Peter B. Berry,
Partner, Berry Family Law

ASLIV, Family Law Specialist

Peter was admitted as a solicitor in 1980, and after practising family law exclusively from 1985, he was accredited by the Law Institute of Victoria as a Family Law Specialist in 1989. He has been a Family Law Instructor at the Leo Cussen Institute for more than 15 years.

Full Profile

Telephone : +61 3 9399 7090

DRAFTING OF AFFIDAVITS IN FAMILY LAW MATTERS

PETER B BERRY - ACCREDITED FAMILY LAW SPECIALIST

"….EVERY PICTURE TELLS A STORY DON'T IT?....." -

What is an Affidavit?

An Affidavit is nothing more or less than the means by which your client's case is put to the Court. It is the sworn document by which your client has an opportunity to "…..paint a picture" in a manner which is persuasive, credible and complies with the Rules of evidence and of Court.

Except by the leave of the court in any court event before trial and even at trial, the only evidence placed before a Family Court Judge is the affidavits filed on behalf of the parties. A judicial officer cannot rely upon "….evidence

from the bar table" and must make his judgment based solely upon the evidence before him or her after hearing submissions in respect to the Orders which are proper in the particular facts of a case.

It is absolutely vital for your clients that their affidavits be:-

- well drafted;
- persuasive;
- contain the evidence which your client can give in the witness box;
- contain evidence in admissible form;
- contain the evidence to address all matters which are relevant to the exercise of a Judge's discretion in respect to the particular Application before the court.

Whilst I can only speculate, it must be exceedingly tiresome for judicial officers to be faced with affidavits on a regular basis which are not well drafted and a breath of fresh air to consider affidavits which are well drafted.

At the most practical of levels, drafting takes time and application.

It is extremely easy to misread an Affidavit prepared by yourself. What you believe you included in the Affidavit is what you are likely to believe you proof read, notwithstanding that this often not the case. To help ensure that the Affidavit is prepared by you will not be an embarrassment to either you or your client:-

(a) Except in cases of urgency, leave the proof reading of your client's Affidavit until at the earliest one or two days after its preparation;

(b) Read the Affidavit aloud. In doing so, you will be surprised at how often reading an Affidavit aloud highlights the inadequacies in it;

(c) After redrafting the Affidavit, repeat above process;

(d) Do not be concerned if the drafting of a lengthy Affidavit takes a significant number of days and a number of drafts;

(e) If time allows, ask a more senior solicitor or counsel to read the Affidavit and settle it as necessary.

The rules of the Family Court have formal requirements in respect to which affidavits are required for which Applications as well as in respect to the format of affidavits. It will reflect upon your professionalism, let alone your clients' prospects of success if you do not draft affidavits properly.

For you to draft affidavits and to ensure that they are relevant and admissible will require you to in turn develop good interviewing skills to adduce from clients the facts to be contained in their affidavits and to present your client's case in the best possible manner. This requires that you :-

- know the rules pertaining to which affidavits and the form of affidavits are required for the matter before the court;
- have a good command of the English language including grammar, spelling and punctuation;
- understand the law applicable and accordingly, what facts are relevant or not;
- have a knowledge of the law of evidence;
- can place the relevant facts in an orderly sequence.
- Tell ".…….the story".

In obtaining instructions, you are often asking a client to recall events and give a history spanning many years from a client who is often emotional and suffering the stress of one of their worst fears in the breakdown of their marriage. Our task as lawyers is made difficult indeed within the confines of the time available for a conference. It is necessary that you think laterally about the matters to be explored with your client the smorgasboard of issues arising out of a marriage.

The purpose of your clients' affidavit is to tell their story.
As Rule 15.08 (d) requires that you as the person drafting the affidavit endorse this on the final page, anonymity is not a defence to poor drafting !

".….YOUR WIFE IS LIVING IN A WOMEN'S REFUSE ….."

There are various practical considerations to good drafting.

- The most obvious of these is the capacity to proofread to ensure that typographical errors do not result in the meaning of your clients' affidavits being changed in a manner which may make their affidavit nonsensical, offensive or even completely change their evidence. Computer spell check is not a sufficient protection in that a word can be correctly spelt but incorrect. Similarly, omitting a word may completely change the meaning of your clients' material.

