Build a Strong case (Part 2) Drafting Effective documents for Family Law litigation

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The first steps in building a strong case

1. **Devise your case theory** from the very outset of the matter, including the type of proposed orders, the evidence you will need in support and how case is to be presented. An effective case theory is:

    i. Based on convincing facts and inferences that can be fairly drawn from those facts;

    ii. Has a framework built on facts not subject to much, if any, dispute;

    iii. Is consistent with any incontestable fact(s);

    iv. Takes into account and/or explains away as many unfavorable facts as possible;

    v. Is not based on unrealistic speculation or theoretical arguments.

    vi. Is believable, logical and not inherently improbable.

2. **Preparing an effective case theory involves:**

    i. Preparing a comprehensive chronology of facts (which will be added to and explained along the way);

    ii. Analyzing the case from a practical perspective by asking:

        i. What are the essential problems for your client needs to be solved?
        ii. What relief is available under the Family Law Act ("FLA") to address those problems?
        iii. Identify any propositions or unifying principle(s) that the facts of your case suggest.
        iv. Identify what elements your need to argue the matter and to resist the case of your opponent; and
        v. Work out the arguments to counter the issues that you expect your opponent will raise.

3. Comply with Pre-action requirements

In 4.1 of the Court's Case Management Practice Direction F2021L01197 prior to commencing proceedings, parties are required to:

a. comply with the pre-action procedures for both financial or property and parenting proceedings (see Schedule 1 of the Family Law Rules and section 60I of the FLA);
b. clearly identify the issues requiring determination; and
c. take genuine steps to attempt to resolve those issues prior to commencing proceedings, unless it is unsafe to do so or a relevant exemption applies.

4.2 A *Genuine Steps Certificate* in the approved form must be filed with an *Initiating Application* or *Response to Initiating Application*, outlining:

a. the filing party's compliance with the pre-action procedures; and
b. the genuine steps taken to resolve the dispute; or
c. the basis of any claim for an exemption from compliance with either or both of these requirements.

4.3 Other than in urgent circumstances, and subject to any safety concerns, no application for final or interim orders should be filed without appropriate notice being given to the respondent of the intended contents of the application and without genuine steps being taken to avoid the need for the application to be filed.

4.4 Failure to comply with the relevant pre-action procedures may result in the application being adjourned or stayed until the failure to comply is rectified (see Part 4.1 of the Family Law Rules).

4. Drafting clear and effective orders

a. The starting point is to identify with precision the power(s) the Court has available to make the orders you are seeking. You might have to adjust your orders in order to comply the Court's rules, jurisdiction or powers.

b. For interim proceedings you ought to formulate a set of orders that resolve or address your client's immediate financially related or parenting needs. Interim proceedings should always be focused upon finding fast and relatively uncomplicated solutions to problems that need immediate attention. The orders of necessity will be short term and of limited scope. Applications for interim orders should never just repeat the final orders sought by your client. Final orders must be much more comprehensive and long term.

c. It is very important to ensure clarity and effectiveness in any Family Law orders. That the parties understand what it is they are required or

not permitted to do without the need for orders to be interpreted. Eliminate ambiguity.

d. If the orders require technical or specialized action, eg: something in the nature of accounting or corporate governance, make sure you seek advice from a qualified person about the form of the order so that it can actually be carried out lawfully and is effective in its terms.

e. The orders you draft should always be "in personam"; that is imposing an obligation on one or more of the parties to do or not to do something. If a person or entity might be affected by an order you seek it would be wise to serve a copy of your Court Application and affidavit(s) upon them even if they are not a party and you do not seek orders against them. An example would be serving the co-owner of real estate owned with spouse party.

f. Use the correct legal language, eg: if you are seeking an injunction use the verbs "enjoined" or "restrained". If you are describing a loan the correct verb is "lent" not "loaned". If you want orders to apply to both parties with any necessary changes to fit both parties you can also use the Latin phrase "mutatis mutandis" to impress the bench.

g. Consider including orders in the alternative (relying on different causes of action to increase your options). There may be multiple forms of relief the Court can grant to achieve the same result. An example was *McIntyre and McIntyre (1994) FLC ¶92-468* where the wife sought to set aside consent property orders by applying under sec 79A and to extend the time to seek to review the Registar's decision to make them.

