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FRAUDULENT CONVEYANCES — CHANGE OF BENEFICIARY OF LIFE INSURANCE POLICY FORMERLY PAYABLE TO INSURED'S ESTATE — An insurance company filed a bill of interpleader to determine disposition of the proceeds of a term policy on the life of one Fitzpatrick, now deceased. Claimants are the administrator, representing creditors, and the deceased's two sons. The policy had been issued payable to insured's estate, but reserved the right to change the beneficiary. A few days before his death (by suicide) deceased sent the company an application for change of beneficiary to his two minor sons. He was then hopelessly insolvent, and the administrator claims that the change of beneficiary was a fraudulent conveyance within the terms of the Uniform Fraudulent Conveyance Act.[1] *Held*, that under the authority of *Ionia County Savings Bank v. McLean* [2] a change of beneficiary in an insurance policy may be a "conveyance" within the fraudulent conveyance statute. However, the general policy of this state is to protect from claims of insured's creditors insurance for the benefit of his wife and children.[3] This can be done by limiting the rights of creditors to the cash surrender value at the time of the transfer, as beyond that an insurance policy represents a mere expectancy. Since the policy involved in the present case had no cash surrender value, there was no conveyance of property in fraud of creditors. *Equitable Life Assurance Society v. Hitchcock*, 270 Mich. 72, 258 N. W. 214 (1935).

The courts are agreed that, in the absence of statute,[4] either the purchase of life insurance payable to another or the assignment, transfer or change of beneficiary of a policy payable to the debtor's estate may constitute a fraud as

[1] Mich. Comp. Laws (1929), sec. 13392 *et seq.*

[2] 84 Mich. 625, 48 N. W. 159 (1891). In this case the insured, being indebted and in ill health, assigned to his wife and daughter a life insurance policy originally payable to his estate. Actual intent to defraud creditors having been found, a decree was made setting aside the assignment. Although the present statute changed the then existing requirements for the establishment of fraud, the rule as to what constitutes a "conveyance" remains the same.

[3] Citing Mich. Comp. Laws (1929), sec. 12451, providing that a husband may insure his life for the benefit of his wife and a father for his children, and that the proceeds of such policies shall be free from claims of creditors of the husband or father. There is nothing in the statute relating to assignments or transfers after the original issuance of the policy.

[4] Today more than half the states have statutes exempting the proceeds of policies from claims of creditors to some extent. The exemptions are usually limited to policies payable to insured's wife or children and to claims of insured's creditors, although occasionally extended to any policy for the benefit of a third person and to claims of the beneficiary's creditors. Most of the statutes apply only to issuance of policies though a few include assignments or transfers to the protected class of beneficiaries. The amount exempted may be unlimited, or limited by a maximum size of policy or maximum annual premium. As to rights of creditors, the exempted amount of insurance may be absolutely protected from debts of the insured (rights of creditors going only to amounts in excess of this), or the statute may permit recovery by creditors where premiums have been fraudulently paid, or make no provision on the subject whatsoever. Where insurance in fraud of creditors is specifically mentioned, the statutes usually limit recovery to the amount of the premiums fraudulently paid; and where assignment is mentioned, to the cash surrender value of the policy. See GLENN, THE LAW OF FRAUDULENT CONVEYANCES, sec. 178 (1931); VANCE, INSURANCE, 2d ed., 617, 621 (1930); Williston, "Can an Insolvent Debtor Insure His Life for the Benefit of His Wife?," 25 AM. L. REV. 185 (1891); 26 HARV. L. REV. 362 (1913); 23 COL. L. REV. 771 (1923); Morehead's Adm'r v. Mayfield, 109 Ky. 51, 58 S. W. 473 (1900); Bailey v. Wood, 202 Mass. 562, 89 N. E. 149 (1909); Stokes v. Amerman, 121 N. Y. 337, 24 N. E. 819 (1890); Pearsall v. Bloodworth, 194 N. C. 628, 140 S. E. 303 (1927); First State Bank of Delaware v. Conn., 136 Okla. 294, 277 Pac. 928 (1929); Cornwell v. Surety Fund Life Co., 44 S. D. 391, 184 N. W. 211 (1921).

to creditors.[5] There is no such unanimity of opinion as to the extent to which the proceeds of a policy so purchased or conveyed may be recovered by the defrauded creditors. May they take the entire proceeds, the amount of the premiums fraudulently paid, a proportionate part of the proceeds, or the cash value at the time of the transfer? [6] There is on principle a distinction between a case

