INTERIM FAMILY LAW PROCEEDINGS

Federal Circuit Court — Practice Direction No. 2 of 2017

IF A PICTURE PAINTS 1000 WORDS, CAN 2500 WORDS PAINT A PICTURE?

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A. OVERVIEW

Practice direction No. 2 of 2017 of the Federal Circuit Court of Australia, published on 7 December 2017, came into effect as of **1 January 2018**. A copy of the practice direction appears at the end of this paper. The Practice Direction implements a new "10 page limit" and a new "48-hour time limit" for filing of affidavits in interim Family Law proceedings, whilst also reminding us of a number of important features of the way in which the Federal Circuit Court (FCC) conducts its business:

1. The **objects of the Court** — being the just, efficient and economical resolution of proceedings;
2. The **obligations of parties and their representatives** to assist the Court in meeting its objectives;
3. The Court's power pursuant to s. 51 of the Federal Circuit Court of Australia Act 1999 ("FCC Act") to make directions to **limit the length of documents filed** in proceedings, subject to the Rules of Court — in the current case, to introduce a new limit upon the length of affidavit material which may be filed in support of an interim Family Law application such that:
    a. each affidavit must not exceed 10 pages in length; and
    b. must not contain more than 5 annexures;
4. The Court's power to determine how it **conducts interim hearings**, in accordance with its objectives, including:
    a. whether or not to conduct an interim hearing on the first return date;
    b. whether to deal with all of the Application/s before the Court, or only part;
    c. limiting the scope of the enquiry and dealing only with those issues identified by the Judge as relevant to the interim hearing; and
    d. enforcing compliance with Rules and Directions in relation to use of affidavit material, including in relation to the filing of further affidavits e.g. in reply to a disputed Response;
5. The consequences of **failure to comply with Practice Directions**, which in the case of the current Practice Direction No 2. of 2017, includes:
    a. loss of hearing priority at the Judge's discretion;
    b. adjournment, with specific costs orders;
    c. the Court proceeding to hear a matter on the basis that non-complying affidavits will not be read; or

d. requiring a party to select 10 pages out of their non-complying material only, to rely upon; and

6. Discretion of the Court to **exclude late-filed documents** or require a party to seek leave if they wish to tender those documents at the commencement of an interim hearing.

The aim of this paper is to address the above issues in a practical way, so as to assist fellow family law practitioners keep in the front of their mind:

- **what we are trying to achieve for our family law clients at interim hearings and why** — namely to tell our client's story persuasively and succinctly whilst complying with legislation, rules, directions and laws of evidence, all with a view to ensuring their interim application is granted and/or that a disputed application/response by the other party successfully opposed;
- **how we can maximise the cost effectiveness and efficiency of the Court process for the benefit of the client** through increased compliance with directions, rules and laws of evidence;
- **how we can improve the chances of our client's interim application proceeding as smoothly and as successfully as possible,** in a manner which meets both the expectations of the client and the objectives of the Court; and avoids undue criticism from our fellow practitioners and the judiciary;
- **the importance of precise, concise drafting of applications and evidence-based affidavit material;** and the need to robustly filter and "curate" all information and instructions provided by the client in order to best achieve this outcome;
- **what to expect at interim hearings and the need to "reality check"** the expectations of the client accordingly; and
- **the practical implications of non-compliance with Practice Direction No. 2** (both in form and in substance) and what happens when things go wrong.

B. OBJECTS OF THE COURT – Informality and Efficiency

The FCC Act and the Federal Circuit Court Rules 2001 ("FCC Rules") unambiguously mandate the intention of Parliament that the FCC should conduct its business with maximum informality and efficiency. Indeed, pursuant to s.3 of the FCC Act (which is echoed in Rule 1.03(2) of the FCC Rules) the objects are stated as follows:

*(a) to enable the Federal Circuit Court of Australia to operate **as informally as possible** in the exercise of judicial power; and*

*(b) to enable the Federal Circuit Court of Australia to use **streamlined procedures**; and*

*(c) to encourage the use of a range of appropriate **dispute resolution processes**.*

Pursuant to s.42 of the FCC Act, the intention is again very clear:

> *"In proceedings before it, the Federal Circuit Court of Australia must proceed without undue formality and must endeavour to ensure that the proceedings are not protracted".*

Similarly, s.45 of the FCC Act precludes the use of interrogatories and discovery unless the "*Judge declares that it is appropriate, in the interests of the administration of justice*" to do so.

FCC Statistics & Targets

The overwhelming majority of the FCC's work is in the family law jurisdiction, being around 90% of proceedings filed. According to the FCC's Annual Report for 2016/2017[1], statistically speaking, 72% of applications filed in the FCC are resolved prior to final hearing. It is also of interest to note that the Court's targets (which have not yet been achieved) include:

- to dispose of 90% of applications for final orders within 12 months;
- to dispose of 90% of all other applications within six months.

If the majority of cases are resolved prior to final hearing, it stands to reason that interim proceedings (and the way in which they are handled) are a major focus of the Court. Indeed if the Court's target is to dispose of 90% of all applications (other than applications for final orders) within 6 months of filing, it is imperative that the Court continues to ensure that these pre-trial applications are being handled with maximum efficiency.

And so it follows that factors which unnecessarily slow down and delay the Court's capacity to deal with these matters swiftly on a day-to-day basis (such as unnecessarily long affidavits and forced adjournments due to late filing) need to be managed in a robust way. Any family law practitioner who has regularly appeared in the Court's busy duty lists will observe that the Court has to spend more time than perhaps it should hearing arguments about late filing, short service (particularly of responding material) and having to come to grips with (often voluminous) material upon which parties seek to rely, notwithstanding the obviously abridged nature of interim hearings. Particularly in children's matters where the best interests of the child are paramount -- and an adjournment may seriously prejudice a party or place a child at risk -- the Court has a difficult balancing act to perform between policing compliance and dealing with urgent matters, often in spite of non-compliance.

