

**Back to Basics;
Keeping on the Straight and Narrow
in Family Law Affidavit Drafting**

NEWNHAMS SOLICITORS

What is an Affidavit

According to the Federal Circuit and Family Court of Australia (FCFCOA) fact sheet, an Affidavit is a written statement prepared by a party or witness. It is the main way you present evidence (facts of the case) to a Court.

As the Affidavit is the primary evidence upon which your client's case is based, it is an extremely important document. It is of the utmost importance that it be relevant and admissible and comply with the appropriate rules.

Too often people put together their Affidavit by consolidating several interlocutory Affidavits which results in material being included that is no longer relevant, is inaccurate as to time or place and/or is hotchpotch of different versions of the evidence.

Frequently practitioners are under time pressures with Affidavits, usually as a result of the client not understanding the time and detail required. In reality, an effective Affidavit is a working document which is easy to follow and is clear, simple and concise.

Formal Requirements

Rule 2.14 of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 ("Rules") provide as follows:

1. Must be typed in at least 12 point font size with line spacing of 1.5 lines;
2. Have margins of approximately 2.5cm;
3. Have each page consecutively numbered;
4. Paper documents must be legible, without erasures, printed on one side of A4 paper and securely bound or fastened;
5. Electronic documents must be filed in PDF format;
6. The above rules do not need to be strictly complied with, if the nature of the document, or the manner of filing means that strict compliance would be impracticable (R2.14 (5)).

When Must an Affidavit be Filed

Affidavits are to be filed in the following circumstances.

Rule 8.13 of the Rules says "*A party may file an Affidavit without the leave of the Court only if a provision of the Rules or an Order of the Court allows the Affidavit to be filed in that way*".

Rule 8.14 says "*An Affidavit filed with an Application may be relied on in evidence only for the purpose of the Application for which it was filed*".

In parenting or property proceedings, an Affidavit is only required if interlocutory or urgent orders are sought. An exception to this is in property proceedings as set out in paragraph 2.6 (f) of the Family Law Practice Direction – Financial Proceedings which is as follows:

“If the Applicant is aware that the Financial Statement will not fully discharge the duty to make full and frank disclosure, an affidavit providing further particulars; see full 6.06 (6) of the Family Law Rules”

is also required. Similarly, if the Application seeks a search order (2.6 (h)) or a freezing order (2.6 (i)) then an affidavit is also required.

Pursuant to paragraph 3.22 of the Family Law Practice Direction – Child Support and Child Maintenance Proceedings, an Affidavit is required “in child support proceedings, an Affidavit is required to be filed with an Initiating Application (Family Law) in all proceedings.” This does not apply to child support appeals or child maintenance proceedings.

Similarly, Affidavits are required in divorce proceedings as set out in the Divorce Proceedings Family Law Practice Direction including for e-filing, where the Applicant is unable to file the marriage certificate, the marriage certificate is not in English or where the parties have lived separately and apart under the one roof for a period of time during the 12 months preceding the filing of the Application.

Limit on Number and Length of Affidavits

Rule 5.08 of the Rules provides the following limits in interlocutory applications:

- A. Subject to Rule 5.06, one Affidavit by each party. Rule 5.06 is where there is the need for an Affidavit in reply;
- B. One Affidavit by each witness, provided the evidence is relevant and cannot be given by a party;
- C. Rule 5.08 (2) states that unless express leave is granted by the Court, the Affidavit must not exceed 25 pages;
- D. Rule 5.09 (3) provides that unless express leave is granted by the Court, the Affidavit must not contain more than 10 annexures.

These restrictions are in relation to Division 1. In relation to Division 2 reference is needed to be made to the Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021 wherein table 2.1 – Modifications of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 provides in item 7 that the 25 pages limit is substituted with 10 pages and in item 8, the 10 annexures are substituted with 5 annexures.