- In drafting your clients' affidavits, use words which your client will understand. Whilst this may seem like an obvious statement, there is little more embarrassing for your client than to be cross-examined in respect to an affidavit but to be unable to explain the contents of their affidavit in that it is drafted in language they are not familiar with.
  "……Please stop masticating".

- There is a school of office administration philosophy which is that "…..everything done on behalf of a client should be done correctly the first time". The proponents of this believe that this also extends to the drafting of letters and documents. This is simply not possible in the case of affidavits. It is not uncommon for me to be required to redraft affidavits a number of times to ensure that they are the best which can be prepared for the client.

- Where there have already been affidavits sworn by your client in a matter, ensure that future affidavits are consistent with the evidence given in those previously filed. It is a cross-examiner's banquet to be able to rely upon inconsistent statements of fact both within the body of the same affidavit and compared to separate affidavits. Unfortunately, this will entail a comparison of previous affidavits to affidavits being drafted for your client. This is something which is necessary and must occur in respect to affidavits of evidence in chief. If on a comparison of previous affidavits it is apparent that your client has sworn an affidavit which contains inaccurate evidence, the best course of action is to address that inaccuracy in your client's Affidavit of Evidence in Chief to minimise the impact of it if your client is required to give verbal evidence and be cross-examined. In short, ".....confess and avoid".

- Do not overstate your clients' case. There is a natural tendency both in clients and practitioners to overstate a case to try and persuade a judicial officer of the correctness of their case. However, this can result in an allegation of fact being made in an affidavit which is inherently unlikely. For example, "….the husband never put our children to bed…." or "…..I always did all the internal housework….." or "…..the wife never contributed to our property from her wages….". Overstating a client's case may be more subtle than this, being a cumulation of a series of allegations of fact which individually appear both feasible and reasonable, but which collectively, are impossible. It is necessary that you reality test your

client's instructions to ensure that they do not swear an affidavit which contains absurdities or evidence which is patently impossible.

- A corollary to not overstating your clients' case, is to also give credit where appropriate to your clients' former partners where it is inevitable that a court will find that credit is due. Doing so can make your client appear to be far more even handed and objective in their evidence. A court is more likely to be persuaded by a person who has patently given even handed evidence. It is inherently unlikely that your clients' former partners do not have any qualities at all when your clients have at some stage had sufficient affection and regard for their former partners to live together, plan a life together and to often have children together.

- If your client is physically unable to sign the affidavit, is illiterate, blind or is not fluent in English, it must be read aloud to your client and if necessary, have the Affidavit translated into their native language together with the oath or affirmation to the affidavit. Below the jurat must be a certification that the affidavit has been read and if necessary, translated and that the deponent understands their affidavit. Care must be taken in that clients may be embarrassed to admit their illiteracy or language difficulties. As a practical matter, if your client may require an interpreter to give oral evidence, an interpreter should be used to translate their affidavit at the time of swearing and on obtaining instructions (see Rule 15.10).

- If you annex a letter from your opposing solicitor to a client's affidavit, ensure that it is not "….without prejudice". Similarly, if quoting from a letter sent by your opposing solicitor, ensure that the quote is not from either a letter or part of a letter which is sent on a "…without prejudice" basis. Should a judicial officer determine that he or she has read material which was "…without prejudice", he or she may disqualify themselves with the consequent adjournment and cost implications.

- If there is a problem in your client's case, it is better to address that problem in your client's own affidavit. Difficulties in your client's case look much worse when exposed by your opponent. By volunteering the weaknesses in your client's case, you have the opportunity to minimise and explain circumstances.

- Affidavits by witnesses other than your client should only be filed if the evidence is relevant and cannot be provided by your client. There is no point to having many affidavits filed by people who could fairly be termed "….barrackers" if they do not add to your client's case. Indeed, having a large number of witnesses can significantly weaken your client's case if upon cross-examination they contradict each other leaving a judicial officer at a loss to know which witness to believe on which point.

- Insofar as your client gives evidence of conversations, actual words used should be specified as far as is possible. However, it is unlikely that your client or witness will remember precisely the words used. In your client's

affidavit you should put something like "….he then said words to the effect of "I will be taking our children to the holiday home this weekend" ….".