[1] Federal Circuit Court annual report 2016/2017 (available under "reports & publications" on the FCC website)

It is in this context that Practice Direction No. 2 of 2017 has been implemented.

As a member of the Victorian Bar (and from discussions with many of my colleagues, I am not alone in my views) the new Practice Direction is considered a welcome and necessary step to better streamline the handling of the many interim applications which come before the Court.

Along with the recent case blitz — involving a large number of suitable cases being referred to mediation or other forms of ADR — these measures are wholly consistent with the Court's continuing efforts to meet its stated objectives for the timely delivery of legal outcomes, without undue delay or formality.

The new Practice Direction will certainly require some practitioners to adjust their approach and drafting style in order to "get on board" with this reinvigorated approach to interim proceedings. Arguably however, the "forced discipline" of an imposed 10 page limit for interim affidavits may in fact liberate practitioners invariably faced with a never-ending stream of instructions and materials from (understandably anxious) family law litigants who cannot be expected to place these limits on themselves.

One can imagine the conversation with those clients would go something like this:

> "*There is a 10-page limit on affidavit material to be filed in interim family law proceedings now and the Court is very strict about it, so we must be careful to only include evidence which is relevant and necessary to support the orders you seek in your interim application. If we don't work within these limits, the other party might object and seek an adjournment with costs; and the Court might refuse to read your affidavit and/or hear your case. So I will go through your notes and instructions very carefully and prioritise the evidence which is most helpful to your application and we will only include that in the affidavit. I will keep the rest on file as helpful background information".*

It is acknowledged that this task is much more difficult when acting for a Respondent, as one has to not only put the evidence in support of the client's case, but also respond to the affidavit of the Applicant; all in "10 pages or less". Needless to say, this is going to prove even more challenging.

Do we still file a longer affidavit in support of final orders when issuing?

Rule 4.05 of the FCC Rules provides that:

(1) "A person filing an application or response, whether seeking final, interim or procedural orders, must also file an affidavit stating the facts relied on.

(2) However, an affidavit is not required:

(a) in an application for interim or procedural orders -- if the evidence relied on is in an affidavit or affidavits filed in the pending proceeding; or…"

As can be seen, the Rules do not oblige a party to file two separate affidavits in support of an Initiating Application for interim and final orders. On the contrary the Rules provide that a single affidavit for both final and interim issues will suffice if one affidavit serves both purposes.

Conversely, the new Practice Direction does not necessarily preclude a party from also filing a longer affidavit in support of final orders at the time of issuing, if they wish. For example, if a practitioner believes that the filing of a separate, longer affidavit in support of the Final Orders (at the time of filing the Initiating Application) would be of assistance, in terms of "filling in the bigger picture," then that is a matter for them.

The new Practice Direction is therefore not inconsistent with Rule 4.05 above; it simply limits the length of any separate interim affidavit.

It is doubtful however, given the new "10 page limit" for affidavits filed in interim proceedings, that parties could continue to file a single affidavit in support of both interim and final orders at the outset without exceeding the page limit.

It is my view (and that of my co-presenter) that parties should consider filing only one short affidavit (10 pages or less) in support of their Initiating Application (where interim orders are sought) at the outset of proceedings. This would mean deferring the filing of longer affidavits (in support of final orders sought) until a later date closer to Trial, when more information about the progress of the matter is known.

Others may have a different view, but it seems to us that if the Court is busy dealing with interim applications at pre-trial hearings (and assuming the interim affidavit sets out sufficient general background information on the first page) then the parties would be unlikely to be criticised for not filing costly, longer affidavits in support of final orders at the outset. Arguably the more appropriate time to file an affidavit in support of final orders would be when specifically directed to do so by the Court, closer to Trial. This is what effectively occurs in practice anyway, because parties invariably need to update the affidavit in support of their Initiating Application closer to Trial — which effectively means parties are always filing another longer affidavit closer to Trial anyway.

The end of "Hamburger with the lot" interim applications?

The new Practice Direction will invariably see a reduction in "hamburger with the lot" interim applications, as practitioners will need to be more selective now in respect of the type and number of interim issues they wish to put before the Court. This could be achieved in various ways, such as:

- **Separating interim applications based on urgency** — i.e. prioritising the most urgent interim matters and deferring less pressing interim matters to a separate application to be filed at a later date is still necessary and/or after mediation/conciliation if those issues do not resolve by consent in the meantime. There is of course nothing preventing a party from bringing a further Application in a Case and filing a separate short affidavit (up to 10 pages) in respect of any new interim matters that arise later, or in respect of the less urgent issues that weren't dealt with in the first round of interim proceedings (if they cannot wait until mediation/conciliation or Trial).

- **Separating interim applications based on subject matter** — i.e. a party might decide to seek final orders in relation to both parenting and property/financial matters in their Initiating Application, but only seek substantive interim orders in relation to one aspect or the other. For example if procedural directions can be made in relation to property issues but the substantive property aspects can wait until after Mediation, should those aspects not resolve in Mediation then a party can file a fresh Application in a Case at that point in time.

- **Making interim applications in relation to multiple issues; keeping the evidence relatively brief and then seek leave to file further affidavit material later if necessary. That said,** there is no reason in theory why multiple issues cannot be covered off in 10 pages, with selective and careful drafting.

- **Waiting to see which issues the other party raises in their Response,** rather than exhaustively pre-empting issues which may not be central to your client's application. Parties are always at liberty to file a further affidavit in reply at a later date in relation to any new issues in a Response that were not dealt with in their original material.

