

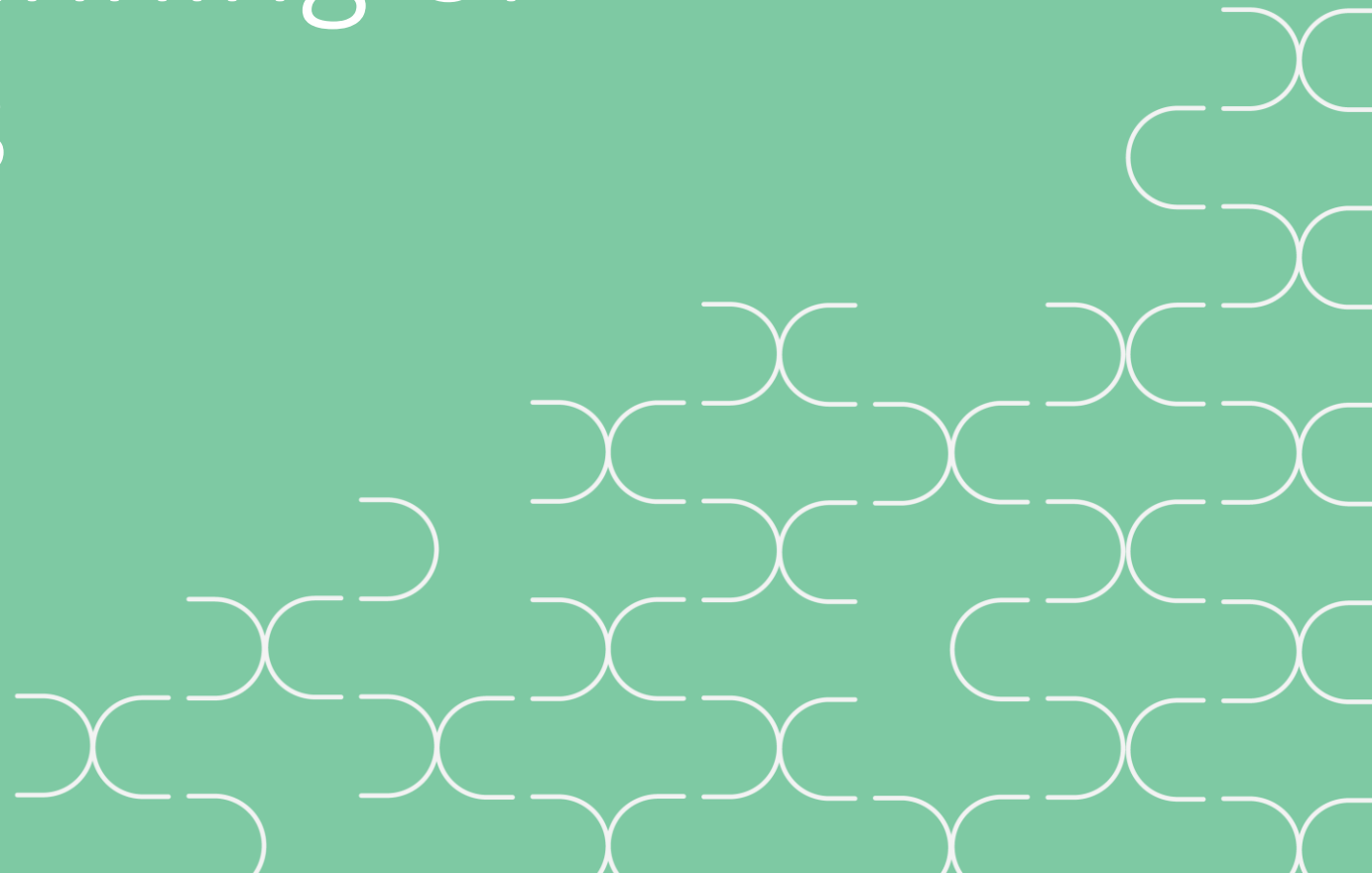


FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA

# Preparation & Running of Property Matters

ACT Law Society Family Law Conference

21 August 2024





# 1. Compiling your client's case

- Identifying issues
- Casting your client's case accordingly

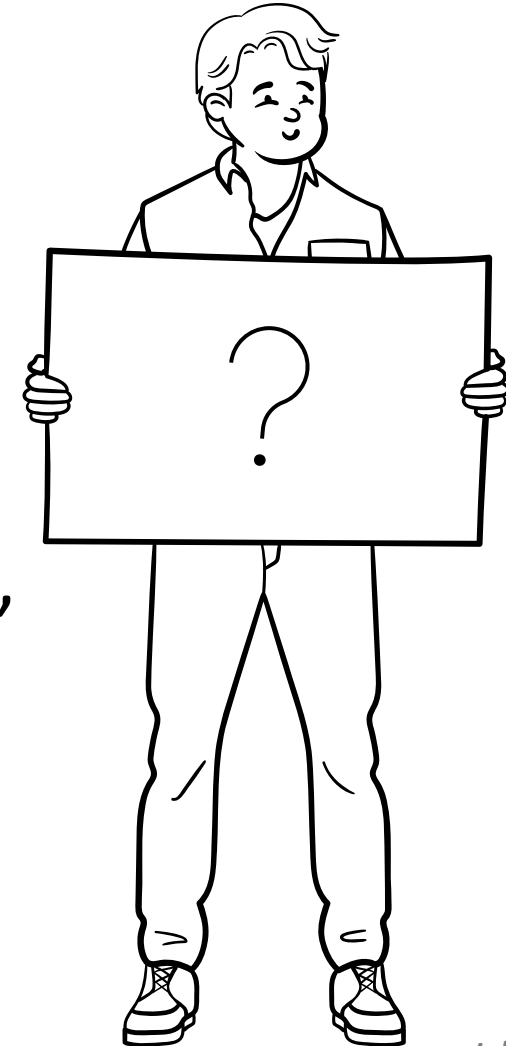
*Judge Mansfield*



## Why are the parties before the Court?

- Usually there is only one answer:
  - Because they, or at least one of them, cannot agree on a resolution to the dispute as between themselves.

- “Because that would be unfair”
- “It’s just not right”
- “I deserve more than that”
- “I won’t be able to start again on that”
- “We always said it would be X”



# Why?

- “They earn much more than me.”
- “I have had to put up with so much.”
- “I still have the kids.”
- “They have already moved in with someone else.”

These why questions are getting closer, but they have still yet to descend into something useful - the facts.

## Terms that do not appear in the Act:

Fair	'Fairness' does in the context of procedural fairness, but not in the context of an outcome.
Right	
Wrong	
Deserve	
Character	Except in s 69ZT, where the word is used in order to identify character evidence not applicable to child-related proceedings.

# The power of 'because'

**“... I said so” vs. “The evidence of A, B, C, and D establishes it”**

- The identification and proving of facts, matters, and circumstances, are the gateway to the orders your client seeks.

A Judge is obliged to give sufficient reasons to identify:

- The principles of law applied; and
- The main factual findings relied upon.



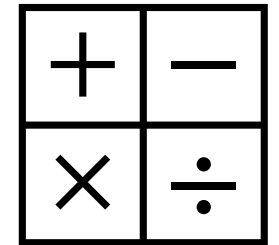
Extrapolated from *DL v The Queen* [2018] HCA 26

Ordinarily, it would be necessary for a Judge giving reasons to:

- Summarise the crucial arguments of the parties;
- **Formulate the issues for decision;**
- Resolve any issues of law and fact which needed to be determined before the verdict could be arrived at;
- **In the course of that resolution to explain how competing arguments of the parties were to be dealt with and why the resolution arrived at was arrived at;**
- Apply the law found to the facts found; and
- Explain how the verdict followed.