Requirements for Affidavits

Rule 8.15 of the Rules sets out requirements and importantly in Rule 8.15(1)(c) must have a statement at the end specifying the name of the witness before whom the Affidavit is sworn (or affirmed) and signed and the date and the place where the Affidavit is sworn (or affirmed) and signed and (d), bear the name of the person who prepared the Affidavit. Note 2 to the Rule says “a professional witness may provide a business address in place of a residential address”.

Subrule (3) refers to a document used in conjunction with an Affidavit which must be identified in the Affidavit filed as an annexure or an exhibit, be paginated, bear a statement signed by the person before whom the Affidavit is made identifying it as the particular

annexure or exhibit and must not be accepted as evidence in the proceeding unless and until it is tendered in evidence at the hearing of the application and accepted into evidence by the Court. A document annexed or exhibited to an Affidavit must be served with the Affidavit.

Rule 8.16 (1) adds that the Affidavit must be:

- (a) confined to facts about the issues in dispute; and
- (b) confined to admissible evidence; and
- (c) sworn or affirmed 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 after it is sworn or affirmed.

Rule 8.17 sets out requirements for Affidavits of illiterate or vision impaired person etc.

Rule 8.18 (1) provides that subject to s69ZT, a Court may order material to be struck out at any stage in a proceeding if it is inadmissible, unnecessary, irrelevant, prolix, scandalous or argumentative or contains opinions of persons not qualified to give them.

The sting in relation to this Rule is Sub Rule (2) which provides that unless the Court otherwise directs, any costs caused by the material struck out must be paid by the party who filed the Affidavit.

Section 69ZT and Parenting Proceedings

This Section provides that in parenting proceedings, the provisions for the Evidence Act listed do not apply which are:

- (a) Divisions 3, 4 and 5 of part 2.1 which deal with the general rules about giving evidence other than certain limited sections;
- (b) Parts 2.2 and 2.3 which deal with documents and other evidence including demonstrations, experiments and inspections;
- (c) Parts 3.2 to 3.8 which deal with hearsay opinion, admissions, evidence of Judgements and convictions, tendency and coincidence, credibility and character.

By Sub Section 2, the Court may give such weight as it thinks fit to the evidence as a consequence of the Evidence Act not applying.

Sub Section 3 provides that the Court may decide to apply one or more of the provisions of the Evidence Act if:

- (a) The Court is satisfied that the circumstances are exceptional, and;
- (b) The Court has taken into account the importance nature, probative value and the powers of the Court to adjourn the hearing to give directions.

Whilst it appears easy to draft an Affidavit in a parenting case including hearsay and opinion evidence, or not setting out the events in proper form, this may well result in little or no weight being given to the evidence. It is far more powerful for the Judge reading the Affidavit to receive the evidence in proper form and/or by way of the appropriate witness and/or expert. Examples of that are included below.

Case Theory

Before developing a case theory which is necessary before embarking upon the drafting of an Affidavit, detailed instructions need to be taken from the client and any necessary or appropriate witnesses to determine the matters in issue.

You must be familiar with the relevant current law applicable to the issues in the case, be it property, spouse maintenance, parenting, adult child maintenance, child support or the like.

It is imperative to have a grasp of the relevant dates and material facts, an example of which is below.

MARY ANNE SMITH

6 Smith St

Smithville 2093

Secretary Tel: 0438692838

JOHN PETER SMITH

2/22 Bounty St

Bligh 2138

Accountant

Date of Cohabitation: 5/3/08
Date of Marriage: 5/5/08 Arncliffe, Sydney
Separation: 01/5/19 Husband moved out

Wife: 25/1/86 37 yrs Born Sydney
Husband: 15/2/83 39 yrs Born New York, entered Aust in 1998

Children:
Louise Mary Smith 7/6/12 10yrs
Josh Peter Smith 21/9/13 9yrs

Schools:
Louise Year 3 Smithville Primary
Josh Year 2 Smithville Primary

Contributions

At Cohabitation

Wife

Car: \$5,000
Savings: \$10,000
Super: \$2,000
Shares: \$3,000
\$20,000

Husband

Car: \$5,000
Savings: minimal?
Super: \$2,000 ?
Credit Card: (\$2,000)
\$5,000

Gifts of Inheritances

Wife parents gifted \$10,000 in about 2004 to purchase the first home.

