

STATE OF SOUTH CAROLINA  
In the Supreme Court

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JAN 26 2015

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

S.C. Supreme Court

The Honorable Doyet A. Early, III, Circuit Court Judge

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Appellate Case No. 2013-001649

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Alan Wilson, in his Capacity as Attorney General of  
South Carolina; and others ..... Plaintiffs,

v.

Albert H. Dallas and others,..... Defendants.

Of whom Adele J. Pope, Individually and on behalf of Others under South  
Carolina Trust Code Section 62-7-405, is the.....Appellant,

And Terry Brown, Forlando Brown, James B., David G. Cannon, Albert H. Dallas  
and Tommie Rae Hynie are.....Respondents

And Alan Wilson in his Capacity as Attorney General of South Carolina,  
Deanna J. Brown Thomas and Robert L. Buchanan, Jr.,  
are.....Additional Interested Persons.

In Re: The Estate of James Brown and The James Brown 2000 Irrevocable  
Trust u/a/d August 1, 2000, Respondents.

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**MOTION TO SUPPLEMENT RECORD  
AND STAY SPOUSAL PROCEEDING  
AND MEMORANDUM IN SUPPORT OF MOTION**

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TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE  
COURT:

Based on the Order of the Honorable Doyet A. Early, III, dated January 13, 2015,

received by Appellant on January 22, a copy of which is attached as Exhibit A, Appellant moves this honorable Court to supplement the record on appeal in this matter with the said order, and with additional documents listed on Exhibit B. Appellant further moves this Court to stay the Aiken County spousal proceeding until the earlier of the conclusion of this appeal, or the conclusion of Richland County Case 2010-CP-40-4900 ("Case 4900").

Irreparable harm by the State's continued joint action with Hynie against Appellant will result if the supplement and stay are not granted.

This motion is based on the Order and the briefs and record on appeal herein. It is supported by the following memorandum.

#### **MEMORANDUM IN SUPPORT OF MOTION**

On May 29, 2013, Louis Levenson, Esq. (Levenson) and counsel for Respondent Tommie Rae Hynie announced their intention to ask Judge Early to go *in camera* and hear why he should reinstate the August 10, 2008 settlement of Attorney General Henry McMaster (AG McMaster) which dismembered the "I Feel Good" Foundation. Hearing this, AG Wilson announced he would be withdrawing from the Aiken proceedings. He did so. But AG Wilson and his trustee Russell Bauknight have remained at the side of Respondent Hynie in Case 4900 and three FOIA matters. This State action to help set aside Brown's noble estate plan; dismember the "I Feel Good" Trust; and damage its 800+ copyrights causes irreparable harm to Appellant; to all fiduciaries and others who have worked to protect the "I Feel Good" Trust; and to the heirs who are not aligned

with the AG, Levenson, Hynie, and David Bell, Esq. (Bell).

The January 13, 2015 Order is the result of a year's work of David Sojourner to help Bauknight, Levenson, Hynie and Bell defeat the real heirs of James Brown. It is a major step in their plan to collect \$20 million in contingency legal fees and place another \$11 million in Hynie's hands. Sojourner did not depose Hynie or conduct any discovery before stipulating to "facts" which do nothing to protect the "I Feel Good" Trust. In the hearing and order Appellant and others were denied even basic Due Process. Appellant, Brown's real heirs, including his incarcerated son Michael; and all others whose property interests are directly affected by a proper determination that Hynie was not Brown's spouse, are simply shut out of the process.

The following chronology shows how this unfortunate proceeding continues the State action to crush Appellant and Robert Buchanan, Jr. for daring to do what Judge Early appointed them to do and Brown's documents demand – vigorously defend the noble estate plan of James Brown.

- |      |   |
|------|---|
| 2001 | After the birth of her son, Hynie conceals her marriage; obtains an Aiken Cty. marriage license; and conducts ceremony with Brown.  |
| 2003 | Hynie's marriage discovered. Hynie says she will obtain divorce within six weeks. She does not.   |
| 2004 | Robert Rosen obtains annulment for Hynie in SC. Husband never served personally or notified of hearing date, which is changed. Rosen informs Brown he has filed a \$5 million lawsuit against him. [Pleadings not found.]         |
| 2004 | Brown, based on Hynie's acknowledgment of her marriage in the 2004 annulment, moves to void the 2001 ceremony. Hynie counterclaims for separate maintenance and support for her son. Brown's seeks DNA testing. Case settles with |

no provision for son and Hynie's agreement never to claim to be common law spouse.

