

Advocacy and Affidavits – An Integrated Learning Approach

Margaret Renaud and Jenny Finlay-Jones*

Introduction

The University of Newcastle offers its LLB students the opportunity to complete their practical legal training requirements for admission to practice as a legal practitioner in New South Wales and other jurisdictions, during the final two years of the LLB. It is known as the Professional Program and was established in 1995. The two year time frame over which it is conducted enables the integration of substantive law and legal theory, clinical placement in legal practice, clinical teaching in legal practice areas, skills, professionalism and ethics.¹ It also enables students to learn steadily and build their skills.

One week before the commencement of each academic year, the Professional Program runs an intensive Orientation and Professional Skills Week (Professional Skills Week) to orientate new students to the program and the University of Newcastle Legal Centre (where clinical placement is undertaken) and to focus on skills training.

This paper aims to share the teaching materials used in a three day advocacy

* Margaret Renaud is a Visiting Professor with the School of Law, University of Newcastle. Prior to that she was the Honourable Justice Renaud of the Family Court of Australia for 15 years. Jenny Finlay-Jones is Acting Director, Clinical Program, School of Law, University of Newcastle. The authors gratefully acknowledge the efforts of Stewart Austin, Ian Duane and Georgia Seaton who participated in the production of the videos that made these exercises possible, and Stephen Nathanson for sharing his ideas and teaching methods with us.

¹ In the 2000 report of the Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, para 2.19, The University of Newcastle was singled out as being the only University in Australia which “allows students to undertake a fully integrated clinical degree program rather than simply an elective unit”. Since that report other Universities have introduced integrated programs, for example, Flinders University.

and affidavit drafting workshop for 44 final year Professional Program students during the Professional Skills Week.² An affidavit drafting intensive had formed part of the week for some years. In 2002 it was integrated with advocacy exercises.

The Workshop

The idea for the workshop came during the production of a series of legal skills videos which included contested interim applications.³ The advocates in these videos were practising barristers, and the Judge was a solicitor and lecturer from the School of Law Professional Program. The videos were designed to realistically demonstrate to students how to conduct interim applications and to form the basis of advocacy exercises.⁴

The workshop comprised three major exercises, the first and third focus on non-trial advocacy⁵ and the second on affidavit drafting. The advocacy exercises were designed to give students the opportunity to practise their advocacy skills and receive feedback in a small group, non-intimidating environment that would facilitate learning. Five guest legal practitioners and Margaret Renaud were the Judges in the student exercises. Immediate feedback from the presiding guest practitioners and peer feedback were essential components of the exercise.

Overall the students found the workshop challenging, stimulating and relevant – characteristics which make the learning of skills interesting and more effective.

An Activity Plan

The workshop exercises are set out in an Activity Plan at Appendix A.⁶ It encompasses instructions to students, materials to be handed out to

² The sharing of teaching material can also be found in Stephen Nathanson, "A Focussed-Practice Exercise in Commercial Drafting" (2001) 35 (2) *The Law Teacher* 233 and Stephen Nathanson, "Designing Problems to Teach Legal Problem Solving" (1998) 2 *California Western Law Review* 325.

³ The videos were produced under the direction of Associate Professor Stephen Nathanson with the assistance of the Media Design, Information and Education Services Division at the University of Newcastle in late 2001. At that time Stephen Nathanson was Director, Clinical Legal Education, Faculty of Law, University of Newcastle. The authors were involved in the making of the videos. Margaret Renaud designed the problems and drafted the applications, responses and affidavits on which the interim application videos are based.

⁴ The application, response and affidavits on which the videoed hearings are based are in Attachments 1 and 4 to Appendix A.

⁵ 'Non-trial' in this context includes interim and interlocutory hearings, that is, hearings other than those for final relief.

⁶ The Activity Plan is a concept we have borrowed from Stephen Nathanson, which he introduced to the authors during his time as Director, Clinical Legal Education at the University of Newcastle.

students and instructions to lecturers. The preparation of an activity plan helps to ensure that the numerous skills exercises created for practical legal training programs are maintained and presented to students in a systematic fashion by different lecturers.

The Skills

Oral and written communication, or more specifically oral advocacy and affidavit drafting are the skills targeted by the workshop. The oral component is learning how to conduct interim contested applications and the written component is learning how to draft affidavits for use in such applications. The applications upon which the exercises were based were:

1. An application seeking a change of venue for the final hearing.
The originating proceedings had been issued in Sydney, the husband's place of residence. The wife had moved to Coffs Harbour, around 500 km away and sought the venue for the hearing be changed from Sydney to Coffs Harbour.
2. An application seeking leave to file for property proceedings out of time.
Under the *Family Law Act 1975* (Cth) proceedings for property must be filed within 12 months of the decree nisi becoming absolute. The applicant wife sought to make the application outside this 12 month period.

Whilst the applications on which the exercises were based were heard before a Judge in the Family Court of Australia⁷, students were encouraged to recognise that they could transfer their learning to different types of interim applications in other jurisdictions, if they understood how to structure the applications.

The format

Each exercise comprised instruction, a demonstration, practise and feedback.

⁷ They could also be run before a Federal Magistrate in the Federal Magistrates Court of Australia.

Exercise 1 – Advocacy (Day 1)

Introduction

Students were informed that they would be presenting a contested interim application that afternoon. The introduction had three purposes. First, to explain the nature of the exercise to the students. Second, to introduce students to the steps involved in making interim applications and to have them think about questions such as:

1. How do I structure the application?
2. How do I develop my arguments?
3. What rules of etiquette and presentation should I follow?
4. How should I proceed before, during and after the hearing?
5. What is the substantive law which provides the basis for my application?
6. How does the law apply to the facts of this case?

Third, to revise the procedural matters associated with these applications. For example,

1. What is an interim application?
2. What documents are filed in support?
3. When are the supporting documents filed?

Demonstration

The video of the first application⁸, which runs for about 15 minutes, was shown once without interruption. It was then shown again, pausing frequently to encourage discussion and analysis by students in accordance with the questions listed above.

Practice

After a period of preparation the students presented the same application they had viewed earlier, before the guest practitioners. They were divided into six groups of six or eight students. To enable the hearings to be completed within two hours, students' submissions were limited to 10 minutes.

Feedback

The guest practitioners provided specific feedback to the students after each hearing. Feedback included comments on delivery, the structure of the submissions, how questions from the bench were handled, whether the law and practice and procedure were applied appropriately, court

⁸ Law teachers wishing to loan the videos should contact the authors. Alternatively, as the source materials are set out in this paper, teachers could make their own videos.

etiquette and overall presentation. Students were permitted to watch their peers and provide peer feedback. It was expected that students appearing later in the list would learn from the earlier feedback and apply it to their own presentation.

Exercise 2 – Affidavit Drafting (Day 2 and 3)

Introduction

Students were informed that Day 2 would be devoted to learning about affidavit drafting and that they would begin a drafting exercise that afternoon. The drafting exercise, due the morning of Day 3, involved re-drafting two badly drafted affidavits. These affidavits formed the basis of the evidence the out of time application students were to present in the second advocacy exercise on Day 3.

Demonstration

After initial class exercises and instruction on affidavit drafting, students were referred to the affidavits they had used in the change of venue advocacy exercise on Day 1. These affidavits served to demonstrate how an affidavit should be drafted and to assist students with their drafting exercise.

Practice

The re-drafting commenced with all students working in teams of two in a University computer laboratory. Students were told not to include the formal parts of the court form and that formatting need not be accurate. These low-level tasks can sometimes take an inordinate amount of time and distract attention from drafting the substance of the affidavit, which was the focus of this exercise. In other parts of the Professional Program, students learn the importance of checking that court documents comply with the Regulations and prescribed forms. The affidavits had to be handed in at 9.30am on Day 3.

Feedback

Feedback occurred on Day 3. Once we checked that each team had handed in two affidavits, the affidavits were re-distributed to the class at random for peer marking and comments. Class discussion was led by the lecturer. The types of matters discussed are set out in the Activity Plan at pages 21 and 22. Affidavits were handed back to the original authors for self review. The sample affidavits prepared for the out of time application were distributed to enable students to compare them with their own efforts.

Exercise 3 – Advocacy (Day 3)*Instruction*

After concluding the affidavit drafting exercise, students were informed they were now expected to present that application in the afternoon. They were encouraged to reflect on their performance on Day 1 and think about what they might do differently this time.

Demonstration

Unlike the first advocacy exercise on Day 1, students were not shown the video of this application beforehand. Students were informed it would be shown after their hearings to demonstrate how the application might be conducted. If students wished, they could review the video shown on Day 1.

Practice

As for Day 1, except students were divided into different groups and different guest practitioners were involved.

Feedback

As for Day 1, except students were also shown the demonstration video at the conclusion of the exercise.

Conclusion

An exercise is successful when students and guest practitioners involved are enthusiastic about it afterwards. This was our experience with this workshop. We hope the attached materials can be of benefit to other law teachers and law students.

Activity Plan

Instructions To Students

Course: Legal Practice 2 – Part A
Clinical Module: Advanced Litigation Practice
Exercise Name: 1. Advocacy Exercise 1 – Contested Interim Application for Change of Venue
2. Affidavit Drafting Intensive
3. Advocacy Exercise 2 – Contested Interim Application for Out of Time Property proceedings

Week: Orientation and Professional Skills Week

Day And Time: Tuesday 11 am – 4 pm
Wednesday 9.30 am – 3 pm
Thursday 9.30 am – 4 pm

A. Background

These exercises are devised under the *Family Law Act 1975* (Cth), so the drafting and advocacy skills are particularly relevant to the presentation of a case in the Family Court of Australia (the Family Court) or the Federal Magistrates Court of Australia (the Federal Magistrates Court). However, you will find that the skills you learn can be transferred to other Courts.

Order 30 Rule 2 of the *Family Law Rules* requires that, except with leave of the Court, all evidence is to be given on affidavit. In accordance with current practice in the Family Court and the Federal Magistrates Court, the interim hearings in this exercise proceed by way of submissions on the affidavit material only, without cross-examination.

B. Objectives

After completion of these exercises you should be able to:

1. Prepare for a court hearing
2. You should be able to prepare for a contested interim hearing by identifying issues likely to arise at the hearing having analysed the orders sought in the application and the affidavit evidence filed in support of the application
3. Represent a client in court

You should be able to appear for an applicant or respondent in an interim application by:

- (a) Observing appropriate court etiquette and procedure
- (b) Presenting the affidavit evidence according to the law and the court's rules
- (c) Organising and presenting in an effective, strategic way:
 - (i) The factual material
 - (ii) An analysis of relevant legal issues
- (d) Making submissions effectively and coherently in accordance with law and good practice.⁹

4. Draft affidavit evidence

- 5. You should be able to draft an effective affidavit for an interim hearing having regard to the rules of evidence and the relevant rules of practice and procedure.

