THIS IS NOT A COMMERCIAL FORCLOSURE

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT FLORIDA IN AND FOR MARION COUNTY

REVERSE MORTGAGE SOLUTIONS, INC.,

Plaintiff,

CASE NO.: 2013-CA-000115
42-2013-CA-000115-AXXX-XX

vs.

Residential Home Foreclosure Case
Florida Homestead of Neil J. Gillespie

NEIL J. GILLESPIE AND MARK GILLESPIE AS CO-TRUSTEES OF THE GILLESPIE FAMILY LIVING TRUST AGREEMENT DATED FEBRUARY 10, 1997, ET AL.

Defendants.
_______________________________________/

AFFIDAVIT OF NEIL J. GILLESPIE - DEFENSES AND CLAIMS IN RECOUPMENT
Section 673.4051(1)(a), Fla. Stat. lack of legal capacity of the borrower

STATE OF FLORIDA)
) SS.:
COUNTY OF MARION)

AFFIDAVIT

BEFORE ME, this day personally appeared NEIL J. GILLESPIE, who upon being duly sworn deposed upon oath as follows:

1. My name is Neil J. Gillespie. I am over eighteen years of age. This affidavit is given on personal knowledge unless otherwise expressly stated.

2. I have resided at 8092 SW 115th Loop, Ocala, Marion County, Florida ("the property") continuously and uninterruptedly since February 9, 2005. On November 17, 2009 I applied for and received the homestead tax exemption as to the property, that 7013-007-001 is the tax identification parcel number of this property, which is exempt from levy and execution under Section 4, Article X of the Florida State Constitution, for the following described property:

> Lot(s) 1, Block G, OAK RUN WOODSIDE TRACT, according to the Plat thereof as recorded in Plat Book 2 at Page(s) 106 through 112, inclusive of the Public Records of Marion County, Florida.

3. The Plaintiff's Verified Complaint To Foreclose Home Equity Conversion Mortgage alleges at paragraph 4:

> Plaintiff is entitled to enforce the Note and Mortgage, pursuant to F.S. § 673.3011, as the owner and holder of an instrument.

4. Section 673.3051, Florida Statutes, provides for defenses and claims in recoupment. Subpart (1)(a)2. provides a defense for "lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor;"

> Section 673.3051, Florida Statutes, defenses and claims in recoupment.
> (1) Except as stated in subsection (2), the right to enforce the obligation of a party to pay an instrument is subject to:
> (a) A defense of the obligor based on:
> 2. Duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor;

5. I am the eldest son of Penelope Marie Gillespie who died September 16, 2009.

6. The death certificate for Ms. Gillespie issued September 23, 2009 for the state of Texas shows dementia was the immediate cause of death. No other cause of death is shown.

7. Ms. Gillespie lacked capacity individually on June 5, 2008 to make any financial decisions due to Alzheimer's disease and/or dementia.

8. Ms. Gillespie lacked capacity as Grantor Trustee on June 5, 2008 to manage or bind in contract the Gillespie Family Living Trust Agreement Dated February 10, 1997, due to Alzheimer's disease and/or dementia.

9. Guardianship in Florida is governed by Chapter 744 Florida Statutes. No guardian was appointed for Ms. Gillespie.

10. I was Ms. Gillespie's primary caregiver. I was power of attorney for Ms. Gillespie, healthcare surrogate, living will proxy, personal representative (alternative) in the Last Will and Testament of Ms. Gillespie, and personal representative under Fla. Stat. § 198.01(2).

11. Ms. Gillespie was a patient of Dr. Gregory J. Howell, M.D., Neurologist, Ocala Neurodiagnostic Center, Windsor Oaks Medical Park, Bldg 400, 1901 S.E. 18th Avenue, Ocala, Florida 34471, November 1, 2005 through the close of his practice December 12, 2006.

12. On May 8, 2006 Dr. Howell wrote to Dr. Christopher Grainger, Ms. Gillespie's primary care doctor, that she was being treated for Alzheimer's dementia, and she was not competent to make any financial decisions:

> "I have been treating the patient for Alzheimer's dementia..." and "It is my impression that the patient has moderate Alzheimer's and is not competent to give things away or make any financial decisions..."

The letter of Dr. Howell dated May 8, 2006 is attached.

