

IN THE SUPREME COURT OF OHIO

11-0910

THE HUNTINGTON NATIONAL BANK :

Plaintiff-Appellant, :

v. :

STEVEN WINTER. :

Defendant-Appellee. :

Appeal from the Hamilton County
Court of Appeals, First Appellate
District

Court of Appeals Case No. C090482

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST**

This case presents a critical issue that impacts the enforcement of civil judgments and the rights of creditors to satisfy their judgments through execution. R.C. 3911.10 exempts life insurance contracts from execution by a creditor. An exception to this exemption is contained in R.C. 3911.10 for proceeds of the life insurance contract where the premiums are paid in fraud of creditors.

Ohio's Uniform Fraudulent Transfer Act, R.C. 1336.01, *et seq.*, allows creditors to obtain remedies which nullify a fraudulent asset transfer by a debtor. A creditor can have the transfer voided to the extent necessary to satisfy the claim of the creditor under R.C. 1336.07(A). If the creditor has obtained judgment, the creditor can also levy execution on the asset transferred or its proceeds under R.C. 1336.07(B).

The First District Court of Appeals held that even though there had been a fraudulent transfer of \$144,000 by Steven Winter to Prudential Insurance Company using the guidelines set forth in Ohio's Uniform Fraudulent Transfer Act, the trial court erred by allowing Steven Winter's whole life insurance policies to be subject to execution. Given the clear intent of R.C. 1336.01 *et seq.* and the exception contained in R.C. 3911.10, the Court of Appeals' decision is erroneous as a matter of law and contrary to principles of justice and fairness to creditors.

In reversing the trial court's decision, that Court of Appeals disregarded the Ohio legislature's intent in R.C. 1336.01, *et seq.* to restrict fraudulent conveyances by debtors and, instead, claimed that it was bound by the language of R.C. 3911.10. However, R.C. 3911.10 does not prohibit the execution against monies contained in whole life insurance accounts where the premiums associated with those whole life insurance accounts were paid in fraud of creditors.

Should other courts follow the Court of Appeals' decision, debtors in Ohio would have an illegitimate safe haven for monies that should instead be paid to their creditors. Like here, a debtor could have substantial monies that could be used to pay his or her creditors. Instead of paying the creditors, the debtor would place the monies in whole life insurance policies with cash value. The creditors would be unable to garnish or execute against those monies, and they could remain in the debtor's possession despite the creditor's valid claims.

The public has an interest in ensuring that a debtor satisfies his or her obligations to his or her creditors. The public also has an interest in ensuring that a debtor does not fraudulently transfer his or her assets away from the reach of his or her creditors. Allowing the First District Court of Appeals' decision to stand is contrary to the public's interest.

For these reasons, this court should grant jurisdiction to hear this case and review the erroneous decision of the Court of Appeals.

STATEMENT OF THE CASE AND THE FACTS

Steven Winter ("Winter") owed his creditors several million dollars in 2007 and was in default on his obligations under several promissory notes and credit agreements with Appellant The Huntington National Bank ("Huntington"), among others. Winter, knowing that he was in default with his creditors and faced with the possibility of garnishments and executions, hired attorney Leo Grote to assist him in moving assets out of his and his company's possession. Leo Grote created the "Winter Family Trust" for the purpose of moving Winter's assets out of reach of his creditors. The Winter Family Trust was created in 2007, when Winter was in default with his creditors, including Huntington.

Winter funded the Winter Family Trust with approximately \$1.3 million. After the Winter Family Trust was funded, Winter used the monies in the Winter Family Trust to build a multi-million dollar home in Indian Hill, Ohio. He also used the monies in the trust for day-to-day personal expenses and to operate his mortgage business. Relevant to the instant appeal, Winter used monies in the Winter Family Trust to pay premiums on whole life insurance policies he owned with Prudential Insurance Company ("Prudential"). On November 16, 2007, Leo Grote wrote two checks from the bank account of the Winter Family Trust to Prudential. These checks totaled \$144,000 and were for the premiums of life insurance accounts Winter had with Prudential. These premiums were for 14 policies of insurance owned by Winter.

