

HOUSE BILL NO. 295

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE ANDERSON

Introduced: 5/2/05

Referred: Labor and Commerce, Judiciary

A BILL

FOR AN ACT ENTITLED

1 "An Act adopting the Uniform Fraudulent Transfer Act and relating to fraudulent
2 transfers of property."

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 * **Section 1.** AS 34.40.050 is amended to read:

5 **Sec. 34.40.050. Conveyance in exercise of power to revoke and reconvey.**

6 **Unless the conveyance is a fraudulent transfer subject to AS 34.40.220 -**

7 **34.40.390, where** [WHERE] a power to revoke a conveyance of land, or the rents and
8 profits from it, and to reconvey the land or the rents and profits is given to a person
9 other than the grantor in the conveyance, and the person subsequently conveys the
10 land, rents, or profits to a purchaser for a valuable consideration, the subsequent
11 conveyance is valid in the same manner and to the same extent as if the power of
12 revocation were recited in it and the intent to revoke the former conveyance expressly
13 declared.

14 * **Sec. 2.** AS 34.40.060 is amended to read:

1 **Sec. 34.40.060. Conveyance before accrual of right to execute power of**
 2 **revocation. Unless the conveyance is a fraudulent transfer subject to**
 3 **AS 34.40.220 - 34.40.390, if** [IF] a conveyance to a purchaser under either
 4 AS 34.40.040 or 34.40.050 is made before the person making the conveyance is
 5 entitled to execute the power of revocation, it nevertheless is valid from the time the
 6 power of revocation actually vests in the person, in the same manner and to the same
 7 extent as if then made.

8 * **Sec. 3.** AS 34.40.080 is amended to read:

9 **Sec. 34.40.080. Invalidity against heirs, successors, representatives, or**
 10 **assigns. Notwithstanding AS 34.40.220 - 34.40.390, a** [A] conveyance, charge,
 11 instrument, or proceeding declared by law to be void as against the creditors,
 12 purchasers, or mortgagees is equally void as against the heirs, successors, personal
 13 representatives, or assigns of the creditors, purchasers, or mortgagees.

14 * **Sec. 4.** AS 34.40.110(e) is amended to read:

15 (e) If a trust contains a transfer restriction allowed under (a) of this section, the
 16 transfer restriction prevents a creditor existing when the trust is created, a person who
 17 subsequently becomes a creditor, or another person from asserting any cause of action
 18 or claim for relief against a trustee of the trust or against others involved in the
 19 preparation or funding of the trust for conspiracy to commit a fraudulent conveyance,
 20 a fraudulent transfer under AS 34.40.220 - 34.40.390, aiding and abetting a
 21 fraudulent conveyance or a fraudulent transfer under AS 34.40.220 - 34.40.390, or
 22 participation in the trust transaction. Preparation or funding of the trust includes the
 23 preparation and funding of a limited partnership or a limited liability company if
 24 interests in the limited partnership or limited liability company are subsequently
 25 transferred to the trust. The creditor and other person prevented from asserting a cause
 26 of action or claim for relief are limited to recourse against the trust assets and the
 27 settlor to the extent allowed under AS 34.40.220 - 34.40.390 [AS 34.40.010].

28 * **Sec. 5.** AS 34.40 is amended by adding new sections to read:

29 **Article 2. Uniform Fraudulent Transfer Act.**

30 **Sec. 34.40.220. Insolvency.** (a) A debtor is insolvent if the sum of the
 31 debtor's debts is greater, at a fair valuation, than all of the debtor's assets.

1 (b) A debtor who is generally not paying the debtor's debts as they become due
2 is presumed to be insolvent.

3 (c) A partnership is insolvent under (a) of this section if the sum of the
4 partnership's debts is greater than the aggregate of all of the partnership's assets, at a
5 fair valuation, and the sum of the excess of the value of each general partner's
6 nonpartnership assets over the partner's nonpartnership debts.

7 (d) Assets under this section do not include property that has been transferred,
8 concealed, or removed with intent to hinder, delay, or defraud creditors or that has
9 been transferred in a manner making the transfer voidable under AS 34.40.220 -
10 34.40.390.

11 (e) Debts under this section do not include an obligation to the extent the
12 obligation is secured by a valid lien on property of the debtor not included as an asset.

13 **Sec. 34.40.230. Value.** (a) Value is given for a transfer or an obligation if, in
14 exchange for the transfer or obligation, property is transferred or an antecedent debt is
15 secured or satisfied, but value does not include an unperformed promise that is not
16 made in the ordinary course of the promisor's business and that is a promise to furnish
17 support to the debtor or another person.

