STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1569

In the Matter of the Hemish Family Share Trust Created Under the Will of Gordon H. Hemish, In the Matter of the DM Hemish Insurance Trust.

Filed July 17, 2023
Affirmed as modified
Ross, Judge

Lyon County District Court
File Nos. 42-CV-20-987, 42-CV-20-988, 42-CV-22-43

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Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

Married tenants in common owning farmland executed identical, mutually irrevocable wills each bequeathing the drafter's interest in the land to a trust benefiting their children and grandchildren and granting one of the children the option to lease the land. After one spouse died and the other sought to lease the land to the designated child at an allegedly lower rental rate than the rate designated in the decedent's will, the trustee brought a trust action, in part asking the district court to authorize her to appoint a manager

to make all decisions concerning the land. The district court granted the trustee's petition. The surviving spouse appeals, arguing that the district court exceeded its trust-action jurisdiction by allowing the trustee to appoint a land manager with authority over the surviving spouse's individual interest, which is not trust property, and that joint land management is neither legally nor factually supported. Because the district court's order afforded the property manager the authority only "to manage the property *described in*" *the trust*, we affirm the district court's exercise of subject-matter jurisdiction. But we modify the order because the district court authorized the manager to have seemingly limitless power to "manage the property" described in the trust, including to "negotiat[e] the lease of the Farmland," when the manager's power may not exceed the trustee's authority over the trust's interest. We do not reach the various collateral issues that were argued by the parties but not directly relevant to our decision.

FACTS

Appellant Doris Hemish and her husband Gordon Hemish owned as tenants in common about 1,212 acres of farmland in Redwood and Lyon Counties. Before Gordon died in 2015, he and Doris executed identical wills that included a contract provision prohibiting the surviving spouse from revoking his or her will after the other died. The wills contained language that created a "family trust" on the death of the earlier-passing spouse, transferred the deceased spouse's interest in the land, and granted the parties' son, Dennis Hemish, the option to lease and farm the 1,212 acres on specific terms:

> I grant to Dennis Hemish the option to farm the real estate described in Article 5.3.1.3 through 5.3.1.5 hereof during the administration of any trust herein. This option is personal to

> Dennis Hemish and may not be transferred or assigned. Said lease shall be on a cash rent basis, with the cash rent being the average cash rent payable on farm real estate within seven (7) miles of the Northwest Quarter of 21-110-39. The cash rent will be due as follows: One-half on or before April 1 of each crop year, and one-half on or before November 1 of each crop year. My trustees and Dennis Hemish shall sign a lease annually during the administration of any trust herein.

The family trust became effective on Gordon's November 2015 death, and the couple's daughter, respondent Kathleen Pollock, became its trustee. Because Gordon's interest in the land passed into the family trust, Doris and the family trust then owned the land as tenants in common, each having an undivided one-half interest. The record suggests that Dennis began leasing the land for the 2015 crop year shortly before Gordon died. The trust has not maintained a lease with Dennis in recent crop years, however, because Dennis and the trust have not agreed on a rental rate. Doris has been leasing the land to Dennis for $150 an acre—a rate the trust contended was more favorable to Dennis than the rate described in Gordon's will.

Doris and Pollock have fought legal battles over the trust and the land since 2018. Pollock petitioned the district court in a 2022 trust action to allow her to resign as trustee and to appoint a successor. Most central to the current dispute, she asked the district court also to authorize the new trustee to appoint a farm manager to manage the land.

The district court denied Pollock's request as submitted to appoint a successor trustee. But it found that Doris and the trust could not possibly manage the land together because of their differences. It interpreted Gordon's and Doris's wills and the trust instrument to mean that the couple effectively agreed to rent the land to Dennis according

to the terms indicated in Gordon's will. The district court therefore authorized the trustee to hire a land manager with broad power over the land:

> The trustee of the Family Trust shall have the authority to retain, at the Family Trust's expense, an experienced farm man[a]ger to manage the property described in Article Five of the Family Trust, including the Farmland but excluding the Article Two Property. The farm manager's authority will include negotiating the lease of the Farmland pursuant to the terms of the Family Trust.

Doris appeals the order allowing common management of the farmland.

DECISION

Doris challenges the district court's order authorizing the trustee to employ a manager over the shared farmland. She asks us to resolve four specific issues: whether the district court had subject-matter jurisdiction in this trust action to grant relief related to the shared land; whether a will and the trust it creates can govern land outside the decedent's estate; whether a contract not to change a will subjects the surviving party to her will during the surviving party's lifetime; and whether the district court erred by finding that common farm management was impossible. We address each issue in turn.