Husband inherited \$100,000 in 2007 which reduced the mortgage.

Assessment

Assets & super net now \$757,000

Husband worked throughout

Wife worked before children then part time when josh was 5 yrs of age

Contribution of wife 45-47½ %

Future Needs

Wife cares for children 9 nights per fortnight, Husband 5 nights per fortnight

Husband earns \$120,000 pa

Wife earns \$30,000 pa part time 3 days per week

Wife can work 5 days and earn \$50,000 pa

Assessment

Adjustment to wife probably 15%

Result

Wife gets approx. 60% = \$454,200

In a property case like the above example, work should begin immediately on the Balance Sheet which is a working document, a first example of which is below.

Balance Sheet

Note: this document can be sent by electronic means between the parties prior to it being filed at court.

		Name	Smith		
		File No			
		Date			
		Before			
Ownership	Description		Wife's Value	Husband's Value	Requires Expert Evidence
Assets					
1	H&W	6 Smith Street, Smithville	750,000		
2	H	2/22 Bounty Street, Bligh	450,000		
3	W	CBA savings	8,350		
4	W	Contents	5,000		
5	W	BHP shares	6,650		
6	H	Savings	E 10,000		
7	H	Holden car used by Wife	20,000		
8	H	BMW	50,000		
9					
10					
11					
Total			\$ 1,300,000		
Addbacks					
Ownership	Description		Wife's Value	Husband's Value	Requires Expert Evidence
12					
13					
Total					
Liabilities					
Ownership	Description		Wife's Value	Husband's Value	Requires Expert Evidence
14	H&W	CBA Mortgage	250,000		
15	H	CBA Mortgage	400,000		
16	W	Credit Cards	10,000		
17	H	Credit Cards	5,000		
18	H	CBA Personal Loan	NK		
19					
Total			\$ 665,000		

Superannuation					
Member		Fund & Interest	Wife's Value	Husband's Value	Requires Expert Evidence
28	W	MLC	22,000		
29	H	MLC	E 100,000		
30					
31					
Total			\$ 122,000		
Financial Resources					
Ownership		Description	Wife's Value	Husband's Value	Requires Expert Evidence
Total			\$0.00	\$0.00	
Summary					
		Assets	1,300,000		
		Liabilities	<u>665,000</u>		
		Net Assets	635,000		
		Superannuation	<u>122,000</u>		
		TOTAL	\$ 757,000		

NOTES

In relation to any disputed items and all disputed values for items a party should state, using the item number as a heading:

1. Why an item should not be on the balance sheet.
2. Whether expert evidence is required to resolve a dispute as to value and what steps have been taken to agree upon and appoint a single expert.
3. Whether documents in the possession of the other party need to be provided before the value of an item can be agreed.
4. Any other comment a party wishes to make in relation to the disputed item.

Item No	

Once you receive the material from the other side then you can complete the draft Balance Sheet which allows you to work out the matters in issue as to value as set out below.

Balance Sheet

Note: this document can be sent by electronic means between the parties prior to it being filed at court.

Name	Smith	
File No		
Date		
Before		

Ownership		Description	Wife's Value	Husband's Value	Requires Expert Evidence
Assets					
1	H&W	6 Smith Street, Smithville	750,000	900,000	
2	H	2/22 Bounty Street, Bligh	450,000	400,000	
3	W	CBA savings	8,350	8,350	
4	W	Contents	5,000	50,000	
5	W	BHP shares	6,650	6,650	
6	H	Savings	E 10,000	7,000	
7	H	Holden car used by Wife	20,000	25,000	
8	H	BMW	50,000	40,000	
9					
10					
11					
Total			\$ 1,300,000	\$ 1,437,000	
Addbacks					
Ownership		Description	Wife's Value	Husband's Value	Requires Expert Evidence
12					
13					
Total					
Liabilities					
Ownership		Description	Wife's Value	Husband's Value	Requires Expert Evidence
14	H&W	CBA Mortgage	250,000	250,000	
15	H	CBA Mortgage	400,000	400,000	
16	W	Credit Cards	10,000	10,000	
17	H	Credit Cards	5,000	20,000	
18	H	CBA Personal Loan	NK		
19					
20					
21					

