devisee's partition action after the estate has been closed cannot be a will contest that attacks the testator's will. Instead, Lewis' no contest provision had the effect of foreclosing such actions and protecting his intent that the last heir standing would inherit the farmland.

CONCLUSION

We conclude that the district court correctly determined that Anna and Lonnie's partition action was not a will contest because it was filed after the estate was closed.

AFFIRMED.

FLORAL LAWNS MEMORIAL GARDENS ASSOCIATION, A NEBRASKA CORPORATION, APPELLEE, V. BRUCE C. BECKER, APPELLANT, AND LINDA BECKER, APPELLEE.

822 N.W.2d 692

Filed October 19, 2012. No. S-11-1077.

1. **Accounting: Equity.** An action for accounting may be one in law or one in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
3. **Receivers: Corporations.** Appointing a receiver for a corporation is a harsh and drastic remedy, and is not one to be implemented lightly.
4. **Receivers: Statutes: Notice.** Under Nebraska law, a court's ability to appoint a receiver is governed by statute. The court can appoint a receiver only in specific situations, and the court must provide notice to all interested parties.
5. **Receivers: Notice.** An order appointing a receiver must provide notice to all interested parties, or the order is void.
6. **Receivers: Final Orders.** An order appointing a receiver is a final, appealable order.
7. **Corporations: Statutes.** Corporations are creatures of statute, and they may be dissolved only according to statute.
8. **Receivers: Corporations.** The general nature of a receiver's task, unless appointed in an action for corporate dissolution, is to preserve and protect the property under his or her control.
9. ____: ____. Where there is no proper action for corporate dissolution, a court does not have the power to bypass that requirement and effectively dissolve the

corporation by having the receiver wind up the business and sell all of the corporation's assets.

10. **Equity.** Equity strives to do justice. Equity is not a rigid concept but, instead, is determined on a case-by-case basis according to concepts of justice and fairness.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS, Judge. Affirmed as modified.

Gregory C. Damman, of Blevens & Damman, for appellant.

Larry R. Baumann and Angela R. Shute, of Kelley, Scritsmier & Byrne, P.C., for appellee Floral Lawns Memorial Gardens Association.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

NATURE OF THE CASE

The district court placed Bruce C. Becker's corporation, Floral Lawns Memorial Gardens Association (Floral Lawns), a cemetery association, into receivership and approved the winding up of the business and its dissolution. The court then fashioned an equitable remedy for distribution of the resulting funds, which Bruce challenged on appeal. The issue is whether the court had the power to take these actions.

BACKGROUND

Several events in this case occurred under older versions of the relevant statutes. But because those versions are not substantively different for our purposes, for convenience we will refer to the most current reissue of the statutes.

PROCEDURAL HISTORY

Bruce was the sole shareholder of Floral Lawns, a cemetery association. At some point in the early 2000's, Bruce's wife, Linda Becker, filed for divorce. During the divorce proceedings, the district court declined to address issues related to Floral Lawns, placed it in receivership in 2003, and directed that those issues be resolved in a separate action. The record does not contain the district court's order appointing the

receiver or detail the court's reasons for doing so. But from the record, it appears that Floral Lawns' finances and accounting records were quite muddled, and the court probably appointed a receiver to sort them out.

In January 2005 (while the divorce was still pending), the receiver, on behalf of Floral Lawns, filed an accounting action against the Beckers. In essence, the complaint requested the court to order them to account for Floral Lawns' income and expenses, and for the funds used to purchase certain real estate. The complaint stated:

> Based upon the reports that [the receiver] filed with the Court, the books and records of [Floral Lawns] are confusing and create doubt as to whether the funds have been properly managed and that the [Beckers] have used funds belonging to [Floral Lawns] for their personal use without regard to proper accounting.

The complaint also asked the court to appoint trustees to operate Floral Lawns, and to approve fees for the receiver and a couple of individuals who assisted in various other capacities.

In May 2005, the court dissolved the Beckers' marriage. The order indicated that the distribution of the marital estate was based on, in significant part, the receiver's findings in the separate accounting action. The decree awarded Bruce "all accounts in his name or in the name of Floral Lawns," along with "any assets of Floral Lawns . . . that remain[ed] after the receiver ha[d] completed his report."

In April 2010, the receiver moved the court to approve its sale of Floral Lawns' assets to another cemetery association. The court approved the sale and entered an order to that effect. Following Bruce's objection to the order, the court clarified that Bruce would still receive the balance of the proceeds deposited by the receiver following the payment of costs associated with Floral Lawns' receivership.