5. A practical guide to drafting an affidavit.

a. As discussed in Part 1 of this paper, your affidavits should be drawn as far as possible having regard to the rules of Evidence and the Rules of Court even in LAT proceedings. They form the foundation of the case you are seeking to present. Your client's affidavit should be like a reference book for the judge to use when arguing your case. I am using this analogy as reference books are a practical way to quickly locate the information you need. Judges expect concise, relevant and straightforward affidavits that are easy to reference and manage. The following are a few things to avoid as they will irritate the bench.

b. When you consider how many affidavits a judge reads in a week, let alone in a month, it is easy to understand how poorly drafted material not only irritates them, it distracts them from the case you are trying to present.

c. Your affidavit evidence should be limited to facts that prove the elements of your client's claim. The evidence needs to address the requirements of the laws upon which you rely. For example if there is a claim for property settlement it will be necessary to include evidence that addresses each of the relevant elements of sections 79 or 90SM of the FLA.

d. By doing this, the evidence directly relates back to the application rather than leaving it to the judge to sift through the affidavit trying to figure out whether the basic elements of the claim have been established. Approaching it this way will make your affidavit(s) much more useful to the Court and more likely to be more persuasive.

e. These things are relative. If your opponent's material is chaotic by comparison the contrast will be obvious.

f. Clients often come to you with boxes of documents and "statements" that list more grievances than facts. Resist the temptation to "pad out" the affidavit with this material just to appease the client. No matter how much a client wants to include irrelevant details of their past life history or of their former partner before they even met you should never include them.

g. To this end Rule 8.18 of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 provides that:

> **8.18 Objectionable material may be struck out**
>
> 1. Subject to section 69ZT of the Family Law Act, the court 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 otherwise directs, any costs caused by the material struck out must be paid by the party who filed the affidavit.

h. There is also available to the Court more general powers in sec 135 of the Evidence Act (1995) ("EA") outlined in Part 1 of this paper. The Court may refuse, even in LAT proceedings, to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

i. be unfairly prejudicial;

ii. be misleading or confusing; or
iii. unduly waste the court's time.

i. This is an age old problem and examples of irrelevant and prolix affidavits can be found as far back as *Ensabella and Ensabella (1980) FLC ¶90-867*, where the respondent to a parenting application complained that the applicant had filed an affidavit in which irrelevant material had been set out at length and in which material that was only of marginal relevance had been dealt with at excessive length. Fogarty J held that the affidavit had been "grossly unreasonable". The Court considered the amount of costs to which the husband had been put in replying to that lengthy affidavit and assessed the affidavit as being at least 50% too long and accordingly ordered the wife to pay one-half of the husband's costs of preparing his affidavit in reply which took 21 hours of conference time. You might be amazed to learn that in 1980 a 42 page affidavit was considered to be of excessive length.

Events described out of a logical sequence

j. Setting events out in an affidavit in a random or disorganised way is usually a product of how it was first assembled. As new information is obtained, due to time pressures, it is simply tacked on to the end or inserted in the middle without consideration about how this affects the readability and integrity of the whole document. Because the affidavit in interim proceedings, in particular, is usually prepared in a rush the final product can be quite disordered. It should not be. When all the information is compiled pull it apart, stand back, and put it back together again so that it makes sense.

k. Put simply, affidavits out of a chronological and/or logical sequence are hard to follow for anyone who is unfamiliar with the story your client is trying to tell. Because of the way we process information it becomes necessary for the reader to sort the events mentally into a logical sequence to make sense of it. The judicial officer's time is being wasted as this exercise should have been undertaken before the document was created rather than when it is first read at the hearing.

l. The risk is that important information will be missed or ignored by the bench because of the unnecessary effort required to sort out the sequence of facts and events in the affidavit(s).

