COURT OF APPEALS DECISION DATED AND RELEASED

DECEMBER 10, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0695

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT III**

DENISE RICE, Personal Representative of the Estate of RAYMOND H. WELK, Deceased,

Plaintiff-Respondent,

v.

SUSAN K. KOEHLER,

Defendant-Appellant,

BRIAN R. KOEHLER and PARK CITY CREDIT UNION,

Defendants.

APPEAL from a judgment of the circuit court for Lincoln County: J. MICHAEL NOLAN, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Susan Koehler appeals a judgment that awarded Denise Rice, as personal representative of the estate of Raymond Welk, the

sums of $44,000 and $11,370 as the amounts due on loans Welk had made Koehler before his death. The trial court also imposed a constructive trust on a tavern and other real estate Koehler had purchased with the money. Susan and her former husband Brian defended the lawsuit on the ground that the financial transfers were gifts, not loans. Susan partially relied on a note, written by Susan and purportedly signed by Welk, declaring that the transfer was a gift. The trial court ultimately rejected the note, after the parties' two handwriting experts disagreed on the authenticity of Welk's signature. On appeal, Susan makes several arguments. Some are evidentiary: (1) Mabel Plautz, a health care provider, wrongly testified to irrelevant statements Welk had made as to the $44,000 transfer about one year after the transfer; (2) personal representative Rice wrongly examined Susan and Brian about Susan's financial transactions with Welk, in violation of the deadman's statute; and (3) Rice improperly examined Brian about statements Susan had uttered concerning the $44,000 transaction, in violation of the privilege for marital communications. Susan also argues that the trial court should have recused itself for cause. We reject these arguments and therefore affirm the trial court's judgment.

First, the trial court properly admitted Plautz's testimony on statements made by Welk. Plautz reported that Welk had expressed concern over a $44,000 loan he had made to an unidentified borrower. Susan objected on relevancy and hearsay grounds. On appeal, she no longer pursues the hearsay objection. She now relies exclusively on her relevancy argument. She alleges that Welk's statement, made about one year after the monetary transfer, was too remote in time to be relevant to the transaction. This argument lacks merit. Trial courts do have a duty to exclude evidence that is remote in time. *See* ***Krueger v. Tappan Co.***, 104 Wis.2d 199, 209, 311 N.W.2d 219, 224 (Ct. App. 1981). Here, however, a one-year time frame does not undermine the inherent relevancy of Welk's statement.

Next, the trial court correctly ruled that the deadman's statute did not bar Rice from questioning Susan and her former spouse Brian about Susan's transaction with Welk. Rice questioned both Susan and Brian as adverse witnesses. The trial court relied on this fact in admitting the evidence. This was a proper analysis. The deadman's statute does not bar adverse examination of witnesses concerning their transactions with deceaseds. *See* ***Zimdars v. Zimdars***, 236 Wis. 484, 487, 295 N.W. 675, 677 (1941). Witnesses called to the stand adversely are not testifying "on their behalf" within the meaning of the statute. ***Id***. The deadman's statute bars witnesses from testifying to such

transactions only on their own behalf. In short, Susan's and Brian's testimony on adverse examination fell outside this restriction.

The trial court also correctly applied the husband-wife privilege. Over Susan's objection, Brian testified how Susan had told him that she intended to get a loan from Welk to buy the tavern. In admitting this testimony, the trial court ruled that this communication was not "private" and that the privilege applied only to "private" communications. The trial court was correct. Under § 905.05(1), STATS., the privilege applies only to "private communications." Courts have generally held that honest spousal communications as to business transactions do not qualify as "private" communications. *See* MCCORMICK ON EVIDENCE § 80, at 166 (2d ed. 1972). Brian testified about a fraud free business communication, one in which Susan honestly expressed an intent to seek a loan. Her communication did not express any intent to falsely call a loan a gift. As such, her statement was not a private communication.

Last, the trial court had no duty to recuse itself. After the trial court issued its decision, Susan asked the trial court to recuse itself for bias against both Susan and her counsel. Susan cited the facts that she had been in a motor vehicle accident with the trial court's daughter, that the trial court had made rulings against her counsel in other cases, and that the trial court's demeanor during the trial and its decision exhibited a predisposition in the case. The trial court should have recused itself if it harbored actual bias against either. *See* ***State v. McBride***, 187 Wis.2d 409, 419, 523 N.W.2d 106, 111 (Ct. App. 1994). None of Susan's allegations warranted recusal. She waived the first two by not raising them until after the trial court's decision. If she believed these matters rendered the trial court biased, she should have raised them before trial.

Susan's next argument is not persuasive. The trial produced ample evidence to support the trial court's findings. First, the financial transfer was presumptively a loan. *See* ***Estate of Reist***, 91 Wis.2d 209, 218, 281 N.W.2d 86, 90 (1979). Second, the size of the alleged gift and Welk's desire to avoid a group home made Susan's gift claim inherently improbable, *cf.* ***Lazarus v. American Motors Corp.***, 21 Wis.2d 76, 84, 123 N.W.2d 548, 552 (1963), and Susan produced no persuasive evidence on why Welk would have granted her gifts of such magnitude. Third, Plautz's and Brian's testimony directly showed

that the transfer was a loan. Fourth, one of two handwriting experts believed that the signature on the note was not Welk's. This suggested fabrication of evidence and thereby inversely showed the transfer to be a loan. *See* ***Price v. State***, 37 Wis.2d 117, 132, 154 N.W.2d 222, 229 (1967); ***Scott v. State***, 211 Wis. 548, 556, 248 N.W. 473, 476 (1933). Welk had also made entries in his business ledger implying that the transfer was a loan. Taken together, this evidence gave the trial court sufficient proof to reject Susan's gift claim and find that the transfer was a loan. Under the circumstances, the trial court's decision exhibits no bias.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.