On December 19, 2008, Prudential was served with a writ of execution issued at the request of Huntington. Counsel for Huntington wrote Prudential on February 16, 2009 and March 19, 2009 indicating that it intended to execute on the current cash value of the life insurance policies and the exception to the execution contained in R.C. § 3911.10 was not applicable. Prudential informed counsel for Huntington that there was cash value in the whole

life insurance accounts owned by Winter. Prudential had placed a hold on the life insurance accounts due to the execution. Winter challenged the execution before a magistrate on March 29, 2009. The magistrate found that Winter had failed to prove that the current cash value of his life insurance policies were exempt from execution or that R.C. § 3911.10 applied. Winter raised objections to the Magistrate's Decision, which were overruled by Judge Ruehlman of the Hamilton County Court of Common Pleas by Order of July 21, 2009.

Winter appealed Judge Ruehlman's decision. The First District Court of Appeals held that Winter had committed fraud on Huntington by transferring monies into the Winter Family Trust and then paying \$144,000 towards premiums on his whole life insurance policies with Prudential. Those policies had a current cash value. Despite this fraudulent conveyance, the Court of Appeals held that it was constrained by the language of R.C. 3911.10 and held that the trial court could not order "Winter to surrender the cash value of his life insurance policies to satisfy the Banks' judgment against him."

The First District Court of Appeals incorrectly interpreted and applied R.C. 3911.10. The Court of Appeals allows a fraudulent conveyance to stand, even though Ohio's Uniform Fraudulent Transfer Act provides expansive remedies to counteract such fraud. Accordingly, Huntington respectfully requests that this Court grant jurisdiction to review the First District Court of Appeals' decision in this matter.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1

This matter is of public and great general interest to all creditors because the First District's decision allows a fraudulent conveyance of funds to be out of a creditor's reach.

R.C. 3911.10 reads:

All contracts of life or endowment insurance or annuities upon the life of any person, or any interest therein, which may hereafter mature and which have been taken out for the benefit of, or made payable by change of beneficiary, transfer, or assignment to, the spouse or children, or any persons dependent upon such person, or an institution or entity described in division (B)(1) of section 3911.09 of the Revised Code, or any creditor, or to a trustee for the benefit of such spouse, children, dependent persons, institution or entity, or creditor, shall be held, together with the proceeds or avails of such contracts, subject to a change of beneficiary if desired, free from all claims of the creditors of such insured person or annuitant. **Subject to the statute of limitations, the amount of any premium upon such contracts, endowments, or annuities, paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the contracts, but the company issuing any such contract is discharged of all liability thereon by the payment of its proceeds in accordance with its terms, unless, before such payment, written notice is given to it by a creditor, specifying the amount of the claim and the premiums which the creditor alleges have been fraudulently paid.**

(emphasis added). Although normally proceeds of life insurance policies are exempt from execution under R.C. 3911.10, this statute does not allow for an exemption where the policies are purchased or funded with monies that should go to a person's creditors. This statute is a logical and effective way to prevent debtors from fraudulently paying for life insurance policies with money that should go to their creditors and then claiming that those policies are exempt from collection by creditors.

However, the Court of Appeals misinterpreted this statute and found that the "proceeds" of Winter's life insurance policies did not include the cash value of the policies and that the trial court erred "by requiring Winter to surrender the cash value of his life insurance policies to satisfy the Banks' judgment against him." The Court of Appeals misinterpreted the holding in *Deal v. Menke*, 1939 Ohio Misc. LEXIS 1021, a court of common pleas opinion from 1939, and

improperly relied on the Sixth Circuit Court of Appeals' opinion in *Doethleff v. Penn Mut., Life Ins. Co.* (6th Cir. 1941), 117 F.2d 582, which is not controlling and distinguishable from the instant case as, unlike here, the court found that the debtor had not paid premiums on his life insurance policies with current cash value in fraud of his creditors.

