

DRAFTING AFFIDAVITS

Patrick Grayer



Purpose of an affidavit?

To put sworn written evidence, including documents, before the court without the need for in person testimony. Just like oral evidence given at trial, the person making the affidavit, the "deponent," swears or affirms that what they are saying is true.

- Allows drafter to control and frame evidence.
- Time consuming and difficult to prepare.

Affidavits are primarily used when making interim applications in the Supreme Court under Supreme Court Family Rules 10-3(4) and 10-6(2), but are also used in:

- hearings in the Provincial Court with permission of the court, under Rule 12(3) of the Provincial Court Family Rules;
- summary trials in the Supreme Court, under SCFR 11-3(5); and
- desk order applications in the Supreme Court, including divorce applications, under SCFR 10-10(2).

Formalities

Supreme Court

Affidavits used in the Supreme Court must generally be in Form F30; the rules about the content of affidavits are found in SCFR 10-4; Special forms of affidavits are required for:

- financial statements (Form F4);
- proof of personal service and service by mail, fax or email (Forms F15 and F16);
- desk order divorce applications (Forms F37 and F38)
- applications for appointment as the guardian of a child, under s. 51 of the *Family Law Act*, and SCFR 15-2.1 (Form F101).

SCFR 10-4 sets out specific formal and formatting requirements that all affidavits used in the Supreme Court must follow:

- the affidavit must be in the first person and show the name, address, and occupation of the deponent, and his or her role in the court proceeding (SCFR 10-4(2)(a),(b));
- the affidavit must be identified, at the upper right-hand corner of the title page, by the name of the deponent, the sequential number of the affidavit made by the deponent, and the date on which the affidavit was made (SCFR 10-4(3));
- the text of the affidavit must be set out in consecutively numbered paragraphs (SCFR 10-4(2)(c));
- the pages of any exhibits attached to the affidavit must be numbered sequentially, beginning on the first page of the first exhibit and ending on the last page of the last exhibit (SCFR 10-4(10)); and
- each exhibit must be marked with a certificate to be signed by the person taking the deponent's oath or affirmation, usually

This is Exhibit" D "referred to in the affidavit of Joan Smith, sworn (or affirmed) before me on November 5, 2020.

Provincial Court

Affidavits used in the Provincial Court must generally be in Form 17; the rules about content and the use of affidavits are found in PCFR 13. Special forms of affidavit are required for:

- financial statements (Form 4);
- proof of personal service and service by mail, fax or email (Forms 5 and 13); and,
- applications for appointment as the guardian of a child, under s. 51 of the *Family Law Act*, and PCFR 18.1 (Form 34).

PCFR 13 says almost nothing about the formal requirements of affidavits prepared for use in the Provincial Court, so follow the requirements of the Supreme Court rules to the extent possible:

Form F30 (Rule 10-4(2) and (7))

This is the 1st affidavit
of Jane Doe in this case and was made on XXXX
Court File No.: XXXX
Court Registry: New Westminster

In the Supreme Court of British Columbia

Claimant: JANE DOE also known as JANE DEER

Respondent: JOHN DOE

AFFIDAVIT

[Rule 21-1 of the Supreme Court Family Rules applies to all forms.]

I, Jane Doe, (address), (occupation), AFFIRM THAT:

1. I make this Affidavit in support of my Notice of Application dated XXXX requesting that an order be made for alternative service and that I be granted permission to post a copy of the Notice of Family Claim at the New Westminster Supreme Court for 30 days.

Background

24. The Respondent, now thereafter referred to as, "John" and I met in XXXX in Mexico City, Mexico John lived in Mexico City at that time and I was there visiting my family. I stayed in New York for approximately 6 weeks.
25. When I returned home we maintained a long distance relationship. John wanted to relocate to British Columbia and started making plans to do so.
26. John moved to Surrey, British Columbia on XXXX and we were married on XXXX. We started living together on XXXX approximately a week prior to our wedding.
27. John and I resided together with my 2 children from a previous marriage.
28. After our wedding I started the sponsorship application for John. Soon after I started the process however John started becoming abusive towards the children and I realized that John's intentions were not genuine. He simply wanted to obtain permanent residency status in Canada.
29. We separated on XXXX after John physically assaulted me. I told John he needed leave the house or I would call the police. I left the house to go to work and when I returned in the evening he had left with all his belongings.

