

FAMILY COURT OF AUSTRALIA

TAISHA & PENG AND ANOR

[2012] FamCA 385

FAMILY LAW – DE FACTO RELATIONSHIP - Dispute as to the relationship - Approach to determining whether a declaration should be made under s 90RD of the *Family Law Act 1975* (Cth) - Question of the onus of proof lying with the applicant and the standard of proof being the balance of probabilities - Applicant failed to reach the appropriate standard of proof.

Evidence Act 1995 (Cth)

Family Law Act 1975 (Cth)

Barry and Dalrymple [2010] FamCA 1271

Briginshaw v Briginshaw (1938) 60 CLR 336

Jonah and White [2011] FamCA 221

Lynam v Director-General of Social Security (1983) 52 ALR 128

Moby and Shulter [2010] FamCA 748

Truman and Clifton (2010) FCWA 91

APPLICANT:

Ms Taisha

RESPONDENT:

Ms Peng

INTERVENOR:

Mr Pan

FILE NUMBER:

MLC 5803 of 2011

DATE DELIVERED:

24 May 2012

PLACE DELIVERED:

Melbourne

PLACE HEARD:

Melbourne

JUDGMENT OF:

Cronin J

HEARING DATE:

2 and 3 May 2012

REPRESENTATION

COUNSEL FOR THE APPLICANT:

Dr Ingleby

SOLICITOR FOR THE APPLICANT:

Macpherson & Kelley

**COUNSEL FOR THE 1ST AND 2ND
RESPONDENTS:**

Mr Mawson SC

**SOLICITOR FOR THE 1ST AND 2ND
RESPONDENTS:**

Lander and Rogers

ORDERS

- (1) That the application filed 15 December 2011 and the response thereto filed 5 April 2012 are both dismissed save as to issues of costs.
- (2) That should any party seek costs arising out of these orders, such application be made by written submission and filed and served by no later than 22 June 2012 with such submission being endorsed with the fact that it has been so served on the other party and any recipient of such submission have until 6 July 2012 to file and serve any response and such response be endorsed with the fact that it has been so served on the other party and upon receipt of any such application for costs, it or they be determined in chambers

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Taisha & Peng and Anor* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

FAMILY COURT OF AUSTRALIA AT MELBOURNE

FILE NUMBER: MLC 5803 of 2011

Ms Taisha
Applicant

And

Ms Peng
Respondent

And

Mr Pan
2nd Respondent

REASONS FOR JUDGMENT

1. For about 17 years until October 2010, Ms Taisha lived in a residence with Ms Peng. Before then, during that period and even now, Ms Peng remained married to Mr Pan and they have three (now) adult children.
2. During the 17 years, at various times, all of these people lived together under the one roof. Sometimes Mr Pan and one of the children lived in another residence but on any view, there was considerable interaction between all of them.
3. Ms Taisha (as the applicant) alleged that she and Ms Peng (as the respondent) were in a de facto relationship for that 17 years. She now seeks a declaration under s 90RD of the *Family Law Act 1975* (Cth) (“the Act”) which, if granted, would empower this Court to resolve the property dispute claim which Ms Taisha brings against Ms Peng.
4. Ms Peng denies any such relationship existed and described her association with Ms Taisha as that of like mother and daughter.

5. The hearing was conducted over two days where all of these six adults along with other witnesses gave evidence. Each of the parties was represented by experienced lawyers.

THE LEGAL ISSUE

6. Because the Court can only exercise its powers to deal with the parties' property if there existed a de facto relationship, the declaration of the existence of that de facto relationship is in the nature of a jurisdictional fact (see *Jonah and White* [2011] FamCA 221). The onus is on the applicant to establish that the Court has that jurisdiction.
7. The definition of a de facto relationship is set out in s 4AA(1) of the Act. It provides:
 - (1) A person is in a de facto relationship with another person if:
 - (a) the persons are not legally married to each other; and
 - (b) the persons are not related by family (see subsection (6)); and
 - (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.
8. Section 4AA(2) provides certain circumstances that might give rise to a conclusion that people were having a relationship as a couple. No particular finding in relation to any of the defined circumstances is to be regarded as necessary (see s 4AA(3)).
9. Section 4AA(2) is prefaced by a heading which reads "Working out if persons have a relationship as a couple". In my view, it is not necessary to look to s 4AA(2) unless there is some definitional uncertainty from a literal reading of s 4AA(1). The latter section has mandatory requirements but the wording of the former, indicates it is to be used as a guide for the purposes of s 4AA(1).

