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Original

NO. 69858-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

LAURIE SCHIFFMAN,
Trustee of the C.B. Special Needs Trust
APPELLANT
v.

FINANCIAL FREEDOM, ACQUISITION, LLC
A California Limited Liability Company; and OneWest Bank
F.S.B. A California Corporation
RESPONDENT/CROSS-APPELLANT

APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
CAUSE NO. 10-2-09938-5

APPELLANT LAURIE SCHIFFMAN'S REPLY BRIEF AND RESPONSE BRIEF TO CROSS APPEAL

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I. INTRODUCTION

On cross appeal, Defendant Financial Freedom seeks to revisit issues dispensed with by agreement at the trial court, and then asks this Court to find on appeal highly disputed issues of material fact that were never fully adjudicated at the trial court. At summary judgment, Ms. Schiffman and Financial Freedom agreed that the issue turned on whether Dexter Welch ratified the deed of trust encumbering real property that was part of the C.B. Special Needs Trust. Lanora Bevins, the beneficiary of the Trust, was not competent to enter into any contractual agreement at the time the deed was signed. Even if she is somehow found to be competent at the time, she had no authority to enter into a reverse mortgage because she was not the Trustee. Regardless of the many signs pointing to Ms. Bevins' incompetence, Financial Freedom nonetheless purported to enter into a deed of trust with her. The Trustee, Mr. Welch, never received notification of the terms of the deed, was never addressed or investigated as Trustee by Financial Freedom, and only became involved because he signed a stipulation regarding his personal rights as an heir. This is insufficient to act as a ratification. The trial court properly found that Ms. Bevins was not Trustee at the time the deed was signed, but it was error for the trial court to find that Dexter Welch ratified the deed of trust as a matter of law.

II. ISSUES ON CROSS APPEAL

1. Was Dexter Welch the Trustee at the time the deed of trust was entered?

2. Was Dexter Welch incapable of ratifying the reverse loan when he had no knowledge of the terms or conditions of the loan?

3. Was Lanora Bevins incompetent at the time the documents encumbering the property were signed, thus lacking any power to enter into a deed of trust?

4. Has Plaintiff continually sought clarification from Financial Freedom, questioning the existence of a valid deed of trust?

III. STATEMENT OF THE CASE ON RESPONSE

A. **The incompetency of Lanora Bevins.**

Plaintiff has always maintained that Lanora Bevins was incompetent in April of 2008 when she signed the documents that are the subject of this suit. Plaintiff's Reply to the Affirmative Defenses and Counterclaim at 2. By early 2003, Ms. Schiffman had noticed that Lanora Bevins was showing signs of confusion and dementia. CP 329. Jerrie Ogden, Lanora's daughter, was then acting as the Successor Trustee of The Trust because Lanora was incapable of caring for herself or managing the Trust. *Id.*; CP 282. Even before the dementia, Ms. Bevins had never managed financial matters. CP 281, 327. In fact, when her

husband died, Lanora was unable to act as Trustee. CP 281. Jerrie Ogden states that she and her husband "took care of all banking, paid all the bills, arranged for lawn and house maintenance, purchased clothing as needed by my mother and similar things . . . because my mother was not able to do these things herself nor to care properly for the property, which by now had been transferred in to The Trust." CP 282. Even before she relinquished her trusteeship of The Trust to her brother Dexter Welch, Jerrie had to hire qualified people to come into the home to provide assisted living services to her mother whose physical and mental condition continued to deteriorate. CP 284.

