How to write a family law affidavit: *Facts the basis of persuasion*

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Every story has three sides to it –
yours, mine and the facts.

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Part I - Introduction

A - The purpose of affidavits

The court website of the Federal Circuit and Family Court of Australia states:[2]

> An affidavit is a written statement where the contents are sworn or affirmed to be true. An affidavit should set out facts, not opinion.

The fact sheet from the court, where you will find out further information, starts off with:[3]

> **What is an affidavit?**
>
> An affidavit is a written statement prepared by a party or witness. It is the main way you present evidence (facts of the case) to a court. Any affidavit you file in court to support your matter must be served on all parties, including the independent children's lawyer (if appointed).

If you are acting in a case in which there are no pleadings like one in the Federal Circuit and Family Court of Australia, the affidavit material is the only opportunity to present your client's version of the facts to the court.

As the QLS says in an excellent series of articles on affidavits:[4]

> With that in mind, it is important to minimise the distractions to the court caused by, for example, the inclusion of inadmissible evidence (especially irrelevant evidence); lengthy, dense, rambling paragraphs in no particular order of importance; or the expression of opinions about the law, the other side's case or the defects in the personality of a witness on the other side.

In family law matters the purpose of an affidavit is to provide evidence support an argument that you are seeking to persuade a court to accept that is to the claims for relief or orders sought set out in the application or response documents.

[2] Affidavit | Federal Circuit and Family Court of Australia (fcfcoa.gov.au).
[3] Affidavit | Federal Circuit and Family Court of Australia (fcfcoa.gov.au).
[4] How to prepare an affidavit - part 1 - Queensland Law Society (qls.com.au).

By its very nature argument and the evidence to substantiate a claim will mostly, if not always be contested.

B - Claims

> A man who makes an assertion puts forward a claim–a claim on our attention and to our belief. Unlike a man who speaks frivolously…, a man who asserts something intends his statement to be taken seriously.[5]

When a person is trying to persuade someone else of something, they put forward a claim. Sometimes they make assertions i.e. claims without proof, sometimes they make allegations i.e. a claim of wrongdoing. At other times they may simply express a concern or declare a belief.

Serious causes usually involve a claim, [6] a complaint, an allegation or accusation being made of one sort or other. These are all forms of claims. If the claim is not clear the enquiry must be made, 'What is the claim?'

When a claim is serious, it is necessary to forensically examine the evidence which is alleged to support the claim. This is because, for example a legal or equitable claim,[7] usually has to be dealt with in a court of law where there are rules for the acceptance of evidence alleged to establish facts to support that claim.

In a family law matter, for example, the claim might be contained in an allegation that a father has engaged in conduct towards a child amounting to abuse.[8]

C - Serious disputes are about issues

Serious disputes are concerned with issues.[9]

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[5] Stephen E. Toulmin, *The Uses of Argument, Updated Edition* (Cambridge University Press, 2003), 11.
[6] A principle, aim, or movement to which one is committed, and which one is prepared to defend or advocate.
[7] Which do come up in family law matters from time to time.
[8] See the definition of *abuse* in the *Family Law Act 1975* (FLA) s 4.
[9] Chester Porter QC, 'The Gentle Art of Persuasion, How to Argue Effectively' (Random House Australia, 2005).

Most legal cases involve more than one issue.[10] It is necessary to frame the issues in the case in terms of the principles alleged to be at stake. Don't be distracted about disputes on details.[11] People love to focus on detail not the gist of what the real issues are. This is because it is easier to attach focus on a detail that you can relate to rather than conceptualise what is a more difficult proposition, that is, the real issue.

In legal cases, the path to good advocacy is to find the real issue.[12] If there is more than one issue, break the issues down firstly into what are the primary issues and then subsidiary issues in rank order of importance i.e. primary, secondary, tertiary etc. If you have to get to down to quaternary issues you are in real trouble.

The primary issue arising from the claim in a children's matter might be whether the father presents a risk particularly an unacceptable risk to the child. A secondary issue arising is what orders should the court make dependent on the findings made on the primary issue.

To get to the issue you must first determine the facts.

[10] J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 10th Ed, 2015) [1085].
[11] Or is that as someone said looking under every rock to check what is underneath.
[12] *The Gentle Art of Persuasion*, 2005, p 72.

Part II - Facts

> In order to advance a cause honestly and efficiently it is first necessary to determine the facts. This is not always easy.
>
> — Chester Porter QC[13]

The modern world is obsessed with stories. We are our own marketers today purveyors of our own sunny stories on social media sites such as Instagram, Facebook and Linkedin.[14] This begs the question of whether clients of the family law system conflate the outside world with the legal system and try and deploy this modern obsession into court when they engage in a family law case.

