2013 IL App (4th) 120956-U

NO. 4-12-0956

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
July 2, 2013
Carla Bender
4th District Appellate
Court, IL

CHARLOTTE HARRISON HUGGINS; CYNTHIA H. PETERS; and SHIRLEY COOPER, f/k/a SHIRLEY A. HUGGINS, Plaintiffs-Appellees, v. LYLE ROGER HARRISON, ROGER LYLE HARRISON, SR., CLARA HARRISON KARBINE, JANET HARRISON CROME, ROGER HARRISON, JR., JOHANNA HARRISON FICKETT, BETH JOHANNA HARRISON, PETER ANDREW HARRISON, and UNKNOWN OWNERS, Defendants-Appellants.	)	Appeal from Circuit Court of Moultrie County No. 11CH27 Honorable Dan L. Flannell, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Steigmann and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's appointment of a manager over the parties' farm property.

¶ 2 In January 2012, plaintiffs Charlotte Harrison Huggins, Cynthia H. Peters, and Shirley Cooper, f/k/a Shirley A. Huggins, filed an amended complaint against defendant Roger Lyle Harrison, Sr. (Roger), and Roger's children, Lyle Roger Harrison, Clara Harrison Karbine, Janet Harrison Crome, Roger Harrison, Jr., Johanna Harrison Fickett, Beth Johanna Harrison, and Peter Andrew Harrison, for (1) partition of nine tracts of farmland located in Moultrie County and (2) an accounting for the Harrison Farms Partnership (Partnership) operated by plaintiffs and Roger. In February 2012, plaintiffs filed a motion for appointment of an

independent farm manager. In March 2012, the trial court held a hearing on the motion and took the matter under advisement. In September 2012, plaintiffs filed an "emergency" motion for appointment of an independent farm manager, and after a hearing, the court entered an order appointing Hardware State Bank (Hardware) as farm manager.

¶ 3 Defendants appeal, arguing the trial court erred in appointing an independent manager as (1) plaintiffs did not satisfy the elements required to obtain appointment of a manager, and (2) the trial judge should have been recused because (a) he is a stockholder of Hardware and (b) he contacted Hardware to determine whether Hardware performed farm management services. We disagree and affirm in part and dismiss the appeal in part.

¶ 4 I. BACKGROUND

¶ 5 This case involves a property dispute between family members and approximately 640 acres of farmland located in Moultrie County. The property consists of nine different tracts of various acreage. Charlotte and Roger are siblings and the two children of their parents. The property has been farmed by the parties' family for several generations.

¶ 6 In July 2011, plaintiffs filed a two-count complaint against Roger for (1) partition of the farmland and (2) an accounting for the Partnership. In January 2012, plaintiffs filed an amended complaint adding Roger's children as defendants to reflect their property interests in tracts 1 and 2. Plaintiffs alleged Roger assumed control of the Partnership in 2010 and terminated the existing farm manager, Hertz Farm Management, Inc. (Hertz), and farm tenant and appointed his son Lyle's company, Harrison Farm Management, LLC (HFM), as farm manager. Charlotte terminated the Partnership on February 7, 2011.

¶ 7 A. The Property

¶ 8 1. *Plaintiffs' Ownership Theory and Evidence*

¶ 9 Plaintiffs alleged the parties derived ownership of the property from Lyle Lux Harrison, Alta Bowers Harrison, and Harry Howard Harrison, who are Charlotte and Roger's father, mother, and uncle, respectively.

¶ 10 Plaintiffs alleged the property is owned as follows:

¶ 11 Tracts 1 and 2: Charlotte and Roger each have an undivided one-half life estate interest in the property, with Cynthia and Shirley having a vested remainder in Charlotte's undivided one-half interest, in fee simple absolute, and Roger's children have a vested remainder in his undivided one-half interest, in fee simple absolute.

¶ 12 Tract 5: Cynthia and Shirley each own an undivided one-fourth interest in Tract 5 with Roger owning the remaining one-half interest, as tenants in common.

¶ 13 Tracts 3, 4, 6, 7, 8, and 9: Charlotte and Roger each own an undivided one-half interest, as tenants in common.

¶ 14 In April 2012, plaintiffs provided the trial court with deeds, wills, and other recorded instruments showing their ownership interests in the property. In June 2012, plaintiffs provided a title commitment dated April 20, 2012, from the Chicago Title Insurance Company reflecting plaintiffs' ownership interests in the property. These documents combined reflect the parties derived ownership as alleged by plaintiffs.

