Continuing Professional Development Seminars

Drafting Effective Family Law Affidavits and Case Summaries

Presenter: Richard Maurice

CONTINUING PROFESSIONAL DEVELOPMENT SEMINARS

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About the Presenter

Richard Maurice holds degrees in Law and Economics from Sydney University.

He was admitted in 1984 and worked in private practice as an employed solicitor in a general practice. About 18 months later he joined the Australian Legal Aid Office (then part of the Federal Attorney General's Department) working as a legal officer where he conducted a diversified practice acting mainly for disadvantaged clients in receipt of Social Security. He also worked as duty solicitor at a number of Local Courts.

In 1987 he transferred to the Family Law Section of the ALAO where he worked exclusively in Family Law including, at that time, Defacto property cases and children's cases heard in the Supreme Court relating to ex-nuptial children. He also worked as a duty solicitor in the Family Court at Sydney and Parramatta and in Children's Courts which at time were located at Silverwater and Haberfield.

In 1988, not long after the Australian Legal Aid Office merged with the Legal Aid NSW he was called to the private bar. Since then he has practiced mainly in the areas of Family Law, De facto relationships, together with Wills and Probate. He also works as a Mediator in Family Law financial and parenting matters. He is a member of the Family Law Section of the Law Council of Australia and an Associate Member of LEADR the Association of Dispute Resolvers.

He has appeared in a number of significant Family Law cases including seminal cases on Family Law and De Facto property division like *Pierce and Pierce (1999) FLC 92-844* and *Black v. Black (1991) DFC ¶ 95-113* as well as in the High Court case of *P and P (1994) FLC ¶ 92-462* (the first child sterilization case).

After 21 years he continues to practice at the private bar in Sydney but travels widely to appear in matters in Brisbane, Canberra and Wollongong.

Seminar Programme

9:15 am – 9:30 am	Registration
9:30 am – 9:40 am	Introduction
9:40 am – 10:15 am	Drafting affidavits for clarity and simplicity
10:15 am – 10:45 am	Things that irritate judges about affidavits
10:45 am – 11:10 am	Admissibility, Annexures, Exhibits & presentation
11:10 am – 11:30 am	Morning Tea
11:30 am – 12:00 pm	Drafting Case Summaries generally
12:00 pm – 12:30 pm	Chronologies and Balance sheets
12:30 pm – 12:45 pm	The Outline of Argument and Objections
12:45 pm – 1:00 pm	Concluding comments – Questions and Review

The above programme is flexible and will be subject to change on the day depending on the requirements of the group who are in attendance. The times used are intended to be indicative only.

Introduction

This paper is designed to assist both newly qualified and experienced practitioners in drafting two of the most important documents used in Family Law proceedings. The emphasis is on development of practical skills to ensure that both Affidavits and Case Summaries are prepared in a way that clearly and efficiently conveys your client's case to the Court. The paper deals with such topics as the effective use of the rules of evidence both to ensure the admissibility of your affidavit evidence and how and when to object to your opponent's written evidence. Also covered are the most effective methods of the presentation of affidavits, annexures, exhibits, chronologies and lists of assets.

Overview

Part 1: Drafting Affidavits

In the first half of this seminar we will deal with many significant aspects of drafting affidavits, the most important document a litigant relies upon. I will look at different styles and contrast the techniques used for financial and children's affidavits. I will consider the rules of evidence and their applicability to affidavits in children's cases and examine the best way of annexing or exhibiting documents to affidavits in all cases.

Part 2: Drafting Case Summaries

In the second half we will deal with perhaps the second most important document your client will rely upon; the Case Summary. We will look at all the important aspects of each component of an effective Case Summary:

- Chronology.
- Balance Sheet.
- Outline of Argument.
- Objections.
- The role of Counsel in drafting and/or settling them.

Part 1: Effective Family Law Affidavits

Drafting Affidavits for clarity, simplicity and admissibility

Without doubt Affidavits are fundamental to the presentation of a strong case. They form the primary evidence upon which your client's case is based.

Regrettably however affidavits regularly develop in a chaotic way. They are often a hotch potch of notes provided from clients derived from their imperfect memories, mountains of documents and the lawyer's own contributions. There are always time pressures and compromises involved. There are arguments with clients about content, form and relevance. Such a recipe can produce an end product distasteful to the pallet of many judicial officers.

The starting point for an effective affidavit is to draft it as a working document; something that a judge will refer to with ease as issues arise. The foundations of any good affidavit therefore are:

Clarity, simplicity and admissibility

By **clarity**, I mean that the affidavit should function almost as a reference book for your client's case. By **simplicity**, I mean that the narrative proceeds in a logical and chronological order which is readily understandable. Finally notwithstanding the relaxation of the rules of evidence in some instances, drafting an affidavit with reference to the **rules of evidence** always produces a more credible and understandable document.

The things in affidavits that irritate judges

Irrelevant material

No matter how much a client wants to include details of their past life history, the personality flaws of their ex-spouse and other material completely irrelevant to the issues in the case you should never include them. Further there is no need for needless repetition of facts, opinions or issues.

Rule 15.13 of the Family Law Rules (2004) provides that:

(1) The court may order material to be struck out of an affidavit if the material:

(a) is inadmissible, unnecessary, irrelevant, unreasonably long, scandalous or argumentative; or

(b) sets out the opinion of a person who is not qualified to give it.

(2) If the court orders material to be struck out of an affidavit, the party who filed the affidavit may be ordered to pay the costs thrown away of any other party because of the material struck out.

This simply continues, albeit in a stronger form, similar provisions in earlier versions of the Family Law Rules and some memorable reported cases.

There is also available to the Court a more general power in sec 135 of the Evidence Act (1995):

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.

Examples of the Court's approach can be found in *Sheehan v. Sheehan (1983) FLC ¶ 91-352* and *Kent v. Matysek (1986) FLC ¶ 91-743*.