6. The most important rules of evidence when drafting an affidavit

Inadmissible and material in bad form

a. As stated above Judges routinely read affidavit material with a view to its

admissibility under the Rules of Evidence whether or not they apply. It is after all a fundamental part of our legal training. Affidavits that are full of rhetoric, speculation or unqualified opinions and which are not supported by admissible facts invariably are given little weight so when a judge says something like: *"I'll allow it subject to weight"* you know you are in trouble.

b. It may sound obvious but your client's evidence must be relevant. Sec 55(1) of the EA provides that evidence is relevant if it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings.

c. Try to restrict the contents of affidavits as much as possible to the facts that have been seen and heard at first hand by the deponent. Avoid argumentative material whose place is in submissions not in an affidavit. Avoid and unqualified opinions which offend sec 177 of the EA and the Court Rules. Most of your client's opinions or interpretation of events are likely to be unqualified and therefore either inadmissible or pointless. eg: *"From the way she looked that day it was obvious that she had contracted Covid from her boyfriend"*.[1] is a waste of time.

7. Less Adversarial Trial

d. If the proceedings are conducted as a Less Adversarial Trial then under 102NL(1) of the FLA many of the rules of Evidence do not apply. They are summarised here:

Part 2.1 - EA

a. Parties being able to question any witness.
b. The order of examination-in-chief, cross examination and re-examination.
c. Manner and form of questioning witnesses and their responses.
d. Attempts to revive memory in Court (being limitations on a witness's ability to rely on a document when answering questions).
e. The effect of calling for production of documents in Court.
f. Compelling someone in Court to be examined without subpoena or other process.
g. Rules against leading questions.
h. Rules about cross examining unfavourable (hostile) witnesses.
i. Usual limits on re-examination.
j. Rules about prior inconsistent statements of witnesses.
k. Rules about previous representations (statements) of other persons.

[1] From an actual affidavit filed in parenting proceedings.

l. Production of documents relating to prior inconsistent statements or previous representations.

Part 2.2 - EA

m. Strict method for proving the contents of documents including voluminous or complex documents and foreign documents.
n. Rules when judge conduct a view (I have attended a view with a judge and my opponents only once in 40 years).

Part 3.2 - EA

o. Rules against Hearsay including all the exceptions.

Part 3.3 - EA

p. Rules about Opinion evidence including all the exceptions.

q. Rules concerning admissions particularly as they relate to the rules against hearsay and opinions.

Part 3.5 - EA

r. Rules excluding the use of judgments and convictions to prove facts.

Part 3.6 - EA

s. Rules limiting tendency and coincidence evidence.

Part 3.7 - EA

t. Credibility Rule and exceptions (ie: that evidence that is relevant only to a witness's credibility is not admissible).

Re-imposing the rules of evidence

a. Sec 102NL(3) permits the Court to re-impose the rules of evidence in certain exceptional circumstances which I have discussed in Part 1 of this paper.

Child-related Contravention proceedings

b. It should be noted that sec 102NL(1) applies to contravention proceedings- *Caballes and Tallant [2014] FamCAFC 112* (Strickland,

Ryan and Kent JJ) where the Full Court said that all proceedings wholly under Part VII (including proceedings under Division 13A [Contravention]) are child-related proceedings (paras 84 to 86).

