.

Memory test

‘Conversations [and/or dates] referred to in this affidavit are to the best of my recollection.’

Language:

- ‘*Tell it in your own words*’: the witness’s words, not yours.
- Avoid ‘legalese’ or sentence construction that would not come naturally to deponent.

Justice Thackray: There are few things more excruciating than to see a litigant being cross-examined about his understanding of an arcane word used in his affidavit.

Justice Bryson: The court will soon compare or contrast the comprehension and powers of expression shown in cross-examination with the language of the affidavit.

- Be alert to the possibility that the client may have a reading difficulty.

Proficiency in the English language:

- Ask whether the client will want to have (or assess whether he/she should have) an interpreter in court; if yes:
- a court-qualified interpreter should be present when instructions are given;
- the affidavit must be translated by an interpreter fluent in both English and the client's language;
- the jurat must include:

the translator/interpreter's name and accreditation;

a statement that the affidavit was read to the witness in his/her language *before* he/she swore and signed the affidavit.

Direct or indirect speech:

- There is no rule of evidence requiring a record of conversation to be in direct speech; but for evidentiary reasons, direct speech is preferred.

S135 *Evidence Act (Cth)* 1995 may be invoked if evidence of a conversation is given in indirect speech:

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

- The probative value of evidence may be diminished/non-existent if presented as indirect speech.

Justice Thackray: ...indirect speech...is not evidence, but rather a statement of the effect the conversation produced on the mind of the witness...The greater the likelihood of cross-examination, the more important it would be to have the witness provide his or her best recollection of the words used.

FORM & RULES

Justice Bryson: These seem unimportant until you get them wrong, so you should study the applicable Rules and Forms.

Check the Rules (*Family Law Rules 2004; Federal Circuit Court Rules 2001*) including as to:

- Margins
- Line spacing
- Font size
- Numbered paragraphs
- Any limitation on length
- Numbering of pages and annexures

Justice Bryson: A paragraph which extends over many pages, or is divided into a great number of sub-paragraphs, does not comply, and is of no use for finding passages in the affidavit.

ADMISSIBILITY: see *Britt & Britt* [2017] FamCAFC 27 (27 February 2017)

COMMON OBJECTIONS to material in affidavits:

The offending passage:

- is not relevant to an issue in dispute and therefore is not admissible;**
- is inadmissible as to form; (often an objection about indirect speech);

- is vague/ambiguous;
- purports to reflect the state of mind of another person;
- is a conclusion without foundation.

Justice Thackray: It is useless for a witness to say that the other party has 'not been willing to be flexible' in relation to contact arrangements if the facts are not stated.

- is repetitive;
- is an opinion the witness is not qualified to give;

Justice Thackray:...practitioners who would never dream of asking a witness in the box for his opinion on a particular topic, repeatedly draft affidavits peppered with statements of belief and opinion.

- is a submission;
- is general/speculative/hypothetical;
- is inadmissible hearsay; *Evidence Act (Cth) 1995.*
 - But see *Family Law Act s69ZT*:

Parts of *Evidence Act (Cth) 1995* do not apply in Division 12A parenting proceedings unless the court determines otherwise: *EA* Parts are 3.2 to 3.8, dealing with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character.

FLA s69ZT (2): The court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the *Evidence Act 1995 (Cth)* not applying.

- ***Britt & Britt*** [2017] FamCAFC 27 (27 February 2017)
- The Full Court provides a clear, thorough exposition of admissibility of evidence.
 - An important issue was the long history of serious family violence alleged by the wife.
 - The Full Court determined that the judge at first instance had erred in rejecting affidavit evidence of the wife about family violence when ruling on objections at the opening of the trial; analysis of the relevant passages from the trial transcript.

Useful papers, including those referred to in the summary:

How to Draft an Affidavit (1985) 1 *Australian Bar Review* 250
J P Bryson QC

Affidavits (1999) 18 *Australian Bar Review* 166 Justice John Bryson

Practical litigation in the Federal Courts of Australia: Affidavits
(2000) *Australian Bar Review* 28 Justice Arthur R Emmett

Family Law Affidavits (2012) 2 *Fam Law Rev* 65 Justice Stephen Thackray

The Law of Affidavits, John Levingston; Federation Press, 2013

Practice Paper CL404 The College of Law October 2015

Mary Falloon, barrister
Frederick Jordan Chambers, Sydney