UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	)	Bankr. No. 98-40040
	)	Chapter 7
EHAB A. ANDRAWIS	)	
Soc. Sec. No. 227-11-2955	)	MEMORANDUM OF DECISION RE:
Debtor.	)	OBJECTION TO CLAIMED EXEMPTIONS
	)	

The matter before the Court is the objection to Debtor's claimed exemptions filed by Trustee John S. Lovald and Debtor's response thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the Trustee's objection to Debtor's claimed exemption in a life insurance policy must be sustained.

I.

Ehab A. Andrawis (Debtor) filed a Chapter 7 petition on January 28, 1998. Debtor is a single person and not the head of a family and, therefore, is entitled to personal property exemptions totaling $2,000.00 under S.D.C.L. § 43-45-4.[1] Debtor claimed limited personalty exempt that totaled $222.50. He also claimed exempt a policy with Jackson National Life Insurance valued at $5,000.00.

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[1] Amendments to S.D.C.L. § 43-45-4 in 1998 to redefine the categories of persons who may claim exemptions under the statute and to raise the exemption amounts do not apply in this case.

On March 4, 1998, Trustee Lovald filed an objection to Debtor's claimed exemptions. He argued that Debtor's life insurance policy was not in full force and effect on the petition date and that pre-petition Debtor had sold to his mother for less than fair market value an automobile in which he had equity and that he put the proceeds into the life insurance policy to temporarily shield the funds from creditors.

Debtor responded on April 10, 1998 and stated that the life insurance policy was in "full force and effect" on the petition date. Debtor also supplied value estimates to show that the auto's pre-petition sale price was at fair market value.

An evidentiary hearing was held April 28, 1998. Appearances included Trustee Lovald and Thomas J. Penisten for Debtor. Debtor testified that in September 1997 he had completed all payments on his car and that no liens on it existed. Debtor stated that he thereafter sold the auto to his mother to garner funds to purchase the life insurance policy. He stated that he determined the auto's value by getting two wholesale estimates and averaging them. Debtor also stated that he now pays his mother $100.00 per month to use that car or one of his parents' other cars and that his mother pays the insurance on the car he sold her. He also testified to some problems that the auto has and some damage it had incurred. He stated it had a relatively new motor when his mother purchased it.

Debtor stated the life insurance policy he claimed exempt was in effect on the petition date.[2] Debtor acknowledged that under the life insurance policy, he could cancel it within one year of purchase and receive the entire cost back. Debtor stated he intends to cancel it and get the $5,000.00 back. Debtor stated he did not now intend to repurchase the auto because it was having additional mechanical problems. He said his parents planned to sell it. Debtor said he openly transferred his car equity into an exemptible asset, the life insurance policy, and that he had no fraudulent intent in doing so.

II.

The property a debtor schedules as exempt is deemed exempt unless a timely objection is filed. 11 U.S.C. § 522(l). Objections must be filed within thirty days after the § 341 meeting of creditors or the filing of any amendment to the list. Bankr. R. 4003(b); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 643-44 (1992). The objector bears the burden of proving that an exemption has not been properly claimed. Bankr. R. 4003(c). The objector must produce sufficient evidence, by a preponderance of the evidence, to overcome the presumption that a claimed exemption is valid. *Gagne v. Berquist*, 179 B.R. 884, 885 (Bankr. D. Minn. 1994); Voiland v. Gillissie (In re Gillissie), 215 B.R. 370, 374 (Bankr. N. D. Ill. 1997); *In re Hoppes*, 202 B.R. 595, 597-98 (Bankr. N.D. Ohio 1996).

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[2] Neither party offered the policy into evidence.

A debtor may maximize his exemptions through pre-bankruptcy planning but he may not do so in an effort to defraud creditors. Whether a debtor acted with fraudulent intent in converting nonexempt property into exempt property is a question of fact. *Abbott Bank-Hemingford v. Armstrong (In re Armstrong)*, 931 F.2d 1233, 1237 (8th Cir. 1991). Fraudulent intent may be manifested by extrinsic evidence. *Federal Savings & Loan Insurance Corp. v. Holt (In re Holt)*, 894 F.2d 1005, 1008 (8th Cir. 1990)(cites therein).