¶ 15 2. *Defendants' Ownership Theory*

¶ 16 On appeal, as in the trial court, Roger and his children assert plaintiffs do not have an interest in the property. At a November 2011 hearing Roger, proceeding *pro se*, presented his theory why plaintiffs do not have ownership. He asserted (1) plaintiffs canceled the Partnership

in February 2011; (2) as a result of the Partnership's cancellation, the farmland went back into the Lyle Lux Harrison revocable trust; (3) Roger is the trustee of the "Lyle Lux Harrison Revocable Trust"; (4) "the trustee has pretty much complete power to decide who gets what"; and (5) plaintiffs do not have any ownership interests. Roger maintained this ownership theory throughout the trial court proceedings, including (1) a December 2011 filing asserting he is "sole trustee of the Trust of Mary E. Lux and the Lyle Lux Harrison Revocable Trust" and he has the power to divide the property as he "sees fit"; (2) a "Roger Lyle Harrison Senior Declaration of Successor Trustees" filed January 31, 2012, naming his five sons as successor cotrustees of the "Lyle Lux Harrison Revocable Trust," the "Mary E. Lux Testamentary Trust," and the "Roger Lyle Harrison Senior Trust"; (3) a request filed March 14, 2012, for the trial court to "clarify all the powers" contained in the "Lyle Lux Harrison Trust" and "Mary E. Lux Testamentary Trust."

¶ 17 We note the record contains a September 8, 1957, circuit court order terminating the Mary E. Lux testamentary trust.

¶ 18 B. The Harrison Farms Partnership

¶ 19 In January 1983, Charlotte, Roger, Cynthia, and Shirley formed the Partnership by written agreement. The agreement states, "The Partners desire to manage and operate the farm lands as a unit." It provides proceeds from the crops harvested after January 1, 1983, will be affected by the agreement. The partnership agreement describes the partners' ownership interests in the tracts of the property but does not expressly state the partners' ownership interests in the Partnership. The agreement provides, "The net profits of the Partnership shall be divided among the partners." Roger was named the managing partner of the Partnership and he "shall make all decisions regarding the management and operation of the farm lands, including the lease of the

farm lands to a tenant or tenants for a term or terms not to exceed one year." The agreement states the Partnership will maintain a checking account at Hardware in Lovington, Illinois.

¶ 20 In May 2004, the partners executed an amendment to the partnership agreement to reflect acquisition of additional ownership interests in Tracts 6, 7, 8, and 9 from the Estate of Harry Howard Harrison. As Harry's widow had died, the amendment stated Charlotte and Roger "now own the entire interest in said parcel of farm land." Charlotte and Roger agreed "that said parcel of farm land shall be managed and operated by Harrison Farms Partnership." The amendment also reflected the sale of 80 acres subsequent to the 1983 agreement. The amendment adjusted the "fractions for division of net profits" and stated these "new fractions shall apply to all receipts and disbursements from and after January 1, 2004.

¶ 21 C. The Trial Court's November 15, 2011, Order Barring Distribution of Proceeds

¶ 22 On November 15, 2011, the trial court held a hearing on various motions filed by the parties. The trial court ordered no distributions from the 2011 crop proceeds were to be made until further order of the court.

¶ 23 D. Plaintiffs' Motion for Appointment of Independent Farm Manager

¶ 24 On February 3, 2012, plaintiffs filed a motion for appointment of an independent farm manager. In the motion, plaintiffs asserted the proceeds from the 2011 crop were being held in an account at Hardware owned by HFM, and Roger was using proceeds from the sale of the 2011 crop to fund his legal defense in the instant case. The motion asserted that in light of the payments from HFM's accounts, "it is apparent that current farm manager [HFM] is unable or unwilling to manage the farm in a way that is equitable and in the best interest of all the parties having an interest in the farmland."

¶ 25 Plaintiffs attached canceled checks drawn on HFM's account at Hardware, including the following: (1) a $1,620 check dated October 6, 2011, payable to Roger's first attorney of record; (2) a $450 check dated October 31, 2011, payable to Roger's second attorney of record; (3) a $10,000 check dated November 4, 2011, payable to Roger's second attorney of record; and (4) a $20,600 check dated November 9, 2011, payable to Roger. No similar payments were made to plaintiffs during this period.

