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STATE OF KANSAS
BEFORE THE DIVISION OF WATER RESOURCES
KANSAS DEPARTMENT OF AGRICULTURE

IN THE MATTER OF THE CITY OF WICHITA'S	)	
PHASE II AQUIFER STORAGE AND RECOVERY PROJECT	)	
IN HARVEY AND SEDGWICK COUNTIES, KANSAS.	)	**Case No. 18-Water-14014**

Pursuant to K.S.A. § 82a-1901 and K.A.R. § 5-14-3a

RESPONSE TO MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY

COMES NOW the Equus Beds Groundwater Management District Number 2 ("the District"), by and through counsel Thomas A. Adrian of Adrian & Pankratz, P.A., Leland Rolfs of Leland Rolfs Consulting, and David Stucky, with its Response to the City of Wichita's "Prehearing Motion in Limine to Exclude 'Expert Reports' of Carl E. Nuzman, Tim Boese and David Pope." In support of this Response, the District states the following:

INTRODUCTION

This hearing should utilize a non-technical standard of evidence in relation to experts applying the law to the facts of this case, and admit the District's expert reports into evidence. This hearing is bound by the Kansas Administrative Procedures Act ("KAPA"), which allows a relaxed application of the rules of evidence. Under those flexible rules, expert opinions should be allowed if they are shown to be reliable and helpful. Even though the parties have been loosely following civil procedural rules, this is an example of where KAPA should govern.

Regardless, even a strict application of the rules of evidence in Kansas would still militate against excluding the reports. It is well settled precedent that experts may refer to the law in formulating conclusions. Additionally, experts may testify to mixed questions of law and

fact. Finally, if the ultimate issue to be determined is of a legal nature, a properly credentialed expert may testify to that issue.

Moreover, the District's expert reports are both reliable and helpful. Here, the testimony of both of the experts in question were written by individuals that have spent much of their lives heading agencies where they were charged with applying facts to laws germane to groundwater—one of which was a former Chief Engineer and the other the manager of a groundwater district—and both reports analyze the present issue using their technical expertise in the professional field. Both experts have the proper training and experience to examine the issues before this hearing, and the experts show how they used those qualifications reliably by detailing their analysis of the facts. The District's experts are helpful because they explain the rationale for their conclusions, and in doing so, provide insight to the Chief Engineer that will be useful to his investigation.

FACTS

1. On March 12, 2018, the City submitted to the Chief Engineer of the Division of Water Resources a proposal titled "ASR Permit Modification Proposal Revised Minimum Index Levels & Aquifer Maintenance Credits" ("the Proposal").

2. The City has developed a modified USGS Equus Beds Groundwater Flow Model ("the Model").

3. The City of Wichita ("the City") submitted expert reports on February 15, 2019.

4. The District submitted expert reports on February 18, 2019.

5. On March 11, 2019, both the City and the District filed Motions in Limine to exclude the others' expert reports.

ARGUMENTS AND AUTHORITIES

I. ***A relaxed, general standard of evidence should apply on this issue because this is an administrative hearing, and KAPA provides flexibility for a hearing officer to not apply the technical rules of evidence.***

In criminal and civil cases in Kansas, parties are bound to the Kansas Rules of Evidence. K.S.A. § 60-402. However, in administrative hearings, hearing officers apply either a) the rules of evidence listed in the applicable statute, or b) KAPA. K.S.A. § 77-503. While criminal and civil cases have technical and rigid rules of the admission of evidence, the Kansas Administrative Procedure Act allows for the presiding officer to not be bound by these technical rules. K.S.A. § 77-524.

This hearing obviously falls within KAPA. The case caption in this matter cites to K.S.A. § 82a-1901. That statute allows for "an administrative hearing by a hearing officer ... and *otherwise in accordance with the provisions of the Kansas Administrative Procedure Act.*" K.S.A. § 82a-1901(a)(emphasis added).[1] The applicable administrative regulations also support this conclusion. K.A.R. § 5-14-3a, which also appears in the case caption, further indicates that "[t]he presiding officer shall not be bound by the technical rules of evidence." Because KAPA governs this hearing, and because KAPA does not require the technical, rigid application of the rules of evidence in this situation, this hearing should use a liberal standard in allowing qualified experts to testify on mixed questions of law and fact.

II. ***Experts can testify on issues of law under certain circumstances, such as in this case.***

a. Experts can testify on questions of law in proper circumstances.

It is well-established that "[a]n expert witness may also refer to the law in expressing an opinion." *Ross v. Rothstein*, 92 F. Supp. 3d 1041, 1073 (D. Kan. 2014) (applying Kansas law).

[1]Throughout the Kansas Waters and Watercourses Act there are approximately a dozen additional statutes that demand hearings that comply with KAPA. *See* Chapter 82a of Kansas Statutes Annotated *et seq.*

Even in a civil case, "the mere fact that the ultimate question at issue is a legal one for the court to determine does not make potential testimony on the subject inadmissible." *Wilson v. State*, 51 Kan. App. 2d 1, 24, 340 P.3d 1213 (2014) (allowing a lawyer to testify as an expert in a legal malpractice matter). The Rules of Evidence emphasize that expert testimony "is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of fact." K.S.A. 60-456(d). "[W]hen expert testimony may be helpful to the court in understanding the background facts of the case or determining the ultimate legal issue, the testimony is admissible." *Wilson*, 51 Kan. App. 2d at 24-25; *see also* K.S.A. 60-456(b); *State ex rel. Schmidt v. Memorial Park Cemetery, Inc.*, No. 108,063, 2013 Kan. App. Unpub. LEXIS 568, 2013 WL 1943071, at *11-12, rev. denied 2013 Kan. LEXIS 1324 (December 27, 2013).

The experts in question are exactly the type of expert that can comment on the application of law to the relevant facts.

It merits emphasizing that both David Pope and Tim Boese have spent a substantial portion of their careers applying groundwater laws to the relevant facts as heads of their respective agencies. As Chief Engineer from March 1, 1983 through 2007, David Pope was charged with the responsibility to "enforce and administer the laws of this state pertaining to the beneficial use of water and shall control, conserve, regulate, allot and aid in the distribution of the water resources of this state for the benefits and beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation." K.S.A. § 82a-706. Of course, he relied on the advice of his staff, but the sole responsibility of administering the Kansas Water Appropriation Act rested on his shoulders. Mr. Pope adopted the basic regulations that are the subject of this hearing, namely K.A.R § 5-12-1 *et seq*. He issued the permits that authorized Phases I of the City's ASR project. No one could be better qualified on this topic to give an opinion to assist the hearing officer.

Tim Boese, as Manager of the District for over a decade, is in charge of a District required by law to provide "for the proper management of the groundwater resources of the state; for the conservation of groundwater resources; ...." K.S.A. § 82a-1020. The District is imbued with many powers, including recommending to the chief engineer rules and regulations which relate to the conservation and management of groundwater within the district; and enforcing those regulations. K.S.A. § 82a-1028. Those regulations have included K.A.R. §§ 5-22-1, 5-22-7 and 5-22-10, which directly relate to the City's ASR project. The District's responsibilities also include providing recommendations to the chief engineer on whether to approve pending applications to appropriate water and change applications. Mr. Boese is also eminently qualified in the subject matter of this hearing.