- (c) TSFA account(s) in the Respondent's name and built during the marriage which I believe to be approximately \$45,000, but for which I have no statements;
- (d) The CPP credits accrued to each party under the Canada Pension Plan;
- (e) The family car, a 2008 Nissan Pathfinder; and
- (f) The family joint account into which the Respondent's income was paid until recently. Attached herein and marked collectively marked **Exhibit "S"** are copies of the joint account monthly statements for the period of September 1, 2013 through January 30, 2104.

My Financial Circumstances

- 56. On December 18, 2014 I was paying for groceries at Costco in Richmond, BC. My debit card was declined. I hold no credit card and was forced to abandon the groceries. The Children were not with me.
- 57. I am able to bank on-line as the Respondent has previously given me the passwords to do so. I went to our on-line joint chequing account web page to discover that the Respondent's last two periodic income deposits, due to be deposited December 15 and 31, respectively, had not occurred. I emailed the Respondent on January 12, 2014 asking him about the mistake and he replied by email on January 14, 2014 advising that he had cancelled the regular deposits, would transfer \$250 into the account and that I "could live off that". Attached herein and marked **Exhibit "S"** is a copy of that email²⁰.
- 58. I have no bank account in my own name and aside from my RRSP's no access to family savings or the Respondent's income.
- 59. I anticipate requiring funds to pay for an appraisal on the former family residence as well as at least one-half of Dr. Goldman's report. I do not have savings or other liquid assets at my disposal with which to fund those disbursements. The matter has been set for trial for five (5) days commencing September 14, 2014. Examinations for discovery have been scheduled to occur on April 6 and 7, 2014. I am unable to pay a retainer to have the benefit of counsel as I have no liquid assets at my disposal.

60. I make this affidavit for no improper purpose.

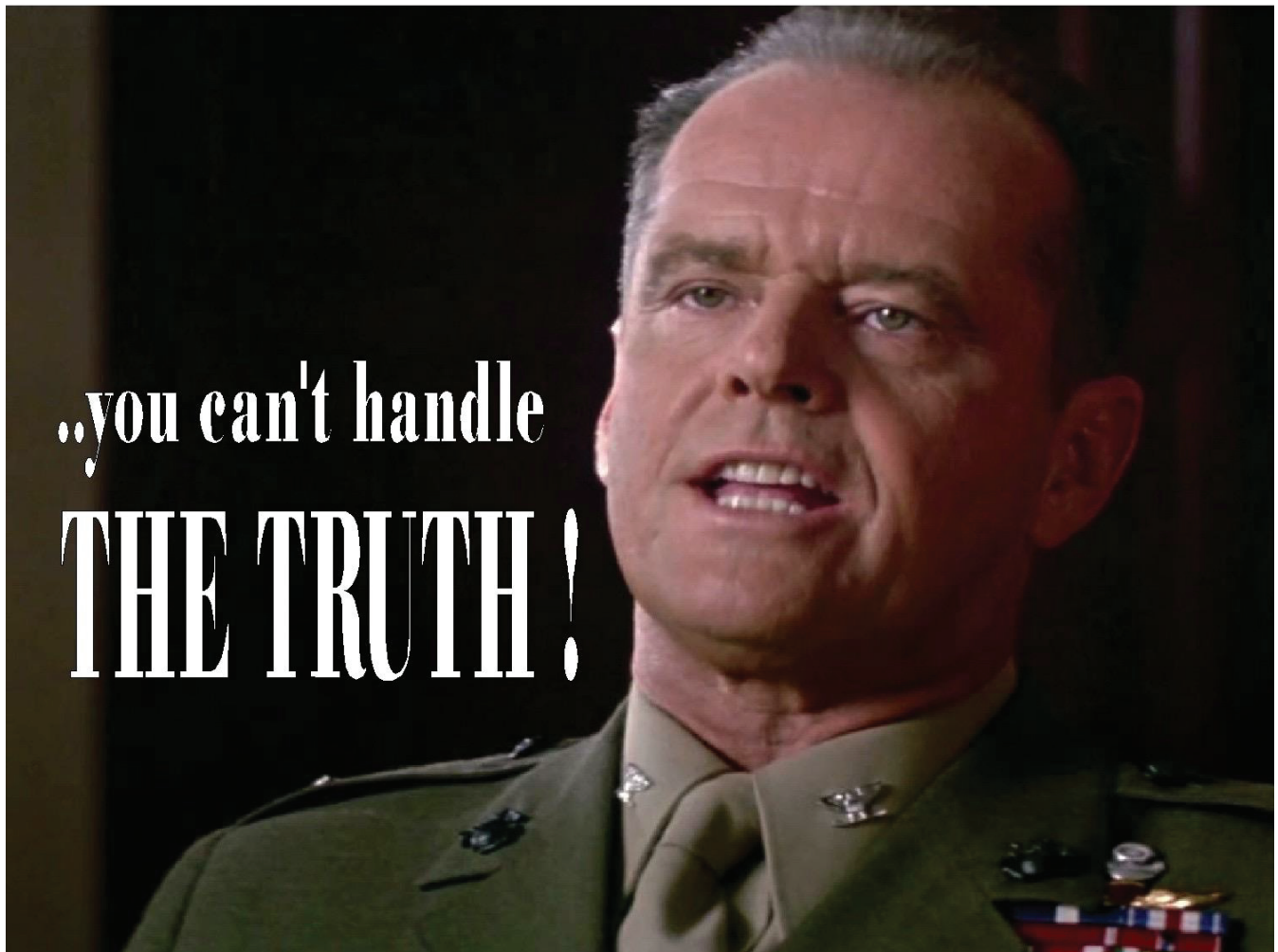
SWORN BEFORE ME at
Vancouver,
British Columbia,
on February 1, 2014