C. Preparation

- 1. Read all the material in this activity plan and Attachment 1.
- 2. To prepare for the advocacy exercises, read:
 - a. The following chapters from Stephen Nathanson, *Non-Trial Advocacy A Case Study Approach*, Cavendish Publishing Limited, London, 2001
 - Chapter 1 "Advocacy Skills"
 - Chapter 4 "The Civil Litigation Process and Non-Trial Advocacy"
 - Chapter 8 "Ethics and the Quality of Advocacy"
 - b. Chapter 4 "Preparing Yourself for Trial" from Lee Stuesser, *An Introduction to Advocacy*, The Law Book Company Limited, North Ryde, 1993.
- 3. To prepare for the affidavit drafting intensive, read:
 - a. Chapter 14 "Affidavits" from your civil Procedure text: Colbran, G Reinhardt, P Spender, S Jackson, R Douglas *Civil Procedure Commentary and Materials* 2nd ed, Butterworths, Australia, 2002
 - b. "Affidavits" in Volume 1, *Court Forms Precedents and Pleadings*, Butterworths looseleaf

⁹ Australasian Professional Legal Education Council, Law Admissions Consultative Committee, Practical Legal Training, *Competency Standards for Entry Level Lawyers*, November 2000, adopted by the Legal Practitioners Board of New South Wales from July 2002.

D. Description Of The Activity

Day 1 - Advocacy Exercise 1 – Interim application for change of venue

1. The class reads the summary, application, response and the affidavits for Advocacy Exercise 1 (these are in Attachment 1)
2. The class gains an initial overview by viewing the video: *Legal Skills Series, Contested Interim Application for Change of Venue*.
3. The class views the video a second time and whilst viewing, analyses the application in light of the following guide for the structure of argument in an interim application.¹⁰

Structure of argument in interim application

1. Introduce counsel and parties [Announce appearances]
 2. State the nature of the application and the orders sought
 3. Summarise the history / facts/ main issue
 4. Identify specific issues
 5. Address issues with supporting principles and facts
 6. Summarise and request appropriate orders
4. The class breaks into teams of two, one to represent the applicant and one the respondent. Class spends one to two hours preparing for the hearing.
 5. The teams form into groups of six or eight to run the hearings before visiting legal practitioners who act as the presiding Judges / Magistrates. The List will run for two hours with appropriate time allocated to each matter. You will have approximately 10 minutes to make your submissions.
 6. After hearings Judges/Magistrates will give you individual feedback on your presentation.
 7. While one team is presenting its case, the other teams in the group will be completing 'feedback sheets' on their colleagues' presentation. The feedback sheet is at the back of Attachment 1.

Day 2 - Affidavit Drafting Intensive

1. Lecturer hands out Exercise 1 and class discusses what is wrong, if anything, with the given extracts from affidavits.
2. Lecturer gives a seminar on affidavit drafting focusing on the rules of procedure and rules of evidence. Reference is made to the affidavits from yesterday's advocacy exercise. These affidavits are used as a 'sample'.
3. Lecturer hands out information about Advocacy Exercise 2 - application

¹⁰ Adapted from Stephen Nathanson, *Non-Trial Advocacy: A Case Study Approach*, Cavendish Publishing Limited, London, 2001 page 74

for leave to issue property proceedings out of time. Badly drafted affidavits are handed out.

3. The class moves to the computer laboratory and, in teams of two, rewrite the badly drafted affidavits.
4. After class, complete the affidavits and hand in at 9.30 am the following day.

Day 3 - Feedback on affidavit drafting exercise

Advocacy Exercise 2 – Interim application seeking leave to issue proceedings out of time

1. Affidavits drafted by students are handed in and checked off, then distributed in class for peer review.
2. Lecturer leads class discussion on the form of the students' affidavits. Students write comments on their colleague's work.
3. Affidavits are handed back to their authors.
4. Lecturer hands out 'sample answer' affidavits. Students spend 10 minutes comparing them with their own work and noting comments.
5. Lecturer leads final discussion and assists with questions about any major differences between the students' work and the 'sample' affidavits.
6. The class breaks into teams of two, one for the applicant and one for the respondent. Class spends two hours preparing for the hearing.
7. The teams form into groups of six or eight to run the hearings before visiting legal practitioners who act as the presiding Judges / Magistrates. The List will run for two hours with appropriate time allocated to each matter. You will have approximately 10 minutes to make your submissions.
8. After the hearings, Judges/Magistrates will give individual feedback on your presentation.
9. While one team is presenting its case, the other teams in the group will be completing 'feedback sheets' on their colleagues' presentation.

Notes

1. These exercises are designed to give you the opportunity to practise and receive feedback on your advocacy and affidavit drafting skills in a professional and collaborative learning environment. You must display a conscientious effort and a professional attitude. Court dress is required for the advocacy exercises being conducted before guest legal practitioners.
2. The small groups will enable immediate feedback to be given. While you are watching others in your group do their appearance, you will complete feedback notes for them. Ensure that your feedback is specific and constructive.

F. The Problems

1. Advocacy Exercise 1 - Application for Change of Venue

The Characters:

Anne Kennedy – mother, lives in Coffs Harbour. Children normally reside with her.

Andrew Kennedy – father, lives in Sydney. Wishes to increase his contact with the children.

Angela Kennedy – eldest child of the marriage. Born 5 March Yr-8.¹¹

Marcus Kennedy – youngest child of marriage. Born 24 June Yr-5. Is physically disabled and is mostly confined to a wheelchair.

Beverley Campbell – solicitor for the mother.

Jackson Riley – solicitor for the father.

Dr. Francis Day – Marcus Kennedy's specialist paediatrician.

The Problem:

Andrew Kennedy has lodged an application for contact orders and property settlement orders with the Family Court. The hearing is due to be held in Sydney, however Anne has made an application to have the venue for the hearing changed to the Newcastle Registry – Coffs Harbour circuit. Anne does not wish to leave Coffs Harbour for the period of the hearing and argues that she cannot afford the expenses involved in running a hearing in Sydney and the added burden of finding adequate childcare. Andrew however, feels that it is more appropriate for the matter to be heard in Sydney as the hearing date will be earlier.

Issues include: (O 27 r 3 Family Court Rules) availability of a court, convenience of parties, limiting of expense and costs of proceedings, any other relevant matter.

The Facts:

For the detailed facts in this case, refer to the affidavits supplied in Attachment 1.

2. Advocacy Exercise 2 – Application for leave to apply out of time for property settlement

The Characters:

Marlene Smith – applicant

Lester Smith – respondent

Val Smith – Lester's current wife.

¹¹ Date coding is used in the materials to enable them to be used from year to year without amendment. Yr0 = current year (2002), Yr-1 = last year (2001), Yr-2 = two years ago (2000), Yr+1 = next year, Yr+2 = two years time and so on. This time-saving concept is also borrowed from Stephen Nathanson.

The Problem:

Marlene is making an application for property settlement, which is more than 12 months after the decree absolute. There are a number of factors that have contributed to the delay in bringing the action. First, Marlene contends that she was encouraged not to take action by her ex-husband and was under the belief that they would be able to divide the assets themselves, without needing to go to court. When it became apparent that there was going to be a disagreement as to how the matrimonial home should be divided, Marlene instructed her solicitor in relation to making an application. However, Marlene's lawyer died a short time later and there were delays in getting a new lawyer and making the application. There has also been disagreement between the parties as to the share of the proceeds that Marlene may be entitled to receive.

Lester argues that he was also under the belief that he and Marlene would be able to divide the property without going to court. Lester contends that the reason for the original delay was to enable him to complete renovations and repairs on the property that would increase its sale value. Eventually, Lester's current wife, Val, offered to lend him some money so that he could purchase Marlene's share of the house. Lester believes that it would cause hardship to Val and himself if Marlene were able to claim proceeds from the sale of the house at its current value, as he has contributed substantial money and effort to the property since the divorce. He hopes to be able to pay Marlene out, rather than sell the house and split the proceeds of the sale.

The Facts:

For more detailed facts for this matter, refer to the affidavits of both parties.

G. Materials

In addition to this Activity Plan, you will progressively receive the following materials that should read before each exercise. They have been referred to as attachments for ease of reference. Please note that the court documents in the materials omit the formal parts prescribed by the Rules. If preparing these documents for filing or serving when in practice, you should always check they comply with the prescribed form.

Attachment 1 – Advocacy Exercise 1 - Kennedy And Kennedy: Change Of Venue

(will be handed out with the Activity Plan, the day before Day 1)

1. Application by Ann Kennedy for change of venue

2. Response by Andrew Kennedy
3. Affidavit of Ann Kennedy
4. Affidavit of Beverley Campbell (Ann Kennedy's solicitor)
5. Affidavit of Andrew Kennedy
6. Affidavit of Jackson Riley (Andrew Kennedy's solicitor)
7. Feedback sheet
8. Order 27 rules 1, 2 and 3 Family Law Rules

Attachment 2 - Affidavit Class Exercises and Drafting Guide

(will be handed out the morning of this exercise, on Day 2)

1. Affidavit Class Exercise 1
2. Sections 55, 56, 59, 60, 62, 76 and 78 of the Evidence Act, 1995 (Cth)
3. Affidavit Class Exercise 2
4. Affidavit Drafting Guide

Attachment 3 – Affidavit Drafting Exercise – Smith and Smith: Out Of Time

(will be handed out after class on affidavit drafting and before moving to computer laboratory for re-drafting exercise, on Day 2)

1. Application of Marlene Smith for leave to apply out of time
2. Response by Lester Smith
3. Badly drafted Affidavit of Marlene Smith – for redrafting
4. Badly drafted Affidavit of Lester Smith – for redrafting
5. Sections 44(3), 44(3AA) and 44(4) of the Family Law Act, 1975 (Cth)

Attachment 4 - Advocacy Exercise 2 - Smith and Smith: Out Of Time

(will be handed out on morning of Day 3, after re-drafted affidavits have been reviewed in class)

1. Application by Marlene Smith for leave to apply out of time
2. Response by Lester Smith
3. Affidavit of Marlene Smith sworn 12 February Yr0
4. Affidavit of Lester Smith affirmed 12 February Yr0
5. Feedback sheet

[From Here to the End of Activity Plan for Lecturers Only]

H. Suggestions To Lecturers For Instruction

Day 1

1. Introduce the workshop exercises to the students. Summarise what they will be doing over the next three days.
2. Lead a short discussion on interim applications. Include questions such as:
 - a. What is an interim application?
 - b. What documents are filed in support?
 - c. When are the supporting documents filed?
3. Lead a short discussion about the steps involved in making an interim application. Take students through the notes on "Structure of argument in interim application" on page [3] of the Activity Plan. Include questions such as:
 - a. How do you structure the application?
 - b. How do you develop your arguments?
 - c. What rules of etiquette and presentation should you follow?
 - d. How do you proceed before, during and after the hearing?
 - e. What is the substantive law which provides the basis for your application?
 - f. How does the law apply to the facts of this case?
4. Lead a short discussion recapping the principles of effective advocacy. Take students to the "Ten techniques to remember when doing oral advocacy" on page 3 of Chapter 1 "Advocacy Skills" of the readings (Stephen Nathanson, *Non-Trial Advocacy: A Case Study Approach*):
 - a. Speak slowly and clearly
 - b. Maintain eye contact
 - c. Be attentive to personal appearance and behaviour
 - d. Keep it simple
 - e. Think structurally
 - f. Lead the Judge
 - g. Use transitional devices
 - h. Focus on facts
 - i. Use law appropriately
 - j. Establish a positive relationship with the Judge.
5. View the video of Kennedy and Kennedy - Change of Venue application (20 minutes) without interruption. Lecturer should have already previewed video and made notes, but this allows a further opportunity to do this. Before the initial viewing ask students to keep notes of any questions they have and the effectiveness or otherwise of the each counsel's approach.
6. View the video a second time, analysing it with the students (allow at least 60 minutes). When analysing, allow frequent pauses in the video to ask questions, make comments and encourage class discussion. You can constantly refer students back to the structure guide and the

effective advocacy techniques. Some suggestions follow.