This special status makes them the exact type of expert qualified to testify on mixed questions of law and fact. "The ruling of an administrative agency on questions of law, while not as conclusive as its findings of fact, is nevertheless persuasive and given weight, and may carry with it a strong presumption of correctness, especially if the agency is one of special competence and experience." *Kansas Bd. of Regents v. Pittsburg State University Chapter of Kansas-National Education Asso.*, 233 Kan. 801, 802, 667 P.2d 306 (1983). In a civil law matter, "T]he legal interpretation of a statute by an ... agency . . . charged by the legislature with the authority to enforce the statute, is entitled to a great deal of judicial deference." In *Richardson v. St. Mary Hospital,* 6 Kan. App. 2d 238, 242, 627 P.2d 1143, *rev. denied* 229 Kan. 671 (1981), the court noted, "In reviewing questions of law, the trial court may substitute its judgment for that of the agency, although ordinarily the court will give deference to the agency's interpretation of the law."

This deference has long existed in Kansas law. In *Harrison v. Benefit Society,* 61 Kan. 134, 140, 59 Pac. 266 (1899), the court wrote that with respect to agencies "the officials" in charge should be afforded deference on questions of law. The reason is that the officials in those agencies are instrumental in the development of the internal regulations and applying those regulations. *See, e.g. Southwestern Bell Telephone Co. v. Employment Security Board of Review,* 189 Kan. 600, 607, 371 P.2d 134 (1962); *State v. Helgerson,* 212 Kan. 412, 413, 511 P.2d 221 (1973).

K.A.R. § 5-22-12 (the District's Application processing requirements and procedures regulation), which specifies in 5-22-12(b)(1) and (2) that the district will review a new or change application and submit recommendation to the chief engineer and "[t]he district staff's recommendation to the chief engineer shall be consistent with the provisions of the Kansas Water appropriation act, the groundwater management district act, and the regulations adopted by the chief engineer pursuant to those acts." Although the City did not file new or change applications pursuant to the City's proposed permit modifications, the District's review and recommendation should follow this same procedure. Therefore, the District can't avoid recognizing the law and regulations when providing an expert report.

As indicated above, Tim Boese and David Pope are exactly the types of experts that may testify on mixed questions of law and fact. Both Mr. Boese and Mr. Pope were instrumental in developing the laws and regulations at issue. Thus, they both have special insight into the legislative history. Both Mr. Boese and Mr. Pope were involved in drafting or reviewing prior Memorandums of Understanding applicable to this matter. Both Mr. Boese and Mr. Pope either apply or did apply groundwater law to relevant facts daily in their jobs. Finally, both Mr. Boese and Mr. Pope do or have headed up an agency that specializes in applying groundwater law. In

fact, it would be very difficult to find anyone more knowledgeable about the applicable statutes and regulations than Mr. Pope and Mr. Boese. Thus, they are quite qualified to testify on this subject. They are exactly the type of experts that the above-cited law contemplates in offering opinions on these issues.

III. ***The District's expert reports should be admitted into evidence because they meet the non-technical requirements of evidence: that the evidence be reliable, and helpful to the finder of fact.***

a. *Reliability and usefulness.*

Generally, evidence is probative or relevant if it has any tendency to make a fact more or less likely than it would be without the evidence or "prove a material fact." *See* K.S.A. § 60-401. The technical rules of evidence exist to ensure that evidence—specifically when relating to a statement or document—admitted to a court is reliable, and not overly prejudicial. *See, e.g.*, K.S.A. § 60-445. But even in a relaxed, non-technical hearing, Kansas courts have held that some minimum standard of reliability must apply. *Woessner v. Labor Max Staffing*, No. 119,087, 2019 Kan. App. LEXIS 11, at *23–24 (Kan. Ct. App. Feb. 15, 2019).

The correct minimum standard to use here, for expert witnesses, is the broad rationale found in *Daubert v. Merrel Dow Pharmaceuticals*.[2] That standard is that the expert's testimony be: a) reliable and from a reliable foundation; and b) "relevant to the task at hand"; or, in other words: helpful. *Daubert v. Merrel Dow Pharmaceuticals*, 509 U.S. 579, 597 (1997).

The District's expert reports are reliable, and from a reliable foundation. Both experts list their academic qualifications, of which both have bachelor's degrees, and one holds a Masters of Agricultural Engineering. Both experts list their prior pertinent job histories, of which both have extensive backgrounds in groundwater management and laws—one of which was a former Chief

[2]For a more detailed discussion of *Daubert*, see the District's Motion in Limine to Exclude Expert Testimony of the City, filed in this case on March 11, 2019.

Engineer and the other a current agency head of a groundwater management district. And both experts discuss how they use their qualifications and experience to analyze and approach the issues brought before this hearing. Because of this, these experts have displayed their reliability by both setting forth their academic and professional foundations, and how they used those foundations reliably to come to their conclusions.

The District's expert reports are also helpful. Both experts analyze a wide range of data and reports, which they then compile and list. They then take that compiled data and analyze it against their professional backgrounds to come to their conclusions, reporting on every step in their analysis. And that analysis is informed by their wealth of experience: one expert being a former Chief Engineer, and the other having managed the groundwater management district for the Equus Beds Aquifer. Whether or not the Chief Engineer agrees with these reports, they're helpful because these experts explain their rationale for their conclusions, and allow for the Chief Engineer, as a finder of fact, to compare his own analysis against those with similar expertise.

b. *Questions of fact and law.*

As indicated above, because these expert reports are so reliable, and so helpful, it is almost certain they would be admissible in a setting where the technical rules of evidence apply. The City asserts that the expert reports are improper and don't meet the technical rules because they "tell the Hearing Officer what the law is." But that isn't so.

A question of law is an issue which involves the interpretation of a law by a judge. *Black's Law Dictionary* 1122 (5th ed. 1979). But the District's expert reports do not attempt to interpret the law. Instead, the expert reports simply list facts side-by-side with the law, and apply their expertise to the facts to come to their conclusions. In other words, the experts are using facts to come to conclusions about hydrologic engineering *as understood through the lens*

of Kansas law, not coming to conclusions about Kansas law itself. Thus, the expert reports should be allowed.

IV. ***The City's expert reports do not meet the relaxed, non-technical standard for admission of evidence in administrative hearings because the reports are neither reliable, nor helpful.***

Even under a relaxed, non-technical standard, the City's expert reports fail. While the City's experts all provide their training and qualifications, the reports don't reflect how they used these qualifications in coming to their conclusions. The reports show no analysis, nor any rationale for any conclusions they come to—so it is impossible to say whether or not they used any reliable methods when coming to their conclusions.

And because these experts didn't use reliable methods, their reports aren't helpful. Not one of the nine experts put forth by the City provides anything of substance beyond bullet-pointed lists of documents reviewed, and the expert's final conclusions. None of those documents reviewed are analyzed, and none of the rationales for their conclusions explained. In other words, none of the City's experts "show their work."

Without showing their work, it is impossible to know how the City's experts came to their expert conclusions. And without that knowledge, the Chief Engineer has no way of comparing his understanding of the issue with these expert conclusions. Thus, the reports aren't helpful, and should be excluded.

CONCLUSION

This hearing should utilize a relaxed standard of evidence with respect to the two experts in question. This hearing is bound by KAPA, which allows for a non-technical application of the rules of evidence. Under those relaxed rules, expert opinions should be allowed if they are shown to be reliable and helpful.