18 (b) For the purposes of AS 34.40.240(a)(2) and 34.40.250, a person gives a
19 reasonably equivalent value if the person acquires an interest of the debtor in an asset
20 under a regularly conducted, noncollusive foreclosure sale or execution of a power of
21 sale for the acquisition or disposition of the interest of the debtor on default under a
22 mortgage, deed of trust, or security agreement.

23 (c) A transfer is made for present value if the exchange between the debtor and
24 the transferee is intended by them to be contemporaneous and is, in fact, substantially
25 contemporaneous.

26 **Sec. 34.40.240. Transfers fraudulent as to present and future creditors.**

27 (a) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor,
28 whether the creditor's claim arose before or after the transfer was made or the
29 obligation was incurred, if the debtor made the transfer or incurred the obligation

30 (1) with the actual intent to hinder, delay, or defraud a creditor of the
31 debtor; or

1 (2) without receiving a reasonably equivalent value in exchange for the
2 transfer or obligation, and the debtor

3 (A) was engaged or was about to engage in a business or a
4 transaction for which the remaining assets of the debtor were unreasonably
5 small in relation to the business or transaction; or

6 (B) intended to incur, or believed or reasonably should have
7 believed that the debtor would incur, debts beyond the debtor's ability to pay as
8 they became due.

9 (b) In determining actual intent under (a)(1) of this section, consideration may
10 be given, among other factors, to whether

11 (1) the transfer or obligation was to an insider;

12 (2) the debtor retained, after the transfer, possession or control of the
13 property transferred;

14 (3) the transfer or obligation was disclosed or concealed;

15 (4) before the transfer was made or the obligation was incurred, the
16 debtor had been sued or threatened with suit;

17 (5) the transfer was of substantially all the debtor's assets;

18 (6) the debtor absconded;

19 (7) the debtor removed or concealed assets;

20 (8) the value of the consideration received by the debtor was
21 reasonably equivalent to the value of the asset transferred or the amount of the
22 obligation incurred;

23 (9) the debtor was insolvent or became insolvent shortly after the
24 transfer was made or the obligation was incurred;

25 (10) the transfer occurred shortly before or shortly after a substantial
26 debt was incurred; and

27 (11) the debtor transferred the essential assets of the business to a
28 lienor who transferred the assets to an insider of the debtor.

29 **Sec. 34.40.250. Transfers fraudulent as to present creditors.** (a) A transfer
30 made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim
31 arose before the transfer was made or the obligation was incurred if the debtor made

1 the transfer or incurred the obligation without receiving a reasonably equivalent value
 2 in exchange for the transfer or obligation and the debtor was insolvent at that time or
 3 became insolvent as a result of the transfer or obligation.

4 (b) In addition to the situation when a transfer is fraudulent under (a) of this
 5 section, a transfer made by a debtor is fraudulent as to a creditor whose claim arose
 6 before the transfer was made if the transfer was made to an insider for an antecedent
 7 debt, the debtor was insolvent at that time, and the insider had reasonable cause to
 8 believe that the debtor was insolvent.

9 **Sec. 34.40.260. When transfer is made or obligation is incurred.** For the
 10 purposes of AS 34.40.220 - 34.40.390,

11 (1) a transfer is made

12 (A) with respect to an asset that is real property other than a
 13 fixture, but including the interest of a seller or purchaser under a contract for
 14 the sale of the asset, when the transfer is so far perfected that a good faith
 15 purchaser of the asset from the debtor against whom applicable law permits the
 16 transfer to be perfected cannot acquire an interest in the asset that is superior to
 17 the interest of the transferee; and

18 (B) with respect to an asset that is not real property or that is a
 19 fixture, when the transfer is so far perfected that a creditor on a simple contract
 20 cannot acquire a judicial lien other than under AS 34.40.220 - 34.40.390 that is
 21 superior to the interest of the transferee;

22 (2) if applicable law permits the transfer to be perfected as provided in
 23 (1) of this section and the transfer is not perfected as provided in (1) of this section
 24 before the commencement of an action for relief under AS 34.40.220 - 34.40.390, the
 25 transfer is considered made immediately before the commencement of the action;

26 (3) if applicable law does not permit the transfer to be perfected as
 27 provided in (1) of this section, the transfer is made when it becomes effective between
 28 the debtor and the transferee;

29 (4) a transfer is not made until the debtor has acquired rights in the
 30 asset transferred;

31 (5) an obligation is incurred when

1 (A) the obligation, if oral, becomes effective between the
2 parties; or

3 (B) the writing executed by the obligor, if the obligation is
4 evidenced by a writing, is delivered to or for the benefit of the obligee.