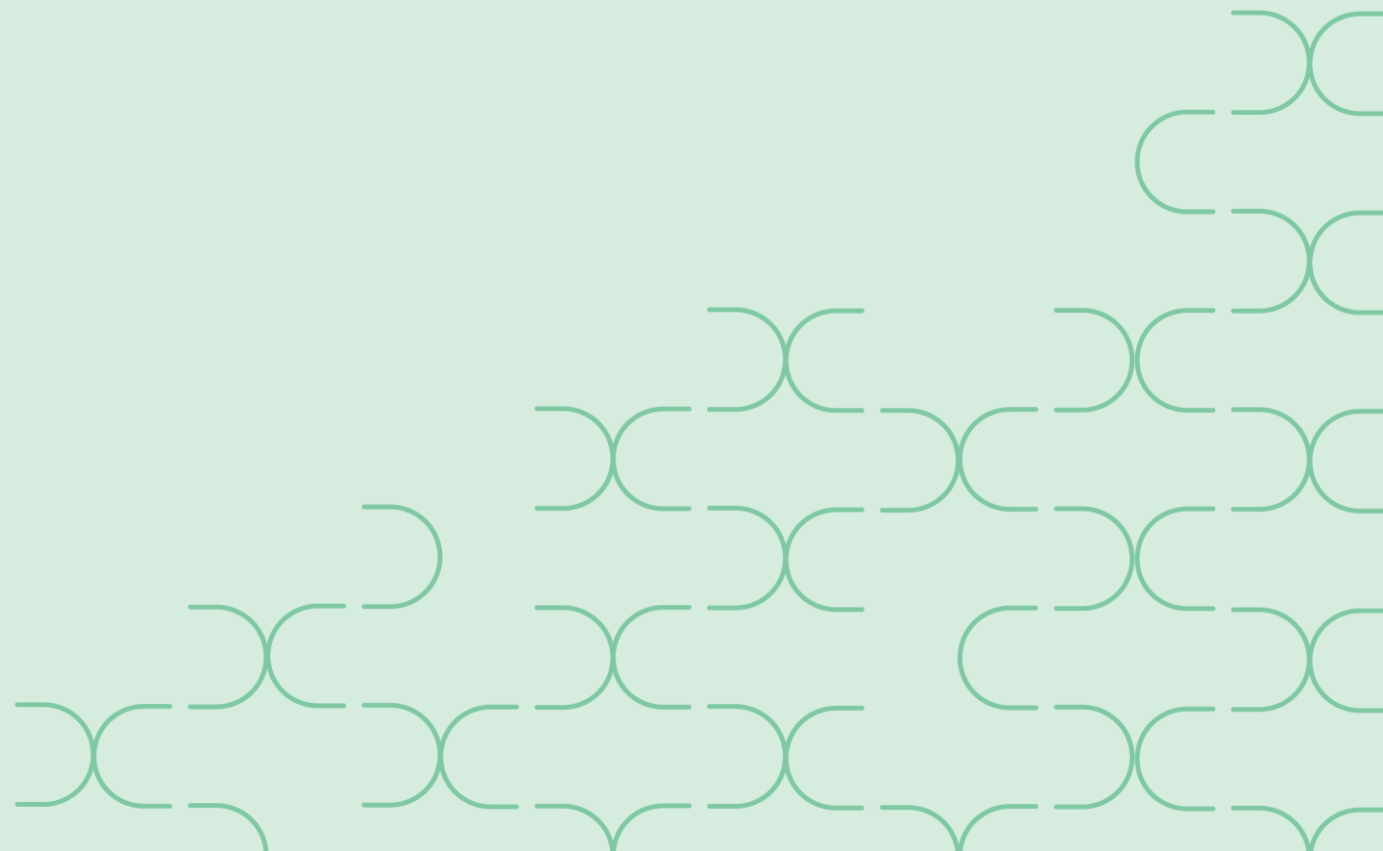


- The judicial formula = I find **X**, because of **Y**, and therefore I order **Z**.
- It is a CON-structive exercise, not a DE-structive exercise.
- It is always better (and easier) to **prove** *your* case, rather than having to **disprove** the other side's.
- It is always better to prove your case, rather than having to seek inferences.