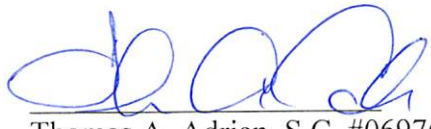
As indicated above, Mr. Boese and Mr. Pope have special qualifications that allow both of them to testify on mixed questions of law and fact. They have spent years heading up agencies charged with applying groundwater statutes and regulations to daily decisions and they were instrumental in developing the applicable regulations. Thus, they are exactly the types of experts that Kansas law allows to testify on questions of law.

Further, the District's experts are reliable because they have the proper training and experience, and show how they use those qualifications by detailing their analysis of the facts surrounding the case. The District's experts are helpful because they explain their rationale for their conclusions, and in doing so, provide insight to the Chief Engineer about how those conclusions were formed.

Conversely, the City's experts fail this relaxed standard. Not one of its nine experts provide any analysis into any fact or reviewed document, and not one gives their rationale as to why or how they came to their conclusions. Because of this, each of these nine reports should be excluded.

WHEREFORE, the District respectfully asks the Chief Engineer to deny the City's Motion in Limine and allow the District's expert reports to be admitted, for it to grant the District's Motion in Limine to exclude the City's expert reports, and for other such relief as the Chief Engineer seems just and equitable.

Respectfully Submitted,



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CERTIFICATE OF FILING AND SERVICE

I, Thomas A. Adrian, do hereby certify that a true and correct copy of the above Response to Motion in Limine was served by (___) mail, postage prepaid and properly addressed by depositing the same in the U.S. mail; (___) fax; (__x_) email; and/or (___) hand delivery on the 18 day of March, 2019, to:

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300 P.3d 116 (Table)
Unpublished Disposition
(Pursuant to **Kansas** Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published **Kansas** appellate court opinion.)
Court of Appeals of **Kansas**.

STATE of **Kansas**, ex rel., Derek SCHMIDT, **Kansas** Attorney General, Appellant,
v.
MEMORIAL PARK CEMETERY, INC., and Donald E. Ballard, Appellees.

No.
108,063
.
|
May 10, **2013**.
|
Review Denied Dec. 27, **2013**.

Appeal from Wyandotte District Court; David W. Boal, Judge.

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Derenda J. Mitchell, assistant attorney general, for appellant.

Aaron J. Racine, of Monaco, Sanders, Gotfredson, Racine, & Barber, L.C., of **Kansas** City, Missouri, for appellees.

Before MALONE, C.J., McANANY and STANDRIDGE, JJ.

MEMORANDUM OPINION

PER CURIAM.

*1 The **Kansas** Secretary of State conducted an audit of Memorial Park Cemetery, Inc.'s (Memorial Park) permanent maintenance and merchandise trust funds and found what it believed to be improper withdrawals from the principal for the payment of taxes as well as alleged deficiencies in deposits. At the request of the Secretary of State's office, the **Kansas** Attorney General initiated an action against Memorial Park and Donald E. Ballard (jointly referred to as Appellees) for a permanent injunction and to have a receiver appointed. The district court granted the State's request for a permanent injunction but denied the State's application for the appointment of a receiver. The State appeals the district court's decision not to appoint a receiver and the decision to permit expert legal testimony introduced by Appellees.

FACTS

In February 2010, the cemetery audit manager for the **Kansas** Secretary of State conducted an audit of Memorial Park's permanent maintenance and merchandise trust funds for the years 1996 through 2009. Although Ballard, the sole shareholder and operating officer of Memorial Park, provided digital records and reports to the auditor, he failed to produce requested copies of the original customer contracts.

Upon review of Ballard's records and bank statements from the trustee, Valley View Bank, the auditor found that Memorial Park (1) failed to comply with statutory requirements for the deposit of funds into the cemetery's permanent maintenance and cemetery merchandise trust funds; (2) failed to provide copies of contracts and other trust information to the Secretary of State upon request; (3) unlawfully withdrew monies from the principal of the permanent maintenance trust fund to pay expenses of the trustee and taxes; (4) failed to provide prepaid merchandise contracts to the trustee as required by statute; and (5) failed to determine wholesale costs of merchandise annually as required by statute.

The parties generally agree that most of the findings set forth above were attributable to Ballard's "netting" method of making contributions to the cemetery trust funds. Instead of making deposits to the trust funds as each individual transaction occurred as required by statute, Ballard only occasionally made deposits to the funds but did so based on calculations for total sales since the last deposit.

The auditor sent two letters to Ballard on May 6, 2010,

and a third on December 13, 2010, demanding that deposits be made into the trust funds within 90 days. On July 20, 2011, at the request of the Secretary of State, the Attorney General filed an action to freeze the assets of Memorial Park, to appoint a receiver, and to enjoin Memorial Park and Ballard from violations of the cemetery trusting requirements and from interfering with a receiver's duties. The district court issued a temporary restraining order against Appellees on July 20, 2011, which froze the assets of the corporation and trust funds and enjoined Appellees from violating cemetery trust statutes and from taking any action that would impair or impede the receiver.

*2 The district court held a trial on the issues presented, after which it found that Memorial Park and Ballard violated the law requiring the cemetery corporation to provide sales contracts to the auditor and to make deposits to the trust funds using the netting method. The court also found, however, that the cemetery merchandise trust was adequately funded as of the most recent audit, the permanent maintenance fund had a surplus, and the payment of taxes out of the permanent maintenance fund was appropriate. The court ultimately granted the State's request for a permanent injunction but denied the State's application for the appointment of a receiver.

ANALYSIS

On appeal, the State claims the district court erred in denying its request to appoint a receiver and in allowing Appellees' expert to testify at trial. We address each claim of error in turn.

I. *The Court's Decision to Deny the State's Request to Appoint a Receiver*

The State contends the district court erred in denying its application for the appointment of a receiver. The State presents its argument on this issue in the alternative. First, the State argues both K.S.A. 16–331 and K.S.A. 17–1312d require a court to appoint a receiver to take over a cemetery corporation upon a finding by the court that the corporation violated the deposit requirements imposed by statute. Alternatively, the State argues the district court abused its discretion in failing to appoint a receiver under the specific circumstances of this case. We address each of these arguments in turn.

A. *Appointing a Receiver: Mandatory or Discretionary?*

Interpretation of a statute is a question of law over which appellate courts have unlimited review. *Unruh v. Purina Mills,* 289 **Kan.** 1185, 1193, 221 P.3d 1130 (2009). The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Bergstrom v. Spears Manufacturing Co.,* 289 **Kan.** 605, 607, 214 P.3d 676 (2009). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *Padron v. Lopez,* 289 **Kan.** 1089, 1097, 220 P.3d 345 (2009).

When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the legislature's intent. *Double M Constr. v. **Kansas** Corporation Comm'n,* 288 **Kan.** 268, 271–72, 202 P.3d 7 (2009).

A "cemetery corporation" is "any individual or entity required to maintain permanent maintenance funds under the provisions of K.S.A. 17–1312f," which applies to "every individual, firm, partnership or other organization hereafter selling or conveying land for cemetery purposes." K.S.A. 16–320(d); K.S.A. 17–1301c(a); K.S.A. 17–1312f.

