EVIDENCE IN FAMILY LAW PROCEEDINGS

Evidence is the "bricks and mortar" of case building. It must have two essential characteristics to be information that can be received by a Court: it must be relevant and admissible. Evidence law was formerly a creature of common law. That is no longer the case. Most Australian jurisdictions have enacted the *Uniform Evidence Act,* which abolished, or modified many of the common law rules. It is not a complete code. Some rules of evidence, both procedural and substantive (like the evidential burden of proof) are covered by other legislation and by common law.

The *Evidence Act* (Cth) was passed and came into operation in 1995. All lawyers practising in the family law jurisdiction should be familiar with the *Evidence Act,* as well as the *Family Law Act* (Cth) 1975, the *Family Law Rules* 2004 and *Family Law Regulations* 1984.

This paper is divided into three parts:

1. Documentary Evidence - the use of technology;
2. Evidence gathering – building your case; and
3. Preparing for and running a trial – when the rules of evidence come into sharp focus.

PART 1: DOCUMENTARY EVIDENCE IN THE 21ST CENTURY

"There was, of course, no way of knowing whether you were being watched at any given moment... it was even conceivable that [the Thought Police] watched everybody all the time... They could plug in your wire whenever they wanted to. You had to live... in the assumption that... every movement was scrutinized."

- George Orwell 1947, in *1984*

Text messages, e-mails, smart phones and social media - this technology now permeates our lives. Consequently, it has created new forms of documentary evidence that is being used in the Courts. It is important to remember that electronic communications are essentially documents and must be proved (assuming they are admissible) if they are to be relied upon as good evidence.

So, what is a "document" and how do you prove it in Court?

The Dictionary in the *Evidence Act* defines "document" very broadly, as follows:

> ***Document*** *means any record of information, and includes-*
>
> *(a) anything on which there is writing; or*
>
> *(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or*
>
> *(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or*
>
> *(d) a map, plan, drawing or photograph.*

This means mobile phones, computers, discs, memory cards, USB sticks, i-phones, i-pads, recordings and images can all be documents for the purposes of evidence, provided they contain information that someone can interpret. That information must be relevant to the proceeding to be admissible evidence.

At common law, the "best evidence rule" meant that the contents of a document would usually be proved by tendering the original

document. Copies of documents and oral evidence about the contents of documents were generally inadmissible (subject to exceptions, for example, where the original document was not available and its absence could be explained). The common law rule no longer applies. Section 48 of the *Evidence Act* sets out how a party may adduce evidence of the contents of a document. I have not extracted the section, which is quite lengthy. By way of summary, a party can tender the document sought to be relied upon, or use one of the following methods:

(a) adduce evidence of an admission made by another party to the proceeding as to the contents of the document in question (for example, put it to them as a prior inconsistent statement in cross examination, or in a Notice to Admit);

(b) tender a copy produced by a photocopier or scanner;

(c) tender a transcript (for example, of a recording);

(d) tender a document that is produced by use of a device used to retrieve, produce or collate information from the article/document (for example, a DVD or USB stick containing information downloaded from a computer);

(e) tender a document that is a summary of or extract from the document in question, which forms part of the records of a business (for example, a copy of a summary of the last set of financial accounts of a business);

(f) if the document is a public document, tender a copy produced from an official government source.

A document can be proved in one of the ways set out above, even if the original document is available. If the original document is unavailable, then under section 48(4) of the *Evidence Act* the document can be proved by way of a copy, extract, summary, or by oral evidence.

Remember to have some forethought about the practicalities of presenting documentary evidence in Court. If you intend to rely on a recording or evidence downloaded from a computer, liaise with the Court before the hearing to ensure that equipment is available in Court to play it on and that the equipment is compatible with device you intend to use.

Information on computers and other devices can be subpoenaed or be the subject of discovery and Notices to Produce in the same way as other documents that are relevant to the proceeding. An Order may be sought by filing an Application in a Case for a party to make its computer available for inspection, if necessary, however issues about legal privilege and relevance may arise if a party wants "carte blanche".

It is now common for documents to be produced under a subpoena on a disc or USB stick and for solicitors to attend the subpoena room with a laptop, rather than a photocopy card. Computer files may also be produced and made available for inspection electronically. Care must be taken in vetting what is included, as there have been cases in which this form of discovery has raised issues about waiver of legal privilege: see for example *GT Corporation Pty Ltd v Amare Safety Pty*

Ltd [2007] VSC 123. In that case, enormous electronic discovery was provided, with no index that identified what the documents were and from whose computer they had come. Amongst the thousands of e-mails in the discovery were some sensitive solicitor-client communications. The case was about whether there had been an implied waiver of privilege and whether counsel who had inspected some of the documents should be restrained from acting in the case. The answers to those questions were no, there had been no implied waiver in the circumstances and yes, counsel was restrained from acting any further in the case.

