COLORADO COURT OF APPEALS

DATE FILED: July 30, 2015
CASE NUMBER: 2014CA350

Court of Appeals No. 14CA0350
Las Animas County District Court No. 11CV61
Honorable Leslie J. Gerbracht, Judge

Terri Nikole Baca and Akamee Baca Malta,

Third-Party Plaintiffs-Appellants,

v.

Philip L. Baca, in his fiduciary capacity as Trustee of the Antonio J. Baca Revocable Trust u/t/a/d December 26, 1995; and Personal Representative of the Estate of Antonio J. Baca,

Plaintiff-Appellee,

and

Edward C. Baca,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE GRAHAM
Webb and Terry, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced July 30, 2015

Montgomery & Andrews, P.A., Suzanne C. Odom, Stefan R. Chacon, Albuquerque, New Mexico, for Third-Party Plaintiffs-Appellants

James G. Whitley, P.C., James G. Whitley, Durango, Colorado, for Plaintiff-Appellee

Wood Nichols, LLC, Kelcey C. Nichols, Carbondale, Colorado; The Simons Firm, LLP, Thomas A. Simons, IV, Santa Fe, New Mexico, for Defendant-Appellee

Antonio J. Baca (the decedent) was a successful man. Later in life, the decedent purchased 17,000 acres in Las Animas County, Colorado, known as Salt Creek Ranch (the Ranch). It is the disposition of that Ranch that requires us to consider whether third-party plaintiffs, Terri Nikole Baca and Akamee Baca Malta, the decedent's grandnieces (the nieces), are entitled to an equitable share of that Ranch. The trial court concluded that they were not, and we affirm.

I. Background

In 1984 and 1985, the decedent opened custodial accounts for the nieces in New Mexico under the New Mexico Uniform Gifts to Minors Act (UGMA), now codified as the New Mexico Uniform Transfers to Minors Act (UTMA), N.M. Stat. Ann. § 46-7-11 to -34 (2015). The custodial accounts were irrevocable gifts under the UGMA and UTMA.

In April 1997, the decedent ordered liquidation of those accounts and was issued two checks totaling $315,239.26. On April 24, 1997, the decedent purchased the Ranch for $1,200,000.00. The Ranch was conveyed by the prior owners to the decedent, the Estate of Josefa A. Baca (the estate of the decedent's

mother for which he was the personal representative), and Edward C. Baca (the decedent's brother and the defendant in the current action).[1]

In 2005, the decedent was diagnosed with cancer. He then conveyed his personal interest and the Estate of Josefa A. Baca's interest in the Ranch to the Antonio J. Baca Revocable Trust (the Trust). The decedent died on December 15, 2005. The decedent's brother, Philip L. Baca, is the trustee of the Trust and the personal representative of the Estate of Antonio J. Baca.

On May 20, 2011, the trustee filed suit against the defendant in Las Animas County seeking to quiet title against the defendant claiming that the defendant's interest in the Ranch was held by the defendant in a resulting trust or constructive trust for the benefit of the trustee. In the alternative, the trustee sought a partition of the Ranch should the court conclude the defendant owned an interest.

The defendant counterclaimed, seeking to quiet title to his interest in the Ranch and for his share of revenue earned by the trustee in leasing the Ranch to third parties.

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[1] The property was conveyed in the following percentages: 18.32% to the decedent, 17.73% to the defendant, and 63.95% to the Estate of Josefa A. Baca.

The nieces filed a third-party complaint against the trustee and the defendant asserting that the decedent had wrongfully used their custodial accounts to buy the Ranch. They sought a constructive trust on a 26.33% undivided interest in the Ranch representing the percentage of the purchase price funded by their accounts.

In August 2013, a trial to the court was held and on November 7, 2013, the court issued its findings of fact, conclusions of law, order for declaratory judgment, and decree of quiet title and partition. Relevant to the current appeal, the trial court concluded that the nieces had failed to trace the funds from their custodial accounts to the Ranch by a preponderance of the evidence. Accordingly, the trial court entered judgment against the nieces.

II. Constructive Trust

On appeal, the nieces contend the trial court erred in its application of the burden of proof to establish a constructive trust. We disagree.

