

COPY

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,

COURT OF APPEALS OF NEW MEXICO
FILED

Respondent-Appellee.

MAR 07 2011

Brian H. McLean

**PETITIONER-APPELLANT'S
BRIEF IN CHIEF**

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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SUMMARY OF PROCEEDINGS

Margaret Anne Dion (“Dion”) is a citizen of Canada and Australia, and is domiciled in New South Wales, Australia.

Dion and Richard Rieser had a long-term relationship and lived in a number of countries over the years.

On February 8, 2007, Richard Rieser died intestate in Santa Fe County, New Mexico.

Decedent’s domicile at the time of his death has not been determined, but it is undisputed that he owned property located in Santa Fe County, New Mexico and at other places within the State of New Mexico. Decedent also owned property in New South Wales, Australia, at the time of his death.

On May 25, 2007, New Mexico Bank & Trust, without notice to Dion, petitioned the New Mexico district court for formal probate and sought appointment as the personal representative of decedent’s estate.

On July 3, 2007, upon learning of the *Rieser* probate, Dion filed her objection to New Mexico Bank & Trust’s Petition, asserting that she was decedent’s surviving spouse and had priority for appointment as the personal representative.

On January 18, 2008, Dion applied to the Supreme Court of New South Wales for letters of administration of the estate of decedent, asserting that she was decedent's surviving spouse.

On August 11, 2008, after the resignation of New Mexico Bank & Trust as the personal representative, the New Mexico district court appointed Nancy Cimarron Rieser, the sister of decedent, as the successor personal representative of the estate of decedent.

In October 2009, the Supreme Court of New South Wales heard testimony regarding Dion's claim, and issued its Judgment on February 12, 2010, declaring that Dion was the *de facto* spouse of decedent at the time of his death and that she was entitled to the real and personal property of his estate.¹

On March 15, 2010, Dion petitioned the New Mexico district court to be appointed personal representative of decedent's estate by virtue of her status granted by the Supreme Court of New South Wales.

¹ Nancy Rieser was a party to the New South Wales action in which the marital status of Margaret Anne Dion and Richard Davis Rieser, deceased, was necessarily and actually litigated. As a result, Nancy Rieser is now collaterally estopped from denying the marital relationship that existed between Ms. Dion and the decedent. See e.g. *Shovelin v. Central N.M. Elec. Coop.*, 115 N.M. 293, 850 P.2d 996 (1993)[Setting forth the elements of the doctrine of collateral estoppel].

On July 29, 2010, the New Mexico district court entered its Order Denying Petition for Appointment of Margaret Anne Dion as Personal Representative of the Estate of Richard Rieser, the order appealed from in this appeal.

ARGUMENT

Introduction:

In New Mexico, a surviving spouse has priority for appointment as personal representative of a decedent's estate. NMSA 1978 § 45-3-203 (2009). Margaret Anne Dion is the surviving spouse of decedent by virtue of the ruling of the Supreme Court of New South Wales that she was the *de facto* spouse of decedent at the time of his death. New Mexico law recognizes lawful marital relationships formed outside of the state. NMSA 1978 § 40-1-4 (1862). As a result, Margaret Anne Dion should be appointed the personal representative of decedent's estate in New Mexico.

Standard of Review:

This court should review the New Mexico trial court's determination in this matter on a *de novo* basis because no facts were determined by the New Mexico trial court. *State v. Gonzales*, 2005-NMSC-025, 138 N.M. 271, 119 P.3d 151.

In New Mexico, a surviving spouse has priority for appointment as personal representative of a decedent's estate

When a decedent dies intestate but is survived by his spouse, the surviving spouse has priority for appointment as personal representative. NMSA § 45-3-203 (2009). In particular, the surviving spouse has priority for such appointment over the other heirs of the decedent. *Id.*

Margaret Anne Dion is the surviving spouse of decedent by virtue of the ruling of the Supreme Court of New South Wales

On February 12, 2010, Judge Bryson of the New South Wales Supreme Court issued his Judgment in *Dion v. Rieser* [2010] NSWSC 50. The Bryson Judgment was attached to Dion's Petition for Appointment and begins in the Record Proper at page 249. Judge Bryson's Judgment is remarkable for its thoroughness and careful consideration of the facts of the case. Judge Bryson reviewed evidence of events in the relationship between Dion and decedent from 1981 until decedent's death in 2007. He took testimony over a period of three days from thirteen witnesses and then applied the criteria set forth in Property (Relationships) Act 1984, as amended, to conclude that Dion was the *de facto* spouse of decedent at the time of his death.