In *Sheehan v. Sheehan* at page 78,360 the Full Court described part of the wife's offending affidavit of 135 pages and 438 paragraphs in this colourful way:

> "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-year marriage on 14 April 1945 which terminated on 27 July 1978 and which had resulted in four children being born and raised to adulthood, to start at a point 50 years prior to the present time".

Consider how many affidavits a judge reads in a week let alone in a year. Irrelevant material not only irritates them, it distracts them from the real issues you are trying to present.

Bad form and inadmissible material

Judges naturally read affidavit material with a view to its admissibility. It is after all a basic part of their legal training and background. Affidavits that are full of unqualified opinions unsupported by facts tend to be given little weight. This is irrespective of the relaxation of some rules of evidence in certain cases. In short, if a judge says to you something like: "I'll allow it subject to weight" you know you are in trouble.

Events described out of chronological order

Primary Affidavits of the parties should in my view always start with:

a. The dates and places of birth of the parties and any children.
b. The dates of parties have become Australian citizens or gaining permanent residence; and [1]
c. The dates of cohabitation, marriage (if applicable) and final separation.

Setting out events in an affidavit in a random or disorganised order is usually a product of how it was first assembled. As new information is obtained, due to time pressures, it is often simply tacked on to the end without consideration about how this affects the readability and integrity of the whole document.

Put simply, affidavits out of chronological order are hard to follow for any person (including a judge) who is unfamiliar with the history being told. Because of the way humans process information it becomes necessary for the reader to sort the events back into some sort of timeline in order to make sense of it. In doing this judge's time simply is being wasted by an exercise that should have been undertaken before the document was printed rather than when it is first read at the hearing.

The risk real here is that important information will be missed or ignored by the bench because of the unnecessary effort required by the reader to sort out events in the affidavit on his or her own.

Have a look at **Appendix 1** and see how easy it is to answer these questions:

[1] If applicable

Questions

a. Identify the sequence of the real estate transactions.

b. What loans were taken out and in what order?

c. What was the order of loans from the husband's parents to the husband?

Compare then the same affidavit whose events are presented chronological order in **Appendix 2.**

Poor references to annexures

How often have you had to search and search for a elusive reference to an annexure in the body of an affidavit? Compare **Appendix 3** with **Appendix 4**

The difference is significant and in the Appendix 4 the references to annexures easily can be identified. Breaking it up logically into 2 paragraphs also makes it easier quickly to locate the references to the annexures. There is a second refinement which makes finding the annexure itself even easier. I will discuss this in the section of this paper devoted to the use of annexures and exhibits in particular.

Difficulty finding the Annexures themselves

Although the rules now require annexures to be numbered consecutively, this rarely seems to happen. [2] It is of the utmost irritation to a judge not to be able to find an annexure or s specific page of an annexure whilst cross examination is underway. The more time a judge spends looking the less he or she is listening to the evidence after all.

The differences between drafting financial and parenting affidavits

It may seem obvious but there should be significant difference in the style you employ in drafting parenting verses financial affidavits.

[2] see Rule 15.12(1)(b)

There is no place for sentiment in a financial affidavit. Introducing matters such as personal character assassination or unhelpful speculation about people's motives with very few exceptions will be struck out. By contrast, however, there is some room for emotion in a parenting affidavit. Of all the issues in Family Law proceedings, parenting cases of course are the most closely focussed on family and human relationships and the parent's relations with their children, the other parent and other adults.

If there is to be a single affidavit of primary evidence for a hearing combining both financial and parenting issues is it essential that the boundaries between the two not be blurred. There should be two very distinct sections to the affidavit which are clearly marked and even if some topics coincide it is best to touch on those topics in within the relevant section of the affidavit rather than mix them up.

The other difference between the two styles of drafting relates to the relaxation of some of the rules of evidence in parenting proceedings.

A practical explanation of the relaxation of the rules of evidence in children's cases arising out of sec 69ZT (1) of the Family Law Act.

Contrary to popular belief only some, not all of, the rules of evidence have been relaxed in child-related proceedings. I described them as "relaxed" because there remains discretion with the Court to restore the use of those rules in "exceptional circumstances" and if other requirements apply.

Appendix 5 sets out a handy summary

Note however even if a rule or rules of evidence is or are applied the judge can still give such weight to the evidence admitted as he or she thinks fit. For this reason alone on significant issues at least, in my view, an affidavit should be drafted with reference to the rules of evidence regardless of the subject matter.

Different approaches to presentation of a case: chronological vs. topic based styles

The two most common approaches to drafting an affidavit are chronological or topic based.

It is not necessary slavishly to follow chronological order in every situation. There are times when a topic based document is preferable especially where the topics are discrete. But within each topic the chronological format ought to be maintained for consistency.

Topic based drafting is especially helpful where a series of related events, like financial transactions relating to real estate, are dealt with together. For example your affidavit might have several sections each dealing with transactions concerning the purchase, development and sale of a certain property. It is logical for these events to be described chronologically in one portion of the affidavit so the funds used to purchase and funds realised on sale can be tracked with relative ease.

If, by contrast, the transactions concerning a particular property are interspersed throughout many pages of an affidavit that same exercise is made significantly more difficult for the judge and those at the bar table.

Continuing the reference book analogy referred to earlier, the decision on which style to adopt depends on the nature of the case you are presenting. As a general rule the more complex a financial case you have, the better suited it may be to the topic based approach.

The proper use of Annexures and Exhibits to affidavits

Before considering the format and style of annexing documents to affidavits, we need to think carefully about why a particular document might be worthy of such an honour. In my view a document should only be annexed if it is necessary to prove a contentious fact independently. Documents should be chosen only for their relevance and effectiveness, not simply because a client wants it attached.

