



## **PRACTICE NOTE**

### **AFFIDAVITS IN FAMILY ACTIONS**

1. The Practice Note dated 11 April 1978 is hereby revoked.
2. The Practice Note set out in the Appendix is approved by me and shall have immediate effect in the Court of Session.

1 June 2004

## **APPENDIX**

### **AFFIDAVITS IN FAMILY ACTIONS**

#### **When affidavits may be lodged**

1. Once the period within which a notice of intention to defend (in the Sheriff Court) or defences (in the Court of Session) require to be lodged has expired, without such defences having been lodged, affidavits may be prepared and lodged without any order of court.

#### **Person before whom sworn or affirmed**

2. An affidavit is admissible if it is sworn (or affirmed) before a notary public, justice of the peace, or any person having authority to administer oaths for the place where the affidavit is sworn, such as a commissioner for oaths or a British diplomatic officer or consul abroad. A solicitor acting for such a party to the action may act in a notarial capacity when an affidavit is sworn. Any person before whom an affidavit is sworn (referred to below as "the notary") must observe all the normal rules in this connection and must satisfy himself or herself as to the capacity of the witness to swear an affidavit.

### **Importance of affidavits**

3. The witness should be made to appreciate the importance of the affidavit and that the affidavit 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 over to the witness.

### **Oaths or affirmation**

4. The witness must be placed on oath or must affirm.

### **Form and signature of the affidavit**

5. The document should be on A4 paper. The affidavit should commence with the words “At the day of 20 , in the presence of I having been solemnly sworn/having affirmed give evidence as follows:”. The affidavit should be drafted in the first person and should take the form of numbered paragraphs. The full name, age, address and occupation of the witness should be given in the first paragraph. 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. Any blanks in the affidavit must be filled in. Any insertion, deletion or other amendment to the affidavit requires to be initialed 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.

### **Drafting the affidavit**

6. An affidavit should be based on a reliable and full precognition of the witness.

7. The drafter of an affidavit should provide himself or herself, before drawing it, with an up to date copy of the pleadings, a copy of the appropriate precognition and the relative productions. The affidavit should be drawn up so as to follow the averments in the pleadings to the extent that these are within the knowledge of that particular witness and in the same order.

8. Affidavits should be expressed in the words of the person whose affidavit it is, should be accurate as to the date of the affidavit and should not consist of a repetition of passages in the pleadings. It should be clear from the terms of the affidavit whether the witness is speaking from his or her own knowledge, as when the witness was present and saw what happened, or whether the witness is relying on what he or she was told by a particular person.

### **Productions**

9. Productions already lodged in process must be borrowed up, and put to the party or to the witness who refers to them in his or her affidavit. Each production will require to be referred to in the affidavit by its number of process and must be docqueted and signed by the witness and the notary. If a production has not yet been lodged when the affidavit is sworn, it will require to be identified by the witness in the

affidavit, should be docketed with regard to the affidavit and signed by the witness and the notary. It must then be lodged as a production. Some productions will necessarily be docketed with regard to more than one affidavit.

10. In consent cases, the defender's written consent form will have to be put to the pursuer in his or her affidavit, and be identified, docketed and signed in the same way as other productions.

11. In adultery cases, photographs of both the pursuer and the defender may require to be produced, put to the appropriate witnesses and be identified, docketed and signed in the manner already described.

### **Date of affidavit**

12. All affidavits lodged must be of recent date. This factor is particularly important in cases involving children, cases in which financial claims are involved and in any other circumstances where the evidence of a witness or circumstances to which the witness speaks are liable to change through the passage of time. The notary must take particular care in such cases to ensure that the affidavit evidence as to such matters is correct as at the time the affidavit is sworn. Affidavits relating to the welfare of children which have been sworn more than three months prior to lodging a minute for decree are likely to be rejected by the court as out of date.

