

# Real Estate Fraud - A Victory for the Homeowner

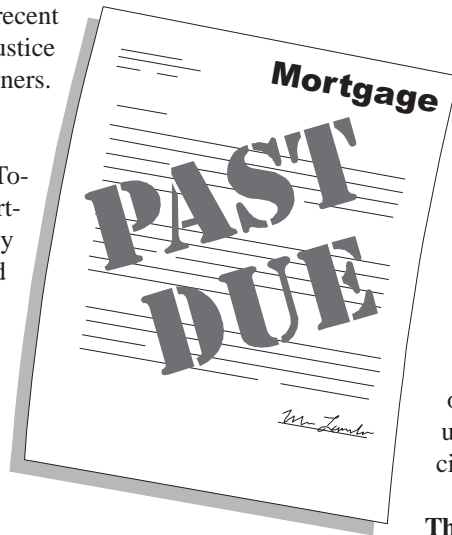
Although not a rampant crime, real estate fraud will not go away. As we have explained in previous editions<sup>1</sup> of *Legal Issues*, real estate fraud can result in a home being sold or mortgaged without the knowledge of the legal owner. Up until recently this has meant that innocent owners risk losing their home, since the scam artist is usually long gone by the time the fraud comes to light. However, a recent decision of the Ontario Superior Court of Justice provides some welcome news for property owners.

### The Facts

In 2001, the Rs purchased a condo in north Toronto. Three years later, the property was mortgage free. Unbeknownst to the Rs, while they were paying off the last of their mortgage, fraud artists, posing as the Rs, purported to sell the condo to a bogus purchaser. The price for this fraudulent sale was \$270,000. In addition, the bogus purchaser granted a mortgage on the Rs condo to TD in the amount of \$247,860. The deed and the mortgage were registered at the Registry Office.

The fraud artists presented what appeared to be proper identification at the time of the sale.

When the Rs discovered what had happened, they sued the bank. Specifically, the Rs sought to have title to their condo restored to their names and the fraudulent mortgage set aside. Although the bank agreed that the fraudulent transfer was invalid, it argued that the mortgage was a valid charge on the property.



### The Law

In 1885, Ontario adopted a land system whereby title to real property would be established by setting up a register. The register would guarantee that the person named as property owner had title subject only to any registered encumbrances. Although the government eventually enacted the *Land Titles Act*, the Supreme Court of Canada has stated that the statute did not abolish the original principals of the common law.

### The Decision

The judge in the Rs' case concluded that the mortgage was a fraudulent charge and was void. He recognized that the Rs and the bank were innocent parties, however only the bank had been in a position to do something which might have been able to prevent the fraud. In the judge's view, the bank had failed to exercise due diligence by ensuring that a proper in-person appraisal was carried out prior to releasing the mortgage monies. He also found that certain anomalies should have put the bank on notice that something was not right. The end result was that the bank could not rely on the register in this instance.

### The Caveat

Last year the Ontario Court of Appeal decided *Household Realty v. Liu*, another mortgage fraud case, in favour of the mortgagee. But unlike the Rs case, where the registered

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*Legal Issues* offers general comments on legal matters of concern to business and individuals. The articles are not intended to provide legal advice or opinions and readers should seek professional legal advice on the particular legal issues which concern them.

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owners of the condo were completely innocent in the fraud, the fraud in the Household Reality case did involve one of the registered owners. Most cases involving a fraudulent mortgage are decided in the mortgagee's favour. Therefore it is by no means certain that if TD appeals this decision that the appellate court will not rule in its favour. Having said that, this particular set of facts might be different enough to favour the homeowners.

**What To Do?**

Although this type of fraud is more common than ever before, it remains relatively insignificant when one considers the number of transactions that are registered on a daily basis in the Ontario Registry System.

The Ontario government recently introduced legislation that would ensure that ownership of property cannot be lost as a result of the registration of a falsified mortgage, fraudulent sale or a counterfeit power of attorney. The legislation would also introduce additional safeguards for suspending and revoking the accounts of fraudsters so that they can-

not register documents and would raise existing fines for real estate fraud related offences.

A recourse for those who have been victims of title fraud is the province's Land Titles Assurance Fund, which was set up to compensate those wrongfully deprived of their land. Unfortunately this is a remedy of last resort and can be a lengthy process.

A proactive step that you can take to protect yourself from this kind of fraud is to purchase title insurance. It can be ordered through your lawyer during a refinance transaction or at any time during the course of home ownership. The policy is effective from the date on which you took title to the property until you sell your home.

If you would like to learn more about purchasing title insurance contact Stanley Landau. 

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<sup>1</sup>What is Title Fraud? (Fall 04)

Title Fraud - The Sequel (Summer 05)

Keeping Your Identity Your Own (Spring 05)

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## Marriage Contracts: The Necessity of Full Disclosure

The *Family Law Act* sets out many of the rules that govern relationships in Ontario. When a couple decides to marry they are entitled to create their own rules if those set out in the Act do not suit their situation.<sup>1</sup>

With a few exceptions,<sup>2</sup> a couple who is married or intend to marry can enter into an agreement setting out their respective rights and obligations in the marriage or on separation, on the annulment or dissolution of the marriage or on death. Those rights and obligations may pertain to

- Ownership in or division of property;
- Support obligations;
- The right to direct the education and moral training of their children; and
- Any other matter in the settlement of their affairs.