13. On September 4, 2008 Dr. Jay J. Rubin, M.D wrote to Dr. Granger about Ms. Gillespie's participation in a research study. Dr. Rubin diagnosed Ms. Gillespie with moderate dementia consistent with Alzheimer's disease, currently treated with Aricept and Namenda. Dr. Rubin noted in his Neurological Examination that "She is disoriented and certainly confused." The letter is attached.

14. A *Home Equity Conversion Mortgage*, or HECM, is a Federal Housing Administration (FHA) "reverse" mortgage program administered by the Secretary, United States Department of Housing and Urban Development (Secretary or HUD) to enable home owners over 62 years old access the subject home's equity. A HECM reverse mortgage is governed by federal law:

> 12 U.S.C. § 1715z–20 - Insurance of home equity conversion mortgages for elderly homeowners; and 24 CFR Part 206 - Home Equity Conversion Mortgage Insurance

15. A HECM reverse mortgage is a non-recourse loan, and the lender has no further means to collect the debt beyond the terms of the original documents. The accounts in this case include:

> Federal Housing Authority (FHA) Case Number: 091-4405741
> Bank of America, N.A. (BofA) Account No.: 68011002615899
> Reverse Mortgage Solutions, Inc. (RMS) Loan Number: 68011002615899

16. On April 22, 2008 I attended a telephonic HECM counseling session with Ms. Gillespie, and Susan Gray, a HUD approved HECM counselor. The counseling session did not comply with HECM rules. Ms. Gillespie was not able to answer questions showing she understood a reverse mortgage. A transcript of the counseling session shows Ms. Gillespie did not actively participate in the call or the counseling. Ms. Gray did not ask Ms. Gillespie to "successfully answer five of the ten review questions" or make other effort to determine if she understood basic information about reverse mortgages, which was impossible due to Alzheimer's disease, but required under 12 USC § 1715z–20(f) Counseling services and information for mortgagors. Therefore Ms. Gray should not have issued the certificate to Ms. Gillespie, but she did anyway.

17. Ms. Gillespie had Alzheimer's disease and dementia and lacked capacity at the time of the HECM counseling session April 22, 2008. Ms. Gillespie lacked capacity at the time of the HECM loan closing June 5, 2008. Elizabeth "Liz" Baize of the Ocala office of The Park Avenue Bank was the HECM loan originator. I told Ms. Baize that Penelope Gillespie had Alzheimer's disease early in the origination process. Ms. Baize's only concern was whether a guardianship was in place for Ms. Gillespie. There was no guardianship.

18. Liz Baize did not require anyone to act as power of attorney for Ms. Gillespie. Instead, the bank had me and Mark Gillespie added to the quit-claim deed along with Ms. Gillespie, and required us all to sign the HECM Notes and HECM Mortgages. When the HECM closed June 5, 2008, Penelope Gillespie age 77 was the only person age 62 or older qualified to be a HECM borrower. I was age 52. Mark Gillespie was age 49.

19. At all times pertinent to this HECM, Ms. Gillespie was not competent and suffered from Alzheimer's disease and dementia.

20. At all times pertinent to this HECM, the lender and lender parties knew or should have known Ms. Gillespie was not competent and suffered from Alzheimer's disease and dementia.

21. Charles J. Thomas, a New York Supreme Court Judge, voided a reverse mortgage and its subsequent refinancing on the grounds that the borrower's mental illness made her unable to understand the reverse mortgage. The Order and a related news story are attached.

> Matter of Doar (Brunson) 2009 NY Slip Op 29549 [28 Misc 3d 759] December 18, 2009 Thomas, J. Supreme Court, Queens County Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. As corrected through Thursday, October 7, 2010.
>
> Appellate Division continued to require that a mortgagee have knowledge of the mortgagor's incapacity before the contract which is otherwise voidable could be voided. In order to void a contract which is voidable because of incapacity, the mortgagor must establish that the mortgagee had knowledge of the "incapacity and were . . . not bona fide mortgagees for value." (See Weisberg v DeMeo, 254 AD2d 351, 351 [1998].)
>
> Under these circumstances, the court finds that Hermina Brunson was incapable of understanding the agreements that she signed on April 21, 2003 and that Financial Freedom is charged with the responsibility to determine, and was in a position to know of her incapacity. Therefore, the court finds the mortgages on June 20, 2003 void.