It is a different arena, to when you are in the outside world but when you are engaged in court the system, affidavits and the facts they set out come into the equation. As can be seen later affidavits in family law matters are to be confined to facts about the issues in dispute.[15] This makes the determination of the facts even harder.

A - Fact finding for a judge: Your job

The process of fact finding for a judge is often not easy.[16] Your job is to assist the court in the determination of the facts by writing a clear affidavit setting out the facts to the best of your ability.

B - The basis of persuasion

The English philosopher Stephen Toulmin says, 'Let it be supposed that we make an assertion and commit ourselves thereby to the claim which any assertion necessarily involves. If this claim is challenged, we must be able to establish it—that is make it good and show that it was justifiable.'[17] We must have facts to support it. If

[13] Ibid, p 19.
[14] From an article published in the Australian on 6 February 2023.
[15] *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* r 8.16.
[16] P W Young, 'Fact finding made easy' (2006) 80(7) Australian Law Journal 454,461.
[17] Toulmin, *The Uses of Argument, Updated Edition*, 90.

you are going to succeed with a claim or ask a court to make orders in your favour you will need facts to support that claim.

The essential contention made by the claim will place a burden upon the claimant to prove the contention. In a family law context that could be that the children should live with your client or that your client should receive a particular award for property settlement or of spousal maintenance.

In court, without compelling evidence, there will not be a case. Otherwise, the claim might remain without cogent evidence to support it and remain a bare and unfounded allegation. That is, you cannot simply make vague statements that cannot stand scrutiny. If you cannot persuade the tribunal to make the necessary findings of fact to support your claim that will inevitably lead to the conclusion that the claim must fail.

C - Assertions, allegations and accusations distinguished

It is necessary to distinguish between assertions, allegations and proven facts.

1. Assertion

> A man who makes an assertion puts forward a claim–a claim on our attention and to our belief. Unlike a man who speaks frivolously…, a man who asserts something intends his statement to be taken seriously.[18]

Assertion is a speech act, carried out by the utterance of a declarative sentence in which a proposition is presented as true or claimed to be true. It is more than just saying something. According to Huddleston & Pullam, making a statement, asking a question, issuing orders etc, are different kinds of speech act.[19] Declarative sentences can be used in particular contexts to assert propositions.[20]

[18] Ibid, 11.
[19] Huddleston & Pullum, *The Cambridge Grammar of the English Language* (Cambridge University Press, 2002), ('CGEL') 61.
[20] Ibid, 34.

Assertion is one of the central kinds of speech act, typically carried out by the utterance of a declarative sentence. It might be defined as a speech act in which a proposition is presented as true or claimed to be true.

For example:

'The sky is blue.'[21]

An assertion can also be made in the form of a declaration that a state of facts exists. That is something declared or stated positively, often with no support or attempt at proof, as in the phrase,'Mere assertion.'

When an assertion is made we can challenge the assertion and demand to have our attention drawn to the grounds (backing, data, facts, evidence, considerations, features) on which the merits of the assertion are to depend. We can, that is, demand an argument; and a claim need be considered only if the argument which can be produced in its support proves up to the standard.[22]

This is the point in a court case in an argument phase when you may hear the, 'Where is the evidence' or 'Take me to the evidence' question spontaneously erupt in court.

2. Allegation

An assertion does not necessarily imply wrongdoing. That is the task for an allegation.

Words set out in a statement or deposed to in an affidavit may consist of allegations or a claim that a person or a child has uttered something. Those allegations may be current or old. They may be substantiated or unsubstantiated by the information or evidence to support them or the lack of it. That is it may be a claim

[21] This is not actually a frivolous assertion. It is capable of serious scientific answers.
[22] Toulmin, *The Uses of Argument, Updated Edition*, 12.

supported by a story and speculation not evidence. The evidence will be in the actual events alleged to constitute the act(s).

Osborn's Concise Law Dictionary, defines *allegation* as follows: [23]

> A statement or assertion of fact made in any proceeding, as for instance, in a pleading; particularly a statement or charge which is, as yet unproved.

Allegation is an assertion implying wrongdoing, especially an unproven one. A speech act carried out by the utterance of a declarative sentence in which a proposition is presented (as true or claimed to be true) that someone has done something illegal or wrong, typically one made without proof.

Allege means to claim without proof or before proof is available.

