COURT OF APPEALS OF THE STATE OF NEW MEXICO

MARGARET ANNE DION,

Petitioner-Appellant

vs. No. 30,699

NANCY CIMARRON RIESER,
Successor Personal Representative of the
Estate of Richard Davis Rieser, Deceased,

Respondent-Appellee.

PETITIONER-APPELLANT'S ANSWER BRIEF

On Appeal from the Hon. Raymond Z. Ortiz,
District Court Judge, Division III,
First Judicial District Court, County of Santa Fe,
Case No. D-0101-PB-200700081
In the Matter of the Estate of Richard Davis Rieser, Deceased

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Oral argument is requested in this matter

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I. INTRODUCTION

The issue before this Court is whether the First Judicial District Court erred in denying Margaret Anne Dion's ("Ms. Dion") Petition for Appointment as Personal Representative based on its determination that the relationship between Ms. Dion and the Decedent Richard Rieser ("Decedent") was not a relationship that New Mexico was required to recognize as marriage. [RP 357-358]

1. Background

The Decedent died intestate. [RP 1] The Decedent was not married to anyone at the time of his death, nor did he have any children. [RP 1] Nancy Rieser, the Personal Representative of the Estate ("Personal Representative"), is the Decedent's sister. [RP 1] Ms. Dion is an interested party to the probate proceeding, having had a relationship with the Decedent for many years prior to his death. [RP 25-28] They lived together for periods of time in New South Wales (Australia), Indonesia and Santa Fe and had some financial inter-relations. [RP 295-296] However, Ms. Dion and the Decedent did not demonstrate an intent to form a marriage nor did they hold themselves out exclusively as husband and wife in an exclusive marriage relationship. [RP 357-358] From these facts, Ms. Dion argues that she was the Decedent's surviving spouse at the time of his death.

2. Summary of Proceedings

A hearing was held in New South Wales on October 26-30, 2009 to determine whether Ms. Dion and the Decedent had a "de facto relationship" in Australia, a specific type of relationship defined by New South Wales law. On February 12, 2010, the New South Wales Supreme Court issued its decision (*Dion v. Rieser* [2010] NSWSC 50) [RP 249-298], finding that Ms. Dion and the Decedent had a "de facto relationship" in Australia, which entitled Ms. Dion to the Decedent's real and personal property in the Australia probate case. [RP 298]

Based on the decision of the New South Wales Court, Ms. Dion filed a Petition for Appointment as Personal Representative with the District Court in New Mexico. [RP 246-248] Ms. Dion claimed that her status as a person in a de facto relationship with the Decedent in Australia was binding on the District Court, and that she should be treated as the Decedent's common law spouse in New Mexico, entitling her to priority to serve as Personal Representative and to receive all assets in the Decedent's probate estate. [RP 246-248]

The issue was fully briefed and argued before the District Court on June 29, 2010. On July 29, 2010, the First Judicial District Court (Honorable Raymond Z. Ortiz) entered an Order finding that the relationship between Ms. Dion and the Decedent was not a common law marriage that the Court in New Mexico should

recognize. [RP 358] The District Court therefore denied Ms. Dion's Petition for Appointment as Personal Representative. [RP 358]

II. ARGUMENT AND AUTHORITIES

1. Standard of Review

The Personal Representative agrees with Ms. Dion that the standard of review applied here is *de novo*. *State v. Oakes,* 2011 WL 704435 (N.M. App.) *1, stating that the application of law to the facts is subject to *de novo* review.

2. An Australian De Facto Relationship is Not Statutory Marriage Nor is it Common Law Marriage.

Dion argues that an Australian de facto relationship is a marital relationship or, alternatively, that it "rises at least to the level of a common law marriage," and that she should therefore be afforded the rights of a surviving spouse in the Decedent's probate proceeding. However, a de facto relationship is not a legal marriage based on Australian or New Mexico statutory requirements, nor is it a common law marriage as recognized by New Mexico case law.

A. A De Facto Relationship in Australia is Not Marriage in Australia or New Mexico.

Ms. Dion claims to have priority for appointment as personal representative of the Decedent's Estate because she is the Decedent's "surviving spouse." She argues that an Australian de facto relationship is a marital relationship. However, Ms. Dion fails to cite any authority equating a de facto relationship with marriage

in Australia. In fact, there is none, as a de facto relationship is a statutory creation in Australia, distinct from marriage or common law marriage.