*3 The **Kansas** cemetery statutes require a cemetery corporation to deposit a specified percentage of any money it receives from consumers of certain services and products in a trust account. K.S.A. 16–301. There are two kinds of accounts required by statute: a cemetery merchandise trust fund and a permanent maintenance fund, which is similar to a trust fund. K.S.A. 16–321; K.S.A. 17–1311; State *ex rel. Stephan v. Lane,* 228 **Kan.** 379, 386, 614 P.2d 987 (1980). The purpose of a cemetery merchandise trust fund is to preserve the corpus thereof "with the goal that the growth of the corpus will be at least equal to the wholesale costs of the preneed cemetery merchandise or preneed burial products or services, at the time of delivery or need." See K.S.A.2012 Supp. 16–321(a). The purpose of a permanent maintenance fund is to maintain burial grounds in a seemly manner and

prevent the public from having to pay for the maintenance of such privately developed public cemeteries. See *Lane*, 228 **Kan.** at 385.

The cemetery trust fund statutes in place at the time of the audit in this case required the cemetery corporation to deposit 110% of the wholesale cost of prepaid merchandise sold into the cemetery merchandise trust fund within 10 days after the money was received. See K.S.A. 16–320; K.S.A. 16–321. For each burial lot sold, whether prepaid or as needed, the cemetery corporation had to deposit not less than $25 or 15% of the purchase price, whichever was greater, in the permanent maintenance fund within 45 days after the money was received. K.S.A. 17–1311. No part of the moneys held in a cemetery merchandise trust fund "shall ever be used for any purpose other than investment until delivery of the merchandise is made." K.S.A. 16–322(b). Similarly, "[n]o part of the principal of the [permanent maintenance] fund shall ever be used for any purpose except for such investment," and, at the time of the events at issue, the income of the permanent maintenance fund was required to be used "exclusively for the maintenance of the cemetery." K.S . A. 17–1311.

Furthermore, in regard to the cemetery merchandise trust fund, K.S.A. 16–331 provides:

> "Any cemetery corporation which refuses or neglects to establish or maintain a cemetery merchandise trust fund, in accordance with the requirements of this act for a period of 90 days after written demand to do so is made upon it by the secretary of state, *shall be deemed to have forfeited its corporate franchise.* The attorney general, upon the request of the secretary of state, *shall then begin an action for the appointment of a receiver for such cemetery corporation and to dissolve the same* ." (Emphasis added.)

Cf. K.S.A.2012 Supp. 16–331.

Regarding the permanent maintenance trust fund, K.S.A. 17–1312d provides:

> "Any cemetery corporation which shall refuse or neglect to establish or maintain a permanent maintenance fund in accordance with the requirements of this act for each cemetery owned by it for a period of 90 days after demand to do so is made upon it by the secretary of state *shall be deemed to have forfeited its franchise* . The attorney general, upon the request of the secretary of state, *shall then begin action for the appointment of a receiver for such cemetery corporation and to dissolve the same.*" (Emphasis added.)

*4 *Cf.* K.S.A.2012 Supp. 17–1312d.

A receiver is defined elsewhere in the corporations chapter of the **Kansas** statutes as someone "with all the powers and title of a trustee or receiver appointed under K.S.A. 17–6808, and amendments thereto, to administer and wind up the [corporation]'s affairs and may grant such other relief as the court deems equitable." K.S.A. 17–76, 117. A receiver's duties are to take charge of the corporation's property, to collect the debts and property due to the corporation, with power to prosecute and defend lawsuits, and to do all other acts necessary for the final settlement of the unfinished business of the corporation. K.S.A. 17–6808; see K.S.A. 17–6901.

With these legal principles in mind, we turn now to the State's claim that the court was legally required under the facts of this case to grant its request for appointment of a receiver. As the State correctly asserts, the district court specifically found Memorial Park failed to comply with K.S.A. 16–321 and K.S.A. 17–1311 when it made payments to the trusts using the netting method instead of as each transaction occurred. Relying on the italicized language in K.S.A. 16–331 and K.S.A. 17–1312d as set forth above, the State argues the court's ruling in this regard necessarily triggered an automatic forfeiture of Memorial Park's cemetery corporation, which in turn automatically imposed upon the district court a statutory duty to appoint a receiver to handle the corporation's affairs. Because the State's argument that the court had a duty to appoint a receiver is conditioned on a finding that forfeiture was automatically triggered, we begin our discussion with the State's argument regarding automatic forfeiture.

Notably, the court did not make any findings related to

forfeiture of the Memorial Park cemetery corporation. But the State argues the court was not required to make such a finding to effect the forfeiture, because the court's underlying factual findings necessarily triggered automatic forfeiture of the Memorial Park cemetery corporation. In making this argument, the State relies on *Hawley v. **Kansas** Dept. of Agriculture,* 281 **Kan.** 603, 132 P.3d 870 (2006), in which the **Kansas** Supreme Court held that a water rights abandonment law was a forfeiture law, mandating that water rights terminated when the holder of the water right failed to meet statutory conditions. 281 **Kan.** at 621, 628. Noting that the court must give effect to the intention of the legislature as expressed and that ordinary words are to be given their ordinary meaning when a statute is unambiguous, the court held that the legislature's chosen language, " 'shall be deemed abandoned and shall terminate,' ' clearly meant that by operation of law those water rights shall terminate. 281 **Kan.** at 621. The court found that " 'shall" is defined in Black's Law Dictionary 1407 (8th ed.2004) as " '[h]as a duty to; more broadly, is required to.' " 281 **Kan.** at 618. Although the court noted that "shall" has sometimes been defined to mean directory as opposed to mandatory, it is only directory when related to matters of mere form, and it is mandatory when related to matters of substance. 281 **Kan.** at 618–19. The court further found that " 'deem' " is defined as " 'establish[ing] a legal fiction ... by "deeming" something to be what it is not,' " or " 'treat[ing] something as if it were really something else.' " 281 **Kan.** at 618 (quoting Black's Law Dictionary 444 [8th ed.2004]).

***5** The State correctly relies on the analysis in *Hawley* to support its argument that the language "shall be deemed to have forfeited" in K.S.A. 16–331 and K.S.A. 17–1312d means that a cemetery forfeits its cemetery corporation when it fails to maintain a cemetery trust fund in accordance with the requirements of the act. In these statutes, "shall" is mandatory, not directory. As the *Hawley* court noted, "whether a statute is directory or mandatory depends upon whether the thing directed to be done is of the essence of the thing required, or is a mere matter of form." 281 **Kan.** at 619 (citing *Wilcox v. Billings,* 200 **Kan.** 654, 657, 438 P.2d 108 [1968]). The *Wilcox* court outlined this analysis:

> "Accordingly, when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance ... [a statute] is regarded as directory.... On the other hand, a provision relating to the essence of the thing to be done, that is, to matters of substance, is mandatory, and ... when some antecedent and prerequisite conditions must exist prior to the exercise of power or must be performed before certain other powers can be exercised, the statute must be regarded as mandatory. [Citation omitted.]" 200 **Kan.** at 657–58.

In this case, it cannot be said that the forfeiture provisions in K.S.A. 16–331 and K.S.A. 17–1312d relate "to some immaterial matter, as to which compliance with the statute is a matter of convenience"; instead forfeiture is the "essence" of the consequence for the statutory violation. See *Wilcox,* 200 **Kan.** at 657–58. In addition, the placement of the forfeiture sentence before the sentence authorizing the Attorney General to bring an action for the appointment of a receiver indicates that the legislature intended that the cemetery corporation must be forfeited as a "prerequisite condition" that must exist "prior to the exercise of power" by the Attorney General. See 200 **Kan.** at 658–59. Based on the plain and unambiguous language of the statutes at issue here, the legislative intent was clearly to require mandatory forfeiture of a cemetery corporation when the corporation fails to maintain the trust funds in accordance with the cemetery statutes.

