AFFIDAVITS IN FAMILY LAW

Presented by

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DRAFTING AFFIDAVITS FOR CLARITY AND ADMISSIBLITY

Evidence-in-chief in Family Courts is given by affidavit.

Filing of an affidavit does not make it evidence. It only becomes part of the evidence when relied upon by a party at a hearing or trial.

The best evidence is succinctly summarised as that which people see, hear and feel. People can also give evidence about their own state of mind.

Rule 15.08 of the Family Law Rules ("**FLR**") sets out the form of affidavits generally. An affidavit must be in numbered paragraphs, each confined to a particular subject matter, bear name of party and name of deponent, specify name of witness and bear the name of the person who prepared the affidavit.

Rule 15.09(1) FLR provides that an affidavit must be:

a) confined to the facts about the issues in dispute;

b) confined to admissible evidence;

c) sworn by the deponent, in the presence of a witness; and

d) signed at the bottom of each page by the deponent and the witness; and

e) filed in the relevant Court.

Rule 15.13 FLR and 15.29 of the Federal Circuit Court Rules ("**FCCR**") provides that the Court may order unqualified opinion evidence, inadmissible, unnecessary, irrelevant, unreasonably long, scandalous or argumentative evidence to be struck out.

Lay out of Affidavit

It is often suggested that material in an affidavit should be set out in chronological order. In the Family Court the affidavit may relate to a number of different issues and it will often be more convenient to adopt a thematic approach.

Have a plan about how you intend to set out the evidence in a way most likely to assist the Court. Headings will help the reader understand the plan and will be useful when going back to the document to look for a particular item of evidence.

AFFIDAVITS AND THE RULES OF EVIDENCE IN FAMILY LAW MATTERS

The relationship between the Evidence Act 1995 ("***Evidence Act***") and the Family Law Act ("**Act**") and the FLR and the FCCR is that the Evidence Act applies where it does not conflict with the provisions of the Act.

In *Kinda Kapers Charlestown Pty Ltd v New Castle Neptunes Under Water Club Inc. & Ors* [2007] NSWSC 239 White J stated:

> "*I make this last direction because Mr Athol Davies' affidavit was prepared without any regard to the rules of evidence. After the rulings on objections to it nothing of substance remained. It is not enough to say that a client or a witness wishes to express himself or herself in his own terms. The party's legal representatives have a responsibility to ensure that affidavits are prepared with regard to the rules of evidence*."

Relevance

Section 55 of the *Evidence Act* defines "relevant evidence" as:

> *"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 proceedings."*

The Evidence Act further provides that unless otherwise specified:

> "*Evidence that is relevant in a proceeding is admissible in the proceeding*." s 56(1)

> "*Evidence that is not relevant in the proceedings is not admissible.*" s 56(2)

In *McGregor & McGregor* (2012) FLC 93-507 it was stated that there must be a rational connection between the evidence sought to be adduced and the facts in issue to be determined at the trial.

> *"Once evidence is determined to be relevant and thus admissible, it is for the finder of fact to determine the weight or importance to give that evidence and to consider whether the evidence should otherwise be excluded under s 135 or its use limited under s 136 of the Evidence Act."*[96]

Section 135 of the *Evidence Act* is in the following terms:

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 exercise of the discretion involves first ascertaining the probative value of the evidence proposed to be admitted, because if that is not done, it cannot be weighed against the dangers referred to in the subsections.

A common mistake made is the inclusion of irrelevant material in affidavits with little or no probative value.

In determining probative value, there only needs to be a minimal logical connection between the evidence and the "fact" in issue. The evidence need not render the fact in issue probable; it is enough if it only makes the fact in issue more probable or less probable than it would be without the evidence.

Case study

In *Ensabella and Ensabella* (1980) FLC 90-867 the husband sought an order for costs against the wife in respect of costs which he alleged he was unnecessarily forced to incur as the result of an affidavit which had been filed by the wife in support of her application. Fogarty J said:

> *"The affidavit dealt in exhausting detail with a number of matters which could not really be said, on any view, to be relevant to the ultimate issue of custody and it dealt at inordinate length with matters of varying shades of relevance. The affidavit canvassed the history of the marriage from start to finish, it referred in extraordinary detail to numerous old, trivial events which in my view could have no significance in the ultimate issue."*

His Honour emphasised the importance of professional judgment. His Honour assessed the affidavit as being at least 50% too long and ordered the wife to pay half the husband's costs of preparing his affidavit in reply.