The analysis of this issue begins with Section 40-1-4 NMSA 1978, which states, "all marriages celebrated beyond the limits of this state, which are valid according to the laws of the country wherein they were celebrated or contracted, shall be likewise valid in this state. . ." To determine whether a valid marriage was formed in a foreign jurisdiction, it is necessary to look to the substantive law of that jurisdiction. *Fellin v. Estate of Lamb,* 99 N.M. 157, 159, 655 P.2d 1001, 1003 (1982)

Accordingly, an analysis of New South Wales and Australian Commonwealth laws must be undertaken to appreciate the nature of a de facto relationship and the distinction between that relationship and marriage. The law defining a de facto relationship is found at Section 4 of the *Property (Relations) Act 1984*, in the New South Wales Consolidated Acts. It is important to note that the de facto relationship statute is part of the property laws of Australia, not the marriage laws. A de facto relationship is one that defines the property rights, not the marital rights, of two people. As Judge Bryson stated in his opinion (*Dion v. Rieser* 2010 NSWSC 50), "the [*Property (Relations)*] *Act* conferred power on the court to adjust property interests of parties to a de facto relationship. . . " [RP 255]

Section 4 of the Act states:

"(1) For the purposes of this Act, a de facto relationship is a relationship between two adult persons:

(a) who live together as a couple, and

(b) who are **not married** to one another or related by family." (Emphasis added.)

Subparagraph (2) of Section 4 includes a list of the factors that are considered when determining whether a de facto relationship exists: (a) the duration of the relationship; (b) the nature and extent of common residence; (c) whether or not a sexual relationship exists; (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties; (e) the ownership, use and acquisition of property; (f) the degree of mutual commitment to a shared life; (g) the care and support of children; (h) the performance of household duties; and, (i) the reputation and public aspects of the relationship. Accordingly, the existence of a de facto relationship depends primarily upon cohabitation and a close personal relationship.

Section 62 of the *Property (Relationships) Act* states as follows:

> Nothing in the *Property (Relationships) Legislation Amendment Act 1999* is to be taken to approve, endorse or initiate any change in the marriage relationship, which by law must be between persons of the opposite sex, nor entitle any person to seek to adopt a child unless otherwise entitled to by law.

The law that specifies the requirements of a valid marriage in Australia can be found in the *Marriage Act 1961*, in the Commonwealth Consolidated Acts (akin to federal law in Australia). Marriage is defined as the "union of a man and a woman to the exclusion of all others, voluntarily entered into for life." (Section 5) The *Marriage Act* requires that a marriage be solemnized by an authorized celebrant (Section 41) in the presence of two witnesses (Section 44), and that notice in writing of the intended marriage, signed by both the husband and the wife, be given to the celebrant at least one month before the marriage (Section 42).

Further distinctions between marriage and de facto relationships can be found in the Australian *Family Law Act* 1975. Section 4AA of the Act defines a de facto relationship in substantially the same way as Section 4 of the *Property (Relationships) Act*. It then goes on to state, at subsection (5), that:

> (a) a de facto relationship can exist between two persons of different sexes and between two persons of the same sex; and
>
> (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

Australian law makes a clear distinction between de facto relationship and marriage. When the definition of marriage, as set forth in the *Marriage Act* (a union. . . "to the exclusion of all others"), is compared to the definition of de facto relationship in the *Family Law Act* (which includes those married to someone else

or in a de facto relationship with someone else), it is clear that a de facto relationship is not marriage in Australia.

Likewise, Ms. Dion's relationship with the Decedent does not adhere to New Mexico statutory requirements for marriage, which prescribe that the contract of matrimony be solemnized. Sections 40-1-2 and 40-1-3 NMSA 1978. Accordingly, Ms. Dion was not in a marital relationship with the Decedent.

B. A De Facto Relationship is Not Common Law Marriage.

Ms. Dion urges this Court to determine that her Australian de facto relationship is equivalent to common law marriage. Common law marriage is not acknowledged in New Mexico. *Merrill v. Davis,* 100 N.M. 552, 553, 673 P.2d 1285, 1286 (1983)] However, New Mexico will recognize a common law marriage if it is valid in the jurisdiction where consummated. *Fellin v. Estate of Lamb,* Supra, 99 N.M. at 159, 655 P.2d at 1003.

Australia law does not recognize common law marriage. In states that do recognize common law marriages, the relationship is established only where there is an express or implied mutual consent or agreement of the parties, cohabitation as husband and wife, and a public declaration of the marriage. *Gallegos v. Wilkerson,* 79 N.M. 549, 552, 445 P.2d 970, 973 (1968). Cohabitation and a close personal relationship is not a common law marriage. In fact, a de facto relationship in

Australia which, pursuant to Australian statutory law, may involve individuals married to others or individuals in multiple de facto relationships, is entirely inconsistent with the essential elements of a common law marriage.