[5] *Purchase*: Central Bank of Washington v. Hume, 128 U. S. 195, 9 Sup. Ct. 41 (1888); Fearn v. Ward, 80 Ala. 555, 2 So. 114 (1886); Merchants' and Miners' Transportation Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272 (1895); Stokes & Son v. Coffey, 8 Bush. (71 Ky.) 533 (1871); Stigler's Ex'x v. Stigler, 77 Va. 163 (1883). *Transfer*: Friedman Bros. v. Fennell, 94 Ala. 570, 10 So. 649 (1891); Pope v. Carter, 210 Ala. 533, 98 So. 726 (1924); Love v. First Nat. Bank, 228 Ala. 258, 153 So. 189 (1934); Davis v. Cramer, 133 Ark. 224, 202 S. W. 239 (1918); Barbour v. Connecticut Mut. Life Ins. Co., 61 Conn. 240, 23 Atl. 154 (1891); Central Bank of Washington v. Hume, 128 U. S. 195, 9 Sup. Ct. 41 (1888), dictum; Johnson v. Alexander, 125 Ind. 575, 25 N. E. 706, 9 L. R. A. 660 (1890); State ex rel. Wright, Adm'r v. Tomlinson, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335 (1896), dictum; Bailey v. Wood, 202 Mass. 562, 89 N. E. 149 (1909); Catchings v. Manlove, 39 Miss. 655 (1861); La Borde v. Farmers' State Bank, 116 Neb. 33, 215 N. W. 559 (1927); Travelers' Ins. Co. v. Grant, 54 N. J. Eq. 208, 33 Atl. 1060 (1896); Aetna Nat. Bank v. Manhattan Life Ins. Co., (C. C. S. D. N. Y. 1885) 24 Fed. 769; Continental National Bank v. Moore, 83 App. Div. 419, 82 N. Y. S. 302 (1903); Gould v. Fleitmann, 188 App. Div. 759, 176 N. Y. S. 631 (1919); Levy Leasing Co., Inc. v. Wishner, 147 Misc. 829, 265 N. Y. S. 184 (1933); Burton v. Farinholt, 86 N. C. 259 (1882); Appeal of Elliott's Ex'rs, 50 Pa. St. 75, 88 Am. Dec. 525 (1865); Provident Life & Trust Co. v. Fidelity Ins. etc., Co., 203 Pa. 82, 52 Atl. 34 (1902); Fidelity Trust Co. v. Union Nat. Bank, 313 Pa. 467, 169 Atl. 209 (1933); Navassa Guano Co. v. Cockfield, (C. C. A. 4th, 1918) 253 Fed. 883, 6 A. L. R. 1168; Walter v. Hartman, (Tenn. 1902) 67 S. W. 476; White v. Pacific Mut. Ins. Co., 150 Va. 849, 143 S. E. 340 (1928); Coalter v. Willard, 156 Va. 79, 158 S. E. 724 (1931); Clay County Bank v. Wilson, 109 W. Va. 684, 158 S. E. 517 (1930); Mahood v. Maynard, (W. Va. 1933) 171 S. E. 884.

A number of cases make an exception to the usual rule of fraudulent conveyances when the insurance is purchased for the insured's wife or child and is no more than a reasonable amount for their protection. Central Bank of Washington v. Hume, 128 U. S. 195, 9 Sup. Ct. 41 (1888); Hendrie & Bolthoff Mfg. Co. v. Platt, 13 Colo. App. 15, 56 Pac. 209 (1899); Ross v. Minnesota Mut. Life Ins. Co., 154 Minn. 186, 191 N. W. 428, 31 A. L. R. 46 (1923), noted 21 MICH. L. REV. 937 (1923). Johnson v. Alexander, 125 Ind. 575, 25 N. E. 706, 9 L. R. A. 660 (1890), extended the theory of the Hume case to an assignment of the policy by a debtor to his wife. Succession of Hearing, 26 La. Ann. 326 (1874), was a case of an assignment to the debtor's wife, but is governed by civil law.

Of course ordinary rules apply as to allegations and proof of actual or constructive fraud. Nat. Bank of Commerce v. Appel Clothing Co., 35 Colo. 149, 83 Pac. 965, 4 L. R. A. (N. S.) 456, 117 Am. St. Rep. 186 (1905); Langford v. Freeman, 60 Ind. 46 (1877); Jones v. Patty, 73 Miss. 179, 18 So. 794 (1895); Studebaker v. Welch, 51 Neb. 228, 70 N. W. 920 (1897); Adler & Sons Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 877 (1898).

[6] A factor which affects not so much the amount of recovery as the method of enforcement is the status of the policy, that is, whether it has matured. Here it is well to note that it is the gratuitous creation of interests in a third party beneficiary and not the contract with the insurance company which is voidable, for the company has

where a policy payable to the debtor or his estate is after his insolvency assigned or transferred by change of beneficiary to some third person and a case where the insolvent debtor takes out a policy on his life payable to another or pays further premiums on a policy already issued in favor of a third person.[7] In the latter situation the debtor deprives his creditors of no anticipated asset save the amount of the fraudulent payments, and it is just to limit the recovery of creditors to the amount of premiums paid while insolvent or with actual intent to defraud.[8] But in the assignment or change of beneficiary case the debtor is depriving his estate of the value of the policy. However, the "possibility" or "expectancy" of realization of the face value is so obviously difficult of measurement that one cannot help feeling it to be a fair sporting proposition, in the absence of actual fraud, to give creditors only the surrender value of the policy at the time of transfer. This is what has been done by a number of cases.[9] The principal case is the first one to