Jerrie continued to act as the Trustee until sometime in 2005 when Dexter assumed the duties of the Trustee. CP 282, 329. Dexter wrote and signed checks in order to take care of Lanora, but never set up a trust account. *See* CP 330, 346-83. Instead, he used Lanora's personal bank account, wrote checks for utilities, credit card charges and for the In-home Care Providers on that account that was clearly in Lanora's name personally, and signed the checks in his own name. *Id.*

By 2007, it was readily apparent to plaintiff Laurie Schiffman that Lanora was suffering from dementia. *Id.* Laurie Schiffman noted that, at paragraph 11, page 5 of her declaration:

> "Throughout this entire period of time after Dexter took over as Trustee, Lanora was not capable of serving as the Trustee of The Trust nor was she even trying to administer it. Dexter completely and totally handled all of The Trust's assets and paid Lanora's expenses after Jerrie withdrew as Trustee. Because Lanora's physical and mental condition continued to worsen, Dexter began hiring people to come into the residence to provide almost 24 hour per day assistance to Lanora." CP 330.

Daughter, Jerrie Ogden states in her declaration, on page 6 the following:

> "By the Fall of 2007 it was my observation that my mother was suffering what I would call severe dementia. I would frequently receive a telephone call from the HCG [Home Care Giver] who would indicate to me that my mother had requested that I be called so that she, my mother and I could talk. By the time I was on the phone with her, it was apparent that she did not know who I was, did not recognize my voice and was often unable to comprehend my explanation to her that I was her daughter." CP 284.

And:

> "It is my opinion, from my own personal observations of my mother with whom I visited frequently, that throughout the month of April, 2008, my mother was fully and completely mentally incompetent." *Id.*.

By March 2008—one month prior to when Lanora allegedly entered into the reverse mortgage—Lanora could not even recognize Laurie and Laurie's parents and could not understand why they were visiting her. CP 332. She was convinced that Laurie's parents had come to "make a proposition to her" when they had merely come to see her before she would likely pass away. *Id.* About her aunt, Lanora, Laurie Schiffman

stated: " . . . on April 15, 2008, it is my strong opinion that Lanora had no mental capacity to know and understand even the basics of the loan papers that the Defendants maintain she voluntarily signed." CP 331.

Indeed, the loan documents themselves evince Lanora's decrepit mental and physical state. Lanora was unable to even sign on the line of many of the loan documents. CP 126, 137, 141-50, 154, 157-58, 161, 164, 170, 172, 174-80, 182-86, 190, 196, 199, 200, 205, 207, 212, 230-31, 233, 244, and 246. Her signature drops through the signature line at nearly a forty-five degree angle in some instances. In addition, from Financial Freedom's own internal records, it is noteworthy to observe that she even failed to sign the loan agreement which constitutes the promissory note and the accompanying deed of trust on April 15, 2008 (the date she allegedly signed all loan documents), forcing Financial Freedom to note in their records that they had to go back to Lanora to get her to re-execute these documents (noted in Financial Freedom's internal note to have been April 22, 2008, although the notary's date of execution remains April 15). CP 250. Obviously the signature date is incorrect. It states that it was signed on April 15, 2008, but the bank's internal records reveal that the notary was actually there on April 22, 2008 "getting the Note and Deed signed correctly." *Id.* The evidence that Lanora Bevins was incompetent is overwhelming.

B. Financial Freedom repeatedly failed to provide proof of a valid loan.

Once Ms. Schiffman became Trustee, she sought information regarding the reverse mortgage she had been told encumbered Trust property. Financial Freedom initially, however, made painstaking efforts to avoid asserting any interest in the property at issue in this case. A timeline of events demonstrates Defendant's abstinence:

- On April 22, 2010, Mr. Stoner, then acting agent of Financial Freedom, informed Ms. Schiffman that the loan had been foreclosed and that the residence was scheduled to be sold at a foreclosure sale scheduled to occur on May 21, 2010—only twenty-one days later. CP 336. Despite being requested to do so, however, Mr. Stoner failed to provide any proof of either the foreclosure sale date or proof of the loan.
- On April 29, 2010, Ms. Schiffman asked Mr. Stoner to provide proof of the security interest. Mr. Stoner said that he would provide proof; however, he failed to do so. CP 81.
- On May 21, 2010, Mr. Van Siclen, counsel of Ms. Schiffman, asked Mr. Stoner for copies the original loan documents and "most importantly, the amounts and dates of all disbursements to Dexter Welch who I assume was the individual who applied for

the loan and managed it." CP 94. Mr. Stoner never responded with either the loan documents or to refute the assumption that Dexter was the one who had entered into the loan. *Id.*