Hearsay (s 59 of the *Evidence Act*)

Hearsay evidence is where a deponent gives evidence as to a statement or observation made by another person.

The hearsay rule applies to evidence of an admission that is not first-hand unless:

1. it is given orally by a person who saw, heard or otherwise perceived the admission being made; or

2. it is a document in which an admission is made.

The general use of hearsay in affidavit evidence was condemned by Lindenmayer J in *Lane's case* (1976) FLC 90-143. However, his Honour allowed that hearsay evidence in such cases might be admissible under the ordinary rules of evidence and in "*exceptional circumstances in which some guarded reference may be made ... with a view to alerting the Court to the possible existence of a state of affairs relating to the child which ought to be further investigated ...*"

Hearsay is generally inadmissible unless it falls within one of the various exceptions to the rule.

Exceptions:

Exceptions to the hearsay rule are contained in the *Evidence Act*:

- if the hearsay evidence is being relied upon for a non-hearsay purpose: s60;
- if the person who made the statement:
    - is not reasonably available: s63;
    - is available and is either going to be called or it would be unduly expensive or cause undue delay to call that person: s64;
- contemporaneous statements about a person's health: s66A;
- business records s69;
- letters, faxes or emails in so far as the representation is as to the identity of the person sending the message, the date and time the message was sent or the destination of the message or the identity of the person to whom the message was addressed: s71;

Section 75 of the *Evidence Act* provides that the rule against hearsay does not apply to affidavit evidence in interlocutory proceedings if evidence of the source is also adduced.

The hearsay provisions apply to property cases only.

Opinion

Section 76 of the *Evidence Act* excludes the evidence of an opinion that is being used to "*prove the existence of a fact about the existence of which the opinion was expressed*" where a deponent seeks that the Court makes a finding of fact about an issue where there are no underlying facts upon which the opinion is based. For example, saying "*the husband was abusive towards me*" rather than detailing the alleged facts such as: "*On 1 April 2010 the husband threw a glass vase at me and on 2 April 2010 he slapped me in the face*."

Facts are set out to enable the Court to draw its own conclusion.

Exceptions

The two most important exceptions to the opinion rule are:

a) opinions based on expert knowledge: s79;

b) lay opinions: which is a non-expert opinion based on what a deponent saw, heard or otherwise perceived about a matter or event, and evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter of event: s78

In *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, the High Court, referring to expert opinion, discussed the interplay between ss 76(1) and 79(1) and said at [602–603]:

> *"Section 76(1) expresses the opinion rule in a way which assumes that evidence of an opinion is tendered "to prove the existence of a fact". That manner of casting the rule does not, as might be supposed, elide whatever distinction can be drawn between "opinion" and "fact" or invoke the very difficult distinction which sometimes is drawn between questions of law and questions of fact. It does not confine an expert witness to expressing opinions about matters of "fact". Rather, the opinion rule is expressed as it is in order to direct attention to why the party tendering the evidence says it is relevant. More particularly, it directs attention to the finding which the tendering party will ask the tribunal of fact to make. In considering the operation of s 79(1) it is thus necessary to identify why the evidence is relevant: why it 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". That requires identification of the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving."*

A common way to attack an expert report is to undermine the factual basis upon which the expert opinion is based and therefore undermine the foundations of the report. In *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 Heydon JA said at [85]:

> *"In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of 'specialised knowledge'; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be 'wholly or substantially based on the witness's expert knowledge', so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibility proved by the expert, and so far*

as the opinion is based on 'assumed' or 'accepted' facts, the must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached. ...If all these matters are not made explicit, it not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible and, so far as it is admissible, of diminished weight."

RULES OF EVIDENCE IN CHILREN'S CASES

It is usual for evidence of children's views to be placed before the court, at first instance, in an affidavit by one of the parties or their witnesses. Should the views be more crucial or the validity of the views be an issue in itself, then often a family report will be ordered.

Section 69ZV of the Act concerns the admissibility of hearsay evidence of statements made by children in proceedings under the Act.

Section 69ZV(2) of the Act states that evidence of any representation made by a child about a matter relevant to his or her welfare or to the welfare of another child is not inadmissible as evidence solely because of the rule against hearsay.

