

COURT OF SESSION

PRACTICE NOTE

No. 1 of 2018

Affidavits in family actions

1. This Practice Note has effect from 24 September 2018. It replaces Practice Note No. 1 of 2004.
2. The purpose of this Practice Note is to provide updated guidance on the preparation and use of affidavits in family actions. The need for clear guidance has arisen as a result of the increased use that is made of affidavits as evidence-in-chief in defended family actions.
3. This Practice Note covers:
 - a. Affidavits generally;
 - b. Affidavits required under rule 49.28 in certain undefended actions;
 - c. Defended family actions.

PART A: AFFIDAVITS GENERALLY

Swearing or affirming an affidavit

4. This part applies to all affidavits lodged in family actions.
5. An affidavit must be sworn or affirmed before a notary public, justice of the peace or any person having authority to administer oaths in the place where the affidavit is sworn (such as a commissioner for oaths or a British diplomatic officer or consul abroad). The witness must be placed on oath or must affirm. A solicitor acting for a party to the action may act in a notarial capacity. Any person before whom an affidavit is sworn or affirmed (“the notary”) must be satisfied that the witness has capacity to swear or affirm an affidavit.

Importance of affidavits

6. The witness should be made to appreciate the importance of the affidavit and must understand that it constitutes his or her evidence in the case. The possible consequences of giving false evidence should be explained to the witness. Before the

witness signs the affidavit, he or she must have read it or the notary must have read it out to the witness.

Form and signature of affidavit

7. The affidavit should be on A4 paper. It should commence with the following words:
"At _____ the _____ day of _____ 20__, in the presence of _____, I _____ [having been solemnly sworn / having affirmed], give evidence as follows:"
8. The full name, age, address and occupation of the witness should be given in the first paragraph.
9. The affidavit should end with the words: *"All of which is the truth as I shall answer to God"* or *"All of which is affirmed by me to be true"*, as appropriate.
10. At the time the affidavit is sworn or affirmed, any insertion, deletion or other amendment to the affidavit must be initialled by the witness and the notary. Each page must be signed by both the witness and the notary. It is not necessary for the affidavit to be sealed by the notary. No alterations or insertions can be made after the affidavit is sworn or affirmed. Where a party wishes to alter or add to the affidavit, this must be done by supplementary affidavit.

Drafting the affidavit

11. The affidavit must be based on statements, precognitions and other material emanating directly from the witness.
12. The drafter must not frame the affidavit in language that the witness would not use. The court is likely to attach little weight to such an affidavit. Equally, the court is likely to discount the witness's evidence if it appears that he or she has been improperly briefed or coached. The affidavit is the evidence of the witness, and must therefore be expressed in the witness's own words – even where this results in the use of confused or intemperate language. In preparing an affidavit, legal advisers should bear in mind that the witness may have to justify on cross-examination statements contained in the affidavit. Legal advisers should make this clear to the witness.
13. It should be clear from the terms of the affidavit whether the witness is speaking from his or her own knowledge, based on what he or she actually saw or experienced, or whether the witness is relying on what he or she was told by a particular person.
14. The affidavit should be drafted in the first person and should take the form of short numbered paragraphs. It should be as succinct as possible, and focus only on matters that are relevant to the issues in dispute, as averred on record. The court will disregard any irrelevant or inadmissible material.

15. Where an affidavit or equivalent sworn statement is sworn in a language other than English, it must contain information of the circumstances in which it was drafted and translated. The original document and the translation must both be provided.

PART B: AFFIDAVITS REQUIRED UNDER RULE 49.28
IN CERTAIN UNDEFENDED FAMILY ACTIONS

16. This part applies to all affidavits lodged under rule 49.28 of the Rules of the Court of Session.

Date of affidavit

17. All affidavits lodged must be of recent date – ideally, they should have been sworn no more than three months prior to the date of lodging. This is particularly important in cases where the evidence of a witness or circumstances to which the witness speaks are liable to change through the passage of time, such as cases involving children or financial conclusions.
18. Affidavits relating to the welfare of children which have been sworn more than three months prior to the date of lodging of the minute for decree are likely to be rejected by the court, on the basis that they are out of date.

Productions in undefended actions

19. Where the affidavit refers to a production already lodged in process, it must be borrowed from process, put to the witness and then docqueted and signed by the witness and the notary. The affidavit must refer to each production by its number of process. If a document referred to has not been lodged as a production when the affidavit is sworn, the witness must identify it in the affidavit. The document must then be docqueted as having been referred to in the affidavit and lodged as a production. Some productions will necessarily be docqueted with regard to more than one affidavit.
20. In actions for divorce or dissolution with consent, the defender's written consent form must be put to the pursuer. It must be identified in the pursuer's affidavit and docqueted and signed in the same way as other productions.