- On September 7, 2010, Mr. Van Siclen again contacted Mr. Stoner and notified him that Mr. Van Siclen knew that there was no recorded lien on the property. He informed Mr. Stoner that Plaintiff may have a purchaser for the property. He again requested the information. CP 97. There was no response from Mr. Stoner.
- On September 9, 2010, Mr. Van Siclen again contacted Mr. Stoner and pointed out the fact that Financial Freedom had, for over six months, failed to prove the security interest it claimed to have. CP 99-100.
- Next, Mr. Stoner referred the matter to Anna Egdorf who he falsely claimed to be his "counsel." Ms. Egdorf then asked Mr. Stoner if he had the Deed of Trust. However, there is no evidence that he confirmed he did to Ms. Egdorf and he certainly did not to Mr. Van Siclen. CP 102.
- A week later on September 17, 2010, after he had still not received any evidence of the security interest (despite leaving two additional voicemails for Ms. Egdorf), Mr. Van Siclen wrote both

Mr. Stoner and Ms. Egdorf and made clear that he assumed from their silence over the past months was evidence that they had no interest in the property. CP 104. Mr. Stoner was never to be heard from again, not even a reply email to Mr. Van Siclen to reassert that Defendants continued to claim an interest in the property.

- However, on September 20, 2010, Ms. Egdorf replied to Mr. Van Siclen's email but did not in any way refute Mr. Van Siclen's stated assumption. CP 106-07. She merely stated that there was no sale date for the property. *Id.* Additionally, the two spoke on the telephone, but Ms. Egdorf still did not offer to provide any proof of the loan. *Id.*
- Mr. Van Siclen responded to Ms. Egdorf's email the same day and explained what Mr. Stoner had stated to Ms. Schiffman with regard to his mention of a foreclosure sale, and again stated that he assumed Mr. Stoner did not have a provable Deed of Trust. CP 106. Yet neither Ms. Egdorf nor Mr. Stoner ever again communicated with either Ms. Schiffman or Mr. Van Siclen regarding their principal's claim of an interest in the property.

When Ms. Schiffman finally filed her lawsuit against Financial Freedom at the suggestion of the court, she knew only that Defendant alleged it had taken a mortgage or deed of trust as security on the

residential property in exchange for a reverse mortgage loan, and that it was refusing to provide confirming documentation. During her litigation with Mr. Welch, she had understood that Mr. Welch had himself obtained the reverse mortgage at issue here. CP 18. Upon examination of the actual documents much later, even this limited understanding was inaccurate, because Lanora herself allegedly entered the contract despite her dementia and not being Trustee.

C. Both parties stipulated that the sole legal issue on summary judgment was whether Mr. Welch ratified the deed of trust.

Regardless of whether Financial Freedom agreed that Ms. Bevins was incompetent, counsel for both parties agreed at oral argument for the pending cross motions for summary judgment that the case could then be decided on the issue of whether Mr. Welch ratified the reverse mortgage and associated contracts through his signing, in his own personal capacity, the Residuary Beneficiary Consent and Release document (The Consent). It is disingenuous for Financial Freedom to now raise for the first time on appeal an argument that the trial court should have made findings on other issues.

The trial court properly found that Lanora Bevins lacked authority to sign the note because she was not Trustee at the time it was executed, as agreed by Defendant in its pleadings, regardless of whether or not she

was competent. See Response to Cross Appeal at 9. The trial court committed error, however, when it found that Mr. Welch ratified the reverse mortgage when he signed the consent form.

