

# WRITTEN EVIDENCE

## This Practice Direction supplements FPR Part 22

### Evidence in general

- 1.1** Rule 22.2(1) sets out the general rule as to how evidence is to be given and facts are to be proved. This is that, at the final hearing, witnesses will normally give oral evidence and, at any hearing other than the final hearing, by evidence in writing (which under rule 22.7(1) will usually be by witness statement).
- 1.2** Rule 22.2(2) excludes the general rule –
- (a) from proceedings under Part 12 (Children) for secure accommodation orders, interim care orders or interim supervision orders; or
  - (b) where an enactment, any rule in the FPR, a practice direction or a court order provides to the contrary.
- 1.3** Application forms, application notices and answers except an application for a matrimonial order or a civil partnership order or an answer to such an application may also be used as evidence provided that their contents have been verified by a statement of truth (see Part 17 for information about statements of truth).
- (For information regarding evidence by deposition see Part 24 and the practice direction which supplements it.)
- 1.4** Affidavits must be used as evidence –
- (a) where sworn evidence is required by an enactment, rule, order or practice direction; and
  - (b) in any application for an order against anyone for alleged contempt of court.
- 1.5** If a party believes that sworn evidence is required by a court in another jurisdiction for any purpose connected with the proceedings, he may apply to the court for a direction that evidence shall be given only by affidavit on any applications to be heard before the final hearing.
- 1.6** The court may give a direction under rule 22.12 that evidence shall be given by affidavit instead of or in addition to a witness statement –
- (a) on its own initiative; or
  - (b) after any party has applied to the court for such a direction.
- 1.7** An affidavit, where referred to in the FPR or a practice direction, also means an affirmation unless the context requires otherwise.

# AFFIDAVITS AND WITNESS STATEMENTS

## Meaning of 'deponent' and 'witness'

- 2.1** For the purposes of the FPR –  
a 'deponent' is a person who gives evidence by affidavit, affirmation or deposition; and  
a 'witness' is a person who gives evidence by witness statement.
- 2.2** References in the following paragraphs to "the maker of", or "making", an affidavit, affirmation, deposition or witness statement are to be construed accordingly.

## Heading and format

- 3.1** The affidavit/statement should be headed with the title of the proceedings where the proceedings are between several parties with the same status it is sufficient to identify the parties, subject to paragraph 4.2, as follows –

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Number:

A.B. (and others)

Applicants

C.D. (and others)

Respondents

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- 3.2** Subject to paragraph 4.2, at the top right-hand corner of the first page (and on the backsheet) there should be clearly written –
- (a) the party on whose behalf it is made;
  - (b) the initials and surname of the maker;
  - (c) the number of the affidavit/statement in relation to its maker;
  - (d) the identifying initials and number of each exhibit referred to; and
  - (e) the date made.
- 3.3** The affidavit/statement should –
- (a) be produced on durable quality A4 paper with a 3.5 cm margin;
  - (b) be fully legible and should normally be typed on one side of the paper only;
  - (c) where possible, should be bound securely in a manner which would not hamper filing or, where secure binding is not possible, each page should be endorsed with the case number and should bear the following initials –
    - (i) in the case of an affidavit, of the maker and of the person before whom it is sworn; or
    - (ii) in the case of a witness statement, of the maker and, where the maker is unable to read or sign the statement, of the authorised person (see paragraphs 7.3 and 7.4 below);
  - (d) have the pages numbered consecutively as a separate document (or as one of several documents contained in a file);
  - (e) be divided into numbered paragraphs;
  - (f) have all numbers, including dates, expressed in figures; and

- (g) give the reference to any document or documents mentioned either in the margin or in bold text in the body of the affidavit/statement.

## **Body**

**4.1** Subject to paragraph 4.2 and rules 14.2 and 29.1, the affidavit/statement must, if practicable, be in the maker's own words, it should be expressed in the first person, and the maker should –

- (a) commence –
  - (i) in an affidavit, 'I (full name) of (residential address) state on oath \_.';
  - (ii) in a statement, by giving his or her full name and residential address;
- (b) if giving evidence in a professional, business or other occupational capacity, give the address at which he or she works in (a) above, the position held and the name of the firm or employer;
- (c) give his or her occupation or (if none) description; and
- (d) if it be the case that the maker is a party to the proceedings or is employed by a party to the proceedings, state that fact.