Further observations and guidence about affidavits

c. These are some further observations I would make about preparing affidavits:

   i. Keep your affidavits as brief as possible; eg: less is more.
   ii. Limit your annexures to those essential to proving your case;
   iii. Limit the number of witness affidavits to those that can materially add to the case; eg; there is little point filing 5 affidavits from 5 people who all saw or heard the same thing. It is the quality not quantity of evidence that counts.

d. You can download a Fact Sheet on the Court's website called "Preparing an affidavit" for some further guidance.

e. Rule 8.15 of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 outlines the requirements for affidavits, viz:

   a. Format: Affidavits must be divided into numbered paragraphs, each addressing a specific point.

   b. Content: They should contain factual information, not opinions, and be relevant to the case.

   c. Deponent Details: The affidavit must include the full name and address of the person making the affidavit (the deponent).

   d. Witness Details: The affidavit must also include the name and address of the person who witnessed the affidavit being sworn or affirmed.

   e. Annexures/Exhibits: Documents referred to in the affidavit must be annexed or exhibited to the affidavit. These documents are served with the affidavit.

   f. Sworn/Affirmed: Affidavits must be sworn or affirmed before a person authorized to witness such documents (e.g., a lawyer, notary public, or Justice of the Peace).

   g. eFiling: When electronically filing, documents like affidavits and annexures must be filed together.

   h. Electronic Signatures: The court will accept documents, including affidavits, signed electronically by the deponent and/or their legal representative.

8. Annexures and Exhibits

a. In Practice Direction F2021L01197 restrictions are imposed on the number and length of annexures to affidavits, both in Division 1 and Division 2 proceedings. These restrictions are as summarised follows:

Division 1:

b. Affidavits filed in Division 1 cannot exceed 25 pages in length or contain more than 10 annexures, unless the court grants leave for an exception.

Division 2:

c. Affidavits filed in Division 2 cannot exceed 10 pages in length or contain more than 5 annexures, unless the court grants leave for an exception.

d. However the prohibition of annexures does not apply to the affidavits of single experts and adversarial experts and treating medical practitioners.

e. Exhibiting documents to an affidavit is preferable to annexing them when they are voluminous.

Preparing an effective Exhibit Book

f. Exhibits are more flexible than annexures in many respects, particularly when placed in a folder with a table of contents, numbered tabs and numbered pages. Use of and reference to the tabs make an exhibit to an affidavit very convenient to use. It is important it is to clearly number all the pages of exhibits. Those pages ought to be clearly referenced in the relevant parts of the affidavit.

g. The affidavit should clearly identify what the exhibit is and where it is. In this way a reference to the exhibit can "index itself" by referencing the relevant pages of the exhibit; for example:

> *Exhibited to me and marked **"XY5" (pages 35 to 41)** is a true copy of my income tax return for the 2023-2024 financial year.*

h. I suggest that the reference to the exhibit ought as shown above to be underlined and the exhibits identifier should be in bold as should the relevant pages. This may all sound pedantic but believe me it makes locating references to exhibits in affidavits much quicker and easier particularly for the judge and also for you.

i. Best practice would be to tab the Exhibit Book as well. If not, a contents or index on the first page of the Exhibits Book provides ease of reference for the bench. It is a lot of work but it will be

appreciated by the bench, especially if you opponent's material is poorly presented by comparison.

j. The guidence above also applies to annexures to affidavits.

9. Witness preparation

a. If your client has never before given evidence they will enter the witness box totally unprepared for what is to come. We all know that it will be a very rude shock. I suggest that you explain to your client the sequence of a hearing, openings, objections and that firstly the applicant and witnesses give evidence in chief, are cross examined and re-examined. Explain that this is repeated for the respondent and their witnesses and then how final submissions work.

b. With regard to giving evidence I suggest witnesses be advised to:

i. Always tell the truth Their evidence should come from their own memory and personal experiences, not those of other people or just made up on the spot. Liars get caught out more often than not.

ii. Address the judicial officer correctly: Judges are addressed as "Your Honour" and Judical Registrars are addressed as "Judical Registrar" or as "Senior Judical Registrar".

iii. Wait for the question:

iv. Listen to the whole question: Ask for the question to be repeated or re-phrased if they do not understand it.

v. Stop talking if there is an objection

vi. Speak slowly and clearly

vii. Keep it short and do not guess the answer if they do not know or cannot remember.

viii. It is not a memory test: Generally they can ask to see their affidavit or a document if they think it will help them remember something although the judge sometimes may not allow it.

ix. Remain courteous. Do not argue with the questioner. Never speak

over or interrupt or argue with the judge – not ever.