Essentially, the relevant analysis under R.C. 3911.10 must center on whether the current cash value of Winter's life insurance policies can be considered to be "proceeds" of the policy. If they are proceeds of the policy, then R.C. 3911.10 by its own express terms allows a creditor to obtain an amount of money equal to the premiums paid in fraud of that creditor from the life insurance policies. "Proceeds" is not defined by R.C. 3911.10. Other states have defined "proceeds" in statutes similar to R.C. 3911.10 as including the "cash value of the policy". See N.Y. Ins. Laws § 3212 (in reference to policies of life insurance, "proceeds and avails" includes cash surrender and loan values); see also Ala. Code § 27-14-29(c) ("proceeds and avails" of life insurance includes cash surrender and loan values). Notably, Winter had whole life insurance policies that had a cash value in addition to the insurance on his life. The Court of Appeals essentially held that the cash value of the life insurance policy was not the "proceeds" of the policy and could not be subject to execution unless "Winter had voluntarily cashed in the policies or had taken a loan against the cash value of the policies", but does not explain why such a distinction is important. If Winter had voluntarily cashed in the policies or had taken a loan against the policies, those monies would not be contained in life insurance policies and R.C. 3911.10 would not apply.

The Court of Appeals summarily stated that "the few courts who have considered R.C. 3911.10, or its former version, have held that the proceeds of the contract come into existence when the contract matures – either at the death of the insured or when the insured voluntarily

accepts the cash surrender value of the contract.” However, R.C. 3911.10 contains no such express limitation and the interpretation of the term “proceeds” has not been established as a matter of common law by this Court.

When premiums for a whole life insurance policy are paid in fraud of a creditor, the “proceeds” of a whole life insurance policy under R.C. 3911.10 must include the current cash value of the policy as well as the benefit that comes into existence when the insured dies. The *Deal v. Menke* decision, which was misconstrued by the Court of Appeals, actually found that the term “proceeds” as used in R.C. 3911.10 included cash value of the policies - if it could be shown that the payments on the policies were made in fraud of a creditor. A creditor’s recovery against the cash value is limited to the amount paid in fraud. This interpretation of the term “proceeds” in R.C. 3911.10 comports with justice and fairness to a creditor who could have recovered payment on a debt if the debtor had not fraudulently used those monies to pay premiums on whole life insurance with a cash value. It further comports with the intent of the Ohio legislature in vitiating a premium payment that is fraudulent as to a creditor. Although there may be an interest in ensuring that the beneficiaries of a life insurance policy are protected, this interest is outweighed by the prevention of fraud in Ohio. R.C. 3911.10 recognizes this interest, and allows all non-fraudulent premium payments and benefits to be exempt from execution by a creditor. However, once there is a showing of fraud, a creditor is provided the limited remedy of recovering any monies fraudulently paid as premiums.

To allow the Court of Appeals’ judgment to stand would be inviting debtors to pay ~~premiums on whole life insurance policies with funds that should instead go to their creditors.~~ Debtors facing bankruptcy or long periods of insolvency would intentionally place monies in whole life insurance policies instead of paying their debts to thwart their creditors’ recovery

efforts. Essentially, the First District Court of Appeals' decision has created a safe haven for fraudulent conveyances through its misinterpretation of R.C. 3911.10. This Court should correct that error and find that when a debtor defrauds his or her creditors, and pays premiums toward whole life insurance policies that have current cash values, those cash values are subject to execution under R.C. 3911.10. Fairness requires that a creditor not be defrauded and, instead, a creditor should be able to reach those monies that are available in the current cash value of a debtor's life insurance policies where fraud has been shown. Accordingly, Huntington respectfully requests that this Court accept jurisdiction to construe the language of R.C. 3911.10 so that creditors can execute against the current cash value of whole life insurance policies where premiums for those policies have been paid in fraud of creditors.

Proposition of Law No. 2

This matter is of public and great general interest to all creditors because the First District's decision nullifies the effectiveness of Ohio's Uniform Fraudulent Transfer Act.