In addition to negotiating the details of the marriage contract, there are two other important steps that must be included in the process. The first is full disclosure. It is incumbent upon both parties to disclose the value of all significant assets, debts and other liabilities--whether the information has been requested or not. The second is independent legal advice. Both parties should have their respective

lawyers review the agreement so that each understands the nature and consequences of what they are signing. While the courts recognize the importance of requiring that couples live by the deal they struck, a marriage contract may be set aside if there has been a lack of full disclosure or a failure to obtain independent legal advice.

**LeVan v. LeVan**

*LeVan v. LeVan* is a recent Ontario decision involving a request to have a marriage contract set aside. The LeVans married in 1996. The wife brought little in the way of material wealth into the marriage. The husband, on the other hand, was a controlling shareholder in his family's business. The wife knew she would be asked to sign a marriage contract and this occurred two days before the nuptials.

Seven years later, the marriage ended and the wife was left with a very one-sided marriage contract. She successfully brought an application to have the contract set aside.

After a careful examination of the circumstances surrounding the signing of the marriage contract, the judge con-

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cluded that, among other things, the husband had made much less than full disclosure of his true financial worth.

#### The Family Business

The husband's father built the family business from the ground up. With the assistance of corporate and financial advisors, he created a complex corporate structure to protect the company and to ensure that shares never went to someone outside the family.

The husband disclosed to his future wife his interest in the company, however he failed to mention the shares he owned in two related companies, the value of which was in excess of \$10 million. He also failed to disclose his income. Although he disclosed his interest in the LeVan Family Trust, he claimed it had no value, which was certainly not true. The husband took the position that his future wife knew he was worth a lot of money and that she was not concerned with an exact amount since she was prepared to sign the marriage contract regardless.

Although the wife had her own lawyer, the husband undermined the relationship at every opportunity and convinced the wife to fire him. Two days before the wedding, the husband's lawyer hired another lawyer for the wife.

The judge concluded that the husband failed in his disclosure obligation, and she exercised her discretion to set aside the marriage contract for the following reasons.

- The husband misrepresented the effect of the marriage contract to the wife. Although the purpose of the contract had been to protect the shares in the LeVan family companies, in fact it excluded all of the husband's business interests from net family property and it severely restricted the wife's right to support.
- The husband applied significant pressure on his future wife, repeatedly telling her that there would be no marriage without a contract. He also pressured her into firing her lawyer, who had been requesting financial information about the husband's interests.
- The marriage contract was not reasonably fair to the wife since she surrendered virtually all of her rights without any meaningful information about the husband's assets or income.


While this case may seem like an extreme example because of the millions of dollars involved, it highlights the importance of full financial disclosure when negotiating a marriage contract. The law permits marriage contracts, which

can allow for greater protection and certainty. However, certain conditions must be satisfied to obtain this comfort, conditions which are not onerous.

#### A Few Tips

If you and your spouse-to-be are thinking about a marriage contract here are a few tips.

- Get professional legal help.
- Work cooperatively with your future partner so that all interests are protected.
- Make full disclosure of your income, your assets and your liabilities, along with their value.
- Do not leave this important task until days before the wedding.
- Approach the task with your business hat on, not your rose coloured glasses. Look at a marriage contract like any other insurance you buy.

For additional information and for assistance drafting a marriage contract or any other domestic contract please contact one of the lawyers in our family law group. 


<sup>1</sup>This will generally be the case in the event that it is a second marriage for one of the spouses or one spouse is bringing greater wealth into the marriage.

<sup>2</sup>A couple cannot decide custody or access issues, or child support, nor can they limit rights with respect to the matrimonial home.

### HOLIDAY TIP

A sure sign that the holiday season is upon us is the appearance of R.I.D.E. spot checks. If you are stopped by the police you may be asked to provide a breath sample by blowing into an approved road side screening device. The law requires you to comply with that request. If you refuse you can be charged with failing to comply. Although the police must advise you of your right to a lawyer, they do not have to wait for you to consult a lawyer before requiring you to blow.

If you fail the roadside test you will probably be taken to the police station for a breathalyzer test. It is your right to consult with a lawyer prior to submitting to the breathalyzer test. However, if you refuse to take the test you may be charged.

If you are convicted of a drinking and driving offence you will be subject to a significant fine and a one year driving prohibition. In addition you will have a criminal record. The best advice: Don't Drink & Drive. 

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The Lawyers and Staff at  
Birenbaum, Steinberg, Landau,  
Savin, Colraine, LLP

extend Season's Greetings to all our clients.  
We look forward to serving you in 2007!

Once again this year, we have made a number  
of charitable donations, including to  
the Women's Habitat  
and  
Willow, a breast cancer support group.



**Make it Your New Year's Resolution**

The New Year is still a few weeks away so this is the perfect time to reflect on your resolutions for 2007. Make this the year that you make a will, a power of attorney for property and a power of attorney for personal care. And if you have a will but have not looked at it in years make it a resolution to review it.

If you do not have a will and you have young children, the court will appoint a guardian for them.

If you die without a will, your property will be divided according to a legal formula. The outcome may have nothing to do with your family's needs or your wishes.

When a person dies without a will the estate's assets are immediately frozen. Before anything else can happen, the court must appoint an administrator for your estate. The result is delays and extra legal costs.

When you have a will you can feel confident your affairs are in order and your family will be protected and will not endure needless work and expense following your death.

Stan Landau and Howard Steinberg would be pleased to assist you with your estate planning. ☐

