

**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.

**INTERVENOR'S RESPONSE TO MOTION IN LIMINE TO EXCLUDE EXPERT
TESTIMONY**

COME NOW, Richard Basore, Josh Carmichael, Judy Carmichael, Bill Carp, Carol Denno, Steve Jacob, Terry Jacob, Michael J. McGinn, Bradley Ott, Tracy Pribbenow and David Wendling ("Intervenors"), by and through counsel Tessa M. Wendling, with their 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 Intervenors state the following:

FACTS

1. On July 23, 2018, the Chief Engineer issued a Prehearing Conference Order stating:

"The hearing, in so far as is reasonable and at the discretion of the chief Engineer, shall be conducted pursuant to K.A.R. 5-14-3a. **The rules of evidence will not be strictly adhered to** in the formal phase of the hearing. However, all cross-examinations conducted should have some reasonable relationship to the testimony provided, and the privileges listed in K.S.A. 60-426 through 60-436, and any other privileges recognized by law shall be given effect, in so far as the Chief Engineer determines such application is reasonable. All rules and procedures shall be applied by the Chief Engineer to provide all parties

to this action a reasonable opportunity to be heard and present evidence.”
(*emphasis supplied*)

2. On February 18, 2019 Intervenors submitted the expert report of Carl Nuzman.
3. On March 11, 2019 the City filed a Prehearing Motion in Limine to Exclude ‘Expert Reports’ of Carl E. Nuzman, Tim Boese and David Pope.
4. On March 19, 2019 Constance M. Owen was appointed as presiding officer and the proceedings were temporarily postponed.
5. The Prehearing Order issued May 2, 2019 provides that parties have until May 3, 2019 to make filings responsive to any of eight pending motions, including the City’s Prehearing Motion in Limine to Exclude ‘Expert Reports’ of Carl E. Nuzman, Tim Boese and David Pope.

ARGUMENTS

1. The Hearing Officer has the discretion and flexibility to allow or exclude expert witnesses.

Multiple authorities allow discretion to the hearing officer in matters pertaining to admissibility of evidence. The Prehearing Conference Order, May 2 Prehearing Order, and KAPA all allow the hearing officer flexibility regarding the rules of evidence. K.S.A. 82a-1901 is cited in the case caption and states: “Orders of the chief engineer...shall be subject to...an administrative hearing by a hearing officer...in accordance with the provisions of the Kansas administrative procedures act.” KAPA states “A presiding officer need not be bound by technical rules of evidence, but shall give the parties reasonable opportunity to be heard and to present evidence.”

Under Kansas Statute expert testimony admissibility is generally at the discretion of the trial court. K.S.A. 60-456 states: “If scientific, technical or other specialized

knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.”

The Hearing Officer in the matter has discretion to allow Carl E. Nuzman's expert testimony in this matter if she finds his specialized knowledge in the areas of water resource engineering, groundwater modeling and surface and groundwater hydrology, as summarized on the enclosed resume, to be helpful in understanding the issues.

II. Kansas Statute allows testimony embracing the ultimate issues.

K.S.A. 60-456(d) addresses this issue directly by stating “testimony 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.” Kansas courts have reached a similar conclusion finding “testimony is not objectionable because it embraced the ultimate issue.” *Fletcher v. Anderson* 29 Kan. App. 2d 784, 788 (Kan. Ct. App. 2001). Similarly, Kansas statute “allows witnesses possessing specialized knowledge to give testimony that embraces an ultimate issue of fact if the testimony is based on sufficient facts or data and is the product of reliable principles and methods and if the witness reliably applied the principles and methods to the facts of the case.” *State v. Ingham* 430 P.3d 931, 937 (Kan. 2018). The Kansas Supreme Court went further to say “witnesses routinely testify as to factual matters that juries are to determine, and K.S.A. 2017 Supp. 60-456 expressly allows testimony embracing ultimate issues to be decided by juries. *Id.*”

Mr. Nuzman's expert report provides helpful and reliable information on the limitations of the MODFLOW tool based on his experience modeling ground water

aquifers. Limitations in the model to accurately account for variations in specific yield, changes in hydraulic conductivity, and simulating recharge inflow are limitations not easily identified by an untrained layman and benefit from the specialized knowledge of someone experienced in ground water modeling and MODFLOW.

