

IN THE COURT OF APPEALS OF IOWA

No. 9-066 / 08-1311

Filed May 29, 2009

**IN THE MATTER OF THE GUARDIANSHIP
OF DOROTHY DRIESEN**

**IN THE MATTER OF THE DOROTHY
DRIESEN TRUST DATED JULY 23, 2002**

**DOROTHY DRIESEN, AS TRUSTEE OF THE
DOROTHY DRIESEN TRUST, and
DOROTHY DRIESEN, Individually, and
RUTH KOOIMA,**
Plaintiffs-Appellees,

vs.

**LITTLE BIG HORN INVESTMENTS, L.L.C.,
a Nevada Limited Liability Company, and JAY DRIESEN,**
Defendants-Appellants.

Appeal from the Iowa District Court for Sioux County, Jeffrey A. Neary,
Judge.

Defendant appeals from the district court's order regarding a trust
amendment. **AFFIRMED.**

Patrick O'Bryan, Des Moines, and Jeffrey Flagg, West Des Moines, for
defendants-appellants.

Debra S. De Jong of Klay, Veldhuizen, Bindner, De Jong, De Jong, &
Halverson, P.L.C., Orange City, for plaintiff-appellee.

Michael J. Jacobsma of Jacobsma, Clabaugh & Freking, P.L.C., Sioux Center, for appellee, Ruth Kooima.

Merlyn Driesen, Fairview, South Dakota, pro se.

Heard by Sackett, C.J., and Vogel, J., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, J.**I. Background Facts & Proceedings**

On June 25, 1999, Dorothy Driesen signed a will leaving her property to her three children, Ruth Kooima, Jay Driesen, and Merlyn Driesen, in equal shares. Dorothy named Ruth as executor of the will.

On July 23, 2002, Jay drove Dorothy from her home in Rock Valley to Des Moines, where Jay had hired an attorney to create a trust for Dorothy, named the Dorothy Driesen Living Trust. The trust document was forty-one pages. It specified that the trust was a revocable trust and named Dorothy as trustee, and if Dorothy became disabled, Jay would serve as successor trustee and then Merlyn, if Jay were unable to serve. The distribution provision of the trust provided that Jay and Merlyn would distribute all of Dorothy's personal effects according to a note left in her bank box, Jay would receive the Driesen family farm,¹ and Jay and Merlyn would each receive half of the funds in Dorothy's investment account and in her checking account, with the remainder of the trust assets going to Ruth. On the same date, Dorothy executed a "Declaration Relating to Life-Sustaining Procedures" and a "Durable Power of Attorney for Health Care Decisions," naming Jay as her designee and Merlyn as the alternate designee. Subsequently, an undated amendment to the trust was signed by Dorothy, but was notarized on September 27, 2002, purporting to make the trust irrevocable. There was no evidence of the circumstances surrounding the execution of this document.

¹ The farm consisted of approximately 150 acres; the investment funds were valued by Jay to be between \$260,000 and \$270,000.

At the end of February 2007, Dorothy had surgery and then moved to a nursing home, Covington Heights, in Sioux Falls, South Dakota. The move was facilitated by Jay. Dorothy did not like the nursing home and wanted to move back to Rock Valley. While at the nursing home, Dorothy was under the care of Dr. Todd Sorensen. In June of 2007, Dr. Sorensen noted that Dorothy had mild dementia and recommended that Dorothy be examined by a licensed physiologist, Dr. Richard Whitten.

On July 23, 2007, Dorothy was examined by Dr. Richard Whitten, who diagnosed Dorothy with mild dementia. Dr. Whitten later wrote that as a result of the examination, he believed Dorothy's dementia interfered with her handling of finances because she did not have the ability to appreciate the value of money, reason about debts and payments, or budget wisely. He described Dorothy as a vulnerable and dependent adult who will not recall financial transactions and is at risk for exploitation. However, Dr. Whitten testified that Dorothy could identify who her children were, understand what her assets were, and express her desires as to provisions relating to the distributions under her trust, but would not understand the technicalities of the trust.