- **Ensure that any evidence best given by another witness is not taking up unnecessary space in your client's (10 page or less) affidavit.** In other words, rather than having your client provide (for example) unnecessary hearsay evidence about what their mother saw, or describing their doctor's opinion of their health (and annexing a hearsay letter from the doctor) it is far more preferable, both from a practical and an evidentiary point of view, to have the client's mother or doctor file a separate affidavit in their own right.

- i.e. The practice direction clearly states that the 10 page limit is for "each affidavit" and does not prevent your client filing witness affidavits in support, in addition to their own affidavit, wherever appropriate.

Some other suggestions for streamlining the content of interim applications

It is suggest that:

- We should become increasingly selective when bringing interim applications, focusing upon only genuinely urgent or pressing matters. We should not weigh our interim applications down with unnecessary complexity or detail, nor with matters that can wait until a later date, such as until after mediation/conciliation or until after the release of a family report;

- Practitioners could perhaps refer their clients in interim parenting matters (in particular those who already have a section 60(I) FDR certificate and who are otherwise poised to issue proceedings) to appropriate agreed experts at the outset — eg. specialist counsellors to address known issues and allegations, family report writers, medical and mental health experts in relation to known health issues of the parties/children etc) — to gather expert evidence and input at an early date and to narrow the scope of issues in dispute prior to coming to Court.
    - If these are the kind of expert reports which are likely to be ordered at the first return of an interim application anyway, in theory the parties are not put to additional cost. On the contrary, it may save costs by providing more focus or avoiding Court proceedings altogether. Of course, this only works where parties have cooperative practitioners!

- Practitioners could refer their clients in interim property disputes to legally-assisted mediation, again prior to the parties' coming to Court. This would give the parties a timely and cost-effective forum in which to ventilate and work through those difficult threshold issues. It would enable them to negotiate options in real time, as an alternative to protracted negotiation by correspondence.
    - It is envisaged that a referral to legally-assisted mediation at an early date could enable the parties to achieve agreement about things such as valuation of assets, sale of property, payment of outgoings, short term financial support / child support arrangements, re-distribution of furniture, return of personal documents to facilitate financial discovery etc — with a view to narrowing the scope of the issues in dispute

before the first interim hearing. Indeed this process might take place after proceedings have issued but prior to the first return.

AIFLAM Fixed Fee Mediation Scheme

In this regard it is noted that AIFLAM run an excellent program called the "**Fixed Fee Mediation Scheme**" whereby they maintain a list of suitably qualified barristers and solicitors who will offer their services as a Mediator for a full day for a reduced fee (being a fixed fee commensurate with the Legal Aid trial appearance fee)[2] The fee is reviewed periodically but as at June 2017 it was $2,116 incl GST. The scheme is available to parties in property matters who have a net asset pool (inclusive of superannuation) of $750,000 or under.

It is always open to parties to engage a mediator at a privately arranged fee in any other case and many reputable Mediators will agree to conduct Mediations for a reasonable or discounted fee (and in some cases *pro bono*) particularly where the matter is yet to reach Court.

Impact on duty lists and file management

Reflecting upon how this new Practice Direction might impact upon the way in which interim applications are filed and dealt with before the Court going forward, I suspect that:

- there might be an increase in the number of interim applications (particularly if practitioners are leaning toward filing a series of more discrete interim applications in priority order, each regarding separate issues. But if so, the upside will surely be that each application will be more succinct and manageable and will be dealt with more quickly and efficiently;
- there may be a perceived increase in legal costs for clients, due to the possibility of practitioners leaning toward filing a series of interim applications resulting in multiple interim hearing dates (rather than a 'hamburger with the lot' interim application), however it is suggested that, as each interim application filed will in theory be dealt with more efficiently, maybe the result will be more focused outcomes and fewer adjournments?;
- the immediate benefits of lawyers and parties having less lengthy documents to work with at the pre-trial stage are self-evident:
    - quicker and cheaper preparation time;
    - more streamlined briefs to counsel;

[2] See: https://www.aiflam.org.au/fixed-fee-mediation.php

- matters are more likely to be heard, as the issues before the Court will invariably be more focused and the affidavit material will be easier for the opponent and the Court to digest in a shorter time frame;
- there will be less last-minute responding material (due to the 48-hour filing rule, discussed below) which means less stress for solicitors and clients, more timely briefs to counsel, and certainty that the material will be on the Court file;

C. OBLIGATIONS OF PARTIES AND THEIR REPRESENTATIVES

Rule 1.03(4) of the FCC Rules provides that "*to assist the Court, the parties must:*

- *avoid undue delay, expense and technicality;*
- *consider options for primary dispute resolution as early as possible*".

In all dealings with clients, other practitioners and the Court, Solicitors and members of Counsel need to be mindful of their obligations under their respective conduct rules. Specifically in respect of the ***Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015,*** those obligations include but are not limited to:

1. paramount duty to the Court and administration of justice;
2. informing clients about reasonably available alternatives to a fully contested hearing;
3. obtaining clear instructions;
4. not making or facilitating the making of allegations without a proper basis and/or without having reasonable grounds to believe there is material to support the allegation;
5. duty to ensure that advice is robust to appropriately advance the case on its merits
6. fundamental ethical duties including:
   - to be honest and Courteous
   - to be diligent and competent
   - to act in the best interest of the client
   - to comply with Rules and the Law
7. avoiding dishonest and disreputable conduct;
8. communicating in a clear and timely manner with clients and opponents;
9. avoiding conflicts of interest;

10. frankness with the Court;
11. maintaining the integrity of evidence;
12. maintaining confidentiality;
13. the need to avoid being overly informal, personal or familiar with the Court in a manner which may reasonably give the appearance of having special favour with the Court (not to be confused with the legitimate object of the FCC to provide flexibility and informality for the benefit of litigants in terms of application of rules and procedures, wherever appropriate); and
14. duty not to deceive or knowingly or recklessly misled the Court.