**4.2** If, in proceedings to which Part 14 (Adoption, placement and related proceedings) applies, a serial number has been assigned under rule 14.2, the affidavit/statement must be framed so that it does not disclose the identity of the applicant.

(Rule 29.1 provides that, unless the court directs otherwise, a party to family proceedings is not required to reveal the address of his or her private residence or other contact details.)

**4.3** An affidavit/statement must indicate –

- (a) which of the statements in it are made from the maker's own knowledge and which are matters of information and belief; and
- (b) the source for any matters of information and belief.

**4.4** It is usually convenient to follow the chronological sequence of events or matters dealt with. Each paragraph should as far as possible be confined to a distinct portion of the subject.

**4.5** The maker should, when referring to an exhibit or exhibits, state 'there is now shown to me marked' \_ 'the (description of exhibit)'.

## **Alterations to affidavits and witness statements**

**5.1** Any alteration to an affidavit must be initialled by both the maker and the person before whom the affidavit is sworn.

**5.2** Any alteration to a witness statement must be initialled by the maker or by the authorised person where appropriate (see paragraphs 7.3 and 7.4 below).

**5.3** An affidavit/statement which contains an alteration that has not been initialled in accordance with paragraphs 5.1 and 5.2 may be filed or used in evidence only with the permission of the court.

## **Swearing an affidavit or verifying a witness statement**

**6.1** An affidavit is the testimony of the person who swears it. A witness statement is the equivalent of the oral evidence which the maker would, if called, give in evidence.

- 6.2** The jurat of an affidavit is a statement set out at the end of the document which authenticates the affidavit. It must –
- (a) be signed by all deponents;
  - (b) be completed and signed by the person before whom the affidavit was sworn whose name and qualification must be printed beneath his signature;
  - (c) contain the full address of the person before whom the affidavit was sworn; and
  - (d) follow immediately on from the text and not be put on a separate page.

**6.3** An affidavit must be sworn before a person independent of the parties or their representatives. Only the following may administer oaths and take affidavits –

- (a) a Commissioner for Oaths (Commissioners for Oaths Acts 1889 and 1891);
- (b) other persons specified by statute (sections 12 and 18 of, and Schedules 2 and 4 to, the Legal Services Act 2007);
- (c) certain officials of the Senior Courts (section 2 of the Commissioners for Oaths Act 1889);
- (d) a circuit judge or district judge (section 58 of the County Courts Act 1984);
- (e) any justice of the peace (section 58 of the County Courts Act 1984); and
- (f) certain officials of any county court appointed by the judge of that court for the purpose (section 58 of the County Courts Act 1984).

**6.4** A witness statement must include a statement of truth by the intended maker as follows: 'I believe that the facts stated in this witness statement are true.'

(Attention is drawn to rule 17.6 which sets out the consequences of verifying a witness statement containing a false statement without an honest belief in its truth.)

(For information regarding statements of truth, see Part 17 (Statements of truth) and Practice Direction 17A.)

(Paragraphs 7.1 to 7.4 below set out the procedures to be followed where the intended maker of an affidavit or witness statement is unable to read or sign the affidavit/statement.)

**6.5** If, in proceedings under Part 14 (Adoption, placement and related proceedings), a serial number has been assigned under rule 14.2 or the name of the maker of the affidavit/statement is not being revealed in accordance with rule 29.1, the signature of the maker will be edited from the affidavit/statement before it is served on the other party.

### **Inability of maker to read or sign affidavit/statement**

**7.1** Where an affidavit is sworn by a deponent who is unable to read or sign it, the person before whom the affidavit is sworn must certify in the jurat that –

- (a) that person read the affidavit to the deponent;
- (b) the deponent appeared to understand it; and
- (c) the deponent signed, or made his mark, in that person's presence.