10. Albeit the requisite elements of s 4AA(1) must be proved, interestingly, s 4AA(4) provides:

(4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

11. Thus, while the onus is on the applicant to prove on the balance of probabilities that a de facto relationship existed, the Court may attach whatever weight it considers appropriate. The *Evidence Act 1995* (Cth) applies (see s 4(1)) and s 140 requires the Court to apply the standard of proof which is described as the balance of probabilities although it would seem that the weighting and the balancing task is much less formal than in other civil proceedings. In my view, s 4AA(4) does not ameliorate the requirement for the applicant to prove her case on that transparent standard.

12. In *Moby and Shulter* [2010] FamCA 748 Mushin J looked at s 4AA(1) and said:

137. ...in *Simonis v Perpetual Trustee Co. Limited* (1987) DFC 95-052, Kearney J agreed with the approach of Powell J referred to in the previous paragraph and held (p 75,589):

I consider that the expression under consideration constitutes a single composite expression of a comprehensive notion or concept, and therefore has to be approached by considering the expression as a whole and not in several parts.

138. The approaches of both Powell J and Kearney J quoted above were adopted by the Court of Appeal of the Supreme Court of New South Wales in *Light v Anderson* (1992) DFC 95-120.

139. While I respectfully agree with the approach of their Honours, before the definition may be considered as constituting "a single composite expression of a comprehensive notion or concept", there are two specific elements of that definition which require individual consideration. The first of those is the concept of "a couple". For the purposes of the definition, "a couple" is constituted by two people, whether of the same or opposite sexes.

140. The second specific element is the concept of "living together".
13. It has also been said that it is the composite picture that must be looked at and any attempt to isolate individual factors and attribute to them relative degrees of ...importance involves a denial of common experience and will almost inevitably be productive of error (see *Barry and Dalrymple* [2010] FamCA 1271 referring to the Full Court of the Federal Court of Australia in *Lynam v Director-General of Social Security* (1983) 52 ALR 128). Whilst a composite picture is clearly the only way any case can be determined here, these are mandatory requirements because they go to jurisdiction. Without proving that the parties were a "couple", there can be no de facto relationship just as conversely, if a couple of people live together but there is no domestic relationship, the section is not satisfied.
 14. In *Moby and Shulter* (supra) Mushin J went on to examine s 4AA(2) as it applied to the parties in that case. With respect, in my view, that exercise is not necessary unless the jurisdictional fact cannot be established from a consideration of s 4AA(1) alone. That is supported by the explanatory memorandum to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 where in respect of s 4AA(1) the memorandum referred to the requirements whilst s 4AA(2) was referred to as providing a list of circumstances for a court to consider.
 15. Turning then to the two requirements. The applicant must establish that the parties were a couple and then establish that the couple lived together in a domestic relationship. The word "genuine" in my view, adds nothing to the definition.
 16. The word "couple" is not defined.
 17. The Australian Bureau of Statistics defines a "couple relationship" as:

being two people usually residing in the same household who share a social, economic and emotional bond usually associated with marriage and who consider their relationship to be a marriage or marriage-like union. This relationship is identified by the presence of a registered marriage or a de facto marriage. (See www.abs.gov.au/ website DBS).

I note that that definition is used for census purposes.

18. The Shorter Oxford Dictionary defines “couple” as a union of two. (See 6th edit (2007)). The very word “couple” comes from the Latin which is a tie or a bond.
19. In *Jonah and White* (supra) Murphy J defined the relationship as being a de facto relationship when the parties had so merged their lives that they were for all practical purposes, living together as a couple which he thought was the “manifestation of coupledness”. His Honour said that it was the nature of the union that lay at the heart of the statutory considerations. I cannot add to what Murphy J said and I respectfully adopt his view.
20. But there must still be evidence of a domestic relationship. Mushin J in *Moby and Shulter* (supra) at para 167 said it was not a term of art but had to be given its ordinary meaning. I respectfully also adopt that because, having regard to s 4AA(4), the Court can take a wide discretionary view of the way in which the parties themselves conducted their relationship. Even having said that however, a domestic relationship must be one in which there are activities of running a household or shared households. That is, something must be seen to be related to domesticity which refers to home conditions and arrangements. For example, it could be indicated by people coming and going as if entitled to use and share the home’s facilities which is quite distinct from a boarding house or backpacking hostel where individuality reigns.
21. A couple therefore living in a domestic relationship is the opposite of a couple of individuals.

