



Title Fraud: How it Can Happen and What You Can Do To Protect Yourself

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The advent of electronic registration of title deeds and mortgages has left the land registration system virtually unrecognizable to most older Ontarians. E-registration has accentuated some dangers relating to title fraud that have always been present but were less widely exploited. An older adult familiar with traditional deeds and mortgages could easily fail to recognize the new form of title documents, if asked to sign one. This article sets out the problem of title fraud, gives examples of cases ACE has seen, and describes remedies and prevention strategies to avoid becoming a victim.

TITLE FRAUD: WHY NOW?

Title fraud is currently a very serious problem in Ontario. The Law Society of Upper Canada, which is the self-governing agency that regulates lawyers in Ontario, has reported that by 2001 annual losses on fraudulent mortgages alone were more than \$300 million in Canada and upwards of \$5 billion in the U.S., and rising. The Law Society has identified title fraud as a "hot topic", and has published special resources for lawyers to do their part in fighting title fraud in Ontario. However, the root causes of title fraud, and successful strategies to combat it, do not begin and end with the legal profession.

A wide range of factors that involve many people in different walks of life contribute to the opportunity for title fraud. In its 2005 *Report to Convocation*, the Law Society described four factors that contribute to mortgage fraud:

- **De-personalized mortgage lending:** The process of buying a home and obtaining mortgage financing has become increasingly depersonalized. A new homeowner can now apply for a mortgage on-line or by telephone, sign documents sent by courier, and arrange mortgage financing without ever having to meet anyone in person.
- **Easier access to vast amounts of real property information on-line:** Electronic land registration, combined with electronically available real-property assessment information, gives computerized access to nearly all the information someone would need to initiate a title fraud.
- **Increased competition among mortgage lenders:** The Canadian Institute of mortgage Brokers and Lenders has reported that consumers have many more

choices about where to obtain mortgage financing, and that “the lending community is becoming larger and much more aggressive about pursuing clients.”

- **Increased competitive pressure to close a real estate deal quickly:** In some transactions, “traditional safeguards, such as hiring a lawyer early in the process, are seen as a hindrance to the speed and cost effectiveness of closing a deal and are being bypassed.”

Some other intergenerational trends also contribute to title fraud. Older home-owning adults tend to live in very valuable homes that are most often mortgage-free. In some cases, friends, neighbours and family members with an expectation of inheritance are anxious to obtain an immediate inheritance, and in extreme cases are willing to commit title fraud to do so. Perpetrators of title fraud who were not previously connected to the older adult, attracted by the high equity value of an older person’s home, sometimes prey upon the failing mental capacity of older adults to induce them to sign legal documents they do not fully understand. Community-dwelling older adults are often very house-rich and cash-poor, which invites the burglary of title and equity-value of their homes.

HOW DOES TITLE FRAUD HAPPEN?

There are many types of title fraud that do not have any pronounced effect on older adults. These forms of fraud usually involve a home-owner willingly selling a home at fair market value to a stranger who somehow inflates its value to fraudulently obtain excessive mortgage proceeds. The vendor home-owner would have no part in the fraud, and is not usually injured by it.

Although spectacular and newsworthy, these value-inflation frauds are not normally a matter of concern to older adults. However, there are a number of increasingly well-known frauds that are prominent in victimizing older adults.

Impersonated and Forged Transfers and Mortgages

Long before the electronic registration of title documents, forged title deeds and mortgages became a problem for real estate lawyers. Most lawyers have never been in the practice of routinely sending title documents out to clients to sign and return by courier, without an in-person meeting, but on rare occasions that did occur. Until 1985, when a signed witness and affidavits of age and marital status and of execution were required, there was much less opportunity to offer a forged document. However, in the 1990s a few spectacular cases of the registration of forged title documents captured the attention of the legal profession, and led to an increased vigilance over the authenticity of title documents.

Historically, most real estate lawyers did not take the steps they do now to ensure that the person actually signing a title document is the authentic titleholder of the property. It was unusual to inspect and photocopy personal identification such as drivers’ licences

and other documents that mortgage lenders now invariably require. Today, to sign a title document, a homeowner should expect to produce at least two pieces of identification, including one piece of photo ID, that would ordinarily be photocopied and kept on file to prove the authenticity of signed documents.