The requirements for annexing documents to affidavits are set out in Rules 15.12 of the Family Law Rules:

(1) A document to be used in conjunction with an affidavit must:

(a) subject to subrules (2) and (5), be attached to the affidavit;

(b) have its pages consecutively numbered beginning on the first page of the document with:

(i) if the document is the first or only document used in conjunction with the affidavit — the numeral '1'; or

(ii) if the document is not the first document used in conjunction with the affidavit — the numeral following the numeral appearing on the last page of the preceding document; and

(c) bear a statement, signed by the witness before whom the affidavit is made, identifying it as the document used in conjunction with the affidavit.

(2)A document to be used in conjunction with an affidavit must not be attached to the affidavit if:

(a) the document is more than 2.5 cm in thickness; or

(b) if the document is not more than 2.5 cm in thickness — the document and the affidavit, including any other documents to be used in conjunction with the affidavit, when combined are more than 2.5 cm in thickness.

(3) If a document to be used in conjunction with an affidavit must not be attached to the affidavit because of subrule (2), the document must be filed:

(a) if the document is not more than 2.5 cm in thickness — in a separate volume; or

(b) if the document is more than 2.5 cm in thickness — in as many separately indexed volumes, each not more than 2.5cm in thickness, as are required to contain the document.

(4) An index of contents must be included at the beginning of:

(a) if more than 1 document is attached to an affidavit in accordance with paragraph (1) (a) — the documents attached to the affidavit; or

(b) if more than 1 volume is filed in accordance with paragraph (3) (b) — each volume.

(5) If a document to be used in conjunction with an affidavit is unable to be attached to the affidavit, the document must be identified in the affidavit and filed.

(6) Paragraph (1) (c) does not apply to an attachment to an Affidavit of Service (Form 7).

It is important for each page of an annexure to be clearly numbered.

Apart from underlining and bolding the reference to an annexure in an affidavit there is a second refinement which makes finding the annexure itself even easier. Whenever an annexure or part of it is referred to in the text of the affidavit the description should give the page number. So for example the reference to a tax return annexed to an affidavit could read:

Annexed hereto and **marked "A" (page 11**) is a copy of my 2008 tax return.

The reference to “page 11” is of course the numbered page of the annexure. If in the body of the affidavit the deponent refers to a different page of the same document referring to the exact page number makes the task of finding it simple.

As a general rule, if the affidavit has annexed to it more than 10 or so documents including an index as the first page of the annexures is also recommended.

Exhibits to affidavits

Exhibits to affidavits are a greatly under utilised resource. Not just documents can be exhibited. You can exhibit photographs, Audio CDs, DVDs or even physical objects. The Rules prohibit annexing documents more than 2.5 cm thick and it is at this point that Exhibits are required. Exhibits have to be filed with the affidavit and copies served on the other parties. They are more flexible in many respects, particularly as they are invariably in the form of a folder with numbered tabs and numbered pages. Use of and reference to the tabs make an exhibit to an affidavit very convenient to use.

Just as with annexures the affidavit should clearly identify what it is and where it is:

Exhibited to me and **marked “E1” (pages 43 to 66**) is a copy of Commonwealth Bank account BSB 232-634 a/c 987653 for the 2005-2006 financial year.

When to use an index and/or table of contents

There are no fixed rules governing when to go to the trouble of providing a table of contents and/or an index to your affidavit. The main consideration is the length and complexity of the subject matter you are dealing with. Where an affidavit covers many events over a sizeable number of years, a table of contents may assist the bench in keeping track of them.

Indexes are rarely used because of the time involved in preparing them and their limited value except in very long and complex cases. You might only consider preparing one where it is essential to identify references to particular events or things scattered throughout a lengthy affidavit.

A table of contents or index makes an affidavit for more useable for the bench.

Helping Counsel settle what you have drafted

Depending on how long Counsel has been involved in the matter for which affidavits are being prepared there are things you can do to ensure that you have the best assistance possible:

- Provide observations which give an overview of the proceedings, including issues of contention, so that the draft affidavit is not being settled “in a vacuum”.
- Give your Counsel copies of all relevant documents not just those you have chosen to be annexed or exhibited. You never know when a document you thought of little value might prove to be crucial.
- Arrange a Conference with Counsel at which the affidavit and annexed documents can be discussed. The process of involving a barrister ought to be more than having them make just grammatical and stylistic changes. There maybe fundamental issues to be added or expanded upon and this is best done in conference.

Part 2: Drafting Case Summaries

Many Family Lawyers overlook the significance of the Case Summary Document. It is often put together at the last minute with little consideration of its worth. However these days judges generally rely on them initially for a concise overview of the case and later as a working document and reference tool.

You know that your case summary has been effective if it is quoted directly or indirectly in the judgment. Whether this happens depends on the quality, layout and content of the document itself. It is a question of aiming for excellence both in form and in substance. It also follows that poorly prepared documents may be commented upon adversely and/or ultimately disregarded by the bench.

The Chronology

Deciding what and what not to include.

A good chronology is concise yet features adequate detail to make it useful as a reference tool. Like a primary affidavit I suggest that it should always start with a short summary of essential information containing:

- The dates and places of birth of the parties and children.
- The dates of parties have become Australian citizens or gaining permanent residence; and [3]
- The dates of cohabitation, marriage (if applicable) and final separation.

The criteria for choosing which event to include is to consider its importance relative to the various issues in the case. For example you would not include the fact that a child had a fight with her friends at school one day but you might include the fact that after many such fights the child was expelled from that school and the "custodial" parent did not tell your client about it.

A good rule of thumb is not to include events that occupy a small amount of space in the affidavit and/or are referred to only in passing.

On the other hand the chronology is not a replacement for the affidavits and simply to edit down a primary affidavit into a chronology defeats the purpose of having one. There have been infamous cases of chronologies handed up which are longer than the primary affidavits.

In addition in my view it is not appropriate (unless it is clearly marked) to include in the chronology material not in evidence; ie: not in an affidavit or document proposed to be tendered. This makes the chronology unreliable as it cannot be easily ascertained which parts are based on evidence and which are not. So if it is proposed to adduce other evidence to support something in a chronology, it should be clearly stated.