Such evidence is, however, not admissible as of right; it is simply able to be admitted at the Court's discretion. It is provided in s 69ZV(3) that a Court may give evidence admitted under s69ZV(2) such weight (if any) as it thinks fit.

s 69ZX(3) which is found in Division 12A provides as follows:

"*(3) The court may, in child- related proceedings:*

(a) receive into evidence the transcript of evidence in any other proceedings before:

(i) the court; or

(ii) another court; or

(iii) a tribunal; and draw any conclusions of fact from that transcript that it thinks proper; and

(b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii).

Case studies

In *S v R* (1999) FLC 92-834 the Full Court of the Family Court held that whilst a mother could give evidence of what she had been told by a police officer about what a child had said in an interview under the exceptions to the hearsay rule, the actual transcript of the interview itself could not be admitted without evidence from someone present at the interview to state that they were accurate.

In *Mitchell and Mitchell* (1984) FLC 91-526 in an application by a mother of two ex nuptial children aged 13 and 11 to vary a previous custody order and to grant her the custody of the children, the mother relied in part on evidence of things the children had said to her and to a clinical psychologist as to their wish to be with her. It was held that the evidence of the children's wishes by the mother and the psychologist was hearsay evidence.

In *Burhop* (1979) FLC 90-672 Treyvaud J ruled that conversations of a child were admissible as evidence in a parenting case.

When might a Court apply the Rules of Evidence in Children's Cases

In cases where there are serious allegations the Court may (but is not obliged to) apply the rules of evidence, which would otherwise not apply.

Section 69ZT(3) of the Act provides that the Court may apply one or more of the provisions of the *Evidence Act* to an issue in the proceedings if the circumstances are exceptional and the Court has taken into account the importance of the evidence in the proceedings, the nature of the subject matter of the proceedings and the probative value of the evidence.

The court is often called upon to exercise its discretion to admit statements of what a child said in cases of child abuse. In *DT v JT* (1999) FLC 92-851 a father (with whom some

of the children resided) made allegations of child abuse against the mother's new partner, alleged to have occurred three years previously. The Full Court allowed evidence to be admitted from the Department of Human Services of an interview with the children at the time, notwithstanding that no action had been taken following the investigation. The evidence was considered to have potential probative value as this was a situation where a child had suffered injuries which the mother was not able to explain.

In cases where there are serious allegations the Court may apply the rules of evidence, which would otherwise not apply. In ***Maluka v Maluka*** (2011) 45 FamLR 129 the Court was asked to terminate the child's relationship with a parent. The proceedings were considered exceptional and the Court applied the rules of evidence.

DIFFERENT AFFIDAVITS FOR DIFFERENT MATTERS

It is important for the practitioner to have in mind the relevant provisions of the legislation to ensure that each of the matters, which the Court is obliged to take into account, is addressed

Property Cases

In a property case use the four step process as your basic structure.

Remember ***Stanford*** wherein determining applications under s 79, the High Court set out three fundamental propositions that "must not be obscured". Particularly relevant to cases where parties are not separated is that:

> *"First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property. So much follows from the text of s 79(1)(a) itself, which refers to 'altering the interests of the parties to the marriage in the property'. The question posed by s 79(2) is thus whether, having regard to those existing interests, the court is satisfied that it is just and equitable to make a property settlement order."*

The High Court majority considered that the just and equitable requirement is "readily satisfied" if the parties are, as the result of a choice made by one or both of the parties, no longer living in a marital relationship. In those circumstances:

> *"It will be just and equitable to make a property settlement order in such a case because there is not and will not thereafter be the common use of property by the husband and wife. … That is, any express or implicit assumption that the parties may have made to the effect that existing arrangements of marital property interests were sufficient or appropriate during the continuance of their marital relationship is brought to an end with the ending of the marital relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end. Hence it will be just and equitable that the Court make a property settlement order. What order, if any, should then be made is determined by applying s 79(4)."*

In circumstances where parties are not separated, careful consideration should be given to matters which might make it just and equitable to make an order. Possible matters include:

- can the needs of a party be met by a maintenance order?
- are future contributions by either party likely?
- is a separation possible or likely?
- does the use of "common property" continue?
- what will be the impact on the parties individually of a s 79 order?
- what is the relevance of the factors listed in s 79(4)?