A. Standard of Review

We review the court's denial of a constructive trust for abuse of discretion. *Cf. Lewis v. Lewis*, 189 P.3d 1134, 1140 (Colo. 2008)

(Because courts must "make extensive factual findings to determine whether a party has been unjustly enriched" we review trial court determinations for abuse of discretion.); *Cedar Lane Invs. v. Am. Roofing Supply of Colo. Springs, Inc.*, 919 P.2d 879, 883 (Colo. App. 1996) ("A constructive trust is a remedy for unjust enrichment." (citing 1 Dan B. Dobbs, *Law of Remedies* § 4.3(2), at 597 (2d ed. 1993))); *see In re Dynamic Techs. Corp.*, 106 B.R. 994, 1007 (D. Minn. 1989) (holding that imposition of constructive trust is equitable remedy which court has discretion to grant or deny).

"The proper burden of proof is a question of law which we review de novo." *McCallum Family L.L.C. v. Winger*, 221 P.3d 69, 72 (Colo. App. 2009).

B. Law and Analysis

Constructive trusts "'are raised by equity in respect of property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it.'" *Hooper v. Yoder*, 737 P.2d 852, 861 (Colo. 1987) (quoting *Page v. Clark*, 197 Colo. 306, 315, 592 P.2d 792, 798 (1979)); *see Mancuso v. United Bank*, 818 P.2d 732, 737-38 (Colo. 1991) (holding that a constructive trust is an equitable

remedy that a court may impose where a property conveyance results in unjust enrichment, or the property was obtained through fraud, duress, or abuse of a fiduciary relationship). Courts impose this "flexible equitable remedy" to "prevent unjust enrichment" and "enable[] the restitution of property that in equity and good conscience does not belong to the defendant." *Lawry v. Palm*, 192 P.3d 550, 562 (Colo. App. 2008); *see Cedar Lane Invs.*, 919 P.2d at 883.

"[W]here a person wrongfully disposes of the property of another but the property cannot be traced into any product, the other has merely a personal claim against the wrongdoer and cannot enforce a constructive trust or lien upon any part of the wrongdoer's property." Restatement (First) of Restitution § 215 (1937); *accord Dep't of Natural Res. v. Benjamin*, 41 Colo. App. 520, 522, 587 P.2d 1207, 1209 (1978); *see In re Marriage of Allen*, 724 P.2d 651, 656 (Colo. 1986) ("[A] constructive trust beneficiary may obtain, through tracing, not merely what was lost but also other property or profits traceable to that lost property."); *accord Lyons v. Jefferson Bank & Trust*, 793 F. Supp. 981, 985 (D. Colo. 1992), *aff'd in part and rev'd in part*, 994 F.2d 716 (10th Cir. 1993).

"[T]he party attempting to set aside a transaction on equitable grounds should only be required to prove the truth of his contentions by a 'preponderance of the evidence.'" *Page*, 197 Colo. at 319, 592 P.2d at 801.

The nieces contend that "[t]he trial court erred in imposing a documentary evidence standard of proof for equitable tracing," and take issue with the following portion of the court's findings of fact and conclusions of law:

> [T]he Court FINDS that the [nieces] did not present sufficient evidence that the funds from the custodial accounts were used by Decedent to pay a portion of the $1,200,000.00 purchase price for the Salt Creek Ranch. The Court FINDS that the Decedent ordered the liquidation of the [nieces'] custodial accounts on April 9, 1997, all securities in the accounts were sold on April 10, 1997, and the brokerage house issues two checks, each in the amount of $157,619.63, to Antonio J. Baca on April 11, 1997. The Court also FINDS that the Ranch was purchased on April 24, 1997. The Court FINDS that the [nieces] failed to present *any documentary evidence* that the funds from the custodial accounts were used to purchase the Ranch. The Court FINDS that [the nieces] failed to trace the funds from the custodial accounts to the Ranch. Thus, the Court FINDS that there is no basis to impose a constructive trust on the Ranch in favor of the [nieces].

(Emphasis added.)