A critical distinction between common law marriage as recognized in New Mexico and a de facto relationship is the requirement that there be evidence of an agreement to enter into a marriage. Of the several New Mexico cases in which courts have decided whether a valid common law marriage existed under the laws of another state or country, only two have actually held that the marriage should be recognized in New Mexico. The New Mexico Supreme Court, in *Gallegos v. Wilkerson,* id., found that a common law marriage existed under Texas laws, which required an express or implied mutual consent or agreement of the parties, followed by cohabitation as husband and wife, and the holding out to the public as married (79 N.M. at 552). The Court's decision was based on proof that the couple rented an apartment in El Paso, agreed to be married, lived together, and held themselves out as husband and wife.

In *Willard v. Mabe,* 93 N.M. 352, 600 P.2d 298 (Ct. App. 1979), the New Mexico Court of Appeals upheld the trial court's determination of a valid Texas common law marriage, where it found "substantial evidence to support the findings which go to an agreement to marry and a public holding out, in Texas, that they were married" (at 354). The court found that the couple contracted and agreed to

enter into a marriage relationship in Texas, cohabitated, held themselves out to the public as being married and wore wedding rings. In addition, the common law wife took her husband's last name.

Gallegos and *Willard* should be compared to *Fellin v. Estate of Lamb,* supra, and *Bivians v. Denk,* 98 N.M. 722, 652 P.2d 744 (Ct. App. 1982), in which the Court declined to recognize the validity of the alleged common law marriages. In *Fellin,* the New Mexico Supreme Court refused to recognize a common law marriage under the laws of Micronesia, because the couple did not participate in a marriage ceremony. In *Bivians,* the New Mexico Court of Appeals held that there was no common law marriage pursuant to Texas laws, because there was no evidence of a present agreement to be husband and wife (98 N.M. at 730). Similarly, there was no evidence of a present intention of the parties to be common law spouses under Colorado law (at 731).

While it is true that New Mexico will recognize a common law marriage if it is valid in the jurisdiction where it is established (*Fellin,* supra, at 159), an Australian de facto relationship is not common law marriage. In fact, it is far from a common law marriage as recognized in New Mexico. *See Marshall v. Carruthers* [2002] NSWCA 47, finding that a married man was in a de facto relationship with another woman; *Lubis v. Walters* [2009] NTSC 23, finding that a de facto relationship existed between a decedent and a paid companion (applying

Northern Territory law); and, *Rowston v. Dunstan* [2011] NTSC 09, which pointed out that, for the determination of whether a de facto relationship exists, "marriage to another person [is] irrelevant" (paragraph 43) (applying Northern Territory law).

A de facto relationship does not require proof of an agreement to be married or that the couple hold themselves out as husband and wife, which are required elements of a valid common law marriage according to New Mexico decisions. In the absence of such evidence, and in the absence of any legal authority equating de facto relationships with common law marriage in Australia, Ms. Dion's relationship with the Decedent should not be accorded the status of a common law marriage in New Mexico.

3. Recognition of a De Facto Relationship as a Valid Marriage or Common Law Marriage Would Undermine New Mexico Public Policy.

New Mexico law recognizing a common law marriage if valid in the jurisdiction where consummated, is based on the rule of comity. *Fellin v. Estate of Lamb,* supra, at 159. Comity is the doctrine wherein courts of one jurisdiction give effect to the laws and judicial decisions of another. *National Bank of Arizona v. Moore,* 138 N.M. 496, 122 P.3d 1265 (Ct. App. 2005). While comity should generally be extended, New Mexico law makes it clear that if doing so would undermine New Mexico's own public policy, comity will not be extended. *Fowler Brothers Inc. v. Bounds,* 144 N.M. 510, 517, 188 P.3d 1261, 1268 (Ct. App. 2008).

New Mexico does not recognize common law marriage because of the possibility of fraud arising from claims of common law marriage and the uncertainty which such claims of marriage inject into the affairs of individuals. *Merrill v. Davis,* 100 N.M. 552, 553, 673 P.2d 1285, 1286 (1983). As the New Mexico Supreme Court explained in *Merrill:*

> the problem would be the ease with which a mere adulterous relation may become, in the mouths of interested and unscrupulous witnesses, a common-law marriage. . . .If we were to say that the same rights that cannot be gained by common-law marriage may be gained by the implications that flow from cohabitation, then we have circumvented the prohibition of common-law marriage. (at 554).