- An affidavit should not contain argument or describe why the court should make Orders sought. For example, an argument such as "the husband is not a good parent because of the way he behaves to our children".

- A conclusion instead of an observation of fact is also not acceptable. For example, "….he is addicted to gambling as he continually went to the casino". This is a conclusion which is also an overstatement.

- Affidavits cannot contain hearsay evidence in general. Hearsay evidence is evidence given of a statement made by person other than the witness giving evidence in the proceedings. To do so is patently unwise in circumstances where evidence can be given firsthand by the person to whom the statement is attributed. There is a significant risk to your client that their recollection of what is said and meant may be different to that of the person to whom the evidence is attributed. For example, if a statement is attributed to a doctor regarding a child's state of health, the doctor will themselves have notes which if produced pursuant to subpoena, may contradict your client's evidence. However, hearsay evidence may be relied upon in circumstances such as:-

    - when giving evidence of a statement made by a child. As a child cannot give evidence themselves, evidence can be led of a

statement made by a child. The evidence may or may not be accepted by the court as proof of what was said, but not of the accuracy of what was said;

- evidence of a statement made to a client may be given to explain the reason why your client took a particular action. For example, if your client had been told by her doctor that their child had been sexually abused, this may explain why action was taken to deny contact.

- The affidavit should be divided into paragraphs and sub-paragraphs for ease of answering as well as ease of referring to it when addressing the court. We have probably all seen affidavits in which paragraphs run one page or more, making the task of answering it almost impossible.

- If in your client's affidavit, serious allegations have been made against their former partner, be certain that the allegations can be proved so as to ensure that making the allegation cannot weaken your client's case. A series of allegations made to try and colour the evidence and persuade the court that the other party is reprehensible in some way, can only place your own client's credibility and character into doubt if the allegations cannot be proven. If you allow your client to stoop to gratuitous and offensive allegations, you may well be faced with a position whereby at trial, your opponents will make a successful application to strike out large portions of your affidavit. The consequences of this both in respect to any

ongoing negotiations, your client's credibility and your client's faith in you as their practitioner do not bear thinking about. It is extremely difficult to have to backpedal at the beginning of a case trying to justify matters in evidence matters which simply should not be placed.

- Affidavits are sometimes drawn which are grossly excessive in length. If this occurs, raising numerous old, trivial events, or minutiae which have no significance, the risk is that the affidavit will either be disposed of entirely or have significant portions of it expunged. Costs implications, as well as that of adversely influencing the court against your client may result. The only time recently in which my firm has not followed this rule was in a matter where our client was suffering from a brain tumour and was about to undergo surgery which was likely to affect his memory and reliability as a witness. In those circumstances, although the issue before the court was primarily a parenting issue, in our client's affidavit we addressed property issues as well - our opponents not taking the point that the material was not strictly relevant to the interim issue at hand.

- In answering an affidavit, you should be aware that if you do not deny a fact either expressly or by necessary implication, or otherwise state that a matter cannot be admitted by your client as they do not know the truth of the fact alleged, your client will be taken to admit the contents of the affidavit you are answering. It may be sensible in answering a lengthy affidavit to include a general statement to the effect that your client does not admit the contents of the affidavit generally unless otherwise stated.

It is your job to present the facts in such a way as to tell your clients' story persuasively and in a manner to influence people reading the affidavit that it should be accepted.

A judicial officer's first impression of your client and first assessment of the strengths of your client's case will be formed from your drafting.

In summary in respect to this portion of the paper, a well drafted affidavit will be :-

- chronological;
- relevant;
- obey the rules of evidence;
- be set out in paragraphs and sub-paragraphs;
- be admissible as to expertise;
- will not contain ambiguities;
- uses words the deponent is comfortable with;
- will be in good grammar and not contain typographical errors;
- will present the facts in a manner which is measured and reasonable.

It would beg belief to think that a Judge would not be influenced either favourably or unfavourably by the quality of the affidavits which you prepare for your clients.

PITFALLS AND PRATFALLS AND THE RULES……

The Rules of the Family Court as will be seen later in this paper, to some extent restate the principles set forth in cases such as *Sieling and Sieling* and *Cowling and Cowling* referred to later in this paper.