- Summer 2006 Hynie, Brown and Albert Dallas have 3-way phone conversation confirming that since they are not married, she is a mere guest at the Beech Island mansion. Brown and Hynie separate for last time. She abandons handwritten notes in Brown's mansion.
- 2007 Hynie files defective Elective Share and Omitted Spouse claims. No. Summons; filed in wrong court. Not served on anyone.
- March 2007 Hynie's handwritten notes found in home; transcribed and widely disseminated and discussed, including by two AG's.
- Late 2007 Hynie seeks summary judgment on ceremonial marriage.
- December 2007 Hynie files defective pleadings to set aside Will and Trust. Estate/2000 Trust move to dismiss. Still pending.
- February 2008 Wayne Byrd, Esq., disseminates copies of Hynie notes, which have been public since August 10, 2007 order of Judge Early. Byrd asserts their importance to the Estate/2000 Trust to defeat Hynie's claims.
- Feb- March 2008 Without a hearing or supporting affidavit, Hynie's attorney obtains 3 gag orders from Judge Early which purport to prevent scores of people from discussing already known contents. Orders become known as the Hynie "diary" gag orders because Hynie's counsel refers to discarded notes as her "diary." Judge Early says the orders will only last 10 days, but time limitation not contained in orders.
- March 22, 2008 Judge Early issues order for determination of heirs both under State law and under the Federal Copyright Act. Buchanan & Pope (for Estate/2000 Trust ) consent, along with Levenson. Order confirms position of five Levenson clients that Hynie not spouse.
- August 10, 2008 AG McMaster, with knowledge of Hynie handwritten notes, reaches settlement to give her 25% of assets Brown gave "I Feel Good" Trust, and "stipulate" that Hynie will be treated as spouse for all purposes.

Sept. 2008 - 2013 Hynie's counsel announces Hynie and Attorney General "speak as one." Hynie dictates State Copyright policy.

January 2009 Bell, known for deception of the courts, joins settlement for Terry Brown (Terry), while purporting to support the estate plan in federal court for Forlando Brown (Forlando). Terry given right of first refusal (ROFR) to buy music empire.

March 2009 Buchanan and Appellant warn the AG of threat of devaluation and further damage to "I Feel Good" Trust now that Terry given ROFR.

March 2010 Hynie's counsel advises Buchanan's counsel AG Sonny Jones has hired Ken Wingate and will sue if Buchanan/Appellant do not resign and abandon appeal.

May 18-19, 2010 Bauknight, Hynie's counsel, Bell, Levenson sign Wingate 40% contingency fee contract. AG, Hynie, James B., others sue Buchanan & Appellant in Case 4900. Claims of wrongdoing include:

1. Failure to accept \$100 million 2007 offer for music empire;
2. Claims related to Christie's sale;
3. Claimed failure to understand Federal Copyright Act;
4. Conducting appeal which will result in *Wilson v. Dallas*.

August 2010 Sr. Assistant AG Jones introduced to Judge Manning as one of Wingate's dozen or so clients. Attends most hearings.

2010 Buchanan and Appellant answer in Case 4900, asserting Hynie is not Brown's spouse. They counterclaim for abuse of process; intentional interference with contract; fraud under § 62-1-106; civil conspiracy; and attorneys' fees.

2010 Three attorneys for Hynie begin discussion with Sr. Assistant Jones and counsel for Bauknight about how \$99 million of assets delivered to Bauknight is wrong; settling parties will consider Brown had no publicity rights; and other issues related to devaluation.

2010 Bauknight secretes \$4.7 million "appraisal" of Brown's worldwide music empire which AG relies on until 2013 to accuse Buchanan and Appellant of federal felony. In 2014 AG and Bauknight both assert that neither AG

McMaster, AG Wilson nor any member of the AG's staff saw the \$4.7 million appraisal. Bauknight says only he and advisors saw it.