- a. When do you come to the bar table? Where do you sit?
- b. How does each barrister announce his or her appearance? [Gives surname and identifies the party for which they appear]
- c. Which counsel addresses first? [See Order 30 Rule 1C]
- d. What is the etiquette relating to when you stand and when you sit?
- e. How should you stand at the bar table? [Do not to bury your head in the lectern, do look up, where should you place your hands, use lectern if available to enable voice to project]
- f. How can your delivery be improved? [Make eye contact, do not read submissions, speak slowly and clearly, speak up so you can be heard]
- g. How should you sit at the bar table? [Sit up straight, do not swivel on chair or otherwise lounge around]
- h. What is the demeanour of these barristers? Does it make a difference if the demeanour is formal rather than casual?
- i. How should you begin? [Clearly state the nature of the application and what orders are sought (point 2 in "Structure of argument in an interim application") for example, "This is an application by the Wife to change the venue of the hearing from the Sydney Registry to the Coffs Harbour circuit of the Newcastle registry. It is made under Order 27 rule 1 of the Family Law Rules"]
- j. Note how the barristers identify the issues before the court and the sections of the Act or Rules on which they rely.
- k. How does the style of presentation between the two counsel differ? Which one is more effective? [More effective if succinct and if "um" is avoided]
- l. How do you make submissions? [Say "it is my submission" or "I (respectfully) submit" do not say "I believe" or "I think" or "It is my opinion".]
- m. Can you see why it is important to have a thorough knowledge of the facts? [When asked a question by the Judge, can answer by reference to specific material in the affidavits]
- n. What is the effect if counsel get a name or other detail wrong? [It makes counsel appear unprepared]
- o. If you are the other counsel and you recognise an error what should you do? Do you interrupt? [Do not interrupt, wait until it is your turn to speak]
- p. If the Judge clearly makes a mistake when referring to the facts, what do you do?
- q. How do counsel refer to each other? ["My friend" not "My opponent"]
- r. How do you take the Judge to the evidence? [Say "If your Honour goes to paragraph X of the Wife's affidavit she sates that ...". If you know the affidavits well you can take the Judge to a specific

- numbered paragraph in the affidavit. This is more effective and helpful than just referring to “the Wife’s affidavit”.]
- s. How does the strategy between the two counsel differ and which is more effective? Has either counsel neglected to summarise the history, facts and main issue at the outset? [It is effective to summarise the history and facts at the outset, for example, “The wife and child live in Coffs Harbour. The Husband lives in Sydney. The Husband commenced the primary proceedings in Sydney.”]
 - t. How persuasively does each barrister introduce and develop the arguments?
 - u. How do you approach the weaknesses in your case? [For example, the wife has a problem in that there will be a delay in the hearing if the proceedings are transferred. Her counsel should meet this head on and persuade the Judge that it is not a difficulty. For example, “Your Honour, I submit that the only negative consequence of changing the venue from Sydney to Coffs Harbour would be the delay of a few months. However this is outweighed by the benefits of having the hearing in Coffs Harbour. This is where the wife and children are located, there is someone there who can mind the children, this is where the paediatrician is located...” and so on.]
 - v. How do counsel respond to questions from the bench? [Questions should be answered, avoid “I’m getting to that Your Honour”. You should maintain sufficient flexibility in approach to tailor your submissions to follow any sequence suggested by the Judge.]
 - w. You will note that counsel for the wife has just taken the Judge to a paragraph in the Husband’s affidavit. Is this a good approach or does it draw attention to the Husband’s evidence and detract from the Wife’s evidence?
 - x. There is an issue about whether the son can walk. Be careful in interim hearings not to make any concessions (for example, that the child *can* walk when the wife’s evidence is that he is *trying* to walk) which could be used against you in the final hearing.
 - y. There are a number of heads of consideration to be taken into account, note how effective it is where emphasis is given only to those relevant in these proceedings.
 - z. How do counsel respond to points made by the other?
 - aa. Notice how effective it is to present the Judge with alternatives. [For example, he husband offered an undertaking not to require the child’s paediatrician for cross-examination at the final hearing. (Can you do this? What if during the preparation for final hearing you realise that you do need to cross-examine this witness? Would you be bound by your undertaking?) The husband could be ordered to pay the costs of the wife’s travel to Sydney and any child minding expenses, if the application was dismissed and the proceedings were to remain in Sydney.]
 - bb. Did you notice how counsel concluded their submission? [Sum-

- marised the wife's case and requested the appropriate orders.]
- cc. Overall, how persuasive was each counsel's submissions? What makes them persuasive or otherwise? In whose favour would you decide if you were the Judge? Why would you decide this way?
- dd. How does an interim or interlocutory application differ from a final hearing and is there anything in the presentation which demonstrates that this is an interim hearing?
- ee. What might you have done differently?

Lecturers should review the video in advance of the class and make notes of where effective advocacy occurs and why, and similarly where it is not so effective and why. Pause the video at these points to lead a discussion about why something was or was not effective. Keep drawing the students back to the structure. [For example "What is the wife's counsel doing now?" Response "Addressing the issue of expense with supporting facts"]. General questions can be asked such as "Why have I stopped the tape?" "What was significant about that submission?" and so on.

7. Request the students form teams of two, one for the applicant and one for the respondent and divide them into groups of six or eight. Ask students to now go and prepare to run that afternoon, the same application they have just analysed. Remind them they will have to closely analyse the application, response and affidavits in the matter. Inform students where their group will have their hearing and the start time. Remind them to be punctual.
8. Set up six rooms with tables arranged as if it were a courtroom.
9. Guest practitioners will have been arranged well in advance. Also in advance, provide guests with a copy of the activity plan, the documents relating to the hearing, and a list of the names of the students appearing before them. Ask guests to make notes of feedback to give to students at the end of each application. Ensure guests know where to go and where you will be both during and at the end of exercise.
10. While exercises are being conducted, lecturer should circulate between the 'courtrooms' and sit in on hearings to ensure everything is running smoothly. Lecturer can also contribute to feedback sessions at the end of each hearing.
11. Before the hearings, arrange a student from each group to thank their guest when they conclude.
12. It will take about two hours to run the hearings. If time permits an additional half hour could be allocated at the end for a 'plenary session' attended by students, lecturer and visiting practitioners for general discussion and feedback.

Day 2

Preparation

1. Ensure that an overhead projector, together with blank transparencies and pens, or a whiteboard, marker and eraser, are available.
2. Prepare to go through the two Affidavit class exercises and the Affidavit Drafting Guide with the students step by step, explaining and expanding upon each point. The students involved in this exercise should have already completed a course on the substantive law of evidence. The sections of the *Evidence Act 1995 (Commonwealth)* on which this part of the exercise is based are those which have particular relevance to affidavit drafting. Experience suggests that the Rules of Evidence which are most often breached not only by students in drafting classes but also by practitioners, are the Hearsay Rule and the Opinion Rule, and to the extent that substantive law is taught (or revised) in this exercise, the focus is on those two rules.

Instruction

3. Commence by congratulating students on their efforts yesterday and recap generally on the feedback.
4. Hand out Attachment 2 and introduce the affidavit drafting exercise. Explain to students that the affidavits they used yesterday should be retained and used as a reference point when they are re-drafting the badly drafted affidavits, the exercise they will commence later in the day.

Affidavit Class Exercise 1

5. Go to Affidavit Class Exercise 1 (in Attachment 2), and also show an overhead of the exercise. This enables the lecturer to point where necessary to relevant sections of the exercise.
6. The aim of this exercise is to get students to reflect on the concept of 'admissibility' and the rules which govern it.
7. Tell the students at the outset that in commenting on the various numbered extracts, they are to assume that
 - Each extract contains evidence relevant to an issue in the proceedings in which the affidavit containing the extract is used.
 - Each deponent, and the maker of any previous representation of which evidence is given, is competent. (See Evidence Act s 61(1) and (3))
 - Each extract occurs in **civil** proceedings – different considerations may apply in criminal proceedings. (See, for example, s73)
8. Students are asked to comment on each extract in turn, to say whether the evidence contained in it is admissible or not, and why. At this stage the lecturer simply listens to the students, and encourages different

views. To obtain maximum benefit from the exercise, the students should be asked to write brief notes on the discussion. At the end of the session, that is, after presentation of the Affidavit Drafting Guide, revisit Affidavit Class Exercise 1 with the lecturer giving answers to the question whether, and why, each extract is admissible.

9. In what follows, the comments on each extract in Affidavit Class Exercise 1 are to be taken as a guide only. Different lecturers may have different views on the admissibility or otherwise of a particular extract. This can be useful in teaching, if somewhat confusing initially, as students can come to realise that in 'real life' situations, there can be lengthy and difficult arguments about the admissibility of a piece of evidence. **The bold section is the relevant extract from Affidavit Class Exercise 1.** Suggested comments by lecturers are in square brackets.

Extract 1. My parents were married on 24 July 1962, a year to the day before I was born.

[Admissible as an exception to the Hearsay Rule – see s 73(1). Prior to the enactment of the Evidence Act, a technically minded advocate could object evidence given by a witness as to his age or date of birth on the grounds that it was hearsay. This section puts an end to the possibility, in civil proceedings, of such an often-trivial objection.]

Extract 2. In April last year, my friend Annie James said to me that she saw the respondent husband in the pub with my children.

Assume

- (a) that Annie James died 3 weeks before the affidavit was sworn
- (b) that Annie James still lives next door to the deponent, but has not been called to give evidence
- (c) that Annie James has made an affidavit in the proceedings.

[Evidence of what Annie told the witness out of court is hearsay. In these circumstances, it is first-hand hearsay. See s 62, which is a significant amendment to the common law. This extract provides the opportunity for an analysis of s 62.

- a. In these circumstances, as Annie, the maker of the previous representation ('I saw your husband in the pub ...etc) is unavailable to give evidence, the witness's evidence is admissible as an exception to the hearsay rule, s 63(1)

Note – If the witness wants to give this evidence she must give notice to the other side. See s 67.

Note – Would there still be an objection to Extract 2 on the basis of form – i.e. that the witness's evidence of Annie's previous representation should have been given in direct speech?

- b. This is probably not admissible as an exception to the hearsay rule as the witness might have difficulty proving that it would cause undue expense or undue delay or would not be reasonable to call Annie. See s 64(1) and (2). There may be special circumstances, of course, such that Annie is very ill in bed. See also **Notes** to (a)
- c. Where Annie is available, and may or may not be called to give evidence, this would be admissible as an exception to the hearsay rule provided that the fact that Annie saw the husband in the pub was 'fresh in her memory' when she reported it to the witness. For a discussion of the interpretation to be given to this phrase, see *Commonwealth of Australia v McLean* (1997) 41 NSWLR 389, and *Antoniadis v TCN Channel Nine Pty Ltd*, unreported, NSW Supreme Court per Levine J, 14 March 1997. The decisions in these cases do not appear to be consistent. In the first one, the Court of Appeal held that an event which happened 34 years before the witness gave evidence of it was still 'fresh in his memory' - in the latter, 18 months was held to be too long.]