22. Therefore this HECM is void or voidable because the mortgagee had knowledge of the "incapacity and were . . . not bona fide mortgagees for value."

FURTHER AFFIANT SAYETH NOT,

[signature]
Neil J. Gillespie

The foregoing instrument was acknowledged before me, this 2nd day of February, 2015, by Neil J. Gillespie, who is personally known to me, or who has produced __________ as identification and states that he is the person who made this affidavit and that its contents are truthful to the best of his knowledge, information and belief.

(SEAL) CECILIA ROSENBERGER
Commission # EE 191610
Expires June 6, 2016
Bonded Thru Troy Fain Insurance 800-385-7019

Cecilia Rosenberger
NOTARY PUBLIC

____
Print Name of Notary Public

My Commission Expires: __________________

OCALA NEURODIAGNOSTIC CENTER

Windsor Oaks Medical Park
1901 S.E. 18th Avenue Bldg 400
Ocala, Florida 34471

Tel (352) 732-7095 Fax (352) 732-0477

Jose Gaudier, M.D.
William Gayá, M.D.
Ken Ng, M.D.
Gregory Howell, M.D.

Diplomates, American Board of Psychiatry & Neurology

May 8, 2006

Christopher Grainger, M.D.
4600 SW 46th Court, Ste. 310
Ocala, FL 34474

RE: Penelope Gillespie
73008

Dear Dr. Grainger:

I last saw Ms. Gillespie in February. I have since received notification from her son who takes care of her and lives with her that she had contributed $40,000 towards a mortgage to purchase a share in a restaurant and the money was gone and the restaurant closed. This involved one of the patient's children, a daughter. The patient also apparently gave several paintings to the daughter and they were not family portraits or heirlooms, but they were worth around $20,000. The patient herself didn't know how she got the paintings and wasn't certain as to whether the paintings were on loan to the daughter or whether she is going to return them. The patient also was riding in a car with a friend who would drink and drive.

At this point the son now lives with her and has Power of Attorney.

I have been treating the patient for Alzheimer's dementia, which is moderate. She is on both Aricept 10mg a day and Namenda 10mg b.i.d. along with her other medications, which include Diovan for hypertension, Digoxin for her heart, Nitroglycerine, Nu-iron for anemia, various vitamins, and Aspirin.

It is my impression that the patient has moderate Alzheimer's and is not competent to give things away or make any financial decisions and needs Power of Attorney or legal guardian to look after her bills and take care of her and make sure that she doesn't give away items or her money to inappropriate people.

The patient's other medications right now include Metoprolol, Dynacirc, Coumadin, Lasix, Spironolactone, Nu-iron, Centrum Silver, B12, and some prn Nitroglycerine.

The patient's blood pressure today was 110/64 in the right arm and 82/50 in the left arm. She has no focal deficits.

She is to come back and see me for follow up in six months.

Sincerely,

Gregory J. Howell, M.D.
GJH/jcm

70314

NEUROLOGICAL ASSOCIATES

Jay J. Rubin, M.D., P.A. • Anette V. Nieves, M.D. • Anna Y. Khanna, M.D.

Specializing in Neurological, Neuromuscular, Movement, Sleep, and Cerebrovascular Disorders

Florida Professional Park 2685 SW 32nd Place Ocala, FL 34474	(352) 732-9643 (352) 732-2243 fax NeuroHealthinc.com	Del Webb Spruce Creek 14031 Del Webb Blvd. Summerfield, FL 34491

September 4, 2008

Christopher Grainger, M.D.
4600 SW 46th Court, #310
Ocala, Florida 34474

NEUROLOGICAL CONSULTATION

Re: Penelope M. Gillespie — Chart #: 56021

Dear Christopher:

Thank you for requesting a neurological consultation regarding this 77-year-old female with Alzheimer's disease. Mrs. Gillespie is accompanied by her son who is a very good historian. He also provided a nicely printed list regarding her current medications.

History of Present Illness: Mrs. Gillespie has a history of progressive short-term memory impairment culminating with a diagnosis of Alzheimer's disease made by Dr. A. Singh in 2004. She was placed on Namenda and then evaluated neurologically by Dr. Howell and treated with Aricept. In 2007, Aricept was stopped for eighteen days whereupon her memory worsened. Mrs. Gillespie stopped driving in 2004. Her son cooks and manages her medications. She generally eats and sleeps well, sleeping about eight to ten hours a day on the average, and she infrequently awakens during the night. She wears Depends for incontinence and for occasional diarrhea. She has some episodes of increased confusion but no hallucinations. Generally, her disposition is very good and she is quite cooperative.