I

Doris first argues that the district court lacked subject-matter jurisdiction in this trust action to issue an order affecting an interest in land that she owned but the trust did not. We review de novo whether a court has subject-matter jurisdiction. *In re Welfare of Child of S.B.G.*, ___ N.W.2d ___, ___, 2023 WL 4096065, at *5 (Minn. June 21, 2023). A district court may exercise jurisdiction over a trust dispute as specified by statute. Minn. Stat. § 501C.0201 (2022). Minnesota Statutes section 501C.0202 (2022) enumerates 24 matters

that are appropriately considered by the district court in a trust proceeding. *See Swanson v. Wolf*, 986 N.W.2d 217, 221 (Minn. App. 2023). Doris argues that this section limits the scope of the district court's authority in a trust action only to property held within the disputed trust. Under this limit, she maintains, the district court lacked subject-matter jurisdiction to rule on the use of the farmland that she shares with the trust because her interest did not belong to the trust and the order affects her shared interest. She is only partly correct.

The statute grants the district court specific subject-matter jurisdiction relevant to our analysis:

> (4) to construe, interpret, or reform the terms of a trust, or authorize a deviation from the terms of a trust, including a proceeding involving section 501B.31;
> . . .
> (14) to mortgage, lease, sell, or otherwise dispose of real property held by the trustee notwithstanding any contrary provision of the trust instrument;
> . . .
> (24) to instruct the trustee regarding any matter involving the trust's administration or the discharge of the trustee's duties, including a request for instructions and an action to declare rights.

Minn. Stat. § 501C.0202. The district court was authorized to order the trustee to act consistently with the trust under these provisions. It did so here, but its order might be read to exceed the trustee's authority.

We reach this conclusion by considering the interests at stake and the specific reach of the trust. Before Gordon died, as a tenant in common with Doris he owned an undivided one-half interest in the farmland. Gordon bequeathed most of his interest in the land to the

family trust (the tenancy in common) and part of his interest in the land to Dennis (the option to lease). Upon Gordon's death, the property interests became as follows: Doris retained her tenancy-in-common interest fully intact; the trust received Gordon's tenancy-in-common interest minus any power to rescind the will's specific grant to Dennis of the option to lease; and Dennis received the grant of the option *from Gordon* to lease the land. *Cf. Wilson v. Fairchild*, 47 N.W. 642, 642 (Minn. 1891) (holding that a grantee in a conditional sale was vested with the rights of the grantor when the grantor held a tenancy-in-common interest in land). By granting Dennis the option to lease and farm "the real estate" that he and Doris owned in common, Gordon could not have diminished Doris's interest, because a person who owns land as a tenant in common shares the authority to manage the land. *Cf. Adams v. Johnson*, 136 N.W.2d 78, 81 (Minn. 1965) (explaining the presumption that one co-tenant's maintaining and profiting from land does not deprive another co-tenant of his interest). Because the trust owns an undivided one-half tenancy-in-common interest in the land (minus the option granted to Dennis) and because the option to lease granted by Gordon's will involves the shared land, the district court had jurisdiction to allow the trustee to appoint a person to manage the land on the trust's (but not Doris's) behalf.

We therefore agree to some extent with Doris in that we read the district court's grant of power to the trustee's hired manager as potentially too expansive. Although the district court had the jurisdiction "to instruct the trustee regarding any matter involving the trust's administration or the discharge of the trustee's duties," Minn. Stat. § 501C.0202(24), its order as written arguably affords the trustee broader power than the

trust document afforded the trustee. The trustee does not have powers beyond those granted in the trust. *See In re G.B. Van Dusen Marital Tr.*, 834 N.W.2d 514, 524 (Minn. App. 2013) ("[A] trustee may not exercise its discretion in a manner that defeats the grantor's intent or the trust's purpose."), *rev. denied* (Minn. June 26, 2013); *Nat'l City Bank v. Coopers & Lybrand*, 409 N.W.2d 862, 866 (Minn. App. 1987) ("A trustee derives his authority from the instrument creating the trust, and each case involving a question as to authority of the trustee must be decided in the light of the provisions of the particular trust instrument."). Regarding the farmland at issue here, the trustee has the power as one of two tenants in common to make decisions about the land in concert with co-tenant Doris and to effectuate Gordon's will's grant to Dennis of the option to farm the land under the specified terms. The district court's order is not narrowly drafted. One might read the order as authorizing the manager "to manage the property" generally, without regard to whether the trust's co-tenant agrees with any management decisions. And one might likewise read the verb "negotiating" to afford more flexibility concerning Dennis's option to lease than the terms that are both granted to Dennis by Gordon's will and that are beneficial to the trust beneficiaries.