The Receiver's Report

In January 2011, the receiver filed his final report with the court. Although Floral Lawns' initial complaint asked for an accounting, at some point a decision was made to dissolve

Floral Lawns once the receivership ended. In the report, the receiver explained that he had sold all of Floral Lawns' assets, paid its expenses, filed its income tax returns, and canceled its insurance policies. The report also stated that the receiver had "wound up all of the day to day business operations" of Floral Lawns. And the report requested the district court to terminate the receivership and dissolve Floral Lawns.

According to the report, there were only two issues that had to be resolved before terminating the receivership and dissolving the corporation. The first was the payment of the receiver's fees and the fees of other individuals who had been involved in various other capacities. The second issue related to the "improprieties of how Bruce . . . dealt with pre-need sales, and his failure to deposit funds into the trust account as required by law."

A "pre-need sale" refers to a purchase of cemetery products before a person's death.[1] Nebraska's Burial Pre-Need Sale Act regulates these transactions.[2] The act requires pre-need sellers like Bruce to deposit the proceeds into a trust account and maintain detailed records.[3] The record shows that Bruce did not keep proper records and failed to deposit pre-need sales proceeds into a trust account as required by the act.

The receiver stated that Bruce admitted that he wrongfully failed to deposit about $115,000 of pre-need sales into Floral Lawns' pre-need trust account. The receiver thought that estimate was fairly accurate. The receiver concluded that the missing money from the pre-need sales "create[d] a large and unresolved liability for Floral Lawns." It appears that "liability" was used in the accounting sense; in other words, the receiver meant that Floral Lawns had unresolved financial obligations. And because of the incomplete records and lack of funds, the receiver was unable to meet those obligations.

The receiver saw two ways of resolving this problem. One was to hire a forensic accountant to go through Floral Lawns'

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[1] See Neb. Rev. Stat. § 12-1102 (Reissue 2007).

[2] See Neb. Rev. Stat. §§ 12-1101 to 12-1121 (Reissue 2007).

[3] See §§ 12-1103 and 12-1105.

financial records, determine the exact amount of money that Bruce had misappropriated, and then sue and obtain a judgment against Bruce. The receiver argued against this approach because it would extend the receivership and delay Floral Lawns' dissolution and it would be unlikely to recover funds sufficient to pay for the cost of such an endeavor. Furthermore, the receiver believed it would be impossible to recover on any judgment against Bruce.

The other way, and the one which the receiver recommended, was to take any leftover funds from Floral Lawns and place them into the pre-need trust account. Quail Creek Cemetery Services & Association (Quail Creek), the cemetery association that purchased Floral Lawns' assets, could then use those funds to bury individuals upon their death whose pre-need money Bruce had failed to place into the pre-need trust account. The receiver advocated for this approach because it would close the receivership sooner and would not require a forensic accountant's services. And to make this approach "more acceptable to" Bruce, the receiver proposed a one-time payment of $4,000 to Bruce from the receivership.

The court adopted the findings and recommendations of the receiver's report, but made a few changes. The court ordered a one-time $4,000 payment to Bruce and then ordered that

> all remaining funds shall be deposited into a trust account . . . to be paid out over the course of time to those individuals who purchased preneed accounts and whose monies where [sic] not deposited into the trust account . . . for such purpose. After the passage of ten years from today's date, if those funds still remain, they shall be paid over to [Bruce].

Bruce appealed this order, but the Nebraska Court of Appeals found some issues left unresolved by the district court's order and dismissed for lack of jurisdiction on June 14, 2011, in case No. A-11-138. The district court then entered a final order in November 2011, which order Bruce appealed.

ASSIGNMENT OF ERROR

Bruce assigns, restated, that the district court erred in ordering Floral Lawns' remaining funds be placed into a trust

account for 10 years, rather than be given to him immediately under the divorce decree.

STANDARD OF REVIEW

[1,2] An action for accounting may be one in law or one in equity.[4] Because of the unique circumstances of this case, there is no adequate remedy at law and equity jurisdiction is proper.[5] On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.[6]

ANALYSIS

Although Bruce assigns as error only the district court's handling of the leftover funds from the sale of Floral Lawns' assets, our de novo review on the record reveals a labyrinth of legal problems that was apparently not recognized by the parties. These issues, combined with the late stage of these proceedings, present a difficult case—one for which there is no easy answer.