10. Subpoenas

a. Subpoenas are often an underutilised forensic tool. The decision about what to seek via a subpoena must be linked back directly to the orders you seek. That means that you work your way through the factors that need to be established and give thought to whether documents can be produced on subpoena that will help.

b. Remember always that sometimes issuing subpoenas can be a double edged sword and may inadvertently assist the other side. They may contain unexpected information or fail to include information that you would have expected.

c. Be economical and careful when seeking documents to be returned on subpoena. It is unwise to inundate a judicial officer with pages and pages subpoenaed material in a hearing for the reasons I have previously discussed. Limit it to material only to that which will make a difference. Tab and number the pages with stickers if you can.

d. If at all possible, get the subpoena returned before the hearing date. It is also very important to make notes ahead of time about facts or records produced so that they are readily available to be identified and tendered. Copies, if permitted, are a very good idea.

11. Notices to Produce

a. Notices to Produce can be useful not just to obtain evidence from the other side, as you may make submissions to the Court about what they have not produced as well. A Notice to Produce should be served well ahead of the hearing date so that complaints are not made about insufficient time to produce.

b. Rule 6.42 of the Rules provides that:

> i. A party may, no later than 7 days before a hearing or 28 days before a trial, by written notice, require another party to produce, at the hearing or trial, a specified document that is in the possession or control of the other party.
>
> ii. A party receiving a notice under subrule (1) must produce the document at the hearing or trial.

c. Notices to produce typically ask for the "kitchen sink". It makes much more sense to consider exactly what you need and ask only for that. For example asking for every receipt for purchases at a supermarket covering the last 24 months is unlikely to be as helpful and more likely

to lead you down a rabbit hole.

12. Obtaining Tax Returns via Freedom of information

a. Invariably parties will say that they have not kept all of their taxation returns going back many years. However in financial proceedings they are absolutely essential in my view, particularly those that cover the period of the relationship and after separation. For example if a party claims that they made all the mortgage payments for 15 years and yet their average assessable income was $20,000 per annum they are bound to be in trouble in the proceedings.

b. It is possible to obtain Tax Returns through freedom of information as records go back 60 years or more. After obtaining the signature of the other party the form can be lodged with the Australian Taxation Office or lodged online to get copies. Often the other party will resist and at some interlocutory stage you may have to seek an order requiring the other party to complete and sign the form and return it to your office or to lodge it online and provide it to your office.

c. It is also possible to obtain other documents out of the reach of subpoenas by use of freedom of information. Anyone who has dealt with Centrelink will have a file and it can be released to them via an FOI application. The same procedure outlined for tax returns above applies here. These files can be and often are a treasure trove for your case; eg: someone who claims to have lived in a de facto relationship for 10 years has told Centrelink the opposite.

d. You can find more information by searching the net for *"Freedom of information (FOI) requests – individuals and businesses"* or *"Australian Government Department of Social Services Freedom of information"*.

e. Overseas financial records can sometimes be obtained by the other party signing an authority addressed to the institution concerned for production of documents and sending it to them. Note that a foreign company or institution is under no compulsion to comply.