5 **Sec. 34.40.270. Remedies of creditors.** (a) In an action for relief against a
6 transfer or an obligation under AS 34.40.220 - 34.40.390, a creditor, subject to the
7 limitations in AS 34.40.280, may obtain

8 (1) an avoidance of the transfer or obligation to the extent necessary to
9 satisfy the creditor's claim;

10 (2) an attachment or other provisional remedy against the asset
11 transferred or other property of the transferee as allowed under AS 09.40 or other laws
12 of this state;

13 (3) subject to applicable principles of equity and under applicable court
14 rules,

15 (A) an injunction against further disposition by the debtor or a
16 transferee, or both, of the asset transferred or of other property;

17 (B) appointment of a receiver to take charge of the asset
18 transferred or of other property of the transferee; or

19 (C) other relief the circumstances may require.

20 (b) If a creditor has obtained a judgment on a claim against the debtor, the
21 creditor, if ordered by the court, may levy execution on the asset transferred or its
22 proceeds.

23 **Sec. 34.40.280. Defenses, liability, and protection of transferee.** (a) A
24 transfer or an obligation is not voidable under AS 34.40.240(a)(1) against a person
25 who took in good faith and for a reasonably equivalent value or against a subsequent
26 transferee or obligee.

27 (b) Except as otherwise provided in this section, to the extent a transfer is
28 voidable in an action by a creditor under AS 34.40.270(a)(1), the creditor may recover
29 judgment for the value of the asset transferred, as adjusted under (c) of this section, or
30 the amount necessary to satisfy the creditor's claim, whichever is less. The judgment
31 may be entered against

1 (1) the first transferee of the asset or the person for whose benefit the
2 transfer was made; or

3 (2) a subsequent transferee other than a good faith transferee or obligee
4 who took for value or from a subsequent transferee or obligee.

5 (c) If the judgment under (b) of this section is based on the value of the asset
6 transferred, the judgment must be for an amount equal to the value of the asset at the
7 time of the transfer, subject to adjustment as the equities may require.

8 (d) Notwithstanding voidability of a transfer or an obligation under
9 AS 34.40.220 - 34.40.390, a good faith transferee or obligee is entitled, to the extent of
10 the value given the debtor for the transfer or obligation, to

11 (1) a lien on or a right to retain an interest in the asset transferred;

12 (2) enforcement of any obligation incurred; or

13 (3) a reduction in the amount of the liability on the judgment.

14 (e) A transfer is not voidable under AS 34.40.240(a)(2) or 34.40.250 if the
15 transfer results from

16 (1) termination of a lease on default by the debtor when the
17 termination is made under the lease and applicable law; or

18 (2) enforcement of a security interest under AS 45.29.

19 (f) A transfer is not voidable under AS 34.40.250(b)

20 (1) to the extent the insider gave new value to or for the benefit of the
21 debtor after the transfer was made, unless the new value was secured by a valid lien;

22 (2) if made in the ordinary course of business or financial affairs of the
23 debtor and the insider; or

24 (3) if made under a good faith effort to rehabilitate the debtor and the
25 transfer secured present value given for that purpose as well as an antecedent debt of
26 the debtor.

27 **Sec. 34.40.290. Supplementary provisions.** Unless displaced by the
28 provisions of AS 34.40.220 - 34.40.390, principles of law and equity, including
29 commercial law and the law relating to principal and agent, estoppel, laches, fraud,
30 misrepresentation, duress, coercion, mistake, insolvency, or other validating or
31 invalidating cause, supplement its provisions.

1 **Sec. 34.40.300. Uniformity of application and construction.** AS 34.40.220
 2 - 34.40.390 shall be applied and construed to carry out its general purpose to make
 3 uniform the law with respect to the subject of AS 34.40.220 - 34.40.390 among states
 4 enacting it.

5 **Sec. 34.40.390. Definitions.** In this chapter,

6 (1) "affiliate" means

7 (A) a person who directly or indirectly owns, controls, or holds
 8 with power to vote, 20 percent or more of the outstanding voting securities of
 9 the debtor, other than a person who holds the securities,

10 (i) as a fiduciary or agent without sole discretionary
 11 power to vote the securities; or

12 (ii) solely to secure a debt, if the person has not
 13 exercised the power to vote;

14 (B) a corporation if 20 percent or more of the corporation's
 15 outstanding voting securities are directly or indirectly owned, controlled, or
 16 held with power to vote, by the debtor or a person who directly or indirectly
 17 owns, controls, or holds with power to vote, 20 percent or more of the
 18 outstanding voting securities of the debtor, other than a person who holds the
 19 securities,