The nieces contend that the trial court erred because it improperly emphasized documentary evidence rather than considering both direct and circumstantial evidence. *See, e.g.*, *People in Interest of M.S.H.*, 656 P.2d 1294, 1296 (Colo. 1983) ("It is well established that there is no qualitative difference between direct and circumstantial evidence."). We do not read the court's order so narrowly. Its findings also specify that the nieces "failed to trace the funds from the custodial accounts to the Ranch." This finding is not limited to documentary evidence and, read together with the court's additional findings, it is apparent that the trial court considered both direct evidence (the amounts of custodial accounts, the date the accounts were closed, and the date the Ranch was purchased) and the circumstantial evidence (that a short period of time elapsed between the accounts being closed and the Ranch's purchase) in holding that the nieces failed their burden to trace the funds by a preponderance of the evidence. The court's observation regarding the lack of documentary evidence does not support an inference that the court misapplied the law as the nieces suggest.

The nieces further contend that *Banks v. Rice*, 8 Colo. App. 217, 45 P. 515 (1896), supports an argument that once they established that their funds had been converted and that the decedent had "available funds in [his] estate," a presumption arose that their "money was applied where it can be reached, and not where it cannot be reached," *id.* at 220, 45 P. at 517, and a constructive trust was established. This argument ignores the requirement that the party seeking to impose a constructive trust *must* trace the funds to the property they now seek. *Marriage of Allen*, 724 P.2d at 657; *Benjamin*, 41 Colo. App. at 522, 587 P.2d at 1209; Restatement (First) of Restitution § 215 (1937).[2] The

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[2] The nieces mistakenly rely on *Lyons v. Jefferson Bank & Trust*, 793 F. Supp. 981, 986 (D. Colo. 1992), *aff'd in part and rev'd in part*, 994 F.2d 716 (10th Cir. 1993), to argue that they need only trace funds into the hands of the wrongdoer. In *Lyons*, the district court found by "overwhelming credible evidence," *id.* at 984, that "the plaintiff . . . clearly traced Iowa Trust property, the 1995 Notes, from its account with Bankers Trust, through the sale of the 1995 Notes and the purchase of the 1994 Notes at FIB, to the eventual sale of the 1994 Notes and transfer of the sale proceeds to defendant," *id.* at 985. Because the original proceeds had been "clearly traced . . . defendant received cash belonging to the Iowa Trust and the final judgment in this action merely requires defendant to reconvey a like amount of cash to plaintiff." *Id.* at 986. Hence, the district court concluded that "[t]he constructive trust doctrine simply *does not require that the subject property be the same* and, therefore, it is irrelevant that the property is fungible or

circumstantial evidence presented by the nieces was simply too weak for the court to conclude that they had surmounted this burden even under a preponderance standard.

Furthermore, *Banks* is readily distinguished from the case before us. In *Banks*, the parties *agreed* that the funds owed to the plaintiff were "used . . . in the conduct of [the now defunct] business, in paying help, interest, and expenses in the management of its business, *and in the purchase of new goods and materials*." *Banks*, 8 Colo. App. at 218, 45 P. at 516. Because there was no dispute as to where the plaintiff's funds had gone, the court concluded that it was the other creditors' responsibility to show the funds were used only to pay debts to avoid the plaintiff gaining priority over those creditors. Here, however, the dispute focused on whether the nieces' funds were used to purchase the Ranch.

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commingled." *Id.* (emphasis added). *Lyons* does not stand for the proposition that the plaintiff need only trace funds to the "wrongdoer" without establishing an object of the funds; rather, *Lyons* makes clear that the plaintiff must trace the converted funds to property held by the wrongdoer, but that that property need not be in the same form as it was originally in order for the plaintiff to recover. *See In re Marriage of Allen*, 724 P.2d 651, 657 (Colo. 1986) (Constructive trust "can attach to proceeds of the property or to other property purchased by the trustee into which the original property or its proceeds *can be traced*.") (citing Restatement (First) of Restitution § 160 cmt. h (1937)) (emphasis added).

Therefore, the burden remained with the nieces to prove, by a preponderance of the evidence, that the Ranch was purchased using the $315,239.26 from their custodial accounts.