However, the rules impose additional obligations upon us as practitioners as well as requiring that Affidavits be filed in respect of particular Applications.

Duty of a lawyer

At Chapter 1, Rule 1.08 (2) & (3), the Rules require that we as lawyers identify the issues generally in dispute in the matters in which we act, be satisfied that there is a reasonable basis to allege, deny or not admit a fact and to limit evidence to only that evidence which is relevant and necessary.
This positive duty applies directly to us as practitioners as well as to our clients. If Affidavits are drafted on behalf of your clients which are prolix or otherwise contain matters which as a consequence of poor drafting, are irrelevant or which fail to contain the matters of fact required to be proved in respect to the Application before the Court, we as lawyers will be personally in breach of the Rules and may well face costs consequences.

Chapter 19 Rule 19.10 gives the Court power to make an Order for costs against lawyers personally. It is my view that the Court is telegraphing by

these rules, that it will not tolerate abuse of the rules by solicitors in the drafting of Affidavits and poor drafting. We breach the rules in respect to the drafting of Affidavits at our own peril.

Chapter 15 imposes additional duties upon us as lawyers in respect to the drafting of affidavits.

Chapter 15, Part 15.2 Rule 15.05 (1) requires that all evidence in chief be contained in your clients' Affidavits. Whilst an oral Application can still be made to adduce oral evidence, it will be at the discretion of the Trial Judge as to whether this will be permitted. Chapter 15, Part 15.2 Rule 15.05 provides that oral evidence "…may adduced at a hearing or trial **only**....." if a witness has refused to swear an Affidavit and if fourteen (14) days before the Pre-Trial Conference notice is provided of the name of that witness and a statement of evidence sought be adduced from the witness is provided. One obvious matter which will follow from this is that it is insufficient to assume that merely providing a Subpoena to an unwilling witness will put your client in a position where that evidence may be placed before the Court. The logical consequence of this to us as practitioners is that if you do not provide notice pursuant to Rule 15.07, and your client's Trial is adjourned, there will be a risk of costs payable by the lawyer.

In practice, Chapter 15, Part 15.2, Rules 15.05 and 15.07 appear to be ignored both by the Court at pre-trial conferences and by practitioners. This section of the Rules refers to the general jurisdiction of the Court under Rule 1.12 to dispense with the Rules where necessary.

Consider however, the impact upon your client's case if it is necessary to have evidence from an expert witness to either shore up, or to attack the evidence of a single expert witness. For example, a clinical psychologist in a parenting dispute may make a recommendation or observation based upon their interviews with and observations of the parties and their children where a rebutting witness may only be able to give evidence by subpoena. This is not unforeseeable whether a rebutting witness may be a doctor, teacher or another counselor. If notice is not given and a summary of evidence is not prepared, your client's case may be substantially weakened or destroyed if the Court does not allow you to subpoena the person concerned to given evidence. However, the rules are silent as to what amounts to a sufficient summary of evidence or the format in which same should be provided.

Chapter 24 Rule 24.01 describes the formal requirements for documents. A copy of that Rule is attached.

Chapter 15 Rule 15.05 (1) requires that evidence at Trial is to be by Affidavit and at Rules 15.08 and 15.09 describes the form of an affidavit and the matters which must be contained. In summary :-

Rule 15.08 states that :

- The Affidavit must be divided into consecutively numbered paragraphs, with each paragraph being confined to a distinct part of the subject matter;

- The Affidavit must state, on the first page, the file number of the case, the full name of the party on whose behalf the Affidavit is filed and the full name of the deponent;
- The Affidavit must have a statement at the conclusion confirming the name of the witness before whom the Affidavit is sworn and signed, and the date and place of the swearing and signature;
- The name of the person who prepared the Affidavit;
- It is noted again that Affidavits must comply with the formal requirements of Rule 24.01.

Rules 15.09 states that an Affidavit must be :

- Confined to the facts regarding the issues in dispute;
- Confined to admissible evidence;
- Sworn by the deponent in the presence of a witness;
- Signed at the base of each page by the deponent and the witness; and
- Filed after it is sworn.
- Initialled at any amendment by the deponent and the witness;
- Drafted to contain any references to a date (save for a month), number or amount of money in figures.

