

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the Estate of CHARLES SKULINA,
deceased.

MARY PECK, GERALD SKULINA, and SHIRLEY
ATKINS,

UNPUBLISHED
June 9, 1998

Appellants,

v

ANNA BOEHNING,

No. 196020
Manistee Probate Court
LC No. 00000375

Appellee.

Before: Gage, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Petitioners Mary Peck, Gerald Skulina and Shirley Atkins appeal as of right from a judgment entered in favor of respondent Anna Boehning following a jury trial. We affirm.

This case, before this Court for a third time, involves the parties' dispute over ownership of two joint bank accounts and nineteen government bonds in the names of the decedent and respondent when the decedent died intestate. Petitioners and respondent are heirs at law of the decedent. Respondent was a sister of the decedent. Petitioners sought to have the bank accounts and government bonds distributed to the decedent's heirs as part of his estate, while respondent claimed survivorship rights in these assets. In each of the prior two appeals, this Court reversed judgments for petitioners because evidence had been erroneously admitted at the jury trials. See *In re Skulina Estate*, 187 Mich App 649; 468 NW2d 322 (1991), and *In re Skulina Estate*, 168 Mich App 704; 425 NW2d 135 (1988). At the third jury trial, the probate court granted respondent a directed verdict on petitioners' fraud claim. The jury then found in favor of respondent on special verdict questions regarding the decedent's intent and undue influence.

Petitioners contend that the probate court abused its discretion in excluding testimony regarding respondent's receipt of proceeds of the estate of another brother, Jerry Skulina, who died about fifteen

years before the decedent. Respondent initially presented this issue as part of a pretrial motion in limine to exclude various proofs involving Jerry Skulina's estate. However, the probate court took the matter under advisement and did not rule on it until respondent's attorney later objected to petitioners' offer to introduce prior testimony of respondent's son John Boehning about Jerry Skulina's estate. The court excluded the evidence on the ground that it lacked probative value. Although petitioners' argument on appeal suggests that the probate court made an evidentiary ruling on whether respondent's own prior testimony could be read to the jury, we find no record support for this claim. Because the burden of establishing a proper evidentiary foundation rests with the proponent of evidence, *People v Burton*, 433 Mich 268, 304 n 16; 445 NW2d 133 (1989), we conclude that petitioners' failure to make an offer of proof of respondent's prior testimony waives our consideration of this particular issue pursuant to MRE 103(a)(2).

However, because the probate court's evidentiary ruling reflects that it decided the broader issue whether petitioners could introduce any evidence on respondent's involvement with Jerry Skulina's estate and because it was given a sufficient factual basis for making its ruling, we will consider this issue. The decision to admit evidence is within a trial court's sound discretion and will not be disturbed on appeal absent an abuse of discretion. *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id.* at 737.

Regarding whether petitioners could introduce any evidence of respondent's involvement with Jerry Skulina's estate, the probate court followed this Court's decision in the second appeal in holding that any reference to respondent's actions toward Jerry Skulina's estate was immaterial and therefore inadmissible. Petitioners argue that the law of the case doctrine did not require that the probate court exclude this evidence. We agree, but find that because the evidence was immaterial, the probate court reached the correct result in excluding it.

The probate court misapplied the law of the case doctrine. This doctrine provides that a question of law decided by an appellate court is not decided differently in a subsequent appeal where the facts remain materially the same. *Bennett v Bennett*, 197 Mich App 497, 499; 496 NW2d 353 (1992). All lower tribunals are also bound on the issue. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997). The doctrine applies to questions specifically decided in an earlier decision and to questions necessarily determined to arrive at that decision. *Id.* at 209.

Here, the specific question decided by this Court in the second appeal was whether SJI2d 6.01(d) should have been read to the jury, instructing it that it could draw an adverse inference against respondent for her failure to produce a canceled check or bank slip evidencing a \$10,000 deposit made in her brother Jerry's bank account if it believed that this evidence was under her control. This Court found that the probate court erred in reading the instruction because

[t]he production of a canceled check or bank slip evidencing a \$10,000 deposit made to a third party's account nearly twenty years before decedent's demise is immaterial with regard to whether decedent was subjected to undue influence or fraud by respondent. This instruction is permissible only when the evidence not produced is

material; here the evidence was clearly collateral to the central issues and only marginally relevant to respondent's credibility. [*In re Skulina Estate, supra* at 654.]

This Court's decision on this instructional issue necessarily required evaluation of an evidentiary issue because materiality is a component of relevancy as defined in MRE 401. See *People v Brooks*, 453 Mich 511, 517-518; 557 NW2d 106 (1996). Therefore, this Court's holding that the documentary evidence on a \$10,000 deposit made nearly twenty years before decedent's death to a third party's account was not material and had only marginal relevancy to respondent's credibility is the law of the case. Cf. *Johnson v White*, 430 Mich 47, 54; 420 NW2d 87 (1988).

Because this Court did not consider the materiality of other evidence regarding respondent and Jerry Skulina's estate, the law of the case doctrine did not preclude the probate court from examining the relevancy of such other evidence. Hence, to the extent that the probate court's ruling could be construed as a determination that it was bound by this Court's holding on the lack of materiality of the nonproduced evidence, this was incorrect. However, reversal is not required when a court reaches a correct result, even if the court relied on a wrong reason. *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993). The probate court reached the correct result because petitioners did not establish the relevancy of the proffered evidence to any fact of consequence to the jury's determinations.