Balancing detail and clarity

As I have discussed there is a tendency in Family Law cases for affidavits to go into excessive detail. This in turn is reflected in the chronology itself. I suggest that you consider with each proposed entry in a chronology whether the event really goes to an important

[3] If applicable

issue or otherwise clarifies something that may be disputed. Each entry should have a purpose and make a definable contribution to your client's case. It should simply not be just background information unless it is essential for understanding what the client asserts.

One test is to consider applying is whether a particular entry in a chronology would be important enough to be included in the judgment. If not, it probably does not have to be included.

On one extreme, generic statements in chronologies invariably are useless. For example to say:

between July 2001 and June 2005	The wife was employed in a variety of jobs for varying hours.

.

does not provide nearly enough detail for a judge to assess those particular contributions.

On the other hand presenting information in the format of an unnecessarily complicated table is also likely be counter productive:

Year ended	**Average Hours worked per week**	**Hourly rate**	**Weekly total**	**Annual total**
30.6.02	33.7	15.23	513.25	26,689.61
30.6.03	21.9	16.34	357.81	58,466.14
30.6.04	15.9	17.89	284.45	14,791.44
30.6.05	38.2	18.11	691.80	35,973.23

Thinking about it from the point of view of what the judge needs, all that is really required is a short table with the taxable income the wife received in each financial year, like this:

Year ended	Taxable income	Affidavit reference
30.6.02	26,689	12(a)
30.6.03	58,466	12(c)
30.6.04	14,791	13(b)
30.6.05	35,973	14(a)

Apart from deleting 3 out of the 5 columns, I have also rounded everything up to whole dollars. So much time is wasted in Family Law proceedings by the inclusion of cents. I recommend that whole dollars always be used in preference. It makes figures so much easier to work with and comparing one set with the other much easier to understand. I have also added a reference back to the primary affidavit so the figures can be justified.

Using of tables of dates vs. a more narrative style

I referred earlier to the use judges make of chronologies. There are two schools of thought about presenting chronological information in a Case Summary. The first is a conventional **tabular chronology**:

12.7.60	Husband's birth in Paris, France
22.4.65	Wife's birth in Tamworth, NSW
19.10.85	Date of marriage in Suva, Fiji

The second is what I call the narrative method:

1. The husband was born in Paris, France on 12.7.60. He migrated to Australia on 13.1.81. He became an Australian Citizen on 28.11.84.
2. The wife was born in Tamworth, NSW on 22.4.65.
3. They married in Suva, Fiji on 19.10.85

The **narrative method** has the advantage of being able to unify related facts that do not necessarily all occur on the same date. In the example above in paragraph one all the relevant information about the husband's date and place of birth and citizenship appear together. It is more flexible. Another advantage is that summaries of facts in judgments usually use the narrative method rather than the tabular style.

In support of this I have heard narrative chronologies referred to somewhat cynically as "the draft judgment".

In the end it is a matter of personal preference but I would suggest you try both styles at least once and "test drive" their relative advantages and disadvantages in an actual Court situation.

How to make your chronology more user-friendly for the judge

Applying the principles I have referred to so far, taking care to include only essential and pertinent facts will go along way to making your chronology effective. However the next goal should be to make it more "user-friendly". I have seen countless occasions when a judge has referred repeatedly only to one side's document throughout a trial. To some extent the format and contents of that document set the agenda about how issues are approached and evaluated. If your chronology is preferred you have an advantage.

By setting the agenda I mean that your side nominates the issues and hopefully the approach to those issues. I have found over many years of practice that setting the agenda is one of the first steps required to dominate your opponents and win the case.

Key points when drafting a chronology:

- All relevant events covered as concisely as possible
- Important events or issues are highlighted.
- Events, documents, etc not yet in evidence are either excluded or identified separately.
- The source of the information from which events in the chronology are drawn is clearly identified.

Balance Sheets

Different formats for property balance sheets

There are numerous ways of presenting the assets, liabilities and financial resources of parties. Too often however either too little or too much information is included and/or presented in a chaotic way. For example:

Item	Amount
Home	450,000
Toyota Corolla	10,000
Personal loan	7,600
Bank accounts	5,555
Mortgage	250,000
Furniture	8,000

There are **numerous problems** with the way this table has been presented.

Here is another example:

Item	Joint	Husband	Wife	Agreed
Home	450,000			yes
Toyota Corolla		10,000		
Personal loan			7,600	Not known
Bank accounts	5,555			yes

Mortgage	250,000	250,000		
Furniture			8,000	no

I will discuss the shortcomings of both of these tables in detail in the seminar. Needless to say however that whilst each attempts to present the figures required neither is of much help.

Basic requirements for a useful balance sheet

I consider that the basic requirements are:

- Grouping assets, liabilities and financial resources together.
- Having separate columns showing the differences asserted by each party.
- Clearly identifying who owns or has an interest in an asset or is responsible for a liability.
- Clearly indentifying the source of information for the figure asserted.
- Subtotals for each category.
- Subtotals of the net assets owned or sought to be owned by a party.
- Inclusion of Superannuation in main table of assets of separately as required.
- An overall total of the net assets of the parties.
- The effect of the orders your client seeks and the effect of the orders the other party seeks based upon your figures. This is expressed as a whole dollar figure and as a percentage of the total of net assets.

What might ideal balance sheet look like?

See **Appendix 6**

The Outline of Argument

How to best present your case on the available facts.

The Outline of Argument should bring your client's case together. It ought to give the judge a broad picture of the case you are presenting. It does not have to be highly detailed. It is not meant to be a set of final submissions but ought to be the scaffold upon which those submissions ultimately will be constructed.