It is the policy of this state to foster and protect the institution of marriage. *Id.,* at 554. New Mexico's interest in marriage is recognized by statute which prescribes that the contract of matrimony be solemnized. Sections 40-1-2 and 40-1-3 NMSA 1978. Again, quoting the *Merrill* Court: "Marriage is a civil contract between three parties—the husband, the wife, and the State [citations omitted]. The State has a strong continuing interest in the institution of marriage and prevents the marriage relation from becoming in effect a private contract terminable at will." (at 554).

Such strong public policy is the reason why New Mexico has recognized common law marriages from other states on very few occasions. An analysis of these cases demonstrates careful scrutiny by the Courts so that spousal rights are

afforded only when the relationship meets the strict criteria of a marriage, albeit not solemnized by a ceremony or license. In the present case, the circumstances of the relationship between Ms. Dion and the Decedent, as thoroughly described in the *Dion v. Rieser* opinion, do not rise to the level of a common law marriage. As the District Court found, Ms. Dion and the Decedent failed to demonstrate the intent to form a marriage relationship and failed to hold themselves out exclusively as husband and wife. [RP 357-358]

The *Dion v. Rieser* opinion includes a lengthy and thorough discussion of the periods of time Ms. Dion and the Decedent lived together. Such was the focus of the hearing because that is the primary element of a de facto relationship in Australia. Ms. Dion and the Decedent did not live together continuously and Judge Bryson noted that it was not possible to establish where Ms. Dion and the Decedent were and when they were together and apart. [RP 292] A factor in the nomadity of their relationship was that the Decedent could not lawfully stay in Australia indefinitely. [RP 292]. In fact, at the time of the Decedent's death, Ms. Dion and the Decedent had not been together for eight months. [RP 293]

The opinion makes it clear that Ms. Dion and the Decedent cohabited, and while they were involved in varying degrees in each other's business and financial interests, there was no evidence of an intent to be married and was, at best, a

domestic partnership. Common law marriage is a much more formalized relationship. It is marriage, although not solemnized by ceremony or license.

If this Court were to extend common law status to Ms. Dion's relationship with the Decedent, it would open the door to the extension of marital rights to all couples who live together without the commitment and responsibilities of marriage. Affording common law marriage status to de facto relationships, which by Australian statute include persons who are married to others or who are in de facto relationships with others, offends New Mexico's public policy and would establish a dangerous precedent.

4. The Personal Representative is Not Collaterally Estopped From Opposing Ms. Dion's Petition.

Ms. Dion argues that the Personal Representative is collaterally estopped from opposing her Petition for Appointment as Personal Representative, because the Personal Representative was a party to the New South Wales action. While it is true that the Personal Representative was a party to that case, she was not collaterally estopped from opposing Ms. Dion's Petition in the New Mexico probate proceeding. Collateral estoppel is applied only when (1) the party to be estopped was a party to the prior proceeding; (2) the cause of action in the two proceedings is different; (3) the issue was actually litigated in the prior adjudication; and (4) the issue was necessarily determined in the prior litigation.

Shovelin v. Central New Mexico Electric Cooperative, 115 N.M. 293, 297, 850 P.2d 996, 1000 (1993).

Here, the issue before the District Court, whether New Mexico should recognize a de facto relationship as a valid marriage in Australia and, therefore, accord Ms. Dion with the rights of a surviving spouse in the Decedent's probate proceeding in New Mexico, was not litigated in the New South Wales proceeding, nor was it necessarily determined. The issue litigated and determined in New South Wales was whether Ms. Dion was in a de facto relationship with the Decedent in Australia, requiring the determination of issues of fact. The issue before the District Court was a matter of law, requiring the Court to determine if a de facto relationship in Australia equates with marriage in Australia. Consequently, the doctrine of collateral estoppel is not applicable here.

III. CONCLUSION

It is clear that a de facto relationship is not a valid marriage, nor is it equivalent to common law marriage as it has been recognized in New Mexico. Affording Ms. Dion the rights of a surviving spouse in the Decedent's probate proceeding would violate the well-established public policy of this State. Additionally, collateral estoppel does not bar the Personal Representative's opposition to Ms. Dion's Petition for Appointment as Personal Representative.

The decision of the District Court, finding that Ms. Dion's de facto relationship with the Decedent was not a common law marriage, must be affirmed.

IV. REQUEST FOR ORAL ARGUMENT

Oral argument would be helpful to address matters related to Australian law and the public policy of New Mexico.

Respectfully submitted,

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I hereby certify that a copy of the foregoing was mailed to the following counsel of record on this 22nd day of April, 2011:

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