Ohio's Uniform Fraudulent Transfer Act is codified in R.C. 1336.01 *et seq.* and provides relief for creditors who have been defrauded by debtors. It allows a creditor to prove certain badges of fraud. *See* R.C. 1336.04. Once those badges are proven and fraud is established, a creditor has remedies which counteract the debtor's fraud. *See* R.C. 1336.07. Specifically, a creditor can obtain an order from a trial court voiding the transfer or obligation to the extent necessary to satisfy the creditor's claim. *See id.* A creditor can also have an injunction against disposition of the fraudulently transferred assets. *See id.* A creditor's rights to recover are expansive under Ohio's Uniform Fraudulent Transfer Act, and the statute specifically allows a court to provide, subject to the applicable principles of equity and in accordance with the Rules of Civil Procedure, "any other relief that the circumstances may require." *See id.*

Notably, the Court of Appeals reviewed Winter's actions against the badges of fraud contained in R.C. 1336.04(B) and found that Winter had committed fraud on his creditors. The evidence showed that R.C. 1336.04(A)(1) was satisfied and the trial court was correct in finding that fraud had occurred. Winter hid assets in the Winter Family Trust which were subject to collection by his creditors. Instead of paying his creditors monies that were owed and that his creditors were actively collecting through civil lawsuits, Winter used the money in the trust to transfer \$144,000 to his life insurance accounts. Winter retained control of the money after it was transferred, as the accounts with Prudential maintained a cash value that was funded by the \$144,000. Based on this, the Court of Appeals found that "there was sufficient evidence to demonstrate that Winter had transferred funds to Prudential to defraud his creditors." However, the Court of Appeals found that it was constrained by the language of R.C. 3911.10 and ignored the expansive remedies available to Huntington under R.C. 1336.07.

The trial court provided the following remedy to Huntington: Prudential was to liquidate Winter's life insurance policies and provide the current cash value to Huntington. The trial court's order allowed the premiums that were paid in fraud of Winter's creditors to be subject to execution. This comported with the letter and the spirit R.C. 1336.07, which provides expansive remedies to a creditor who has been defrauded, including the avoidance of a fraudulent transfer.

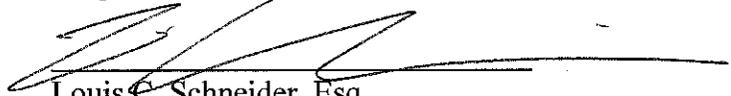
By reversing the trial court's decision and holding that R.C. 3911.10 provided an exemption for the cash value of Winter's whole life insurance policies despite his fraudulent conveyance, the Court of Appeals ignored Ohio's Uniform Fraudulent Transfer Act and the policy embodied therein. Ohio's courts have been given expansive remedies under R.C. 1336.07 to prevent debtors from fraudulently transferring their assets to avoid seizure by their creditors. Accordingly, Huntington respectfully requests that this Court accept jurisdiction so that creditors

can obtain relief under Ohio's Uniform Fraudulent Transfer Act where a debtor has paid premiums on whole life insurance policies in fraud of his or her creditors.

CONCLUSION

For the foregoing reasons, this case involves matters of public and great general interest. Appellant The Huntington National Bank respectfully requests that this Court grant jurisdiction and allow this case to be heard so that the important issues presented herein will be reviewed on the merits.

Respectfully submitted,

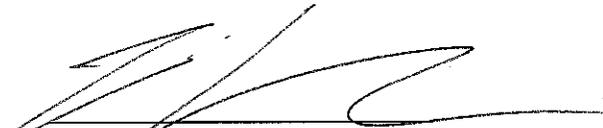


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 22th day of May, 2011, via regular mail upon the following:

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P.O. Box 75069
Ft. Thomas, Kentucky 41075
Counsel for Steven Winter



Louis C. Schneider, Esq.

APPENDIX

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

HUNTINGTON NATIONAL BANK : APPEAL NO. C-090482
and : TRIAL NO. EX-0800603
MERCHANTS BANK & TRUST CO., : *JUDGMENT ENTRY.*
Plaintiffs-Appellees, :
vs. :
STEVEN A. WINTER :
and :
FIVE STAR FINANCIAL :
CORPORATION, :
Defendants-Appellants. :



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This cause was heard upon the appeal, the record, the briefs, and arguments.

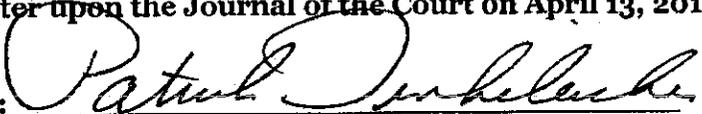
The judgment of the trial court is reversed for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on April 13, 2011 per Order of the Court.