THE FUTURE PROBLEMS?

22. Despite s 4AA(4) to which I have referred, this particular case shows the extent to which the recent jurisdictional changes have opened up the invasion into an otherwise private area of the lives of individuals. Much of the evidence in this case centred around the sexual proclivities of two women whilst each probed the other on how they defined their 17 years together.

CREDIT

23. Each of the parties placed their credit in issue. Each was hampered by a language barrier and required interpreters. The language differences make credit much harder to determine.
24. Because of the starkly polarised positions of the main parties and their witnesses, I am required to determine, on the balance of probabilities, which side's version is more plausible. Accepting the factual versions of one side does not necessarily mean the Court can grant the order sought because the question still remains whether the jurisdictional fact has been established.

THE PARTIES

25. Ms Taisha is a 44 year old factory worker who came to Australia in 1979. Between 1998 and now, she has had a variety of jobs. In 1993, at the age of 24, Ms Taisha met Ms Peng then aged 44 years, and they became friends. Ms Taisha said they commenced a sexual relationship in a car and the two women then went to Ms Peng's home where for the first time, Ms Taisha met Mr Pan. There is no dispute that at that time, Mr Pan and Ms Peng were married and had three children.
26. Ms Peng is now 66 years of age and describes herself as retired. She married Mr Pan in 1976 and migrated to Australia ten years later starting with virtually nothing. Both Mr Pan and Ms Peng are Australian citizens. Throughout the marriage, Ms Peng raised the children, performed home duties and worked periodically in such jobs as an assistant in the education industry, in the hospitality industry and as an unskilled worker. She said that throughout their years together, she and Mr Pan had worked hard and acquired modest assets.
27. Ms Peng denied there was ever any sexual relationship with Ms Taisha.

THE EVIDENCE

28. Ms Taisha said that when she went to the home of Ms Peng in 1993, they were welcomed by Mr Pan and they then went into a bedroom containing a bunk bed on which Ms Peng's daughter slept on the top. This daughter M was then aged

16 years. Ms Taisha said that she and Ms Peng slept on the bottom bunk and thereafter, she remained at Ms Peng's house. Ms Peng's evidence was that it was January 1994 and Ms Taisha attended at her home in a distressed condition complaining of being kicked out of her family home. She said she asked Mr Pan could Ms Taisha stay and he agreed as a temporary measure. Ironically, that temporary measure remained in place for the next 17 years and the Ms Peng / Mr Pan family came to accept Ms Taisha living in their home.

29. Witnesses such as the three adult children said they overheard this first night conversation albeit that it was a long time ago and they were between 11 and 16 years respectively.

MS TAISHA AND MS PENG SLEEP TOGETHER

30. It is important at this point to highlight the one significant difference. Ms Peng said that whilst there was no sexual or any romantic relationship, she and Ms Taisha did sleep together at times. The expression "sleep together" is often used in polite society but also colloquially. More often than not, there is no misunderstanding about this euphemism. Here however, the parties' respective references were starkly at odds with each other. Ms Taisha was, mostly by inference, referring to sexual intimacy whilst Ms Peng was literally talking about two people asleep in the one bed. Ms Peng described the relationship with Ms Taisha as a mother-daughter one whilst at the same time she was in a loving and romantic relationship with her husband. Mr Pan and the children support that view. As to this marriage, Ms Taisha said that Ms Peng told her it was a sham and that she did not want to be with Mr Pan nor have any sexual activity with him. All of the respondent's witnesses denied that description.
31. In respect of the sleeping arrangement in 1993, the adult daughter M gave evidence that whilst she slept on a bunk bed, Ms Taisha slept on a fold-out bed in the same bedroom and whilst her parents slept in another room, there were times when her mother did sleep on the bottom bunk. Ms Peng's evidence was that in the early years, there was a portable single fold-down bed in M's room upon which Ms Taisha slept.