Chapter 15 Rule 15.13 gives the court the power to strike out affidavit material which is inadmissible, unnecessary, irrelevant, unreasonably long, scandalous or argumentative or sets out the opinion of a person who is not qualified to give it. Rules 15.13 (2) specifically mentions that costs consequences can flow from the striking out of material.

The Federal Magistrates' Court rules contain similar requirements at Part 2 Rule 2.01 and Division 15.4 (Rules 15.25 to 15.29A).

A real concern is Rule 15.06(2) of the Family Law Rules which provides that the Court "may" Order that an Affidavit which does not comply with the Rules **must not** be relied upon at Trial. While the apparent contradiction between "may" and "must not" is confusing, it is clear that any affidavit which does not comply with the necessary formalities runs the risk of being completely disregarded at Trial.

Chapter 5 Part 1 Rule 5.09 restates the requirement that when an Affidavit is filed, that the Affidavit must state the facts relied upon. Rule 5.09 requires that when an Affidavit is filed in an interim or procedural matter, that only one Affidavit be filed by each party. A responding Affidavit cannot be filed of right unless (Chapter 9 Rule 9.07) the response filed by the respondent raises a new cause of action. In that instance, if the Applicant opposes the new causes of action raised in an Interim Application, a further Affidavit may be filed confined to those new causes of action.

In practice, the Courts appear to readily allow the filing of a second Affidavit by an Applicant in an Application in a Case where the Respondent's Affidavit raises new matters of fact as opposed to new causes of action.

An Affidavit may be filed on behalf of a witness in interim or procedural matters **provided** that their evidence is relevant and cannot be given by a party to the proceedings (Chapter 5 Rule 5.09).

If the Affidavits prepared by you on behalf of your client and witnesses not merely fail to comply with the rules referred to above, but fail to set out or to disclose the facts which give your client a reasonable likelihood of success, or are frivolous, vexatious or an abuse of process, Chapter 10 Part 10.3 Rule 10.02 provides that a summary Application may be made to have your client's Application or Response struck out.

As can be seen from the above, the rules impose strict obligations in respect to the drafting of Affidavits and are clearly intended to limit the length and number of Affidavits filed in respect to each stage of the proceedings.

When can an Affidavit be filed?

Affidavits are **not** filed with the filing of any Application for Final Orders proceedings or any response thereto (Chapter 4 Part 4.1 Rule 4.02) except in Applications and responses pertaining to property, maintenance and child support when a Financial Statement (Form 13) must be filed (Chapter 2 Part 2.1 Rule 2.02(1)). Chapter 2 Part 2.1 Rule 2.02 also provides that Affidavits must also be filed with other Applications (or Responses) seeking Orders summarised as follows:-

- For a medical procedure
- For step-parent maintenance which are either by consent or unopposed
- For Nullity of marriage

- For a declaration as to the validity of a marriage, divorce or annulment
- Relating to a passport
- Pertaining to an Application for child support or an Appeal pertaining to child support
- Contravention
- Contempt

Chapter 2 Part 2.1 Rule 2.02 (3) provides further that an Affidavit must be filed addressing reasons why it is not possible to file the following supplementary documents required to be filed by the rules:-

- Marriage certificate
- Birth certificate
- Divorce/nullity Orders

Interestingly, Applications initiating proceedings and responses (Form 1 and Form 1A) now contain Affidavits at the end of both documents. In the Affidavit to both documents, clients swear to having read the Application or Response, to the accuracy of the facts alleged in a Form 1 or Form 1A and that they are aware of their duty to the Court and to each other party to "…give full and frank disclosure of all information relevant to the issues of the case, in a timely manner…". I am firmly of the view that as a consequence of this, should your client seek Orders which are patently unreasonable or have no prospect of success, they cannot deny knowledge of the Application before the Court and the consequence of being assessed by the Court based upon the tenor of their Application.

Further, a party cannot deny knowledge of the requirement of disclosure - something which may be of use in matter where one party steadfastly remains uncooperative in respect to disclosure of documents and information as a tactic within their case.

Chapter 4 Rule 4.02 (Applications) and Chapter 9 Part 9.1 Rule 9.02 (Responses) provide that Affidavits **cannot** be filed except as specified in those chapters or in Rule 2.02.

What do you include in an Affidavit?