By: 

Presiding Judge

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

HUNTINGTON NATIONAL BANK	:	APPEAL NO. C-090482
	:	TRIAL NO. EX-0800603
and	:	
MERCHANTS BANK & TRUST CO.,	:	<i>DECISION.</i>
Plaintiffs-Appellees,	:	
vs.	:	PRESENTED TO THE CLERK OF COURTS FOR FILING
STEVEN A. WINTER	:	APR 13 2011
and	:	
FIVE STAR FINANCIAL CORPORATION,	:	COURT OF APPEALS
Defendants-Appellants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed

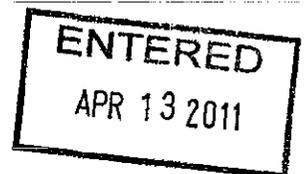
Date of Judgment Entry on Appeal: April 13, 2011

Kohnen & Patton LLP and *Louis C. Schneider*, for Plaintiff-Appellee Huntington National Bank,

Thompson Hine LLP and *Bryce A. Lenox*, for Plaintiff-Appellee Merchants Bank & Trust,

Steven A. Winter, pro se.

Please note: This case has been removed from the accelerated calendar.



HILDEBRANDT, Presiding Judge.

{¶1} Bringing forth four assignments of error, defendants-appellants, Steven Winter and his company, Five Star Financial Corporation, (collectively, "Winter") appeal the trial court's judgment granting Winter's creditors, plaintiffs-appellees Huntington National Bank and Merchants Bank & Trust Co. (collectively, "the Banks"), the right to garnish the cash values of Winter's life insurance policies. For the following reasons, we reverse.

{¶2} In 2007, Winter had defaulted on promissory notes and certain credit obligations owed to the Banks. Thereafter, in October 2007, Winter and his wife, Sarah, retained Leo Grote to form a revocable trust titled "The Winter Family Trust." Grote stated that the trust was funded with \$700,000 from a payoff on a mortgage loan, \$650,000 in cashier's checks made payable to Sarah Winter, which she endorsed over to the trust, and \$150,000 drawn on a line of credit from one of the Banks. Both Grote and Winter admitted in their depositions that the trust was created to protect Winter's money from potential garnishment and execution.

{¶3} In November 2007, Grote, acting as the trustee, paid The Prudential Insurance Company of America ("Prudential") \$144,000 from the trust to cover the yearly premiums of Winter's life insurance policies. Fourteen of the 16 life insurance policies were whole-life insurance policies with a total cash value of approximately \$133,000. The beneficiaries of the life insurance policies were Winter's wife and children. Winter had maintained these policies for many years.

{¶4} In early 2008, the Banks obtained judgments against Winter and attempted to partially satisfy those judgments by serving writs of execution on

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APR 13 2011

OHIO FIRST DISTRICT COURT OF APPEALS

Prudential to garnish the cash value of Winter's life insurance policies. Winter objected to the writs of execution, arguing that R.C. 3911.10, which exempts the proceeds of life insurance policies from claims of creditors, applied. But the Banks argued that R.C. 3911.10 made an exception to its exemption when an insured had paid the insurance premiums to defraud its creditors.

{¶5} Following a hearing on Winter's objections, a magistrate determined that the exemption contained in R.C. 3911.10 was not applicable because Winter had paid his premiums to defraud his creditors, and that the Banks could therefore execute on the cash value of the life insurance policies. The trial court adopted the magistrate's decision. This appeal followed. Because the beneficiaries of the life insurance policies were Winter's wife and children, and because the life insurance policies had not reached maturity, we hold that the exemption to the execution on life insurance policies contained in R.C. 3911.10 was applicable and that the trial court erred by permitting the Banks to execute on Winter's whole-life insurance policies.

{¶6} In the first assignment of error, Winter contends that the trial court erred by permitting the Banks to garnish the cash value of Winter's life insurance policies absent the filing of a motion by the Banks to set aside a fraudulent transfer. We are unpersuaded.