32. Ms Taisha maintained that Ms Peng asked her daughter M to sleep in the lower bunk rather than in the top bunk because she did not want M looking down to see their intimacy. Not only was that denied by Ms Peng but the only inference I can draw from the evidence of M was that M slept in the top bunk anyway.
33. Ms Taisha said Ms Peng's marriage was unhappy. No other witness said that and it was specifically denied by Mr Pan and Ms Peng who said they were happily married.
34. Ms Taisha said Mr Pan and Ms Peng slept in separate rooms because of an allegation made to her by Ms Peng that her husband had sexually assaulted her. That was denied by Mr Pan and Ms Peng.
35. Ms Taisha said she and Ms Peng went to Queensland on holidays and Ms Peng's sister went along. She said she slept with Ms Peng who was questioned by her sister about it at that time in Queensland. The denial by Ms Peng took the matter no further and the sister was not called as a witness.

MS TAISHA AND K

36. Ms Taisha said the original living arrangements at the first house continued for approximately two years but Ms Peng and Mr Pan said that Ms Taisha was not there consistently and she had a boyfriend during that time. The boyfriend relationship was denied by Ms Taisha who said that the man referred to as K was simply the son of a friend of Ms Peng. K was said by Ms Peng to have had an involvement in Ms Taisha's life and in particular on holidays overseas but whilst it was said that K was present, Ms Taisha maintained no boyfriend/girlfriend relationship existed.

THE UNIT IS PURCHASED

37. In 1995, a unit was purchased for \$110,000 in the name of Mr Peng and Ms Taisha. The circumstances were controversial from the parties' perspective but did little to shed any objective light on the disputed relationship.

38. Ms Taisha said that she and Ms Peng decided to buy a property but it was eventually bought with Mr Pan because Ms Peng already had her name on the first property and she did not want asset problems with Centrelink. Whilst agreeing with the former, Ms Peng denied the latter assertion.
39. Mr Pan had \$60,000 saved but because of his income, he could not borrow from a bank for the balance that was required for the purchase. He and Ms Taisha borrowed \$55,000 and it was this money that enabled Ms Taisha to provide the second half of the purchase price. Two important things can be established. First, the loan was joint. Secondly, a large amount of the mortgage payments thereafter were made by Mr Pan. Ms Taisha said that her half of the purchase price came from the borrowings just mentioned, but also an insurance payout from a written-off motor car and money lent to her by Mr Pan which in turn, he had received from a redundancy package.
40. The details of these loan arrangements remain vague. No corroborative records were produced because Ms Taisha said that payments were made in cash and receipts were not kept.
41. Ms Peng said that when Ms Taisha was asked to repay money, she became angry. The financial position of Ms Taisha during these years was confusing. Ms Peng alleged that Ms Taisha had been in a number of different jobs and was often out of work. To that assertion, when she filed an affidavit in reply, Ms Taisha remained silent. She did produce credit card statements but they are not conclusive of anything asserted.
42. Initially the purchase of the unit had been for two units but when the contract of sale was executed, a change occurred and the second unit was purchased by the selling agent. There was considerable disquiet expressed, and some cross-examination of that agent, about the legitimacy of what occurred. The agent is now the intimate partner of Ms Taisha.
43. Ms Y (the agent) is that partner and she was very defensive about what she had done and was keen to assure me that no laws had been broken. I am not in a

position to make any finding and the issue does not affect either the dispute before me nor the credit of the witness.

Ms Y

44. Ms Y was called to give evidence about her perception of the relationship of Ms Taisha and Ms Peng. The relevance of her evidence was limited to her belief about the parties based on seeing them going out together on social events, going on dates as well as shopping trips. Her public perception clashes with Ms Taisha's own concession that she was a very secretive person about the relationship. Ms Taisha maintained that that secrecy was at the request of Ms Peng but in any event, that is what occurred. I conclude that Ms Y had the benefit of hindsight but no-one else had. Ms Y's evidence did not assist me.

THE OCCUPANTS OF THE NEW UNIT

45. According to Ms Taisha, when the second property was settled, Ms Peng and her husband Mr Pan along with their children moved there but Ms Peng said that it was Ms Taisha who moved first and she and Mr Pan stayed in the first house until it was leased. That issue was contentious. Ms Peng's version was supported by the child M who by then was an adult student conscious of access to public transport to her university. The evidence about the living arrangements was also supported by the other children who are now adults. It is hard for me to reject their evidence having regard to the preciseness and certainty with which they gave it.
46. Ms Peng said that she regularly went to the second house whilst still residing in the first house so that she could provide for the children. Whilst that activity was questioned because of the ages and capabilities of the children to care for themselves, it is not something that I find implausible. If, as I accept, Ms Peng did spend time at the first house before moving to the second house, it is inconsistent with Ms Taisha's evidence and inconsistent with an unbroken de facto relationship.