If documents are voluminous and complex, section 50 of the *Evidence Act* provides that evidence of the documents may be adduced by way of a summary, provided the other party is served with a copy, given the name and address of the person who prepared the summary and has a reasonable opportunity to inspect the documents. This may be a useful provision in complex financial cases in the Family Court, in which evidence may need to be adduced of the financial records of a group of companies, or the gambling records of spouse committing waste over a number of years.

Do you have to authenticate documents in Court?

The document sought to be adduced as evidence must be authenticated. This means that the Court must be satisfied that the document is what it is purported to be. Sections 57 and 58 of the *Evidence Act* relaxed the common law requirements for documents to be authenticated before they could be relevant. Under section 57, a

court can make a finding that unauthenticated documentary evidence is relevant, if it is reasonably open to the court to make that finding, or subject to further evidence being admitted later in the proceeding that will make it reasonably open to the Court to make a finding that the evidence is relevant. Further, under section 58, the Court may examine a document and draw from it any reasonable inference as to its authenticity or identity. In other words, the Court can accept the authenticity of a document at face value.

However, if the authenticity of a document is in question and the party seeking to rely on it does not bring evidence about the making of the document when they could do so, then the Court may find it is not relevant, or exclude the evidence using the discretionary power under section 135 of the *Evidence Act* to exclude evidence that might be unfairly prejudicial, misleading or confusing, or cause or result in undue waste of time.

Computer records are dealt with in section 147 of the *Evidence Act.* This section basically says that if a document is produced by a process, machine or other device in the course of a business, then evidence is not required about the working accuracy of the "device" (unless there is evidence to displace the presumption of authenticity raised by the section). Section 161 contains a similar provision in relation to electronic communications. If a document purports to contain a record of an electronic communication, then it is presumed that the communication was made, sent and received in the manner appearing on the document.

What about the hearsay rule?

Many documents are hearsay. That is, they are representations made by a person out of court. Section 59 of the *Evidence Act* defines the hearsay rule as follows:

> *Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.*

There are various exceptions to the hearsay rule. The most relevant one in this context is the exception for business records in section 69 of the *Evidence Act*, which is based on their reliability and necessity. "Business" is defined widely. To come within the exception, the document must satisfy one of two conditions. Firstly, the business record was made by a person who had, or might reasonably be supposed to have had, personal knowledge of the fact asserted. Secondly, and in the alternative, it was made on the basis of information directly or indirectly supplied by such a person.

There is also an exception to the hearsay rule in section 71 of the *Evidence Act* about records of electronic communications, in so far as the representation is about the identity of the sender, the date, time and destination of the communication. For example, if an e-mail print-out states that it was sent by Husband to Wife at 10.40pm on 1 March 2013, then that is admissible evidence of the sending of the e-mail at that time.

It is also important to note that section 60 of the *Evidence Act* makes a significant change to the common law hearsay rule. Once a document is admitted into evidence for a non-hearsay purpose, it can also be used for a hearsay purpose. This means that if an out of court representation is admissible as evidence that a statement was made, then it is also admissible as evidence of the fact asserted in the statement. So, for example, if a download from a Facebook page is admissible as evidence that person A communicates with person B through social media, then the facts asserted in the Facebook post are also admissible evidence.

What about telephone calls & recordings?

In relation to telephone calls, you should be aware of section 7 of the *Telecommunications (Interception and Access) Act* (Cth) 1979, which prohibits the interception and recording of telephone calls. As a general rule, telephone calls may not be recorded whilst being transmitted unless the person recording the call informs the speakers that they are being recorded. A party can record a telephone conversation in which he or she is a participant without offending this section, as it is the interception of the call without the participants' knowledge, rather than the recording in itself that creates the offence.

Arguably, the Court may exercise its discretion under section 138 of the *Evidence Act* to admit evidence of illegally intercepted telephone calls, if the probative value is high, and grant a certificate against self-incrimination under section 128 of the *Evidence Act* to the witness

giving such evidence. The law in this area is not completely settled, as there is a tension between section 138 of the *Evidence Act* and section 63 of the *Telecommunications Act,* which provides a mandatory prohibition on using unlawfully intercepted information as evidence in a proceeding.