It is true that the district court has the authority to modify trust terms in some situations, *see* Minn. Stat. § 501C.0202(4), but the parties agree that it was not asked to do so here. Nor did it expressly characterize its order as one modifying the trust's terms. To the extent the district court's order increases the trustee's power, the order's language is too expansive. We must therefore modify the district court's order to reflect our understanding of the law as it regards the parties' ongoing shared ownership of the land,

as it regards a grantee's option to lease, and as it regards a trustee's duties to trust beneficiaries. Regarding the shared ownership of the land, for the reasons we have explained, the trustee or a manager acting on her behalf can be vested with no more authority over the land than Gordon had as tenant in common. Regarding the option to lease, Dennis has been granted by only one of the two tenants in common the option to lease the land on specific terms. And regarding the trustee's duties, "[a] trustee-beneficiary relationship necessarily gives rise to a fiduciary duty in the trustee toward the beneficiar[ies]." *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 914 (Minn. App. 2008), *rev. denied* (Minn. Jan. 20, 2009).

For all the reasons discussed, we affirm the district court's exercise of trust jurisdiction. We hold that the district court acted within its jurisdiction by authorizing the trustee to appoint a third-party manager over the real estate bequeathed to the trust by Gordon's will but that the manager's authority can extend no further than the trustee's power under the terms of the will and the trust, neither of which extinguishes or supersedes Doris's continuing rights as a tenant in common. We therefore modify the district court's order authorizing the trustee to appoint a third-party farm manager, as follows:

> The trustee of the Family Trust is authorized to retain, at the Family Trust's expense, an experienced farm manager to manage the property described in Article Five of the Family Trust (including the Farmland but excluding the Article Two Property), acting on behalf of the trustee with the trustee's authority as one of two tenants in common. This includes the power to enter into agreements with co-tenant Doris Hemish regarding the management of the Farmland, such as agreements to lease the Farmland to any person, recognizing that if that person to whom the two tenants in common lease the land is Dennis Hemish, the manager is bound to honor the

> terms offered to Dennis Hemish as stated in Gordon Hemish's will.

Our modification of the district court's order authorizing the trustee to hire a farm manager arguably moots Doris's other challenges to the district court's order. We nevertheless address those challenges in the interest of clarity and completeness.

II

Doris next challenges two of the district court's conclusions about her property interest. In appeals from orders in will and trust proceedings, we review findings of fact for clear error and conclusions of law de novo. *In re Est. of Short*, 933 N.W.2d 533, 537 (Minn. App. 2019). Doris first challenges the district court's conclusion that Gordon's will burdened the entire farmland and not just the trust's interest. Doris argues that a decedent's will and trust cannot govern property not part of the decedent's estate. She specifically contends that Gordon's will cannot burden her undivided one-half interest in the land. We agree that a trust cannot control property outside the trust for the reasons we have already stated. But the real property subject to the district court's order lies within the trust—it encompasses the land that the trust and Doris own as tenants in common. Doris does not own half the physical area of the real property; she and the trust each own an undivided one-half interest in the entire property. And just as she has the authority to enter into contracts that bind the land, the trust has the reciprocal authority. The district court therefore correctly concluded that Gordon's will affected the entire land. We reject Doris's assertion that validating the district court's order would allow a grantor "to claim any property on earth simply by naming it in a trust," particularly because we have modified

the order. Gordon's will transferred only his interest in the property. This does not mean, of course, that the will lessens Doris's interest as a tenant in common or restricts any rights she maintains because of her interest. And because Gordon did not convey nontrust property or attempt to devise any property he did not own, Doris's ademption argument is not germane.

Doris also challenges the district court's conclusion that both Doris and Gordon intended Gordon's will to govern the leasing terms of the land after Gordon's death. She argues that her agreement with Gordon prohibiting either from changing his or her will after the other died does not result in the terms of her will becoming effective during her lifetime. We agree that Doris's will does not speak for her until her death. *See In re Hencke's Est.*, 19 N.W.2d 718, 723 (Minn. 1945) ("[A] will speaks as of the death of the testator . . . .") (quotation omitted). But the district court's order allowing the trustee to hire a manager rests on the language in Gordon's will, not in Doris's. The district court determined, "It was the intent of both Gordon Hemish and Doris Hemish, in executing wills subject to Minn. Stat. § 524.2-514, to enter into a contract and to be subject to the terms of the predeceased spouse's Will." The district court's statement is literally correct. Doris and Gordon, in their identical wills, contracted to maintain the wills unchanged. By statute, parties may stipulate by contract not to revoke a will after the other's death. Minn. Stat. § 524.2-514 (2022). Doris's and Gordon's wills provided that each contained a "contract for the purpose of making this will and not revoking our wills after the death of the other so as to complete our estate plan as expressed in our respective Last Wills and Testaments." The will fixes the trust's position as to any land-lease terms with Dennis, if

Dennis opts to lease the land, and the parties' arrangement necessarily establishes that Doris understood that the trust is bound to honor that position. Although our conclusion has no apparent bearing on whether Doris must also herself join in Gordon's grant to Dennis, we hold that the district court correctly determined that Doris and Gordon intended Gordon's will to govern the lease option and lease terms that *the trust* must agree to extend to Dennis after Gordon's death.