Extract 3. Martin Evans said to me last night 'I cannot lie to you. I did the robbery I've been charged with'.

[The fact that Martin said to the witness 'I cannot lie' etc. is admissible as an exception to the hearsay rule, provided the conditions referred to above are met. The issue is whether what Martin said is admissible as evidence of the truth of the fact that he did the robbery. Sections 81 and 82 allow the evidence of Martins admission to be admissible as an exception to the hearsay rule provided the witness actually 'saw, heard or otherwise perceived' Martin make the admission.]

Extract 4. Annie James told me last night that Martin Evans told her at lunchtime yesterday that he had done the robbery he has been charged with.

[The evidence of the witness that Annie reported to her what Martin said (and one would think that what Annie said would have to be reported in direct speech to be admissible) is admissible, but the content of what Martin said is not admissible as an admission as it is not first hand hearsay. See comments on Extract 3.]

Extract 5. To the best of my knowledge and belief the mother has never had any fixed place of abode and is always on the move. She would be unable to provide adequate physical care for the child.

[Order 30 Rule 2A (1b)(2) allows, as an exception to the hearsay rule in interim and interlocutory proceedings, evidence made 'on information and belief' provided the witness gives the 'source and ground' of that belief. The drafting of that rule is obscure. It seems to suggest that evidence which

is admissible in accordance with the rule will begin 'I am informed (by X) and verily believe that ...' which is an outdated piece of 'legalese'. Nor is it clear what the difference is between 'source' and 'ground'. A clearer expression of what is presumably the same point occurs in s 75 of the Evidence Act – 'In an interlocutory proceeding' (but query whether this includes an interim proceeding) the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source'. This extract, however, does not come within the exception, as the source of the witness's belief is not adduced. Moreover, what follows is merely the witness's opinion. It is also a meaningless generalisation. What do 'never' and 'always' mean? The expression 'fixed place of abode' is archaic, and would probably not reflect the kind of language the witness would use. The second sentence is inadmissible for the same reason; it is an opinion, conclusion or submission (these terms have much the same meaning) which, to be acceptable, must be a summary of admissible evidence of observations.]

Extract 6. I was informed by Mr Black, the child's teacher, and I verily believe, that the child has some learning difficulties.

['I verily believe' is meaningless padding, although some drafters may feel obliged to include it because of the wording of Order 30 Rule 2A(1b)(2). What Mr Black said should be put in direct speech, but even so the extract would not be admissible as evidence of the child's learning difficulties unless Mr Black is qualified to give an expert opinion on the point.]

Extract 7. The respondent father is a habitual user of amphetamines. He was incarcerated in November 1999.

[The first sentence expresses an opinion or conclusion. One of the warning flags is the use of value-laden but content-free words such as 'habitual', 'always' etc. The second sentence may be admissible depending on the rest of the context, but 'incarcerated' is probably not the word the witness would use. It sounds like one of those words a drafter might use in the hope of being considered 'learnedly legal'.]

Extract 8. The husband assaulted me on a number of occasions and as a result of my injuries I am unable to work.

[That the husband 'assaulted' the witness is a conclusion or opinion, but could be argued to be admissible by virtue of s 78. 'The opinion rule does not apply to evidence of an opinion expressed by a person if:

- (i) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and
- (ii) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.'

The same may apply to the second part of the sentence.]

Extract 9. The applicant mother is a very poor housekeeper and her house is always filthy.

[See above for comments on the use of such words as ‘very poor’ and ‘filthy’. It is arguable that ‘filthy’ could be saved by s 78. It is important to note, however, that without evidence of the observations on which the conclusion ‘filthy’ is based, the conclusion itself would be given little or no weight, even if technically admissible. This extract, and extract 8, could form the basis of an analysis of the distinction between ‘admissibility’ and ‘weight’.]

General comments to raise with students

10. There are two theories about drafting affidavits, and it is instructive to have the students discuss which they favour, and why. The first view is that the drafter should include everything in an affidavit which is likely to influence the judge in favour of their client, whether or not what is included is admissible. Proponents of this view argue that even if material is objected to and disallowed, it will still influence the judge subconsciously. In criminal proceedings, if oral evidence is led in accordance with this view, you run the risk of having the jury discharged and the trial aborted.

According to the second view, only admissible material should be included when drafting an affidavit. Arguably, while perhaps not including something the client is anxious to have aired, this approach is more in accordance with the practitioner’s duty of honesty to the court. As a matter of personal integrity, a drafter should be reluctant to include a piece of evidence which they could not justify if challenged. Because there may be differences of opinion about what is admissible, this second view does not compel the drafter to exclude anything which may be genuinely and rationally arguable, but would exclude anything which is not.

A practitioner who adopts the second view will come to earn the trust and respect of the judge as being both honest and competent, from which future clients will benefit.

Affidavit Drafting Guide

11. The lecturer has this document on overheads, and deals with each point in turn. Copies are handed out to students after they have completed the section on Affidavit Class Exercise 1. The material is presented in such a way as to enable the students to make notes on each point as the lecturer expands on it. Emphasis is placed on the importance, so far as formal requirements are concerned, of consulting the Rules of the court in which the hearing is conducted. In the case of the Family Law Rules, the most relevant ones are Rules 2 and 16. The formal requirements which are set out in the earlier part of the Affidavit Drafting Guide are self explanatory and there is no need to dwell on them. However, the lecturer should inform the students that they will be expected to comply with them when doing the re-drafting exercise. The only exception is that for the purpose of that exercise they do not need to include the cover sheet or the heading (i.e. the identification of the Court, Registry, matter number and parties' names).
12. It is worth emphasising that an affidavit is written evidence in chief, and is subject to all the same rules as oral evidence (not 'testimony') given from the witness box (not 'the stand'. Regrettably, the attempt to prevent the Americanisation of Court terminology is probably a lost cause .)
13. For the discussion of admissibility, the lecturer will have overheads setting out sections 55, 56, 59, 60, 62, 76 and 78. Copies of these sections, including a list of sections containing exceptions, are in Attachment 2. Each section may be explained in as much detail as time allows, and should include constant feedback from the students to ensure they understand the law involved.

Affidavit Class Exercise 2

14. The lecturer has an overhead of this exercise which should remain displayed throughout the discussion. The students also have a copy (Attachment 2)
15. The exercise is designed to help the students to understand s 60 of the *Evidence Act* which is not only quite complex in its operation, but is also substantially different from the common law.
16. As set out in the exercise, the facts are a summary of those in *Lee v The Queen* (1998) HCA 60 (30 September 1998), unreported but available from Austlii. Outline the facts with the students. It may take the students a little while to grasp the significance of the various statements, and it can help to schematise what happened. Lecturers will develop their own ways of doing this. For example, (where → means 'says to')

- Calin → police 1. "Calin → Lee '\$80'."
 2. "Lee → Calin 'shots'."
- Calin → court 1.
 2. Denied

At the trial, the prosecution sought to have the prior inconsistent statement – namely 1 and 2. – admitted.

The High Court held that whilst the prior inconsistent statement was admissible under s 60, the trial judge may have misled the jury by not clearly instructing them that it was admissible as evidence of the fact that Calin had earlier **told the police** both 1 and 2, but had denied 2 in court, but it was not admissible as evidence that Lee had fired shots. The police evidence of what Calin originally said to them, although hearsay, was admissible as an exception to the hearsay rule because it was admitted as relevant to Calin's credibility. Having been admitted for that purpose, it then became evidence of the fact that Lee **said to Calin** that he had fired shots. The fact 'intended to be asserted' by Calin in his statement to the police was that he said '\$80' to Lee and Lee said 'shots' to him. Calin did not intend to assert to the police that Lee fired shots – only that Lee said he did. Therefore the jury would have been misled if they had understood the judge to say or imply that Calin's original statement to the police was evidence of the fact that Lee fired shots.

This would seem to be a classic case where the trial judge would have been wise to invoke the provisions of s137 of the *Evidence Act* and refused to admit the evidence of the prior inconsistent statement on the grounds that 'its probative value is outweighed by the danger of unfair prejudice to the defendant'.

The High Court allowed the appeal and remitted the case for rehearing.

The questions set in the exercise are readily answerable by reference to the above outline.

The answer to question 3 is 'yes'. For a discussion of the differences see, for example, *Welsh* (1996) 90 A Crim R 364.

Revision Of Class Affidavit Exercise 1

17. At this stage, lecturers should return to the final discussion of Affidavit Class Exercise 1.

Affidavit Re-drafting Exercise

18. After a break, the class meets in computer laboratory for the re-drafting exercise, which they do in teams of two. Hand out Attachment 3. Each team must re-draft the badly drafted affidavit of Marlene Smith and Lester Smith.
19. While students are doing this exercise the lecturer should circulate and answer questions.
20. When the class concludes, remind students that the exercise must be completed in their own time and handed in at 9.30 am next morning.

Day 3

1. Check affidavits handed in to make sure all students have completed task. Re-distribute the students' work to the class so that each class member has someone else's work in front of them.
2. Explain that the next hour or so would be spent providing feedback on the students' attempts at re-drafting the badly drafted affidavits.
3. Ask students to make notes on the affidavits in front of them looking in particular for the following:
 - a. How does your affidavit begin? [Badly drafted affidavits have address and occupation in the wrong place]
 - b. Does your affidavit state "in the State of New South Wales"?
 - c. Is there an inconsistency as to whether the affidavit is being affirmed or taken on oath? Look at the front and end of affidavit to check this.
 - d. What strikes you about the look of your affidavit?
 - i. Are there any un-numbered paragraphs?
 - ii. Are there any unsigned jurats?
 - iii. Are any affidavits not dated?
 - iv. Does the name of the solicitor/barrister/litigant who prepared or settled the affidavit appear after the jurat?
 - e. How does your affidavit start? Does it identify who the deponent is? Does it identify the part the deponent plays in the proceedings? For example "I am the applicant..." or "I am the doctor who treats the respondent ...".
 - f. Is the date of birth and age given? Is this hearsay? [Would fall within s 73 Evidence Act exception]
 - g. Does your affidavit take a chronological approach? Is there any other logical sequence which the evidence, or perhaps parts of it, could follow? [Headings could be used which accord with the factors from the Act or Rules to be addressed: for example, *'The availability of a court to hear the proceedings'* *'The convenience of the parties'* and so on.].