Shortly thereafter, Jay unilaterally began to act as trustee for Dorothy's trust. However, even prior to assuming the role of trustee, Jay took trust funds to pay \$5000 on his own legal fees that had no plausible connection to the trust.²

On August 20, 2007, Ruth instituted two actions in Sioux County. She filed a petition seeking an involuntary guardianship for Dorothy, with Ruth as the proposed guardian. She also filed a petition seeking to have Dorothy removed

² Jay testified he repaid the funds just prior to trial, in March 2008.

as the trustee of her trust and have an “independent trustee such as a bank or corporate fiduciary to act as trustee.” That same day, the district court appointed attorney Debra De Jong to act as guardian ad litem/attorney for Dorothy in both of the proceedings.

On October 4, 2007, Dorothy, with the assistance of De Jong, executed an amendment to her trust. The amendment named the People’s Bank of Rock Valley, Iowa, as the trustee and changed the distribution provisions, leaving the “balance” of the trust assets to Ruth. That same day, Dorothy executed a general power of attorney naming Ruth as her attorney in fact and executed a declaration relating to life-sustaining procedures and a durable power of attorney for health care decisions, also naming Ruth as her designee for each.

On December 11, 2007, Jay transferred the “Driesen farm,” consisting of approximately 150 acres, from Dorothy’s trust to Little Big Horn Investments, L.L.C., incorporated in the state of Nevada, with its “managing member” shown as the Dorothy Driesen Trust and its “manager” as Jay Driesen.

On January 10, 2008, Dorothy filed a petition in Lyon County seeking to quiet title in the farm land. On February 18, 2008, the district court consolidated the pending guardianship, trust, and the quiet title actions.

In March 2008, Dr. Brad Kamstra, who had been Dorothy’s physician prior to her move to Sioux Falls and resumed as her physician upon her return to Rock Valley, was deposed. He had performed a “Mini-Mental State Examination” on Dorothy, which resulted in a score of twenty-seven/twenty-eight out of thirty. Dr. Kamstra indicated that Dorothy was “capable of making most of her own decisions.”

The consolidated petitions came on for trial on March 27, 2008, and the district filed its ruling on August 4, 2008. As to the guardianship petition, the court appointed Ruth to act as guardian for Dorothy. As to the trust action, the court (1) found that Dorothy's trust dated July 23, 2002, was a valid revocable trust; (2) found that the October 4, 2007 amendment was validly executed; and (3) removed Jay as trustee and appointed the People's Bank of Rock Valley as trustee. As to the quiet title action, the court found the quitclaim deed conveying the Driesen farmland to the Little Big Horn Investments, L.L.C. was null and void and quieted title to that property in the Dorothy Driesen Trust. Jay appeals only the court's findings as to the terms of Dorothy's trust.³

II. Standard of Review

The parties dispute whether this case should be reviewed de novo or for corrections of errors at law. We review a case in the same manner it was tried in district court. *Stanley v. Fitzgerald*, 580 N.W.2d 742, 744 (Iowa 1998). The consolidated trial consisted of a guardianship action, an action contesting the terms of a trust, and a quiet title action. See Iowa Code § 633.33 (2007) (stating “[a]ctions to set aside or contest wills, for the involuntary appointment of guardians and conservators, and for the establishment of contested claims shall be triable in probate as law actions”). “Where there is uncertainty about the nature of a case, a litmus test we use in making this determination is whether the trial court ruled on evidentiary objections.” *Ernst v. Johnson County*, 522 N.W.2d 599, 602 (Iowa 1994). During the hearing, the district court ruled on evidentiary

³ There is a considerable amount of information in the record from attorney/guardian ad litem reports to the court. While Jay asserted the reports are purely hearsay, we note they were admitted without objection.

objections and therefore, it was tried at law. Because this case was tried at law, our review is for correction of errors at law. Iowa R. App. P. 6.4. We are bound by the district court's findings of fact if they are supported by substantial evidence. Iowa R. App. P. 6.14(6)(a).