If you have the task of drafting this part of the Case Summary you should always follow a basic framework which is:

- What are the legal principles upon which the orders your client is seeking are based?
- What is the best way to apply those legal principles to the facts the case as asserted by your client?
- What evidence can be pointed to or what arguments are available to demonstrate that your client's version of the facts is to be preferred?
- How can you anticipate and counter the arguments you believe your opponent will raise?

There are many instances where some authorities appear to contradict what you are asserting. The best way to deal with that, is to distinguish them on their facts. Family Law generally does not generally lend itself naturally to the use of precedents, For good reasons the phrase "but every case is determined on its own facts" is common in many judgments.

I recall in one case in which I was involved Senior Counsel for the husband quoted a handful of unreported authorities apparently contrary the argument I was advancing. I dealt with this by drawing up a table demonstrating how the facts in each case materially differed from the case before the Court. Fortunately for me my table turned up in the judgment and those authorities were given relatively little weight. It can be done but it takes a little creativity.

How to get your message across simply and persuasively

There ought to be a theme in every case; sometimes more than one. The secrets to getting a judge's attention are:

- Present that theme with clarity and simplicity (if possible);
- Back it up with your client's version of the evidence;
- Find legal principles that support it; and
- Repeat the theme often in your Outline of Argument so that the message gets across.

I cannot stress the value of repetition of a good point or points in a case. It is an important means of "setting the agenda" in a case. Clear and simple propositions that are logical, supported by the evidence and consistent with the law will always prevail. Long-winded, irrelevant and/or complex arguments do not stand a chance against them.

The Outline of Argument is the means by which the repetition of good arguments begins. During the course of the case with a skilled advocate those themes will be repeated, emphasised and ultimately ought to be accepted by the judge as the appropriate way to determine the case.

Anticipating arguments to be raised by the other side

If you have been involved in the case from the outset you should have a pretty good idea of the key points of difference between your side and your opponent. It is useful to anticipate these in the Outline of Argument.

The best way to do so is:

- Describe the facts or issues in contention;
- Identify the evidence in your case that contradicts your opponent's position;
- Point out any logical inconsistencies in what the other side are asserting; and
- If possible, identify precedents that support what your client asserts in preference to the other side.

Dealing with shortcomings in your own case

There are two contradictory approaches to dealing with this, but at the outset let me say that recognising and dealing with the weaknesses of your own case at the earliest possible time

is just as important as presenting the positives in your client's position or challenging the arguments of your opposing party.

When faced with shortcomings you can either address them head on, try to distinguish them or possibly ignore them.

If the shortcomings potentially are fatal to your case; for example there is only one possible interpretation of a section of the Act and it precludes what you are trying to achieve, you must deal with this at the earliest possible time, namely in the Outline of Argument. How you deal with it is something for you and your Counsel to work out, but in my view the earlier you present your argument the better so that doubt is created in the judge's mind about the apparent invincibility of the opposing position.

The other approach is to distinguish or even ignore the point in the hope that other issues will emerge which will overcome or mask the problem. The expression "the less said the better" is sometimes apposite. Deciding which approach to take is a matter for deliberation with your barrister as the benefits of one approach can outweigh the disadvantages of the other.

Effectively synthesising the facts with the law

Drawing on the comments I have previously made, there is no value in citing well known authorities in your Outline of Argument just for some bland reason. If you refer to a case it should be for a specific purpose. Some guidelines are:

- Read the whole case not just the headnote. You would be amazed how often the headnote is inaccurate or incomplete. You may find a useful quote in the decision but fail to turn the page where you would have found that quote was later disregarded or distinguished.
- Make sure that the facts are broadly consistent with your own case. In fact the closer it is to your case the better. There may be little value in quoting a case about a multi-million dollar property accumulated during a 25 year marriage, if your case concerns a modest home bought during a marriage of a only few years.
- Do not quote multiple cases on the same point. Usually the most recent case will contain the most contemporary version of the concept

- Make sure you distinguish and understand the difference between the **ratio decidendi** [4] of a judgment and **obiter dicta** [5] as the **ratio** of the decision is the most significant part. It is the rationale of a particular judgment and the part which is usually binding on lower Court.

- Be careful about using old cases. Legislation almost invariably changes and it is likely that the principles in an older case have been refined and possibly significantly modified or overturned by later decisions.

- Do not quote decisions that would be well known to the judge, except in passing, unless it is absolutely necessary.

Fitting your arguments within the legislative framework for children's cases

Because of the complexity of the Shared Parental Responsibility amendments to Part VII of the Family Law Act in 2006, cases really must now be presented within the legislative framework rather than in just some general way. That framework was concisely set out by the Full Court in Goode and Goode (2006) FLC ¶ 93-286. In summary:

- You ought to address the primary considerations in sec 60CC(2) first and then such of the secondary considerations in sec 60CC(3) as are relevant.

- Next you should address issues going to the presumption of equal shared parental responsibility in sec 61DA (particularly if your client is opposed to it).

- Finally and if applicable, you should deal with the presumptions in favour of equal time or substantial and significant time in sec 65DAA.

There is always flexibility to depart from this rigidly applying this approach, but this does follow the path most authorities say a judge should take when determining a children's case.

[4] The point which decides a case
[5] Observations made by the judge in passing but not necessarily a reason for a decision

Collaboration with your opponents to benefit your client

When preparing any Outline of Argument you should give consideration to contacting your opponent to see what facts or issues, if any, can be agreed upon and whether any compromises can be reached; for example regarding valuations. Reducing the range of issues and factual disputes usually makes the presentation of your case easier and more efficient. If there are fewer rear-guard battles to be fought, more time can be spent on accentuating the positives of your client's case.

With some exceptions there is usually no reason why an Outline of Argument and Balance Sheet, or indeed an entire Case Summary ought not be to shown to the other side well before the hearing (provided they agree to do the same for you).

Judges in any event now expect that there will be a degree of collaboration at least concerning the creation of a joint schedule of Assets and Liabilities. A joint document is always preferable as long any differences between the parties are made abundantly clear. All of this will assist the Court and assist the advocate presenting your client's case.