IV. ARGUMENT

On cross appeal, Financial Freedom now adopts the position that the trial court should have found Ms. Bevins competent to contract with Financial Freedom despite its agreement that this case should be resolved on the issue of whether the Trustee, Mr. Welch, ratified the agreement, notwithstanding the fact that Plaintiff presented ample evidence at summary judgment demonstrating Ms. Bevins' well-documented incompetency at the time of contracting. In fact, it was this compelling evidence that Lanora was not competent to be Trustee, to say nothing about being competent to execute the obviously complex set of legal documents comprising the reverse mortgage, that caused Financial Freedom to allege in defense of Lanora's incompetency that Dexter Welch had nevertheless "ratified" the reverse mortgage by signing the beneficiary consent. Finally, Financial Freedom argues that Ms. Schiffman should be judicially estopped from pursuing her claim despite the lack of factors necessary for such a finding. This improper reading of the law should not be adopted by the court here.

A. The loan information available to Mr. Welch is wholly insufficient to enable ratification.

Financial Freedom did not dispute at summary judgment that Mr. Welch, not Ms. Bevins, was the qualified Trustee of the C.B. Special Needs Trust in April of 2008. It acknowledged that the "The Trust is correct that under the Fourth Amendment to the Charles A. Bevins and Lanora I. Bevins Revocable Trust Agreement, if at any time Lanora Bevins failed or for any reason was unable to act as Trustee, Dexter Welch would be the Trustee." CP 49. Defendant then went on to argue to the Trial Court that the fact that Lanora was not the duly authorized representative of the Trust was irrelevant because Dexter Welch, who was the proper Trust representative, had ratified the reverse mortgage when he signed the beneficiary consent document in his own personal capacity. By Defendant's own argument, Mr. Welch was acting as Trustee during the time period in which the deed of trust was signed.

However, the Defendant's claim that because Dexter Welch signed the Residual Trust Beneficiary's Consent and Release document he thereby "consented to and ratified the reverse mortgage," is unsupported by anything whatsoever that was in the record and presented to the trial court at the time the summary judgment motion was granted. Defendant goes on to argue that Dexter "did more than "remain silent" and that he

had actual knowledge of the loan and "consented to Ms. Bevins' execution of the documents." A closer reading of the document the Defense claims is a ratification agreement, however, clearly discloses that nowhere in that instrument is there language of ratification, and nowhere in that instrument does it indicate that Dexter Welch is or was acting on behalf of the Trust when he signed it.

The beneficiary consent and release instrument simply indicates that the "Borrower" is "Lanora I. Bevins," that Welch is one of the remainder/residuary beneficiaries of the Trust, that Welch understands that Lanora, as "Borrower" is the life beneficiary under the Trust, that the "Borrower" intends to obtain and receive a reverse mortgage from Financial Freedom Senior Funding Corporation, that Dexter Welch "agrees that the reverse mortgage loan is necessary and appropriate for the enjoyment, care, support, maintenance, health and living expenses of the Borrower," that he acknowledges "the Trustee's authority" to obtain the reverse mortgage and encumber the real property and finally Dexter consents to the reverse mortgage loan and releases any interest he may have to the proceeds of the reverse mortgage loan.

There is no ratification language contained in this instrument. There is no information regarding the terms of the loan in this instrument. Dexter signed the consent form only as a residuary beneficiary and

certainly not as Trustee. The argument advanced by Defendant that Dexter Welch's execution of this instrument is a ratification on behalf of the Trust to the reverse mortgage and its ancillary documents and instruments is simply incorrect and not supported by anything in this record or in any legal authority cited by the Defendants. Mr. Welch's lack of knowledge regarding the terms of the loan is hand-in-hand with the fact that no ratification language exists in the beneficiary release, because legally such information must exist to enable ratification. *See Barnes v. Treece,* 15 Wn.App. 437, 443, 549 P.2d 1152 (1976). It is completely absurd for Defendant to claim surprise or that this argument is improperly brought when the trial court itself ruled that a ratifying party " 'must have acted with full knowledge of the facts.'" Order Denying SJ at 2 (quoting *Ward v. Richards & Rossano, Inc.,* 51 Wn.App. 423, 433, 754 P.2d 120 (1988)).