In New South Wales, Australia, a *de facto* spousal relationship is a relationship between two adult persons who live together as a couple and who are not married to one another or related by family. Property (Relationships) Act 1984, as amended at § Decision at § 4(1). A copy of the Property (Relationships) Act was attached to Dion's Reply to Personal Representative's Response to Petition for Appointment as Exhibit A and will be found beginning at page 315 in the Record Proper.

In determining whether two persons are in a *de facto* relationship, all the circumstances of the relationship are to be taken into account, including each of the following matters as may be relevant in a particular case: (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. *Id.* at §4(2). No finding with respect to any of the foregoing or any combination is

necessary for the existence of a *de facto* relationship, and a court determining whether such a 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.

Id. at §4(3).

The current Personal Representative has suggested that the *de facto* spousal relationship set forth in the New South Wales statute should not be accorded the same respect as a common law marriage because of the lack of intent of the participants to be married. In explaining the background of the definition upon which he relies, Judge Bryson states that the earlier definition referred to “living together as husband and wife” but goes on to state that the phrase had been abandoned because it could lead to inappropriate search for analogies to that legal relationship. Bryson Judgment at ¶ 12. Notwithstanding the absence of the phrase “living together as husband and wife,” Judge Bryson concludes that the present definition (which he applies) does not make a large departure from the earlier definition but, instead, restates and somewhat amplifies the earlier definition.

Id. Judge Bryson also relied on decedent’s application for a permanent residence visa made in 1997 in which decedent indicated

his marital status to be “de facto/common law.” Bryson Judgment at ¶ 61.

The current Personal Representative urged the New Mexico trial court to look to the issue of intent, that is, the agreement of the parties to enter into a marriage. While an expression of agreement is implicit in “living together as husband and wife,” the Australian court eschews the notion of any single factor being the deciding factor, and instead looks to the totality of the circumstances of the relationship in reaching its decision. Bryson Judgment at ¶ 12. This approach is particularly sound in light of the fact that the “agreement” urged by the current Personal Representative is not usually express in cases of common law marriage but is more often inferred as a result of circumstantial evidence, i.e. length of relationship, residence together, and other factors. *Lozoya v. Sanchez*, 2003-NMSC-0099, 133 N.M. 579, 66 P.3d 948 at ¶ 25. In determining whether the decision of the court in New South Wales reflects a marital relationship, all of the foregoing should be considered in light of the basic definition of a *de facto* spousal relationship in New South Wales: a relationship between two adult persons who live together as a couple.

The *de facto* spousal relationship defined by the New South Wales statute and found by Judge Bryson is a marital relationship. It lacks none of the indicia of such, including the intent of the parties to be in a marital relationship.

New Mexico law recognizes lawful marital relationships formed outside of the state

Since 1862 it has been the law of New Mexico that this state recognizes as valid marriages contracted according to the laws of foreign jurisdictions, that is, valid according to the laws of the jurisdiction in which they arose. NMSA 1978 § 40-1-4 (1862). It does so as a matter of comity. It also recognizes marriages that could not be contracted in New Mexico if they are valid where contracted. It should also recognize the marital status of two people adjudged by an Australian court to be *de facto* spouses under Australian law.