Objections to Affidavits

Formal Objections to affidavits are less common than in previous years. This is largely a combination of many new factors working against the practice. These include the relaxation of some rules of evidence in children's cases; pressure from the bench to "get on" with the hearing due to less time being made available to hear cases and perhaps a growing perception in the profession that objections are becoming superfluous.

However properly taken objections have an important part to play in all cases both financial and parenting. The secret is to know when to object and how to do it.

In parenting cases as I have discussed earlier there is still the potential for the rules of evidence to applied. For example a second or third hand hearsay conversation going to a serious issue in a children's case could and should be objected to. Another example is the presentation of evidence that denies natural justice to another party should not normally be permitted irrespective of the provisions of sec 69ZT. [6]

[6] Crestin and Crestin (2008) FLC ¶ 93-368

Framing Objections to the other side's affidavits

Here are some useful general rules before making objections:

- Objections should be planned well in advance and not made "off the cuff".
- The basis of the objection should be carefully considered. Make sure you have a good grasp of the relevant rules of evidence or authorities upon which you rely.
- The effect of the objection being upheld ought to be the forefront of your mind before making the objection. There are times when taking the objection in haste produces an unexpected problem for you.
- Unless a particular affidavit is outrageously inadmissible, objections should be taken sparingly and concentrate only on weakening important issues in your opponent's case. Objections on technical grounds on matters of little significance will only irritate the bench and waste time.
- Make your objection in writing. Generally a schedule should contain in a table format:
    a. The exact paragraph number(s).
    b. Identity of the parts of the paragraph(s) objected to.
    c. The basis for each objection.

See **Appendix 7**

Different ways to present objections

Apart from taking individual objections it is possible to:

- Object to whole paragraphs. If significant parts of a paragraph are objectionable there may be no point in preserving the balance. In this situation it is preferable to object to the entire paragraph.

- Object to parts of an affidavit dealing with an objectionable topic. There may be multiple parts of an affidavit dealing with a topic that is scandalous or irrelevant. For example there might be allegations that a party has acted inappropriately in his or her workplace; something that may have no place in a financial case. It is appropriate to object to all parts of an affidavit dealing with the topic as a single objection.

Deciding when and when not to object

There are many factors applicable when deciding whether or not to object to part of an affidavit. Some are:

- How strong are your grounds for objection?
- Will it make any measureable difference to weakening your opponent's case?
- Will your opponent be able to get the evidence before the Court is some other way?
- Is the objection itself likely to alert your opponents to a problem in their case that they have not anticipated.

Generally, if the first two of these criteria are answered in the affirmative, the objection is probably worthwhile.

Objections to Reports, Statements and other documents

This topic could occupy a whole seminar in itself. There are however some key areas of objection to documents annexed or exhibited to affidavits.

Statements

Often we are confronted with a statement the deponent has made to a police officer or public authority. The Statement might be signed and might even be sworn. It is not widely known that any statement attached to an affidavit ought to be subject to the rules of evidence in the same way as is the affidavit itself. In other words if there is opinion evidence or hearsay for example the offending of the statement can be objected to. If it is a parenting case however, the relaxation of the rules of evidence also applies to statements.

Police Reports

Dealing with Police records outside the context of parenting cases, it is common for them to be tendered as business records. What is less commonly known as that they are defined in the Evidence Act not to fall within the business record definition.

According to Section 69: to be admissible as a "**business record**" a document must:

i. form part of the records belonging to a person, body or organisation in the course of or for the purposes of a business; or

ii. at any time formed part of such records and contains a previous representation made or recorded in the course of or for the purposes of a business.

However Section 69(3): **Excludes documents** prepared for or in contemplation of legal proceedings or an investigation relating to or leading to **criminal proceedings**.

Expert Reports.

Expert Reports are not sacrosanct. They are not exempt from criticism and certainly are not immune from objection. In *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85], Heydon JA stated the requirements of admissibility relation to expert opinion evidence under the Evidence Act to be as follows:

> *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 propounded. 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.

In the same vein, Einstein J said in *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 123 at [83]:

It seems plain that for example where there is a failure to demonstrate a relevant reasoning process then the Court simply cannot follow the opinion or be satisfied as to how the opinion was reached and in particular as to whether or not the witness has demonstrated that the opinion is wholly or substantially based on any specialised knowledge said to be a held.

In *Arnotts Ltd v Trade Practices Commission* (1985) 24 FCR 313, 350, the Full Court of the Federal Court cited with approval the following passage from Eggleston, *Evidence, Proof & Probability* (2nd ed) at 148:

As to the material on which the expert opinion can be based, just as the non-expert who is allowed to express an opinion does so on the basis of experience, so can the expert base his opinion on his experience,

without having to prove by admissible evidence all the facts on which the opinion is based. Accordingly, a valuer can base his opinion on comparable sales of property, without having to call witnesses to prove the facts relating to the sales. An experienced valuer will in the course of a lifetime accumulate a mass of material about sales, from his own practice, from journals, from newspaper reports, and from discussion with his fellow practitioners, much of which he will be unable to recall, but which enables him to express an opinion more accurately than one who has examined only the facts regarding the sales in the area. But if he wishes to cite a particular instance to the Court, for example, where there is an adjoining property that has recently been sold, evidence must be given by someone who can swear to the facts relating to the sale.