- 7.2** If that certificate is not included in the jurat, the affidavit may not be used in evidence unless the court is satisfied that it was read to the deponent and that the deponent appeared to understand it. Annex 1 to this practice direction sets out forms of the jurat with the certificate for an affidavit and an affirmation respectively.
- 7.3** Where a witness statement is made by a person who is unable to read or sign the statement, it must contain a certificate made by an authorised person. An authorised person is a person able to administer oaths and take affidavits but need not be independent of the parties or their representatives.
- 7.4** The authorised person must certify –
- (a) that the witness statement has been read to the witness;
  - (b) that the witness appeared to understand it and approved its content as accurate;
  - (c) that the statement of truth has been read to the witness;
  - (d) that the witness appeared to understand the statement of truth and the consequences of making a false witness statement; and
  - (e) that the witness signed or made his or her mark in the presence of the authorised person. The form of the certificate is set out at Annex 2 to this practice direction.

### **Filing of affidavits and witness statements**

- 8.1** If the court directs that an affidavit/statement is to be filed, it must be filed in the court or Division, or office or Registry of the court or Division, where the action in which it was or is to be used, is proceeding or will proceed.
- 8.2** Where the affidavit/statement is in a foreign language –
- (a) the party wishing to rely on it must –
    - (i) have it translated; and
    - (ii) must file the foreign language affidavit/statement with the court; and
  - (b) the translator must sign the translation to certify that it is accurate.

## **EXHIBITS**

### **Manner of Exhibiting Documents**

- 9.1** A document used in conjunction with an affidavit/statement should be –
- (a) shown to and verified by the maker, and remain separate from the affidavit/statement; and
  - (b) identified by a declaration of the person before whom the affidavit/statement was sworn.
- 9.2** The declaration should be headed with the name of the proceedings in the same way as the affidavit/statement is headed.
- 9.3** The first page of each exhibit should be marked –
- (a) as in paragraph 3.2 above; and

- (b) with the exhibit mark referred to in the affidavit/statement in accordance with paragraph 4.5 above.
- 9.4 Where the maker makes more than one affidavit/statement, to which there are exhibits, in the same proceedings, the numbering of the exhibits should run consecutively throughout and not start again with each affidavit/statement.

### **Letters**

- 10.1 Copies of individual letters should be collected together and exhibited in a bundle or bundles. They should be arranged in chronological order with the earliest at the top, and firmly secured.
- 10.2 When a bundle of correspondence is exhibited, the exhibit should have a front page attached stating that the bundle consists of original letters and copies. They should be arranged and secured as above and numbered consecutively.

### **Other documents**

- 11.1 Photocopies instead of original documents may be exhibited provided the originals are made available for inspection by the other parties before the hearing and by the court at the hearing.
- 11.2 Court documents must not be exhibited (official copies of such documents prove themselves).
- 11.3 Where an exhibit contains more than one document, a front page should be attached setting out a list of the documents contained in the exhibit. The list should contain the dates of the documents.

### **Exhibits other than documents**

- 12.1 Items other than documents should be clearly marked with an exhibit number or letter in such a manner that the mark cannot become detached from the exhibit.
- 12.2 Small items may be placed in a container and the container appropriately marked.

### **General provisions**

- 13.1 Where an exhibit contains more than one document –
  - (a) the bundle should not be stapled but should be securely fastened in a way that does not hinder the reading of the documents; and
  - (b) the pages should be numbered consecutively at bottom centre.
- 13.2 Every page of an exhibit should be clearly legible; typed copies of illegible documents should be included, paginated with 'a' numbers.
- 13.3 Where affidavits/statements and exhibits have become numerous, they should be put into separate bundles and the pages numbered consecutively throughout.
- 13.4 Where on account of their bulk the service of exhibits or copies of exhibits on the other parties would be difficult or impracticable, the directions of the court should be sought as to arrangements for bringing the exhibits to the attention of the other parties and as to their custody pending trial.

## MISCELLANEOUS

### Defects in affidavits, witness statement and exhibits

**14.1** Where –

- (a) an affidavit;
- (b) a witness statement; or
- (c) an exhibit to either an affidavit or a witness statement, does not comply with Part 22 or this practice direction in relation to its form, the court may refuse to admit it as evidence and may refuse to allow the costs arising from its preparation.

**14.2** Permission to file a defective affidavit or witness statement or to use a defective exhibit may be obtained from the court where the case is proceeding.