Defendant contends that Mr. Welch was provided with sufficient knowledge to ratify the reverse mortgage contract via the beneficiary release instrument because that document erroneously listed Lanora Bevins as the Trustee and indicated that Trust property was subject to the reverse mortgage. *Thiel v. Miller,* 122 Wn. 52, 209 P. 1081 (1922), cited by Defendant, stands however for the proposition that knowing ignorance between parties entering a contract does not create a "mutual mistake"

requiring rescission of the contract. *Id.* at 58-59. Mr. Welch was not party to the deed of trust signed by Ms. Bevins, and unlike the parties in *Thiel,* never himself assumed the loan. *Thiel* is thus inapplicable to the instant case. Financial Freedom appears to have found no additional authority for its contentions beyond recitations of the basic rules of ratification.

Despite Defendant's arguments, the Illinois Court of Appeals applied the same rule as exists in Washington when it decided *Prodomos v. Poilos*, 202 Ill. App.3d 1024, 560 N.E.2d 942 (1990): that the party ratifying a contract must have full knowledge of the facts. *Id.* at 1029. Although the trustee in *Prodomos* was confronted with documents that only referred to the property at issue and not the contract, the *Prodomos* court did not rule that anything short of full understanding would be sufficient. Unless the "ratifying party fully understood what was being ratified," it was not a ratification. *Id.* at 1030. Mr. Welch here indisputably did not possess full understanding of the reverse mortgage contract. To this day there is nothing in this record to establish even a scintilla of evidence that Dexter Welch had sufficient knowledge to understand this reverse mortgage, because there is no evidence that he has ever seen the documents themselves or received any information on the terms contained therein. As noted above, his understanding was limited to

the minor extent a reverse mortgage would affect his possible personal inheritance.

Financial Freedom also asks this court to find as a matter of policy that its peripherally-related beneficiary release form signed by Mr. Welch should constitute ratification because a Trustee has a duty of loyalty to the Trust beneficiary. Here, Mr. Welch's duty of loyalty was not implicated by the beneficiary release form because the form solely dealt with his personal rights as an heir to Ms. Bevins. Mr. Welch obtained no personal benefit from signing this document, which in fact warns that he may suffer a future personal detriment as a result of the reverse mortgage. Requiring a lender, just any party who files a lawsuit, to identify if a person is contracting specifically in their individual capacity or as Trustee, is not onerous. Contrary to Defendant's concerns, it would not "throw the law of trusts on its head" to require specification when a third-party document, sent to a Trustee in his individual capacity and regarding specifically individual issues stemming from an extremely complicated bunch of separate documents, actually implicate the Trust if it is so intended. A sophisticated lender such as Financial Freedom, as drafter of any set of complicated loan documents, is in a much better position to prevent any confusion than a Trustee who also happens to be a

beneficiary. It was error for the trial court to find that Mr. Welch ratified the deed of trust.

B. Lanora Bevins was incompetent and unable to act as Trustee in April of 2008 when the loan documents were signed.

The Deed of Trust in question is invalid for two reasons: First because Lanora Bevins was incompetent to act as a trustee at the time the numerous loan documents were signed by her, and, second, because she was not the acting Trustee of The Trust at the time she allegedly signed the loan documents. Defendant brought its motion for summary judgment on the basis that Lanora Bevins was the Trustee at the time the loan documents were executed. In its response to the defendant's summary judgment motion, Plaintiff presented evidence in her cross motion for summary judgment that Mr. Welch was the actual Trustee of The Trust at the time Lanora allegedly signed the numerous reverse mortgage documents, and that Ms. Bevins was incompetent to contract then in any case. Defendant appears to have agreed, because it then argued for the first time that the validity of the contract hinged on whether Mr. Welch ratified the loan. Financial Freedom stated, "The Trust is correct that under the Fourth Amendment to the Charles A. Bevins and Lanora I. Bevins Revocable Truste Agreement, if at any time Lanora Bevins failed or

for any reason was unable to act as Trustee, Dexter Welch would be Trustee." CP 49. It then relied on this to argue that Mr. Welch ratified the deed of trust by way of signing the beneficiary form in his personal capacity. *Id.*