Having determined that Memorial Park's cemetery corporation was automatically forfeited as a matter of law upon its violations of the **Kansas** cemetery statutes, we now turn to the State's argument that the district court had a statutory duty to appoint a receiver to handle the corporation's affairs upon such forfeiture. Specifically, the State argues that the forfeiture itself mandates the appointment of a receiver to fill the void of leadership created by the forfeiture, because otherwise there would be no one to run the cemetery lawfully and thereby protect consumers of burial services. This argument, however, finds no support in the cemetery statutes. The fact that K.S.A. 16–331 and K.S.A. 17–1312d require the Attorney General to bring an action for the appointment of a receiver upon the request of the Secretary of State does not mean that the court must agree with the State's position and grant the appointment a receiver. The "shall" language of the final sentences of the two statutes is mandatory but only in reference to the Attorney General's duty to bring an action for the appointment of a receiver. K.S.A. 16–331; K.S.A. 17–1312d. There is no mandatory language in either statute requiring the court to appoint a receiver. We therefore conclude the district court had the discretion, but was not required by statute, to appoint a receiver upon forfeiture.

B. *Abuse of Discretion?*

***6** Because the district court has discretion to appoint a

receiver when a cemetery corporation is deemed to have been forfeited, we now turn to the State's argument that the district court in this case abused its discretion in deciding not to do so.

A district court's decision to appoint a receiver is reviewed for an abuse of discretion. *City of Mulvane v. Henderson,* 46 Kan.App.2d 113, 118, 257 P.3d 1272 (2011) (citing *Johnson v. Gaskin,* 183 **Kan.** 728, 732, 332 P.2d 263 [1958]). A judicial action constitutes an abuse of discretion if the action is arbitrary, fanciful, or unreasonable, based on an error of law, or based on an error of fact. *Critchfield Physical Therapy v. The Taranto Group, Inc.,* 293 **Kan.** 285, 292, 263 P.3d 767 (2011). An abuse of discretion occurs if discretion is guided by an erroneous legal conclusion or goes outside the framework of or fails to consider proper statutory limitations or legal standards. *O'Brien v. Leegin Creative Leather Products, Inc.,* 294 **Kan.** 318, 331, 277 P.3d 1062 (2012). The party asserting the trial court abused its discretion bears the burden of showing such abuse of discretion. *Harsch v. Miller,* 288 **Kan.** 280, 293, 200 P.3d 467 (2009).

An appellate court reviews the trial court's findings of fact to determine if the findings are supported by substantial competent evidence and are sufficient to support the trial court's conclusions of law. Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. *Hodges v. Johnson,* 288 **Kan.** 56, 65, 199 P .3d 1251 (2009). An appellate court has unlimited review of conclusions of law. *American Special Risk Management Corp. v. Cahow,* 286 **Kan.** 1134, 1141, 192 P.3d 614 (2008). An appellate court does not weigh conflicting evidence, evaluate witnesses' credibility, or redetermine questions of fact. *In re Adoption of Baby Girl P.,* 291 **Kan.** 424, 430–31, 242 P.3d 1168 (2010).

In support of its claim that the court's decision to deny the request for appointment of a receiver was an abuse of discretion, the State argues (1) the district court's conclusion that the permanent maintenance fund had a surplus was based on errors of law and fact and (2) the district court's conclusion that that the limited amount of money in controversy did not justify the high cost associated with appointment of a receiver was arbitrary, fanciful, and unreasonable.

1. *The District Court's Conclusion that the Permanent Maintenance Fund Had a Surplus*

In support of its claim that the district court abused its discretion in concluding that the permanent maintenance fund had a surplus, the State argues (a) the court's calculation has no basis in fact because the supporting documentation necessary to make this calculation was never provided to the court; (b) the court improperly included in its calculation money that was deposited into the trust funds in a manner that violated K.S.A. 16–321 and K.S.A. 17–1311; and (c) the court improperly considered withdrawals for tax payments and trustee fees from the trust principal to be legally appropriate in assessing whether the trust fund had a deficit or surplus.

a. *Supporting Documentation*

*7 The State alleges the record from the trial in this matter lacks the requisite evidentiary foundation to support the court's conclusion that the permanent maintenance fund had a surplus. Specifically, the State claims the court should not have relied solely on information within Memorial Park's files to determine whether the permanent maintenance fund had a deficit or a surplus but instead should have reviewed the underlying consumer contracts in order to verify the accuracy of that information.

As the district court itself acknowledged, the "absence of [the underlying] contracts makes the auditing process much more difficult and the results of the audit less reliable." But this acknowledgement falls far short of a finding that Memorial Park's files were inaccurate or insufficient evidence to rely upon in making a decision regarding whether it was necessary to appoint a receiver. Significantly, both the State's auditor and Appellee's expert relied solely on the information in Memorial Park's files to conduct their respective audits, and each came to a different conclusion as a result of their calculations. The district court determined that the calculations used by the Secretary of State were flawed. In particular, the court held the State should have included in its calculations certain "old" contributions of $8,000 and $9,000 made by Ballard from the late 1990's and should not have included a deficit of $17,500 due to withdrawals from the permanent maintenance fund for payment of taxes and trustee expenses. The court's factual findings in this regard are supported in the record by the opinion of Appellees' legal expert, who testified the trust fund had a $31,000 surplus, as well by the information in Memorial Park's files.

b. *Money Deposited in Violation of Cemetery Trust Statutes*

The State argues the court should not have considered in its calculations any money deposited in a manner that violated K.S.A. 16–321 and K.S.A. 17–1311. In support of this argument, the State notes that K.S.A. 17–1311 requires "[d]eposits to the permanent maintenance fund shall be made within 45 days of receipt of moneys" and that "[n]o part of the principal of the fund shall ever be used for any purpose except for such investment." Principal, or "corpus," has been defined in Attorney General Opinion 94–123 as "the required deposit equal to 15% of the purchase price of each burial lot, such deposit to be not less than $25, as well as donations and bequests to the to the permanent maintenance fund" but excludes "accumulated income derived from the investment of the corpus." Att'y Gen. Op. No. 94–123, p. 3. The State asserts that by failing to timely make the deposits to the funds in violation of K.SA. 17–1311, Appellees made use of what should have been payments to the principal in violation of the statute.

Although neither party disputes the district court's finding that Memorial Park and Ballard violated the cemetery statutes, the State's summary citation to these statutes fails to explain why Appellees' violations of the cemetery trust statutes somehow nullify the money in the permanent maintenance fund. There is no **Kansas** law, be it statute, caselaw, or even Attorney General Opinions, to support the State's position here. Attorney General Opinion 94–123 did provide a cemetery the authority to use excess funds in a cemetery trust account, but it failed to answer the question of whether those excess funds may be used to offset future statutorily required deposits for customer merchandise or burial plots. Regardless, the situation at issue in the Attorney General Opinion appears to be distinguishable from this case, because there the disputed money in the fund came from a separate marker maintenance fund that was not required under the cemetery statutes. Here, however, the record indicates that the funds Ballard deposited into the permanent maintenance fund were required by the cemetery statutes because they were lump sum payments of the money received from consumer transactions. In other words, the money in the fund consisted of the deposits for consumer transactions required to be made under K.S.A. 17–1311, albeit untimely deposits in violation of that statute. The court did not err in considering these deposits in its calculations.

c. *Cemetery Trust Taxes and Trustee Fees*

***8** The State contends the district court erroneously failed to consider the deficit created by an unlawful payment of trustee fees and taxes out of the fund's principal. In support of this contention, the State relies on language in K.S.A. 17–1311, which states that no money may be withdrawn from the principal of a cemetery permanent maintenance fund except to purchase investments.