- h. Does your affidavit state when the decree became absolute rather than just the date of the divorce? This is relevant because time runs from the date of the decree absolute.
 - i. Does anyone have any conversations in their affidavit? How have they been expressed? Are they in direct speech or third person?
 - j. Can anyone detect any hearsay in their affidavits?
 - k. Does anyone have one of the deponents giving their belief? For example, Marlene Smith stating: "It was my belief that it would not matter". Can you do this given that it is her state of mind or opinion? [It is opinion but it is there not to prove the truth of what she believed, rather her motivation for why she did not do something earlier].
 - l. The last paragraph of Marlene Smith's badly drafted affidavit states: "...but I should think he is in a better financial position than I am." Does anyone have this in their affidavits? What is wrong with it? [It is probably irrelevant and is opinion. It does not come under an exception to the opinion rule].
4. Ask for affidavits to be handed back to their authors.
 5. Hand out Attachment 4 which contains the 'sample answer' affidavits. Ask students to spend 10 minutes comparing the sample affidavits with their own work, and make notes and comments on their work.
 6. Before students break, request they form different teams of two, one for the applicant and one for the respondent and divide them into groups of six or eight. Ask students to go and prepare for that afternoon, the application for leave to apply out of time. Remind them they will have to closely analyse the application, response and affidavits in the matter. They are to rely on the affidavits in Attachment 4. Inform students where their group will have their hearing and the start time. Remind them to be punctual. Remind them that the class will re-group after the hearings to view the video of the application they will have just done.
 7. Students then go and prepare for hearing the application on which the affidavit drafting exercise was based.
 8. Set up six rooms with tables arranged as if it were a courtroom.
 9. Guest practitioners will have been arranged well in advance. Provide them with a copy of the activity plan and the documents relating to the hearing (Attachment 4). Provide them with a list of the names of the students appearing before them. Ask guests to make notes of feedback to give to students at the end of each application. Ensure guests know where to go and where to meet up at the end of exercise.
 10. Whilst exercises are being conducted, lecturer should circulate and sit in on hearings to ensure everything is running smoothly. Lecturer can also contribute to feedback sessions at the end of each hearing.
 11. In advance of the hearings, arrange a student from each group to thank their guest when they conclude.
 12. After these hearings re-group in lecture theatre to view video of out

of time application. Ask students to make notes of what was effective and what was not. If there is sufficient time (although students will be quite tired by this point), the video can be analysed in a fashion similar to that on Day 1, however not in as much detail. After viewing the video lecturer leads a short discussion asking students to comment on whether their approach differed greatly from the counsel on the video and if so, in what respects. Discuss which is more effective. It is useful if guest lecturers can stay for the viewing of the video as they can provide valuable commentary and comparisons.

Attachment 1

Advocacy Exercise 1 - Kennedy and Kennedy Change of Venue

(will be handed out the day before Exercise 1)

1. Application by Ann Kennedy for change of venue
 2. Response by Andrew Kennedy
 3. Affidavit of Ann Kennedy
 4. Affidavit of Beverley Campbell (Ann Kennedy's solicitor)
 5. Affidavit of Andrew Kennedy
 6. Affidavit of Jackson Riley (Andrew Kennedy's solicitor)
 7. Order 27 rules 1, 2 and 3 Family Law Rules
 8. Feedback sheet
-

Application by Ann Kennedy for Change of Venue

1. That the venue for the hearing of the application by the respondent husband for parenting orders and settlement of property be changed from the Sydney Registry of the Family Court to the Newcastle Registry of the Family Court for hearing on circuit in Coffs Harbour.
 2. That the respondent husband pay the costs of and incidental to this application.
-

Response by Andrew Kennedy

1. That the applicant wife's application for change of venue be dismissed.
 2. That the applicant wife pay the costs of and incidental to this application.
-

Affidavit of Ann Kennedy

I, Ann Marie Kennedy of 4 Hillside Crescent, Coffs Harbour in the State of NSW, full time mother, affirm:

1. I am the applicant for Change of Venue, and the respondent to the application filed by the respondent husband for contact orders and orders for settlement of property.
2. I was born on 25 April Yr-35 and I am 34 years old. The husband Andrew Kennedy ('Andrew') and I were married on 3 June Yr-10 and separated on 5 December Yr-2 when I left the home in which we were living in Balgowlah Heights in Sydney and moved to rented accommodation in Coffs Harbour. We are not yet divorced.

3. There are 2 children of the marriage, Angela born 5 March Yr-9 (8) and Marcus born 24 June Yr-6 (5). Marcus has a number of physical problems and is confined to a wheelchair. He has no mental disability and is enrolled to attend the local primary school from the beginning of next year, Yr+1. This is the school which Angela also attends.
4. One of the orders which Andrew seeks is that he have contact with both children for one long weekend each term, including overnight, in Coffs Harbour, and for one week of each school holidays in Sydney. In my response, I have sought an order that Andrew's contact with Marcus not include overnight. Moreover, whilst I do not oppose Andrew's application for Angela to spend a week of each school holiday period with him, I oppose that same order he has sought in relation to Marcus.
5. In support of my case, I propose to call an expert witness, Marcus's specialist, whose practice is in Coffs Harbour. I also intend to seek an order for a family report to enable a counsellor to assess Marcus's relationship with Andrew, and Marcus's wishes about holidays in Sydney.
6. In his application for settlement of property, Andrew seeks an order that he purchase my share, whatever the Court determines it to be, in our former matrimonial home at Balgowlah Heights. I am seeking an order for the sale of the home, and a division of the proceeds of the sale.
7. Since Marcus was born I have not worked in paid employment, nor do I intend to do so in the foreseeable future. I spend all my time caring for the children. As a result of the nature of Marcus's health problems, I spend about 5 hours each day helping him to exercise his legs and encouraging him to try to walk. I receive considerable support from a physiotherapist from the North Coast Area Health Service. The same service has also provided respite care to enable me to take Angela on a long weekend holiday on 3 occasions since we came to live in Coffs Harbour, as I need to make sure that I spend some time with her in view of the amount of time I have to spend with Marcus.
8. My income consists of \$50 per week, being a partial supporting parent's benefit, \$160 per week disability support allowance for Marcus and \$450 a week child support from Andrew. After paying rent of \$120 a week, and food, clothing and education expenses for the family, I am not able to save anything from my weekly income.
9. I do not have the financial resources to travel to Sydney for the hearing of Andrew's application, nor do I wish to leave the children for the period of the hearing. I have instructed a solicitor in Coffs Harbour, and I would have to pay extra costs if she represented me in Sydney, or briefed a barrister to do so. I would also have to pay for Marcus's specialist to travel to Sydney. If the family report is prepared in Sydney, the children and I will all have to make the journey to Sydney for interview with the counsellor. This would cause hardship to me and to the children.

Affirmed by the deponent
In Coffs Harbour on 24 January
Yr0 before me

.....

Beverley Campbell, solicitor
This affidavit was prepared by Beverley Campbell, solicitor.

Affidavit of Beverley Campbell, solicitor for the applicant wife

I, Beverley Campbell of Beverley Campbell and Associates, 55 Main Street, Coffs Harbour in the State of NSW, make oath and say:

1. I am the solicitor for the wife in these proceedings, Ann Kennedy ('Mrs Kennedy'). I have taken instructions from her in relation to a response to her husband's application for contact with the parties' 2 children, and for settlement of property, and also for her application for a change of the venue of the hearing of the husband's application from the Sydney Registry of this Court to the Newcastle Registry for hearing in Coffs Harbour.
2. If the matter is heard in Coffs Harbour, I will be appearing for Mrs Kennedy, and I estimate that the hearing will last one and a half days. In that event, my costs for the preparation and hearing of the substantive matter will be approximately \$5,000. If the matter were heard in Sydney, I would have to add the costs of my travel and accommodation in Sydney, which I estimate to be a further \$1,500 (approximately). If, instead of travelling to Sydney myself, I briefed counsel to appear for Mrs Kennedy, I estimate the additional costs of a one and a half day hearing would be approximately \$3,500.
3. Mrs Kennedy is not in receipt of legal aid.
4. I have spoken to Dr Francis Day who is Marcus Kennedy's specialist paediatrician. He said to me, in effect, 'If I write a report on Marcus, and appear in Coffs Harbour court, I will charge \$2,000. If I have to travel to Sydney I will charge \$3,500 plus travel, and also accommodation if I have to stay overnight, in order to cover my expenses and the work I would lose during the hearing.'
5. I intend to seek an order for the preparation of a family report for the hearing of the matter, and there is a counsellor of this court working permanently in Coffs Harbour. She could interview the parties and the children in Coffs Harbour, and appear at the hearing. On 12 January I spoke by telephone to the Assistant Registry Manager at the Newcastle Registry who said, in effect, 'It is not the Court's policy to pay the expenses of a court counsellor to travel between registries. If you wanted a Coffs Harbour counsellor to give evidence in Sydney, it would be up to the parties to pay her expenses'.
6. In the course of the same conversation, I said to the Assistant Registry

Manager ‘I have been instructed by a client to seek a change of venue from Sydney to Newcastle for a one and a half day contact and property matter. When could it be heard in Coffs Harbour?’ He replied ‘We only have one circuit a year to Coffs Harbour, and that will be in August this year. It could most probably be heard then if the transfer is ordered in the next few weeks.’

- 7. Last Friday, January 18, I spoke by telephone with Mr Jackson Riley, the solicitor for the husband in this matter. He said to me, in effect, ‘The Kennedy matter can be heard in Sydney in early March’. If that were to happen, there would not be time to prepare a family report. It is my professional opinion that a family report would be of great assistance to the court in this matter, and I will be making an application that one be prepared by the court counsellor in Coffs Harbour.
- 8. I support Mrs Kennedy’s application for change of venue from the Sydney Registry to the Newcastle Registry. If the application is successful, the matter will be listed for hearing in Coffs Harbour in August Yr0.

Sworn by the deponent
At Coffs Harbour on 24 January
Yr0 before me

.....
Alexander Hrostovsky, solicitor
This affidavit was prepared by Beverley Campbell, solicitor

Affidavit of Andrew Kennedy

I, Andrew James Kennedy, of 18 Mackinnon Place, Balgowlah Heights in the State of NSW, primary school teacher, make oath and say:

- 1. I am the applicant for orders for contact and property settlement, and the respondent to an application by my wife Ann Kennedy (‘Ann’) for a change of venue of that application. I do not agree to the hearing taking place in Coffs Harbour.
- 2. I was born on 31 July Yr-34 and I am 33. Ann and I were married on 3 June Yr-10 and separated on 5 December Yr-2 when Ann left our home and moved with our 2 children to Coffs Harbour. Our children are Angela who is 8 and Marcus who is 5.
- 3. I have seen the children on only 3 occasions since they have been living in Coffs Harbour, once when Ann brought them to Sydney and stayed for 3 days in the home at Balgowlah, and twice when I have travelled to Coffs Harbour. About a month ago, I rang Ann and said, in effect, ‘I would like to see the children during the January school holidays. I’d like them to come home, but if that can’t be arranged, I’ll come to Coffs Harbour and stay in a caravan park with the children’. Ann said, in effect ‘I don’t want Marcus to go to Sydney again. He was very upset last time and it took me about 2 weeks to settle him down.

You can see them here, but I'd like you to bring Marcus back home each night.' I said 'If that's your attitude, I'll take what I can get, but I want my application heard as soon as possible'.