[3,4] The first issue that arises is whether the district court properly appointed the receiver. It is well established that appointing a receiver for a corporation is a harsh and drastic remedy, and is not one to be implemented lightly.[7] And under Nebraska law, a court's ability to appoint a receiver is governed by statute.[8] The court can appoint a receiver only in specific situations,[9] and the court must provide notice to all interested

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[4] See, e.g., *Arizona Motor Speedway v. Hoppe*, 244 Neb. 316, 506 N.W.2d 699 (1993). See, also, 1 Am. Jur. 2d *Accounts and Accounting* § 54 (2005).

[5] See, e.g., *Hoppe, supra* note 4; *Trump, Inc. v. Sapp Bros. Ford Center, Inc.*, 210 Neb. 824, 317 N.W.2d 372 (1982).

[6] *Newman v. Liebig*, 282 Neb. 609, 810 N.W.2d 408 (2011).

[7] See, e.g., *Furrer v. Nebraska Building & Investment Co.*, 108 Neb. 698, 189 N.W. 359 (1922); 12 Zolman Cavitch, Business Organizations With Tax Planning § 155.01[2] (2007).

[8] See Neb. Rev. Stat. § 25-1081 (Reissue 2008).

[9] See *id.*

parties.[10] The initial question is whether those requirements were met here.

The record does not show why the district court appointed a receiver in the underlying divorce action, because we have no record of the testimony or hearings in that case. Nor do we have the court's order appointing the receiver. From our reading of the divorce decree, it appears that the trial court initially appointed the receiver to hold Floral Lawns' assets until Floral Lawns' finances could be sorted out. The main goal, presumably, was to get an accurate valuation for Floral Lawns and thereby obtain a fair division of the marital estate.

Under § 25-1081, obtaining a valuation of a corporation does not fall under any of the specifically enumerated grounds for appointing a receiver. But § 25-1081 also includes a catchall ground for situations where, historically, "receivers have heretofore been appointed by the usages of courts of equity."[11] That catchall provision arguably applies here. There exists some support for appointing a receiver to manage a corporation's assets when the corporation is included in the marital estate in a divorce action.[12] As such, there appear to be statutory grounds to support the court's appointing a receiver to assess and manage Floral Lawns' assets pending the divorce.

[5] An order appointing a receiver must also provide notice to all interested parties, or the order is void.[13] At oral argument, the parties conceded that either Bruce was the sole shareholder or Bruce and his ex-wife were the only shareholders. Both Bruce and his ex-wife presumably received notice of the order to appoint the receiver, because both were parties to the divorce action. We conclude that the notice requirement was met.

[6] We also note that the court appointed the receiver in 2003 and that neither party appealed the appointment. An order

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[10] See Neb. Rev. Stat. § 25-1082 (Reissue 2008).

[11] See § 25-1081(8).

[12] See, e.g., *Mayhue v. Mayhue*, 336 Pa. Super. 188, 485 A.2d 494 (1984). See, also, 24 Am. Jur. 2d *Divorce and Separation* § 569 (2008).

[13] See § 25-1082 and Neb. Rev. Stat. § 25-1089 (Reissue 2008).

appointing a receiver is a final, appealable order,[14] and so the time for appeal has long passed.[15] Bruce did not assign the order appointing a receiver as error. And neither party claimed such error at oral argument. We conclude that the court did not err in appointing a receiver for Floral Lawns.

[7] But we do find error in the receiver's and court's actions following the appointment. We first address the court's attempted dissolution of Floral Lawns. In short, the court did not have the power to dissolve Floral Lawns. Corporations are creatures of statute, and they may be dissolved only according to statute.[16] No statutory grounds for dissolution existed here.

Which statutes apply depends on whether the corporation is a nonprofit or for-profit company. There is some question as to how to characterize Floral Lawns, but testimony and answers at oral argument indicated that Floral Lawns was a for-profit corporation, and this was not questioned by either party. Under the for-profit corporate statutes, a corporation may be dissolved voluntarily, administratively, or judicially.[17] There is no evidence to show that this was a voluntary or an administrative dissolution. And although Bruce suggested that the trial court could have ordered him to dissolve the corporation, this was not done, and we therefore have no reason to address this contention.

This leaves only the possibility of judicial dissolution under § 21-20,162. Section 21-20,162 says that a court may dissolve a corporation only when the action is brought by the Attorney General, a shareholder, or a creditor, on various grounds, or when the corporation asks the court to continue its already ongoing voluntary dissolution. None of those requirements are met here, because it was the receiver who brought this

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[14] See, *Robertson v. Southwood*, 233 Neb. 685, 447 N.W.2d 616 (1989); Neb. Rev. Stat. § 25-1090 (Reissue 2008).