¶ 26 Plaintiffs attached a "Semi-Annual Report 2011" produced by HFM dated August 4, 2011. The report stated Lyle was "in charge of the financials for Harrison Brothers Farm" and he "opened a savings account for the Harrison Brothers Farm at the Hardware State Bank in addition to a rental account and operating account." The report indicated delivery of a 56,400-bushel grain bin was expected in August.

¶ 27 On March 24, 2012, Roger filed a response to plaintiffs' motion. The response stated (1) on November 20, 2011, HFM made the last distribution from the 2010 crop in the amount of $20,600; (2) "[HFM] has loaned approximately Thirty-Thousand (+$30,000) dollars of their own money to Defendant Roger L. Harrison to use on legal fees, attorneys, travel, legal research, and Court expenses"; (3) the status quo for the Harrison Brothers Farm for the past 130 years has been "the Trustee makes all the decisions and all Court costs have been paid out of the Trust Funds"; and (4) "Lyle Lux Harrison, to the current knowledge of Defendant and Trustee Roger L. Harrison, never wanted Plaintiff Charlotte Huggins or Plaintiff Charlotte Huggins' daughters to be Beneficiaries of The Lyle L. Harrison Trust. *** Lyle L. Harrison, only wanted the children of Defendant and Trustee Roger L. Harrison to be successor Trustees and Beneficiaries."

¶ 28 Roger attached an "Annual Report 2011" produced by HFM dated January 20, 2011. This report stated 9,000 bushels of corn were being stored on the farm.

¶ 29 E. The Trial Court's March 27, 2012, Hearing

¶ 30 On March 27, 2012, plaintiffs and Roger appeared before the trial court for a hearing on various "motions" filed by Roger and plaintiffs' motion for an independent farm manager. The court observed a Hardware representative appeared in the courtroom. The court asked why the representative was appearing and explained it had a "very minor percentage" of stock ownership in Hardware. Plaintiffs stated the representative was there to authenticate the bank records attached to their motion.

¶ 31 Plaintiffs argued HFM was not an impartial farm manager as it was controlled by Lyle. Plaintiffs asserted there was no way for them to verify the amount of crops harvested or the amount of crops in storage because the storage bins are located on the property. Plaintiffs represented to the trial court Hertz would be able to manage the farm if it was appointed by the court, but "Hertz is not interested in managing the farm if it's going to be reporting to or taking direction from Mr. Harrison or his family."

¶ 32 Roger stipulated to the bank documents and canceled checks drawn on HFM's account at Hardware. Roger explained, "The money that was taken for court expense, legal expenses and so forth actually has been taken by my son and charged against his own pay, not actually coming from the farm account. It's through the farm account, because that's where everything goes."

¶ 33 Roger admitted he signed a contract with HFM to provide farm management. Roger represented the property has two storage bins used for storing crops. The soybeans bin is

capable of storing 18,000 bushels and the corn bin is capable of storing 56,400 bushels.

¶ 34 The trial court took the matter under advisement and requested the parties to each submit two proposed farm managers by April 10, 2012.

¶ 35 F. Roger's "Motion" To Vacate the March 27, 2012, Order

¶ 36 On April 10, 2012, Roger filed a "Defendants' Motion to Vacate or Otherwise Modify the March 27, 2012, Order Regarding Independent Farm Manger." Roger asserted (1) Hertz was a deficient farm manager, (2) HFM doubled the income from the property, and (3) HFM would be entitled to a "severance package of approximately $112,000." Roger suggested a farmer from Atwood and the Farmers National Company from Argenta as farm managers.

¶ 37 Attached to this document was a copy of the October 20, 2011, contract between HFM and Roger and a handwritten amendment dated October 30, 2011. The contract described the acreage of the nine tracts and stated HFM's management "is to cover all phases of the operation of the farm," including "to collect rentals, sell crops, and other farm products." The contract provided "Farm income collected by you will be deposited in an individual farm account in a bank selected by you [(Lyle)], and of which I [(Roger)] approve, and held for the account of these properties."

¶ 38 The October 30, 2012, handwritten amendment extended the previous contract for five years and provided if the contract is canceled, HFM "will immediately be awarded a cancellation penalty payment of twice the bin management fee at $1.00 per bushel which equals two times the 56,400 bushel bin capacity of [(*sic*)] $112,800."