It is helpful in drafting Affidavits pertaining to particular matters, that you have a copy of the relevant section, rules and any relevant case law available to you at the time of dictating. By doing so, you will have an effective check list of matters about which your client must give evidence.

For example, in dealing with an Application for Spousal Maintenance, address the matters contained in Section 72 and Section 75(2). In an Application pertaining to property, you should address the matters specified in Section 79(4) and Section 75(2).

In children's matters, you should have a copy of Part VII of the Act, and specifically Section 60(CC) available to you.

Interim Applications

To an extent, the rules mirror the matters to be considered by the Court and referred to in the cases such as *Sieling* and *Cowling*.

Chapter 5 Part 5.2 Rule 5.08 must be considered in the drafting of Affidavits in support of Interim Applications whether for restraining Orders pursuant to Section 114 or Interim Orders pertaining to children and financial matters in that it requires the Court to take into account:-

- The best interests of a child (and the matters referred to in Section 68F in a parenting case;
- Whether there are reasonable grounds for making the Order;
- Whether for reasons of hardship, family violence, prejudice to the parties or the children, the Order is necessary;
- The main purpose of the Rules (cf. Rules 1.04); and
- Whether the family would benefit from a primary resolution method.

Chapter 5 Part 5.3 Rule 5.12 specifies the matters which must be addressed with regard to an Application without notice to the Respondent in a supporting Affidavit (or orally with the Courts permission [Chapter 5 Rule 5.12(b)] being:-

- Why it is not more appropriate to serve the Application and fix an early date for hearing
- Why an Order should be made without notice
- Whether there is a history or allegation of child abuse or family violence
- whether there has been previous proceedings between the parties and if so the nature of the case
- Particulars of Orders currently in force
- Whether there has been breach of a previous Order by either party

- Whether the respondent or their lawyer has been told of the intention to make the Application
- Whether there is likely to be any hardship, danger or prejudice to the respondent, a child or a third party if the Order is made
- The capacity of the applicant to give an undertaking as to damages
- The nature of the damage or harm that may result if an Order is not made
- Why the Order must be urgently made
- The last known address or Address for Service of the other party

As a matter of good drafting, reference to this rule is necessary when obtaining instructions from your client in drawing their Affidavit. Always ensure that your client's instructions are clear regarding any undertaking as to damages.

In *Sieling and Sieling* (1979) FLC 90-627 the Full Court of the Family Court stated at 78,254 "The general principles are that the court must be satisfied that the matter is of such urgency that the Applicant's interests (or the interests of the child) can be protected only by an immediate Order. It is necessary to balance the likelihood of harm to the Applicant against the hardship to the Respondent of making an Order without hearing him. The more drastic the Order the more grave must be the risk to be averted and the more important the requirement that the Respondent be heard at the earliest opportunity. An Order that a party be excluded from the home or that a child be removed from the custody of a party must be supported by evidence of an imminent risk of such nature that the court cannot wait even the period of time

necessary for short service. An Order restraining dealings in property may have less drastic consequences for the Respondent, or the consequences may be such that the Respondent can be protected by an undertaking for damages. Nevertheless, in such cases the need for urgent action by the court may also be less apparent and the possibility of postponing the matter and bringing it on at short notice should be considered." The court provided a summary of factors which would require consideration and whilst acknowledging that it is not possible for the court to lay down precise or exhaustive guidelines to cover the many fact cases which may arise. In an ex parte Application the court will consider :-

- the nature and imminence of risk to the Applicant, to a child, to property interests or to a third party;
- any hardship or prejudice to the Respondent and children or to any third party which may arise from proceedings to make an Order ex parte;
- where the Order relates to property, whether there is a need to protect the Respondent by requiring the Applicant to give an undertaking as to damages;
- the possible consequences of delaying the Order until the Respondent can be heard and the steps which should be taken to give notice to the Respondent;
- the need to protect the Respondent by ensuring that the Order is clear in its terms, that it is served within the shortest possible time, that a return date is fixed and that the Respondent be informed of his or her rights to apply to have the matter brought on for the return day.

The Court will also enquire as to steps which could have been taken to notify the Respondent.

