

IN THE COURT OF APPEALS OF IOWA

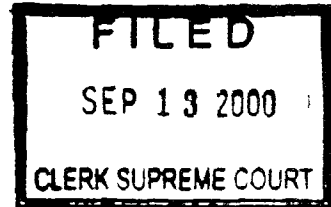
No. 0-504 / 99-1858
Filed September 13, 2000

**IN THE MATTER OF THE ESTATE OF LILLIE
B. RILEY, Deceased,**

**MILDRED MULLENBACH,
Appellant,**

vs.

**THE HOME TRUST & SAVINGS BANK, Administrator,
Appellee.**



Appeal from the Iowa District Court for Mitchell County, James W. Drew,
Judge.

Mildred Mullenbach appeals an adverse district court ruling concluding
there was insufficient evidence to overcome the validity of the decedent's
revocation of her December 11, 1990 will. **AFFIRMED.**

Brian R. McPhail of Gross & McPhail, Osage, for appellant.

James F. Smith of Noah, Smith & Schuknecht, P.L.C., Charles City, for
appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

SACKETT, C.J.

Appellant Mildred Mullenbach sought to probate a copy of a December 11, 1990 will signed by her aunt, decedent Lillie B. Riley. The district court found the will was valid when executed but that decedent revoked it on June 26, 1991. Mildred on appeal claims the district court's finding the revocation was valid was not supported by substantial evidence. Defendant Appellee The Home Trust & Savings Bank (hereinafter Bank), administrator of Lillie B. Riley's estate, on cross appeal contends the December 1990 will was not a valid will for when Lillie executed it she was under Mildred's influence. Mildred argues the Bank's challenge to Lillie's competency to execute the December 1990 will was litigated in a prior action and the district court erred in failing to apply issue preclusion. We affirm.

Lillie and her husband Eugene Riley had no children. Mildred was one of Lillie's several nieces and nephews. Mildred as well as Eugene and Lillie were long-time residents of Osage, Iowa, and Mildred had a close relationship with the couple. Eugene was terminally ill on November 30, 1990, when Mildred contacted attorney Keith McKinley to meet with Lillie and Eugene. Eugene knew he was dying and was seeking to avoid probate procedures. McKinley, experienced in the area of probate, had been Eugene and Lillie's attorney for over twenty years. He suggested among other things that Eugene and Lillie deed their home to Mildred and Mildred and her husband deed back to the Rileys a life estate in the property. McKinley also recommended that Lillie give Mildred a power of attorney as Eugene had conducted the family business. McKinley

prepared the power of attorney and the deeds but was not able to get them signed before Eugene died on December 4, 1990.

Lillie met with McKinley on December 7, 1990 and signed the power of attorney. The deeds to the house needed to be redrafted because they had called for Eugene's signature. Lillie met with McKinley again on December 11, 1990, and the will sought to be probated was signed and witnessed in his office. That will gave all Lillie's property to Mildred and named Mildred executor of Lillie's estate. In addition to signing the will on December 11 Lillie also signed a deed McKinley had prepared deeding her home in Osage to Mildred and her husband Harold. In return Mildred and Harold deeded back to Lillie a life estate in the property. Mildred accompanied Lillie on her trips to McKinley's office to complete these documents.

On June 24, 1991 Bess Buchholtz, the wife of one of Lillie's deceased brothers, took Lillie to McKinley's office. Bess told McKinley Lillie wanted to revoke her December 11, 1990 will. McKinley spoke to Lillie alone and had her family doctor, William Spencer, evaluate her mental status. Spencer was of the opinion Lillie was able to handle her own affairs. Lillie went back to McKinley's office on June 26, 1991 and signed a paper revoking the December 11, 1990 will. Two employees in McKinley's office as witnesses signed the revocation. A new will leaving everything to Bess was discussed but not drawn. Lillie then gave the Bank a power of attorney. On July 3, 1991 Lillie talked to McKinley and his partners about drawing her new will. McKinley was of the opinion Lillie was not competent and no will was drawn.

The Bank was subsequently appointed Conservator for Lillie and sued Mildred and Harold seeking to set aside the December 11, 1990 deed conveying Lillie's Osage home to them. The Bank alleged that Lillie and Mildred had a confidential relationship and that Mildred exercised undue influence over Lillie in obtaining the deed. The district court refused to set aside the deed and appeal was taken to this court where that finding was affirmed. *Home Trust & Savings Bank v. Mullenbach*, No. 92-1465 (Iowa App. April 25, 1994). [Citation to unpublished opinion].¹ In affirming this court found at the time of the transfer of the house there was no confidential relationship and even if there were that the Bank as plaintiff had failed to present sufficient evidence Lillie did not have the mental competence required for the transaction of ordinary business or that she was mentally incompetent when she executed the deed. *Id.*

Lillie died on January 17, 1998, and the Bank was appointed administrator of her estate. Mildred then sought probate of a copy of the December 11, 1990 will.