A commissioner for taking
affidavits for British Columbia

JOAN SMITH

²⁰ Be very careful and exercise restraint when including email correspondence in affidavits. Attaching emails may harm the parties' future ability to communicate electronically and the parties' ability to communicate is directly linked to the best interests of the children in issue. In other words, be careful not to poison the well. Also, voluminous emails when in the form of strings can be repetitive and at times difficult to follow.

What should be included?



The Facts

- Present the facts which support your client's position in a seemingly objective and dispassionate nature.
- At a minimum, an affidavit should set out the facts on which the application is advanced or opposed in a concise, logical and factually accurate manner.
- The facts set out in the affidavit must also be admissible under the evidence acts, the rules of court, and the common law rules governing evidence.

Client Interview

- Remind the client it is a sworn statement of evidence, as if given before a judge. They may be cross examined on the contents at some future time in the proceeding.
- Client may hide harmful evidence but better you frame it than the client is made to look like a liar on cross.
- *Ex parte* applications – you have to disclose all the relevant facts even those that support the other side's position.

Client Narrative

- Use plain language as much as possible.
- Be concise - longer is not better.
- Affidavits should generally be type written although the Provincial Court does provide forms for filing in by hand.
- Do not use legal terms.
- Use headings for new topics or changes in subject matter to break up long affidavits.
- Narrative should generally be chronological.

- Opening paragraphs should include background for context.
- A judge in Supreme Court chambers does not have access to the whole file.
- A judge in Provincial Court likely won't have reviewed anything beyond what you have submitted in support.
- Attach all of the relevant court orders as exhibits.

Documents as Exhibits

In general, only those documents which actually serve to improve the likelihood the client's evidence is true should be used as an exhibit, for example:

- "Lydia is doing well at her new school" -report card from old school, report card from new school, attendance records, assessments from tutors and counsellors;
- "I deposited my share of the house sale proceeds into our joint account" -vendors' statement of adjustments, trust cheque from conveyancer, bank statement from joint account, deposit slip or teller's receipt; and,
- "I have a blue Ford F150 pickup truck" -insurance documents, vehicle transfer form; photograph, lease. or financing agreement

- Photographs if relevant but not “happy parent with children” photos. Photos must contain the date taken and the name of the photographer.

But not...