Preparing a property affidavit

Set out the facts as to the basic history of the marriage or relationship including dates of birth, date of marriage and separation, children's details and occupations.

Next, specifically identify the assets and liabilities of the parties, whether held jointly or solely. Consider including a table which sets out the ownership of the assets and liabilities and your client's position as to their value at the time of swearing the affidavit.

Then set out the facts referable to the contributions of the parties both by way of direct and indirect financial and non-financial contributions as per s79(4) of the Act, including as a homemaker and parent.

Potential s75(2) factors and relevant evidence to be considered:

- age and state of health of parties;
- income, property and earning capacity of the parties;
- financial resources of the parties;
- care and control of children / protecting the party's continuing role as a parent;
- commitments of the parties to support themselves and any children or responsibility to support any other person;
- a standard of living that is reasonable;
- creditors and bankruptcy;
- cohabitation with another person and financial circumstances relating to such cohabitation; and
- any other fact or circumstance that the justice of the case required to be taken into account.

Parenting Cases

In parenting cases s 60CC of the Act is often a good structure to follow.

Consider what evidence is required for the type of application being filed. For example, is it an application for:

- the return of a child wrongfully removed or retained overseas; or
- to relocate with the child or oppose an application for relocation; or
- for protective injunction and supervision of time; or
- for equal or substantial time with the child; or
- to vary a final parenting order.

After the deposition of the relevant basic information as to dates of birth of the children, there should be a comprehensive coverage of facts in relation to the s 60CC factors. In determining what is in the child's best interests, the court must consider:

- the benefit of the child of having a meaningful relationship with both of the child's parents; and
- the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The Court must also consider:

- any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;
- the nature of the relationship of the child with each of the parents and other persons including any grandparent or other relative of the child;
- the extent to which each of the child's parents has taken, or failed to take, the opportunity to participate in making decisions about major long-term issues in relation to the child; to spend time with the child; and to communicate with the child;
- the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parents obligations to maintain the child;

- the likely effect of any changes in the child's circumstances, including the effect on the child of any separation from either of his or her parents or any other child and the expense of a child spending time with and communication with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

- the capacity of each of the child's parents and any other person (including any grandparent or other relative of the child) to provide for the needs of the child, including emotional and intellectual needs;

- the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

- if the child is an Aboriginal child or a Torres Strait Islander child, the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture) and the likely impact any proposed parenting order under this Part will have on that right;

- the attitude to the child and to the responsibilities of parenthood demonstrated by each of the child's parents;

- any family violence involving the child or a member of the child's family; and

- if a family violence order applies, or has applied, to the child or a member of the child's family--any relevant inferences that can be drawn from the order, taking into account the nature of the order, the circumstances in which the order was made, any evidence admitted in proceedings for the order, any findings made by the court in, or in proceedings for, the order.

In *Baines and Baines* (No 2) (1981) FLC 91-063, there was an appeal to the Full Court of the Family Court from an order giving care of the two children of the marriage to the wife. In the proceedings before the trial Judge, there had been 15 witnesses who had sworn affidavits. Many of these affidavits did no more or little more than say, if the affidavit was filed on behalf of the husband, that he was a proper custodian, and if it was filed on behalf of the wife,

that she was a proper custodian. In dismissing the appeal, the Full Court made the following comments in relation to affidavits in parenting matters (at p 76,497):

> *"The filing of affidavit material in custody cases is of particular importance in this regard ... The affidavit material, if properly prepared, can define the issues which are involved so that when the case commences both counsel and the trial Judge are aware what the real issues are. If it appears that the parties have mistaken what the real issues should be, the trial Judge has a duty to dissuade parties from presenting material of remote or tenuous relevance and if necessary should exclude such material as a matter of exercise of discretion."*

Remember: Address only the real issues in the case.

PROPER USE OF ANNEXURES AND EXHIBITS

Rule 15.12 FLR and Rule 15.28 FCCR govern the use of annexures and exhibits. The Rules provide that if a document is to be used in conjunction with an affidavit, it is to be annexed to the affidavit, and have its pages consecutively numbered with the cover sheets included in the numbering. This is rarely done in practice, but should be implemented.

Do not take shortcuts by simply annexing a letter in which the details of certain events have been related. It makes it difficult for the other party to respond. Rather set out the facts in the body of the affidavit.