The use of the forms *alleged* or *allegedly* is used in a legal context to distinguish an unproven accusation i.e. an allegation, from a proven fact (the victim of the alleged fraud; the alleged attackers). Or to cast doubt on the genuineness of a statement or claim (the alleged illness that prevented him from coming to the wedding; the alleged medical breakthrough.) The distinction in claiming qualification they provide is not needed in sentences which the context makes a situation clear.[24]

Allegation often implies that the thing claimed has not been confirmed or proven or that the claim has been made without proof or before proof is available.

For example:

'It is only allegation at this stage.'

'Max has allegedly falsified the accounts.'

[23] John Burke, *Osborn's Concise Law Dictionary*, (6th ed, Sweet & Maxwell 1976)
[24] Jeremy Butterfield, *Fowler's Dictionary of Modern English Usage* (4th ed, Oxford University Press, 2015)

This is an example of the qualification used adverbially. This has the status of an allegation and I cannot say whether it is true. The function is to use it to absolve of responsibility for the residual proposition that it is true.[25]

Distinguish between allegations and propositions. Propositions are in the domain of argument.

3. Accusation

This is the whole new level.

An *accusation* may be defined as:[26]

> 1: an allegation that a person is guilty of some fault, offence, or crime; imputation.
>
> 2 a formal charge brought against the person stating the crime that he is alleged to have committed.

D - Legal system is based on facts

> Everyone is entitled to his own opinion, but not to his own facts. [27]
>
> — Daniel Patrick Moynihan

1. Proven facts

This then leads us to what are proven facts in legal proceedings.

In legal proceedings the claims made that are (mostly) serious and if the claim is not serious, such as when it is vexatious, it still needs to be taken seriously. The point is you need to remember what arena you are playing in. As my said old Dad said tears ago, 'Son, you have to know the rules of the game you are playing.'

[25] CGEL, 769.
[26] *Collins Dictionary of the English Language*, 1979 William Collins Sons & Co Ltd.
[27] *Oxford Dictionary of Quotations* (Oxford University Press, 8th Ed, 2014), p 550, a quote in Newsweek 25 August 1986.

The arena for a family law case is not the court of public opinion. It is a court of law. In a court of law true facts matter. And they matter a lot. You need to keep in sharp focus that the courts are in the **facts business and the currency of that business is evidence**.[28] That is the legal system is based on facts.

Facts must be proven in our legal system and this is the function of evidence whether in the form of testimony, documents or electronic recordings.[29]

Unfortunately, as mentioned earlier, we live in a world where narrative or story seeks to dominate, not facts. We need to change that.

A good example is the internet which contains an enormous amount of information with little in the way of a guide that vouches for the truth of the matters alleged.[30] Beware of allegations masquerading as facts. We tend to believe what we want to believe. So, if allegations suit the cause they soon become undoubted facts.[31]

Claims in legal cases are on another level to arguments in a non-forensic domain such as in a club or committee meeting.

Courts cannot act on allegations in the absence of evidence. If you bring a proceeding in a court or tribunal you will have to show by the preponderance of evidence that you are entitled to the relief that you claim. You bear the onus to prove your case by putting on the evidence to support your position. In civil cases the standard required is the balance of probabilities and in criminal cases that is beyond reasonable doubt.

In cases before the Federal Circuit Court and Family Court of Australia, the court must determine matters pursuant to s 140 of the *Evidence Act 1995* (Cth). This provides that evidence must be proved according to the civil standard but taking into

[28] This is an alleged comment of a judge. It is likely apocryphal. But it is a good comment.
[29] RB Wilson, *Nutshell: Evidence* (Lawbook Co, 3rd Ed. 2010) p 1.
[30] *The Gentle Art of Persuasion*, 2005.
[31] Ibid.

(a) the nature of the cause of action or defence; and (b) the nature of the subject-matter of the proceeding; (c) the gravity of the matters alleged before it.[32]

There is a great difference between alleged facts and proven facts. An allegation is the claim to the existence of a fact. Proven facts become the evidence.

You have to analyse the available data to see if your client's claim holds up.[33]

Think in terms of, 'What are these data telling us?'[34] Can you convince the finder of fact to accept the evidence that the fact exists. They may accept or reject that evidence.