47. The second house had two bedrooms and a study. Ms Taisha said that she and Ms Peng shared the master bedroom but that was denied by Ms Peng who said that she slept in the lounge room until 2006. The lounge room and the master bedroom are side by side in this unit. Ms Peng said that the child M slept on a roll-out mattress and with that, M agreed.
48. In about 1996, so not long after the second house was acquired, the first house was leased so Mr Pan went to the second house where Ms Taisha said he slept in the living room. That too seems supported by other witnesses.

MS PENG SLEEPS WITH MS TAISHA

49. Ten years later, there is no dispute that Ms Peng began sleeping in the master bed, in the master bedroom with Ms Taisha. Ms Peng still denied there was any intimacy involved in this. She said she went there because her back was injured and she had been sleeping on a couch or sofa. She said she entered the bed late after Ms Taisha was asleep.
50. The parties disputed the question of the door to this master bedroom being open or shut but on any view, the unit was small and Mr Pan was sleeping only metres away. It seems that he was right outside the bedroom door. The adult children gave evidence and said that the door was open. The child M recalled going into the bedroom at night to let her mother know that she had returned home very late. There was a ring of reality about that statement.

HOLIDAYS

51. There is no dispute that Ms Taisha and Ms Peng had overseas holidays together where they stayed in a variety of accommodation both commercial and with relatives. Ms Peng was at pains to point out that any sleeping arrangements were open to family scrutiny. The major disputes about the holidays fell into two categories. First, Ms Taisha said they went on a holiday that Ms Peng said did not occur. Secondly, Ms Taisha said she paid for all of the holidays and expenses.

52. Ms Peng responded to the allegations about the holidays denying not only the 2005 holiday but also said that the costs were split and that her children contributed towards airfares. The children corroborated those matters. Ms Taisha was keen to point to photographs of the two women on holidays together in poses that she described as affectionate. I certainly agree they show two women posing as such but I could not conclude that that evidence proves anything more than that they were posing for a tour guide who apparently took the photographs. One would expect them to look happy.
53. In April 2011, Ms Taisha said she was giving Ms Peng \$100 per week until she had saved up \$1000. On the face of it, that would have occurred after separation but I have presumed that it was a typographical error. What is of relevance is that Ms Taisha complained that Ms Peng used the money to pay for her ticket to America which was an acknowledged holiday for both women but that she put the son's name on the receipt. That is certainly inconsistent with a happy relationship but no details were otherwise provided. I am not at all sure whether this incident occurred before or after the holidays so that to the extent that Ms Taisha became aware that her money was being used by Ms Peng, she still went on the holiday.
54. It was Ms Taisha's view that she and Ms Peng were inseparable and that is supported by others but that does not mean that they were a couple or (to use the words of s 4AA(2)) there was any mutual commitment to a shared life. Ms Peng's evidence and that of her witnesses also was that Ms Taisha was like a daughter and/or aunty. The photographs and the behaviour of both Ms Peng and Ms Taisha is consistent with both concepts.

FINANCES

55. Ms Taisha's evidence was that she earned money and contributed financially towards the household by paying "the" rates and insurance and "all" food and groceries. She said she paid for all of her travel as well as lent the adult children money. The response of Ms Peng to the rates point was that Ms Taisha paid one-half. In her second affidavit, Ms Taisha did not advance the issue any

further. There is a significant difference between “all” the rates and half of them.

56. A half payment as asserted by Ms Peng is more consistent with Ms Taisha being a half owner with Mr Pan.
57. The onus rests on Ms Taisha to establish that she made these payments because of what she asserts. How it was done is not shown in her affidavit in reply. What is shown is a variety of payments for insurance and holidays but nothing of a corroborate nature to what she said. The same applied in respect of “all” food. The response of Ms Peng was that Ms Taisha did not make all of the payments but that she and Mr Pan paid for such household items themselves and their children made a contribution. The child M said that she paid her mother \$50 to \$100 per week from her earnings.
58. Ms Taisha said that she spent money on furnishings and curtains for the second house. She said she retiled the kitchen and paved the backyard. That evidence was led to establish a contribution as well as her role in the family. Ms Peng said no such renovations or refurbishments were done. She said window furnishings were included in the property when it was bought and the carpet near the kitchen was retiled 12 years later than that suggested by Ms Taisha. Ms Peng said that the retiling was not done by Ms Taisha. Ms Peng said that although Ms Taisha bought paving blocks, it was Ms Peng and the child M who did the completion of the work. Ms Taisha had the opportunity to lead some further corroborating evidence about this in her affidavit in reply but did not do so.
59. The vague and general nature of Ms Taisha’s evidence about these specific items does not match the specific nature of the detailed responses of Ms Peng and her family. The absence of receipts is not necessarily the problem.