Applications for divorce or dissolution where there are children aged under 16

21. In actions of divorce, dissolution, judicial separation or nullity of marriage / civil partnership in which there are children of the family¹, but in which no order is sought

¹ "Child of the family" is defined in section 12(4) of the Children (Scotland) Act 1995.

under section 11 of the Children (Scotland) Act 1995, the court must² consider whether to exercise the powers set out in section 11 of that Act or section 62 of the Children's Hearings (Scotland) Act 2011 in light of the information available in respect of the arrangements for the child(ren)'s upbringing. Information outlining these arrangements must therefore be provided to the court.

22. These affidavits should, where relevant, include the following:
 - a. the qualifications of the witness (if not a parent) to speak about the child, including how often and in what circumstances the witness normally sees the child;
 - b. the ability of the person(s) with whom the child lives to provide proper care for him or her;
 - c. observations as to the relationship between the child and the other members of the household, the child's general appearance, interests, state of health and well-being;
 - d. a description of the home conditions in which the child lives;
 - e. the arrangements for contact between the child and any parent and siblings who do not live in the same household as the child;
 - f. information about the school the child attends and whether the child attends school regularly;
 - g. details of childcare arrangements during working hours, including the arrangements for such care outside of school hours.

Applications for section 11 orders

23. Where there is an application for an order under section 11 of the Children (Scotland) Act 1995, the affidavit must contain only relevant material supportive of the section 11 order(s) sought. It must also include the material listed in paragraph 22, above.
24. The court will disregard any part of an affidavit that does not contain evidence relating to the tests set out in section 11(7) of the Children (Scotland) Act 1995.

Financial conclusions

25. Where a financial conclusion is sought, the court must be provided with evidence that is as full, accurate and up-to-date as possible. If, after an affidavit has been lodged, a material change in circumstances occurs before decree is granted, the court must be informed immediately. A further affidavit may have to be sworn / affirmed.

² Section 12 of the Children (Scotland) Act 1995.

26. The pursuer must give evidence of all financial information relevant to the orders sought.
27. Where the pursuer's affidavit gives evidence of the defender's resources, it should state, as precisely as possible, the date at which the information was valid. The court should be provided with recent information relating to the defender's ability to pay the sums sought by the pursuer. Where the pursuer cannot obtain recent information relating to the defender's resources, the affidavit should make this clear and include as much information as is available to the pursuer.
28. Where the pursuer has concluded for several financial orders (for example, a capital sum, an order for the sale of the matrimonial home, a periodical allowance and expenses) but ultimately does not seek decree for one or more of these or seeks decree for a lesser sum, the affidavit should give reasons for that.
29. If the court is not satisfied on the basis of the material provided that decree should be granted as sought, a by order hearing will be fixed.

PART C: DEFENDED FAMILY ACTIONS

30. This part applies to defended family actions.

Productions in defended actions

31. Where the affidavit refers to a production, it must refer to the production by its number of process. There is no need for productions to be borrowed, docketed and signed in defended actions. Instead, a copy of the production must be put to the witness, but should not be appended to the affidavit. No documents of any kind should be appended to affidavits in defended actions.

Lodging of affidavits - timing

32. Wherever possible, unless the court otherwise directs, parties are asked to intimate and lodge affidavits on the same day. The purpose of that is to minimise the risk of one witness seeing another's evidence in advance and ensure that his or her evidence is not influenced.
33. When taking a witness's precognition prior to preparing his or her affidavit, legal advisers must not show the witness the precognitions, affidavits or draft affidavits of any other witness. Once affidavits have been lodged, the witness may be shown any other affidavits that are relevant to his or her evidence. If the witness consequently wishes to modify his or her evidence, this can be done by lodging a supplementary affidavit explaining the change. Alternatively, the witness could give supplementary

oral evidence at the proof. The sole purpose of a supplementary affidavit is to correct or qualify evidence contained in the initial affidavit. It should not be treated as an opportunity to comment on or dispute the evidence of other witnesses.

34. Where the initial affidavit of a witness is lodged after the affidavits of other witnesses have been lodged, his or her affidavit must contain a declaration stating that the witness has not seen or been informed of the evidence of others. Where the witness has seen or been informed of the evidence of others, the affidavit must clearly identify that evidence and specify the circumstances in which the witness came to see or hear about it.

Edinburgh
18 July 2018

CJM SUTHERLAND
Lord President