2. What really happened and the truth?

The truth is not always obvious. Usually thought and effort are required to reveal the truth. Often people are in a hurry. But truth is precious.[35]

> In ordinary life and in court, we seek the truth. There is no need to philosophise about truth. Truth is for this purpose what really happened. But we cannot assume that we will always find out what really happened no matter how hard we try. This may be because of lack of evidence, perhaps because all the witnesses are dead or brain damaged or it may be that some one or more persons are deliberately laying false trails to avoid the truth coming out.
>
> The basic necessity in fact finding is to have before you the fullest detailed observation of all possible witnesses. A judge has not the luxury of ensuring that this will occur. He or she is limited to the material that the parties place before the court. However, because one would expect all parties to put before the court all material which would advance their case, the absence of such material will often be significant.[36]

[32] See *Isles & Nelissen* (2022) 367 FLR 338 [3]-[8].
[33] As Chester Porter says in the later quote there is no substitute for careful analysis of the facts.
[34] Unfortunately, the term *data* is plural.
[35] *The Gentle Art of Persuasion*, 2005, p 24.
[36] P W Young, 'Fact finding made easy' (2006) 80(7) Australian Law Journal 454.

Remember our legal system is adversarial, the court is not there to do your job for you. It is up to you to put on the evidence to advance your case.

The facts are the basis of persuasion.[37] Where persuasion needs to be used, there is no substitute for careful study of the facts.[38] Fact-checking is very laborious, slow and time consuming.

Read everything thoroughly. The nuggets of gold,[39] will be buried deep and most likely hidden. Sometimes deliberately. Sometimes in plain sight. As will the hidden gems really. For example, a compensation agreement recorded on a title search buried 300 pages deep at the back of an affidavit. So go to the end and start there and go backwards.

3. Some practicalities: Proofs of Evidence/Statements of instructions

Obtaining a proof of evidence or statement of instructions is a lost art which needs resurrection.

At an early stage in the conduct of a matter a statement of facts or proof of evidence should be prepared first to set out your client's instructions. Where possible use direct reported speech and be write in the first person setting out the facts. Prepare this in a form and to a standard that can easily be later converted into an affidavit.

Keep in mind the comments in *Thorne v Kennedy* that the principles of equity: [40]

> 'Calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties to establish the justice of the case and a consideration of the mental capacities, processes and idiosyncrasies of [the other party].'

The comprehensive proof of evidence or statement of instructions by the client should be prepared in the form of a narrative statement in ascending chronological

[37] That is not the evidence per se, it is the facts.
[38] *The Gentle Art of Persuasion*, 2005, p 21.
[39] Of important information that is.
[40] *Thorne v Kennedy* (2017) 263 CLR 85 [43].

order to be signed by the client to a standard (in admissible form) that may be readily converted into an affidavit in support of an application to court.

That statement could be initially compiled from all the instructions already received and then combined into one document and augmented as the matter progresses.

Statements should contain facts not speculations, opinions, conclusions emotions or argument.

E - True facts

Ascertaining the *true facts* on any question is often a long and tedious process. If there is an allegation that suits the argument, there is an obvious temptation to translate that allegation into fact.[41]

The true facts may not fit the narrative the other side are seeking to project or push. Alternatively, the narrative the other side is propagating may be based on facts that are fictional or a fabrication. The other side may pose as promoting one narrative but actually promoting another.

Testing this is all part of fact checking to validate or non-validate the claim. As new information becomes available your case theory might have to be modified to fit.

In the long run there is no substitute for care and accuracy in stating the facts. Upon this accuracy depends the whole validity of the message sought to be conveyed.[42] If you gain a reputation with judges for not being accurate than that will destroy your credibility with them.

[41] *The Gentle Art of Persuasion*, 2005, p 22.
[42] Ibid, p 26.

Ascertaining the true facts on any question is often a long and tedious process.[43] **Failure to check the facts can lead to embarrassing blunders**.[44]

Not each and every fact may be proved to the same degree.

So, if the evidence to support the fact to be proved is weak it may be necessary to gather more evidence to bolster that proof.

If that cannot be achieved then that part of the case may collapse namely the proof of that fact. This is how a weak case can collapse e.g. a witness previously thought to be compelling does not come up to proof or another witness is called which discredits that witness. We all can remember a case where that happened.

In the end, here is no substitute for care and accuracy in stating the facts. Upon this accuracy, depends the whole validity of the message sought to be conveyed.[45]

1. Facts in issue

It is the facts in issue in the proceedings that must be proven.[46] It is the facts that make up the evidence. So you must prove the facts to the satisfaction of the court or tribunal.

