

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE

PRACTICE NOTE

No. 2 of 2023

Affidavits in Undefended Family Actions

1. This Practice Note has effect from 18 December 2023. It replaces Practice Note: Affidavits in Family Actions, dated 3 April 2003.
2. The purpose of this Practice Note is to provide updated guidance on the preparation and use of affidavits in undefended family actions.
3. This Practice Note covers:
 - a. Affidavits generally;
 - b. Applications where there are children under 16;
 - c. Financial craves and other procedure

PART A: AFFIDAVITS GENERALLY

4. After the expiry of the period in which a notice of intention to defend requires to be lodged, where no such notice has been lodged, affidavits may be prepared and lodged without any order of the court.
5. Rule 33.28 and Rule 33A.29 of the Ordinary Cause Rules 1993 (“Evidence in certain undefended family actions” and “Evidence in certain undefended civil partnership actions”) provide that, unless the sheriff otherwise directs, evidence shall be given by affidavit and, unless the sheriff otherwise directs, evidence relating to the welfare of a child shall be given by affidavit.

Swearing or affirming the affidavit

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

7. 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). A solicitor acting for a party to the action may act in a notarial capacity. Any person before whom an affidavit is sworn ("the notary") must be satisfied that the witness has capacity to swear or affirm an affidavit. The swearing or affirming of an affidavit may be done remotely.

Importance of affidavits

8. The importance of the affidavit must be made clear to the witness and they must understand that the affidavit constitutes their evidence in the case. The possible consequences of giving false evidence should be explained to the witness. Before the witness signs the affidavit they must have read it or the notary must have read it out to the witness. The notary should always read the affidavit to ensure there are no errors in the document.

Form and signature of the affidavit

9. The affidavit should be on A4 paper. It 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:"

10. The full name, age, address and occupation of the witness should be given in the first paragraph.
11. 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.
12. At the time the document is sworn or affirmed, any insertion, deletion or other amendment to the affidavit must be initialled by the witness and the notary. No alterations can be made to the document after it is sworn or affirmed. Where a party wishes to alter or add to the affidavit that must be done by supplementary affidavit. 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

13. The affidavit must be based on statements and precognitions from the witness.
14. The drafter of the affidavit should have an up to date copy of the pleadings, a copy of the witness's precognition and the relative productions. The evidence contained in the affidavit must have a basis in the pleadings and any affidavit seeking to introduce new or irrelevant evidence will not be accepted.
15. The affidavit should be in the form of short, numbered paragraphs and should follow the same order as the averments in the pleadings, to the extent that these are within the knowledge of that witness. It should not however consist of repetition of passages from the pleadings.

16. The affidavit should be drafted in the first person and expressed in the witness's own words. It should be clear from the terms of the affidavit whether the witness is speaking from their own knowledge, based on what they actually saw or experienced or whether the witness is relying on what they have been told by a particular person. If a witness is speaking to the period of separation between the parties, the witness must make it clear how he/she knows when the separation took place and how he/she knows that the parties have not reconciled during the relevant period.
17. It is often apparent that passages from one witness's affidavit have been copied into that of another witness (the electronic "cut and paste"). This often results in obvious errors and where errors are identified in an affidavit, it will be rejected by the court.
18. Where the 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.

Productions

19. Productions already lodged in process must be borrowed up and put to the party or witness who relies on them in their affidavit. Each production will require to be referred to in the affidavit but its number of process and must be docketed 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, docketed with regard to the affidavit and signed by the witness and notary. It must then be lodged as a

production. Some productions will necessarily be docketed with regard to more than one affidavit.

Date of affidavit

20. 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 to which the witness speaks is liable to change through the passage of time, such as cases involving children or financial orders. Affidavits relating to the welfare of children which have been sworn or affirmed more than three months prior to lodging are likely to be rejected by the court as being out of date.

PART B: APPLICATIONS WHERE THERE ARE CHILDREN UNDER 16

Section 11 orders

21. Where there is an application for an order under section 11 of the Children (Scotland) Act 1995, there must be two affidavits detailing the welfare of the child, at least one from a witness who is not a party to the action. The affidavits should contain only information relevant to the section 11 order sought and present the court with a full picture as to the arrangements for the care of the child and include the information specified in paragraph 23 below. The affidavits should set out reasons why it is better that the section 11 order be made than not. If the pursuer is unable to provide substantial evidence as to the arrangements made for the care of the child, it is likely to be necessary to obtain such evidence from the person responsible for the care of the child.

22. The affidavits will require to contain evidence sufficient to satisfy the tests set out in section 11(7) of the Children (Scotland) Act 1995.

Applications for divorce or dissolution of civil partnership

23. In actions of divorce, dissolution, judicial separation or annulment in which there are children of the family (as defined by section 12(4) of the 1995 Act) section 12(1) of that Act provides that the court must consider whether to exercise the powers set out in section 11 of the 1995 Act or section 62 of the Children's Hearings (Scotland) Act 2011 in light of such information as is before the court as to the arrangements which have been, or are proposed to be, made for the upbringing of each child. Accordingly, information about these arrangements must be provided to the court.
24. These affidavits should include the following information;
- 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.

PART C: FINANCIAL CRAVES AND OTHER PROCEDURE

25. Where financial craves are sought, the court should 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 or affirmed.
26. The pursuer should give evidence of all financial information relevant to the orders sought.
27. Where the pursuer's affidavit gives evidence of the defender's resources, the affidavit should state the date at which the information was valid. The court should be provided with recent information regarding 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. Productions should be lodged to support of the position or to provide vouching.
28. Where the pursuer has craved several financial orders such as, a capital sum, an order for the sale of the matrimonial home, a periodical allowance and expenses and in the minute for decree the pursuer does not seek decree for one or more of these or seeks decree for a lesser sum, the affidavit should provide reasons for that.

Joint Minutes

29. Where parties record their agreement as to how the court is to deal with financial and other craves, the pursuer's affidavit should refer to the joint

minute and indicate that they are content that the agreement set out in the joint minute should be given effect.

Minute for Decree

30. The minute for decree must be signed by a solicitor who has examined the affidavits and other documents. That solicitor takes responsibility, whether or not they drew up the initial writ or affidavits. The minute for decree seeking decree of divorce or separation should not be signed unless the evidence consists of, or includes, evidence of a person who is not a party to the action.