Annexures must be:

- paginated consecutively, with the first page of the first attachment being marked numeral 1;
- no more than 2.5 inches thick, or sufficiently large that the whole affidavit is more than 2.5 inches thick once put together;
- if the 2.5 inches rule is breached, then the documents must be filed in separate volumes each no more than 2.5 inches thick;

- in the alternative, identify the document and file it.

The FCCR further requires the relevant page number to be identified in the body of the affidavit. For example:

> *Annexed and marked with the letters "P" (pages 13-14) is a true copy of the agreement for sale.*

A practice has evolved of attaching numerous documents to an affidavit. Before doing so, you should consider whether or not you need to attach the document. Is the matter to which the document relates contentious? Is it better for the deponent to give the evidence and then when challenged in cross-examination produce the document in re-examination.

In addition to the requirements of the Rules, think about:

- **The purpose of the affidavit**. In a busy duty list, a short affidavit with documents exhibited or identified and then tendered at the hearing is often best.

- **The nature of the document**. Lengthy standard business documents such as trust deeds or shareholders' agreements are often better exhibited or tendered, whereas short annexures directly in point are best as attachments.

- **Usability of the document**. A bulky, unpaginated affidavit with voluminous attachments will not endear you to the judicial officer you hope to persuade. If volumes are required, exhibit, paginate, tab and use ring binders or other binding to make the evidence easy to refer to.

A book of exhibits is often useful as it can sit aside of the affidavit and the reader can flick through it without having to turn back and forth from annexures to the body of the affidavit.

WHEN TO USE AN INDEX OR TABLE OF CONTENTS

A rule which is all too often ignored is Rule 15.12(4) of the FLR which provides that an index of contents must be included at the beginning:

- of the documents attached to the affidavit, if more than one document is affected;

- of each volume, if there is more than one volume.

THINGS THAT IRRITATE JUDGES

State only the facts! Commonly deponents state not only the facts but also the inferences that they say should be drawn from those facts. This is argument and should be left to counsel at trial. If there are insufficient facts in the affidavit there may be insufficient evidence for the Court to come to the desired finding.

The greatest ramification of an ill-prepared affidavit is an order for costs against the client or, the practitioner. Costs can be ordered against practitioners personally according to Rule 19.10 FCR and Rule 21.07 FCCR.

Tone: An affidavit should be pitched so that the voice of the deponent comes through, not the voice of the practitioner. However, neither should the affidavit sound like ordinary, casual speech. The practitioner should draw out the facts. Avoid using words in the affidavit which the deponent is unlikely to understand.

Avoid identical language in multiple affidavits: affidavits in a contentious matter from more than one person in a particular interest where the affidavit uses identical language. The obvious inference is that one person, generally a legal practitioner, has had too great a hand in the preparation of the two or more affidavits:

In *Macquarie Developments Pty Ltd and Anor v Forrester and Anor* [2005] NSWSC 674 Palmer J said at [90-92]:

> *"Save in the case of proving formal or non-contentious matters, affidavit evidence of a witness which is in the same words as affidavit evidence of another witness is highly suggestive either of collusion between the witnesses or that the person drafting the affidavit has not used the actual words of one or both of the deponents. Both possibilities seriously prejudice the value of the evidence and Counsel usually attacks the credit of such witnesses, with good reason.*

> *Where the identity of evidence is due to collusion, the devaluation of the evidence is justified but where, as in the present case, the identity of evidence is due entirely to a mistake on the part of a legal adviser, a witness' credit and a party's case may be unjustly damaged.*
>
> *I accept the evidence of the Defendants' solicitor as to how the identity of the affidavit evidence of Gregory and Bradley Forrester occurred, and that the mistake was an honest one on his part. The explanation entirely removes any suspicion that there has been collusion on the part of Gregory and Bradley Forrester in the preparation of their affidavit evidence."*

The incorporation of interim affidavits into trial affidavits: it is far more convenient for the Judge to have all of the relevant material set out in one document. Rule 15.06 provides that "*an affidavit filed with an application may be relied upon in evidence only for the purpose of the application for which it was filed*."

When replying to an affidavit, avoid referring to the number of the sentence in a paragraph: For example "*As to paragraph 12, I deny the first, second and fourth sentences*." It can be frustrating for a Judge to constantly have to refer back and count sentences.