In respect to interim residence disputes, the court in *Cowling and Cowling* (1998) FamCA19 held that :-

- in determining interim residence Applications, that the best interests of the child are the paramount consideration and will normally be met by ensuring stability in the child's life pending a full hearing of all relevant issues. Where at the date of the hearing the child is well settled in their environment, that stability will usually be promoted by an Order providing for a continuation of that arrangement, unless there are overriding indications relevant to the child's welfare to the contrary, such overriding indications would include convincing proof that the child's welfare would be really endangered by the child remaining in that environment".

The court is entitled to place such weight upon the importance of retaining the child's current living arrangements as it sees fit in the circumstances. In doing so it may examine whether the current living arrangements arose by virtue of some agreement between the parties, by acquiescence or were unilaterally imposed by one party on the other, the duration of the current living arrangements and whether there has been any delay in instituting proceedings or in the proceedings being listed for hearing.

In determining whether the child is living in a well settled environment, consideration should be given to :-

- the wishes, age and level of maturity of the child;
- the current and proposed arrangements for the day to day care of the child;
- the period during which the child has lived in the environment;
- the nature of the relationship between the child, each parent and any other significant adult and the child's siblings;
- the educational needs of the child.

Further Rules to Be Considered

In navigating the minefield of issues which must be addressed in your client's affidavit it is common sense to look at the relevant rule, section of the Act and cases in preparing your client's affidavit material.

For example, in bringing an ex parte Application, Part 5.3 Rule 5.12 describes the matters which must be addressed in your client's affidavit and is appended.

Similarly, the rules make specific provision in respect to the contents of Affidavits in Support of an Application for an Anton Piller Order (Chapter 14 Rule 14.04) and in support of an Application for a Mareva Order (Chapter 14 Rule 14.05)

Chapter 13 Part 13.1.1 provides that each party has a duty to give full and frank disclosure of all information relevant to the case in timely manner. Rule 13.04 of that chapter with regard to financial matters provides that the disclosure include a wide description of matters to be included, which again should be considered with respect to the drafting of a Financial Statement or Affidavits pertaining to financial matters. If a party is aware that completion of a Form 13 will not fully discharge their duty of disclosure, an Affidavit must be filed giving further particulars (Chapter 13 Part 13.1 Rule 13.05(2)). The matters to be considered in whether full or frank disclosure has been provided include:-

- Income, including whether paid or assigned to another party, person or entity
- Vested and contingent interests in property
- Vested and contingent interests in properties owned by a legal entity fully or partially owned or controlled by a party
- Income earned by a legal entity fully or partially owned or controlled by a party, including whether paid or assigned to any other party, person or legal entity
- Financial resources
- Disclosure of any Trust
- Disposal of property in the period of 12 months before separation and since (save with the consent or knowledge of the other party or in the ordinary course of business)
- Liabilities and contingent liabilities

Should a party's financial circumstances change either before a Conciliation Conference, Pre-Trial Conference or Trial, or at the time of seeking a Consent Order, then at least seven (7) days before any of those Court events a new Form 13 must be filed with amendments clearly marked or details be provided in an Affidavit of 300 words or less (Rule 13.06).

A refusal by a party to file an updated financial statement coupled with a refusal to disclose documentation pertaining to significant changes in their circumstances, can only badly impact upon such a person's credibility at Trial for in any Interim Court Event.

In drafting a Financial Statement, I believe that it is unwise to adopt the practice of providing a blank Financial Statement to your client and then simply retyping without examination their instructions to you. Commonly, people over estimate their level of expenditure instructing that they spend significantly more than their personal income when it is apparent that they have no corresponding increase in personal debt. Further, clients often do not think laterally about their assets and liabilities or expenditure. As is apparent from the rules, it is essential that this occur. If it becomes clear from cross examination or through the process of disclosure, that your client has misled the Court or the other party in respect to their financial circumstances (whether innocently or otherwise), their credibility and motives are immediately in question.

Often, clients will estimate their expenditure to significantly exceed their income. Unless they have funded the shortfall by borrowings or by monies advanced by another person, clearly either their income is understated or their expenses overstated.