[15] See Neb. Rev. Stat. § 25-1912 (Reissue 2008).

[16] See, *Furrer, supra* note 7; 19 Am. Jur. 2d *Corporations* § 2350 (2004); 19 C.J.S. *Corporations* § 916 (2007); 14 Zolman Cavitch, Business Organizations With Tax Planning § 186.01[1] (2006).

[17] See Neb. Rev. Stat. §§ 21-20,151 to 21-20,166 (Reissue 2007).

action and there was no evidence of a voluntary dissolution. As such, the court had no power to dissolve the corporation under Nebraska law and its attempt to do so was error.

[8,9] Because the statutory requirements for judicial dissolution were not met, the receiver's actions in winding up Floral Lawns and selling its assets were also improper and outside the power of the court to approve. We recognize that a receiver's powers have been described by some commentators as allowing the receiver "to do whatever is appropriate and equitable, if approved by the receivership court."[18] But the general nature of a receiver's task, unless appointed in an action for corporate dissolution, is to preserve and protect the property under his or her control.[19] And where there is no proper action for corporate dissolution, a court does not have the power to bypass that requirement and effectively dissolve the corporation by having the receiver wind up the business and sell all of the corporation's assets.[20] This is what happened here, and this was error.

In sum, the court had the power to place Floral Lawns in receivership. But the court did not have the power to dissolve the corporation. And because there was no proper action for dissolution, the court did not have the power to approve the receiver's winding up the business and selling the business' assets.

Our ability to correct these errors is restricted by several factors. The receiver has already wound up the business and sold all of its assets. Practically speaking, it would be impossible to undo these actions. Moreover, both parties seemingly accept that the business is ended; they just dispute what should happen to the remaining proceeds from the sale of the assets. We also note that the remaining funds are a relatively small amount ($10,000 to $17,000 by the parties' estimations), so it does not make sense to remand the cause for further

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[18] 12 Cavitch, *supra* note 7, § 155.04[1] at 155-42.

[19] See *id.*, §§ 155.01[1] and [2] and 155.04[1] through [4].

[20] See *Furrer, supra* note 7.

proceedings, which would simply exhaust the funds through fees and other costs.

[10] But this action sounds in equity, and we may craft a remedy according to equitable principles.[21] Equity strives to do justice.[22] Equity is not a rigid concept but, instead, is determined on a case-by-case basis according to concepts of justice and fairness.[23]

Here, the divorce decree awarded Bruce any funds remaining after Floral Lawns' receivership. But the record also shows that he did not deposit money from pre-need sales into a trust account as required by Nebraska law. In essence, Bruce misappropriated those funds, to the tune of about $115,000, for his own personal use.

Justice may be blind, but it is not stupid. Bruce already received a one-time $4,000 payment from the receivership, and we reject Bruce's claim for the remaining funds. Though the remaining funds are less than the total amount Bruce failed to deposit in the pre-need trust account, placing the funds in the trust account can help mitigate the loss.

If Bruce had properly deposited the pre-need sales' funds into the trust account, then Floral Lawns would have been entitled to receive those funds once it provided the funeral products to the pre-need purchaser upon his or her death.[24] In other words, the funds would have been deferred compensation for the cemetery once it provided the purchased products. The record shows that Quail Creek has assumed many of Floral Lawns' financial obligations, including providing burial arrangements to individuals who made pre-need purchases from Floral Lawns but whose money Bruce did not properly

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[21] See, e.g., *State ex rel. Stenberg v. Moore*, 253 Neb. 535, 571 N.W.2d 317 (1997); *Synacek v. Omaha Cold Storage*, 247 Neb. 244, 526 N.W.2d 91 (1995), *overruled on other grounds, Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000).

[22] See, e.g., *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

[23] See, e.g., *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006); *Trieweiler, supra* note 22.

[24] See § 12-1113.

deposit in the trust account. We believe the equitable remedy is to place the remaining money in the existing pre-need trust account, give Quail Creek all existing records which document the pre-need sales, and allow Quail Creek to withdraw the money as it renders services. And unlike the district court, we conclude that the money should not revert to Bruce no matter how much time has passed. Accordingly, we affirm the district court's judgment as modified by this opinion.

AFFIRMED AS MODIFIED.