Total			\$ 665,000	\$ 680,000	
Superannuation					
Member		Fund & Interest	Wife's Value	Husband's Value	Requires Expert Evidence
28	W	MLC	22,000	22,000	
29	H	MLC	E 100,000	98,000	
30					
31					
Total			\$ 122,000	\$ 120,000	
Financial Resources					
Ownership		Description	Wife's Value	Husband's Value	Requires Expert Evidence
Total			\$0.00	\$0.00	
Summary					
		Assets	1,300,000	1,437,000	
		Liabilities	<u>665,000</u>	<u>680,000</u>	
		Net Assets	635,000	757,000	
		Superannuation	<u>122,000</u>	<u>120,000</u>	
		TOTAL	\$ 757,000	\$ 877,000	

NOTES

In relation to any disputed items and all disputed values for items a party should state, using the item number as a heading:

1. Why an item should not be on the balance sheet.
2. Whether expert evidence is required to resolve a dispute as to value and what steps have been taken to agree upon and appoint a single expert.
3. Whether documents in the possession of the other party need to be provided before the value of an item can be agreed.
4. Any other comment a party wishes to make in relation to the disputed item.

Item No	

You need to identify the issues which you need to address and prove as part of your case theory. Examples are:

1. The value of assets held as at the commencement of cohabitation;
2. Gifts or inheritances that may have been received;
3. Personal injury, payouts received;
4. Non-financial contributions of homemaker and parent;
5. Non-financial contributions to improvements to property e.g. building a room on the home.

These may be the issues that you need to be in a position to prove to follow the case theory of a certain percentage entitlement for your client.

The same can be said in relation to issues of future needs including:

1. The ages and/or special needs of any children;
2. The income earning capacity of both parties;
3. The health of one or other party and its impact upon working life and/or capacity.

In a parenting case, the case theory may be that one parent is not suitable such that there is an unacceptable risk of harm to the children based upon any or all of the following:

1. Mental health issues;
2. Drug or alcohol issues;
3. Anger management issues.

Once the issues are identified and you have your case theory as to the outcome sought then the Affidavit can be drafted with those things in mind.

The Affidavit Drafting

With it clearly in mind that the Affidavit or parts of the Affidavit will be struck out as set out in Rule 8.18, I address some of the issues.

Irrelevant Material

Nothing annoys a Judge more than to be asked to wade through an Affidavit containing unnecessary detail about history that has no relevance to the matters requiring determination

by the Court. Many client's want full and complete details of irrelevant matters however, these should never be included.

A clear example is the case of Sheehan & Sheehan (1983) FLC 91-352 at page 78,360 where the full Court described part of the Wife's Affidavit as follows:

"The substance of the Affidavit commenced at para. 4, and commenced the matrimonial history of the parties by referring to the fact that they became acquainted as children in primary school when the wife was aged nine and the husband was aged ten. Put another way, whoever was responsible for the drafting of the Affidavit thought that it was, if not necessary, at least reasonable that, for the resolution of property and maintenance matters arising out of a 33 years marriage... and which had resulted in four children being born and raised to adulthood, to start at a point fifty years prior to the present time".

Other examples include the following:

"In 1985 I purchased a unit at Smith Town using \$50,000 gifted to me by my parents and a loan of \$50,000 from CBA. I sold this property before I met the wife".

"I moved out of the home because the wife had an affair with John Doe".