Despite this heightened sense of vigilance over the authenticity of title documents, instances of fraud by impersonation still occur. In some reported cases, although a very small number, the impersonation might be facilitated by the naïve co-operation of a lawyer who is duped into exercising a lowered level of diligence in real estate transactions. In other cases, a sophisticated plan is made to “invent” a fictitious purchaser of real estate from someone impersonating the registered owner of the property. In these cases, the impostor “sells” the property at market value to the fictitious purchaser, who in turn finances it with a new mortgage. Once the deal is closed, the impostor vendor, the fictitious purchaser and the mortgage money used to finance the transaction all vanish at once, leaving only a very real mortgage debt against the home. The true owner of the home would only discover the fraud later, sometimes at the point of eviction for non-payment of the fraudulent mortgage debt. This type of fraud was widely reported in the 2006 Ontario Court of Appeal case of *Lawrence v. Maple Trust*, which prompted a change in the law.

While forgery and impersonation can happen to anyone of any age, older adults face other pressures that make them more vulnerable to this type of fraud:

- **Absence of photo ID:** Many older adults, having chosen not to drive, no longer carry an Ontario drivers’ licence, which is the most common form of photo ID. The absence of a drivers’ licence and other photo ID can sometimes be “explained away” more easily by someone posing as an older-adult home-owner. However, with due diligence a solicitor would normally be expected to adequately verify identity in such cases.
- **Genuine confusion over a name:** The name that appears on title might not be the same name that appears on a person’s photo ID. Older titles that pre-date the 1985 land registration reform did not record the date of birth of the title-holder, with the effect that persons of different generations with similar names may more easily impersonate each other. Family members with identical or similar names can present an easy opportunity to impersonate each other.
- **Use of Forged Powers of Attorney:** Another circumstance that ACE sees periodically is the use of a forged power of attorney to complete title transactions. In one recent case, our elderly client gave an authentic power of attorney to her two adult sons, who could only act jointly. Without her knowledge, someone forged a new power of attorney in her name to one of her sons, as her sole attorney for property. The son named in the forged power of attorney then used this document to personally sign, as her attorney for property, a transfer of title to himself and two new mortgages on our client’s home without her knowledge or consent. When our client later discovered that she no longer held title to her own home, the police were

involved and verified that power of attorney document had been forged. While the matter is now before the courts, and the outlook is good that our client will recover title to her home and be compensated for most if not all of her losses, she did face the very real threat of eviction for a default in payment of the fraudulent mortgage transactions that were outside her knowledge. One can only imagine the distress of an octogenarian served with a Sheriff's notice to vacate a home she has owned and occupied for more than forty years, not knowing that she had been defrauded.

The use of forged powers of attorney is a very well-known occurrence. In fact, this type of fraud is specifically addressed in remedial title-fraud legislation enacted by the Government of Ontario in the fall of 2006. While remedies for the fraudulent use of forged powers of attorney are clear, the remedies for the fraudulent use of authentically-signed powers of attorney are less so. The definitions of "fraud" in remedial title fraud legislation do not include the fact situation where a power of attorney is authentically given, but fraudulently used by the named attorney for property to steal the title to real-property or the proceeds of a fraudulent mortgage from a homeowner. This underlines the message that homeowners of all ages should always be vigilant not to give out powers of attorney that are not necessary or that are ill-advised.

Deception as to the Nature and Character of Documents

Perhaps the most common and most difficult of title fraud cases occur when an older adult is deceived into signing a document not fully understood, and without independent legal advice. Someone who last dealt with real estate when s/he purchased a home thirty years ago might not recognize the new landmarks of real-property registration in Ontario. If asked to sign a deed or mortgage with red margins and a sworn affidavit of age and marital status (landmarks of the traditional system), the older-adult homeowner would likely recognize the nature of the transaction despite any misrepresentation from a trusted friend or family member. However, without the familiar landmarks, older-adults are sometimes lost in a new domain.

Many clients come to ACE having been told fantastic stories about how necessary it is to sign some kind of document to do something that is essential to help themselves or their loved one, but that will have absolutely no effect on the legal title to their home. Sometimes, it seems that the older adult would like to operate in a state of suspended disbelief, preferring if at all possible to trust the person so loved in their life, unless contradicted with clear and convincing evidence of falsehoods. Too often, that clear and convincing evidence does not come in the form of independent legal advice, and is not apparent from what the person is asked to sign without a full and complete understanding. Unfortunately, what is signed in these cases may turn out to be a transfer or mortgage of property that is only later understood when adverse consequences, including a threat of eviction, begin to unfold.

While fraud is a criminal offence, and misrepresentation or deceit can form a defence to the enforcement of legally-signed documents, the burden of proof that is needed to prove fraud, misrepresentation or deceit is onerous. ACE is presently engaged in an

increasing number of cases where older adults have been misled into signing documents defrauding them of title to their homes, sometimes under conditions of a compromised mental capacity. Like the Law Society, liability insurers, title insurers, and mortgage lenders of all types, we too are facing increased pressure on our resources to cope with the increased demand for services that these cases present.