4. Marcus has a disability of which I am well aware. He walks only with difficulty, and for some of the time he needs a wheelchair. However, he is able to move about the house, whether at my home or Ann's, without the need for the wheelchair.
5. I know that Ann spends a number of hours a day giving Marcus exercises to help with his mobility. However, she has been able on occasions to leave him with carers from the local Health Service in order to go away with Angela. She would be able to leave him with the same carers to come to Sydney for the hearing of my application.
6. I speak with Dr Day, Marcus's paediatrician, at least once a month by telephone, and I have also spoken to him on the 2 occasions I have visited Coffs Harbour to see the children. I have instructed my solicitor that if Ann obtains a report from Dr Day for the hearing, I will not seek to have him cross examined.
7. If the court grants Ann's application for the preparation of a Family Report, I am willing to travel to Coffs Harbour for interview with the court counsellor. I will also pay expenses for the counsellor to travel to Sydney for the hearing on condition that Ann's solicitor undertakes to the court prior to the hearing that it is necessary for her to cross examine the counsellor, and provided that this is borne out by the cross examination at the hearing.
8. The main reason I wish my application to be heard in Sydney is that I have been told by my solicitor Jackson Riley (and in this regard I rely on his affidavit filed in these proceedings) that the matter can be heard more quickly in this Registry than in Coffs Harbour. This is a critical issue for me, as I wish to resume overnight contact with my children, and to give them the opportunity to return for holidays to the matrimonial home where they spent all their lives until the move to Coffs Harbour.
9. For the sake of the children, and to enable to visit the Balgowlah home in the future, I am seeking to purchase Ann's interest in the home, whatever the Court determines it should be, rather than sell it, as Ann wishes. Moreover, as the home is presently mortgaged, I wish to have the opportunity to continue to pay off the mortgage and retain the home in the hope of a future rise in prices as this has always been the trend in house prices in Sydney. I will need to call a real estate valuer as a witness to enable the court to make a fair and equitable order for settlement of property. This valuer will have to be someone from the Balgowlah area who is familiar with values in the area. It would be a waste of money for him to travel to a hearing in Coffs Harbour.

Sworn by the deponent
In Balgowlah on 5 February

Yr0 before me

.....

Jackson Riley, solicitor

This affidavit was prepared by Jackson Riley, solicitor.

Affidavit of Jackson Riley, solicitor

I, Jackson Riley, of Riley, McIntosh and Lewis, 14 Balgowlah Road, Balgowlah, solicitor, make oath and say:

1. I am the solicitor for the husband, Andrew Kennedy, ('Mr Kennedy') and I am acting for him both in his substantive application for contact and settlement of property, and in his wife's application for a change of the venue of the hearing from the Sydney Registry of this Court to the Newcastle Registry, for hearing in Coffs Harbour.
2. On 17 January Yr0 I rang the Contested List Clerk in the Sydney Registry, and said to her, in effect, 'I am the solicitor acting for Mr Kennedy in the matter of Kennedy and Kennedy, and I would like to know when the matter is likely to be heard if it remains in the Sydney Registry. The first directions hearing is on 22 February.' She said 'If it is ready for hearing, it will be given a hearing date in the first week of March this year.'

Sworn by the deponent

At Sydney on 24 January

Yr0 before me

.....

Christine Lewis, solicitor.

This affidavit was prepared by Jackson Riley, solicitor.

Advanced Litigation Practice 2002

In The Family Court Of Australia

Feedback Sheet For The Advocacy Exercise

Student Legal Practitioner: _____

Where Applicable:	Poor		Average		Excellent
1. Delivery – can be heard clearly	1	2	3	4	5
2. Structure of submissions	1	2	3	4	5
3. Ability to cope with questions from the Bench	1	2	3	4	5
4. Uses law & practice and procedure appropriately	1	2	3	4	5
5. Court etiquette	1	2	3	4	5
6. Overall	1	2	3	4	5

Specific Comments:

Name of person giving feedback:

Date: _____

Family Law Rules - Order 27 Rule 1

Change of venue

1. (1) A party who has filed an application or response in proceedings in a court exercising jurisdiction under the Act may, by application filed in the filing registry, apply to have the proceedings heard:
 - (a) in another registry of that court; or
 - (b) in another court exercising jurisdiction under the Act.
- (2) A party who has filed an application or response in proceedings in the Supreme Court of a State or Territory may, by application filed in that Court, apply to have the proceedings heard at a particular place within that State or Territory.

Family Law Rules - Order 27 Rule 2

Applications under subsection 40 (6), 41 (4A) or 46 (3A) of the Act

2. An application under subsection 40 (6), 41 (4A) or 46 (3A) of the Act shall be in accordance with Form 8 and the applicant shall file with the application an affidavit in support.

Family Law Rules - Order 27 Rule 3

Matters to be considered

3. (1) In considering an application for an order under rule 1 or under subsection 40 (6), 41 (4A) or 46 (3A) of the Act, the court shall have regard to:
 - (a) the availability of a court to hear the proceedings;
 - (b) the convenience of the parties;
 - (c) the limiting of expense and the costs of the proceedings; and
 - (d) any other relevant matter.
- (2) In making an order under rule 1, the court may impose such terms and conditions as it thinks fit.

Attachment 2 -

Affidavit Class Exercises And Drafting Guide

(will be handed out the morning of this exercise, on Day 2)

1. Affidavit Class Exercise 1
 2. Sections 55, 56, 59, 60, 62, 76 and 78 of the Evidence Act
 3. Affidavit Class Exercise 2
 4. Affidavit Drafting Guide
-

Affidavit Class Exercise 1

Assume that the following extracts occur in various affidavits. What, if anything, is wrong with them?

1. My parents were married on 24 July 1962, a year to the day before I was born.
 2. In April last year, my friend Annie James said to me that she saw the respondent husband in the pub with my children.
Assume:
 - (a) that Annie James died 3 weeks before the affidavit was sworn
 - (b) that Annie James still lives next door to the deponent, but has not been called to give evidence
 - (c) that Annie James has made an affidavit in the proceedings.
 3. Martin Evans said to me last night 'I cannot lie to you. I did the robbery I've been charged with'.
 4. Annie James told me last night that Martin Evans told her at lunchtime yesterday that he had done the robbery he has been charged with.
 5. To the best of my knowledge and belief the mother has never had any fixed place of abode and is always on the move. She would be unable to provide adequate physical care for the child.
 6. I was informed by Mr Black, the child's teacher, and I verily believe, that the child has some learning difficulties.
 7. The respondent father is a habitual user of amphetamines. He was incarcerated in November 1999.
 8. The husband assaulted me on a number of occasions and as a result of my injuries I am unable to work.
 9. The applicant mother is a very poor housekeeper and her house is always filthy.
-

Evidence Act 1995 Sect 55

PART 3 .1 Relevance

55 Relevant evidence

- (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
 - (2) In particular, evidence is not taken to be irrelevant only because it relates only to:
 - (a) the credibility of a witness; or
 - (b) the admissibility of other evidence; or
 - (c) a failure to adduce evidence.
-

Evidence Act 1995 Sect 56

56 Relevant evidence to be admissible

- (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
 - (2) Evidence that is not relevant in the proceeding is not admissible.
-

Evidence Act 1995 Sect 59

PART 3 .2 Hearsay DIVISION 1 The hearsay rule
59 The hearsay rule- exclusion of hearsay evidence

- (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.
- (2) Such a fact is in this Part referred to as an asserted fact .
- (3) Subsection (1) does not apply to evidence of a representation contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Note: Specific exceptions to the hearsay rule are as follows:

- * evidence relevant for a non-hearsay purpose (section 60);
- * first-hand hearsay:
 - civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64);
 - criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66);
- * business records (section 69);
- * tags and labels (section 70);
- * telecommunications (section 71);
- * contemporaneous statements about a person's health etc. (section 72);
- * marriage, family history or family relationships (section 73);
- * public or general rights (section 74);
- * use of evidence in interlocutory proceedings (section 75);
- * admissions (section 81);
- * representations about employment or authority (subsection 87(2));
- * exceptions to the rule excluding evidence of judgments and convictions (subsection 92(3));
- * character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

Examples:

- (1) D is the defendant in a sexual assault trial. W has made a statement to the police that X told W that X had seen D leave a night club with the victim shortly before the sexual assault is alleged to have occurred. Unless an exception to the hearsay rule applies, evidence of what X told W cannot be given at the trial.
- (2) P had told W that the handbrake on W's car did not work. Unless an exception to the hearsay rule applies, evidence of that statement cannot be given by P, W or anyone else to prove that the handbrake was defective.
- (3) W had bought a video cassette recorder and written down its serial number on a document. Unless an exception to the hearsay rule applies, the document is inadmissible to prove that a video cassette recorder later found in D's possession was the video cassette recorder bought by W.

Evidence Act 1995 Sect 60**60 Exception: evidence relevant for a non-hearsay purpose**

The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

Evidence Act 1995 - Sect 62**62 Restriction to “first-hand” hearsay**

- (1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.
 - (2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.
-

Evidence Act 1995 Sect 76**PART 3 .3 Opinion 76 The opinion rule**

- (1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.
- (2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Note: Specific exceptions to the opinion rule are as follows:

- * summaries of voluminous or complex documents (subsection 50(3));
- * evidence relevant otherwise than as opinion evidence (section 77);
- * lay opinion (section 78);
- * expert opinion (section 79);
- * admissions (section 81);
- * exceptions to the rule excluding evidence of judgments and

convictions (subsection 92(3));

* character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

Examples:

- (1) P sues D, her doctor, for the negligent performance of a surgical operation. Unless an exception to the opinion rule applies, P's neighbour, W, who had the same operation, cannot give evidence of his opinion that D had not performed the operation as well as his own.
 - (2) P considers that electrical work that D, an electrician, has done for her is unsatisfactory. Unless an exception to the opinion rule applies, P cannot give evidence of her opinion that D does not have the necessary skills to do electrical work.
-

Evidence Act 1995 Sect 78

78 Exception: lay opinions

The opinion rule does not apply to evidence of an opinion expressed by a person if:

- (a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and
 - (b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.
-

Affidavit Class Exercise 2

Romeo Calin met Nathan Lee in the street. He said to Lee 'Give me the \$80 you owe me'. Lee said 'Leave me alone, because I'm running, because I fired 2 shots... I did a job, and the other guy with me bailed out'.

The police took a written statement from Calin which included the circumstances of his meeting with Lee, and repeated the above conversation.

Lee was charged with being armed with a pistol, and assaulting Mrs Jones with intent to rob her. At Lee's trial, Calin gave oral evidence to the effect that he had seen Lee in the street and asked for the money Lee owed him, but that there had been no other conversation between them. The police tendered Calin's written statement.

At Lee's ultimate appeal to the High Court, one of the issues was the admissibility of Calin's written statement at the trial, and, if admissible, what it was evidence of.

Reading

Lee v The Queen (1998) HCA 60 (30 September 1998). You will find this in Austlii.

Evidence Act 1995 (NSW) Sections 59, 60, 137. (These sections are the same as those in the Commonwealth Evidence Act)

Questions

1. Was Calin's written statement admissible at the trial?
 2. If so, what was it evidence of?
 3. Would your answer to 2. have been different, and if so, in what way, if the case had been decided before the enactment of the Evidence Act?
 4. Was there any admissible evidence in Calin's written statement to support the charge that Lee was armed with a pistol?
 5. Justify your answer to 4.
-

Affidavit Drafting Guide

An affidavit is the sworn, written evidence of a party, or other witness, made for the purpose of a Court hearing (it is different to a statutory declaration). The affidavit should meet the following criteria:

1. An affidavit must be in the form prescribed by the appropriate Court Rules. ALWAYS CHECK THESE WHEN DRAFTING AN AFFIDAVIT.