III. The probative value of Mr. Nuzman's expert report outweighs any prejudicial effect due to the absence of a jury.

Broad discretion is allowed trial courts in admitting or excluding expert witness. "To be admissible, expert testimony must be helpful to the jury. *State v. Papen*, 274 Kan. 149, 157 (Kan. 2002). Expert testimony is not helpful where laypersons with normal experience and qualifications are able to draw proper conclusions given the facts and circumstances. *Id.* Mr. Nuzman's previous work experience at the Division of Water Resources and experience with ground water models is helpful in evaluating the application of MODFLOW for the modifications proposed by the City of Wichita.

The City relies on *Glassman v. Costello*, 267 Kan. 509, 986 P.2d 1050 (1999) to support its argument to exclude the expert testimony of Carl E. Nuzman and other experts. An important distinction can be made between an expert testifying before a jury in a medical malpractice case to the current administrative hearing. This distinction is reflected in the full quotation referenced by the City, in the *Glassman* opinion, which states:

"While witnesses may be permitted, in a proper case, to give an opinion on the ultimate fact involved in the case, there is a strong consensus among jurisdictions, amounting to a general rule, that witnesses may not give an opinion on a question of domestic law or on matters which involve questions of law. ***The fundamental problem with testimony containing a legal conclusion is that conveying the witness' unexpressed, and perhaps erroneous, legal***

standards to the jury amounts to a usurpation of the court's responsibility to determine the applicable law and to instruct the jury as to that law." *Glassman v. Costello*, 267 Kan. 509, 528 (citing, 31A Am. Jur.2d, Expert and Opinion Evidence, § 136, pp. 143-144)

It should not be overlooked that the present matter is before a Hearing Officer and not a jury. In allowing expert testimony where the expert "gave his opinion on how he believed it was proper to read the statute" and the district court heard contradictory testimony the Kansas Court of Appeals found "both sets of testimony helpful." The Court of Appeals further stated, "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." *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) see also *Rondout Valley Cent. School Dist. V. Coneca Corp.*, 321 F. Supp.2d 469, 480 (N.D.N.Y. 2004) (noting that 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.") Mr. Nuzman's testimony is intended to be helpful and falls far short of telling "the Hearing Officer what the law is" as alleged by the City. The Hearing Officer is quite capable of discerning whether Mr. Nuzman's expert report has probative value outweighing any alleged prejudicial effect.

IV. Alternatively, the Hearing Officer has discretion grant in part and deny in part the City's Motion in Limine to Exclude Expert Report of Carl E. Nuzman.

In applying the Federal Rules of Evidence the U.S. District Court upheld a Magistrate Judge's ruling to disregard opinions amounting to legal opinions but allowed

the expert to testify regarding his knowledge or experience, excluding legal opinions. The expert was not allowed to "provide an opinion that defines the legal parameters for the fact-finder, he may, however, testify about factual issues that will assist the Court in making a legal determination." *Ross v Rothstein* 92 F. Supp 3d 1041, 1074 (D. Kan. 2015) "Such testimony may assist the Court in reaching its own legal conclusion." *Id.* If the Hearing Officer finds Mr. Nuzman's expert report opines on impermissible matters she has the option to exclude only the impermissible portion and allow the remaining testimony.

CONCLUSION

A relaxed standard of evidence should apply to the admission of Carl E. Nuzman's expert report for this administrative hearing. Mr. Nuzman's expert report should be allowed if found to be reliable and helpful. Mr. Nuzman's extensive engineering background and experience with ground water modeling allow for his testimony to be helpful and reliable in the current matter.

WHEREFORE the Interveners respectfully asks the Hearing Officer to deny the City's Motion in Limine and allow the Intervenor's expert report by Carl E. Nuzman to be admitted, and for such other relief as the Hearing Officer deems just and reasonable.

Respectfully submitted,



Tessa M. Wendling, #27768
1010 Chestnut St.
Halstead, KS 67056
(773) 459-8147
twendling@mac.com

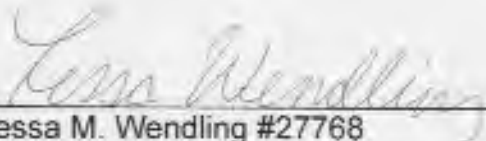
CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that she transmitted the above and foregoing Response to the City of Wichita's Prehearing Motion in Limine to Exclude "Expert Reports" of Carl E. Nuzman, Tim Boese and David Pope by electronic mail on this 3rd day of May, 2019, for filing, to Constance Owen at connieowen@everestkc.net and served the same upon counsel for the other parties herein by electronic mail, this 3rd day of May, 2019 addressed to:

Division of Water Resources
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, Kansas 66502
Aaron.olech@ks.gov
Lane.letourneau@ks.gov