¶ 39 G. The April 2012 Default Order Against Roger Harrison, Sr.

¶ 40 On April 27, 2012, the trial court entered an order of default against Roger as to

all the allegations contained in plaintiffs' amended complaint. The court ordered Roger (1) to prepare and submit a full and complete accounting for the Partnership from January 1, 2010, through the date of the accounting; and (2) to prepare and submit a full and complete accounting with respect to the property. The court reserved the division and partition of the property pending resolution against the remaining defendants.

¶ 41 On May 25, 2012, Roger filed a *pro se* motion to vacate the default judgment. We note the record does not reflect a ruling by the trial court on this motion.

¶ 42 H. The Trial Court's Appointment of Hardware as Farm Manager

¶ 43 On September 6, 2012, plaintiffs filed an "emergency" motion for appointment of an independent farm manager. The motion noted plaintiffs filed their original motion on February 3, 2012, and the 2012 crop was in the process of being harvested. The motion requested Hardware to be appointed as farm manager.

¶ 44 On September 7, 2012, the trial court held a hearing on plaintiff's emergency motion. Plaintiffs asserted they and defendants' counsel had contacted Black Prairie Agricultural Services over the summer about its willingness to serve as farm manger. In August, Black Prairie stated it was unwilling to serve under the circumstances.

¶ 45 Defendants Lyle, Roger Lyle Harrison, Jr., and Andrew Lux Harrison appeared *pro se*. Lyle asserted an independent manager should not be appointed as his company, HFM, "doubled" the profit from the farm and has a five-year contract with a $112,000 "severance package." Lyle stated this amount was calculated based on the money "saved [by] the farm for the building of the bin and subtract that amount of money that Hertz was going to charge." The trial court questioned "the propriety of a buyout provision penalty of that magnitude."

¶ 46 Before announcing its decision, the trial court acknowledged the fall harvest was in "full swing." For the record, the court stated:

> "I am not individually a shareholder in the Hardware State Bank. I have control through a self-directed IRA of five total shares of the Hardware State Bank that have been in the name of the First National Bank of Sullivan, across the street here, in an IRA that I have there. That's the extent of my holdings or any capacity in the Hardware State Bank."
>
> ***
>
> I don't know how many shares there are in the Hardware State Bank, but I can assure you that five of them does not put me in much of a position of power."

¶ 47 The trial judge acknowledged he was general counsel at Hardware "25 years ago before I came to the bench" and denied ever being a board member of Hardware.

¶ 48 The trial court appointed Hardware as an independent farm manager. For the record, the court stated:

> "I do want the record to reflect that I made a phone call today in anticipation of this hearing to the Hardware State Bank to inquire if they still did farm management, because, frankly, I was aware they had eliminated their trust powers of cases I had in the court where they were resigning, but I frankly did not know. I haven't been in the Hardware State Bank for years. I called to see if they even still

did farm management, to see if in fact they would be eligible to be appointed. I do know of other banks in the area that do that, and frankly didn't know if they did. There's never been any litigation involved in that kind of operation, and they confirmed that, in fact, they still did do that type of service independent of any kind of trust powers."

¶ 49 On October 5, 2012, defendants filed a notice of interlocutory appeal on the issue of appointing a farm manager. On November 14, 2012, defendants filed a motion to stay pending appeal.

¶ 50 On November 15, 2012, the trial court denied the motion to stay. In ruling on the motion, the court stated "why in the world would I leave things under the control of one example of a group that would enter into this contract for farm management which is so obvious in its original purpose, and that is to protect Mr. [Lyle] Harrison *** financially? Why in the world would at that point there not be a belief that there is a problem?" The court approved Hardware's contract for farm management services.

¶ 51 This appeal followed.

¶ 52 II. ANALYSIS

¶ 53 Defendants appeal, arguing the trial court erred in appointing an independent manager because (1) plaintiffs did not satisfy the elements required to obtain appointment of a manager, and (2) the trial judge should have recused himself because (a) he announced he was a stockholder of Hardware and (b) he contacted Hardware to determine whether Hardware performed farm management services. We disagree and affirm.

¶ 54 A. Roger's Status as a Party to This Appeal

¶ 55 On page 14 of defendants' brief, defendants state "Roger Lyle Harrison Sr. died on September 19, 2012." Our review of the record shows on November 14, 2012, defendants filed a "Defendants' Verified Answer And Response to Hardware State Bank's Request for Court Approval of Its Proposed Contract." This document contained information Roger died on September 19, 2012.