### Affirmations

**15.1** All provisions in this or any other practice direction relating to affidavits apply to affirmations with the following exceptions –

- (a) the deponent should commence ‘I (full name) of (residential address) do solemnly and sincerely affirm \_’; and
- (b) in the jurat the word ‘sworn’ is replaced by the word ‘affirmed’.

### Certificate of court officer

**16.1** In proceedings under Part 7 (Matrimonial and Civil Partnership Proceedings), where the court has ordered that a witness statement, affidavit, affirmation or deposition is not be open to inspection by the public (see rule 22.19(2) and (3)) or that words or passages in the statement etc are not to be open to inspection (see rule 22.19(5)), the court officer will so certify on the statement etc and make any deletions directed by the court under rule 22.19(3).

### Video Conferencing

**17.1** Guidance on the use of video conferencing in the family courts is set out at Annex 3 to this practice direction.

A list of the sites which are available for video conferencing can be found on Her Majesty’s Court Service’s website at [www.hm-courts-service.gov.uk](http://www.hm-courts-service.gov.uk).

# Annex 1

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## **Certificate to be used where a deponent to an affidavit is unable to read or sign it**

Sworn at \_ this \_ day of \_ Before me, I having first read over the contents of this affidavit to the deponent [if there are exhibits, add 'and explained the nature and effect of the exhibits referred to in it'] who appeared to understand it and approved its content as accurate, and made his/her\* mark on the affidavit in my presence. Or, (after 'Before me') the witness to the mark of the deponent having been first sworn that the witness had read over etc. (as above) and that the witness saw the deponent make his/her\* mark on the affidavit. (Witness must sign.)

*\* delete as appropriate*

## **Certificate to be used where a deponent to an affirmation is unable to read or sign it**

Affirmed at \_ this \_ day of \_ Before me, I having first read over the contents of this affirmation to the deponent [if there are exhibits, add 'and explained the nature and effect of the exhibits referred to in it'] who appeared to understand it and approved its content as accurate, and made his/her\* mark on the affirmation in my presence. Or, (after 'Before me') the witness to the mark of the deponent having been first sworn that the witness had read over etc. (as above) and that the witness saw the deponent make his/her\* mark on the affirmation. (Witness must sign.)

*\* delete as appropriate*

## Annex 2

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### **Certificate to be used where a witness is unable to read or sign a witness statement**

I certify that I [name and address of authorised person] have read over the contents of this witness statement and the statement of truth to the witness [if there are exhibits, add ‘and explained the nature and effect of the exhibits referred to in it’] who (a) appeared to understand the witness statement and approved its content as accurate and (b) appeared to understand the statement of truth and the consequences of making a false witness statement, and [signed the statement] [made his/her mark]\* in my presence.

\* *delete as appropriate*

# Annex 3

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## Video Conferencing Guidance

1. This guidance is for the use of video conferencing (VCF) in proceedings to which the Family Procedure Rules apply. It is in part based, with permission, upon the protocol of the Federal Court of Australia. It is intended to provide a guide to all persons involved in the use of VCF, although it does not attempt to cover all the practical questions which might arise. Any reference in this guide to a judge is to be taken as including a district judge or justices of the peace if the proceedings are before a magistrates' court.