There is no dispute here that Memorial Park's trustee pays the costs of administration and taxes for both cemetery trust funds out of the trust investments. The trust officer herself testified that she paid taxes out of the principal of the permanent maintenance trust fund. The State's auditor considered these tax and trustee expense payments from the permanent maintenance trust fund to be made in violation of K.S.A. 17–1311 and, in turn, considered the absence of that money as a deficit to the statutory funding requirements. But the Appellees' legal expert testified at trial that these payments were correctly treated as appropriate expenditures to be made out of the permanent maintenance fund. After hearing all of the evidence and reviewing the applicable law, the district court ultimately concluded that "[w]here neither statute nor the trust document makes provision for the expenses of the trustee or payment of taxes, the Uniform Principal and Income Act applies and under said act the payment of taxes by Valley View Bank was appropriate." The court went on to note that the 2011 amendments, see K.S.A.2012 Supp. 17–1312(b)(2), (c)(2)(F), confirmed its finding. For the reasons stated below, the district court did not err in reaching this conclusion.

As it existed when the tax and trustee expense payments were made here, K.S.A. 17–1311 did not provide a mechanism for paying the expenses of the trustee or the payment of taxes. At trial, Appellees claimed the absence of such a mechanism within the cemetery corporation statutory scheme necessarily triggered application of the Uniform Trust Code, K.S.A. 58a–101 *et seq.*, which defers to the language of the trust document establishing the permanent maintenance fund. See K.S.A.2012 Supp. 58a–105(b) ("The terms of a trust prevail over any provision of this code except [as provided.]"). Because the trust document in this case is silent on how taxes and trustee fees should be paid, Appellees urge us to apply the more general rules of the Uniform Trust Code and the Uniform Principal and Income Act, K.S.A. 58–9–101 *et seq.*, which direct a trustee to pay taxes and compensation of the trustee out of income or principal depending on whether receipts are allocated to income or principal. K.S.A. 58a–816(15) authorizes a trustee to "pay taxes, assessments, compensation of the trustee and of employees and agents of the trust and other expenses incurred in the administration of the trust." Under

K.S.A.2012 Supp. 58–9–505:

> "(a) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.
>
> *9 "(b) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal...."

See K.S.A.2012 Supp. 58–9–505(c).

When "allocating receipts and disbursements to or between principal and income," the trustee must administer a trust in accordance with the Act if the terms of the trust do not contain a different provision. K.S.A. 58–9–103(a)(3). The Act authorizes the trustee to "adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages the trust assets as a prudent investor." K.S.A. 58–9–104(a). Under the Act, then, the trustee in this case was free to pay taxes out of the income of the fund if they arose from the income and to pay taxes arising out of the principal from the principal.

The district court correctly agreed with this interpretation of the statutory scheme. Unlike K.S.A. 16–322(a), which clearly authorized the trustee to pay the taxes and costs "from the earnings" of a cemetery merchandise trust fund "prior to the allocation of earnings to the individual accounts," the plain language of K.S.A. 17–1311 was ambiguous as to whether taxes and trustee fees could be considered part of "investment" and therefore a valid use of the principal of the permanent maintenance fund. Consequently, it was appropriate for the district court to look to the Uniform Trust Code and the Uniform Principal and Income Act to interpret K.S.A. 17–1311. Under those Acts, the trustee was well within its discretion in paying the taxes out of the principal if the money was allocated to the principal.

Notably, the recent amendments to the cemetery trust statutes confirm that the legislature intended to allow taxes to be paid out of either income or principal, depending on whether the taxes were income or capital gains taxes. The legislature made several amendments to the cemetery trust statutes in May 2011, which went into effect January 1, 2012. See L.2011, ch. 78, secs. 1–25. The amendments apparently were made in response to several instances where cemeteries did not comply with the law, especially an incident involving a Hutchinson cemetery that siphoned off hundreds of thousands of dollars from its trust funds, for which the Secretary of State's office was heavily criticized. News Release, Kris W. Kobach, **Kansas** Secretary of State, Kobach's Column (May 20, 2011) (http://www.kssos.org/about/about_news_archives.html); Stalter, ***Kansas*** *Cemetery Trustees: Beyond the Call of Duty,* Death Care Compliance Law (February 5, 2012) http://www.deathcarelaw.com/archives.

Several of these changes readily establish that the legislature intended to allow taxes to be paid out of income and principal. First, it deleted the following sentence from K.S.A. 17–1311: "The income of the permanent maintenance fund shall be used exclusively for the maintenance of the cemetery," which eliminates any argument that income can only be used for maintenance, not taxes. See K.S.A.2012 Supp. 17–1311.

*10 Second, it added a subsection to K.S.A. 17–1311, which reads: "The primary purpose of the permanent maintenance fund is to maintain the corpus of the fund. The income earned from the permanent maintenance fund may be dispersed to the cemetery. All capital gains shall be allocated to principal." K.S.A.2012 Supp. 17–1311(b).

Third, in K.S.A.2012 Supp. 17–1312(c)(2)(F), the legislature added a reporting requirement, in which a report must be provided to the Secretary of State containing "capital gains taxes paid from capital gains." When read in conjunction with K.S.A.2012 Supp. 17–1311(b), this line authorizes capital gains taxes to be paid from the principal of the permanent maintenance fund.

Fourth, the legislature added K.S.A.2012 Supp. 17–1312(b)(2), which states:

> "The trustee may recover from the earnings of the permanent maintenance fund for all reasonable costs incurred in serving as trustee, including a reasonable fee for its services. The taxes and costs may be paid from earnings of the fund prior to the distribution of the income. If all income is exhausted, any remaining capital gains tax liability may be paid out of the realized capital gains before the balance reverts to principal."

This provision clearly allows the trustee to pay for its own fees as well as taxes and costs out of the income of the permanent maintenance fund before it is distributed to the cemetery. It also authorizes capital gains taxes to be paid

out of the principal when necessary.

Courts generally presume that the legislature acts with full knowledge of existing law. *State v. Henning,* 289 **Kan.** 136, 144–45, 209 P.3d 711 (2009). Therefore, we may presume the legislature was aware of the ambiguity in K.S.A. 17–1311 regarding how to pay taxes resulting from the permanent maintenance fund when it drafted these amendments and therefore that the amendments were intended to clarify its intent as to the payment of taxes out of the cemetery trust funds.

In sum, we find no support in fact or law to conclude that the permanent maintenance fund at issue here was not properly funded. In the absence of factual or legal error, we similarly find no support for the State's claim that the district court abused its discretion in denying the State's request to appoint a receiver.

2. *Harm to the Public*

The State contends the district court abused its discretion by finding that the significant cost associated with appointing a receiver was not justified by the harm to the public caused by violation of the cemetery statutes here. Again, a judicial action constitutes an abuse of discretion if the action is arbitrary, fanciful, or unreasonable, based on an error of law, or based on an error of fact. *Critchfield Physical Therapy,* 293 **Kan.** at 292.