¶ 56 The record on appeal does not contain a suggestion of Roger's death or a motion to substitute his personal representative as a party in the trial court. See 735 ILCS 5/2-1008(b)(2) (West 2010). Nor have the parties notified this court of Roger's death. As this court has stated before, "A dead person cannot be a party to a suit as such is a nonexistent entity." *Reed v. Long*, 122 Ill. App. 2d 295, 297, 259 N.E.2d 411, 412 (1970). As no substitution has been made, Roger is not a proper party to this appeal, and we dismiss the appeal as to him. The appeal may proceed against the remaining defendants. 735 ILCS 5/2-1008(b) (West 2010).

¶ 57 B. Illinois Supreme Court Rule 307(a)

¶ 58 Defendants asserts jurisdiction lies in this court under Illinois Supreme Court Rule 307(a)(5) (eff. Feb. 26, 2010). Plaintiffs assert jurisdiction lies under Illinois Supreme Court Rule 307(a)(2) (eff. Feb. 26, 2010) which permits an appeal from an interlocutory order "appointing or refusing to appoint a receiver or sequestrator." Rule 307(a)(5) applies to the appointment of a receiver for "a bank, savings and loan association, currency exchange, insurance company, or other financial institution." Ill. S. Ct. R. 307(a)(5) (eff. Feb. 26, 2010). As defendants' appeal does not involve such an institution, we agree with plaintiffs our jurisdiction lies with Rule 307(a)(2).

¶ 59 C. The Trial Court's Decision To Appoint a Receiver

¶ 60 Defendants' contend the trial court erred because (1) plaintiffs "have yet to prove and establish" their ownership interests in the property, (2) defendants will suffer "irreparable harm" because defendants "were pursuing a profitable management program of the farm based on custom farming" and Hardware's "cash rent approach is not in the best interests of the parties and the farm," (3) an independent manager "in effect divests defendants from their current farm management, and costs defendants and the plaintiffs profits," and (4) plaintiffs have shown no such probability of a success on the merits. Defendants assert no receiver should be appointed as (1) HFM's management was the status quo, (2) severance of the contract with HFM would cost $112,800, (3) and HFM has "doubled the farm profit and saved the farm approximately +$310,000 over a two-year period."

¶ 61 Plaintiffs rebut defendants' assertions they do not have ownership interests by pointing out defendant's theory of ownership rests on "a willingness to fabricate self-serving facts" such as (1) Roger and Charlotte's father and uncle (two brothers) held property as tenants by the entirety, (2) property deeded to Roger and Charlotte's father and uncle in 1936 was still in trust, and (3) Roger was trustee of a trust that terminated in 1957. Plaintiffs assert defendants changed the status quo when they "unilaterally" fired Hertz and "appoint[ed] one of their own as farm manager."

¶ 62 This case is complicated by the nature of tenancies in common, number of tracts involved, and number of parties involved. To properly resolve this issue, we begin with basic principles of the law concerning tenancies in common and receivers.

¶ 63 1. *Partition and Accounting for Property Held as Tenants in Common*

¶ 64 A tenancy in common is a form of joint ownership in which each tenant in common has an undivided share of the property. However, a tenant in common cannot exclude other cotenants or appropriate any portion of the real estate as his own. *Massman v. Duffy*, 333 Ill. App. 30, 40, 76 N.E.2d 547, 551-52 (1947); *NAB Bank v. LaSalle Bank, N.A.*, 2013 IL App (1st) 121147, ¶ 22, 984 N.E.2d 154. A cotenant may assert his or her right to share in the possession or may have the property partitioned. *Massman*, 333 Ill. App. at 40, 76 N.E.2d at 552. Section 17-101 of the Partition Act permits coowners to compel a partition of lands held as tenants in common. 735 ILCS 5/17-101 (West 2010). Section 4a of the Joint Tenancy Act permits cotenants to seek an accounting where "one or more joint tenants, tenants in common or co-partners in real estate, or any interest therein, shall take and use the profits or benefits thereof, in greater proportion than his or their interest." 765 ILCS 1005/4a (West 2010); see also *Regan v. Regan*, 192 Ill. 589, 593, 61 N.E. 842, 844 (1901) (a cotenant is entitled to an accounting where the one of the cotenants receives rent on the property).