CREDIT

60. As witnesses, both parties gave credible answers to all questions put to them. The language barrier made any possible conclusion about credit difficult.

61. The evidence of Mr Pan was largely unhelpful because although his affidavit had been interpreted before he swore it, he simply corroborated what Ms Peng said in her affidavit. Unfortunately, he could not remember much and his demeanour indicated that he was a confused and unwell man. His evidence was prepared at the same time as his children and there is a remarkable similarity about the language used. Cross-examination of the two sons about the meaning of words such as “advance” showed their evidence was carefully prepared to support the views of Ms Peng. However, the major evidence about the sleeping arrangements, the financial contributions to the household and holidays along with their denials of any sexual relationship involving their mother all seemed plausible.

SUBMISSIONS

62. Dr Ingleby on behalf of Ms Taisha submitted that for expeditious reasons, both sides had restrained themselves from cross-examination on every factual issue. To their credit, both counsel did that which is why I have traversed the evidentiary differences as I perceive them. Dr Ingleby submitted the factual disputes were more extreme in this case than usual over what happened in the lives of these two women for 17 years. There is some truth in that. The difficulty is that one of these parties is not telling the truth and the onus is on Ms Taisha.
63. Dr Ingleby went through a “statutory checklist”. In my view for the reasons outlined above, that is only necessary if there is some doubt about whether Ms Taisha and Ms Peng fell within the definition of de facto relationship. Even if I am wrong about that, it is still only a matter of looking at what assistance s 4AA(2) can provide.
64. Dr Ingleby submitted that on any view of the evidence, the parties slept in one bed from four to five years at least from 2006 and that the evidence of Ms Peng and her family members was less favourable than Ms Taisha. It was submitted that an inference should be drawn that the sleeping together had a normal feature of their intimate sexual relationship. Much was made about the

sleeping arrangements and I am not comfortable on that evidence that I could find that there was any particular sexual intimacy. The evidence is as consistent as a mother and daughter relationship as it is with sexual intimacy.

65. It was submitted on behalf of Ms Taisha that it was implausible that three intelligent and self-sufficient adult children could ignore the sleeping habits of their mother. Conversely, it is open for me to find that because I accepted their mother's sleeping habits, they did not draw any inference about her indulging in any sexual activity. None of them indicated that they were repelled, happy or curious about the concept of their mother being in a lesbian relationship. They thought the sleeping arrangement was convenient having regard to the relevant positions of the parties in the unit and their mother's bad back. Dr Ingleby submitted that I should draw an inference in favour of the relationship having existed because Mr Pan never went on a holiday with his wife and particularly in circumstances where Ms Peng's explanation of her husband's absence was that she wanted to save money and that that was implausible. I agree that it appears unusual but I also have the difficulty of the conflict about who paid anyway. Dr Ingleby submitted that Ms Taisha was the breadwinner. I reject that for the reasons earlier outlined.
66. Generally matters as indicated in s 4AA(2) if it is intended as a checklist, are unhelpful in this particular case.
67. Dr Ingleby submitted that the shared activity in the home was evidence of a domestic relationship. I reject that on the evidence. I am satisfied that Ms Taisha did not have a major role in the family's daily life.
68. Mr Mawson SC on behalf of the respondent Ms Peng submitted as did both parties, the applicant bore the onus of proof and that the standard was the balance of probabilities.
69. Mr Mawson submitted that sharing a common residence did not give rise to a presumption of parties living together as a couple on a genuine domestic basis. He pointed to the fact that there was a fundamental difference between those two concepts.