Many of these duties and obligations come into play when drafting interim applications in compliance with Practice Direction No 2 of 2017, in particular points 1 to 5 inclusive.

D. LIMITING THE LENGTH OF DOCUMENTS – 10 PAGE AFFIDAVITS

The introduction of a 10 page limit for affidavits in interim family law proceedings is a good opportunity to revisit the FCC Rules in terms of its technical requirements for filing documents. The following rules apply to the way affidavits must be typed, printed and set out, but it is important to note that this rule does not apply to annexures (in the sense that these are usually documents created by a third party, the content of which the litigating party has no control).

FCC RULE 2.01 — Requirements for documents

(1) A document (other than a form) to be filed must:

(a) be set out on 1 side only of size A4 durable white paper of good quality; and

(b) be legible and without erasures, blotting out or material disfigurement; and

(c) have a margin at the left side of at least 30 mm; and

(d) have clear margins of at least 10 mm on the top, bottom and right sides; and

(e) be written in English; and

(f) be:

(i) printed in a font of not less than 12 points; or

(ii) hand-printed clearly in ink in a way that is permanent and can be photocopied to produce a copy satisfactory to the registrar; and

(g) have a space of not less than 8 mm between the lines of printing…

Key practical pointers

The key practical requirements to bear in mind are that parties and practitioners:

- must continue to use a font of not less than 12 points;
- must use an appropriate margin (at least 30 mm on the left side and 10 mm on the other three sides); and
- must have at least 8 mm of space between each line of printing.

In other words, parties and practitioners cannot increase margins and reduce fonts in their affidavits, in an attempt to maximise their word count within the new 10 page limit!

FCC Rule 15.26 — Making an affidavit

(1) The person making the affidavit must sign each page of the affidavit.

Note: For the persons before whom an affidavit may be made: see section 59 of the Act.

(2) The affidavit must:

(a) contain a jurat including:

(i) the full name of the person making the affidavit; and

(ii) whether the affidavit is sworn or affirmed; and

(iii) the day and place the person makes the affidavit; and

(iv) the full name and capacity of the person before whom the affidavit is made; and

(b) be signed by the person making the affidavit in the presence of the person before whom it is made; and

(c) then be signed by the person before whom it is made.

Note: A jurat is a clause placed at the end of an affidavit stating the time, place and officer before whom the affidavit is made.

(3) Any interlineation, erasure or other alteration in the affidavit must be initialled by the person making the affidavit and the person before whom the affidavit is made.

Key Practical pointers

- If practitioners are concerned about keeping within their 10 page limit for interim affidavits:
    - there does not appear to be any compulsion to take up a large amount of space at the bottom of each page with a "text boxes for signing". It is sufficient for the client simply to sign in the bottom margin;
    - the affidavit jurat normally appears on a separate page at the end. It is my view that the 10 page limit on affidavit material would relate to the substantive text and not the jurat. Put another way, if the jurat is page 11, I would be surprised if the Court considered that non-compliant with the current Practice Direction.

FCC Rule 15.25 – Form of affidavit

"The body of an affidavit must be divided into paragraphs numbered consecutively, each paragraph being as far as possible confined to a distinct part of the subject."

It is very important to try to contain each paragraph to a distinct issue within the series of paragraphs setting out the evidence. This forces the practitioner drafting the affidavit to think more clearly about what they are trying to say and whether it is relevant. It also forces the other party to respond specifically to each point without having so much opportunity to "fudge the issue" (which is easy to do when responding to a rambling, poorly organised affidavit).

Outline numbering

It is suggested that "Outline" numbering is preferable to "Roman" because of the internal consistency in the format of the number — thus avoiding the need to turn back multiple pages from, say, subparagraph (z) to see what the actual original paragraph number is. This is not only helpful when preparing responding material but when making submissions in Court and referring to paragraph numbers within the affidavit.

FCC Rule 24.02 —Financial statement

(1) An applicant, or a respondent who files a response, must file and serve with the application or response:

(a) a financial statement in accordance with the approved form; or

(b) an affidavit of financial circumstances.

(2) If an applicant, or a respondent who files a response, is seeking an order for property settlement and has a superannuation interest, he or she must attach to the financial statement or affidavit a completed superannuation information form in relation to the interest.

(3) However, an applicant or respondent need not comply with subrule (2) if, when the statement or affidavit is filed:

(a) the person has, in accordance with section 90MZB of the Family Law Act, made an application to the trustee of the eligible superannuation plan in which the superannuation interest is held for information about the interest; and

(b) the trustee has not provided the information.

(4) An applicant or respondent to whom subrule (3) applies must file and serve a completed superannuation information form within 7 days after receiving the information from the trustee.

A financial statement is essentially an affidavit by another name. Accordingly, great care should be taken to ensure that the evidence provided within that document is accurate and supported by available material

AFFIDAVIT DRAFTING SKILLS

Painting a picture in 2500 words (10 pages - or less!)

The key to making a successful interim application on behalf of your client lies in telling your client story persuasively and succinctly using factual, evidence-based statements in support.

The evidence in the affidavit is not provided in a vacuum. It must correspond with the terms of the orders being sought.

If necessary, use headings and subheadings in the affidavit to cross-reference with the application (and the relevant legislative provisions applicable to the type of water you are seeking), to ensure that all relevant points in the application have been addressed.