13. Miscellaneous strategies and traps

a. There are 3 important questions you should ask your opponent before the matter is called on in Court for hearing, particularly an interim case:

   i. What orders and directions are you seeking today?

   ii. Do you have a copy of your case outline for me? and

iii. Could you show me what you are tendering and/or showing my client?

b. Part of building an effective case is to anticipate the arguments that the other side are proposing to run and then working out how to counter them. Step one is to know what documents they propose to rely on and to show witnesses in the case. Surprisingly many people are unaware of Court rules that are of great assistance in this regard.

c. The issue of disclosure could occupy a paper 5 times the length of this one, however there are some strategies concerning disclosure (or lack of it) that can be very effective at a hearing. Rule 6.17 of the FCFCOA Rules provides as follows:

> **Consequences of non-disclosure (Rule 6.17)**
>
> If a party does not disclose a document as required by these Rules:
> (a) the party:
> (i) must not offer the document, or present evidence of its contents, at a hearing or trial without the other party's consent or the court's permission; and
> (ii) may be guilty of contempt for not disclosing the document; and
> (iii) may be ordered to pay costs; and
> (b) the court may stay or dismiss all or part of the party's case.

d. More importantly from the context of a final hearing Rule 6.17 is very important. In essence if your opponent tries to use a document they have not disclosed to you beforehand it cannot be used in the trial without your consent. The effect of these rules are that the days past when both you and your witnesses are confronted with documents in the witness box for the first time are gone.

14. Balance Sheets

a. A lot of time is wasted at hearing attempting to come up with an agreed balance sheet. This wastes Court time and diverts resources away from the real contest. If at all possible the process of putting an agreed balance sheet together should commence several weeks before the trial. When sending a draft balance sheet to the other side I would suggest that routinely you request that they make no changes to your column without your consent but that if they wish to add items that this be clearly indicated, for example, in a different colour.

b. I am also a great believer in simplified balance sheets. Do we really have to include the husband's power tools and the wife's 23 year old VW in it? Also include whole dollars not cents. Always include totals for assets, liabilities, superannuation and financial resources and grand net total figure. Have a spreadsheet of it handy on your laptop for Court.

c. Remember also that "notional property" (addbacks) can no longer to be included on your balance sheet since *Shinohara & Shinohara (No 2) [2025] FedCFamC1F. see also Sand and Sand* (2012) FLC ¶93-519.

15. Concessions obtained by default

a. Colleagues often complain to me about a lack of response from their opponent to correspondence when they are seeking obvious concessions. There is a simple solution - include this sentence in the last line of your letter:

"Please note that in the absence of a response by (deadline) our client will be conducting his/her case on the basis that your client has made the following concessions sought herein."

List here…

Believe me you will then get a response nearly every time.

16. Conclusion

Building a strong case requires ingenuity and diligence. Hopefully you can apply some of my suggestions to do just that and conduct your cases in a more efficient and effective way. Judges appreciate and remember practitioners who present their case properly and will remember and appreciate your good work next time.

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About the Author

Richard Maurice holds degrees in Law and Economics from Sydney University. He works as a Barrister & Mediator in Family Law financial and parenting matters.

He was admitted in 1984 and worked in private practice as an employed solicitor in a general practice and later for the Federal Attorney General's Office representing disadvantaged clients and as a duty solicitor in the Family Court, in NSW State Children's Courts and in many NSW Local Courts.

In 1988, he was called to the private bar. Since then he practiced mainly in the areas of Family Law, De facto relationships and Child Support, together with Wills and Probate.

He has appeared in a number of significant Family Law cases including seminal cases on Family Law and De Facto property division like Pierce and Pierce (1999) FLC 92-844 and Black v. Black (1991) DFC ¶ 95-113 and Jonah & White [2011] FamCA 221 and more recently Sand & Sand [2012] FamCAFC 179 and Vega and Riggs [2015] FamCA 797.

He completed the LEADR mediation course on 2006 (taught by Sir Lawrence Street) and a refresher course at the Resolution Institute in 2024. He is a member of the Family Law Section of the Law Council of Australia, is registered with the Civil Mediation Council (UK) and a member of the International Society of Family Law. He is an Australian NMAS Accredited Mediator.

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