- Letters are generally inadmissible, as all they prove is a letter was written. The contents are not evidence.
- Character reference letters are worse than useless, as not only are they biased but will only serve to make a judge angry.

Business records if properly dated and identified are usually admissible. Typically, in family law proceeding they will include:

- personal income tax returns, notices of assessment, and notices of reassessment;
- corporate income tax returns and financial statements;
- bank, credit card, loan, and investment statements;
- school report cards, and educational assessments;
- medical, dental and psychiatric reports, estimates, and quotes;
- receipts, invoices, bills, and account statements; and,
- ICBC receipts, drivers' abstracts, forms, and statements.

Evidence of Children

FAMILY LAW ACT [SBC 2011] CHAPTER 25

Court may decide how child's evidence is received

202 In a proceeding under this Act, a court, having regard to the best interests of a child, may do one or both of the following:

- (a) admit hearsay evidence it considers reliable of a child who is absent;
- (b) give any other direction that it considers appropriate concerning the receipt of a child's evidence.

After reading and affidavit a Judge should understand:

- who is making the affidavit;
- the role of the deponent in the court proceeding;
- the history of the parties' relationship;
- the history of the court proceeding so far;
- the nature of the order the client seeks or opposes; and,
- why the client seeks or opposes that order.

What not to include

Hearsay

- Hearsay is repeating what someone else has said as proof of a fact, for example saying:

"Yoko told me that she saw Ted at the park with a frisbee and a squirrel" to prove that Ted was in the park with a frisbee and a squirrel.

- Hearsay is permitted on interim applications but not at hearings where the result will be a final order, usually at summary trials brought pursuant to SCFR 11-3 or in desk order divorce applications under SCFR 10-10.

Double Hearsay

- Double hearsay is repeating as a fact what someone else said to someone else; "Yoko told me that Ted said he was at the park with a frisbee and a squirrel." Double hearsay is never permitted.

Anonymous Hearsay

- Using hearsay without naming the source is never permitted.

Information and Belief

- Where hearsay evidence is permitted the deponent must state the source of the information and why they believe it to be true.
- This can be as simple as:
 - On the afternoon of November 4, 2020, my neighbour Jianmin Jiang told me he was on his porch and saw Louise enter my house at approximately 2:00 am that morning. He was wearing a watch and checked the time because it was late. I believe this to be true because Mr. Jiang told me so.

Opinion and Expert Evidence

Opinion evidence is an inference drawn from a set of facts or circumstances that usually expresses a point of view:

- "I think Ted is an irresponsible father" or
- "I think Ted is a narcissist and may be a kleptomaniac."

Expert evidence is a kind of opinion evidence that includes statements about facts that are beyond most people's knowledge:

- "Ted's kleptomania is caused by high levels of lead in his well water" or
 - "Ted's results on the personality inventory indicate that he is a narcissist."
-
- In general, only experts may give opinion evidence and must be qualified by a judge before doing so:
 - doctors, psychologists, accountants, engineers, appraisers, etc.
 - The court will generally allow but ignore common types of opinion evidence that are mostly inconsequential - ("I think Ted is an irresponsible father").
 - It will not allow expert opinion evidence - ("Ted's kleptomania is caused by high levels of lead in his well water").

Shock and Disgust

In a 1993 case called *Creber v. Franklin*, Mr. Justice Spencer said that affidavits:

- should state only facts and should not be "larded with adjectives" about the conduct of others; and
- "Self-serving protestations of surprise, shock, disgust or other emotions" must also be avoided.

Legal Argument

Affidavits may not contain legal argument even where the argument is phrased as hearsay that would normally be acceptable:

- "The respondent maliciously attacked me".
- "I am advised by my advocate that because the respondent and I separated more than two years ago we are no longer spouses".

Problematic Statements



"I swear to tell the truth, the whole truth, and nothing but the truth, from my perspective."

“The Respondent and I began cohabiting on June 1, 1993. We separated on September 15, 2013, when the Respondent maliciously attacked me and the police kicked him out.”

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- Argument: it is not appropriate to submit argument in the guise of evidence: *Chamberlain v. Surrey District # 36*, (1998), 168 D.L.R. (4th).