To the extent that *Banks* may be read to support the nieces' position that the trustee or the defendant had the burden to prove the custodial account funds were not used to purchase the Ranch, we decline to follow it. *See, e.g.*, *Harper Hofer & Assocs., LLC v. Nw. Direct Mktg., Inc.*, 2014 COA 153, ¶ 25 (one division of this court is not bound by the decision of another). Instead, we choose to follow the vast weight of authority requiring a plaintiff to trace funds to the property for which a constructive trust is sought. *Benjamin*, 41 Colo. App. at 522, 587 P.2d at 1209; *see, e.g.*, *First Fed. of Mich. v. Barrow*, 878 F.2d 912, 915 (6th Cir. 1989) (asserting that, as a general rule, party seeking to impress funds held by debtor with a constructive trust has burden of identifying funds by tracing them through debtor's commingled accounts); *McMerty v. Herzog*, 702 F.2d 127, 130 (8th Cir. 1983) ("The law of constructive trusts allows a victimized party to 'trace' wrongfully diverted funds and to recover the funds or their proceeds. . . . The burden is on the beneficiary of the 'trust' to trace the funds."); *Cent. Nat'l Bank of Cleveland v.*

King, 573 F.2d 669, 671 (10th Cir. 1978) (holding that bank suing borrower for constructive trust on borrower's children's trust funds had burden to establish by a preponderance of the evidence that portions of the proceeds from sale of stock could be traced directly into trust funds); *In re Estate of Redpath*, 402 N.W.2d 648, 650 (Neb. 1987) ("'As a general rule, provided the property *can be traced or identified*, any third person who has obtained trust property or its product, by a transfer made in violation of the trust' may be subject to a constructive trust. (Emphasis supplied.) 90 C.J.S. *Trusts* § 441 at 850 (1955). It is necessary, however, that the property can be traced or identified."); *Estate of Cowling v. Estate of Cowling*, 847 N.E.2d 405, 412 (Ohio 2006) ("[B]efore a constructive trust can be imposed, there must be adequate tracing from the time of the wrongful deprivation of the relevant assets to the specific property over which the constructive trust should be placed."); *Wilz v. Flournoy*, 228 S.W.3d 674, 676 (Tex. 2007) ("A party seeking to impose a constructive trust has the initial burden of tracing funds to the specific property sought to be recovered."); *Tauber v. Commonwealth ex rel. Kilgore*, 562 S.E.2d 118, 129 (Va. 2002) (holding that the successful proponent of a constructive trust bears

the initial burden of tracing the trust's assets and establishing the amount of its intangible assets). Indeed, *Banks* was decided in 1896, and the law on constructive trusts has evolved since that time. *See generally* Restatement (First) of Restitution § 160 (1937); 90 C.J.S. *Trusts* § 196, at 326-28 (2002) ("The burden of proof of a constructive trust is on the person seeking to establish it . . . .").

The nieces' reliance on *Carlson v. Wells*, 705 S.E.2d 101 (Va. 2011), is also unavailing. While under the UTMA a custodian may bear the burden of proving that each transfer of UTMA funds was used for a proper purpose, *id.* at 107-08, the nieces did not bring an action under the UTMA. Rather, the only requested relief was for a constructive trust. For similar reasons *In re Estate of Wallen*, 633 N.E.2d 1350 (Ill. App. Ct. 1994) is not applicable here. *Id.* at 1360 (In an action to enforce a judgment from another forum, the burden was on the administrator of the decedent's estate who had commingled funds after the decedent's death to "sort out and account for those assets as he was in the best position to know of them.").

And other cases relied upon by the nieces, *see Brennan v. Tillinghast*, 201 F. 609 (6th Cir. 1913); *Lyons*, 793 F. Supp. at 981;

Wallen, 633 N.E.2d 1350; *Corp. of President of Church of Jesus Christ of Latter-Day Saints v. Jolley*, 467 P.2d 984 (Utah 1970), either include trial court findings that the property wrongly converted could be traced to the property that the plaintiffs sought to impose a constructive trust on, or remanded to the trial court to make such findings. *See Brennan*, 201 F. at 612-13 ("[T]he court below correctly held that Brennan was entitled to recover as a preferential claim, to be paid in full, . . . the sum of $3,558.75 . . . . to the extent that[] he sustained the burden of proof of tracing this money, either in its original shape or in a substituted form, . . . into the moneys which came into the hands of the receiver as part of the assets of the bank."); *Lyons*, 793 F. Supp. at 985 ("Here, plaintiff has clearly traced Iowa Trust property . . . to the eventual sale of the 1994 Notes and transfer of the sale proceeds to defendant."); *Jolley*, 467 P.2d at 985 ("The evidence in this case justified" the trial court's finding of a constructive trust.); *Wallen*, 633 N.E.2d at 1361 ("It is not for this court to perform the trial court's fact-finding function of tracing the assets of the corporation. We leave it to the trial court to fashion an appropriate and just remedy.").