The general rule being that all the facts in issue or relevant to the issue in a given case must be proved by evidence: testimony, admissible hearsay, documents, things and relevant facts.[47]

2. Main facts in issue

The main facts in issue are all those facts which the applicant or a respondent in a family law case, must prove in order to succeed.[48] The main facts in issue in a

[43] Ibid p 22.
[44] Ibid.
[45] Ibid p 27.
[46] *Evidence Act 1995* (Cth) s 55.
[47] J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 10th Ed, 2015) [3001].
[48] Ibid[1080].

family law case can only be ascertained by reference to the substantive law given there are no pleadings.

3. Subordinate or collateral facts

Subordinate or collateral facts which may be an issue are (a) those affecting the credibility of a witness, and (b) those affecting the admissibility of certain items of evidence; they may be an issue in a particular case on account of the law of evidence itself, and not on account of the substantive law all pleadings.[49]

4. Proof of facts in dispute

In all trials much is taken by the parties is assumed, and only those facts really in dispute strictly proved. In such cases what is assumed is in proof.'[50]

F - Alleged facts

According to Prof Joe Siracusa, Martin Luther King said a fact was something from which there could be no controverting.

Alleged facts may be based on surmisal or assumption rather than actual proof.[51]

Properly check facts *alleged* in an affidavit. Should these prove to be weak reeds, at least the speakers' credibility and integrity can survive when his or her *alleged facts* prove to be untrue.[52]

G - Support for the existence of facts

Your client has to have the facts to support what they are claiming. It follows as night follows day that they must in turn have support for the existence or non-existence of the facts in issue in the proceeding.

[49] Ibid [1085].
[50] Ibid [1080].
[51] *The Gentle Art of Persuasion*, 2005, p 19.
[52] Ibid, p 26.

To support the existence or non-existence of the fact = subpoena document, statutory presumption, cross-examination, objects relating to the existence or non-existence of an alleged or disputed fact.

In that way, an allegation is a claim to the existence or non-existence of a fact by a party in a pleading, charge, or defence. Another definition is that an allegation is an assertion especially an unproven one. Until they can be proved, allegations remain merely assertions (declarations about the state of existence or non-existence of a fact) that is an unsupported allegation.

To **support** an allegation, 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: Section 55 of the *Evidence Act 1995* (Cth). Something could be evidence but not relevant. Proof is establishing the fact.

Evidence is anything presented in support of an assertion or allegation. This support may be strong or weak. That is the question of degree of proof. Strong evidence would be called 'compelling'. Clear and convincing proof means that the evidence presented by a party during the trial must be highly and substantially more probable to be true than not and the trier of fact must have a firm belief or conviction in its factuality.

A compelling argument might need a key piece of evidence to settle the question i.e. to put it beyond doubt. That piece of evidence could be determinative.

The trier of fact may place more or less emphasis on the fact. This is the question of weight. That is the evidence would not be convincing to the tribunal. It may regard that information as insignificant for the task.[53]

[53] See Testing Evidence page 5.

The strongest type of evidence is that which provides direct proof of the truth of an assertion. Weaker evidence may be indirect or circumstantial.

1. Verification and fact checking[54]

Verification or fact checking is very important. That is the process of the process of establishing the truth, accuracy, or validity of the alleged fact.

Another way of putting that is information to support the existence of a fact in issue. To do that always look for objective information that will support the claim.

That is fact check your own client. It is much better to have facts tested in the privacy and comfort of your office than to have the facts tested under the glare of cross-examination and discomfort of court.

Corroboration from independent sources is best. Corroboration is evidence which confirms or supports a statement, theory, or finding i.e. confirmation.

2. Impossible, Improbable and implausible

Parties must adduce sufficient evidence on a fact to support the issue and to enable its acceptance by the finder of fact where that evidence on its face is not inherently improbable,[55] or incredible. If that evidence *is* inherently improbable or incredible, then independent checking or evidence is necessary. Further if such evidence is inherently improbable or incredible it should be explained. Such claims need to be independently verified.

> If something is impossible, this means that it cannot be the case. This may be because its occurrence would violate a law of nature (it is physically impossible) or because its truth can be negated by the use of logic (it is logically impossible). For example, it is physically impossible to use an ordinary pistol and bullet to hit a target on the moon while standing on the earth. One could prove this by gathering information—e.g. how much a bullet weighs, how much force is produced by the explosion of a standard

[54] 'Fact checking' is the vogue term and probably the clearer one.
[55] Not likely to be true or to happen.

charge of gunpowder, the distance from earth to the moon—and then applying the laws of Newtonian physics to reach the conclusion. Both of these elements are empirical; the information about pistols, bullets, etc. is gathered from the real world (though one might look it up in a reference, rather than determining it in person) and also the laws of Newtonian physics are derived from empirical observations, first made by Newton, and confirmed many times by others after him. On the other hand, it is logically impossible for 2 plus 2 to equal 5, when working in the usual system of base-10 arithmetic. It is not necessary to gather any information about the real world to prove this; it can be proved by using logic, starting from the axioms on which the usual system of arithmetic is based. Showing that something is impossible often involves a series of steps, some of which show physical impossibility and others logical impossibility, e.g. to prove E is impossible, we first show that A is physically impossible, then show that B is logically impossible whenever A is not the case, and so forth.