REMEDIES FOR TITLE FRAUD

An older adult who is the victim of title fraud can pursue a number of remedies, depending on the individual circumstances of a case. Not all of these remedies will be available in every case. None of them is a perfect answer to the fraud committed, because even if a remedy succeeds it is usually fraught with uncertainty until a successful outcome is achieved. These are some of the possible remedies:

- **Criminal Complaints:** A criminal complaint could result in an order for restitution and compensation if the fraudster is convicted. Even if there is no conviction, the results of a police investigation could assist in other civil proceedings.
- **Defence of Mortgage Enforcement Proceedings:** It is usually necessary to defend mortgage enforcement proceedings brought against the defrauded home-owner for the possession and sale of a home to satisfy a mortgage debt. These are difficult proceedings to defend because the home-owner will need to produce some evidence that calls the validity of the mortgage itself into question.
- **Civil Actions for the Restoration of Title and Recovery of Funds:** The defrauded homeowner can bring a civil action against the perpetrator of the fraud for a judgment restoring title to one's home, and for damages resulting from the fraud. While it might not be difficult to obtain judgment for both title and damages, it is usually very difficult to collect any money from the defendant, who might have no means to pay or may have absconded.
- **Civil Actions for Solicitor's Negligence:** The negligence of a solicitor acting on a fraudulent transaction can never be assumed, but must be proven with evidence. If negligence did occur, the home-owner could also bring legal action against the solicitor, who might be responsible in damages. Ordinarily, actions for solicitor's negligence are not easy to pursue.
- **Title Insurance Claims:** Title insurance provides the best possible protection against title fraud. If a fraud is proven by an insurer's investigation, a fraudulent mortgage can be paid out without resort to court proceedings. However, in Ontario title insurance is a fairly recent development, and it is only available if a home-owner or mortgage lender has purchased it. Most older adult home-owners did not buy title insurance when they bought their homes long ago, and are not covered by title insurance.

- **Land Titles Assurance Fund Claims:** There are two systems of land registration in Ontario: “Land Registry” and “Land Titles”. Land registry does not offer any assurance of title. On the other hand, Land Titles does offer some limited protection to home-owners who are the subject of title fraud. As a last resort, a home-owner can make an application to the Director of Titles to delete any fraudulently-registered transactions, and to the Land Titles Assurance Fund for compensation for a fraudulently-placed mortgage. However, this protection only applies in a fairly narrow set of circumstances that does not capture all instances of fraud; and it does not apply to any land registered outside the Land Titles system.

WHAT CAN YOU DO TO PREVENT TITLE FRAUD?

The phenomenon of title fraud seems to be less connected with the electronic system of registration, which for the most part appears to be quite secure, and more closely tied to the rapidly changing landscape of the entire real estate and mortgage-lending industries that often puts the security of land titles in peril. Here are some strategies for preventing title fraud and protecting yourself:

- **Existing-Owner Title Insurance:** Experienced real estate practitioners widely recommend that older adults owning mortgage-free homes purchase “existing-owner” title insurance. This is the same type of insurance that a new home-owner might buy when completing a purchase transaction. It provides the best possible protection against title-fraud committed by third parties without the knowledge, consent or involvement of the home-owner. The benefits of existing-owner title insurance far outweigh its cost, and it is truly something that many older adults should not be without. To investigate the costs of coverage offered by existing-owner title insurance, older-adults should speak with a solicitor or other advisor.
- **Independent Legal Advice:** A home-owner of any age should never enter into any real estate transaction without independent legal advice. Legal advice is not “independent” if the lawyer acting represents more than one interest in a transaction. You need your lawyer to represent you, and to fairly and independently advise you. A lawyer also acting for someone else, even an immediate family member, with a different interest in the transaction is not able to do this. Even though it does cost more to hire two lawyers than one, scrimping on independent legal advice is a dangerous and false economy.
- **Vigilance not to Sign Legal Documents without Full Understanding:** The single most important thing an older-adult can do to protect against title fraud costs absolutely nothing: simply do not sign anything that you do not completely understand. The most difficult thing to overcome is your own signature. In most cases that we see, the older adult has signed something, be it a power of attorney, a deed or mortgage, or some other paper that was never fully understood until it was much too late. Those who absolutely do not sign things they do not understand give themselves the best protection that money can buy.