Leave yourself plenty of time to obtain thorough instructions and double-check instructions using a draft affidavit. Then edit and proofread the draft carefully. If you plan and curate your affidavit in this way, you

are much more likely to stay on track (in terms of relevance to the application being supported by the affidavit).

The following are some relevant Rules and legislative provisions to bear in mind when drafting affidavits.

FCC Rule 15.29 — Objectionable material may be struck out

(1) *The Court or a Registrar may order material to be struck out of an affidavit at any stage in a proceeding if the material:*

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

(b) contains opinions of persons not qualified to give them.

(2) *Unless the Court or a Registrar otherwise directs, any costs caused by the material struck out must be paid by the party who filed the affidavit.*

Evidence Act 1995 (Commonwealth)

s. 55 — Relevant evidence

(1) *The evidence that is relevant in a proceeding is 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.*

(2) *In particular, evidence is not taken to be irrelevant only because it relates only to:*

(a) the credibility of a witness; or

(b) the admissibility of other evidence; or

(c) a failure to adduce evidence.

s. 56 — Relevant evidence to be admissible

(1) *Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.*

(2) *Evidence that is not relevant in the proceeding is not admissible.*

Key practical pointers

Do not waste your precious 10-page word limit, or your client's money, drafting affidavits which contain objectionable material. There is a risk it will be struck out, thereby depriving your client of the opportunity to have that evidence put in proper form before the Court. Having material struck out can result in costs orders, incomplete evidence being put before the Court on behalf of your client and consequential professional embarrassment, not to mention unnecessary fees being paid even if costs orders are not made.

Poorly drafted, unnecessarily lengthy affidavits can slow down the administration of justice. Sometimes they can even be inflammatory and counter-productive, particularly if they contain a lot of commentary or irrelevant material. In releasing the new Practice Direction, the Court seems to be sending a very clear message to practitioners to "get on board" or "get left behind" in terms of the profession continuing to help the Court meet its stated objectives of efficiency, informality and timely outcomes.

The Court's objectives may at times seem to be at odds with the interests and wishes of clients, who want to put their case as fully as possible at the earliest date. However as practitioners our first duty is to the Court and we must balance these aspects as best as we can, by putting our client's case at its highest whilst also being selective and succinct in the manner in which that material is presented.

A good rule of thumb in terms of relevance of evidence in an affidavit is to look at your application and make sure that it relates directly to the orders which you are seeking and that it advances those points. If you provide too much background detail which does not advance the orders you seek, it is quite likely your affidavit will be filling up with irrelevant material, taking up space for more important evidence about relevant issues. No matter how hard your client lobbies you, always double check the evidence against the application to make sure they correspond and try to keep your evidence in admissible form in accordance with the Rules. Also, always check instructions on the affidavit against extraneous material such as title and company searches, financial records, specialist reports, child support assessment etc.

The Five Human Senses

Another good rule of thumb, in terms of whether something is "evidence" or not, is to think of it in terms of the five human senses. A client can only give evidence about something they have:

- Seen with their own eyes;
- Heard with their own ears;
- Touched with their own body;
- Perceived through their sense of smell; or
- Perceived through their sense of taste.

Paraphrasing events is not a substitute for evidence. Where an interaction and/or a conversation our client has with another person is relevant, we must set out the physical conduct and use "quotation marks" for key statements made, to specifically indicate what was said and by whom and when.

For example don't simply say "***he verbally abused me***". That is merely an unsupported conclusion.

Instead, say exactly what the client saw and heard e.g.

> *"I heard loud banging on my front door and when I opened it the husband was standing on my doorstep. He leaned forward shouted, about 10 cm from my face, 'let me in bitch, or I swear I will kill you. It's still my house too'. A few seconds later, my neighbour Janet leaned over the fence and said loudly to the husband "I heard you making threats. You should leave right now. I'm calling the police!"*

This is far more compelling than a generic 'conclusive' statement which provides the Court with no relevant detail.

<u>Other tips for drafting</u>

- Use definitions for important names, entities or places and be consistent
- Avoid ambiguity
- Use correct grammar and punctuation
- Tell your client story first and then answer the other affidavit, in response
- Be honest and not evasive. If credit is due to the other party, give them that credit.
- Avoid exaggeration, understatement, superlatives and absolute statements such as "always" and "never"
- Use the client's own words and make sure they understand the affidavit
- Avoid jargon, unnecessary contractions and slang (unless directly quoting something which was said)
- Unless the witness is an expert, do not include statements about their beliefs or opinions
- Be wary of hearsay even in interim applications, but if you must use it, state the name of the source and make sure that it is relevant. An example of unnecessary and irrelevant hearsay in support of a property application is:

> *"Her former husband James has informed me that during the period of their 18 month relationship the applicant was controlling, manipulative and aggressive".*

- Look at the Legislation and Rules and be mindful that there are certain types of applications which require specific matters to be addressed in the affidavit:
    - interim parenting proceedings — follow the legislative pathway set down by Goode's case;
    - interim property proceedings — be familiar with the relevant case law principles, legislative provisions and heads of power so that you can properly address the things your client needs to prove to be successful in their application
        - e.g. ensure that your affidavit sets out evidence about matters which you need to show to obtain injunctive relief under section 114 (3) of the Family Law Act 1975, as such injunctions are not granted lightly and must be necessary to preserve assets;
        - e.g. set out the facts in support of an application for change of venue having regard to the requirements of Rule 8.01 of the FCC Rules facts supporting arguments relating to convenience of the parties and minimising the cost of the proceeding;
        - e.g. be familiar with the principles about sole use and occupation of the home; or to obtain a partial settlement as opposed for example to an order for litigation funding or lump sum spousal maintenance
        - e.g. set out the evidence in support of the legislative factors for interim spouse maintenance applications

ANNEXURES

Rule 15.28 — Documents annexed or exhibited

(1) A document to be used in conjunction with an affidavit must be annexed to the affidavit.