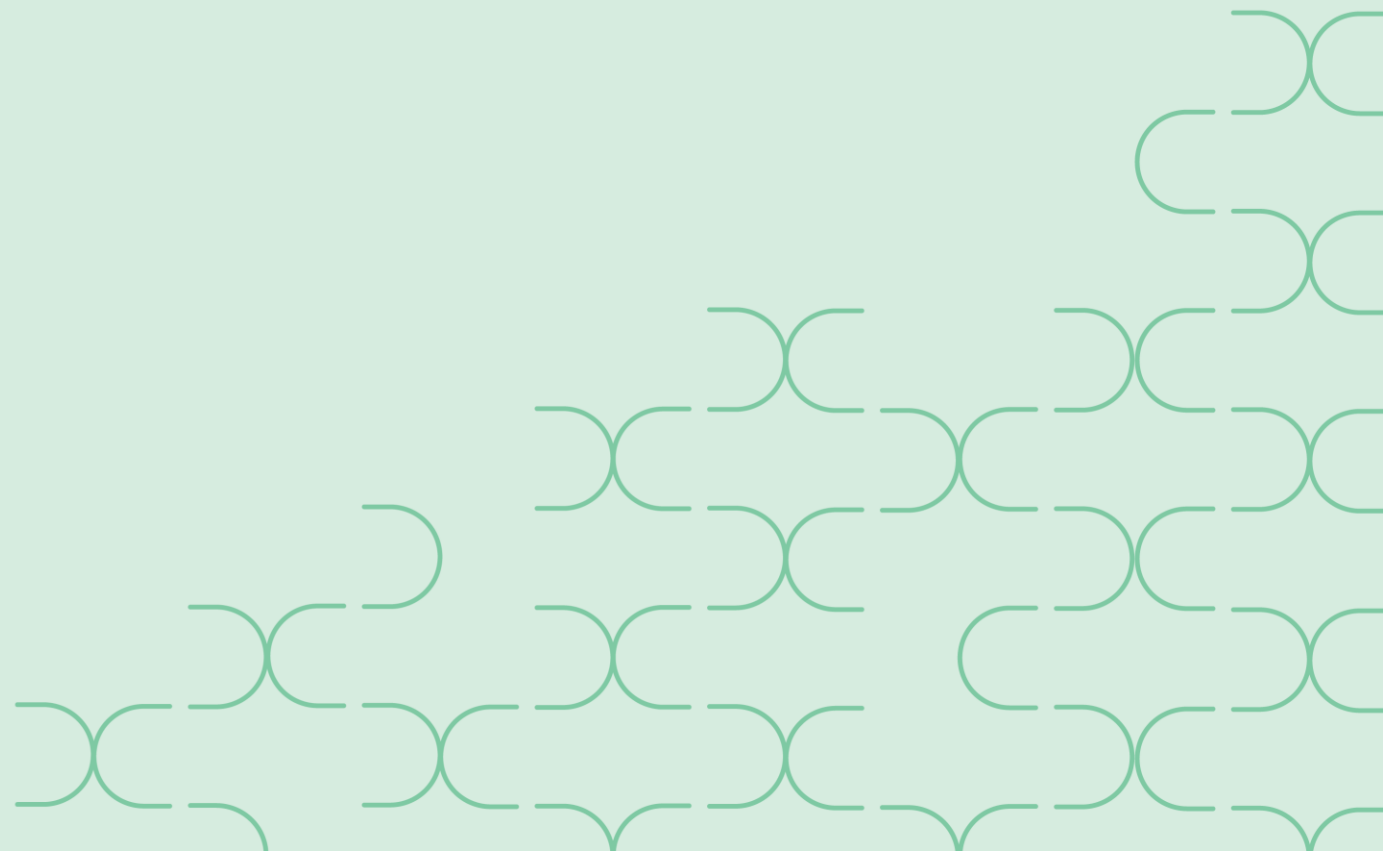
# Family Violence in Property Proceedings

*Judge Hughes*



# Use of Direct Speech in Affidavits

*Judge Mansfield*



# *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381

- In this case, Jackman J addressed the form of the evidence of conversations. Kane's Hire claimed that an aircraft purchased from the respondent was heavier than represented to Kane's Hire and as promised under the Sale and Purchase Agreement, resulting in loss. Central to the claim were conversations in which the weight of the aircraft was communicated.





# “THE FORM OF EVIDENCE OF CONVERSATIONS

- [118] In the present case, the applicant and the respondents took markedly different approaches to the form in which evidence in chief of conversations was given. [...]
- [123] There is ample authority for the proposition that **there is no rule of the law of evidence in Australia that evidence of conversations must be given in direct speech...**
- [124] ... All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience. [...]
- [127] **The practice of witnesses and lawyers working up a version of a conversation in direct speech** (whether or not prefaced by the phrase “in words to the following effect”) from the witness’s actual memory merely of the substance or gist of what was said **is logically, ethically and grammatically wrong...**
- [128] The form in which evidence of conversations is given should reflect the difference between verbatim memory and gist memory...”

“[129] Applying that reasoning, the following general principles apply to the form of evidence of conversations:

- (1) **The form of the evidence should correspond to the nature of the actual memory the witness has of the conversation.** ... There is no reason in the abstract to think that evidence in direct speech is more reliable or credible than evidence in indirect speech, or vice versa.
- (2) **If the witness remembers only the gist or substance of what was said, and not the precise words, then the evidence should be given in indirect speech** (also known as reported speech), in terms which reflect the witness’s actual memory.
- (3) **If the witness claims to remember particular words or phrases being used, then those words or phrases should be put in quotation marks** to indicate that they are verbatim quotations, even if the evidence is otherwise given in indirect speech...



- (4) If the witness genuinely claims to recall the actual words used in a conversation, then the evidence should be given in direct speech; that is, quoting the words as actually spoken. Apart from rare cases of photographic memory, this may well be the case where the witness has made a detailed contemporaneous note of the conversation, and has refreshed his or her memory from the note (in which case this should be expressly stated along with the tender of the note).
- (5) Evidence given in direct speech should not be prefaced by the phrase that the conversation occurred “in words to the following effect”. That expression blurs the important distinction between verbatim memory and gist memory, and leaves the Court unable to ascertain which kind of recollection is being claimed by the witness.
- (6) Evidence of a witness who claims to remember the exact words of a conversation, but who is found after cross-examination to have exaggerated the nature and quality of his or her memory, may well suffer an adverse effect on his or her credibility (the weight of which will depend on all the circumstances).