As a general rule, under State legislation, such as the *Surveillance Devices Act* 1999 (Vic), it is illegal to use a listening or surveillance device to record a *private* conversation to which the person using the device is not a party without the express or implied consent of the parties to the conversation. It is legal to make a recording in a public place, where you would expect other people to hear you, and to record conversations in which you are a participant. In practice, this means that a parent can legally make an audio and visual recording (for example, on a mobile phone) of his or her direct interaction with the other parent at a contact changeover without the other parent knowing and consenting. However, it also means that a parent cannot lawfully record a child's telephone conversation with the other parent without them knowing (for example, by holding a tape recorder up to the hand-piece of an extension phone).

PART 2: EVIDENCE GATHERING – BUILDING YOUR CASE

Financial disclosure

The parties have an obligation to make full and frank disclosure of all documents in their possession or control that are relevant to the proceeding and that are not subject to legal privilege. Privileged

documents are those documents prepared for the dominant purpose of current or anticipated legal proceedings.

Note, section 55 the *Evidence Act* defines relevant evidence as being evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

The *Family Law Rules* and *Federal Circuit Court Rules* set out the documents that must be disclosed in financial cases as a minimum requirement, to the extent that they are relevant. In addition to a general obligation of financial disclosure, there are specific provisions requiring production of:

- last 3 tax returns and assessments
- superannuation information forms
- last financial statements for trusts, companies and partnerships
- copies of trust deeds and partnership agreements
- BAS for the past 12 months
- Market appraisals of assets
- Proof of income
- Disclosure of disposal of assets over the past 12 months

See *Family Law Rules* 12.02, 12.05 and 13.04.
See *Federal Circuit Court Rules* 24.03, 24.04 (financial cases) and 24.05 (maintenance cases, in which 12 months bank statements are also required).

Obtaining evidence from third parties

Third parties can be joined or intervene in proceedings if Orders are sought that affect their rights, for example, a trustee in bankruptcy. Parties may also need to join a third party, if that person or entity must be bound by the Orders made by the Court for them to be effective, for example, where a company or trustee is required to transfer an asset to a spouse party.

Subpoenae may be issued and served on third parties at any stage of the proceeding in the Federal Circuit Court, up to a maximum of five (see *Federal Circuit Court Rules* 15A.01 to 15A.11). Subpoenae may be issued in the Family Court without permission for the purposes of an interim or procedural hearing, but the leave of the Court is required to issue subpoenae for trial (see *Family Law Rules* 15.17 to 15.21). Special rules apply to self-represented litigants and subpoenaing documents from other courts.

A subpoena to give evidence, or to produce documents and give evidence, will not be issued if a subpoena to produce documents would be sufficient. A subpoena may be objected to if it is oppressive, vexatious, or a fishing expedition.

His Honour Justice Cronin reviewed the law on subpoenae in the recent decision of *Cahill & Cahill (no.2)* [2013] FamCA 453. In that case, the wife sought production by a firm of solicitors of documents relating to the disposition and potential sale of assets by a group of family owned entities. She also sought the production of invoices

rendered by the firm on matters related to a variety of companies, trusts and a deceased estate. The wife had made untested allegations in the case that the husband's family had an arrangement about how trust assets would be divided, which the Husband denied.

The husband's mother objected to the subpoenae in her personal capacity, her capacity as a director of the group of companies, executor of her late husband's estate and the appointor of some trusts. She was found to have a "sufficient interest" in the subpoena to be heard.

The husband's mother objected to the subpoenae on the basis that they were oppressive, fishing and not relevant, and harassing. The first ground was difficult to argue because the documents had already been provided, however, His Honour Justice Cronin said:

> *…oppression is not confined simply to the size of the task but rather to whether the court considers this exercise imposed on a non-party is an unreasonable invasion of their privacy having regard to the task of the Court to do justice to the parties in the substantive proceedings.*

The objector argued that the subpoenae were harassing because a subpoena had already been issued and later withdrawn by the wife, and the husband argued that his interest in the objector's assets and those of the "family" was speculative at best. The Judge rejected this argument and said the relevance of documents in this context is not limited to documents admissible in themselves in proof of an issue

raised in the case. It is sufficient that they could "possibly throw light" on the issues in the substantive proceedings, or it appears to be "on the cards" that they will do so. The party seeking to inspect subpoenaed documents need only show a legitimate forensic purpose in the inspection.