RCW 11.36.21(2)(a) disqualifies "persons of unsound mind" from serving as a trustee. There was abundant and unrefuted evidence presented to the trial court at the oral argument for the cross motions for summary judgment that Lanora Bevins, at the time she purportedly signed the reverse mortgage documents with Financial Freedom, was "of unsound mind." In fact, her diminished capacity is well documented in the months and years leading up to April 15, 2008, which is the date Defendants claim that Lanora signed their loan instruments.

As discussed above, both Plaintiff Laurie Schiffman and Ms. Bevins' daughter Ms. Ogden had noticed a continual and serious decline in Ms. Bevins' mental capacity. Both testified in their declarations that Ms. Bevins was incapable of taking care of herself. Both testified that it was readily apparent by 2007, a year before Ms. Bevins signed the reverse mortgage documents that she was suffering from dementia. Finally, both testified that, based on their interactions with Ms. Bevins, she was incapable of understanding the loan

documents she allegedly agreed to. The factual assertions contained in these declarations of plaintiff, Laurie Schiffman and Lanora's daughter, Jerrie Ogden were completely un-rebutted and uncontested by the defendant and its attorneys. These unrefuted declarations demonstrate Lanora's unsound mind leading up to her alleged signing of the myriad of reverse mortgage documents. Additionally, they show that Lanora was not even attempting to act as the Trustee of The Trust. Instead, she relied first on Jerrie Ogden and then later Dexter Welch to manage The Trust and its assets and to ensure that she received proper care. But the evidence of Lanora's incompetence to enter into the reverse mortgage does not end here.

Indeed, the loan documents themselves evince Lanora's decrepit mental and physical state. Lanora was unable to even sign on the line of many of the loan documents, her signature often dropping through the signature line at as much as a forty-five degree angle. CP 126, 137, 141-50, 154, 157-58, 161, 164, 170, 172, 174-80, 182-86, 190, 196, 199, 200, 205, 207, 212, 230-31, 233, 244, and 246. As indicated above, in addition, from Financial Freedom's own internal records, it is noteworthy to observe that she even failed to sign the loan agreement which constitutes the promissory note and the accompanying deed of trust on April 15, 2008, the date she allegedly

signed all loan documents. This forced Financial Freedom to state in their records that the notary was actually there on April 22, 2008 "getting the Note and Deed signed correctly." CP 250. The fact that she failed to sign correctly is indicative of her greatly diminished mental state.

Not only was Lanora incompetent to act as the Trustee, she was also incompetent to enter into any contract. The test for capacity to contract is "whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms and effect of the contract in issue." *Page v. Prudential Life Ins. Co. of America*, 12 Wash.2d 101, 109, 120 P.2d 527 (1942). The contract at issue here was not a straightforward agreement that is easily understood. *Cf. In re Gallagher's Estate*, 35 Wash.2d 512, 213 P.2d 621 (1950) (finding that decedent had the mental capacity to enter into a *marriage contract* and to understand the nature of the contract). Instead, this was a very complex "reverse mortgage" allowing older homeowners to withdraw equity in their home through a line of credit. In this case, Financial Freedom required Lanora to sign her name nearly 50 (if not more) times on literally a score of separate instruments, almost every one of which contained multiple pages and complicated legal terms and conditions. See CP 126-246.