In particular, look for:

- a. Page size – usually A4, one side only.
 - b. Special requirements for margin widths and line spacing.
 - c. Whether the affidavit must be typed, or whether it may be hand-written.
 - d. Numbering of paragraphs.
 - e. Numbering of pages.
 - f. The jurat – requirements for swearing or affirming.
 - g. Who may witness an affidavit? Check the Oaths Act.
 - h. Signing – who and where?
 - i. The need to identify who prepared/settled the affidavit.
 - j. Alterations after engrossing – must be initialled.
 - k. Requirements concerning blind or illiterate deponents.
2. An affidavit must be expressed in the first person.
 3. Conversations reported in an affidavit must be in direct speech.
 4. All evidence in an affidavit must be ADMISSIBLE.
 5. An affidavit must contain ALL the evidence the witness wishes to put before the Court.
 6. Use a simple, conversational style – avoid words or expressions the deponent would not normally use and avoid slang.
 7. Evidence should be set out in logical sequence – think ‘chronological’ first.
 8. An affidavit must be:
 - a. Filed at the appropriate Registry in accordance with the Rules, or any orders made relating to time of filing.
 - b. Served on all other parties, and anyone else specified in the Rules, or ordered by the Court.

Attachment 3

Affidavit Drafting Exercise – Smith And Smith: Out Of Time

(will be handed out after class on affidavit drafting and before moving to computer laboratory for re-drafting exercise)

1. Application of Marlene Smith for leave to apply out of time
 2. Response by Lester Smith
 3. Badly drafted Affidavit of Marlene Smith – for redrafting
 4. Badly drafted Affidavit of Lester Smith – for redrafting
 5. Sections 44(3), 44(3AA) and 44(4) of the Family Law Act
-

Application by Marlene Smith for leave to apply for settlement of property

1. That the applicant be granted the leave of the Court to apply for settlement of property notwithstanding that more than 12 months have elapsed since the decree nisi of dissolution of her marriage to the respondent became absolute.
 2. That the parties do all acts and sign all documents necessary to place the former matrimonial home at 24 Valley View Parade, Berowra on the market for sale and that, after deduction of
 - a. Agents commission
 - b. All amounts outstanding on the mortgage
 - c. Outstanding rates and taxes
 - d. All expenses, including legal costs, reasonable associated with the sale, they divide the net proceeds of the sale so that the applicant receives 65% and the respondent receives 35%.
 3. That the respondent pay the applicant's costs of and incidental to this application.
-

Response by Lester Smith

1. That the applicant's application for leave of the Court to apply for settlement of property be dismissed.
 2. In the alternative, that the applicant transfer to the respondent the whole of her right, title and interest in the former matrimonial home at 24 Valley View Parade, Berowra upon payment by the respondent to the applicant of the sum of \$160,000.
 3. That the applicant pay the respondent's costs of and incidental to these proceedings.
-

Badly drafted Affidavit of Marlene Smith – for correction

I, Marlene Louise Smith, make oath and say:

I live at 2 Watson Street, Waratah and I am a part-time sales assistant.

I left Les on 28 February Yr-3. We had been living in our home at 24 Valley View Parade, Berowra. We were married on 28 August Yr-32 and I filed an application for divorce in April Yr-2 and told him at the time that we should sell the house (of which we are joint tenants) so that we could each have a share. Les agreed and said that he would see a solicitor to get everything worked out.

I was born on 16 March Yr-54 and am 53.

After we were divorced – it became absolute on 6 July Yr-2 - I told him that my solicitor told me we only had 12 months to sort out our property, and asked him what we should do. He told me that he would look after it and not to hassle him.

I rang him twice after that, once in September Yr-2 and once in January Yr-1 and asked him what he was doing about the house. I told him I needed the money and we only had 6 months left to go to court if we couldn't work something out. He told me that he had to replace the roof and paint the house before we could put it on the market and that he was doing the best he could. I wasn't very impressed to hear that Les remarried in February Yr-1 and they're living in our house. I feel that is quite bad taste on Les's part. He finally told me in May Yr-1 that he had put the house on the market and that the Hooker agent at Berowra said we could expect to get about \$350,000 which I thought was fair enough. He wanted me to go to the solicitor and sign the contract which I did about a week later. My solicitor was Henry Walker of Georgetown. I didn't believe we'd have to go to Court, so I didn't worry when the 12 months was up.

Les rang me in July Yr-1 and told me that he wouldn't accept the only offer we'd had on the house which was \$320,000 and that we should wait a bit longer. I couldn't believe it when he rang me in early August Yr-1 and said he wanted to take the house off the market as Val was going to lend him \$160,000 to buy my share. My solicitor told me I should get more than half and anyway, the house is worth more than \$320,000 in my opinion, with which my solicitor agrees. Les told me I'd have to take what he offered me and reminded me that it was too late to go to Court. I was pretty upset by what Les told me so I went to my solicitor and told him to apply for leave to apply for property settlement. I wanted the house sold, and I wanted to receive 65% of the proceeds of the sale.

In mid October Mr Walker's firm sent me a letter to say that he had died a week or so before and he had been their only Family Law specialist so I should retain the services of another solicitor - I no longer have the letter - so I saw my present solicitor Jeffrey Harrison and he filed my application on 24 January Yr0 and about a week after that Les rang again and told me that he was going to oppose my application which he thought was unnecessary as he was still prepared to pay me \$160,000 for my share , but I am not willing to accept Les's offer because when we separated I came to live in Newcastle to be near our daughter Rosemary who is 28 (our son Daniel is 25) and her son Philip who is 5. I've been renting since then from Jack and Kathie Long – a 'studio flat' at the back of their house in Waratah which (i.e. the studio flat) has one room containing a small kitchen area and a separate bathroom and shared laundry for which I pay \$70 a week rent and I also pay gas and electricity and my share of water usage.

I have a part-time job at a florist shop in Georgetown from which I earn \$420 a week and I have an interest in the house at Berowra and a small amount of furniture and a Ford Laser and nothing else. If I am not granted leave to seek an order for property settlement I will suffer hardship as I wish to buy a house with at least 2 bedrooms so that Philip can come and stay with me sometimes, and I intend to invest some money to supplement the small amount of superannuation I will receive from my present employer which I believe to be somewhat unfair as I will have to continue to work until I am 65 and I wish to have some security in my old age but the amount Les has offered me is not enough to achieve this. I don't know what his financial position is or whether he has any assets apart from our interest in our house, or superannuation, but I should think he is in a better financial position than I am.

Affirmed by Marlene Smith
On 12 February Yr0

Badly Drafted Affidavit of Lester Smith – for correction

I am Lester Bruce Smith and I live at 24 Valley View Parade, Berowra, NSW. I am a plumber and I was born on 3 August Yr-56 so I am 55.

Marlene and I were married on 28 August Yr-32 and Marlene left me without good reason. We were divorced on 6 July Yr-2 (decree absolute) and I oppose Marlene's application for leave to make an application for property settlement because I think it would be unfair in the circumstances, which I set out in this my affidavit.

I married Valerie Martin on 12 February Yr-1 and we have been living

since then in the house at Berowra.

We have 2 children Rosemary who is married with one child and lives in Newcastle and Daniel who works for a stockbroker and lives in Sydney.

When Marlene applied for a divorce, which I did not approve of, I intended to sell our home and pay her half the proceeds of the sale, but before I put the house on the market for sale in May Yr-1 it was necessary for me to do repairs, that is to say I had to replace the roof, which I was able to do myself, but it took me some months to complete it as I work full time for Marks Brothers Plumbers and I have worked for them for about 15 years. The materials for the roof cost me \$4,500 and I paid a labourer \$2,200 to help me. I also renewed some plumbing to the bathroom, and repainted the house inside and out. I estimate that the cost of materials for these jobs was about \$1,500, but I have not kept any record of what my labour was worth.

Some time in July Yr-1 I rang Marlene and told her that we had had an offer on the house for \$320,000 but that I didn't think that was enough and neither did the estate agent. I rang her again in early August and told her that Val was prepared to lend me \$160,000 to buy Marlene's share of the house, but Marlene refused, which I think was unreasonable of her. By that time the 12 months since our divorce had elapsed and I believed Marlene was not longer entitled to go to apply for property settlement and she had said nothing to me about it anyway, and I believed we would reach agreement, but I heard nothing further from her until I was served on 24 January Yr0 with a copy of her application filed on 24 January Yr0

Val and I made some improvements to the house and she paid to have a new kitchen installed – approximate cost \$9,000, and she also paid \$4,500 for a new carpet so it would cause hardship to both me and Val if Marlene was permitted to make a claim on the house in excess of what I have offered her.

Marks Brothers pay me about \$1,100 gross per week. I have an interest in the house, some furniture and personal effects and a Holden Commodore. Marks Brothers began contributing to a superannuation fund for me about 5 years ago, and I also contribute. If I were to retire not, I would receive about \$20,000 but I do not intend to retire until I am 65.

Affirmed by Lester Smith and

Witnessed by April Kingsley.

Family Law Act 1975 Sect 44**44 Institution of proceedings**

(1) Except as otherwise prescribed by the regulations or by the applicable Rules of Court, proceedings under this Act shall be instituted by application.

(1A) Proceedings under this Act for a decree of dissolution of marriage or nullity of marriage may be instituted by either party to the marriage or jointly by both parties to the marriage.

(1B) An application for dissolution of a marriage shall not, without the leave of the court granted under subsection (1C), be filed within the period of 2 years after the date of the marriage unless there is filed with the application a certificate in the form prescribed by the applicable Rules of Court:

(a) stating that the parties to the marriage have considered a reconciliation, with the assistance of a specified person or organization, being:

- (i) a family and child counsellor or an approved counselling organisation; or
- (ii) another suitable person or organisation nominated by the Principal Director of Court Counselling of the Family Court or by an appropriate officer of a Family Court of a State; and

(b) signed by that person or on behalf of that organisation, as the case may be.

(1C) Notwithstanding subsection (1B), if the court is satisfied that there are special circumstances by reason of which the hearing of an application for dissolution of a marriage should proceed notwithstanding that the parties have not considered a reconciliation with assistance of the kind referred to in subsection (1B), the court may:

- (a) if the application has not been filed – give leave for the application to be filed; or
- (b) if the application has been filed – at any time before or during the hearing of the application, declare that it is so satisfied;

and, where the court makes a declaration under paragraph (b), the application shall be deemed to have been duly filed and everything done pursuant to that application shall be as valid and effectual as if the court had, before the application was filed, given leave under paragraph (a) for

the application to be filed.

(2) Notwithstanding subsections (3) and (3A), a respondent may, in an answer to an application, include an application for any decree or declaration under this Act.

(3) Where, whether before or after the commencement of section 21 of the Family Law Amendment Act 1983 :

- (a) a decree nisi of dissolution of marriage has become absolute; or
- (b) a decree of nullity of marriage has been made;

proceedings of a kind referred to in paragraph (c) or (ca) of the definition of matrimonial cause in subsection 4(1) (not being proceedings under section 78 or 79A or proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) shall not be instituted, except by leave of the court in which the proceedings are to be instituted or with the consent of both of the parties to the marriage, after the expiration of 12 months after:

- (c) in a case referred to in paragraph (a) – the date on which the decree nisi became absolute; or
- (d) in a case referred to in paragraph (b) – the date of the making of the decree.

The court may grant such leave at any time, even if the proceedings have already been instituted.

(3AA) However, if such proceedings are instituted with the consent of both of the parties to the marriage, the court may dismiss the proceedings if it is satisfied that, because the consent was obtained by fraud, duress or unconscionable conduct, allowing the proceedings to continue would amount to a miscarriage of justice.