"Relief by way of receivership is equitable in its nature and is controlled by and administered upon equitable principles." *Geiman–Herthel Furniture Co. v. Geiman,* 162 **Kan.** 48, 60, 174 P.2d 117 (1946). Our Supreme Court has found that

> *11 "[O]nly in cases of greatest emergency are courts warranted in restricting a business or property by the appointment of a receiver. There must be some evidence that the appointment is necessary to prevent fraud or to save the subject of the litigation from material injury or to rescue it from threatened destruction. In addition, a receiver should only be appointed when there is no other adequate remedy available." *City of Mulvane,* 46 Kan.App.2d at 118 (citing *Browning v. Blair,* 169 **Kan.** 139, 145, 218 P.2d 233 [1950]).

Thus, the power to appoint a receiver "is not properly exercised in any case where there is no fraud or imminent danger of the property sought to be reached being lost, injured, diminished in value, destroyed, wasted or removed from the jurisdiction." *Browning,* 169 **Kan.** at 145. Furthermore, a receiver "should never be appointed where it may do irreparable injury to others or where greater injury is likely to result from such appointment than that if none were made." 169 **Kan.** at 145.

In this case, the district court correctly balanced the equities to hold that the relatively low disputed trust fund amount compared to the high cost of a receiver did not warrant the appointment of a receiver in this case: "[C]onsidering the costs of a receiver, the fact that neither trust had a deficit and the proposed trustee's two other cemetery trust cases involved trusts which were underfunded by $800,000.00 and $650,000.00, the appointment of a receiver here is not warranted." Specifically, the district court found that a receiver would charge $265 per hour as well as the expenses of discovery and hiring accountants. Even if the district court was correct in its finding that the fund had a surplus of as much as $31,000, paying the hourly rate of the receiver would quickly use up that overfunding in a matter of weeks (assuming the receiver worked 8 hours per day, 5 days per week, his weekly cost would be around $10,000) and begin to eat into the trust amounts needed to pay for merchandise and maintenance owed to consumers. This evidence supports the district court's conclusion that appointing a receiver would create a greater injury than if no appointment were made. See *Browning,* 169 **Kan.** at 145.

Based on the discussion above, we find the district court did not abuse its discretion in deciding not to appoint a receiver to take control of the cemetery corporation in this case.

II. *Expert Testimony*

In its second claim of error, the State claims the district court erred by overruling its motion in limine, which in turn permitted Appellees' legal expert witness to testify as to what the cemetery statutes require. The State argues the witness should not have been allowed to testify as to Appellees' duty regarding paying taxes out of the permanent maintenance fund because that testimony is an ultimate legal conclusion that can only be decided by the district court.

The admission of expert testimony generally lies within the trial court's sound discretion, and its decision will not be overturned absent abuse of discretion. In **Kansas,** opinion testimony is governed by K.S.A. 60–456, which states:

> *12 "(b) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness."

Notably, "[t]estimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact." K.S.A. 60–456(d).

Kansas courts have found it is not an abuse of discretion for a district court to allow a witness to provide expert legal testimony where it has been found helpful to the court in understanding the facts of the case and in determining the ultimate legal issue. See, *e.g., Plains Resources, Inc. v. Gable,* 235 **Kan.** 580, 582–83, 682 P.2d 653 (1984); *Fletcher v. Anderson,* 29 Kan.App.2d 784, 787–88, 31 P.3d 313 (2001). Our Supreme Court has also held that the existence of a duty is a matter of law for the court's determination, so the legal conclusions of an expert witness "do not settle the analysis." *KPERS v. Kutak Rock,* 273 **Kan.** 481, 493, 44 P.3d 407 (2002).

In this case, the district court allowed Appellees to present at trial an expert witness, attorney William Stalter, who specializes in death care compliance law. Stalter testified regarding the requirements of the **Kansas** cemetery laws as well as the results of his own audit of Memorial Park's trust funds. His testimony included his assessment of the proper interpretation of K.S.A. 17–1311 regarding the payment of taxes out of the principal of the permanent maintenance fund:

"Q. [Plaintiffs counsel:] And you are assuming also that it is appropriate to take taxes out of principal?

"A. Yes, I believe that's true. Well, let's clarify, that they can pay taxes on capital gains from principal if the capital gains have been allocated to principal.

"Q. Okay. You would, you don't dispute the fact that the K.S.A. 17–1311 says no part of the principal of the funds shall ever be used for any purpose except for such investment?

"A. That's what the statute says.

"Q. Okay. And how is payment of a tax an investment?

"A. Well, how do I reconcile that section with the uniform principal and income act, which instruct the trustee how to pay taxes when it is allocated a capital gain to principal. We are required to reconcile those two statutes.

"Q. So you contradict and nullify K.S.A. 17–1311 by your interpretation of allowing the trustee to pay taxes out of principal?

"A. I think that you create a conflict between the two statutes.

"Q. And you just pick the other statute, correct?

"A. No. Well, I guess, if that's the way you are going to phrase it. That's my training with regard to how to reconcile statutes."

Stalter clearly gave his opinion on how K.S.A. 17–1311 should be interpreted, which embraced the ultimate legal issue that the district court had to decide regarding whether the tax payments were appropriately made out of the permanent maintenance fund. As we noted above, however, K.S.A. 60–456 allows a witness to testify as to his or her opinion on the ultimate issue.

*13 Additionally, Stalter's opinion on whether taxes could be paid out of the principal of the trust fund was critical to explain how he arrived at his conclusions in his own audit of the trust accounts. Similarly, in *Gable,* our Supreme Court found that an expert witness on oil and gas in that case also "had, of necessity, to give consideration to what in his expert opinion was encompassed within the contractual obligation of the parties" in order to determine "what were or were not proper charges in this highly specialized field." 235 **Kan.** at 583. Here, Stalter could not explain to the district court how he arrived at his determination that the account had a surplus without discussing his decision to include the tax payments in his final number.

Moreover, Stalter did not tell the district court how it should rule, he simply gave his opinion on how he believed it was proper to read the statute. The district court heard contradictory testimony from the Secretary of State's auditor regarding paying taxes out of the principal. Both sets of testimony were helpful to the district court in sorting out a complicated statutory scheme and determining the duties of the parties under those statutes. The district court was free to find one interpretation more

persuasive than the other or ignore both altogether in making its own determination on how K.S . A. 17–1311 should be interpreted.

Along these same lines, we note that the trial in this case took place before a judge, not a jury. Thus, many of the concerns associated with a witness expressing a legal opinion are moot. See *Puckett v. Mt. Carmel Regional Med. Center,* 290 **Kan.** 406, 445, 228 P.3d 1048 (2010) (noting that "testimony expressing a legal conclusion should ordinarily be excluded because such testimony is not the way in which a legal standard should be communicated to the jury"); *Specht v. Jensen,* 853 F.2d 805, 807–08 (10th Cir.1988) (observing that court must consider whether expert encroached upon trial court's authority to instruct jury on applicable law because "it is axiomatic that the judge is the sole arbiter of the law and its applicability" and that testimony on ultimate questions of law is not favored because "testimony which articulates and applies the relevant law ... circumvents the jury's decision-making function by telling it how to decide the case"). "A trial judge is quite capable to discern the relevant evidence, weigh the probative value or its prejudicial effect, and readily reject an improper inference or intrusion role upon its role. [Citations omitted.]" *Rondout Valley Cent. School Dist. v. Coneco Corp.,* 321 F.Supp.2d 469, 480 (N.D.N.Y.2004).