## Video conferencing generally

2. The guidance covers the use of VCF equipment both (a) in a courtroom, whether via equipment which is permanently placed there or via a mobile unit, and (b) in a separate studio or conference room. In either case, the location at which the judge sits is referred to as the 'local site'. The other site or sites to and from which transmission is made are referred to as 'the remote site' and in any particular case any such site may be another courtroom. The guidance applies to cases where VCF is used for the taking of evidence and also to its use for other parts of any legal proceedings.
3. VCF may be a convenient way of dealing with any part of proceedings- it can involve considerable savings in time and cost. Its use for the taking of evidence from overseas witnesses will, in particular, be likely to achieve a material saving of costs, and such savings may also be achieved by its use for taking domestic evidence. It is, however, inevitably not as ideal as having the witness physically present in court. Its convenience should not therefore be allowed to dictate its use. A judgment must be made in every case in which the use of VCF is being considered not only as to whether it will achieve an overall cost saving but as to whether its use will be likely to be beneficial to the efficient, fair and economic disposal of the litigation. In particular, it needs to be recognised that the degree of control a court can exercise over a witness at the remote site is or may be more limited than it can exercise over a witness physically before it.
4. When used for the taking of evidence, the objective should be to make the VCF session as close as possible to the usual practice in court where evidence is taken in open court. To gain the maximum benefit, several differences have to be taken into account. Some matters, which are taken for granted when evidence is taken in the conventional way, take on a different dimension when it is taken by VCF- for example, the administration of the oath, ensuring that the witness understands who is at the local site and what their various roles are, the raising of any objections to the evidence and the use of documents.
5. It should not be presumed that all foreign governments are willing to allow their nationals or others within their jurisdiction to be examined before a court in England or Wales by means of VCF. If there is any doubt about this, enquiries should be directed to the Foreign and Commonwealth Office (International Legal Matters Unit, Consular Division) with a view to ensuring that the country from which the evidence is to be taken raises no objection to it at diplomatic level. The party who is directed to be responsible for arranging the VCF (see paragraph 8) will be required to make all necessary inquiries about this well in advance of the VCF and must be able to inform the court what those inquiries were and of their outcome.

6. Time zone differences need to be considered when a witness abroad is to be examined in England or Wales by VCF. The convenience of the witness, the parties, their representatives and the court must all be taken into account. The cost of the use of a commercial studio is usually greater outside normal business hours.
7. Those involved with VCF need to be aware that, even with the most advanced systems currently available, there are the briefest of delays between the receipt of the picture and that of the accompanying sound. If due allowance is not made for this, there will be a tendency to 'speak over' the witness, whose voice will continue to be heard for a millisecond or so after he or she appears on the screen to have finished speaking.
8. With current technology, picture quality is good, but not as good as a television picture. The quality of the picture is enhanced if those appearing on VCF monitors keep their movements to a minimum.

### **Preliminary arrangements**

9. The court's permission is required for any part of any proceedings to be dealt with by means of VCF. Before seeking a direction, the applicant should notify the listing officer, diary manager or other appropriate court officer of the intention to seek it, and should enquire as to the availability of court VCF equipment for the day or days of the proposed VCF. If all parties consent to a direction, permission can be sought by letter, fax or e-mail, although the court may still require an oral hearing. All parties are entitled to be heard on whether or not such a direction should be given and as to its terms. If a witness at a remote site is to give evidence by an interpreter, consideration should be given at this stage as to whether the interpreter should be at the local site or the remote site. If a VCF direction is given, arrangements for the transmission will then need to be made. The court will ordinarily direct that the party seeking permission to use VCF is to be responsible for this. That party is hereafter referred to as 'the VCF arranging party'.
10. Subject to any order to the contrary, all costs of the transmission, including the costs of hiring equipment and technical personnel to operate it, will initially be the responsibility of, and must be met by, the VCF arranging party. All reasonable efforts should be made to keep the transmission to a minimum and so keep the costs down. All such costs will be considered to be part of the costs of the proceedings and the court will determine at such subsequent time as is convenient or appropriate who, as between the parties, should be responsible for them and (if appropriate) in what proportions.
11. The local site will, if practicable, be a courtroom but it may instead be an appropriate studio or conference room. The VCF arranging party must contact the listing officer, diary manager or other appropriate officer of the court which made the VCF direction and make arrangements for the VCF transmission. Details of the remote site, and of the equipment to be used both at the local site (if not being supplied by the court) and the remote site (including the number of ISDN lines and connection speed), together with all necessary contact names and telephone numbers, will have to be provided to the listing officer, diary manager or other court officer. The court will need to be satisfied that any equipment provided by the parties for use at the local site and also that at the remote site is of sufficient quality for a satisfactory transmission. The VCF arranging party must ensure that an appropriate person will be present at the local site to supervise the operation of the VCF throughout the transmission in order to deal with any technical problems. That party must also arrange for a technical assistant to be similarly present at the remote site for like purposes.