- Having extensively quoted from *Kane's Hire*, the NSW Court of Appeal in *Gan v Xie* [2023] NSWCA 163 approved Jackman J's approach and added:

*[120] Any objection that evidence in indirect speech of the substance or gist of what was said is inadmissible as opinion evidence, being the witness' inference drawn from observed and communicable data, is met by s 78 of the Evidence Act.*



# Example 1

On one occasion, I was called by our family friend K who babysat [the child] during the relationship, that she was at the school collecting her daughter when [the child] ran to her having seen her car and told her words to the effect that dad had not come to collect him. It was 3.30pm and I asked K could she take him home and I would collect him.

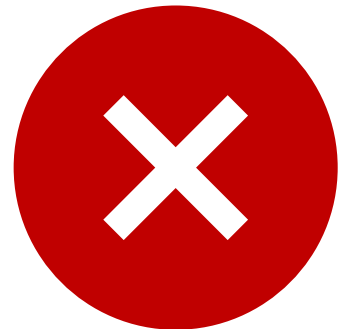


## Example 2

[The mother] suffers from depression. I can recall her telling me early in our relationship. *“Before I met you, I had depression really bad. I got prescribed Pristiq 100mg and have to see a psychologist.”*

Soon after [the child’s] birth, I can recall [the mother] saying to me, *“They’ve upped my Pristiq to 150mg.”*

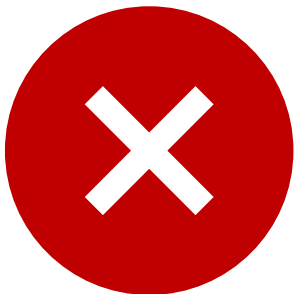
I do not seek to go into all of the details of my relationship with [the mother], however I will simply say that [the mother] often had difficulty coping with the children.

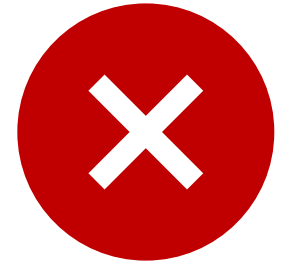


## Example 3

[The child] has expressed to me some reluctance in spending time with [the father]. I say this because:

- Approximately twice a month, when I have said to her words to the effect of, *“Daddy will pick you up from school today Lea”*, she has started crying;
- Approximately three times a month, usually on a Friday when I tell her that she is spending time with [the father] on the weekend, she has responded saying words to the effect of, *“No please, I don’t want to go.”* This used to occur more regularly, nearly every time [the child] was due to go into [the father’s] care.
- When [the child] expresses reluctance, I say *“thank you for sharing with me”*, and I try to say something about the time that she can look forward to such as a party, or games or Arts. If she is very reluctant, I say *“we can chat with [the father] about the upcoming weekend and see what great things he has planned”*.





## Example 4

~~As I have previously stated, I would have been financially much better off staying in Canberra but [the husband] said to me words to the effect:~~

~~*"I am a jealous person. I would not be able to cope with you staying in Canberra"*~~

When I moved to [the coast] and lived with [the husband] in his house, I wanted him to sell that house and buy another house in our joint names, but [the husband] would not agree. He kept saying he wanted to finish doing the house up. ~~I recall saying words to him to the effect;~~

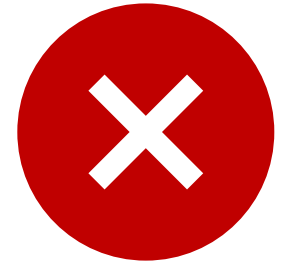
~~*"I don't want to do all this work to the house if it's not going to be my house too"*~~

~~and [the husband] replied words to the effect:~~

~~*"This is your home, I want it to be our home together"*~~

[The husband] and I often talked about our future plan, which was to finish renovating the house completely and in the future, to sell it and buy a small house of lesser value to use as a base and to travel. Our intention then was to initially travel Australia and then to do overseas trips together.

## Example 5 – Precisely the problem!



When I depose to conversations in this Affidavit I do so with words to the effect of those said. Most of my conversations with the children are in French. When I hear the children speak to [the father], it is in German. [The father] and I speak to each other in English. When deposing conversations that occurred either in French or German, I have tried to use English words that are either the direct or the closest translation of the original French/German words. However, sometimes a direct or even very close translation is not possible, and where that is the case I have used the best possible word to convey the actual words and tone used.