III. Analysis

Jay first asserts that the district court erred in finding the Dorothy Driesen Trust was a revocable trust because a September 27, 2002 amendment to the trust made it irrevocable. Dorothy asserts that this issue is not preserved. We agree. Although the amendment was introduced into evidence, the district court did not make any mention of this amendment either in its findings of fact nor in its ruling. Jay did not file a motion to amend, enlarge, or modify pursuant to Iowa Rule of Civil Procedure 1.904(2). In order to be preserved for appellate review, an issue must be raised and decided on by the district court. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2006). "When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Id.* With no such motion and ruling, the issue is not preserved for our review.

Jay next asserts that the October 4, 2007 amendment to the trust was not a validly executed amendment because at the time it was executed, he claims Dorothy was incompetent to amend the trust. In order to modify a revocable trust, a person must be competent, which is defined as "the degree of understanding required to execute a will." Iowa Code §§ 633A.3101(1), .1102(4). Thus, in order to amend a revocable trust, a person must have testamentary capacity, which requires a showing that the person know and understand: (1) the

nature of the instrument that is being executed; (2) the nature and extent of his property; (3) the natural objects of his bounty; and (4) the distribution he desires to make of his property. See *Pearson v. Ossian*, 420 N.W.2d 493, 495 (Iowa Ct. App. 1988) (defining testamentary capacity).

Jay further asserts that the need for an appointment of a guardian is inconsistent with a finding that Dorothy had the capacity to amend her trust. However, the test for a guardianship is not the same as a test for capacity to amend a trust. Compare Iowa Code § 633.552(2)(a) (stating that a guardian may be appointed for an adult “whose decision-making capacity is so impaired that the person is unable to care for the person’s personal safety or to attend to or provide for necessities for the person such as food, shelter, clothing, or medical care, without which physical injury or illness might occur”), with *Pearson*, 420 N.W.2d at 495 (defining testamentary capacity); see also *Ward v. Sears*, 247 Iowa 1231, 1241, 78 N.W.2d 545, 550 (1956) (“[T]hough a person be under guardianship, he may yet be found competent to make a will.” (citations omitted)).

In the present case, the medical evidence supported Dorothy’s competency to amend the trust on October 4, 2007. Although Dr. Whitten testified that Dorothy was not competent to handle her financial affairs, he essentially testified that she had testamentary capacity as she could identify her children, knew what her assets were, and would be able to make dispositive provisions for her property. Further, Dr. Brad Kamstra, who had been Dorothy’s physician for years, administered a cognitive test on September 26, 2007. His office notes included these observations:

Alert and cooperative She remembered most things. There were a few things she was a little confused and did not quite have done as far as where she had been living or her surgeries. She was oriented to person, place, and pretty close on time Early dementia without behavior problems I think she is capable of making most of her own decisions. She knows that she needs to be in the nursing home for help.

In addition to the medical evidence, the district court questioned Dorothy at some length during the trial. The court made very specific fact and credibility findings. First, the district court found that although Dorothy may not be able to comprehend complex legal documents and language as well as the details of her financial matters, she was previously and currently capable to express her desires as to the distribution of her assets under the trust. The court added: “This is bolstered by the testimony which the Court received directly from Dorothy at the outset of this hearing.” Second, the district court found that Jay’s actions both in taking \$5000 of trust assets for payment of his own personal legal fees, as well as transferring the farm out of the trust, had raised “sufficient questions,” and that Jay had “not always acted in the best interests of the Trust”; therefore, the court determined Jay was not qualified to act as the trustee of Dorothy’s trust.

As a result, the district court found that Dorothy “had sufficient capacity to amend her trust document on [October 4, 2007]” and Dorothy continued to have sufficient capacity to express her desires as to the distribution provisions of her trust. The October 4, 2007 trust amendment was therefore a valid amendment and People’s Trust Bank of Rock Valley was appropriately appointed as trustee and the distributive provisions of the trust were amended accordingly.

The district court’s findings are not only supported by substantial evidence in the record, but also merit our deference to the court’s credibility assessments.

See *EnviroGas, L.P. v. Cedar Rapids/Linn County Solid Waste Agency*, 641 N.W.2d 776, 785-86 (Iowa 2002) (“Because we review only for the correction of errors at law, we will not reweigh the evidence nor assess the credibility of witnesses.”); *Tim O’Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996) (“The district court has a better opportunity than we do to evaluate the credibility of witnesses.”). We therefore affirm the district court.

AFFIRMED.