¶ 65 We note this appeal does not concern plaintiffs' request for an accounting of the Partnership or its dealings with winding up the Partnership's business. See 805 ILCS 206/807 (West 2010) (settlement of partnership accounts) and 805 ILCS 206/802(a) (West 2010) (once partnership is dissolved it only has power to wind up partnership business).

¶ 66 2. *Standard of Review and Receivers in General*

¶ 67 The appointment of a receiver is an equitable remedy, "the object being to secure and preserve the property for the benefit of all concerned so that it might be subjected to such order as a court might render." *People ex rel. Scott v. Pintozzi*, 50 Ill. 2d 115, 123, 277 N.E.2d 844, 849 (1971). A receiver is " 'an indifferent person between the parties, appointed by the

court, and on behalf of all parties, and not of the complainant or one defendant only, to receive the thing or property in litigation, pending the suit.' " *Firebaugh v. McGovern*, 404 Ill. 143, 148-49, 88 N.E.2d 473, 476 (1949) (quoting *Baker v. Administrator of Backus*, 32 Ill. 79, 95 (1863)). The appointment of a receiver is a "high and extraordinary remedy" within the sound discretion of the trial court. *Bagdonas v. Liberty Land & Investment Co.*, 309 Ill. 103, 110, 140 N.E. 49, 52 (1923); *Pintozzi*, 50 Ill. 2d at 123, 277 N.E.2d at 849; *Witters v. Hicks*, 335 Ill. App. 3d 435, 446, 780 N.E.2d 713, 722 (2002).

¶ 68 As a general rule, an applicant for a receivership must show (1) "that he has a clear right to the property itself" and (2) "that the property itself, or the income arising from it, is in danger of loss from neglect, waste, misconduct or insolvency." *Bagdonas*, 309 Ill. at 110, 140 N.E. at 52. See also *Simpson v. Adkins*, 311 Ill. App. 543, 550, 37 N.E.2d 355, 358 (1941) (a receiver may be appointed where the subject matter of the litigation is being dissipated); *People ex rel. Fahner v. Community Hospital of Evanston*, 108 Ill. App. 3d 1051, 1059, 440 N.E.2d 200, 207 (1982) (same).

¶ 69 3. *Defendants' Claim the Trial Court Erred*

¶ 70 The trial court did not abuse its discretion when it appointed Hardware as an independent administrator to safeguard the profits from the property pending a final determination of the parties' rights to the property. First, plaintiffs provided the court with recorded deeds showing their interests in the property and the record shows defendants recognized plaintiffs' ownership interests for nearly 30 years before this litigation. In April 2012, the court entered a default judgment against Roger concerning his ownership interests in all nine tracts of property. This judgment admitted plaintiffs' ownership interests as they pertain to

Roger. Defendants ignore the effect of this order by asserting plaintiffs have yet to establish their ownership interests for purposes of a receiver. Defendants confuse basic principles of property and trust law by contending the property reverted to trust when the Partnership terminated. There are no allegations or evidence presented indicating the Partnership ever owned the property. While we express no opinion on the ultimate question of ownership rights, plaintiffs provided the trial court with evidence they have a right to the property.

¶ 71 Plaintiffs have shown the property and profits therefrom are in danger of waste or misconduct. We decline defendants' suggestions for this court to substitute its judgment for the trial court's to determine if HFM is a suitable manager. Evidence supporting the appointment of an independent administrator is as follows: (1) after nearly 30 years of recognizing plaintiffs' ownership of the property, defendants refused to acknowledge plaintiffs' ownership rights; (2) proceeds from the harvest were being stored on the property and controlled by HFM; (3) HFM (a) was hired by Roger to manage the property without input by plaintiffs, (b) is solely owned by Lyle, an interested party, (c) had a provision in its operating contract for a $112,800 "buyout," (d) made a significant expenditure in building the storage bin on the property, (e) altered the farming methods that had been accepted by the parties for the past 10 years, and (f) distributed from its operating account at Hardware (i) a $1,600 check to defendants' first counsel, (ii) a $10,000 check to defendant's second counsel, and (iii) a $20,600 check to Roger. This evidence shows (1) funds intended for the operation and management of the property were being diverted to personal expenses; and (2) raises significant questions whether HFM was (a) independent, (b) impartial, (c) observing corporate formalities, (d) contracting for Lyle's sole financial benefit, and (e) managing the property for the benefit of all the properties. Further, the court had ample

evidence of defendants' acrimonious behavior toward the Hugginses, including Roger's allegations in court filings Charlotte stole the land, was a felon, and her husband engaged in tax evasion and was a child predator. The trial court cannot be said to have abused its discretion when it concluded HFM was not an appropriate entity to continue managing the property during the pendency of this litigation and an independent manager was necessary to safeguard the parties' interests.