Consequently, the district court did not abuse its discretion in allowing Stalter to testify regarding his own audit and his opinions on how to interpret the **Kansas** cemetery statutes. The district court's decision was not arbitrary, fanciful, or unreasonable because **Kansas** law allows such testimony embracing the ultimate legal issue. Furthermore, the testimony was relevant to the judge's determination of the amounts at issue and therefore its decision on whether a receiver was necessary.

***14** Although we have resolved the issues presented by the State on appeal, there remains unresolved an additional issue. Specifically, we must determine whether a cemetery corporation is legally permitted to actively engage in business when an automatic forfeiture has been imposed but a receiver has not been appointed. In this case, the district court enjoined Memorial Park and Ballard from violating K.S.A. 16–331 and K.S.A. 17–1312d, thus impliedly allowing them to continue to do business despite the fact that the cemetery corporation already had been forfeited by operation of law.

We begin by noting that forfeiture and dissolution are distinct concepts in the law. Black's Law Dictionary defines "dissolution" as the "termination of a corporation's legal existence by the expiration of its charter, by legislative act, by bankruptcy, or by other means," whereas "forfeiture" is defined as the "loss of aright, privilege, or property because of a crime, breach of obligation, or neglect of duty." Black's Law Dictionary 541, 722 (9th ed.2009). In addition, **Kansas** law has been held to draw a distinction between the dissolution of a corporation and forfeiture of a corporation's articles of incorporation, at least in the context of nonpayment of state franchise taxes. *Pottorf v. United States,* 773 F.Supp. 1491, 1493–94 (D.Kan.1991), *aff'd* 982 F.2d 529 (10th Cir.1992) (without opinion). In *Pottorf,* the United States District Court for the District of **Kansas** discussed K.S.A. 17–7002(a)(2), which provides that where a corporation's articles of incorporation have become inoperative by law for nonpayment of taxes, the corporation may procure its extension, restoration, renewal, or revival of its articles of incorporation at any time. The *Pottorf* court found that this statute authorizing reinstatement "clearly suggests that forfeiture does no more than forfeit the corporate right to do business and does not extinguish the corporation as a legal entity." 773 F.Supp. at 1494.

Therefore, Memorial Park's cemetery corporation was automatically forfeited, but not dissolved, as a matter of law upon its violations of the **Kansas** cemetery statutes. But what legal impact does such a forfeiture have on Memorial Park's ability to do business? As noted above, forfeiture is the loss of a right or privilege due to a breach of obligation or failure to comply with statutory conditions. Black's Law Dictionary 722 (9th ed.2009). Being that the statutes regarding the cemetery corporation and permanent maintenance trust fund are located in the corporation chapter of the **Kansas** statutes, this court may look to the rest of **Kansas** corporation law for further assistance in interpreting what forfeiture means for a cemetery corporation in this situation.

Several of the **Kansas** corporation statutes make clear that upon forfeiture, the corporation's document of incorporation expires and thus the corporation may no longer do business. See K.S.A. 17–5228 ("Upon such forfeiture the certificate of incorporation shall expire and all action taken in connection with the incorporation thereof, except the payment of the incorporation fee, shall become void."); K.S.A. 17–2719 ("In the event of any such forfeiture, ... its corporate existence and rights in this state have been forfeited and canceled.").

***15** Although not allowed to do engage in business, the corporation statutes allow the affairs of the corporation to be wound up, whether by the officers or a receiver, during the period after forfeiture before the corporation ceases to exist. See K.S.A. 17–2719 ("The directors and officers in office when any such forfeiture occurs shall be the

trustees of the corporation, shall have full authority to wind up its business and affairs, sell and liquidate its property and assets, pay its debts and obligations and to distribute the net assets among the shareholders."); K.S.A. 17–6812(b) ("The district court shall have power, by appointment of receivers or otherwise, to administer and wind up the affairs of any corporation whose articles of incorporation shall be revoked or forfeited by any court under any section of this act or otherwise.").

Moreover, and as the United States District Court for the District of **Kansas** in *Pottorf* noted, the **Kansas** Corporation Code was patterned after the Delaware Corporation Code, where it has long been the law that a corporation is not dead for all purposes following forfeiture of its charter. See *Pottorf,* 773 F.Supp. at 1494; *Frederic G. Krapf & Son, Inc. v. Gorson,* 243 A.2d 713, 715 (Del.1968). The *Pottorf* court concluded that under **Kansas** corporation law "forfeiture does no more than forfeit the corporate right to do business and does not extinguish the corporation as a legal entity." 773 F.Supp. at 1494. A panel of this court agreed with the *Pottorf* decision in *Doniphan County v. Miller,* 26 Kan.App.2d 669, 670–71, 993 P.2d 648 (1999), *rev. denied* 268 **Kan.** 885 (2000), where the court concluded that because a corporation did not dissolve but merely forfeited its articles upon failing to file an annual report and pay its franchise tax, the corporation retained legal title to property and thus could properly convey it.

In certain situations, several **Kansas** corporation statutes allow rescission of the forfeiture and reinstatement of a corporation's articles of incorporation and thus its ability to do business. See K.S.A. 17–76,139(d) ("Whenever the articles of organization of a domestic limited liability company ... are forfeited for failure to file an annual report or to pay the required annual report fee, the domestic limited liability company ... may be reinstated by filing a certificate of reinstatement, in the manner and form to be prescribed by the secretary of state and paying to the secretary of state all fees, including any penalties thereon, due to the state."); K.S.A. 17–6911 ("The liquidation of the assets and business of an insolvent corporation may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation no longer exists. In such event the district court in its discretion, and subject to such condition as it may deem appropriate, may dismiss the proceedings and direct the receiver to redeliver to the corporation all of its remaining property and assets."); K.S.A. 17–7002(a) ("Any corporation may procure an extension, renewal or reinstatement of its articles of incorporation ... in the following instances: ... (2) at any time, where the corporation's articles of incorporation ... has become inoperative by law for nonpayment of taxes or fees, or failure to file its annual report.").

***16** In the absence of any specific requirements within either K.S.A. 16–331 or K.S.A. 17–1312d, we necessarily conclude that the district court has great discretion on how to handle a forfeiture. To that end, **Kansas** corporation statutes provide possible options for a district court after a cemetery corporation has been deemed forfeited. Although not required to do so, the district court here could have appointed a receiver to wind up the cemetery corporation's business, dissolve it, and sell the corporation's assets to a new owner. It also could have ordered Ballard, as an officer of the corporation, to wind up the corporation's business himself. The district court also could have rescinded the forfeiture and reinstated the corporation, allowing Ballard and Memorial Park to continue to do business.

Although the district court's order was similar to this last option, the court never directly addressed whether Memorial Park's cemetery corporation remained forfeited. Because forfeiture occurred by operation of law, the corporation is still forfeited, despite the district court's injunction, which appeared to permit the corporation to continue to do business in accordance with the cemetery statutes.

CONCLUSION

We conclude the district court did not err in denying the State's request to appoint a receiver or in allowing Stalter to testify as an expert at trial. But because the cemetery corporation's legal ability to do business appears to be in legal limbo, we find it necessary to remand the case to the district court for the limited purpose of determining the legal status of the cemetery corporation going forward. Specifically, the court (1) may order Ballard, as an officer of the corporation, to wind up the corporation's business or (2) may order the forfeiture of the corporation to be rescinded and the corporation reinstated, which would permit Ballard and Memorial Park to continue to do business.

Affirmed in part, reversed in part, and remanded with directions.

All Citations

300 P.3d 116 (Table), 2013 WL 1943071

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