- 12.** It is recommended that the judge, practitioners and witness should arrive at their respective VCF sites about 20 minutes prior to the scheduled commencement of the transmission.
- 13.** If the local site is not a courtroom, but a conference room or studio, the judge will need to determine who is to sit where. The VCF arranging party must take care to ensure that the number of microphones is adequate for the speakers and that the panning of the camera for the practitioners' table encompasses all legal representatives so that the viewer can see everyone seated there.
- 14.** If the local site is to be a studio or conference room, the VCF arranging party must ensure that it provides sufficient accommodation to enable a reasonable number of members of the public to attend if appropriate.
- 15.** In cases where the local site is a studio or conference room, the VCF arranging party should make arrangements, if practicable, for the royal coat of arms to be placed above the judge's seat.
- 16.** In cases in which the VCF is to be used for the taking of evidence, the VCF arranging party must arrange for recording equipment to be provided by the court which made the VCF direction so that the evidence can be recorded. An associate will normally be present to operate the recording equipment when the local site is a courtroom. The VCF arranging party should take steps to ensure that an associate is present to do likewise when it is a studio or conference room. The equipment should be set up and tested before the VCF transmission. It will often be a valuable safeguard for the VCF arranging party also to arrange for the provision of recording equipment at the remote site. This will provide a useful back-up if there is any reduction in sound quality during the transmission. A direction from the court for the making of such a back-up recording must, however, be obtained first. This is because the proceedings are court proceedings and, save as directed by the court, no other recording of them must be made. The court will direct what is to happen to the back-up recording.
- 17.** Some countries may require that any oath or affirmation to be taken by a witness accord with local custom rather than the usual form of oath or affirmation used in England and Wales. The VCF arranging party must make all appropriate prior inquiries and put in place all arrangements necessary to enable the oath or affirmation to be taken in accordance with any local custom. That party must be in a position to inform the court what those inquiries were, what their outcome was and what arrangements have been made. If the oath or affirmation can be administered in the manner normal in England and Wales, the VCF arranging party must arrange in advance to have the appropriate holy book at the remote site. The associate will normally administer the oath.
- 18.** Consideration will need to be given in advance to the documents to which the witness is likely to be referred. The parties should endeavour to agree on this. It will usually be most convenient for a bundle of the copy documents to be prepared in advance, which the VCF arranging party should then send to the remote site.
- 19.** Additional documents are sometimes quite properly introduced during the course of a witness's evidence. To cater for this, the VCF arranging party should ensure that equipment is available to enable documents to be transmitted between sites during the course of the VCF transmission. Consideration should be given to whether to use a document camera. If it is decided to use one, arrangements for its use will need to be established in advance. The panel operator will need to know the number and size of documents or objects if their images are to be sent by document camera. In many cases, a simpler and sufficient alternative will be to ensure that there are fax transmission and reception facilities at the participating sites.

## **The hearing**

- 20.** The procedure for conducting the transmission will be determined by the judge. He will determine who is to control the cameras. In cases where the VCF is being used for an application in the course of the proceedings, the judge will ordinarily not enter the local site until both sites are on line. Similarly, at the conclusion of the hearing, he will ordinarily leave the local site while both sites are still on line. The following paragraphs apply primarily to cases where the VCF is being used for the taking of the evidence of a witness at a remote site.
- 21.** At the beginning of the transmission, the judge will probably wish to introduce himself or herself and the advocates to the witness. He will probably want to know who is at the remote site and will invite the witness to introduce himself or herself and anyone else who is with the witness. The judge may wish to give directions as to the seating arrangements at the remote site so that those present are visible at the local site during the taking of the evidence and to explain to the witness the method of taking the oath or of affirming, the manner in which the evidence will be taken, and who will be conducting the examination and cross-examination. The judge will probably also wish to inform the witness of the matters referred to in paragraphs 7 and 8 (co-ordination of picture with sound, and picture quality).
- 22.** The examination of the witness at the remote site should follow as closely as possible the practice adopted when a witness is in the courtroom. During examination, cross-examination and re-examination, the witness must be able to see the legal representative asking the question and also any other person (whether another legal representative or the judge) making any statements in regard to the witness's evidence. It will in practice be most convenient if everyone remains seated throughout the transmission.