The rules require that certain financial documents be taken to the Court in respect to maintenance matters (Chapter 4 Rule 4.15). If a party does not comply with the rules in respect to taking documents to Court, they may be faced with an Application for adjournment. It is also entirely possible that the documents taken to Court will display the inaccuracies in your client's Affidavit. As a matter of commonsense, these documents should be cross-referenced where possible to your client's Financial Statement. In complex financial matters, it may be sensible to retain a forensic accountant to ensure that your client does not inadvertently swear a financial statement which contains inaccuracies.

Likewise, documents provided by either party pursuant to the rules and directions made by the Court in respect to disclosure of documents in property matters and both before a Case Conference or a Conciliation Conference may expose inaccuracies in your client's Financial Statement. If this were to be the case, and unlike the position in respect to Affidavits in support of Applications in a Case, a further Financial Statement or short Affidavit may be filed as referred to above.

In addition to the Affidavits referred to above, the rules provide for Affidavits to be filed in support of the following Applications in a Case:-

- Application for medical procedures pertaining to a child (Chapter 4 division 4.2.3 Rule 4.09)
- Step parent child support where the Application is by consent or unopposed (Chapter 4 Rule 4.16(2)
- Nullity, declaration of validity of marriage or divorce (Chapter 4 division 4.25 Rule 4.29)
- Leave to intervene in proceedings (Chapter 6 Part 6.2 Rule 6.05 and 6.06)
- Responding to a Request for Answers to Specific Questions (Chapter 13 Part 13.1 Rule 13.27)
- To adduce evidence from a child (Chapter 15 Part 15.1 Rule 15.01)
- To appoint an assessor (Chapter 15 Part 15.4 Rule 15.38(2)
- In support of an Application for a single expert (Chapter 15 Part 15.5 Rule 15.52 (2);
- Pertaining to the Affidavit of Evidence in Chief of a single expert (Chapter 15 Part 15.5 Rule 15.62)
- If a transcript of evidence does not exist pertaining to the review of a hearing, an Affidavit as to evidence given (Chapter 18 Part 18.2 Rule 18.10(2) (d))
- Chapter 19 Part 19.2 Rule 19.05 describes the matters which the Court may consider in respect to an Application for security of costs;
- Enforcement proceedings (Chapter 20 Part 20.1 Rule 20.06)

- In support of obtaining a Warrant (Chapter 20 Part 20.3 division 20.3.1 Rule 20.16) and similarly in respect to an Enforcement Warrant against a Third Party (Rule 20.32 (1))
- Pertaining to the Sequestration of property (Chapter 20 Part 20.5 Rule 20.42 (1))
- In support of an Application to appoint a receiver (Chapter 20 Part 20.6 Rule 20.46(1)
- To enforce an Order as a consequence of contravention of an Order and otherwise is respect to an Application for contempt of Order (Chapter 21 Part 21.1 Rule 21.02 (2))
- When seeking permission to appeal from an Interlocutory Order, (other than an Interlocutory Order) relating to a child welfare matter, of the Family Court or the Federal Magistrates Court and an Order made by a Judge, the Federal Magistrates Court or a Court of summary jurisdiction pursuant to the *Child Support Assessment Act* or *Registration Act* (Chapter 22 Part 22.7 division 22.72 Rule 22.46(3))

As can be seen from the above, the Rules are complex. Whilst I have touched on the requirements for the Applications which are more commonly before the Court and the Rules in so far as they make specific requirements with respect to the contents of Affidavits, as a matter of commonsense and good drafting, the Rules should be checked before the drafting of any Affidavit in support of an Application in a Case. You must ensure that insofar as the Court has specific requirements pertaining to those Affidavits, that you obtain

instructions from your clients and their Affidavits set out those facts relevant to the Application before the Court.

"….Proof reading"

An example of the importance of that most basic of good drafting skills - proof reading:-

"….after learning that I had become pregnant with XXX I informed the Applicant father, that my doctor had been unable to determine the exact date of conception and that I appeared to have conceived that child at the time when I was not involved with sexual relations with any person…from that time onwards, the Applicant father and I then assumed that XXX was his daughter…."

Despite all the best care in the world, you will on occasion draft affidavits for your clients which will later be a source of embarrassment. At least by taking as much care as possible, the chances of this will be reduced.

It is at least of some reassurance that even parliamentary draftspersons will draft Acts which are absurd such as Section 4(i) of the Commonwealth Evidence Act. This section provides that a person cannot give evidence "….if the person is dead".