furnished consideration. Accordingly, there can be no recovery at all except so far as consistent with the terms of the insurance company's contract. After maturity, the methods of enforcement are those of the usual stakeholder situation. Before maturity, creditors might be given either a lien upon the policy or complete title. The remedy of a lien would, however, be inadequate unless accompanied by the right to pay future premiums and add them to the amount of the lien. And if title is given to enforce a recovery of less than the face of the policy, the insured or beneficiary should have a right of redemption. There are, however, very few reported instances of attempts by creditors to reach insurance taken out by their debtor before its maturity. Bailey v. Wood, 202 Mass. 562, 89 N. E. 149 (1909); Stokes v. Amerman, 121 N. Y. 337, 24 N. E. 819 (1890).

[7] This suggests the further question of the nature of the policy and the extent of the insured's interest therein. The many combinations possible in a single contract of insurance necessitate close analysis. For example, an endowment or annuity contract with provision for payment to a named beneficiary in case of the insured's death prior to the maturity date has characteristics both of a policy payable to the insured's estate and of one for the benefit of a third person. And *cf.* Talcott v. Field, 34 Neb. 611 (1892).

Where a policy is originally made payable to a third person, the various powers retained by the insured, although assets to some extent, at least in bankruptcy, are probably not important for purposes of fraudulent conveyances. While a power to change the beneficiary without his or her consent could of course be exercised in favor of insured's estate, there would be no fraud in the mere failure to exercise it or even in naming a different beneficiary. And where the naming of the beneficiary is not wrongful, the reservation of a power to surrender the policy for its cash value or failure to exercise such power could not be fraudulent.

[8] Shaver v. Shaver, 35 App. Div. 1, 54 N. Y. S. 464 (1898), dictum; Stigler's Ex'x v. Stigler, 77 Va. 163 (1883); White v. Pacific Mut. Ins. Co., 150 Va. 849, 143 S. E. 340 (1928); GLENN, THE LAW OF FRAUDULENT CONVEYANCES, sec. 182 (1931); VANCE, INSURANCE, 2d ed., 624 (1930). This is the rule ordinarily adopted by statutes.

[9] Davis v. Cramer, 133 Ark. 224, 202 S. W. 239 (1918); Barbour v. Connecticut Mut. Life Ins. Co., 61 Conn. 240, 23 Atl. 154 (1891), dictum; White v. Pacific Mut. Ins. Co., 150 Va. 849, 143 S. E. 340 (1928); Coalter v. Willard, 156 Va. 79, 158 S. E. 724 (1931); Mahood v. Maynard, (W. Va. 1933) 171 S. E. 884, noted 40 W. VA. L. Q. 383 (1934). See also, GLENN, THE LAW OF FRAUDULENT CONVEYANCES, sec. 183 (1931).

measure recovery by surrender value where the circumstances (suicide) indicate actual fraud. Similar cases award creditors the entire proceeds.[10] Other cases awarding defrauded creditors the entire proceeds of the policy [11] are evidently applying a rule which originated in the field of constructive trusts to give one whose property had been misappropriated the right to follow it in any form and claim all appreciations thereof.[12] The rule has, however, received considerable approval.[13]

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[10] Continental Nat. Bank v. Moore, 83 App. Div. 419, 82 N. Y. S. 302 (1903), suicide; Gould v. Fleitmann, 188 App. Div. 759, 176 N. Y. S. 631 (1919), suicide; Navassa Guano Co. v. Cockfield, (C. C. A. 4th, 1918) 253 Fed. 883, 6 A. L. R. 1168 (1918), fatal illness. The first two cases bear an additional similarity to the principal case in that New York also has a statute exempting policies taken out for benefit of insured's wife from claims of his creditors.

[11] *Taking out policy*: Fearn v. Ward, 80 Ala. 555, 2 So. 114 (1886); Merchants' and Miners' Transportation Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272 (1895); Stokes & Son v. Coffey, 8 Bush (71 Ky.) 533 (1871). *Transfer*: Love v. First Nat. Bank, 228 Ala. 258, 153 So. 189 (1934); Stokes & Son v. Coffey, 8 Bush (71 Ky.) 533 (1871); Appeal of Elliott's Ex'rs, 50 Pa. St. 75, 88 Am. Dec. 525 (1865); Fidelity Trust Co. v. Union Nat. Bank, 313 Pa. 467, 169 Atl. 209 (1933); Walter v. Hartman, (Tenn. 1902) 67 S. W. 476.

[12] VANCE, INSURANCE, 2d ed., 618 (1930). The constructive trust theory was expressly applied in Fidelity Trust Co. v. Union Nat. Bank, 313 Pa. 467 at 481, 169 Atl. 209 (1933).

[13] Williston, "Can an Insolvent Debtor Insure His Life for the Benefit of His Wife?," 25 AM. L. REV. 185 (1891); 26 HARV. L. REV. 362 (1913); 23 COL. L. REV. 771 (1923); 40 W. VA. L. Q. 383 (1934).