More recently, she has been under the care of Dr. Gaya, but her son expressed an interest in the Alzheimer's Investigational Study. Her son indicates that Mrs. Gillespie has had more confusion this year. For example, she often does not seem to realize that her son lives with her.

Your evaluation included a head CT scan in 12/07 at Advanced Imaging Center that showed an old appearing right frontoparietal cortical stroke and atrophy. She had a normal TSH and B12 level in 06/08. Her creatinine has gradually been elevated and was 1.98 in July.

Past Medical/Surgical History: Is noteworthy for atrial fibrillation, mitral valve regurgitation, Alzheimer's disease, TIA, hypertension, and irritable bowel syndrome. She is s/p bilateral total knee arthroplasty (in 1998 and 2000).

Current Medications: Namenda 10 mg bid (began in 2004), Aricept 10 mg q a.m. (began in 2005), Furosemide 20 mg qd, Spironolactone 25 mg qd, Coumadin, Nitroglycerin 0.4 mg prn, multivitamins, vitamins B6 & B12, Imodium AD prn, and Tylenol prn. She is not to take Advil, Aleve, Motrin or Ibuprofen.

Allergies: Rythmol, Methotrexate, or fresh, frozen or canned corn.

Social History: Mrs. Gillespie is widowed and has three children. She is a high school graduate. She smoked minimally in the past. No history of any alcohol consumption. She is retired from retail work. She enjoys watching television and reading newspaper and magazines.

G

Family History: Her mother died at 83 years of age from a stroke. Her father died at 60 years of age with myocardial infarction. Her brother is age 82 and her sister is age 79, both with heart disease. Her maternal grandmother also had dementia.

Review of Systems: Is noteworthy for weakness, fatigue, hypertension, occasional chest pains, irregular heartbeat, daytime sleepiness, nocturia, back pain, pain with walking about half a block, confusion, and chronic anxiety, but there is no history of depression according to Mrs. Gillespie or her son. Complete ROS is available in the chart and I reviewed this with Mrs. Gillespie.

NEUROLOGICAL EXAMINATION: Blood pressure is 120/80. Pulse 80 with slight irregularity. Height 5'5". Weight 157 lbs. She is right-handed. Mrs. Gillespie appears short-stature, pleasant, cooperative, comfortable, and with a somewhat flattened affect, and with mild bradykinesia. Chest is clear. Heart rate is frequently irregular. No heart murmur or carotid bruits are present. She is disoriented and certainly confused. She recalled 0/3 objects in five minutes with poor visual spatial skills. She scores 17/30 on the Mini-Mental Status Examination. HEENT: PERRL. Full visual fields and extraocular movements but with decreased smooth pursuit. Normal grimace, hearing, elevation of palate, shrug and tongue movements. There is mild atrophy present in the distal lower extremities but strength is normal throughout. Sensation is only decreased to vibration in the toes. Normal coordination and gait. Deep tendon reflexes are diminished throughout but symmetrical. Babinski sign is present bilaterally but no spasticity is present.

DIAGNOSES:

1. Moderate dementia consistent with Alzheimer's disease, currently treated with Aricept and Namenda.
2. History of right frontoparietal cortical stroke probably occurring two years ago by history and by head CT scan.
3. Chronic renal insufficiency.

RECOMMENDATIONS/PLAN: I reviewed the findings, diagnoses and treatment options with Mrs. Gillespie's son. He is very intelligent, supportive and provides many documents including a detailed list of all of her tests and procedures between 10/05 and 07/08. Her son expresses much interest in helping his mother participate in a research study. Therefore, this is being discussed. If she is a candidate, she will be screened for the study and if her son is interested, then we will pursue appropriate treatment. Otherwise, I am going to recommend continued current medications. We will also schedule a return appointment for Mrs. Gillespie and I look forward to following her along.

It was a pleasure seeing this delightful lady today and I also appreciate the helpful records you provided.

Sincerely,

Jay J. Rubin, M.D., P.A.

