

Fraudulent Transfers – Questions and Answers

Question 1: What is a fraudulent transfer?

Answer: Generally, a fraudulent transfer is a transfer for less than fair market value of assets out of your name or beyond the reach of creditors at a time when you knew, or reasonably should have known, that a liability or a debt exceeding your financial ability to pay it would arise. An obligation to a person other than your creditor may constitute a fraudulent transfer, e.g. you incur a debt to your brother so that you don't have the funds to pay an unrelated creditor.

Question 2: What is the creditor's remedy for a fraudulent transfer?

Answer: The creditor may ask the court hearing the case to order the recipient of the gift to return or pay to the creditor the property or value of the property to the extent necessary to pay the debt. The court may order any other relief that is appropriate under the circumstances.

Question 3: How does a creditor prove fraudulent intent?

Answer: The court will consider a number of factors including to whom you transferred the property, the percentage of your total assets transferred, how much control you retain over the transferred property, the relationship in time between the occurrence of the events underlying the obligation and the transfer, and others.

Question 4: When is a transfer made?

Answer: A transfer of real property is made when the deed is recorded. A transfer of personal property is made when you relinquish control over the property or legally transfer title of the property.

Question 5: When is an obligation incurred?

Answer: An oral obligation is incurred when it becomes effective between the parties. A written obligation is incurred when the writing executed by the obligor is delivered to or for the benefit of the obligee.

Question 6: When does a liability arise?

Answer: A liability arises when the events that gave rise to the liability have occurred. For example, liability for damages resulting from a car accident arises at the time of the accident. Liability for medical malpractice arises at the time the doctor leaves the sponge in the patient. Legal malpractice liability arises at the time the lawyer fails to file the complaint within the statute of limitations.

Question 7: How much time does the creditor have to ask the court to void a fraudulent transfer?

Answer: Depending on the circumstances, the creditor may have up to four years to ask the court to set aside the transfer or void the obligation. The four-year time period begins at the time you make the transfer or incur the obligation. However, if the creditor is unaware of the transfer and does not discover it until after the four-year period elapses, the creditor has one year from the time he discovers the transfer or obligation.

Question 8: I just lost a court case and have a substantial judgment against me. My brother and I own an investment property. He wants to buy me out for less than fair market value. Could this be considered a fraudulent transfer?

Answer: Yes, The value of the fraudulent transfer would be the difference between the amount your brother pays you and the fair market value of your interest. If your brother pays you fair market value, the court would not consider the transfer fraudulent.

Question 9: I am about to invest my time and money in a new business. The potential reward is huge, but I will have to incur substantial debt, and the lenders want me to sign the promissory notes personally. I want to transfer my assets so that my lenders can't get at them. Would a transfer now be fraudulent?

Answer: Yes, unless you keep sufficient assets available to pay the potential debt.

Question 10: I have no existing liability, but I have considerable risk in my profession. I am insured, but I want to put my \$750,000.00 brokerage account into a protected asset. May I do this?

Answer: Probably. Prudent asset-protection planning in advance of unexpected liabilities should not be considered a fraudulent transfer.

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