¶ 72 We note defendants add arguments about whether the trial court should approve Hardware's contract as independent manager and whether custom farming is superior to the cash-rent method. As these issues are not before this court on appeal, we expressly decline to address defendants' arguments.

¶ 73 D. Defendants' Claim the Trial Judge Should Have Recused Himself

¶ 74 Defendants assert the trial judge should have recused himself pursuant to Illinois Supreme Court Rules 62 (eff. Oct. 15, 1993) and 63(C)(1)(d) (eff. Apr. 16, 2007) because (1) he announced at the September 7, 2012, hearing "that he is a stockholder in the Hardware State Bank," and (2) "he phoned the Bank before the receivership hearing, *ex parte*, to determine whether the Bank even did farm management, an evidentiary fact that was certainly an issue at that hearing, and a fact that was learned by the judge in an *ex parte* conversation." Plaintiffs respond (1) defendants did not object to the trial court's ruling on this basis, (2) the judge's interest in Hardware is *de minimis*, and (3) the communication with Hardware was "a non-substantive, incidental inquiry into the availability of a certain potential farm manager" and not prohibited by Illinois Supreme Court Rule 63(A)(4) (eff. Apr. 16, 2007). We agree with plaintiffs.

¶ 75 1. *Trial Court's Interest in Hardware*

¶ 76 Rule 63(C)(1)(d), which is part of canon 3 of the Code of Judicial Conduct, states a judge must disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned, including where "the judge knows that he or she, individually or as a fiduciary, *** has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other more than *de minimis* interest that could be substantially affected by the proceeding." Ill. S. Ct. R. 63(C)(1)(d) (eff. Apr. 16, 2007). The Code of Judicial Conduct defines "economic interest" as follows:

> "ownership of a more than *de minimis* legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:
>
> (i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest[.]" Code of Judicial Conduct, Terminology (eff. Aug. 6, 1993).

¶ 77 At the September 7, 2012, hearing, the trial court announced it owned five shares of stock in Hardware through a self-directed individual retirement account (IRA) held at a different bank and had never participated in the management of Hardware. Defendants have not provided the number of outstanding Hardware shares or any other evidence to provide context for the ownership interest five shares represent. It is common knowledge outstanding corporate

shares can often range into the millions. Absent contrary evidence, the judge's five shares is a *de minimis* economic interest. Further, defendants failed to object to the trial judge's interest and have waived review of such error. See *People v. Jones*, 206 Ill. App. 3d 477, 480, 564 N.E.2d 944, 946 (1990).

¶ 78 2. *The Trial Court's Inquiry to Hardware*

¶ 79 Rule 63(A)(4)(a) permits a judge to consider *ex parte* communications under certain circumstances:

> "scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond." Ill. S. Ct. R. 63(A)(4)(a) (eff. Apr. 16, 2007).

¶ 80 Here, the communication was an effort to determine if Hardware's appointment was a legal impossibility and did not concern any substantive matter of the motion. The trial court could reasonably inquire whether an entity can perform the functions the court is about to assign to it as an agent of the court. Further, defendants did not object to the trial court's disclosure in the trial court and should not be permitted to object on appeal. See *Gaffney v.*

Board of Trustees of the Orland Fire Protection District, 2012 IL 110012, ¶ 33, 969 N.E.2d 359 (party cannot proceed in one manner and then contend on appeal the action was error).

¶ 81 E. A Final Note

¶ 82 In closing, we note this case is approximately two years old and has been marked by unnecessary delay. We encourage the parties to resolve this litigation and reach a settlement. Protracted litigation over this property is not in anyone's best interests and will serve only to be a costly and painful endeavor.

¶ 83 III. CONCLUSION

¶ 84 We dismiss the appeal as to defendant Roger Lyle Harrison, Sr.; we otherwise affirm the trial court's judgment.

¶ 85 Affirmed in part and dismissed in part.