To summarise the so-called Makita principle (and then blend it with the requirements of the Family Law Rules 2004) the following applies:

i. *The opinions proffered by the expert::*

   - *Must be within of the terms of reference of his or her reports.*
   - *Must be wholly or substantially based on the witness's expert knowledge.*

ii. *There must be a proper foundation for the "facts" on which the opinions are said to be based.*

iii. *The expert must have explained how the field of "specialised knowledge" in which they are 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 propounded.*

iv. *So far as the opinion is based on "assumed" or "accepted" facts, they have to be properly identified.*

v. *So far as the opinion is based on facts "observed" by the expert, they have to be identified and admissibly proved by the expert.*

vi. *Instructions have to be annexed to report(s).*

vii. *The author must indicate he or she has read and is bound by the expert's code (in Family Law cases as required in Part 15 of the Family Law Rules).*

Note however **against this** in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*, [7] Branson J stated that the approach in *Makita* should be understood as a 'counsel of perfection' and that, in the context of an actual trial, it is sufficient for admissibility that the judge be satisfied that the expert has drawn his or her opinion from known or assumed facts by reference to his or her specialised knowledge. [8] The *Makita* criteria, it was said, should commonly be regarded as going to weight rather than admissibility.

These conflicting approaches were discussed by the Full Court in Carpenter and Lunn (2008) FLC ¶ 93-377 at p. 82,717.

Counsel's Role

Settling or drafting?

In my opinion the expression "two heads are better than one" is highly applicable to answering this question. Apart from the issues of costs, and by that I mean it is likely to be far more expensive to have Counsel take instructions on and draft an affidavit from scratch, leaving it to Counsel means that the advantage of having two minds apply themselves with freshness to the task is lost.

Unless there is no alternative, I would not recommend engaging a barrister to undertake drafting of primary affidavit material. On the other hand, when settling an affidavit Counsel

[7] Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd [2002] FCAFC 157.
[8] Ibid, [7], [16].

invariably will adjust your draft and/or seek clarification or more information if necessary or just pare it down to make it simpler or more poignant.

Best way to gather and present information to assist Counsel to prepare a Case Summary

If you have followed the guidelines I have referred to previously your draft Case Summary should already be in a very appropriate form. But regardless of the detail in any draft you present to Counsel to settle I suggest that you provide:

- A copy of all Case Summary or Outline filed by your opponents.
- A list of all Applications and Responses and their amended versions.
- A list of all affidavits filed in the case as on occasion one or more do not make it into Counsel's brief.
- Copies of all interim or currently operative orders in the proceedings.
- Copies of all documents referred to (if not otherwise annexed to affidavits).
- With regard to balance sheet figures that you indicate clearly what is agreed, what is dispute and by how much.

Conclusion

I trust that you will find the knowledge and experience reflected in this paper to be of assistance in preparing your cases. Many experienced advocates will tell you that winning a case is about 70% preparation, about 20% experience and about 10% luck. Make sure you aim for 70% in all your preparation work.

Appendix 1 – Affidavit out of Chronological Order [9]

1. Mary and her cousin Mark moved my unit at Lane Cove after it was purchased and paid a weekly rent. I lived with my parents and moved into the unit when Mary and I married.

2. On or about January, 2003 Mary and I purchased a block of land at 3 Dawson Place, Epping for $135,000. Annexed hereto and marked "A" is a copy of the Transfer.

3. Between about November 2001 and January 2002 my parents lent me the sum of $42,000 to pay off the loan to the Commonwealth Bank. Annexed hereto and marked "B" is a copy of the loan statement showing this payment. I have not repaid this sum to my parents.

4. Mary worked prior to and for the first 18 months of marriage as a Bank Clerk. I do not recall what her salary was however her wages were applied to general household expenses and repaying her debts.

5. Prior to marriage in May 2000 I owned a home unit at 3/54-56 Macquarie Place, Lane Cove. I purchased this unit on or about 27 June, 1999 for the sum of $138,250.00 with the assistance of a mortgage from the Commonwealth Bank of $60,000, a loan from my father for $20,000 and the balance from my savings of $58,250.00. Annexed hereto and marked "C" , "D" and "E" respectively are copies of the transfer, mortgage and letter dated 20 June, 1999 acknowledging the loan from my father.

6. In 2003 Mary and I also obtained a loan of approximately $100,000 to build a home. That loan was paid out by my father when he retired. I repaid the loan to my father over a period of ten years. No interest was charged.

7. I sold the Lane Cove unit in December, 2002 for the sum of $156,000. After selling expenses I netted $154,400 from this sale. Annexed hereto and marked "F" is a copy of the Transfer.

[9] This is extract from a real affidavit with the details changed.

Appendix 2 – The same Affidavit sorted into Chronological Order

1. Prior to marriage in May 2000 I owned a home unit at 3/54-56 Macquarie Place, Lane Cove. I purchased this unit on or about 27 June, 1999 for the sum of $138,250.00 with the assistance of a mortgage from the Commonwealth Bank of $60,000, a loan from my father for $20,000 and the balance from my savings of $58,250.00. Annexed hereto and marked "A" , "B" and "C" respectively are copies of the transfer, mortgage and letter dated 20 June, 1999 acknowledging the loan from my father.

2. As at date of marriage Mary had some furniture, a credit card debt of approximately $2,000 and a bank staff loan liability of approximately $3,000.

3. Mary worked prior to and for the first 18 months of marriage as a Bank Clerk. I do not recall what her salary was however her wages were applied to general household expenses and repaying her debts.

4. Mary and her cousin Mark moved into the unit after it was purchased and paid a weekly rent. I lived with my parents and moved into the Lane Cove unit when Mary and I married.

5. Between about November 2001 and January 2002 my parents lent me the sum of $42,000 to pay off the loan to the Commonwealth Bank. Annexed hereto and marked "D" is a copy of the loan statement showing this payment. I have not repaid this sum to my parents.

6. I sold the Lane Cove unit in December, 2002 for the sum of $156,000. After selling expenses I netted $154,400 from this sale. Annexed hereto and marked "E" is a copy of the Transfer.

7. On or about January, 2003 Mary and I purchased a block of land at 3 Dawson Place, Epping for $135,000. Annexed hereto and marked "F" is a copy of the Transfer.

8. Shortly thereafter Mary and I obtained a loan of approximately $100,000 to build a home. That loan was paid out by my father when he retired. I repaid the loan to my father over a period of ten years. No interest was charged.

