

How to prove your family law case

Rules about what you can say in court

January 2013

Who should use this fact sheet?

Use this fact sheet if you had legal aid for your family law **case** and your lawyer helped you draft your court documents and prepare you for your final **court hearing**. You now plan to represent yourself in court. When you arrive at court, tell the judge's associate that you are representing yourself.

What do these words mean?

Words that are highlighted in **bold** the first time they appear are explained in the Family Law Courts' fact sheet *Legal words used in court*. See the Family Law Courts website.

What is evidence?

Evidence is factual information used in court to support your case. It can be documents or witness statements. Your lawyer will have helped you prepare **affidavits**, which set out the facts you want the court to consider in your case.

Evidence must be relevant and follow the rules

The court can only look at evidence that is relevant to the case and 'admissible' (able to be used in court). Evidence is relevant if it supports your argument or helps disprove the other side of the argument. The evidence must be directly linked to your argument. Do not use unnecessary evidence.

What if the evidence does not support my case?

You have a duty to give information relevant to the issues of the case, even if it does not support your argument. If you leave out important information it could affect your 'credibility' (whether the court believes that you are a truthful person). The court needs to know the whole story.

What evidence is 'inadmissible'?

Not all evidence can be shown to the court. There are rules that mean some evidence cannot be used in court. This is called 'inadmissible' evidence. The common types of inadmissible evidence are listed as following:

Hearsay evidence

Hearsay is something that you have heard from someone else. You cannot use hearsay evidence in court. For example, you cannot talk about a conversation between your sister and ex-partner, which happened when you were not there.

There are exceptions to this rule. Evidence about a conversation might be allowed if it is to work out the time and place of an event or why a person acted in such a way.

So, you can say that a conversation took place, but not what was said.

You can also call the person who made the statement as a witness so that they can provide evidence.

Opinion evidence

Usually witnesses can only give evidence about things they know as fact, not about what someone was thinking or feeling. A witness can give evidence of what they saw but not what they think about it. The exception to this is the evidence of an expert (such as a doctor) who has qualifications or experience that they use to give an opinion.

Character evidence

Usually evidence used to harm a witness's credibility is inadmissible. However, if the other **party** uses evidence to show a witness's good character, you may be allowed to use evidence to show otherwise.

Past behaviour

How a witness behaved in the past, if not related to the current case, is usually inadmissible. However, you may use evidence that shows a pattern of behaviour leading to, or directly connected with, your case. For example, you may be able to show evidence of previous incidents of **family violence** if violence is an issue in your case. Get legal advice about this.

Confidential information

Confidential information that you have given or got from your lawyer, including negotiations with the other party, is inadmissible. Things that are said at mediation or in **family dispute resolution** are inadmissible. However, you may give evidence of an agreement made in writing.

Expert witnesses

Reports from professionals (expert witnesses) should only be used when their evidence is necessary to sort out an issue in dispute. If you want to use an expert witness it needs to be included in an affidavit.

Do all of the evidence rules apply to my case?

Sometimes the court will decide to use a less formal process at your court hearing. This is called a 'Division 12A hearing'. The court will usually decide this on the first day of your court case or during a 'call over' (a pre-trial court meeting).

In Division 12A hearings the judge or federal magistrate decides which rules of evidence you must follow.

It may help your case if you follow the evidence rules. If you want the rules of evidence to be followed at your hearing, you have to ask for this. See the fact sheet *How to run your family law case*.

How do I prepare for my day in court?

Help from your lawyer

Your lawyer will have helped you prepare the following:

- a list of witnesses and evidence you would like to use, and any **subpoenas** you may need
- a detailed list of the orders you want
- a list of the reasons you need the witnesses and evidence to support your case.

Preparing your cross-examination

Cross-examination is where you ask the other party about their evidence. See the fact sheet *How to run your family law case*.

It is important to prepare your questions for cross-examination. Read all the affidavit material for your case and the other party's case.

Some key tips are:

- prepare questions about the areas of weakness and differences between each affidavit
- write down the main points you want to make and the questions you want to ask
- if you have evidence that proves the other party's statements are wrong, you must 'put' (tell) that evidence to the witness. If you do not question or tell them about this, you are not allowed to use this evidence at all
- you are allowed to ask leading questions (questions in which the answer is suggested), for example, 'You were late to pick up Peter, weren't you?'
- you cannot ask questions that are offensive or abusive.

What is an example of cross-examination?

Ms Jones is being cross-examined about not letting Mr Jones see their son Peter. The parties had previously made **consent orders** that they both agreed to. Ms Jones said in her affidavit that Mr Jones made no contact with Peter. She suggested that Mr Jones does not care about Peter.

Mr Jones says that Ms Jones stops him seeing Peter. He has copies of his telephone records showing calls to Ms Jones's number. In cross-examining Ms Jones, he might say the following.

'Now on 6 January 2008, you went to the Family Court at Melbourne, didn't you?'

'You had a lawyer representing you that day, isn't that right?'

'Is it correct that we read and signed consent orders written by your lawyer?'

'Is it also true that you were given a copy of the consent orders?'

'Would you agree that the orders clearly state that Peter is allowed to get a call from me each Wednesday between the hours of 6.30 pm and 7.00 pm?'

'Is it correct that your home number is 9123 4567?'

'Since the orders were made, is it true that I have called your home and asked to speak to Peter each Wednesday at 6.30 pm?'

'Is it true that on each and every occasion that I have called to speak to Peter, you have answered the telephone?'

'Is it true that as soon as you hear my voice you hang up the telephone?'

If Ms Jones does not agree that the phone calls happened, Mr Jones can 'tender' (show) the phone records. However, the phone records only show that a phone call was made from Mr Jones's phone to Ms Jones's phone. The records do not prove that it was Ms Jones who answered the call and hung up the phone. She might say that Peter took the calls. If that is the case, the information should have been in her affidavit. Not including this information may affect her credibility.

More information

Family Law Courts

See the court website for publications about court processes
www.familylawcourts.gov.au

Federation of Community Legal Centres

Call to find your nearest community legal centre
Tel: 9652 1500

Law Institute of Victoria

Referral to a private lawyer
Tel: 9607 9550

Where to find the law

Comlaw

The *Family Law Act 1975* and Family Law Rules 2004 are on
www.comlaw.gov.au

Victoria Legal Aid

Legal Help

Free legal help by telephone and information about Victoria Legal Aid services

Tel: 9269 0120 or 1800 677 402 (country callers)

Public law library

The library is open to the public. Librarians can help you locate legislation, case law or other legal material

Tel: 9269 0232