

Becoming a Witness: Supporting Your Client in Court



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Alexandra Wearne, Solicitor Advocate, Legal Aid NSW on 1 September 2015. This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars.

This factsheet looks at:

- Best interest of child factors to focus evidence on
- What you can give evidence on
- What to include in your affidavit/report
- “Do’s” & “Don’t’s”

Why give evidence?

- In family law parenting matters the Court needs information about the impact of family violence on victims. This need for information is not general or theoretical
- It is a need for information specific to this victim & her family

Best interest of child factors to focus your evidence on

- A court determines what is in a child's best interests by looking at the primary considerations & the additional considerations in s 60CC *Family Law Act*
- These are the factors the court is seeking evidence from you so they can make an assessment of what is in the child's best interests

Primary considerations (s 60CC(2))

- The primary considerations the court considers are:
 - The benefit to the child of having a meaningful relationship with both of the child's parents &
 - The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence
- The court is to give greater weight to protecting the child from harm than having a meaningful relationship with the parents

Additional considerations the court considers are (s 60CC(3)):

- a) Any views expressed by the child & any factors (such as the child's maturity or level of understanding)
- b) The nature of the relationship of the child with each parent & other persons (such as grandparents)
- f) The capacity of each parent & any other persons to provide for the needs of the child, including emotional & intellectual needs
- i) The attitude to the child & the responsibilities of parenthood, demonstrated by each of the parents
- j) Any family violence involving the child or a member of the child's family
- k) Any family violence order that applies to the child or a member of the child's family, taking into account:
 - i) The nature of the order;
 - ii) The circumstances in which the order was made;
 - iii) Any evidence admitted in proceedings for the order;
 - iv) Any findings made by the court in, or in proceedings for, the order;
 - v) Any other relevant matter
- l) To make the orders that would least likely to lead to further court proceedings
- m) Any other fact or circumstance that the court thinks its relevant



What you have to say is relevant & important

- Corroboration is crucial when we are dealing with a crime that takes place in private
- Your opinions count:
 - Evidence of an **opinion** is not admissible to prove the existence of a fact about the existence of which the opinion was expressed (s 76(1) *Evidence Act*)
 - If a person has **specialised knowledge based** on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge (s 79(1) *Evidence Act*)
- **But you are not the Court's expert....**
 - Both the *Family Law Rules* & the *Federal Circuit Court Rules* contemplate the appointment of a single expert or Court expert to give evidence about significant matters in issue
 - In parenting matters, this is commonly a child & family psychologist or psychiatrist who meets with the whole family & undertakes an holistic assessment, with focus on special forensic issues affecting that family
 - In other cases, a Family Consultant provided by the Family Court or Federal Circuit Court may prepare a Family Report
 - It's important to note that the *Family Law Rules* outline when the single expert rule doesn't apply, & therefore what you can give useful & solid evidence on:

Rule 15.41 Family Law Rules:

Single experts rules do not apply to*:

- a) Evidence from a medical practitioner or other person who provided/is providing, treatment for a party/child if the evidence relates to:
 - (i) The results of an examination, investigation or **observation**;
 - (ii) A **description of treatment** carried out or recommended;
 - (iii) **Expressions of opinion** limited to reasons for carrying out or recommending treatment & the consequences of the treatment, including a prognosis...
- b) Evidence from an expert retained for purpose other than the giving of advice/evidence or preparing a report for a case, being evidence:
 - (i) **About expert's involvement** with a party/child/subject matter of a case; &
 - (ii) **Describing reasons for involvement** & results of involvement;
- c) Evidence from expert associated, involved or who had contact with a party/child/subject matter of a case for a purpose other than the giving of advice/evidence/preparing a report for a case, being **evidence about that expert's association, involvement or contact with that party, child or subject matter...**

**Exception: discloser of reports must be made to other parties to the proceedings, including the Independent Children's Lawyer (Rule 15.55)*

How will your evidence be given?

- In family law matters, your evidence "in chief" is given in written form
- It should be in the form of an Affidavit

BUT...