{¶7} Winter, citing Civ.R. 6(D) and Loc.R. 14 of the Hamilton County Court of Common Pleas, maintains that the Banks should have been required to file a motion alleging that the trust funds paid into the policies had been fraudulently transferred to Prudential so that he would have had proper notice that the Banks were going to allege fraud at the exemption hearing. We find this argument



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disingenuous because Winter was the one who had requested the exemption hearing, but had failed to specify on the hearing-request form which property was exempt and why it was exempt. Nevertheless, at the hearing before the magistrate, he specifically stated that the life insurance policies were exempt from garnishment under R.C. 3911.10. R.C. 3911.10 provides that the proceeds of a life insurance policy are exempt from execution except for the amount of the premiums for the policies that were paid to defraud creditors. Surely, Winter knew or should have known when he raised this exemption that the Banks would raise the issue of fraud. Further, Winter never asked for a continuance so that he could present witnesses or evidence demonstrating that he did not pay the premiums fraudulently. Although we are convinced that the Banks were not required to file a separate motion asserting that Winter had paid his premiums to defraud his creditors, we would hold, even if they were required to do so, that Winter was not prejudiced by the absence of a separate motion.¹ Accordingly, the first assignment of error is overruled.

{¶8} In the second assignment of error, Winter maintains that the trial court erred by allowing the cash value of his life insurance policies to be garnished absent evidence that he had made a fraudulent transfer. Essentially, Winter argues that there was insufficient evidence of fraud presented to the trial court. We disagree.

{¶9} R.C. 1336.04(A)(1) provides that “[a] transfer made * * * by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made * * * if the debtor made the transfer * * * [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.” Because actual intent may be

¹ See *Miley v. STS Systems, Inc.*, 153 Ohio App.3d 752, 2003-Ohio-4409, 795 N.E.2d 1254, 126.



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difficult to prove, a creditor may establish a debtor's fraudulent intent when the circumstances demonstrate the badges of fraud set forth in R.C. 1336.04(B).² The creditor need not demonstrate all the statutorily defined badges of fraud; as few as three badges of fraud have been held to constitute evidence of actual fraudulent intent.³

{¶10} The badges of fraud set forth R.C. 1336.04(B) include, but are not limited, to the following:

{¶11} "(1) Whether the transfer or obligation was to an insider;

{¶12} "(2) Whether the debtor retained possession or control of the property transferred after the transfer;

{¶13} "(3) Whether the transfer or obligation was disclosed or concealed;

{¶14} "(4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;

{¶15} "(5) Whether the transfer was of substantially all of the assets of the debtor;

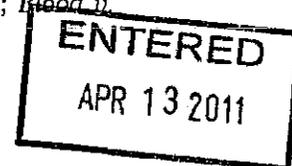
{¶16} "(6) Whether the debtor absconded;

{¶17} "(7) Whether the debtor removed or concealed assets;

{¶18} "(8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

{¶19} "(9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

² *UAP-Columbus JV326132 v. Young*, 10th Dist. No. 09AP-646, 2010-Ohio-485, ¶29; *Blood v. Nofzinger*, 162 Ohio App.3d 545, 2005-Ohio-3859, 834 N.E.2d 358.
³ *UAP-Columbus*, supra, at ¶29.



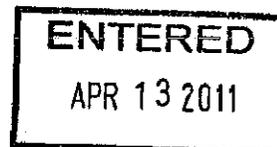
OHIO FIRST DISTRICT COURT OF APPEALS

{¶20} “(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;

{¶21} “(11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.”

{¶22} Here, there is sufficient evidence in the record to demonstrate Winter's fraud. Winter admitted in his deposition that he had created the Winter Family Trust in 2007, at a time when the Banks were already his creditors, and that he used that trust to shelter his assets from his creditors. Grote, Winter's attorney, also testified at his deposition that the trusts were created to get the money “away from the chaotic and disorderly seizures[,] into the trusts where, you know, the money can be more orderly distributed to creditors upon their agreement or upon order of bankruptcy court.” Grote testified that, at the direction of Winter and his wife, he had transferred \$144,000 from the trust to Prudential in November 2007 to pay the premiums on Winter's life insurance policies. Winter retained an interest in that money after it was transferred, as that money was used to pay premiums on whole-life insurance policies that had a significant cash value. Although Winter had claimed that the transfer to Prudential came from his wife's separate funds, it is evident that the money came from the Winter Family Trust, which both Winter and his wife created. Based on the foregoing, we hold that there was sufficient evidence to demonstrate that Winter had transferred funds to Prudential to defraud his creditors. The second assignment of error is overruled.