70. Mr Mawson referred to the decision of Murphy J in *Jonah* (supra) and submitted that there was no manifestation of “coupledom” here. He submitted this was about Ms Taisha having a relationship with the entire family of Ms Peng. It was submitted that the broad allegations of a sexual relationship by Ms Taisha were not particularised in any form and in my view, they do not necessarily need to be so particularised. An allegation of a sexual relationship carries with it many connotations and no doubt many adults view their relationships as sexual and otherwise in different ways. In this case, an allegation that there was a sexual relationship and a denial thereof is simply a matter that can be determined on the facts as alleged.
71. Mr Mawson submitted that none of the evidence of Ms Taisha demonstrated any degree of exclusivity and that was a flaw in the case. He submitted that it was implausible on the evidence to draw an inference about a clandestine relationship as submitted by Dr Ingleby because the evidence showed that no-one had any privacy or personal space having regard to the size of the property in which they were all living.
72. In respect of the law, Mr Mawson submitted that the legislation did not contemplate a clandestine relationship as a couple. However, it must be said that the law recognises that people do have affairs or relationships within marriage and that it recognised that a de facto relationship can still exist.
73. In respect of the authorities, reference was made to *Lynam and Director of General Social Security* [1983] 52 ALR 128, *Truman and Clifton* (2010) FCWA 91 and the decision of Coleman J in *Barry and Dalrymple* [2010] FamCA 1271 in which different judges have endeavoured to grasp the mettle and confine the legislation to some parameters of definition but in each case, there is the underlying problem that whilst these are of assistance if not guidance, each case must turn upon its own facts.

THE APPROACH TO THE BALANCE OF PROBABILITIES

74. Despite the reference in s 4AA(4) to the Court making its finding on such “matters” and giving those such weight as the Court considers appropriate, it was submitted by both parties that the standard of proof was the balance of probabilities. Section 4AA does not create an evidential burden upon the respondent.
75. The degree to which a court should be satisfied is best summed up in the words of Dixon J (as he then was) in *Briginshaw v Briginshaw* (1938) 60 CLR 336 where his Honour said:

The truth is that, when the law requires that proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal.

76. In that same case, Rich J described the requirement as one of “comfortable satisfaction”. Latham CJ said a court should not act on mere suspicion or guesswork. His Honour went on to say that:

Fair inference may justify a finding upon the basis of preponderance of probability.

77. The secretive nature of the asserted relationship, the various circumstances of the living arrangements which changed from time to time and which are as consistent with a mother and daughter relationship as they are of a sexual relationship, the absence of any significant corroborative material to support the major assertions and the absolute denials of the family and the respondent’s other witness, all lead me to doubt the case of Ms Taisha. I cannot guess because that is exactly what the trial judge did in *Briginshaw*. I find that I am

not persuaded to the appropriate standard as to the existence of a de facto relationship.

THE ONUS OF PROOF

78. The onus is on Ms Taisha to prove the existence of the de facto relationship. On her evidence, I could not find that she has established that burden.

POSSIBLE BREACH OF S 121 OF THE *FAMILY LAW ACT 1975* (CTH)

79. On the second day of the hearing, Ms Peng began her evidence. She said that on the previous evening, her neighbour gave her an envelope addressed to the neighbour in which the only content was a photocopy of the February affidavit of Ms Taisha. The envelope was handwritten and there was a postage stamp which was not post office stamped or cancelled upon it.
80. Leaving aside any breach of s 121 of the Act, the evidence was led to show that Ms Taisha had tried to cause embarrassment to Ms Peng. Ms Peng was cross-examined and Ms Taisha and her partner Ms Y were also recalled and cross-examined.
81. Because the original affidavit of Ms Taisha had been e-filed at the Court, the only documents in the hands of the litigants at that time and thereafter, was the sealed acknowledgement of the filing. No copies of the affidavits were adorned with seals. As such, both parties had unsealed but signed copies of the affidavit.
82. All witnesses denied any knowledge of the delivery of the document and it is impossible on the evidence, to draw any conclusion as to why either party would give such material to a neighbour of Ms Peng.
83. The only observation I make is that someone wanted to publish that which should have remained very private. To the extent that one of the witnesses did it, the additional problem is that that person or persons, has (have) perjured themselves.

84. Accordingly as the envelope and its contents are now in the possession of the Court by my direction, to the extent that either side makes a complaint to police requesting an investigation into the offence of perjury or that the Commonwealth Attorney-General is requested to investigate a breach of s 121 of the Act, the documents remain on the Court file specifically for that purpose.
85. I propose also asking the administration of the Court to consider the question of whether or not the move to the digital age of filing could be better served by endorsing each page of a document with confirmation of the filing for the purposes of service.

I certify that the preceding Eight Five (85) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Cronin delivered on 24 May 2012.

Associate:

Date: 24 May 2012