Conversely in the *Cahill* case, Justice Cronin had previously set aside subpoenae issued by the husband against the wife's family on the basis that they were too wide-ranging in circumstances where inter-party discovery had not been undertaken. It was not a case of "what is good for the goose is good for the gander", as the wife had exhausted all other avenues of obtaining the documents she sought to support her allegations about the husband's true financial resources. The Husband, when he issued his subpoenae, had not exhausted all other avenues.

Expert evidence

Consider at an early stage of the case whether or not you need expert evidence. If so, should a single expert be jointly appointed? If you have obtained a single expert report, do you need a shadow expert to challenge the evidence of the single expert, or to advise you on how to attack the single expert's report? The rules about experts are clear, both in terms of procedure under the *Family Law Rules* and in terms of who may be called as an expert.

Expert evidence is admissible opinion evidence. As a general rule, evidence of an opinion is inadmissible under section 76 of the

Evidence Act. To be admissible, the opinion of an expert must satisfy three criteria, set out in section 79 of the *Evidence Act,* being:

1. The person must have specialized knowledge;
2. The specialized knowledge must be based on the person's training, study or experience; and
3. The opinion must be wholly or substantially based on their specialised knowledge.

Further, the common law "basis rule" still applies to expert evidence, although it is not expressly set out in section 79. This means that the facts underpinning the evidence must be disclosed. The expert must set out the facts observed and proved, upon which the opinion is based, or identify any facts that have been assumed or accepted in formulating the opinion.

The seminal decision on expert evidence is *Makita (Australia) Pty Ltd v Sprowles* [2001| NSWCA 305, in which Heydon JA summarized the principles applicable to expert evidence, which were codified in the *Evidence Act.* He said, "*..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 of 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 specialized knowledge."*

The foundation of an expert's opinion on "facts" that are hearsay and the subject of dispute between the parties can provide fertile grounds for cross-examination. For example, a psychologist cannot give evidence about who abused a person and when the abuse occurred, as that is outside the area of the psychologist's expertise. Further, a psychologist cannot give an opinion that a witness is a "good parent", based on what a witness has told them in clinical sessions. This is a matter for the court.

In financial cases, be wary of accountants who exceed the scope of their expertise in providing reports and giving expert evidence. For example, an accountant may not be able to give admissible evidence about what would be expected of a diligent company director, unless he/she has experience as a director of a number of public and private companies. Further, does the accountant have the industry experience to provide valuations of company assets, such as licences or franchises, if these are in issue?

The *Evidence Act* abolished two common law rules, which in effect expanded the scope of expert evidence. Under the common law, an expert could not give an opinion about the ultimate issue in the proceeding, or a matter of common knowledge. Whilst these rules have been abolished, Courts may use their discretion to give such evidence relatively little weight, or to exclude it under the general discretion under section 135 of the *Evidence Act* to exclude unfairly prejudicial evidence. Be wary of the expert who becomes a "barraker" for one party and loses objectivity.

PART 3: EVIDENCE AT TRIAL

Rule15.09 of the *Family Law Rules* prescribes the format of Affidavits. The Family Court and the Federal Circuit Court are essentially Courts of trial by Affidavit. The Judge will have read the parties' trial Affidavits before coming onto the bench to hear the case and in many instances will have formed a preliminary view of the matter on the basis of what he or she has read. Therefore, it is important to get them right, from both a factual and tactical point of view.

I have set out below the requirements and some points of "best practice" for drafting a trial Affidavit, which are basic but often transgressed:

1. It should therefore contain all of the facts that the witness will attest to in the witness box. It is the party's evidence in chief in writing.
2. Those facts must be set out in numbered paragraphs and each paragraph should only deal with one subject.
3. The Affidavit should be chronological, unless there is a particular reason for drafting the Affidavit by topic or theme instead.
4. It is sworn evidence. An Affidavit should not contain hearsay, conclusions, speculation, opinions that the witness is not qualified to give, irrelevant information or arguments.
5. Avoid using absolutes and adjectives, like "always", "never" and "very". They can put the witness in a difficult spot when under cross-examination. Adjectives can often detract from the facts, which do not need to be embellished.

6. Do not put conversations in inverted commas, unless the witness is 100% sure of the words used. Avoid using the phrase"….*said words to the effect of*." It is unnecessary to use it and strictly speaking, it is not evidence of what was said in substance, but the effect of it on the listener.
7. If responding to an Affidavit from another party, you will be assumed to admit the contents, unless you specifically deny them. It is not necessary to specifically admit or provide "no comment" in relation to non-contentious paragraphs.
8. It is not necessary in a trial Affidavit to recite the procedural history of the case. The Court file sets this out and to the extent that it is relevant to the determination of the matter, or to costs, it can be dealt with in submissions.
9. The witness' evidence should be contained in the one Affidavit. Do not seek to rely on earlier Affidavits as well, or incorporate them by reference. On the other hand, when drafting an Affidavit of evidence in chief, ensure that you re-read and cross-reference previous Affidavits to check that the witness is being consistent. Do not leave them open to being cross-examined about making a prior inconsistent statement.
10. All annexure cover pages and annexures should be paginated, following on from the last numbered page of the Affidavit.
11. If the annexures are extensive, consider providing the Court with a separate exhibit book, rather than annexures (and number every page consecutively for ease of access during the trial).