Avoid discrepancies between affidavits: make sure that you are familiar with earlier affidavits filed in the proceedings and that any relevant material contained in any interim affidavit is included in the trial affidavit. Make sure that evidence in the trial affidavit does not contradict any earlier evidence given.

Overarching principles

Section 37M(2) of the *Federal Court of Australia Act 1976* (Cth) ("***Federal Act***") also makes it clear that the overarching purpose of civil practice and procedure provisions includes the following objectives:

- the just determination of all proceedings before the Court;
- the efficient use of the judicial and administrative resources available for the purpose of the Court;

- the efficient disposal of the Court's overall case load;
- the disposal of all proceedings in a timely manner; and
- the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

The *Federal Act* imposes a duty (s 37N(1)) on parties to a civil proceeding to conduct the proceedings in a way that is consistent with the overarching purpose. Furthermore, and of particular significance to practitioners, is the obligation imposed by s 37N(2) on a party's lawyer conducting civil proceedings to take into account the duty of their client to act consistently with the overarching purpose and to assist their client in doing so. The Act also makes clear that any failure to comply with those duties may be taken into account in awarding costs, including costs payable personally by a lawyer (s 37N(4) and (5)).

DRAFTING AFFIDAVITS WHEN SELF-INCRIMINATION IS AN ISSUE

Section 128 of the *Evidence Act* provides that:

> "*A witness may object to giving particular evidence or evidence on a particular matter on the ground that the evidence may tend to prove that the witness:*
>
> *a) has committed an offence against or arising under Australian law or the law of a foreign country; or*
>
> *b) is liable to a civil penalty.*
>
> *The court has to determine whether there are reasonable grounds for objections (s128(2))*

Section 128 Certificate

The Court can issue a certificate under s 128 so that the evidence that the witness gives and evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given the evidence, cannot be used against them.

A common view is that a certificate needs to be sought before an affidavit, which includes evidence which may incriminate the witness, is sworn and filed. Once the evidence has been given, it may be too late to apply for a certificate.

There is also a view that the certificate can be sought after the affidavit has been sworn but before it has been filed and served.

Another view is that it can be granted before the affidavit is relied on, even if it has already been filed and served.

The usual practice to seek the certificate is to apply in one of the following ways:

1. Apply for a certificate before filing the affidavit. This application can be made orally on, for example, the First Day of Trial, or

2. File an Application in a Case seeking a certificate. In the client's affidavit, exclude the evidence which is sought to be covered by a certificate, but set out that the client will seek a certificate with respect to that issue.

3. Prepare an affidavit which contains the evidence for which the certificate is sought. Serve an unsworn copy of the affidavit or a proof of evidence on the other party's lawyers and advise that a certificate will be sought at the next available opportunity — such as the commencement of the trial — but before the affidavit containing the material is sworn. If and when the certificate is granted, the client swears the affidavit.

Is the protection absolute?

The decision by Justice Cronin of *Vasilias & Vasilias* [2008] FamCA 34 is a reminder that s 128 does not provide a "golden ticket" to freedom from prosecution. Cronin J said:

> *"I am left with an unusual dilemma which is that the parties have benefited from the Commonwealth unreasonably, inappropriately and presumably, illegally. I find therefore that directly or otherwise, the parties' current financial circumstances are such that they have assets which they may not otherwise have but for that inappropriate conduct. Leaving aside any question of criminal conduct and its consequences, I am being asked to divide up the financial resources of the parties including an unquantifiable sum that should not belong to them".*

Cronin J was concerned about the conflict between s 128 and the consequence of a certificate potentially precluding the Commonwealth from recovering in any criminal or civil action. He cited cases confirming that the Court had the power to report an offence to the relevant authorities (eg *Malpas & Malpas* (2000) FLC 93-061), which, in this case was Centrelink.

Cronin J considered whether there were any options available to him, such as to:

- Quarantine an amount from the pool and direct that it be returned by the parties to Centrelink.
- Adjourn the proceedings to enable the issue to be clarified by the relevant Commonwealth authorities. This was impermissible due to s 128(7)(b) which provides that the evidence in respect of which a certificate has been given "cannot be used against the person"

- Report the matter to the relevant authorities in the knowledge that they would be constrained by s 128 in the use it could make of the affidavit.