The nieces argue that "[f]lexible application to do justice is a bedrock principle of equity." This is true. *See, e.g.*, *Ulander v. Allen*, 37 Colo. App. 279, 281, 544 P.2d 1001, 1002 (1976). But this does not obviate the nieces' responsibility to prove, by a preponderance of the evidence, that their funds were used to purchase the Ranch. Flexibility cannot be used to supplant necessary evidence.

In sum, we perceive no error on the part of the trial court in concluding that the circumstantial evidence of the date of the liquidation of the custodial accounts and the date of the purchase of the Ranch, without more, did not establish by a preponderance of the evidence that the Ranch was purchased with the nieces' funds. Whether the nieces' argue that the court failed to consider equity in coming to this determination or argue that the court "made explicit findings of unjust enrichment followed by the purchase of an asset . . . by the wrongdoer but then imposed a statute of frauds to foreclose any remedy," in either case the nieces' are essentially asking us to reweigh the evidence in their favor. This we cannot, and will not, do. *See In re Estate of Schumacher*, 253 P.3d 1280, 1285-86 (Colo. App. 2011) ("It is the function of the trial court, and

not the appellate court, to weigh the factual evidence, and we will not substitute our own judgment for the trial court's, but rather 'defer to a trial court's reasonable inferences drawn from such facts.'"(quoting *In re Estate of Perry*, 33 P.3d 1235, 1237 (Colo. App. 2001))).[3]

III. Testimony of Matthew Baca

The nieces also contend that the trial court abused its discretion when it excluded the testimony of Matthew Baca, their father, that the decedent told him in 1997 that he intended to use the nieces' funds to buy the Ranch. We reject this contention.

A. Standard of Review

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[3] The nieces also complain that the trial court "did not consider that neither the Plaintiff Trustee nor the Defendant was a bona fide purchaser for value, and that there were no creditors asserting competing claims against the Ranch." Because the nieces failed to prove by a preponderance of the evidence that their funds were used in the purchase of the Ranch, the court did not need to consider whether equity would prevent the imposition of a constructive trust because it might occasion a hardship on a bona fide purchaser or other creditors. *See Dep't of Natural Res. v. Benjamin*, 41 Colo. App. 520, 523, 587 P.2d 1207, 1209 (1978) ("A court may impose a constructive trust where its only effect is to return property to a plaintiff but may deny it on the same basic facts where its effect would be to work an unwarranted preference over general creditors."); *accord Presidents Mortg. Indus. Bank v. Indus. Bank Sav. Guar. Corp. of Colo. (In re Presidents Mortg. Indus. Bank)*, 110 B.R. 508, 512 (D. Colo. 1989).

Generally, we review a trial court's decision to exclude evidence for an abuse of discretion. *See Berenson v. USA Hockey, Inc.*, 2013 COA 138, ¶ 10. A trial court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. *See McLaughlin v. BNSF Ry. Co.*, 2012 COA 92, ¶ 10. A trial court's misapplication of the law may constitute an abuse of discretion. *Berenson*, ¶ 10.

B. Facts

During trial, the nieces sought to introduce evidence in the form of testimony by their father, Matthew Baca, that the decedent had told him it was his intent to use the nieces' custodial accounts to purchase the Ranch. Both the trustee and the defendant objected, and the trial court sustained the objection without stating whether the testimony was inadmissible hearsay or not corroborated by material evidence of a trustworthy nature under the Colorado Dead Man's Statute, § 13-90-102, C.R.S. 2014.

C. Hearsay

Hearsay is a statement other than one made by the testifying witness that is offered to prove the truth of the matter asserted. CRE 801(c); *McLaughlin*, ¶ 11. Hearsay is generally inadmissible,

subject to certain exceptions. CRE 802; *McLaughlin*, ¶ 11. One exception to the general prohibition on hearsay evidence is a "statement of the declarant's then existing state of mind." CRE 803(3).