Lanora had never before handled legal or financial matters, and her mental state rendered her almost always incapable of even recognizing her daughter in the months leading up to when the documents were signed. CP 284. One month before the documents were signed, Lanora could not recognize Laurie and Laurie's parents and was nonsensical when she spoke. CP 332. Lanora's dementia had robbed her of her most basic comprehension skills and it defies reason to suggest that she was competent to enter into a familiar contract, let alone a contract unfamiliar to the general population. The evidence that Lanora was not competent nor the Trustee when the Deed of Trust was signed is overwhelming.

C. Plaintiff has consistently questioned the existence of a valid deed of trust once the facts of this case became known.

Once Ms. Schiffman became aware of the facts surrounding the reverse mortgage here, she consistently questioned its validity. She originally operated under the false assumption that Mr. Welch had entered into a deed of trust with Financial Freedom. It was only after obtaining Trust financial documents through discovery in this case that Ms. Schiffman realized that Mr. Welch had not obtained and executed the loan, nor ever been in possession of loan documentation relating to the reverse mortgage. Each example cited by Defendants of

Ms. Schiffman behaving as though the deed was valid occurred before this point. Ms. Schiffman was then forced to engage in an extensive and long-unsuccessful discovery effort in this case to obtain the loan documents from Financial Freedom to determine whether a proper contract actually existed. Financial Freedom's repeated failure to provide proof of a valid loan upon Ms. Schiffman's request was the impetus of this very lawsuit.

Financial Freedom now argues that Ms. Schiffman should be judicially estopped from acting on what she learned. Judicial estoppel precludes a party from gaining an advantage by taking one position and then seeking a second advantage by taking an incompatible position in a subsequent action. "The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and the waste of time." *Seattle-First Nat'l Bank v. Marshall,* 31 Wn. App. 339, 343, 641 P.2d 1194 (1982).

Courts examine three main factors when deciding whether to apply judicial estoppel: "(1) whether "a party's later position" is " 'clearly inconsistent' with its earlier position," (2) whether "judicial acceptance of

an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled' "; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Arkison v. Ethan Allen, Inc.,* 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750–51, 121 S.Ct. 1808 (2001) (citations omitted)). These factors are not exclusive, and the court may take other factors into consideration. *Id.* at 751; *Markley v. Markley*, 31 Wn.2d 605, 614–15, 198 P.2d 486 (1948). Application of the doctrine is inappropriate, however, " 'when a party's prior position was based on inadvertence or mistake.' " *Arkinson,* 160 Wn.2d at 539 (quoting *New Hampshire*, 532 U.S. at 753 (quoting *John S. Clark Co. v. Faggert & Frieden, P. C.*, 65 F.3d 26, 29 (4th Cir.1995)).

Judicial estoppel is thus a discretionary form of equitable relief, largely punitive in nature, and invoked to protect the integrity of the judicial process. *Anfinson v. FedEx Ground Package Sys., Inc.,* 174 Wn.2d 851, 861, 281 P.3d 289 (2012). Courts only apply it when confronted by "clearly inconsistent positions" of a party that indicate that the court is being "mislead," and where an unfair advantage would confer to that party. *Id.* Such is not the case here.

Contrary to Defendant's statements, Ms. Schiffman is not taking an inconstant position with that advanced in her lawsuit against Mr. Welch. The legal issues in that case, where the suit dealt with a trustee breaching his duty, are indisputably different from the issues in the present case, where at issue is the existence of a valid deed of trust encumbering Trust property. Financial Freedom was not a party to the prior suit against Dexter Welch, and its claimed interest in the property was in no way affected by that suit's outcome, beyond the fact that the new Trustee now noticed the serious flaws in its alleged deed of trust.