Cronin J took that last approach and ordered that the Registry Manager refer a copy of the reasons for judgment to the Centrelink Investigations Unit to do the best they could within the constraints imposed by the s 128 certificate.

In this case, Cronin J seemed to be attracted to the approach taken by Young J in *HMP Industries Pty Ltd v Robert Graham* [1996] NSWSC 371 where Young J was concerned that the issuing of a s 128 certificate would impede criminal proceedings. Young J said:

> *"… it seems to me that these orders [in relation to the issuing of a s 128 certificate] should also be brought to the attention of the prosecuting authorities, as it may be they would wish to be heard as to whether it would be better to have no affidavit which might impede the investigation of criminal proceedings. If they take that view then I think that all copies of the affidavit may have to be destroyed. They are not parties to the proceedings, but I think in the public interest I should hear them as amicus curiae".*

Other Family Court judges, such as Watts J in *Lambert & Jackson* [2011] FamCA 275 have taken a broader view than Cronin J. Watts J considered that a s 128 certificate guaranteed a complete and satisfactory remedy. His view was that the affidavit should be sworn, but not filed and served, before the certificate was obtained. Until it had been filed, it had not been published.

When drafting an affidavit which may expose the client to a liability it may be useful to include a paragraph such as follows:

> "*I am not willing to give evidence in answer to the allegations made against by the wife about XYZ (or referred to in paragraph A of the wife's affidavit filed…) without first obtaining a certificate under section 128 of the Evidence Act*."

CASE STUDY- DRAFTING A PARENTING AFFIDAVIT

Relocation

No specific section of the FLA refers specifically to the difficult subject of relocation. In fact, there is no such thing as a "relocation case". So what principles should one follow when drafting an affidavit in a relocation application?

In *B and B: Family Law Reform Act 1995* (1997) FLC 92-755, their Honours Nicholson CJ and Fogarty and Lindenmayer JJ, made it clear that:

> *"Relocation cases are not a separate category within the Family Law Act … each is a case under Part VII relating to the best interests of the children but within a particular context and,…is to be determined in accordance with the principles contained in that Part."*
>
> *As a result of the complexities associated with parenting cases involving the proposed relocation of children, the Full Court of the Family Court and the High Court have given careful, and repeated, consideration to the approach to be adopted in these difficult cases.*

On 1 August 2000, the Full Court of the Family Court delivered its reasons for judgment in *A v A: Relocation Approach* (2000) FLC 93-035, and formulated a guideline judgment to

be applied when determining parenting cases of this sort. That decision draws together the principles enunciated by the Full Court in *B and B* and the 1999 High Court decision in *AMS v AIF; AIF v AMS* (1999) FLC 92-852.

The decision in *A v A* is authority for the principle that in reaching a decision in cases where one party proposes to relocate with a child or children of the relationship:

- the court cannot proceed to determine the issues in a way that separates the issue of relocation from that of residence and the best interests of the child.
- compelling reasons for, or indeed against, the relocation need not be shown.
- the best interests of the child are to be evaluated taking into account considerations including the legitimate interests of both the residence and non-residence parent.
- neither the applicant nor respondent bears an onus.
- treating the welfare or best interests of the child as the paramount consideration does not oblige a court to ignore the legitimate interests and desires of the parents. If there is a conflict between these considerations, priority must be accorded to the child's welfare and rights.
- if a parent seeks to change arrangements affecting the residence of, or contact with the child, he or she must demonstrate that the proposed new arrangement, even if that new arrangement involves a move overseas, is in the best interests of the child.

The *Family Law Act by the Family Law (Shared Parental Responsibility) Act* 2006 ("***Amendment Act***") has changed the way a Court approaches making a parenting order. The court must, if it proposes to make or makes a parenting order, apply (unless it is not applicable or is rebutted) the presumption of equal shared parental responsibility (s 61DA). The making or proposing to make an order for equal shared parental responsibility then necessitates the requirement to consider the matters set out in s 65DAA.

In the Full Court decision of *McCall & Clark* (2009) FLC 93-405 Bryant CJ, Faulks DCJ, Boland J stated that:

"The Federal Magistrate, at the commencement of his consideration of the approach to be applied noted, correctly, that the best interests of the child were the paramount consideration, and then said that he was required to consider:

…

(a) whether the child spending equal time with each of the parents would be in the interests of the child and if not: whether the child spending substantial and significant time with each of the parents is in the best interests of the child as mandated by the statutory requirements in s.65DAA;

(b) the proposals of the parties; and

(c) subject to considerations of procedural fairness, such other proposals that might better serve the best interests of the child.