JJR/wltv

Judge Voids Reverse Mortgage, Says Counseling Fails to Prove Competency

Posted By Reva On January 14, 2010 @ 9:50 am In Counseling,Legislation,News,Reverse Mortgage | 105 Comments

In a ruling last month, Charles J. Thomas, a New York Supreme Court Judge voided a reverse mortgage and its subsequent refinancing on the grounds that the borrower's mental illness made her unable to understand the reverse mortgage.

In the case, *Matter of Doar, 31393/07* [1], the borrower, Ms. Hermina Brunson, took out a reverse mortgage with Financial Freedom on her home in Queens for $300,000 in December of 2001, refinancing for $375,000 in June of 2003.

However, at the time, Ms. Brunson was being treated for chronic paranoid schizophrenia. By the end of 2001, her psychiatrist testified that Ms. Brunson was hearing voices, believed her neighbor was trying to take her home away from her, and claimed that she no longer had the deed to the home.

Despite the counseling session lasting 45 minutes over the phone, the judge wrote that it was "not meant to be perfunctory or a mere rubber stamp of the banking or mortgage industry. It was intended to secure that the rights of elderly homeowners were protected. The mortgagee is entrusted with the responsibility of conducting an inquiry of the applicant's understanding of the mortgage agreement."

Judge Thomas continued, "There is no evidence that Ms. Brunson understood the terms of the mortgage or the Counseling Certificate that she signed on June 20, 2003." He faulted the counselor for not unearthing the borrower's mental illness and her delusions regarding her home. Most significantly for the industry, Judge Thomas ruled:

> *While the Certificate of Counseling is an indication that information was given to the homeowners it is not dispositive of the issue of the mortgagor's knowledge and understanding of the implications of a reverse mortgage or that the National Housing Act has been satisfied. That determination rests ultimately with the court.*

As a result, the responsibility is on the lender to prove that the borrower understood the reverse mortgage, regardless of whether or not they received a counseling certificate.

The judge further faulted the counseling process, noting that there was no evidence as to the qualifications of the counselor, whether the counselor spoke to Ms. Brunson or only to her brother, if Ms. Bunson's questions were answered, and what information the counselor provided.

While recent counseling reforms such as the qualification of the counselor addresses some of these issues, this is still a situation that could be repeated today.

In the ruling, Financial Freedom was ordered to void the mortgage, but the Guardian of the borrower is directed to reimburse Financial Freedom for monies paid out at the closing which includes taxes, water charges, and the New York City Department of Social Services liens. It is unclear whether Financial Freedom will appeal.

Matter of Doar, 31393/07 [1]

Write to Reva Minkoff [2]

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URLs in this post:

[1] Matter of Doar, 31393/07: **http://reversemortgagedaily.com/img-112161623-0001.pdf**
[2] Reva Minkoff: **mailto:rminkoff@reversemortgagedaily.com**
[3] Sign up: **http://reversemortgagedaily.list-manage.com/subscribe?u=bccc16f054acb3137aa5fcfe5&id=48b4357284**
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHARLES J. THOMAS IAS TERM, PART 20B
Justice

-----------------------------------X

In the Matter of the Application of ROBERT DOAR, as the Commissioner of Social Services of the City of New York,

Petitioner, INDEX NO.: 31393/07

For the Appointment of a Guardian of the Personal Needs and Property Management of

HERMINA BRUNSON

A Person Alleged to be Incapacitated

-----------------------------------X

The following papers numbered 1 to read on this motion by

	PAPERS NUMBERED
Order to Show Cause........................	1-8
Answering Affidavits-Exhibits..............	9
Memorandum	10-13

In March 2008 the New York City Commissioner of Social Services submitted a Petition pursuant to Article 81 for the appointment of a Guardian for Hermina Brunson. Dimas Salaberios was appointed Temporary Guardian for Ms. Brunson.

At the time of the hearing which was commenced on February 28, 2008, continued on various dates until May 8, 2009, Ms. Brunson's home had been in foreclosure. The foreclosure action has been stayed pending the conclusion of the guardianship proceeding.