{¶23} Winter contends, in the third assignment of error, that the trial court erred by ordering him to surrender the cash value of his life insurance policies to the



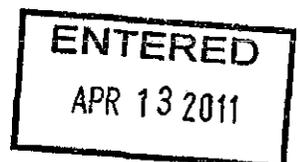
Banks. Citing *Deal v. Menke*,⁴ Winter argues under R.C. 3911.10 that even if he had paid his premiums to Prudential to defraud his creditors, the Banks were still prevented from garnishing the cash value of the policies until the policies had matured, which would only occur upon his death or when he voluntarily accepts the cash surrender value of the policies. We are constrained to agree with Winter.

{¶24} R.C. 3911.10 states in relevant part, "All contracts of life or endowment insurance or annuities upon the life of any person * * * which may hereafter mature and which have been taken out for the benefit of, or made payable by change of beneficiary * * * to the spouse or children * * * for the benefit of such spouse [or] children * * * shall be held, together with the proceeds or avails of such contracts * * * free from all claims of the creditors of such insured person. * * * Subject to the statute of limitations, the amount of any premium upon such contracts * * * paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the contracts."

{¶25} R.C. 3911.10 limits a creditor's recovery of fraudulently paid premiums to the "proceeds" of the life-insurance contract. The few courts who have considered R.C. 3911.10, or its former version, have held that the proceeds of the contract come into existence when the contract matures--either at the death of the insured or when the insured voluntarily accepts the cash surrender value of the contract.

{¶26} In *Menke*, the court interpreted the former version of R.C. 3911.10, which is substantially similar to the current version, and it stated that it was the legislature's intent on "life insurance policies to limit the recovery of premiums paid

⁴ (C.P.1939), 14 O.O. 414.



in fraud of creditors to the funds arising upon the maturity of the contract [and that] this fund may arise by the insured voluntarily accepting the cash surrender value of the policies or upon the death of the insured.”⁵ Further, in *Doethlaff v. Penn Mut. Life Ins. Co.*,⁶ the Sixth Circuit Court of Appeals held that the former version of R.C. 3911.10 did not authorize the court to order a debtor who had filed for bankruptcy and had been accused of paying his premiums in fraud of his creditors to accept the cash surrender value of his life insurance policy so that he could repay his creditors. Instead, the court held that the creditors could only be paid from the proceeds of the policy and that the policy did not have any “proceeds” until it matured, which would occur when the debtor died.⁷

{¶27} Given these cases and the fact that R.C. 3911.10 is an exemption statute that is to be construed in favor of the debtor,⁸ we hold that the trial court erred by ordering Winter to surrender the cash value of his life insurance policies to satisfy the Banks’ judgments against him. If Winter had voluntarily cashed in the policies or had taken a loan against the cash value of the policies, that money would have been subject to execution by the Banks.⁹ But that did not happen here, at least not on the record before us. Accordingly, the third assignment of error is sustained.

{¶28} Based on our resolution of the third assignment of error, Winter’s fourth assignment of error, which challenges the trial court’s ruling that payments made toward the premiums of term-life insurance policies could also be garnished, is moot.

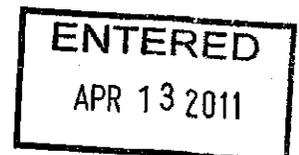
⁵ Id.

⁶ (C.A.6, 1941), 117 F.2d 582.

⁷ Id. at 584.

⁸ Id.

⁹ See *Kuhn v. Wolf* (1938), 59 Ohio App. 15, 16 N.E.2d 1017.



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{¶29} We accordingly reverse the trial court's judgment permitting the Banks to garnish the cash value of Winter's whole-life insurance policies.

Judgment reversed.

SUNDERMANN and FISCHER, JJ., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