> '[E]xtrinsic' must mean some evidence other than the conversion of the property into exempt form itself, the debtor's insolvency, and the debtor's purpose to put the property beyond the reach of creditors.

Hanson v. First National Bank, 848 F.2d 866, 870 (8th Cir. 1988)(Arnold, J., concurring)(relying on *Forsberg v. Security State Bank*, 15 F.2d 499 (8th Cir. 1926)). Factors to consider, when the exempt asset purchased is life insurance or related benefits, include: the amount of existing coverage, *Holt,* 894 F.2d at 1008; whether the amount of additional coverage purchased was reasonable, *Id.*; whether funds placed into the additional coverage were borrowed or whether property was purchased on credit and then sold with the proceeds used for exempt property, *Hanson*, 848 F.2d at 869; whether the debtor materially misled or deceived creditors, *Armstrong*, 931 F.2d at 1237; whether all proceeds from the sale of non exempt property are accounted for, *Hanson*, 848 F.2d at 869; and whether any sale of non exempt property was at fair market value.

Id.

Dealings with family members alone do not constitute extrinsic evidence of fraud. *Hanson*, 848 F.2d at 869. However, it is a badge of fraud. Kelly v. Armstrong, 141 F.3d 799, 802 (8th Cir. 1998).

III.

The sale price Debtor obtained for his vehicle was reasonable. Although it had a newer engine, there had been body damage, which the Blue Book's value would not reflect (the Blue Book value was for a fully reconditioned auto in excellent condition). Also, there was no direct evidence on whether the options listed on the Blue Book estimate existed (standard or optional) in the auto Debtor sold.

Debtor's use of the auto sale proceeds, however, was fraudulent as to creditors. Several factors or badges of fraud combine to establish that conclusion. Foremost, Debtor had no present intent to purchase and retain the life insurance policy when he transferred the $5,000.00 to the life insurance company. He only intended to use the policy as a device to shelter his equity in the vehicle when he filed bankruptcy. Second, Debtor made the transfer in anticipation of his bankruptcy case. Third, the sale was to a family member. Fourth, Debtor retained free use of the asset he sold to acquire the funds. All these factors or badges of fraud converge to establish Debtor's fraudulent intent.

Kelly, 141 F.3d at 802. That Debtor may have transferred the auto equity into a life insurance policy on the advice of counsel and that he disclosed the transaction on his schedule does not change the fraudulent nature and purpose of the transaction. Had Debtor had some other purpose for purchasing the life insurance or had he intended to retain it, the result may have been different.

Trustee Lovald's objection to the value of the car sold will be denied. Trustee Lovald's objection to Debtor's exemption claim in the life insurance policy will be sustained. Debtor must restore to the bankruptcy estate $5,000.00[3] less any unused exemptions under § 43-45-4.

An appropriate order shall be entered.

Dated this 29 day of July, 1998.

BY THE COURT:

N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: Diane Dickelson
Deputy Clerk

(SEAL)

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was mailed, hand delivered or faxed this date to those creditors and other parties in interest identified on the attached service list.
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota
By: DM
Date: 7-30-98

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
JUL 30 1998
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

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[3] Trustee Lovald's objections do not specifically address Debtor's use of the balance of the car sale proceeds nor was there any testimony on what happened to the remaining $1,500.00. Accordingly, the Court is only ordering that the $5,000.00 that went into the life insurance policy is non exempt property of the bankruptcy estate.

Case: 98-40040 Form id: 122 Ntc Date: 07/30/98 Off: 4 Page : 1
Total notices mailed: 4

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Aty Penisten, Thomas J. PO Box 85103, Sioux Falls, SD 57101
Trustee Lovald, John S. PO Box 66, Pierre, SD 57501
Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321