As part of the guardianship proceeding Petitioner seeks to establish that Ms. Brunson was incapacitated from the year 2000 forward and that she lacked the capacity (1) to execute the deed transferring the property to her brother Joseph and (2) to enter into mortgage agreements with Financial Freedom signed in December 2001 and June 2003. The Temporary Guardian seeks to vacate the mortgages because of Ms. Brunson's incapacity and claims that the proceeds were used solely for the benefit of Ms. Brunson's brother, Joseph Brunson. He also alleged that Ms. Brunson signed the mortgage agreement under physical and emotional duress from her brother.

Financial Freedom Senior Funding Corp. (hereinafter "Financial Freedom"), which has appeared in this action with regard to the issues involving the mortgage, claims that Ms. Brunson had sufficient capacity to enter into the mortgage agreements on December 28, 2001 and June 30, 2003 and that even if she did not, the proceeds of the mortgage were used for her benefit. That being the case, Financial Freedom claims it is entitled to repayment of the monies expended from the mortgage proceeds.

It is agreed between the parties that Ms. Brunson purchased a one family home in 1974 and held the property individually in fee simple until October 12, 2001. At that time Ms. Brunson signed a deed transferring her property to herself and her brother Joseph Brunson as joint tenants with the right of survivorship. It is also agreed that two reverse mortgages were executed by both Ms. Brunson and her brother Joseph Brunson—the first on December 30, 2001 for $300,000.00; the second on June 20, 2003 for $375,000.00. The second mortgage paid off and satisfied the first leaving only the June 20, 2003 mortgage outstanding.

At the hearing Dr. Arthur Pierre Lewis testified that he treated Ms. Brunson from December 2000 when she was transferred from Elmhurst Hospital to Creedmore Psychiatric Hospital until 2006. As her treating physician Dr. Pierre Lewis diagnosed Ms. Brunson's condition as chronic schizophrenia paranoid type. Dr. Pierre Lewis testified that he saw Ms. Brunson on a monthly basis and that Ms. Brunson was also treated by Dr. Penny, a psychologist on a bi-weekly basis.

At the end of 2001 Ms. Brunson began suffering from a cognitive impairment that included a loss of memory and inability to function. She complained of hearing voices and suffered from delusions including the delusion that her neighbor, who had recently been released from prison, was trying to take her home away from her. She also claimed that she no longer had the deed to the house.

At approximately the same time Ms. Brunson also expressed anxiety and great fear of her brother, Joseph. Ms. Brunson claimed among other things that her brother was not feeding her. On several occasions Dr. Pierre Lewis witnessed the interaction between Ms. Brunson and her brother Joseph Brunson. Dr. Pierre Lewis felt that based on his expertise as a psychiatrist and on the interaction between the two siblings on these occasions, Joseph Brunson was mistreating Ms. Brunson. His findings resulted in his referring the matter to Adult Protective Services which, after reviewing the complaint, took no further action and closed the case.

Based upon the testimony of Dolly Cook, Ms. Brunson's sister, and Dr. Pierre Lewis, the Court finds that Ms. Brunson suffers from a mental illness which, from the time of her hospitalization in the year 2000, rendered her incapable of handling her financial affairs and from understanding the nature of reverse mortgages entered into in 2001 and 2003 and their long-term complications. Her psychosis and delusions, which seem to center around the loss of her home, made it unlikely that she could have distinguished that which was real from that which was delusional.

Prior to the enactment of Mental Hygiene Law of Article 81 the rights of the parties to a contractual agreement where one of the parties is incapacitated was set forth by the Court of Appeals, in Ortelere v. Teachers' Retirement Bd. 25 NY2d 196.

> The avoidance of duties under an agreement entered into by those who have done so by reason of mental illness, but who have understanding, depends on balancing competing policy considerations. There must be stability in contractual relations and protection of the expectations of parties who bargain in good faith. On the other hand, it is also desirable to protect persons who may understand the nature of the transaction but who, due to mental illness can not control their conduct Hence, there should be relief only if the other party knew or was put on notice as to the contractor's mental illness(205).

In 1992 when the legislature enacted Article 81 of the Mental Hygiene Law, the requirement of knowledge of one party's incapacity by the other was not included in the statute. Section 81.29(d) of the Mental Hygiene Law provides as follows:

> (d) If the Court determines that the person is incapacitated and appoints a Guardian, the Court may modify, amend or revoke any previously executed...contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the Guardian if the Court finds that the previously executed... contract, conveyance, or disposition..., was made while the person was incapacitated...