That approach is consistent with the approach enunciated in AMS v AIF; A v A and U v U and reaffirmed by the Full Court of the Family Court in Taylor and Barker [2007] FamCA 1246 (particularly having regard to the substantial amendments to the Family Law Act by the Family Law (Shared Parental Responsibility) Act 2006.

In our view, his Honour dealt with the relocation proposed in the context of his consideration of s 60CC and s 65DAA, at least in so far as it was possible to do so. It should be implicit in our conclusion in relation to this ground, that a relocation proposal should ***continue to be considered and evaluated, so far as possible, in the context of the making of the necessary findings in relation to the relevant s 60CC matters; however, … such a proposal now also needs to be considered in the context of s 65DAA****".* [own emphasis]

Consider the following headings (where applicable) when drafting an affidavit

- Introduction;
- Current living arrangements

- Reasons for wishing to relocate for example:
    - the offer of an employment opportunity which cannot be obtained in the deponent's current location;
    - a substantial increase in income;
    - flexibility around working hours which would enable more time to be spent with the child;
    - payment of relocation costs, schooling subsidies; and/or
    - a relationship which would come to an end if the deponent were forced to remain.
- Any views expressed by the child;
- The nature of the child's relationship with each parent and others;
    - history of care for the children
- The extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;
    - the extent of payment of periodic and non-periodic child support or lack thereof
- The likely effect of my proposal on child (including any separation from other parent, child or person);
- The practical difficulty and expense of child spending regular time with a parent;
    - proposals if the child is permitted to relocate, for example:
        - substantial time during the holiday periods;
        - a one off lump sum payment to subsidise the cost to the other parent of travelling once a year to see the child;

        - regular communication by Skype, telephone, mobile and/or Facetime;

    - proposals if the child is not permitted to relocate with me:

        - substantial time during the holiday periods;

        - regular communication as detailed above

- Benefit to the child of having a meaningful relationship with both parties;

- The need to protect child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence;

- Extent to which each parent has taken, or failed to take, the opportunity to participate in making decisions about major long-term issues, spend time with the child and communicate with the child or has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;

- Capacity of each parent to provide for the child's emotional, intellectual and other needs;

- Child's maturity, sex, lifestyle, background, culture and traditions;

- Child's right to enjoy their Aboriginal or Torres Strait Islander culture;

- Evidence of parents' attitude to child and responsibilities of parenthood;

- Any relevant inferences to be drawn from past or present family violence order; and

- Any other relevant fact or circumstance for example, issues relating to:

    - passports;

    - holidays;

    - schooling;

    - religion etc

TIP: Briefing counsel to settle your draft is advisable.

FIXING AFFIDAVIT EVIDENCE AFTER A CLIENT DISCOVERS THE INFORMATION IS NOT ACCURATE

What happens in a situation where a deponent client swears an affidavit and after it has been filed discovers that they have omitted vital information or they have inadvertently provided inaccurate information.

As soon as practicable, file a further affidavit informing the Court of the omission or inaccuracy and provide the necessary evidence. Include an explanation as to why the information was omitted, or incorrect, in the previous affidavit.

Can you seek leave to remedy the evidence in the witness box? There is no guarantee that the Court will allow oral evidence-in-chief from a witness although, leave will often be granted to correct an inaccuracy or provide updated evidence as to what has occurred since the filing of the affidavit.

Remember the ***Legal Profession Uniform Law Australian Solicitors' Conduct Rules*** 2015 in particular:

- Rule 21.3.1:

  "A solicitor must not allege any matter of fact in any court document settled by the solicitor … unless the solicitor believes on reasonable grounds that the factual material already available provides a proper basis to do so."

- Rule 24.1.1:

  "A solicitor must not advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

Useful sources:

CCH Family Law Service

Gerard Holmes *"Preparation of Affidavits in Family Law Matters"*

Belle Lane *"Drafting Affidavits in Family Law Matters*"

Justice Alan Robertson "*Affidavit Evidence*" 26 February 2014 (Federal Circuit Court of Australia papers and publications)

Justice Stephen Thackray "*Family Law Affidavits*"