Appendix 3 – Affidavit without annexure references highlighted

10. Judy worked fulltime for the first 18 months of our marriage. She ceased working once pregnant with Billy. Judy worked casually throughout the marriage. In the last three to four years of our marriage Judy worked on average about three days a week for about 4 hours each day for seven months of the year. She received an income of about $15,500 per annum. Her income was below the tax threshold and apart from a couple of years she was not required to lodge tax returns and annexed hereto and marked "A" is a copy of her 2007 tax return. I prepared the returns which were lodged to demonstrate to the tax office that her income remained below the threshold. Since marriage I have been employed by Zetland Industries and for the last 10 years by Diamond Industries and annexed hereto and marked "B" is a copy of my 2009 PAYG statement. My base salary is $84,271. After payment of child support, tax and other expenses my disposable income is only $298 per week.

Appendix 4 – Annexure references highlighted in body of affidavit

10. Judy worked fulltime for the first 18 months of our marriage. She ceased working once pregnant with Billy. Judy worked casually throughout the marriage. In the last three to four years of our marriage Judy worked on average about three days a week for about 4 hours each day for seven months of the year. She received an income of about $15,500 per annum. Her income was below the tax threshold and apart from a couple of years she was not required to lodge tax returns and annexed hereto and **marked "A"** is a copy of her 2007 tax return. I prepared the returns which were lodged to demonstrate to the tax office that her income remained below the threshold.

11. Since marriage I have been employed by Zetland Industries and for the last 10 years by Diamond Industries and annexed hereto and **marked "B"** is a copy of my 2009 PAYG statement. My base salary is $84,271. After payment of child support, tax and other expenses my disposable income is only $298 per week.

Appendix 5

Summary of the effect of sec 69ZT of the Family Law Act on the Rules of Evidence

Pursuant to sec 69ZT(1) the following parts of the Evidence Act do not apply in parenting cases .[10]

Part 2.1

a. Parties being able to question any witness.
b. The order of examination-in-chief, cross examination and re-examination.
c. Manner and form of questioning witnesses and their responses.
d. Attempts to revive memory in court (being limitations on a witness's ability to rely on a document when answering questions).
e. The effect of calling for production of documents in court.
f. Compelling someone in Court to be examined without subpoena or other process.
g. Rules against leading questions.
h. Rules about cross examining unfavourable (hostile) witnesses.
i. Usual limits on re-examination.
j. Rules about prior inconsistent statements of witnesses.
k. Rules about previous representations (statements) of other persons.
l. Production of documents relating to prior inconsistent statements or previous representations.

Part 2.2

m. Strict method for proving the contents of documents including voluminous or complex documents and foreign documents.
n. Rules when judge conducts a view.

[10] I have excluded sections not relevant to Family Law cases

Appendix 5 (cont) /2

Note: Portions of sec 69ZT(1) are the most relevant subsections to take into account when to drafting an affidavit. The most significant exemptions the rules of evidence (from the point of view of drafting) are found in Part 3:

Part 3.2

o. Rules against Hearsay including all the exceptions.

Part 3.3

p. Rules about Opinion evidence including all the exceptions.

q. Rules concerning admissions particularly as they relate to the rules against hearsay and opinions.

Part 3.5

r. Rules excluding the use of judgments and convictions to prove facts.

Part 3.6

s. Rules limiting tendency and coincidence evidence.

Part 3.7

t. Credibility Rule and exceptions (ie: that evidence that is relevant only to a witness's credibility is not admissible).

Appendix 5 (cont) /3

However pursuant to sec 69ZT (2) the court may give such weight (if any) as it thinks fit to evidence admitted as a result of the exclusion of those rules of evidence.

Accordingly the rules of evidence (or some of them) may still be applied at the discretion of the judge if the criteria in sec 69ZT (3) are made out, namely:

(a) the court is satisfied that the circumstances are exceptional; and

(b) the court has taken into account (in addition to any other matters the court thinks relevant):

(i) the importance of the evidence in the proceedings; and

(ii) the nature of the subject matter of the proceedings; and

(iii) the probative value of the evidence; and

(iv) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

Appendix 6: An ideal balance sheet?

Item	Owner	Amount	Total husband	Total wife	Agreed
ASSETS					
Home at 10 Smith St, Erskinville	Joint	450,000 [11]			No
Toyota Corolla	Husband	10,000 [12]	10,000		Yes
ANZ Bank account	Husband	1,000 [13]	1,000		Yes
NAB Bank account	Wife	4,555 [14]		4,555	Yes
Furniture	Wife	8,000 [15]		8,000	No
Gross assets		473,555	11,000	12,555	
LIABILITIES					
Mortgage from NAB for home	Joint	(250,000)			Yes
Personal loan from ANZ	Wife	(7,600)		(7,600)	Yes
Total liabilities		(257,600)			
NET ASSETS		215,955			

[11] Valuation by BDF Valuers dated 12th July 2009
[12] Valuation by Ryde Toyota dated 21st September 2009
[13] Current bank statement
[14] Current bank statement
[15] Valuation by Combined Auctioneers dated 10th October 2009

Appendix 6: (cont) /2

Effects of the competing applications

Husband receives	His Application	Wife's Application
50% net proceeds of the home	$100,000	$20,000
Plus what he currently owns or has in his possession	$11,000	$11,000
Total	$111,000	$31,000
Percentage	51.3%	14.3%

Appendix 7: Example of a List of Objections

Paragraph	Part	Objection
5	Whole	Relevance
11	1st Sentence	Unqualified opinion
23	7th Sentence	Hearsay
24	2nd & 3rd Sentences	Argumentative
29	6th Sentence from words “he thought I was going to steal his Mercedes but ..” to end of sentence	Speculation
33	Whole paragraph	Relevance
41	Whole paragraph except 1st sentence	Hearsay