### **Applications relating to parental responsibilities and rights (See RCS 49.28, OCR 33.28)**

13. In actions in which an application in terms of section 11 of the Children (Scotland) Act 1995 is before the court not fewer than two affidavits dealing with the welfare of the child(ren) should be provided, at least one of them from a person who is neither a parent nor a party to the action. These affidavits should present the court with a full picture of the arrangements for the care of the child(ren) along the lines set out in paragraph 15, adapted to suit the circumstances of the particular case. The affidavits should set out the reasons why it is better that the section 11 order be made than not. The pursuer's affidavit should deal fully with the arrangements which have been made for their care, so far as within his or her knowledge. If the pursuer cannot give substantial evidence as to that it is likely to be necessary to obtain such evidence from the person who is responsible for their care.

14. In actions of divorce, judicial separation or nullity of marriage in which there are children of the marriage or children treated by the parties as a child of the family but in which no order in terms of section 11 of the Children (Scotland) Act 1995 is sought, the court, in terms of section 12, requires to consider whether to exercise the powers set out in section 11 or 54 of that Act in light of the information before it as to the arrangements for the child(ren)'s upbringing. Information accordingly requires to be before the court as to these arrangements. As a minimum, the affidavits of the witnesses should include the information set out in paragraph 15 (a) to (e) below.

15. An affidavit dealing with the arrangements for the care of children should, where relevant, include the following:

- (a) the qualifications of the witness, if not a parent, to speak about the child; how often, and in what circumstances the witness normally sees the child;
- (b) the ability of those 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; whether the child attends school regularly; and
- (g) details of child care arrangements during working hours, including the arrangements for such care outwith school hours.

### **Affidavit relating to disclosure of the whereabouts of children**

16. An affidavit sworn or affirmed in compliance with an order to disclose the whereabouts of children (in terms of the Family Law Act 1986, section 33 and RCS 49.24 or OCR 33.23) will require to be drafted in such a way as to meet the requirements of the court in the circumstances of the particular case. The form of the affidavit should be as above.

### **Financial and other ancillary craves**

17. Affidavit evidence in support of financial craves is necessary in an undefended action. (See *Ali v Ali* 2001 SLT 602). Where financial craves are involved, the evidence should be as full, accurate and up-to-date as possible. If the evidence is insufficient the court may require supplementary evidence to be provided. If, after an affidavit has been sworn and the solicitor concerned has parted with it, a material change of circumstances occurs before decree has been granted the court must be informed forthwith. A further affidavit may have to be sworn.

18. The pursuer should give evidence as to his or own financial position at the date of the affidavit. Where the pursuer gives evidence in an affidavit as to the financial position of the defender, the affidavit should state the date, as precisely as possible, at which the information was valid. The court must be provided with information which is as up-to-date as possible as to the defender's ability to pay the sums the pursuer is seeking. Where the pursuer cannot obtain recent information as to the defender's means the affidavit should state that that is the case but should contain as much material information relating to the defender's means as possible. If the pursuer is unable to provide sufficient evidence to justify the orders concluded for or craved in full, in the minute for decree, after the words "in terms of conclusion(s)/crave(s) (number(s)...) of the summons/initial writ", there may be added words such as "or such other such sum (or sums) as the court may think proper".

19. Where the pursuer has concluded for or craved a capital sum, an order for the sale of the matrimonial home, a periodical allowance, interdict or expenses, for example, and in the minute for decree does not seek decree for one or more of these, the reasons for that should be given in his or her affidavit.

### **Joint minutes**

20. When parties record their agreement in a joint minute as to how financial and other ancillary conclusions or craves should be dealt with by the court, the pursuer's affidavit should refer to the joint minute and indicate that he or she is content that the agreement set out in it should be given effect.

### **Minute for decree**

21. The minute for decree must be signed by counsel or by a solicitor who has examined the affidavits and other documents. That counsel or solicitor takes responsibility therefor, whether or not he or she is the person who drew the summons, initial writ or affidavits. The minute for decree should not be signed seeking decree of divorce, separation or declarator of marriage or nullity of marriage unless the evidence consists of or includes evidence other than that of a party to the marriage (or alleged or purported marriage). [Civil Evidence (Scotland) Act 1988, section 8(3), *Taylor v Taylor* 2001 SCLR 16].