III

Doris last argues that the record does not support the district court's finding that joint administration of the farmland was impossible, and she also contests the legal conclusion the district court drew from it. The challenged factual finding and legal conclusion states as follows:

> It is illogical and impossible to allow one tenant in common to set a rental rate or to manage real estate in a manner that is different from and not agreed upon by the other tenant in common. Based upon the mutual language in the Wills, the amount of rent charged for the Farmland, when rented to Dennis Hemish, should be calculated pursuant to the terms of the Family Trust and the Farmland should be managed by the trustee.

Resting in part on that finding, the district court held as a matter of law that "[t]he management of the Farmland is governed by the Family Trust." Doris maintains that the finding is contrary to the evidence as a matter of fact and that, even if it were evidentially supported, the fact that the two tenants in common cannot possibly jointly manage the farmland is irrelevant to whether the district court has authority in this trust action to essentially give one of them unilateral control of the farm. We review the district court's

fact findings for clear error and its conclusions of law de novo. *Short*, 933 N.W.2d at 537. Again, we address this issue in light of our modification to the district court's order.

The record supports the district court's finding of an impasse, particularly as it relates to the conflicting preferences about a rental rate. We reverse findings of fact only when we are left with the "definite and firm conviction that a mistake has been made," *id.* (quotation omitted), and the record leaves us without that conviction. Trial testimony shows disagreement about the rate and farmland management in general during Doris and the trustee's co-management. Pollock believed Doris was leasing to Dennis at a rate that was too low, and Doris testified that Dennis did not maintain a lease with the trust—leading to a dispute that she described as "unresolved" at the hearing in the district court. And although Doris points to the testimony of her proposed farm manager to show that the co-tenants can jointly manage the land, the testimony she highlights does not address the dispute at issue here. We conclude that the district court did not clearly err in its factual finding that "[i]t is . . . impossible to allow one tenant in common to set a rental rate or to manage real estate in a manner that is different from and not agreed upon by the other tenant in common." This is an accurate statement, and it applies to both tenants in common. As we have reasoned already, Doris necessarily understood that, after Gordon died, Gordon's interest as tenant in common passed to the trust, and the trustee was bound by Gordon's will to agree to lease the property to Dennis according to the terms of the trust. The district court is correct: It is impossible, as it is legally untenable, for either owner acting against the express desire of the other to set a rental rate or manage the property in

a manner that materially differs from the terms of any property-management agreement between them.

The district court was mistaken, however, in assuming as a matter of law that this sort of agreement already exists between Doris and the trust by virtue of the identical language in Doris's and Gordon's wills. The district court reasoned that, "based upon the mutual language in the Wills, the amount of rent charged for the Farmland, when rented to Dennis Hemish, should be calculated pursuant to the terms of the Family Trust." We have already observed that Doris's will becomes effective only upon her death, not upon Gordon's death. Ineffective until then, therefore, is Doris's bequeathing of her interest in the land to the trust and her granting to Dennis the option to farm the land on the lease terms stated in her will. The fact that the language in Doris's will as it regards passing her interest to the trust and her granting of the option to Dennis mirrors the language in Gordon's will as it regards Gordon's interest and Gordon's grant to Dennis does not result in any agreement to accelerate effectuation of those terms in either of their wills.

IV

We have addressed the issues raised in this trust dispute as to jurisdiction and limited the district court's order to fit within that jurisdiction and the proper scope of our review. We clarify that our answers to these issues do not directly resolve underlying questions that seem to have precipitated this dispute, such as whether either the trust or Doris may lease the land under terms to which the other objects. We also do not decide whether the trust (through its trustee or its eventual manager) has any legal or equitable duty to agree with Doris's farm-management or farm-leasing preferences, or whether Doris has any duty to

agree with the trust as to its preferences, as it bears on leasing to Dennis or to any other person. Nor do we decide the consequences of any other disagreement on those matters as it relates to Doris, the trust, or Dennis. We likewise have not attempted to address whether any equitable or legal doctrine applies to affect Doris's rights by virtue of her silence regarding the trust's lease terms when Gordon executed his will and she included identical terms in her own will. And we have not opined on the proper legal forum or action to decide any of these issues and their related questions. Our decision is limited by the nature of this action and the issues presented on appeal.

Affirmed as modified.