Bad Form and Inadmissible Material

You should always consider that the evidence of a witness in an Affidavit is something that they saw, touched, smelt, heard or did. It should not be what someone usually did or would do.

Some examples of bad form and inadmissible material and how they can be corrected are as follows:

1. *"I would bath the children each night".*

A corrected version is

"I bathed the children each night".

2. *"The father came home drunk, abused me and scared the children".*

A corrected version is

"At about 8:00pm on Friday, 14 January 2022 I heard a car door shut and heard the respondent father say in a very loud voice "thanks for the lift mate, I'll be right". The words were loud and slurred. A few moments later, I heard a key being tapped against the door near the lock on three or four occasions and then heard the key slide into the lock and unlock the door. I saw the respondent father walk in a swaying and staggering manner, stumbling into the back of the lounge. I saw him grab the lounge for support and I said to him "go to bed". I was within 2 metres of the respondent father and saw his eyes glassy and I smelt beer on his breath which

I had smelt on his breach numerous times before when he had come from our local RSL Club”.

“The respondent father then, whilst looking directly at me, raised his voice to a very loud level and yelled “you bitch, get out of my way”. I then looked toward the children’s bedroom and saw the children come out of their bedroom to see that the noise was and I said to the children in the presence of the respondent father “go to bed everything is ok”. Michael responded “we heard yelling and are worried about you mum”.

The respondent father then raised his arm to the side and above his shoulder in a fashion that made me scared and fearful that I was about to be hit and he yelled “you bitch, get out of my way, how dare you involve the children. Get out of my way or I’ll knock you down”.

I quickly moved out of the way whilst being scared and physically shaking. I felt sick in the stomach and feared for my safety. I saw the children quickly return to their room and shut the door”.

3. When I was a very junior solicitor in 1985, I appeared in the divorce list before Justice Ellis in circumstances where I did not have a copy of the Marriage Certificate although, my client was in attendance as was the husband. I advised the Court that I had applied for, but not yet received, the Marriage Certificate and applied to adjourn the divorce hearing and advised the Court that I had not yet been able to comply with the undertaking given to file a Marriage Certificate and sought leave to have the undertaking extended. The Undertaking was to file the Marriage Certificate once obtained. This is also an example of caution being needed when providing Undertakings to the Court. Following questioning by the Judge as to when and how the Application for the Marriage Certificate was made, His Honour was satisfied that best endeavours had been made for the Marriage Certificate to be filed prior to hearing of the Divorce Application. Expecting His Honour to adjourn the hearing so that the marriage certificate could be obtained and filed in accordance with the Undertaking, His Honour invited me to put my client into the witness box to prove marriage. I asked the witness *“Did you participate in a marriage ceremony with the Respondent Husband, Bill Smith on 2 January 1975?”*.

The Judge objected to this question and with a Court room full of other solicitors and clients proceeded to elicit the evidence in proper form commencing as follows:

Judge:

“Did someone ask you a question?”

Witness:

“Yes”

Judge:

“Who?”

Witness:

“Bill Smith”

Judge:

“What question?”

Witness:

“Will you marry me”

Judge:

“Did you say anything?”

Witness:

“Yes”

Judge:

“What did you say?”

Witness:

“Yes, I will”

Judge:

“Did anything happen after that?”

Witness:

“Yes, we arranged to be married”

Judge:

“On what day?”

Witness:

“2 January 1975”

Judge:

“Was anyone else present?”

Witness:

“Yes”

Judge:

“Apart from guests, who was present?”

Witness:

“A marriage celebrant and bridal party”

Judge:

“Was a ceremony conducted?”

Witness:

“Yes”

Judge:

“What ceremony?”

Witness:

“Marriage”

Judge:

“At the end of the ceremony was there any document?”

Witness:

“Yes”

Judge:

“What document?”

Witness:

“A Marriage Certificate”

Judge:

“What happened then with the Marriage Certificate?”

Witness:

“We signed it”

Judge:

“Who signed it?”