20 (i) as a fiduciary or agent without sole power to vote the
 21 securities; or

22 (ii) solely to secure a debt, if the person has not in fact
 23 exercised the power to vote;

24 (C) a person whose business is operated by the debtor under a
 25 lease or other agreement, or a person substantially all of whose assets are
 26 controlled by the debtor; or

27 (D) a person who operates the debtor's business under a lease
 28 or other agreement or controls substantially all of the debtor's assets;

29 (2) "asset" means property of a debtor; in this paragraph, "property"
 30 does not include

31 (A) property to the extent it is encumbered by a valid lien;

1 (B) property to the extent it is generally exempt under
2 nonbankruptcy law; or

3 (C) an interest in property held in tenancy by the entireties to
4 the extent it is not subject to process by a creditor holding a claim against only
5 one tenant;

6 (3) "claim" means a right to payment, whether or not the right is
7 reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured,
8 disputed, undisputed, legal, equitable, secured, or unsecured;

9 (4) "creditor" means a person who has a claim;

10 (5) "debt" means liability on a claim;

11 (6) "debtor" means a person who is liable on a claim;

12 (7) "insider" includes

13 (A) if the debtor is an individual,

14 (i) a relative of the debtor or of a general partner of the
15 debtor;

16 (ii) a partnership in which the debtor is a general
17 partner;

18 (iii) a general partner in a partnership described in (ii)
19 of this subparagraph; or

20 (iv) a corporation of which the debtor is a director,
21 officer, or person in control;

22 (B) if the debtor is a corporation,

23 (i) a director of the debtor;

24 (ii) an officer of the debtor;

25 (iii) a person in control of the debtor;

26 (iv) a partnership in which the debtor is a general
27 partner;

28 (v) a general partner in a partnership described in (iv) of
29 this subparagraph; or

30 (vi) a relative of a general partner, director, officer, or
31 person in control of the debtor;

- 1 (C) if the debtor is a partnership,
- 2 (i) a general partner in the debtor;
- 3 (ii) a relative of a general partner in, or a general partner
- 4 of, or a person in control of the debtor;
- 5 (iii) another partnership in which the debtor is a general
- 6 partner;
- 7 (iv) a general partner in a partnership described in (iii)
- 8 of this subparagraph; or
- 9 (v) a person in control of the debtor;
- 10 (D) an affiliate, or an insider of an affiliate as if the affiliate
- 11 were the debtor; or
- 12 (E) a managing agent of the debtor;
- 13 (8) "lien" means a charge against or an interest in property to secure
- 14 payment of a debt or performance of an obligation; in this paragraph, "charge against
- 15 or interest in" includes a security interest created by agreement, a judicial lien obtained
- 16 by legal or equitable process or proceedings, a common-law lien, or a statutory lien;
- 17 (9) "person" has the meaning given in AS 01.10.060, and also includes
- 18 a government or governmental subdivision or agency;
- 19 (10) "property" means anything that may be the subject of ownership;
- 20 (11) "relative" means
- 21 (A) an individual related by consanguinity within the third
- 22 degree as determined by the common law;
- 23 (B) a spouse, or an individual related to a spouse within the
- 24 third degree as determined by the common law; and
- 25 (C) an individual in an adoptive relationship within the third
- 26 degree;
- 27 (12) "transfer" means every mode, direct or indirect, absolute or
- 28 conditional, voluntary or involuntary, of disposing of or parting with an asset or an
- 29 interest in an asset; in this paragraph, "mode" includes payment of money, and release,
- 30 lease, or creation of a lien or other encumbrance;
- 31 (13) "valid lien" means a lien that is effective against the holder of a

1 judicial lien subsequently obtained by legal or equitable process or proceedings.

2 **Sec. 34.40.395. Short title.** AS 34.40.220 - 34.40.390 may be cited as the
3 Uniform Fraudulent Transfer Act.

4 * **Sec. 6.** AS 34.40.010, 34.40.020, 34.40.030, and 34.40.100 are repealed.

5 * **Sec. 7.** The uncodified law of the State of Alaska is amended by adding a new section to
6 read:

7 **TRANSITION PROVISION.** This Act does not apply to a cause of action that arises
8 under AS 34.40.010, 34.40.020, 34.40.030, or 34.40.100, repealed by sec. 6 of this Act, or
9 AS 34.40.050, 34.40.060, 34.40.080, or 34.40.110(e), as amended by secs. 1 - 4 of this Act,
10 before the effective date of this Act.