Petitioners sought to introduce evidence of respondent's involvement with Jerry Skulina's estate to show that, motivated by the distribution, closing and ultimate bankruptcy of her husband's drugstore after his death, she engaged in a pattern of deception toward her brothers' estates. We decline to consider this evidentiary issue in the context of any claim of fraud because petitioners have not briefed any issue on whether a directed verdict was proper on their fraud claim or that this claim would have been decided differently had the proffered evidence been allowed. Appellants may not leave it to this Court to discover and rationalize the basis of their arguments. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Thus, the only material question raised by petitioners is whether the proffered evidence should have been admitted as evidence of their claim that decedent added respondent's name to the bank accounts and government bonds as a result of undue influence and, in particular, on the issue of respondent's motive. Motive can be relevant to the issue of undue influence when there is affirmative evidence that it was acted upon. See generally *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). Evidence of prior acts is admissible to establish motive under MRE 404(b) as long as the evidence was (1) offered for a proper purpose rather than to prove character or propensity to a commit a crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to prevail under the balancing test of MRE 403. *People v Hoffman*, 225 Mich App 103, 105; 570 NW2d 146 (1997).

The evidence of respondent's conduct towards Jerry Skulina's estate was not actually offered to show motive, but rather to show that respondent had acted on the motive to secure assets that arose from the loss of her husband's drugstore. This purpose comes within the parameters of MRE 404(b), but only if it is part of a common scheme, plan or system in doing an act. The problem in this case is that the "scheme" evidence proffered by petitioners' attorney involved respondent's conduct towards different estates, different circumstances and a substantial lapse of time between the alleged acts. The

only connection between the circumstances surrounding the assets of Jerry Skulina and decedent appeared to be that they both had joint bank accounts with respondent. However, even this connection differs in that respondent's claim that she supplied the \$10,000 in the joint account with Jerry Skulina was disputed, while Charles Skulina undisputedly supplied the funds for his joint account with respondent.

Furthermore, the evidence regarding Jerry Skulina's estate was at best collateral to the issue before the jury whether respondent exerted undue influence over the decedent so that he would add her name to bank accounts and government bonds. To establish undue influence, one must show that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overcome volition, destroy free agency, and impel the grantor to act against his inclination and free will. *In re Erickson Estate, supra* at 331. Neither the fact of respondent's joint bank account with Jerry Skulina nor the proffered evidence of her conduct towards his estate after he died made it more probable than not that respondent was able to exert undue influence over the decedent. Thus, while the probate court erroneously relied on this Court's decision in the second appeal in excluding all evidence regarding Jerry Skulina's estate, we uphold its decision because the excluded evidence was indeed irrelevant. MRE 401.

Petitioners next argue that the probate court abused its discretion by refusing to permit cross examination regarding the circumstances of a loan to respondent's son Charles Boehning and respondent's handling of this matter as temporary personal representative of decedent's estate. We hold that the probate court did not abuse its discretion because the loan transaction was collateral to the issues to be decided by the jury. See *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996); *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). By omitting it from their offer of proof, petitioners failed to preserve their argument that they should have been able to explore the circumstances of decedent's transaction with Charles Boehning because the testimony of decedent's neighbor Joseph Cudney allegedly contradicted their claim that decedent treated everyone equally. MRE 103(a)(2).

Next, petitioners argue that the probate court's instructions misstated the law by requiring wrongful conduct for establishment of a constructive trust. Because petitioners failed to object on this ground, appellate review is precluded absent manifest injustice. *Mina v General Star Indemnity Co*, 218 Mich App 678, 680; 555 NW2d 1 (1996). We find no manifest injustice.

We agree with petitioners' argument that the instructions defining a constructive trust can be construed as requiring wrongful conduct and that this would constitute error because a constructive trust does not require wrongful conduct. It may arise out of unconscionability and unjust enrichment. *Grasman v Jelsema*, 70 Mich App 745, 752; 246 NW2d 322 (1976). Furthermore, we disagree with respondent's argument that the law of the case doctrine precludes our consideration of this issue because there has been no showing that this issue was squarely presented, specifically decided, or necessarily had to be determined in the prior appeals. *Webb, supra* at 209; *People v Goliday*, 153 Mich App 29, 33; 394 NW2d 476 (1986). The jury found no wrongful conduct by respondent and that the decedent intended that respondent would become the legal owner of the bank accounts and government bonds on his death. Thus, no facts exist that establish unconscionability or otherwise justify

the imposition of a constructive trust for the benefit of decedent's estate. Therefore, based on our de novo review of the equities in light of the jury's findings, *Webb, supra* at 210, we conclude that the trial court's erroneous instruction regarding the establishment of a constructive trust did not result in manifest injustice.

In light of this conclusion, we find it unnecessary to reach the question raised by respondent whether we should revisit the issue of the propriety of a jury trial on the constructive trust issue.

Affirmed.

/s/ Hilda R. Gage

/s/ E. Thomas Fitzgerald

/s/ Michael R. Smolenski