



Précis Paper

How to draft an Affidavit

A discussion about the art of drafting affidavits including tips and tricks on what to include and what to avoid, particularly in relation to family law matters.

Discussion Includes

- Why is drafting an affidavit important?
- Principles of court in child related proceedings
- Relevance
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- Formal aspects of an affidavit
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- Tips when drafting affidavits

How to draft an Affidavit

1. In this edition of BenchTV, Malcolm Gittoes-Caesar (Principal/Director, Head of Family Law, Coleman Greig, Parramatta) and Karina Ralston (Principal Lawyer, Team Leader Family Law, Coleman Greig, Parramatta) discuss the art of drafting affidavits including tips and tricks on what to include and what to avoid, particularly in relation to family law matters.

Why is drafting an affidavit important?

2. With the delays in the court, interim decisions are likely to stay in place for a couple of years. Interim decisions are made based on affidavits and as such, it is usually a legal practitioner's one chance to put their client's best case forward.
3. The drafting of affidavits is becoming a lost art perhaps due to time pressures, sheer volume of work and client's wanting to assert what they want in their affidavits rather than properly articulating the issues that need to be raised in the proceedings for consideration by the court.
4. Judges are becoming more frustrated and more willing to express in their judgements, their criticism of the information and evidence provided to them.
5. There are several legislative provisions contained in the *Family Law Act 1975* (Cth) that impact upon the way affidavits are meant to be drafted in family law matters.

Principles of court in child related proceedings

6. The general proposition is that the rules of evidence do not apply in parenting matters.
7. Division 12A of the *Family Law Act 1975* (Cth) sets out the principles the court needs to abide by in child related proceedings.
8. Section 69ZN of the *Family Law Act 1975* sets out 5 principles for child related proceedings
 - a. The court must consider the needs of the child concerned and the impact that the proceedings may have on the child;
 - b. The court is to actively direct, control and manage the conduct of the proceedings
 - c. The proceedings are to be conducted in a way that protects children from harm and takes into account family violence
 - d. The proceedings will be conducted in a way that will promote cooperative and child focused parenting by the parties;

- e. The proceedings must be conducted without undue delay and with as little formality and legal technicality and form as possible
- 9. It is important for legal practitioners to remember that when they are writing letters and affidavits, the court has the power to refer them and the correspondence that they have written to the law society and legal services commissioner to see whether or not they have acted in a way that fulfils these principles.

Relevance

- 10. Section 69ZT of the *Family Law Act 1975* (Cth) notes that the rules of evidence do not apply to parenting matters.
- 11. Even so, it is important to note that certain rules of evidence do still apply regardless.
- 12. Relevance is one rule of evidence that still applies to parenting matters and is contained in section 55 of the *Evidence Act 1995* (NSW).
- 13. The evidence that is relevant in a proceeding is evidence that is if it were accepted, could rationally effect, directly or indirectly, the assessment of the probability of the existence of a fact in issue.
- 14. The relevance of the evidence is tied to what your client is asking the court to do and to the application that is being sought. For example, if a legal practitioner is drafting an application that seeks equal shared parental responsibility, the affidavit does not need any of the criticism that a client may wish to put in about the other person. Having regard to an application that is drafted this way, considerations of family violence in the affidavit are entirely irrelevant.

Opinion evidence

- 15. Opinion evidence is another of the rules of evidence that does apply irrespective of whether it is property or parenting cases.
- 16. If a client wishes to be able to assert a particular thing, they will need to have expert evidence to assert that thing. It is not enough for a client to say that their experience of a person is that they have a particular medical diagnosis.
- 17. The issues of opinion evidence primarily come into play in two situations, firstly a diagnosis of mental health for the other party or secondly, a diagnosis about their own medical conditions.
- 18. A client asserting an issue, must tie the issue to a risk and why it would be appropriate or inappropriate for particular orders to be made.
- 19. If a client has raised issues of coercive controlling behaviour or other forms of family violence and seeks overnight time in their orders, a practitioner must decide to what extent do they refuse to put particular orders to the court based on the information provided by the client.

Hearsay

20. Ultimately whilst the hearsay rule does not apply in parenting proceedings, courts must give regard to the weight that they are going to attach to particular evidence.
21. For a client's evidence to be given the highest regard, a practitioner should have regard to hearsay and put their client's best evidence forward.
22. More often than not, hearsay is not the best evidence. For example, there should never be a situation where there is a paraphrase of text messages when you could otherwise annex the text messages or email correspondence to the affidavit.