The matter was tried to the district court. The district court found the December 11, 1990 will was a valid will and that decedent had sufficient capacity to revoke it and that she was not subject to undue influence when she revoked it.

We first address Mildred's challenge to the district court's holding the revocation of the will was valid.

Our standard of review is for errors at law. See *Pearson v. Ossian*, 420 N.W.2d 493, 495 (Iowa App. 1988); *In re Estate of Lachmich*, 541 N.W.2d 543,

¹ The suit also sought the return of certain certificates of deposit that Lillie had transferred to Mildred. The district court found this transfer occurred after the confidential relationship was established and ordered the certificates returned. This finding was also affirmed on appeal.

545 (Iowa App. 1995). In case of doubt or ambiguity we construe the findings to uphold, rather than defeat, the judgment. *Grinnell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988). We do not weigh the evidence or the credibility of the witnesses. *Id.* The district Court's conclusion is binding on us if supported by substantial evidence. See *In re Estate of Fisher*, 344 N.W.2d 579, 581 (Iowa App. 1983) (citing *In re Estate of Crozier*, 232 N.W.2d 554, 558 (Iowa 1975); Iowa R. App. P. 14(f)(1)).

The questions are whether Lillie was competent at the time of the revocation and whether in revoking the will was subject to the undue influence of Bess Buchholtz.

The same mental capacity as is required to make a will is necessary to make a revocation of the will effective. See *Linkmeyer v. Brandt*, 107 Iowa 750, 77 N.W. 493 (Iowa 1898). A higher degree of mental competence is required for the transaction of ordinary business and the making of contracts than is necessary for testamentary disposition of property. *Daughton v. Parson*, 423 N.W.2d 894, 896 (Iowa App. 1988).

Prior to having Lillie execute the revocation McKinley met with her privately. He also had her examined by Dr. Spencer. Spencer determined she was capable of transacting her own business. The two witnesses to the revocation, both employees of McKinley's law office, testified that from their observations Lillie understood the revocation at the time she signed it and she wished to do it. Two days after signing the revocation Lillie went to the Bank to retrieve her will from her safety deposit box. At the bank she signed a second document stating her intention to destroy the will in the presence of the vice-

president and trust officer and destroyed it in front of her. This person had no question as to Lillie's capacity to revoke the will.

Mildred, in seeking to establish the existence of a confidential relationship, has the burden to show by clear proof the existence of a confidential relationship in which Bess was the dominant person and Lillie the subservient one. See *Luse v. Grenko*, 251 Iowa 211, 214, 100 N.W.2d 170, 172 (1959). A confidential relationship arises whenever a continuous trust is reposed by one person in the skill and integrity of another. *First Nat'l Bank in Sioux City v. Curran*, 206 N.W.2d 317, 322 (Iowa 1973).

Confidential relationship is a very broad term and is not at all confined to any specific association of the parties to it. In law it has been defined or described as any relation existing between the parties to a transaction wherein one of the parties is duty bound to act with the utmost good faith for the benefit of the other party. In its broadest connotation the phrase embraces those multiform positions in life wherein one comes to rely on and trust another in his important affairs. *Id.* at 321-22. A suspicion, but not a presumption, of undue influence arises where the dominant party in a confidential relationship participates in the contested revocation of a will. See *Olsen v. Corporation of New Melleray*, 245 Iowa 407, 416, 60 N.W.2d 832, 836-37 (1953). While the burden of proof remains with Mildred the contestant, the law is well settled in that considering the sufficiency of the evidence to support the findings of the court, properly introduced evidence must be viewed in the light most favorable to the contestant, giving her the benefit of all possible inferences. *Id.* at 413, 60 N.W.2d at 836; *In re Estate of Herm*, 284 N.W.2d 191, 201 (Iowa 1979).

Although Bess was with Lillie when she went to McKinley's office, he talked to Lillie alone. There was no evidence there was a continual trust or that Lillie relied on Bess for important business.

We recognize as Mildred argues that some of the evidence above is contradicted. Yet the weight of this evidence and credibility of witnesses was for the district court to determine. *Crozier*, 232 N.W.2d at 558; *In re Estate of Hoxsey*, 225 N.W.2d 141, 142 (Iowa 1975); *In re Estate of Givens*, 254 Iowa 1016, 1025, 119 N.W.2d 191, 196 (1963); see also *In re Estate of Hasselstrom*, 257 Iowa 1014, 1021, 135 N.W.2d 530, 535 (1965) (citations omitted). The district court found the will had been revoked and Mildred failed to prove Bess had a confidential relationship with Lillie. These conclusions are supported by substantial evidence. See *In re Estate of Baessler*, 561 N.W.2d 88, 93 (Iowa App. 1997). Consequently we need not address the issue of whether the will when executed was valid. We affirm.

AFFIRMED.