12. Only annex relevant pages of documents to an Affidavit that relate to issues in dispute. Courts do not appreciate bulky Affidavits, in which the annexures exceed the main body of the evidence.

Whilst a trial Affidavit contains factual evidence, how you organize the facts in a trial Affidavit, the level of detail you include in relation to different aspects of the case and the matters you downplay or exclude are all tactical decisions. When drafting, have in the back of your mind what the issues in the case are. In your final submissions, what do you want to impress upon the Court? You need to ensure that the evidence is in the trial Affidavits to support your arguments at the end of the case and that the most important evidence is prominent.

If you are served with Affidavits that contain conclusions, speculation, argument, unqualified opinions, irrelevant material or inadmissible hearsay, then prepare written objections. Rule 15.13 of the *Family Law Rules* and Rule 15.29 of the *Federal Circuit Court Rules* gives the Court the power to strike out affidavit material that is inadmissible and/or irrelevant. The Objections should be served on the other side before the trial, so that counsel can agree to strike out certain paragraphs that clearly offend the rules of evidence. The balance of the objections can then be argued before the Judge at the start of the trial, if they go to matters that are contentious. This can take up valuable time at the start of the trial, but is can have advantages, both strategic and in seeking an order for costs thrown away.

Be wary of section 69ZT of the *Family Law Act,* which gives the court a discretion to allow certain evidence in parenting cases that would not be admissible under the *Evidence Act,* for example, hearsay evidence.

It is common to see statements in Affidavits like the following, which are inadmissible, unless they are supported by evidence, and should be listed in objections served on the other parties:

"I have a close and loving relationship with the children" (conclusion – how is this manifested?)

"The Husband was violent and abusive towards me." (conclusion – what did he do? Include particulars to what was said and done to whom and when)

"I made significantly greater contributions than the Wife." (conclusion and argumentative – how, what, when?)

"The Wife has tried to alienate me from the children." (conclusion and speculation – the behaviour must be particularized. A witness cannot know what someone else is thinking or intends, only the effect of the behaviour observed by the witness)

"*The value of the property is likely to increase substantially." (opinion and speculation – is the witness qualified to give expert evidence about this?)*

"If I am not permitted to relocate, my mental health will suffer." (speculation and opinion, rather than facts)

"Family members have told me that the Husband has denigrated me to our family and friends." (*inadmissible hearsay and unsupported conclusion about what was said*).

"*I am concerned that the Husband may attempt to dispose of assets." (this is irrelevant – Judges will tell you that they are not interested in your client's "concerns" – what is the evidence that the witness has seen or heard that poses a risk of the disposal of assets?).*

Consider what will make life easy for the Judge when he or she hears the case and the most efficient means of getting evidence before the Court. A chronology and a balance sheet should be prepared, agreed and handed up to the Judge as aides memoire, where appropriate. Summaries and spreadsheets, for example, of valuations or expenses may also be useful aide memoires for the Judge in financial cases and save time, where the other parties do not take issue with the content.

Finally, beware the spectre of fraud. If your client has a history of claiming Centrelink benefits, make sure you know the history of them before your client is subjected to cross-examination. This is more important than ever, when the dates of commencement and termination of de facto relationships are increasingly in issue in proceedings. For example, if a party gives evidence that she was in a de facto relationship at a given date, her credibility is damaged if sole parent benefits were being claimed at the same time. Alternatively, if

her evidence about the relationship is accepted, then she was committing an offence under the Social Security Act and may be exposed to prosecution.

If there are tax skeletons in the closet, find out about them before a single expert accountant/valuer report highlights them for the court and the parties are referred by the Judge for prosecution. This may mean liaison with the client's accountants and ensuring that tax records are up to date before proceeding.

Under section 128 of the *Evidence Act,* a witness may rely upon the privilege against self-incrimination and apply for a certificate from the court. However, once the evidence spills out, it is too late. This needs to be done before the horse has bolted.

JEANETTE SWANN
BARRISTER