If something is improbable, this means that it is possible, but the probability of its being the case is low, usually very low. For example, it is improbable that an amateur chess player will win a game against one of the world's top players. There is no reason this is either physically or logically impossible. There are circumstances in which it could occur, e.g. if the top player had a sudden and severe headache or was distracted by worrying about a serious personal problem. But in the absence of information about any such circumstance, one would assign a very low probability to its occurring. (Probability is a number between 0 and 1 which expresses how likely some event is. There are a number of ways to interpret what it means, one of which is to say, if the process was repeated a very large number of times, in about what fraction of them would this result occur.)

The word "implausible" is used about an explanation or a claim, to say that we believe the probability of its being true is very low. For example, suppose a man living in New York has a twin brother who lives in Tokyo, and the man is a accused of having murdered his next-door neighbour because a witness saw, through a window, someone who looks like him in the victim's house at about the time the murder was committed. If his lawyer suggested to the jury at his trial that the victim was killed by the man's twin brother, who slipped into the United States without being detected, committed the murder, and then returned to Tokyo without his absence having been noticed, the jury would probably find that explanation implausible. Note that **implausible and its opposite, plausible, are statements about subjective belief**; nothing is objectively plausible or implausible, in the absence of someone evaluating the likelihood that it is true.[56]

[56] https://www.quora.com/What-is-the-difference-between-improbable-impossible-and-implausible

H - Alternatives to facts: Expressions of concern, reacting to subjective 'concerns', suspicions, beliefs, and the conclusion jumping machine

I don't want to hear about your concerns,
I want to see your evidence.[57]

1. Expressions of concern

All too often today the first port of call for a person involved in a family law situation is to express their 'concern'. The first question asked is, 'What is your concern?' or, 'How does that make you feel?', not – 'What happened?' or more precisely, 'What did you see, hear or otherwise perceive?' [58]

Everyone today is 'concerned' about this or that without much care for the facts of the situation.

An expression of concern is not a claim. Saying, 'I am concerned.' is the same as, 'I am worried about'/ 'troubled by'/ 'anxious about' / 'distressed by' or 'very gutted' (by something or by some situation).' 'Raising concerns' may be synonymous with raising an issue. Such as raising alleged concerning behaviours, in the form of an expression like, 'The mother raised concerns that alleged disclosures had been made by [*Child name*]. It is therefore all about the speaker. This is not to imply that a concern may not be genuinely raised. But on the other hand, it does not mean that the basis for it is factual. A concern is just an emotion. It is not evidence of anything.

If 'reported' concerns are to be substantiated, they need to be backed up preferably verified with independent evidence. It may be in contest that the utterances alleged.

57 A judge speaking in a court in a galaxy far, far away (potentially). Note: This is a fictional character. See *Johnson v Johnson* (2000) 201 CLR 488 [15]-[16] where the High Court dealt with a case involving trial judge making statement about looking to independent evidence.
58 See *Evidence Act 1995* (Cth) s 62 for use of *perceive.*

2. Why should we react to subjective concerns?

Some people will seek to manufacture or invent concerns reasons, provocations or circumstances to suit their portrayal of the alleged facts or as pretext for some counterfactual. That is invented facts. They may express a concern or fear but be unable to articulate why or provide any evidence. Manufactured or factitious, it is all the same.[59] The reality is that an expressed concern if not backed by information of substance such as by an account or observations is not evidence but a just a speculation.

In the case of *Symon & Symon* [2016] FamCA 980, Austin J said:

> The father sought to manufacture another reason for the child to be returned to his care on Sunday afternoons, notwithstanding the effect of proposed Order 7, but it had no objective basis.
>
> He is apparently concerned the child will not cope adequately with staying away for another night each fortnight with the mother.
>
> His apprehension may be genuine, but that does not mean the basis for it is factually correct or that the Court should *react to his subjective fear*.[60]
>
> No aspect of the evidence reasonably suggested the child would not cope with the extra night.