Nevertheless, the Appellate Division continued to require that a mortgagee have knowledge of the mortgagor's incapacity before the contract which is otherwise voidable could be voided. In order to void a contract which is voidable because of incapacity, the mortgagor must establish that the mortgagee had knowledge of the "incapacity and were not bonafide mortgagees for value". (See Weisberg, et al v. DeMeo, et al, 254 AD2d 351, 678 NYS2d 661).

In 1996 Congress authorized the National Housing Act which created reverse mortgages aimed at providing the elderly access to the equity in their home. When it did so, the Department of Housing and Urban Development stressed its concern about the intricacies of a reverse mortgage and the need to insure that elderly individuals not risk their hard earned equity by entering into a reverse mortgage unless they fully understood the terms and significance of the mortgages to which they are agreeing. The very nature of the intended recipients of these mortgages render such transactions suspect and thus a greater obligation is appropriately placed on the mortgagee than in an otherwise arms length transaction. Hence, the burden of knowledge which had been placed on the proponent seeking to void the contract due the lack of capacity of a party by the Ortelere Court must be shifted to the mortgagee when dealing with a reverse mortgage. In such cases it is sufficient if the mortgagee knew or could have known by the reasonable fulfilment of its statutory obligations. To rule otherwise would render the protections meaningless.

Congress' concern is reiterated and codified in 26 CFR Section 206.41, the regulations that accompany the National Housing Act. To that end the statute requires both counseling of the prospective mortgagors as well as the execution and submission of a certificate attesting that the counseling requirement had been either satisfied or waived. The statute requires that an attorney or certified counselor discuss and advise the prospective mortgagor of their rights and responsibilities under a Housing and Urban Development guaranteed reverse mortgage. This certification was not meant to be

perfunctory or a mere rubber stamp for the banking and mortgage industry. It was intended to secure that the rights of elderly homeowners were protected. The mortgagee is entrusted with the responsibility of conducting an inquiry of the applicant's understanding of the mortgage agreement.

The purpose of the counseling is two-fold. First, to insure that no one enters into a mortgage contract without a full understanding of his or her rights under the mortgage. Second, that a reviewing court can ascertain that the intent of the legislation has been accomplished and that the statutory requirements have been fulfilled. Here the Court is not satisfied as to either.

Freedom Fidelity, who was unable to produce the individual who filled out the Certificate of Counseling was unable to substantiate the details of what Ms. Brunson had been told. While the certificate indicating that a Rosa Colarte certified that the homeowners had received counseling was submitted into evidence (Respondent's Evidence 14), there was no evidence as to the qualifications of Ms Colarte or the counseling itself. The certificate states that the counseling was not face to face but over the phone and that the total time was 45 minutes. The information on the certificate does not inform the Court whether Ms. Colarte actually spoke to Ms. Brunson and if so what portion of the conversation was with Ms. Brunson as opposed to Joseph Brunson who clearly dominated his sister's actions. The Court can not ascertain what information Ms. Brunson was given by Ms. Colarte and whether she had or asked questions and, if so, what they were and whether her questions were answered.

There is no evidence that Ms. Brunson understood the terms of the mortgage or the Counseling Certificate that she signed on June 20, 2003. Under the circumstances of this case any responsible counselor would have unearthed Ms. Brunson's mental illness and her delusions regarding her house and determined that Hermina Brunson lacked the capacity to enter into the mortgage, or, at the very least, that further counseling was needed. While the Certificate of Counseling is an indication that information was given to the homeowners it is not dispositive of the issue of the mortgagor's knowledge and understanding of the implications of a reverse mortgage or that the requirements under the National Housing Act have been satisfied. That determination rests ultimately with the court.

Under these circumstances the court finds that Hermina Brunson was incapable of understanding the agreements that she signed on April 21, 2003 and that Financial Freedom is charged with the responsibility to determine, and were in a position to know of her incapacity. Therefore, the Court finds the mortgages on June 20, 2003 void.

The Court, however, recognizes that Ms. Brunson used a portion of the funds to benefit and protect her ownership rights in the property and to such extent Financial Freedom should be compensated.

Accordingly, the Guardian is directed to reimburse Financial Freedom for monies paid out at the closing including taxes, water charges and the New York City Department of Social Services liens.

DATED: December 18, 2009

CHARLES J. THOMAS, J.S.C.