Witness:

“Me, Bill, the matron of honour, best man and then the marriage celebrant”

Judge:

“Thank you, I’m satisfied that the marriage is proven”

Expert Reports

Objection can also be taken to Expert Reports Section 79(1) of the Evidence of Act 1995, says in relation to an expert

“If a person has specialised knowledge based on the persons training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.”

In *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85], Justice Heydon provided the following definition:

*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 admissibly proved by the expert, and so far as the opinion is based on “assumed” or “accepted” facts, they 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: that is, the expert’s evidence must explain how the field of “specialised knowledge” in which the witness is expert by reason of “training, study or experience”, and on which the opinion is “wholly or substantially based”, applies to the facts assumed or observed so as to produce the opinion produced. If all these matters are not made explicit, it is 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. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ’s characterisation of the evidence in *HG v R* (1999) 197 CLR 414, on “a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise” (at [41]).*

Covid-19 – Signed in NSW

The NSW Government, as part of its response to the COVID-19 pandemic, initially made regulations and subsequently enacted legislation to allow for documents to be witnessed by electronic means. The methodology is now contained within Part 2B of the *Electronic Transactions Act 2000* (NSW).

The Part allows for documents that require a witness to be witnessed by audio visual link. It also allows for Affidavits to be taken by authorised witnesses by audio visual link.

The Part has the following formal requirements:

1. Observe the person signing the document;
2. The witness should attest or otherwise confirm the signature was witnessed by:
 - a. Signing a counterpart of the document; OR
 - b. Having the person scan the document and signing the signed copy of the document; OR
 - c. Have the person send you the original of the document and sign the original (less preferred)

NOTE: (a) and (b) are specifically detailed in the regulation as options. (c) is not and therefore it is safer to witness using (a) or (b)

3. The witness must be reasonably satisfied that the document signed is the same document as the copy they witness.
4. Endorse the document/copy of the document with a statement specifying the method used to witness the signature and that it was witnessed in accordance with the Regulation. Example:
 - a. *This document was signed [in counterpart] and witnessed over audio visual link in accordance with Section 14G to the Electronic Transactions Act 2000.*

As a practical example, using the example of a will, this may be effected by:

1. Send the client a copy of the document in PDF format before the video conference. This (as far as possible) prevents the client from making changes to the document.
2. During the video call, ask the client to show the two witnesses the document through the camera.
3. Once ready for signing (i.e. after giving your advice and the like), have the client hold each page up to the camera before signing that page. Ensure that the page is identical to the version in front of you.
 - a. TIP: You may be able to have the client set up their camera such that you can see the document without having to hold each page individually up to the camera. If in doubt, however, have the document held up to the camera.
4. If signing a counter-part, sign your version as you normally would and at the execution block, write the statement above (modified as appropriate).

5. If signing a scanned copy, once the client has scanned their copy to you, print and sign that copy of the document and at the execution block, write the statement above (modified as appropriate).
6. Make a contemporaneous file note of the processes you took in the witnessing of the document.

In the process of witnessing documents, the regulations may also be used verify identity and their signatures as is often required when witnessing documents. In order to verify identity, best practice is to:

1. Have the person show you their identity document over the camera; AND
2. Send you a scanned copy for your file.

This was initially a temporary measure in response to COVID-19. On 29 November 2021, the *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW) was passed and came into force to make remote witnessing a permanent addition in NSW.

Federal Circuit and Family Court of Australia

The Federal Circuit and Family Court of Australia, and its predecessors, previously had a protocol that allowed for documents to be signed by parties and lawyers electronically and without being witnessed (with an exception for Affidavits for eFiling (Divorce)).

This protocol was revoked as at close of business on 4 November 2022 and documents must now be signed in accordance with usual requirements. Documents which require an oath are signed in accordance with state legislation. For this reason, documents in the Federal Circuit and Family Court of Australia may continue to be signed and witnessed in accordance with the state legislation (i.e. Part 2B of the *Electronic Transactions Act 2000*)