(3A) Notwithstanding subsection (3), where, whether before or after the commencement of section 21 of the Family Law Amendment Act 1983 :

- (a) a decree nisi of dissolution of marriage has become absolute or a decree of nullity of marriage has been made; and
- (b) the approval under section 87 of a maintenance agreement between the parties to the marriage has been revoked;

proceedings of a kind referred to in paragraph (c) or (ca) of the definition of matrimonial cause in subsection 4(1) (not being proceedings under section 78 or 79A or proceedings seeking the discharge, suspen-

sion, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) may be instituted:

(c) within the period of 12 months after:

- (i) the date on which the decree nisi became absolute or the date of the making of the decree of nullity, as the case may be; or
- (ii) the date on which the approval of the maintenance agreement was revoked;

whichever is the later; or

(d) with the leave of the court in which the proceedings are to be instituted;
and not otherwise.

(3B) Despite subsection (3), if, whether before or after the commencement of Schedule 2 to the Family Law Amendment Act 2000 :

(a) a decree nisi of dissolution of marriage has become absolute or a decree of nullity of marriage has been made; and

(b) a financial agreement between the parties to the marriage has been set aside under section 90K or found to be invalid under section 90KA; proceedings of a kind referred to in paragraph (c) or (ca) of the definition of matrimonial cause in subsection 4(1) (not being proceedings under section 78 or 79A or proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) may be instituted:

(c) within the period of 12 months after the later of:

- (i) the date on which the decree nisi became absolute or the date of the making of the decree of nullity, as the case may be; or
- (ii) the date on which the financial agreement was set aside, or found to be invalid, as the case may be; or

(d) with the leave of the court in which the proceedings are to be instituted;

and not otherwise.

(4) The court shall not grant leave under subsection (3) or (3A) unless it is satisfied:

- (a) that hardship would be caused to a party to the relevant marriage or a child if leave were not granted;
- or

(b) in the case of proceedings in relation to the maintenance of a party to a marriage—that, at the end of the period within which the proceedings could have been instituted without the leave of the court, the circumstances of the applicant were such that the applicant would have been unable to support himself or herself without an income tested pension, allowance or benefit.

Attachment 4

Advocacy Exercise 2 - Smith And Smith: Out Of Time

(will be handed out on morning of Day 3, after re-drafted affidavits have been reviewed in class)

1. Application by Marlene Smith for leave to apply out of time
 2. Response by Lester Smith
 3. Affidavit of Marlene Smith sworn 12 February Yr0
 4. Affidavit of Lester Smith affirmed 12 February Yr0
 5. Feedback sheets to be used by students **
-

Application by Marlene Smith for leave to apply out of time for settlement of property

1. That the applicant be granted the leave of the Court to apply for settlement of property notwithstanding that more than 12 months have elapsed since the decree nisi of dissolution of her marriage to the respondent became absolute.
 2. That the parties do all acts and sign all documents necessary to place the former matrimonial home at 24 Valley View Parade, Berowra on the market for sale and that, after deduction of
 - a. Agents commission
 - b. All amounts outstanding on the mortgage
 - c. Outstanding rates and taxes
 - d. All expenses, including legal costs, reasonable associated with the sale, they divide the net proceeds of the sale so that the applicant receives 65% and the respondent receives 35%.
 3. That the respondent pay the applicant's costs of and incidental to this application.
-

Response by Lester Smith

1. That the applicant's application for leave of the Court to apply for settlement of property be dismissed.
 2. In the alternative, that the applicant transfer to the respondent the whole of her right, title and interest in the former matrimonial home at 24 Valley View Parade, Berowra upon payment by the respondent to the applicant of the sum of \$160,000.
 3. That the applicant pay the respondent's costs of and incidental to these proceedings.
-

Affidavit of Marlene Smith

I, Marlene Louise Smith, of 2 Watson Street, Waratah in the State of NSW, part-time sales assistant, make oath and say:

1. I am the applicant.
2. I was born on 16 March Yr-54 and am 53 years old.
3. I was married to the respondent Lester ('Les') Smith on 28 August Yr-32. There are 2 children of the marriage, Rosemary (28) and Daniel (25). The decree nisi of my divorce from Les became absolute on 6 July Yr-2
4. Les and I separated on 28 February Yr-3 when I left our home at 24 Valley View Parade, Berowra.
5. At about the time I filed the application for dissolution of marriage, which was in early April Yr-2 I said to Les, in effect, 'I think we should sell the house so we can each have a share'. Les said, in effect, 'I agree. Don't worry, I'll see a solicitor and get everything worked out.' Les and I own the house as joint tenants.
6. After the divorce, I said to Les, in effect, 'My solicitor has told me that we only have 12 months to sort out our property. What are we going to do?' Les said, in effect, 'I told you I'd look after it. Don't hassle me.'
7. On 2 subsequent occasions, once in September Yr-2 and once in January Yr-1, I said to Les, in effect, 'What are you doing about the house? You know I need some money from it, and we only have 6 months left to go to Court if we can't work something out.' On both occasions, Les replied something like 'I've got to replace the roof and paint the house before we can put it on the market. I'm doing the best I can.'
8. In February Yr-1 Les remarried and he and his second wife are living in our home in Berowra.
9. In May Yr-1 Les rang me and said, in effect, 'I have put the house on the market. The agent at L.J. Hooker of Berowra said we could expect to get about \$350,000. Could you go to your solicitor and sign the contract?' I was satisfied with the price, and about a week after our conversation, I went to my solicitor, Henry Walker of Georgetown, and signed the contract for the sale of the house.
10. At that time, I believed that there would be no need to go to Court, so I did not worry when the 12 months was up.
11. In July Yr-1 Les rang me and said 'We've only had one offer on the house and it was for \$320,000. I'm not prepared to accept it. We'll wait a bit longer'.
12. In early August Yr-1 Les rang me again and said, in effect, 'I want to take the house off the market. Val is going to lend me some money to buy your share, and I'll pay you \$160,000 which is half what we were offered for it.' I said 'No, I won't take that. The house is worth at least \$350,000, and anyway, my solicitor has told me I should get more than half'. Les said something like 'Well, you'll have to take what I've offered you, because it's too late to go to Court now'.

- 13. I saw my solicitor and instructed him to file an application at once for leave to apply for property settlement, and to seek that the house be sold and that I receive 65% of the proceeds of the sale.
- 14. In mid October Yr -1, I received a letter from Mr Walker’s firm. I no longer have the letter, but it said, in effect, that Mr Walker had died a week or so before, and suggested that, as he had been their only Family Law specialist, I retain the services of a solicitor from another firm.
- 15. In early December Yr-1, I saw my present solicitor Jeffrey Harrison and my application was filed on 24 January Yr0.
- 16. About a week after my application was filed, I had another phonecall from Les. He said, in effect, ‘I am going to oppose your application. It’s quite unnecessary as I’m still prepared to pay you \$160,000 for your share of the house’.
- 17. I am not willing to accept Les’s offer. When we separated, I came to live in Newcastle to be near our daughter Rosemary and our grandson Philip who is now 5. Since then I have been renting, from Jack and Kathie Long, a ‘studio flat’ at the back of their house in Waratah. The flat has one large room containing a small kitchen area. It has a separate bathroom and a shared laundry. I pay \$70 a week rent, and I also pay gas and electricity, and my share of water usage.
- 18. I have a part-time job at a florist shop in Georgetown from which I earn \$420 a week. Apart from my interest in the home at Berowra, I own a small amount of furniture and a Ford Laser.
- 19. If I am not granted leave to seek an order for property settlement, I will suffer hardship as I wish to buy a house with at least 2 bedrooms so that Philip can come and stay with me sometimes. I also intend to invest some money to supplement the small amount of superannuation I will receive from my present employer. I will have to continue to work until I am 65, but I wish to have some security in my old age. The amount Les has offered me is not enough to achieve this.
- 20. I have not had the opportunity to find out what Les’s present financial position is. I do not know whether he has any assets apart from his interest in our house, not do I know whether he has any entitlement to superannuation.

Sworn by the deponent
 At Waratah on 12 February
 Yr0 before me

.....

James Harrison, Solicitor

This affidavit was prepared by James Harrison, solicitor.

Affidavit of Lester Smith

I, Lester Bruce Smith, of 24 Valley View Parade, Berowra in the State of NSW, plumber, affirm:

1. I am the respondent.
2. I was born on 3 August Yr-56 and am 55
3. The applicant ('Marlene') and I were married on 28 August Yr-32 and we have 2 children, Rosemary who is married with one child and lives in Newcastle, and Daniel who works for a stockbroker and lives in Sydney.
4. Marlene and I are divorced, and the decree nisi became absolute on 6 July Yr-2 On 12 February Yr-1 I married Valerie Martin ('Val'). Since then, she and I have lived in the house at Berowra
5. I oppose Marlene's application for leave to make an application for property settlement. When Marlene applied for a divorce, it was my intention to sell our home and pay her half the proceeds of the sale. Before putting the house on the market for sale in May Yr-1, it was necessary for me to do repairs. I had to replace the roof, which I was able to do myself, but which took me some months to complete as I work full time. The materials for the roof cost me \$4,500 and I paid a labourer \$2,200 to help me. I also renewed some plumbing to the bathroom, and repainted the house inside and out. I estimate that the cost of materials for these jobs was about \$1,500. I have not kept any record of what my labour was worth.
6. Some time in July Yr-1 rang Marlene and said to her something like 'We've had an offer on the house for \$320,000. I don't think it's enough.' In early August, I rang her again and said, in effect, 'Val is prepared to lend me \$160,000 to buy your share of the house.' Marlene said 'No'. By that time the 12 months since our divorce had elapsed, but Marlene had said nothing to me about going to Court. I believed she was no longer entitled to apply for property settlement, and that we would reach an agreement. However, I heard nothing further from her until, on 30 January, Yr0 I was served with a copy of her application filed on 24 January.
7. Because I did not think that Marlene would be able to file for property settlement after July Yr-1 and that she would eventually accept the money I offered her, Val and I decided to make some improvements to the house. She paid to have a new kitchen installed at an approximate cost of \$9,000. She also paid \$4,500 for new carpet. It would therefore cause hardship to both me and Val if Marlene was permitted to make a claim on the house in excess of what I have offered her.
8. I am employed by Marks Brothers Plumbers for whom I have worked for about 15 years. I am presently earning about \$1,100 gross per week. My only assets, apart from my interest in the house, are some furniture and personal effects and a Holden Commodore.
9. My employers began contributing to a superannuation fund for me

about 5 years ago, and I also contribute. If I were to retire now, I would receive about \$20,000. I do not intend to retire until I am 65.

Affirmed by the deponent
At Berowra on 12 February
Yr0 before me

.....

April Kingsley, Solicitor
This affidavit was prepared by April Kingsley, solicitor.

Advanced Litigation Practice 2002

In The Family Court Of Australia

Feedback Sheet For The Advocacy Exercise

Student Legal Practitioner: _____

Where Applicable:	Poor	Average	Excellent		
1. Delivery – can be heard clearly	1	2	3	4	5
2. Structure of submissions	1	2	3	4	5
3. Ability to cope with questions from the Bench	1	2	3	4	5
4. Uses law & practice and procedure appropriately	1	2	3	4	5
5. Court etiquette	1	2	3	4	5
6. Overall	1	2	3	4	5

Specific Comments:

Name of person giving feedback:

Date: _____