(2) However, if because of the nature of the document or its length it is impractical to annex the document, it may be made an exhibit to the affidavit.

(3) An annexure must:

(a) be paginated; and

(b) bear a statement signed by the person before whom the affidavit is made identifying it as the particular annexure mentioned in the affidavit.

(4) If there is more than 1 annexure, the pagination must be consecutive until the last page of the annexures and identified by page number in the affidavit.

Example: For an affidavit with 10 annexures totalling 100 pages, the first page of the first annexure is page 1 and the last page of the last annexure is page 100. An annexure would be identified in the affidavit in the following way: 'Annexed and marked with the letter G (pages 72-81) is a copy of the agreement for sale'.

(5) An exhibit must:

(a) be marked with the title and number of the proceeding; and

(b) be paginated; and

(c) bear a statement signed by the person before whom the affidavit is made identifying it as the particular exhibit mentioned in the affidavit.

(6) A document annexed or exhibited to an affidavit must be served with the affidavit.

Practical pointers

1. Do number the pages of your Annexure is consecutively in compliance with the Rules.

2. Only annexed material which is relevant to the immediate interim application. Key documents only.

3. Do not unnecessarily annex letters or documents created by a third party to your client's affidavit (such as a report from a GP or psychologist, or a real estate valuation) if that third party is able to swear an affidavit to give that evidence on their own behalf. Evidence should be presented in its best form.

4. If you are quoting correspondence from the other party's lawyer in the body of the affidavit, quote the relevant section in full context. If you do this, it often becomes unnecessary to annex the letter. This approach makes the affidavit more readable and reduces the number of pages that have to be attached. It is safe to assume that the other party will not deny the existence of the letter so ask yourself what is gained by annexing it, before making a decision. Anecdotal evidence suggests that members of the bench appreciate not having to flip back and forth (between the body of the affidavit and the Annexures) in order to follow the narrative. Bring copies of the relevant letters to Court and duplicate them for counsel in the brief, in case the Court wishes to see the full letter.

5. Do not annex financial disclosure to your interim affidavit. This is not appropriate, nor is it necessary. If there are important financial documents (or if the issue of the extent of disclosure is in dispute) consider instead perhaps annexing an "index of financial documents" disclosed to date (rather than the financial documents themselves). That way, the other party can easily identify any documents on the list (or not on the list) which they say have not been received. The documents can then be disclosed accordingly. It is not the Court's responsibility to wade through parties' disclosure in the form of Annexures and fit the pieces of the puzzle together.

6. Include a table of assets and liabilities in the body of the affidavit in financial matters where appropriate. The financial statement of the client pertains only to assets in his or her name and does not tell the full picture. The Court will appreciate a clear overview of the asset pool (or best estimates) at an early date.

7. If a document is relevant and available — and has already been provided to the other party — it can be produced on request and/or tendered to the Court by consent during the hearing if required. Don't annex things simply as an excess of caution. Be judicious.

8. The limit imposed by the practice direction of "no more than 5 Annexures" is not a target to hit. An interim affidavit without Annexures is also perfectly acceptable — particularly if the material being annexed is uncontroversial and has already been provided to the other side. If you make proper reference to the relevant document in the affidavit and disclose it to the other party in a timely manner (on the basis that it can be produced to the Court if required) that is often sufficient. Ask yourself whether the Annexure "adds" to the content of the affidavit and advances the client's case, or not.

9. If you must annex copies of SMS conversations, do not mark or adulterate them with comments or labels. They should be 100% clear, legible and unmarked/unadulterated copies of the actual text messages (not a transcript prepared by the client of the actual messages) . They should be in chronological order and curated to ensure the full context of any conversation is shown, not just snippets out of context.

10. It is preferable to quote the full content of each text message in quotation marks in the body of your affidavit (in terms of readability) rather than to simply refer to a wad of pages which are difficult to read, out of order and not in context. Nothing is sure to frustrate your opponent or the Court (or your barrister!) more than dozens of pages of illegible text messages which are difficult to decipher, lacking context and thus of questionable relevance.

11. There is no need to annex appraisals of real estate because they have limited evidentiary value, not being sworn valuations. Your client's financial statement will provide an estimate of value in any event. Particularly if you have already provided copies of those appraisals to the other party (and the fact your client obtained them is not in dispute) it is sufficient to say in the body of the affidavit who the agent was and what they advised you. Such estimates are always subject to expert valuation or agreement in any event.

E. CONDUCT OF INTERIM HEARINGS

Rule 15.01 — Court may give directions

The Court may give directions:

(a) as to the order of evidence and addresses; and

(b) generally as to the conduct of a hearing.

Practical pointers

- Provide your client with realistic advice about what to expect at the hearing and explain that the Court has discretion to handle the proceedings in such manner as it deems fit within their discretion under the Rules.
- Don't file an affidavit exceeding 10 pages in length on the assumption that you will be given leave to rely upon it. That leave can only be sought on the day of the hearing itself and if that leave is not granted, then the hearing may be wasted and costs may be ordered.
- If you are seeking leave to file an affidavit exceeding 10 pages in length on an interim application, perhaps set out in the body of the affidavit the grounds upon which that leave is sought and/ or provide a clear explanation in correspondence to the other party or in a memo to Counsel. This will assist Counsel make submissions to protect you and your client on costs and it may reduce the likelihood of your opponent objecting in the first place.
- It is noted however that the Court can implement Practice Direction No 2 of 2017 in the absence of an objection from the other side, so if you cannot comply with the Direction, be prepared to explain.