- It is usually acceptable for the Affidavit to annex a report (or reports) you have prepared (together with the letter requesting a report & your *curriculum vitae*)
- Sometimes, the Court will accept your report into evidence without it being annexed to an Affidavit

What should your Affidavit / Report include?

- Your relevant qualifications, training & experience
- A history of your dealings with the client



- Dates, time frames of contact
- Source of referral
- Observations:
 - Client's presentation:
 - Physical & emotional
 - Then & now
- A description of your work:
 - Practical help – referrals made
 - Therapeutic assistance - CBT?
- The future:
 - Plans for ongoing work

What can your Affidavit / Report include?

- Opinions which are based upon your direct observations of your client.
- Example:
 - You cannot say: "Paul was a perpetrator of coercive controlling family violence in his relationship with Kathy".
 - You can say: "In her sessions with me, Kathy described a pattern of coercive controlling behaviour by Paul which included:
 - Limiting her access to finances by restricting her access to cash & credit cards;
 - Taunting her with comments like, "fat pig" & "lazy cow"; and
 - Destroying Kathy's possessions including cutting up her clothing & smashing her ornaments."



Top Tip:

- Remember that evidence from you is probably already before the Court in the form of your clinical / running notes, produced in compliance with a subpoena
- Make sure the contents of your report are consistent with the notes you have made

Cross-examination

- If you have sworn an Affidavit or prepared a report to be used in evidence, you can be called for cross-examination
 - I.e., you will be asked questions about your work with the client
- Cross-examination – also referred to as "testing" the evidence - has two primary purposes:
 - To elicit favourable concessions &
 - To undermine your evidence
- You will be cross-examined by the other parent's (party's) legal representative & the ICL. The Judge may also ask you questions
- Cross-examination is not confined to the contents of your report or Affidavit

The process

- First question: religious oath or affirmation?
 - Asked by the Court officer when you are sworn in
- Evidence in Chief
 - Undertaken by the legal representative for your client
 - Name, occupation, professional address
 - Confirmation the contents of your Affidavit / report are true & correct
 - This is the time to make corrections!
 - Sometimes your evidence can be updated at this point (with the Judge's permission)
- Cross-examination



- Re-examination
 - Undertaken by the legal representative for your client
 - An opportunity to clarify your evidence / clear up misunderstanding



Top tips for surviving cross-examination:

- Listen to the question & answer only what is asked
 - Keep your answers as brief as possible
 - Don't "second guess" the cross-examiner's intention
- Take your time:
 - If you don't understand the question, say so!
 - It's OK to ask for it to be repeated or reframed
 - If you see a legal representative getting to their feet during or just after a question is asked – wait!
 - This usually means that an objection is going to be made to the question
 - Wait until the judge resolves the objection & the question is re-framed before answering
- Tell the truth!
 - Make appropriate concessions
 - Don't evade
 - If you do not know the answer, say so
- Don't argue with the cross-examiner
- Remain calm & thoughtful
- Look at the Judge when you are giving your answers

Options for cross-examination

- Sometimes distance & professional commitments make personal attendance at Court difficult or impossible. If this is an issue:
- Get your client / their lawyer to ask about you giving your evidence electronically:
- By audio visual link ("AVL"); or
- By telephone
- Have all relevant documents in front of you if this permission is granted by the Court
- Interposing your evidence at a convenient time

Not called for cross-examination?

- The case may have settled
- Your evidence is unchallenged & has been accepted by the Court

"Dos" & "Don'ts"

- Do outline your professional background, training & experience in your written evidence
- Do refer to your clinical notes when preparing report or Affidavit
- Do remain focussed on your client, their presentation & their issues
- Be focussed on specific observations, not theories or generalities about family violence victims
- Listen carefully to the questions you are asked & respond succinctly
- Don't be defensive of your client

Check out our related Ask LOIS webinars:

- [Best Interest of the Child Principles in Family Law](#)
- [Preparing Affidavits](#)