The honesty of someone's impressions is not proof of the facts.[61] It is just an utterance or statement. The truth of it is another thing entirely for the finder of fact to determine.

The objective evidence may be that there is no substance to someone's worries. That is, the basis or alleged basis for the concern is not factually correct. At issue might then become the reaction by the person making the allegations to the challenge to their perceptions. How they react might be very telling of that person's resilience or mental health.

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[59] Factitious *adj.* 1. Specially contrived, not genuine (*factitious value)* 2. Artificial, not natural (*factitious joy).*
[60] Emphasis added.
[61] *Scott & Scott* (NO.3) [2019] FamCA 936 [16].

3. A better approach

A better approach than 'holding a concern' is to:

a. Positively assert and state the facts'

b. Set out the risk contended.

4. Sentiments

A sentiment is not a fact even it is expressed about a fact. An expression of concern is the utterance of a sentiment or personal emotion (most often as part of a reaction to a situation). It is not a fact or an utterance of a fact. That is not literally true. They are not evidence of anything, except that someone had expressed an emotion.

5. Suspicions, beliefs and the conclusion jumping machine

Your client may suspect some state of affairs to be the case, or think they know something, but if the claim is serious you have to prove it to the required standard. That is not to say that it an impossibility that it may be proven later, that a suspicion is factual. That is a matter for the evidence.

A person may hold a belief that a certain state of affairs exists or does not exist. This alleged belief may be nothing more than a suspicion.

The brain is a machine for jumping to conclusions. People have a bias to believe and confirm.[62] It is much easier a person to believe something than to unbelieve something. They will seek data which is likely to confirm the belief they already hold.

Contrary data is unlikely to convince them. Unlike the scientific approach which is to try and refute a hypothesis.

[62] Funnily enough called the confirmation bias. For more on this see Daniel Kahneman, 'Thinking Fast and Slow', Penguin Books, 2011
Thinking, Fast and Slow Part 1, Chapter 7 Summary & Analysis | LitCharts

A likely tactic of someone who is convinced by a belief will be to try and denigrate any expert called.[63] This is more so when the belief is unwarranted. Beliefs are based on trust and will not be accepted by someone they do not trust.

They will not be convinced to abandon their belief no matter what evidence to the contrary is provided to try and dissuade them. As Johnathan Swift probably said,[64] you cannot reason your way out of a belief not based on reason in the first place -

> It is useless to attempt to reason a man out of which he was never reasoned into.

Maybe that is why facts do not appeal to some family law clients only their emotions and emotional reactions. That is why they get upset when called out. Facts can be inconvenient to their agenda. However, the reality is facts just do not care about your feelings.[65]

We cannot prevent someone from denying evidence of a fact. That may be because of their emotional reaction to the inconvenience of the fact or for another reason such as their agenda. That might say more about them, and steps need to be taken to sidestep that.

As one judge was allegedly reported to have said in a United State court hearing:[66]

> 'This is not your show,' the judge told Jones.
>
> 'Your beliefs do not make something true. You are under oath.'

[63] Daniel Kahneman, Thinking, Fast and Slow. P 80-81.
[64] Oxford Book of Quotes. This is attributed to Swift but not found in his works. Probably apocryphal.
[65] Neither does the universe.
[66] InfoWars host Alex Jones confronted by Sandy Hook family in court over claims school shooting was a hoax. Here's what happened - ABC News accessed 3 August 2022.

6. Distinctions between a belief and a suspicion

In the case of *Applications for an Apprehended Domestic Violence Order on behalf of DW, a child* [2013] NSWLC 2, the court said:

> 18 In the stated case, his Honour posed the question: "Did I err in considering that it was necessary for me to be satisfied that the Appellant engaged in conduct amounting to harassment or intimidation?" McClellan CJ at CL answered in this way (at [56]):
>
> > As I have indicated. s 562A(1) of the Crimes Act provides that a court may make an APVO if it is satisfied on the balance of probabilities that a person "has reasonable grounds to fear, and in fact fears", the engagement of that other person in conduct amounting, inter alia, to harassment or intimidation and the conduct is sufficient to warrant the making of the order. Accordingly, the inquiry which the court must undertake is whether the complainant has reasonable grounds to fear and in fact fears the engagement of the other person in the relevant conduct. Before coming to that conclusion it is not necessary for the court to determine that the other person has in fact engaged in that conduct but, only, that the complainant has a fear which is based on reasonable grounds. Of course, if the court was satisfied that the other person had not conducted him or herself in the manner which the complainant alleged this would be relevant to a consideration of whether or not the court should be satisfied in the particular case and may prove fatal to the application. However, by confining the relevant question to whether or not the other person had actually sent the emails, Puckeridge DCJ, in my opinion, was diverted from the inquiry which the section requires.
>
> 19 I next turn to consider the 'reasonableness' of the grounds to fear held by Detective Beltrame. Justice Howie reviewed this question in *Ryan Kapral v Federal Agent Joshua Bunting* [2009] NSWSC 749, in a case dealing with the *Crimes (Forensic Procedures) Act, 2000.* The legislation is obviously different but the principles are, in my view, equally applicable. His Honour said (at [33]):
>
> > The Magistrate, after reviewing the relevant evidence relied upon against the plaintiff, considered the law relating to the distinction between a suspicion and belief. He referred to the decision in *International Finance Trust Company Limited v NSW Crimes Commission* [2008] NSWCA 291 and quoted the following paragraphs from the judgment of Allsop P:

> [110] In *George v Rockett* (1990) 170 CLR 104 the High Court considered s 679 of the *Criminal Code* (Qld) which provided that if it appeared to a justice that "there are reasonable grounds for suspecting or believing" (relevant matters) the justice may issue a warrant directing a police officer to take steps to enforce the law. **The High Court made plain that when legislation took this form the court's task was to be satisfied that there were reasonable grounds for the suspicion but it was not necessary for the court itself to entertain the relevant suspicion. Sufficient facts must exist to induce the relevant suspicion in the mind of a reasonable person (p 112).** "It must appear to the issuing justice, not merely to the person seeking the search warrant, that reasonable grounds for the relevant suspicion and belief exist." [111] The High Court also considered the nature of the facts required to be established to demonstrate reasonable grounds for a suspicion or belief. "Suspicion" and "belief" are different states of mind. **"Suspicion" is "a state of conjecture or surmise where proof is lacking"**[67] (*Hussien v Chong Fook Kam* [1970] AC 942 at p 948). The facts sufficient to found a suspicion may be quite insufficient to ground a belief.

7. The wrap on emotions

As stated earlier, an emotion is not a fact nor is the expression of it in text a fact. As lawyers and especially in court we must look beyond a subject reaction to a situation and see what available evidence there is to underpin the facts of the situation or substantiate a claim. It is the facts to support a claim that the next section is concerned. That is the enquiry into what happened and when.

The main point being is that it might be natural for someone to react or be concerned about a situation. That is just an emotional reaction to the situation. Once we move from the domain of emotion to the forensic domain, the facts in issue become the main business and the evidence that underpins it becomes the currency.

[67] Emphasis added.

So the legal method is not about expressing concern or beliefs but gathering the evidence which supports the claim being made and testing the case theory against that evidence.

Part III - Bibliography

A - Articles/Books/ Papers

John Burke, *Osborn's Concise Law Dictionary*, (6th ed, Sweet & Maxwell 1976)

Jeremy Butterfield, *Fowler's Dictionary of Modern English Usage* (4th ed, Oxford University Press, 2015)

Collins Dictionary of the English Language, 1979 William Collins Sons & Co Ltd

J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 10th Ed, 2015)

Huddleston & Pullum, *The Cambridge Grammar of the English Language* (Cambridge University Press, 2002)

Daniel Kahneman, 'Thinking Fast and Slow', Penguin Books, 2011

Oxford Dictionary of Quotations (Oxford University Press, 8th Ed, 2014)

Chester Porter QC, 'The Gentle Art of Persuasion, How to Argue Effectively' (Random House Australia, 2005)

Stephen E. Toulmin, *The Uses of Argument, Updated Edition* (Cambridge University Press, 2003)

RB Wilson, *Nutshell: Evidence* (Lawbook Co, 3rd Ed. 2010)

P W Young, 'Fact finding made easy' (2006) 80(7) Australian Law Journal 454

B - Cases

Applications for an Apprehended Domestic Violence Order on behalf of DW, a child [2013] NSWLC 2

Isles & Nelissen (2022) 367 FLR 338

Johnson v Johnson (2000) 201 CLR 488

Scott & Scott (NO.3) [2019] FamCA 936

Symon & Symon [2016] FamCA 980

Thorne v Kennedy (2017) 263 CLR 85

C - Legislation

Evidence Act 1995 (Cth)

Family Law Act 1975 (FLA)

Federal Circuit and Family Court of Australia (Family Law) Rules 2021