“I have two wonderful, kind, and caring children named Austin Lee, born on November 1, 2005 and Jennifer Grace, born November 2, 2006.”

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- Describing the children using possessive language in the first person is the fastest way to ensure the Court suspects your client may not fully comprehend what the children need and what is in their best interest.
- Don't expect the Court do the math; include the actual ages of each child.

“The children and I live in our home in Vancouver. The Respondent lives way off in North Vancouver in a dark and damp basement suite.”

“The children and I live in our home in Vancouver. The Respondent lives way off in North Vancouver in a dark and damp basement suite.”

- Unnecessarily exaggerated/dramatic and no basis establishing the source of information set out.
- “Larding with adjectives” or “self-serving protestations of surprise, shock or disgust” are not helpful even if rarely admissible: *Creber v. Franklin*, [1993] B.C.D. Civ. 1549-03.

All of my friends have asked me in the past “why do you put up with such an abuser?” I know they care about me and believe the Respondent to be a batterer, which I agree with.

All of my friends have asked me in the past “why do you put up with such an abuser?” I know they care about me and believe the Respondent to be a batterer, which I agree with.

- Friends not identified; even if they were, it is hearsay; even it was admissible hearsay it is opinion evidence without qualification.
- *Foote v. Foote*, (1996), 6 B.C.L.R. (2d) 237;
- *Trus Joist (Western) Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 1598*, [1982] 6 W.W.R. 744.

“The Respondent failed my son when he did not take him to his Saturday soccer practice on three occasions since separation: once in October of 2013 and twice in November of 2013. Austin was hurt and upset and suffered emotional abuse.”

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- Unnecessary exaggeration.
- Argument coupled with opinion evidence.

I am totally and completely devoted to doing everything the children need whenever they need it. I am shocked and dismayed at the Respondent's lack of caring. I was told by my brother Sam that he spoke to the Respondent and the Respondent talked to him about work, telling him he was busier and ever, but never once mentioned the children!

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- Adjectival lard: *Creber*, supra.
- Opinion/Argument: *Chamberlain*, supra.
- Double hearsay; inappropriate use of unnecessary punctuation:

“The children don’t want to live with the Respondent. I know this to be true. The children and I are very close and I know that they prefer to live with me. I love them and would do anything to protect them, as any good mother should.”

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- Another’s state of mind; inadmissible. Hearsay from a child generally admissible but must be set out with specific attribution to a given child on a given date in as close to the original phrasing as possible.
- Argument. *Chamberlain*, supra.

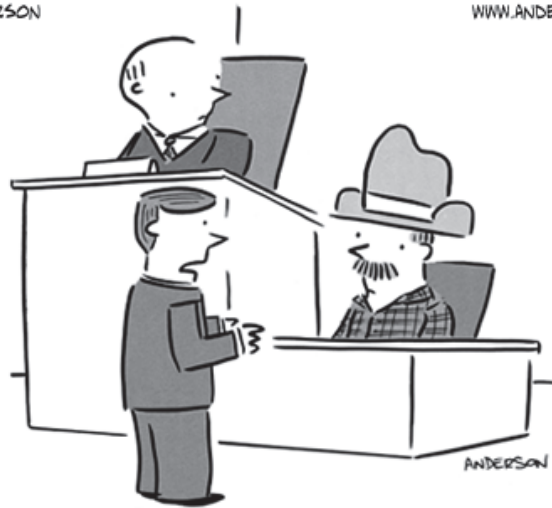
The Respondent is a terrible, terrible drunk. Nothing seems to be able to help him. Not only is the respondent an alcoholic, but he has also broken the law by having his license suspended for driving drunk, thus demonstrating his contempt of the law and the courts.

The Respondent is a terrible, terrible drunk. Nothing seems to be able to help him. Not only is the respondent an alcoholic, but he has also broken the law by having his license suspended for driving drunk, thus demonstrating his contempt of the law and the courts.

- Opinion; adjectival lard: *Creber*, supra.
- Opinion; conjecture; argument. Likely the entire paragraph is inadmissible.

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"And do you see that no good low-down
dirty hornswaggler in the courtroom today?"

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