"The state of mind exception to the hearsay rule is based upon the trustworthiness of spontaneous statements." *People v. Nunez*, 698 P.2d 1376, 1378 (Colo. App. 1984), *aff'd*, 737 P.2d 422 (Colo. 1987). "The rule requires that such declarations relate to a then existing state of mind and that they must have been made under circumstances indicating sincerity." *Morrison v. Bradley*, 655 P.2d 385, 388, 387 n.1 (Colo. 1982) (Applying the common law state of mind exception and noting that CRE 803(3) "tracks the common law definition of the state of mind exception."); *People v. Gash*, 165 P.3d 779, 783 (Colo. App. 2009) ("Because the state of mind exception permits the admission of declarations made without opportunity to reflect on their legal consequences and *in situations that are exceptionally conducive to veracity*, it constitutes a firmly rooted hearsay exception.") (emphasis added).

Therefore, in some circumstances, "[s]tatements of present intent to engage in future conduct may be used as proof of the subsequent act." *Nunez*, 698 P.2d at 1378.

Here, the offer of proof by the nieces gave no indication that the alleged statements made by the decedent were "made under circumstances indicating sincerity." *Morrison*, 655 P.2d at 388. Consequently, we perceive no abuse of discretion in the court's decision to exclude this testimony.

D. Colorado's Dead Man's Statute

Additionally, even if the decedent's statement was made under circumstances indicating sincerity, the offered testimony was inadmissible under Colorado's Dead Man's Statute because it lacked corroboration by material evidence of a trustworthy nature.

Under the Dead Man's Statute, "[q]uestions of admissibility . . . shall be determined by the court as a matter of law." § 13-90-102(2); *see also In re Estate of Crenshaw*, 100 P.3d 568, 569 (Colo. App. 2004).

As relevant here, section 13-90-102 allows testimony about a decedent's oral statements only if "[t]he testimony concerning the oral statement is corroborated by material evidence of a trustworthy

nature." § 13-90-102(1)(b); *see Glover v. Innis*, 252 P.3d 1204, 1211 (Colo. App. 2011) ("The concepts of corroboration and trustworthiness are not new to Colorado evidence law. *See* CRE 803(7), 803(8), 804(b)(3), 807 (using one or both concepts as conditions to hearsay exceptions); *see also* § 13-25-129(1)(b)(II), C.R.S. 2010 (requiring corroborative evidence where out-of-court statement of a child is used when the child is unavailable); *see also* [Herbert E. Tucker, Marc Darling & James W. Hill, *The New Colorado Dead Man's Statute*, 31 Colo. Law. 119, 119 (July 2002)].").

> "Corroborated by material evidence" means corroborated by evidence that supports one or more of the material allegations or issues that are raised by the pleadings and to which the witness whose evidence must be corroborated will testify. Such evidence may come from any other competent witness or other admissible source, including trustworthy documentary evidence, and such evidence need not be sufficient standing alone to support the verdict but must tend to confirm and strengthen the testimony of the witness and show the probability of its truth.

§ 13-90-102(3)(a).

All parties agree Matthew Baca is an interested party under the statute. *See* § 13-90-102(1) (A "person in interest with a party

shall be allowed to testify regarding the oral statement . . . ."); § 13-90-102(3)(c) ("'Person in interest with a party' means a person having a direct financial interest in the outcome of the civil action or proceeding, or having any other significant and non-speculative financial interest that makes the person's testimony, standing alone, untrustworthy.").

The nieces contend that four pieces of evidence corroborate their father's proposed testimony: (1) the closing account statements; (2) testimony from the Morgan Stanley records custodian that a check for the liquidated funds was made out to the decedent; (3) closing documents showing the decedent's purchase of the Ranch; and (4) testimony from the trustee that there was no evidence of other purchases, debts, deposits, or investments by the decedent at or near the time the Ranch was purchased. While this evidence is trustworthy, we conclude it was not sufficiently corroborative of the proposed testimony that the decedent used the nieces' funds to purchase the Ranch. Simply put, this evidence shows that the funds were withdrawn and checks were made out to the decedent but it does not "confirm and strengthen the testimony of" Matthew Baca that the decedent then deposited those checks in

his own account and paid the purchase price for the Ranch from that account using those funds.

Because this testimony was both inadmissible hearsay and barred by the Dead Man's Statute, we determine the trial court did not abuse its discretion in excluding it

IV. Conclusion

The judgment is affirmed.

JUDGE WEBB and JUDGE TERRY concur.

Court of Appeals

STATE OF COLORADO
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Denver, CO 80203
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CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(l), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 23, 2014

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