

# Drafting Affidavits

Contributed by Rochelle Macredie

## How to Draft an Affidavit

Rochelle Macredie B.A. B.Sc LLB

Solicitor

The advice in the following article relates primarily to the law in New South Wales. Interstate readers will need to make their own enquiries in order to ascertain whether the legal situation is the same in their jurisdiction.

## What is an Affidavit?

An affidavit is defined as a statement in writing that sets out the facts of a case. It sets out the evidence in a matter. It must be either sworn or affirmed, usually before a Justice of the Peace, Commissioner of Oaths or lawyer, as a true record. This swearing or affirming process is referred to as attesting. Affirming means that you state that you will tell the truth and usually that you are aware of the penalties for making a wilfully false statement.

## Who Swears or Affirms an Affidavit?

The person on whose evidence you rely will either swear or affirm an affidavit. You may either swear or affirm an affidavit about evidence in your case but so may those people who you plan to call as witnesses.

What this means is that the person who is telling the story is the one who swears or affirms the Affidavit.

## What is the Difference between Swearing and Affirming?

Some people do not have any religious beliefs, nor do they have any belief in either a god or superior force in the universe, so it is ridiculous for those people to take a religious oath, in other words, to swear such a document, so they affirm it instead. Other people do have religious beliefs but will not take religious oaths, because they consider them to be blasphemous, for example, some Orthodox Jews will not take religious oaths, nor will some Christians. Some people will not take a religious oath on the Christian Bible, for example, Muslims or some Orthodox Jews. You should be aware, that whether you take a religious oath or not, the court is not entitled to conclude that you are more likely or less likely to be believed because of the particular method of attestation you choose.

## How to Draft an Affidavit

Number each paragraph.

One point should be made per paragraph, for example:

-  
I first saw the Respondent with her child, Jacob, on 17 March, 2000.

-  
It was Jacob's birthday.

-  
The Respondent said, " Would you please go over and speak to your aunt, whether you like her or not?"

Not:

-  
I first saw the Respondent with her child, Jacob on 17 March, 2000. It was Jacob's birthday. The Respondent said, " Would you please go over and speak to your aunt, whether you like her or not?"

#### Facts Only Not Editorial Comment

An affidavit should contain facts only, not law or opinion. Lawyers refer to the opinions as editorial comment and your opponent's lawyers will try to get these comments struck out. An example of this sort of thing in an affidavit is:

-  
I spoke to the Respondent on 20 May, 2000 and asked him not to feed the children junk food.

-  
He told me I'll feed them what I bloody well like! This is an example of his arrogance and stupidity!

In the above example, the statement This is an example of his arrogance and stupidity! is an example of editorial comment; the sort of remark that will be struck out.

The above example would have been alright had it simply said:

-  
I spoke to the Respondent on 20 May, 2000 and asked him not to feed the children junk food.

-  
He told me I'll feed them what I bloody well like!

#### Use Direct Speech

Always use direct speech of the form I said , he said , she said etc. If you're unsure of the exact words use the term "or words to the effect of". An example of this is:

The Respondent said I won't be picking the children up on Wednesday because I have to go interstate on business or

words to the same effect.

Don't instead use the form of indirect speech. For example:

The Respondent told me that he would not be picking up the children on Wednesday as he had to go interstate on business.

### The Rule Against Hearsay Evidence

Generally speaking hearsay evidence is inadmissible. What hearsay means is what someone else was heard to say as distinct from what that person says themselves. An example of hearsay would be What the soldier said was that he heard the Respondent say that he got drunk every night. Such evidence is not hearsay, if you call the person who makes the statement (in this example, the soldier), but it is if you don't call them.

There are exceptions to the hearsay rule. The most important exception that need concern you in relation to family law matters is under section 75 of the Evidence Act 1995 (Commonwealth) which provides, that in an interlocutory hearing, the hearsay rule does not apply if the party calling the evidence names the source of that evidence, in other words, the person who made the comment.

What is an interlocutory hearing? That is a hearing that is taken on a matter that is incidental to the purpose of the action. An example of this would be, where you apply for custody of your children and a hearing is held as to whether you are financially able to support them.

Now, determining what is admissible and inadmissible hearsay is very tricky indeed, in fact, it is a whole topic in itself. The Evidence Act 1995 (Commonwealth) provides a comprehensive flowchart to help you determine whether something is hearsay or not. You really will need to look at this Act yourself if you're self-represented.

### How to Attach an Annexure

Sometimes, you may need to attach an annexure, that is, another document to an Affidavit. An example of this would be, if you're alleging violence and after being assaulted, you went to a medical practitioner and showed them your injuries and got a certificate to the effect that you had some physical damage.

There is a standard way to do this and this is as follows (use the following words but remember to delete ~~sworn~~ if you affirm or ~~affirm~~ if you swear the Affidavit):

This is the Annexure marked A referred to in the Affidavit of ~~sworn/affirmed~~ at this \_\_\_\_ day of \_month\_, 20\_\_

Before me \_\_\_\_\_

(This is signed by the person who witnesses the document not the person who swears or affirms it)

\*Rochelle Macredie is a Solicitor in NSW working with McKenzie Friends. She practices with the firm Oliveri Attorneys and can be contacted on 02 9550 0853, 0407 896 832 or by email at rochelle.macredie@aapt.net.au