Formal aspects of an affidavit

23. Affidavits on an interim basis have a 10 page rule, however a practitioner can seek an order that exempts them from the 10 page minimum if they have a set of circumstances where they deem it necessary to exceed the 10 pages, for example to include examples of the behavior asserted.
24. There is power in the Family Court rules and the Federal Circuit Court rules for objectionable material to be struck out of affidavits. Therefore, evidence that is inadmissible, unnecessary, irrelevant, unreasonably long, scandalous or argumentative need to be kept out of affidavits.
25. Rules 1508 and 1509 of the *Family Law Rules 2004* (Cth) prescribe what an affidavit requires.

Information obtained

26. Section 131 of the *Evidence Act 1995* (NSW) relates to privileged information. Any documents marked 'without prejudice save as to costs' or any irrelevant correspondence between solicitors are privileged and should not be annexed to affidavits.
27. Section 138 of the *Evidence Act 1995* (NSW) relates to evidence that was obtained improperly.
28. Whilst recordings are generally inadmissible, the court can take into account certain things regarding admissibility. Section 131(3) prescribes that the court can look at the probative value of the evidence, the importance of the evidence and the gravity of the impropriety or contravention when deciding whether recordings can be admissible.
29. In the matter of *Huffman & Gorman (No. 2)* [2014] FamCA 1077, Her Honour let recordings in because they directly refuted the evidence that was given by one of the parties.

Tips when drafting affidavits

30. The court needs to make a determination which takes into account the best interests of the children and therefore need to know what any asserted arrangements will look like into the future. Therefore, it is important to put in information regarding employment, living arrangements, what activities the client will do with the children etc.
31. It is recommended to not use absolutes, be consistent with grammar, words and phrases and check any typos. Further, to draft chronologically, always use direct speech and to limit emotive language as it is generally inflammatory.
32. The case of *Britt & Britt [2017] FamCAFC 27* stands as the proposition as evidence that is not specific in relation to family violence is still relevant as it can still go towards a fact in issue and it can directly or indirectly effect a decision that is made
33. In the matter of *Drew & Jensen [2017] FCCA 656*, the Court was critical of a legal practitioner for only including the good things in their affidavit and neglecting criminal convictions that should have been disclosed.
34. Drafting affidavits is important as you are your client's voice in terms of drafting the affidavits and tying them back to the legislation and to your client's case is imperative

BIOGRAPHY

Malcolm Gittoes- Caesar

Principal/Director, Head of Family Law, Coleman Greig – Parramatta.

Malcolm Gittoes-Caesar currently heads Coleman Greig's Family Law Team and is both an Accredited Specialist in Family Law and an Accredited Family Law Mediator and Arbitrator. With over 15 years of experience, Malcolm has a breadth of practical knowledge across a wide range of family-related matters. Malcolm has particular expertise in complex parenting matters, which often involve high-net worth clients, and in turn, complicated financial issues. His experience in drafting Binding Financial Agreements, Child Support Agreements and Consent Orders, as well as dealing with criminal and AVO matters, enables him to resolve complicated cases with a high level of aptitude and efficiency. As a Nationally Accredited Family Law Mediator and Arbitrator, Malcolm works at all times to resolve disputes without the need for court. In the event that litigation is unavoidable, Malcolm is highly experienced in advocating for clients across all jurisdictions and is well respected by both the judiciary and other members of the legal profession. Malcolm was a finalist in the 2017 and the winner of the 2019 Partner of the Year Awards (Family Law) as well as the Australian Law Awards – Partner of the Year and is current Vice President of the Greater West Family Law Practitioners Association Inc.

Karina Ralston

Principal Lawyer, Team Leader Family Law, Coleman Greig Lawyers - Parramatta

Karina Ralston is a Principal Lawyer and is head of Coleman Greig's Penrith Family Law team. She is both an Accredited Specialist in Family Law and an Accredited Family Law Mediator and Arbitrator with experience and skills allowing her to provide advice and representation in a range of matters including divorce, parenting arrangements, relocation cases, property matters, Binding Financial Agreements and De-Facto relationships. Through her experience in academia, Karina has a comprehensive knowledge of current developments in legislative reform and case law. Karina has completed the Master of Laws (Applied Law) majoring in Family Law from College of Law and is a casual academic at Western Sydney University teaching and marking various undergraduate law subjects, including family law. Karina's involvement with the South West Sydney legal Service and prior work with the Women's Legal Centre includes providing pro-bono legal advice and assistance to those who may be experiencing legal difficulties. In addition, she mentors students, cadets and graduates within Coleman Greig and the wider community. Karina has joined the board of the Parramatta Law Society.

Bibliography

Legislation

Family Law Act 1975 (Cth)

Family Law Rules 2004 (Cth)

Evidence Act 1995 (NSW)

Cases

Huffman & Gorman (No. 2) [2014] FamCA 1077

Britt & Britt [2017] FamCAFC 27

Drew & Jensen [2017] FCCA 656