New Mexico recognizes the marital relationships sanctioned by other jurisdictions. The law set forth in NMSA 1978 § 40-1-4 (1862) is not based on the vagaries of common law marriage as it may be applied by another jurisdiction. Instead, it is based on the rule of comity. “New Mexico applies the rule of comity, that the law of the place where the marriage is performed governs the validity of that

marriage.” *Fellin v. Estate of Lamb*, 99 N.M. 157, 159, 655 P.2d 1001, 1003 (1982) [Citing *Ferret v. Ferret*, 55 N.M. 565, 237 P.2d 594 (1951)]. It does so even if the marriage could not be contracted in New Mexico. *See e.g. Leszinske v. Poole*, 110 N.M. 663, 798 P.2d 1049 (Ct.App. 1990) [uncle-niece marriage unlawful in New Mexico] and *Bivians v. Denk*, 98 N.M. 722, 652 P.2d 744 (Ct. App. 1982) [common-law marriage valid where contracted].

“‘Comity’ is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.” *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). “Under the doctrine of comity, state courts recognize foreign judgments where the proceedings on which the judgment is based are not contrary to the public policy of the forum, where the judgment sought to be recognized was rendered under circumstances wherein the foreign court had jurisdiction over the subject matter and the parties, and where the parties were given an opportunity for a full and fair hearing on the issues [Citations omitted].” *Watson v. Blakely*, 106 N.M. 687, 690, 748 P.2d 984, 987 (Ct. App. 1987). In this instance, the New South Wales court found jurisdiction over both the subject matter and the parties, and it is clear

from the detailed opinion that the parties were given a full and fair hearing.

Margaret Anne Dion should be appointed the personal representative of decedent's estate in New Mexico

The *de facto* spousal relationship found by the Supreme Court in New South Wales between Dion and decedent rises at least to the level of a common-law marriage, which has been recognized by the New Mexico courts on numerous occasions. The current Personal Representative's suggestion that recognition of the Australian *de facto* spousal relationship would somehow violate the public policy of New Mexico mischaracterizes the *de facto* spousal relationship as a domestic partnership.

The Property (Relationships) Act 1984 upon which Judge Bryson relies for his decision in *Dion v. Rieser*, clearly distinguishes between a *de facto* spousal relationship and a domestic relationship, characterizing the domestic relationship as "a close personal relationship" rather than the relationship between two people "who live together as a couple." Compare Property (Relationships) Act 1984 § 4 defining *de facto* spousal relationship with § 5 defining "domestic partnership." Judge Bryson did not declare that Ms. Dion

was the domestic partner of Richard Rieser; instead he declared that she was his *de facto* spouse. The Personal Representative's attempts to characterize the relationship recognized by the Australian court as a domestic partnership should be rejected in light of the Act and the Australian court's decision.

The formulation of "public policy" in New Mexico has been restated rather recently: "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." Restatement (Second) of Conflict of Laws 283 at 233 (1971) [cited in *Leszinske v. Poole*, 110 N.M. 663, 798 P.2d 1049 (Ct.App. 1990)]. The foregoing seems to be a restatement of the earlier formulation of public policy set forth in *Gallegos v. Wilkerson*, 79 N.M. 549, 445 P.2d 970 (1968), rejecting the notion that New Mexico public policy would act to prevent New Mexico residents from contracting a common-law marriage in Texas.

This Court should apply the rule of comity and the law of New Mexico in recognizing the *de facto* spousal relationship found by the Supreme Court of New South Wales in this matter.

CONCLUSION

The *de facto* spousal relationship defined in the Property (Relationships) Act 1984 and found by Judge Bryson in *Dion v. Rieser* should be accorded recognition on a par, at least, with a common law marriage. As such, this Court should conclude that Margaret Ann Dion is the surviving spouse of decedent and is entitled to priority for appointment as personal representative of his estate.

Because of the many policy issues inherent in this matter, oral argument would be helpful.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original of the foregoing Petitioner-Appellant's Brief in Chief was mailed to Marcy Baysinger, Esq., Pregenzer Baysinger Wideman & Sale, P.C., Attorneys for Nancy Rieser, 2424 Louisiana Blvd. N.E., Suite 200, Albuquerque, New Mexico 87190-3694, on this 7th day of March, 2011.

CATRON, CATRON & POTTOW, P.A.

By 
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