Secondly, at the time of Plaintiff's prior suit against Mr. Welch, Plaintiff erroneously understood that Mr. Welch had himself entered into an loan agreement with Financial Freedom and that Financial Freedom was threatening to foreclose on the property. She later learned when she was granted permission by the court to contact Financial Freedom that its agent, Matthew Stoner, had lied to her about the property having been foreclosed upon and set for a foreclosure sale. As noted by the Washington Supreme Court in *Arkinson v. Ethan Allen,* application of the judicial estoppel doctrine is inappropriate when a party's prior position is based on mistake. *Arkinson,* 160 Wn.2d at 539. Defendant is well aware that Ms. Schiffman was unable to examine any of the loan documentation until well after this suit was filed. It would in fact work an injustice

against Plaintiff were this court to prevent her from acting on the corrected information she received when Financial Freedom has suffered no actual prejudice.

Again Defendant attempts to reroute the issues to Ms. Bevin's incompetence at the time of contracting, but this is irrelevant to any determinations regarding judicial estoppel. At no time has Ms. Schiffman ever taken the legal position that Ms. Bevins was competent in April of 2008, and at no time has Ms. Schiffman ever argued that Ms. Bevins was Trustee in April of 2008. In Plaintiff's Reply to Defendant's Counterclaims, Plaintiff denies that Ms. Bevins was competent to enter the reverse mortgage contract, and this allegation has never changed. Further, Financial Freedom's own argument here relies on the fact that Plaintiff sued Mr. Welch as Trustee of the C.B. Special Needs Trust. The reverse mortgage was discussed in that context alone.

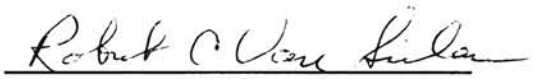
It is clear that Financial Freedom comes to this argument with unclean hands, now taking an inconsistant position with its own prior arguments in this suit when it relied below on the fact that Mr. Welch was Trustee. It benefitted from this position because the trial court erroneously found that Mr. Welch's personal acts constituted ratification of the deed of trust. It would compound this error for this Court to find

that Ms. Schiffman is judicially estopped from bringing her claims against Financial Freedom.

V. CONCLUSION

Defendant seeks to litigate issues on appeal that were not argued below by agreement of the parties. It now takes an inconsistent position with its prior statements, arguing that Mr. Welch was never the trustee of the C.B. Special Needs Trust. Financial Freedom then proceeds to argue judicial estoppel when it itself relied on and benefited from prior representations that Mr. Welch ratified the agreement as Trustee. Finally, Defendant erroneously asks this court to find that Ms. Schiffman is judicially estopped from bringing her claim because of her prior mistake relative to who obtained and executed the reverse mortgage. The Trustee Mr. Welch never possessed sufficient knowledge to ratify the reverse mortgage on behalf of the Trust. The deed of trust is therefore invalid. This Court should reverse the trial court's finding of ratification.

DATED this the 10th day of July, 2013.



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Certificate of Transmittal/Proof of Service

The undersigned, under penalty of perjury under the laws of the State of Washington, deposes and states as follows:

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUL 10 PM 4:30

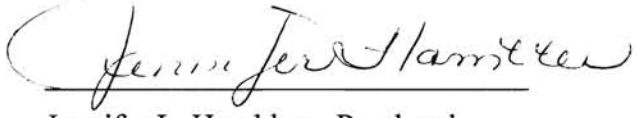
That declarant is a citizen of the United States of America and of the State of Washington, living and residing in Pierce County in said State, of legal age, not a party to the above-entitled action, and competent to be a witness herein.

That on the 10th day of July, 2013, declarant effected service of this Appellant Laurie Schiffman's Reply Brief and Response Brief to Cross Appeal to the following individuals by using the methods stated below:

Ann T. Marshall
Bishop, White, Marshall & Weibel, P.S.
720 Olive Way, Suite 1301
Seattle, WA 98101-1801
Via ABC Legal Messenger and Email Attachment

John S. Devlin
Laura Marquez-Garrett
Lane Powell, PC
1420 5th Avenue, Suite 4100
Seattle, WA 98101
Via ABC Legal Messenger and Email Attachment

DATED this 10th day of July, 2013 in Auburn, Washington.



Jennifer L. Hamblen - Paralegal