City of Wichita
Department of Public Works & Utilities
455 North Main Street
Wichita, Kansas 67202
jpajor@wichita.gov
bmcleod@wichita.gov

Equus Beds Groundwater Management District No. 2
313 Spruce
Halstead, Kansas 67056
tboese@gmd2.org
tom@aplawpa.com
Leland.rolfs@sbcglobal.net
Stucky.dave@gmail.com



Tessa M. Wendling #27768
1010 Chestnut St.
Halsted, KS 67056
(773) 459-8147
twendling@mac.com

RESUME' AND PERSONAL INFORMATION

Name: Carl E. Nuzman, P.E., P.Hg.
3314 NW Huxman Road
Silver Lake, KS 66539

Phone: (785) 582 4054
Cell: (785) 224 9929
cenuzman@gmail.com

Position: Consulting Engineer / Hydrogeologist

Academic and Professional Certifications:

Bachelor of Science in Agricultural Engineering, Kansas State University, 1953.

Master of Science in Water Resources Engineering, Department of Civil Engineering, University of Kansas, 1966.

Professional Engineer, licensed in Kansas in 1962, KS-4481. Formerly licensed in others states.

Professional Hydrogeologist, Certified in 1986 by the American Institute of Hydrology, P., Hg-385.

Professional Positions:

- Consultant - 1997 to Present
- Layne GeoSciences, Inc. Mission Woods, KS, Vice-president and Principal Hydrologist – 1988 to 1997
- Groundwater Management, Inc. Kansas city, KS, Vice President and Chief Hydrologist, 1985 to 1988
- Layne Western Company, Inc. Hydrology Division Manager and Chief Hydrologist 1970 to 1985
- Layne Western Company, Inc. Kansas City, MO, Sales Engineer 1967 to 1970
- Kansas Water Resources Board, Topeka, KS, Hydrologist III 1966
- Kansas State Board of Agriculture, Division of Water Resources, Topeka, KS, Assistant Engineer 1957 to 1965

Specialized Competence:

- Surface and ground water hydrology
- Water well treatment and rehabilitation/ground water quality
- Well and well field design and construction
- Modeling of ground water aquifers
- Injection well design and operation
- Water pumps and associated equipment including suction flow control devices

Applicable Experience:

Mr. Nuzman has extensive experience in the areas of ground water modeling, water well and well field design and construction, water well treatment and rehabilitation, and soil and ground water remediation. He worked with the U.S. Geological Survey Analog Model laboratory in Phoenix, AZ, in doing the first model work of the Equus Beds aquifer north of Wichita in 1961. He was the first to model a small portion of the Ogallala aquifer in SW Kansas using the passive element, steady state, electric analog model technique which he perfected in 1966. He joined Layne Western in 1967 and has conducted numerous water well pumping tests, aquifer modeling projects and well field design and construction for multiple Cities and Companies through out the United States and in some foreign countries. He has consulted on deep disposal well construction. He was instrumental in developing the Suction Flow Control Device that distributes the pump energy in a well so that all sections of the well screen produce water uniformly through its length that is applicable to both vertical and horizontal wells. He has recently completed the plans and specifications for replacement wells for several cities and one industry.

Publications: He has numerous project reports, technical publications, one book and three patents.

Professional Societies: Past member of seven professional societies.

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.

Attorneys and Law Firms

Dorenda 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.

1. 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. Parino 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, 302 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. 17-1301(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 100% 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 mean[ed] 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 *Johnston 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 Toronto 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. *Marsch 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 Adaption 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 the limited amount of money in controversy did not justify the high cost associated with appointment of a receiver was arbitrary, fanciful, and unreasonable.

3. 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 Appellee's 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 permanent maintenance fund” but excludes “accumulated income derived from the investment of the corpus.” Atty 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.S.A. 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 consumer 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.

*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-(03(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. 16-312(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(h), 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. *Crutchfield 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. Kunk 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 instructs 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 *Pickett v. Mt. Carmel Regional Med. Center*, 290 Kan. 406, 445, 238 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.]” *Rosilont Valley Cent. School Dist. v. Comco 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 his 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 right, 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. *Pattorf v. United States*, 773 F.Supp. 1491, 1493-94 (D.Kan.1991), *aff’d* 982 F.2d 529 (10th Cir.1992) (without opinion). In *Pattorf*, 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 *Pattorf* 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 *Pattorf* 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 *Pattorf*, 773 F.Supp. at 1494; *Frederic G. Kruff & Son, Inc. v. Garson*, 243 A.2d 713, 715 (Del.1968). The *Pattorf* 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 *Pattorf* decision in *Daniphan Cooney 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 Staller 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