F. FILING DEADLINES — Calculation of Time

FCC Rule 3.04 Calculating time

(1) This rule applies to a period of time fixed by these Rules or by a judgment, decree, order or any document in a proceeding.

(2) If a period of more than 1 day is to be calculated by reference to a particular day or event, the particular day or the day of the event must not be counted.

(3) If a period of 5 days or less would, but for this subrule, include a day when the registry is closed, that day must not be counted.

Practical pointers

It is suggested that paragraph 13 of Practice Direction No. 2 of 2017 should be read in context of the above Rules in relation to calculation of time, which calculate days so as to exclude non- business days i.e. when the Registry is closed. Paragraph 13 of the Practice Direction states:

> "*Documents filed less than 48 hours prior to hearing (electronically or otherwise) ('a late document') cannot be relied upon at the hearing without leave of the Court. A party or practitioner seeking to rely upon a late document must seek leave to tender a copy of it at the commencement of the hearing".*

For example if an interim hearing is listed for 9:45 AM on a Wednesday, responding (or other) material would need to be filed by absolutely no later than 9:45 AM on the Monday (say, two clear business days).

However if the interim hearing is listed for 9:45 AM on a Monday, responding (or other), arguably to follow the spirit of the Practice Direction, material would need to be filed by close of business on Wednesday (thereby allowing two clear business days being Thursday and Friday).

SERVICE OF DOCUMENTS

FCC Rule 6.03 -- Service of documents

(1) A document to be served in a proceeding must be filed and sealed.

(2) An application and any document filed with it must be served on each party in the proceeding within the time mentioned in rule 6.19.

(3) If a document, other than an application and its related documents, is required to be served, the person who files the document must serve a copy of it as soon as practicable:

(a) on each other party in the proceeding who has an address for service in the proceeding; and

(b) on any independent children's lawyer in the proceeding.

FCC Rule 6.19 -- Time for service of applications

Unless the Court orders otherwise, an application and any document filed with it may not be served:

(a) less than 3 days before the day fixed for the hearing of an application in a case; or

(b) less than 7 days before the day fixed for the hearing of any other application.

Practice Direction No. 2 of 2017 makes no reference to the timing for serving documents after filing. It only refers to a requirement for documents to be filed no less than 48 hours prior to the hearing.

Nevertheless, one would think it fairly safe to infer an intention on the part of the Court that any documents filed in compliance with the Direction (and particularly documents filed very close to that 48-hour deadline) must be served promptly and wherever possible, by email or other electronic means (at least in the first instance) so as to avoid the loss of 24+ hours usually involved with service by hand or express post.

After all, the FCC Rules require service of an "Application and any document filed with it" (which presumably includes a Responding Application) in relation to an Application in a Case to be filed and served not less than 3 days before the interim hearing.

Taking the Practice Directions and the Rules together, it is suggested that every practitioner should be erring on the side of filing AND serving at least 3 business days before the hearing (i.e. 1-2 days in advance of the 48 hour Practice Direction deadline) -- as opposed to filing right on the 48 hour deadline and then putting the opponent in the position of being served less than 48 hours before the hearing.

It is not difficult to envisage an opponent seeking an adjournment with costs on the hearing date, on the basis that they were only served with your client's responding material on the eve of the hearing, notwithstanding that you had technically complied with the obligation to file that material 48 hours prior.

Arguably this would be compliance in form but not in substance -- and as such, contrary to the spirit and clear intention of the Practice Direction.

Of course there are occasions when you cannot serve an opponent on the very same day that you file the material. But if you think that is likely to be the case in a particular matter, then you should take every reasonable steps to avoid filing so close to the 48-hour deadline or be prepared to explain to the Court why that could not be avoided for the purposes of seeking leave to rely on that material anyway. If you anticipate lateness due to the client's situation (illness or travel) then that could perhaps be included in the affidavit to assist in making submissions on the application for leave to rely on late-filed material.

It is otherwise difficult to imagine a client willing to pay the costs of an adjournment because you did not put their material before the Court (or serve it) in a timely manner, resulting in the matter not being able to proceed. That is a matter you should discuss clearly with your client prior to Court, if costs applications are likely to be an issue.

G. FAILURE TO COMPLY WITH THE PRACTICE DIRECTION AND CONSEQUENCES OF LATE FILING

FCC Rule 12.01 — Order for costs

(1) An application for an order for costs may be made:

(a) at any stage in a proceeding; or

(b) within 28 days after a final decree or order is made; or

(c) within any further time allowed by the Court.

(2) In making an order for costs in a proceeding, the Court may:

(a) set the amount of the costs; or

(b) set the method by which the costs are to be calculated; or

(c) refer the costs for taxation under Part 40 of the Federal Court Rules or under Chapter 19 of the Family Law Rules; or

(d) set a time for payment of the costs, which may be before the proceeding is concluded.

FCC Rule 12.07 — Order for costs against lawyer

(1) The Court or a Registrar may make an order for costs against a lawyer if the lawyer, or an employee or agent of the lawyer, has caused costs:

(a) to be incurred by a party or another person; or

(b) to be thrown away;

because of undue delay, negligence, improper conduct or other misconduct or default.

(2) A lawyer may be in default if a hearing may not proceed conveniently because the lawyer has unreasonably failed:

(a) to attend, or send another person to attend, the hearing; or

(b) to file, lodge or deliver a document as required; or

(c) to prepare any proper evidence or information; or

(d) to do any other act necessary for the hearing to proceed.

(3) An order for costs against a lawyer may be made on the motion of the Court or Registrar, or on application by a party to the proceeding or by another person who has incurred the costs or costs thrown away.

(4) The order may provide:

(a) that the costs, or part of the costs, as between the lawyer and party be disallowed; or

(b) that the lawyer pay the costs, or part of the costs incurred by the other person; or

(c) that the lawyer pay to the party or other person the costs, or part of the costs, that the party has been ordered to pay to the other person.

(5) Before making an order for costs, the Court or Registrar:

(a) must give the lawyer, and any other person who may be affected by the decision, a reasonable opportunity to be heard; and

(b) may order that notice of the order, or of any proceeding against the lawyer be given to a party for whom the lawyer may be acting or any other person.

Practical pointers

It is the view of the writer and her co-presenter that there is a real risk of costs being ordered against solicitors who fail to comply with Practice Direction No. 2 of 2017 without good reason (and/or who are unsuccessful in obtaining leave to the contrary). The terms of Rule 12.07 are very clear and the Practice Direction makes unambiguous reference to "the making of specific costs orders" at point 12.

It is envisaged that non-compliance with the new Practice Direction will almost certainly be met with costs applications from opponents and/or costs order from the Court. If however there are genuine reasons for non-compliance (either in terms of the length of the affidavit, the number of annexures, the filing date or the timing of service) solicitors should be prepared to present material (including set out relevant evidence in the affidavit) to support submissions in respect of seeking leave. Such material may deal with such issues as the date of first receiving instructions, illness or other matters beyond the practitioner or the client's control, issues of natural justice or the best interests of a child and the question of who benefits from the adjournment. Practitioners should always turn their mind the quantum of costs, including advising the client of the possibility that costs might be ordered and against whom, if applications for leave are unsuccessful.

In conclusion, it is suggested that Practice Direction No. 2 of 2017 should be considered a "call to action" by the Court for practitioners to take a more disciplined approach to drafting, filing and serving material in

interim proceedings. There will always be appropriate exceptions in meritorious circumstances, but practitioners must be prepared to explain any non-compliance to the satisfaction of the Court and deal with the consequences if they are unsuccessful. It remains to be seen whether the Court will allow a period of leniency for adjustment to the new Practice Directions, however it is imperative that practitioners make every effort to comply and those who do not heed such warning, arguably do so at their own peril or that or their client.

Michele J Brooks, Barrister

Owen Dixon Chambers East

February 2018

FEDERAL CIRCUIT COURT OF AUSTRALIA

Practice Direction No 2 of 2017

Interim Family Law Proceedings

Part 1 Preliminary

1. This Practice Direction sets out arrangements for the management of interim proceedings in the family law jurisdiction in the Federal Circuit Court of Australia.

2. This Practice Direction commences **1 January 2018** and supersedes the following Information Notices:

   Notice to Litigants and Practitioners – Interim Proceedings- Adelaide Registry;

   Notice to Litigants and Practitioners – Interim Parenting Proceedings – Sydney, Newcastle and Canberra Registries.

3. The conduct of proceedings in the Court is governed by the *Federal Circuit Court of Australia Act 1999* and the *Federal Circuit Court Rules 2001.* Consistent with its legislative mandate, the Court applies the rules of Court flexibly and with the objective of simplifying procedures to the greatest possible extent.

4. ***It is expected that parties and their representatives will assist the Court to ensure that proceedings are conducted expeditiously and consistently with the objectives of early identification of the issues in dispute requiring adjudication and the efficient use of judicial resources.***

Commencing proceedings

5. Proceedings in the Court are commenced by an Initiating Application supported by an affidavit. Interim orders may be sought at the time of filing an Initiating Application for final orders or during the proceedings by way of an Application in a Case. Applications for any interim orders must be supported by an affidavit. In financial matters they must also be supported by a financial statement or an affidavit of financial circumstances.

6. Pursuant to section 51 of the *Federal Circuit Court of Australia Act 1999* the Court directs that, unless express leave is granted by the Judge into whose docket the matter has been allocated, affidavit material in support of an interim application must not:

- exceed 10 pages in length for each affidavit;
- contain more than 5 annexures.

Interim hearing

7. The Judge determines whether to conduct an interim hearing on the first return date of an Initiating Application, or Application in a Case. The Judge will also determine whether to deal with all or part of the application and/or the Response as filed.

8. Any interim hearing will be conducted as an abridged process with a circumscribed scope of inquiry. Only those issues, specifically identified by the Judge as the subject matter of the interim hearing, will be dealt with.

9. The relevant facts to be relied on by a party at an interim hearing must be set out succinctly in their affidavit material complying with paragraph 6 above. Division 15.4 of the *Federal Circuit Court Rules 2001* sets out the rules in relation to affidavits.

10. Where the respondent seeks interim orders additional to those sought by the applicant, and the applicant opposes the orders sought, the applicant may file a second affidavit in answer, complying with paragraph 6 above, and setting out:

a. any additional orders sought;
b. any additional relevant facts relied on in opposition to the respondent's orders.

Failure to comply

11. Parties and practitioners should expect that failure to comply with any part of this Practice Note will result in loss of hearing priority, or adjournment of an interim hearing with costs orders.

12. In particular, if a party proposes to rely upon an affidavit which does not comply with paragraph 6 above, parties and practitioners should expect that:

    a. in the discretion of the Judge,
        i. non complying affidavits will not be read; or
        ii. the responsible party will be required to select 10 pages out of their non complying material that they seek to rely upon;
    b. Specific costs orders may be made.

13. Documents filed less than 48 hours prior to hearing (electronically or otherwise) ('a late document') cannot be relied upon at the hearing without leave of the Court. A party or practitioner seeking to rely upon a late document must seek leave to tender a copy of it at the commencement of the hearing.

14. This Notice can be found on the Court's website: www.federalcircuitCourt.gov.au

W Alstergren

Chief Judge

Federal Circuit Court