- October 2010 AG/Hynie name Cannon and Dallas as witnesses against Buchanan & Appellant in Case 4900. No attempt to recover \$17 million taken by Cannon from funds James Brown gave "I Feel Good" Trust.
- 2010 - today Hynie, AG and others move for relief from default as to counterclaims of Buchanan and Appellant. Refuse all discovery in Case 4900 except witness list.
- January 2011 AG McMaster, Terry, Levenson, counsel for Hynie & Bell secretly amend Legacy Trust. Terry assigns interest in Legacy Trust, ROFR and Estate to Forlando. Bell begins 3-years of open representation of parties taking opposite sides in state and federal courts. Bauknight notifies federal court the 2000 Trust does not want to seek attorneys' fees for Forlando's 3-year suit to enjoin 2000 Trust until Cannon Trustees return.
- January 2011 Incorrect GRAMMY claims show up on KS website without knowledge of Robert Potter, Esquire, credited with "halting" the sale. GRAMMY placement and withdrawal were both appropriate; without penalty. Placement believed to be Bell/Forlando working with Cannon trustees. Their association with KS dates to 1999 TIAA deal.
- March 2011 S.C. Court of Appeals upholds claim of AG/Hynie that jurisdiction and venue of Case 4900 is proper in Richland County. (Over objection of Buchanan and Appellant).
- 2010 & 2011 Bauknight tells IRS & Supreme Court that music empire worth \$4.7 million and personal property \$.5 million. Asserts there have never been offers to buy the assets. Hynie and AG agree, but do not amend pleadings/claims in Case 4900.
- August 2011 S.C. Supreme Court declines request of AG, Hynie & others to supplement record in Wilson with \$4.7 million.
- August 2011 At Buchanan's suggestion, Appellant files two FOIA suits after AG & Legacy Trust refuse to produce the following

public documents:

1. Wingate Litigation Retention Agreement
2. \$4.7 million appraisal which AG is using to accuse Buchanan and Appellant of a federal felony.
3. Copies of the Legacy Trust & Amendments. [Legacy Trust is a Co-Plaintiff with the AG and Hynie in Case 4900]

Fall 2011- 2012 Hynie and others move to intervene in one FOIA suit and obtain sanctions against Appellant for exercising her FOIA rights. AG, Hynie, others have FOIA suit seeking Wingate Agreement transferred to Richland County and consolidated with Case 4900. Legacy Trust claims it is not subject to FOIA; threatens sanctions. AG & Legacy Trust have second FOIA suit moved to Richland. No hearing has been held in either FOIA suit since 2012.

November 2011 Forlando has falling out with Bell, Bauknight. Terminates Bell and reveals secret amendment to Legacy Trust and other secret dealings, including his participation in possible \$200 million sale of music empire.

April 2012 Forlando/Bell's 4-year frivolous lawsuit against the 2000 Trust to reinstate the Cannon trustees is dismissed. Bauknight, apparently reconciles with Forlando.

May 2012 AG, Hynie, others, file motion to compel settlement with Buchanan in Case 4900. Buchanan to be paid \$500,000 and release Hynie, AG, Legacy Trust and others. Appellant supports payment to Buchanan, but opposes provision which fails to tell Supreme Court that AG is preventing Buchanan from filing Petition for Rehearing in *Wilson*.

July 2012 To prevent deposition of Hynie, she and AG secure order for pre-discovery mediation in Case 4900.

July 2012 Hynie, AG get emergency oral order from Judge Manning to stop deposition of their witness Albert Dallas after it becomes clear he will testify that Brown & Hynie were not married, and he discussed it with both of them in the summer of 2006. Dallas gives sworn statement to that

effect.

- July 2012 Jg. Early issues order declaring he lacks jurisdiction to grant Appellant's motion to lift 2008 gag orders, to protect herself from claims of AG/Hynie in Case 4900, and elsewhere. Cites *Wilson* appeal. From May 8, 2013 until today (January 23, 2015) he declines numerous requests for hearing on her Motion.
- Fall 2012 Before Mediation, Appellant makes offers of Judgment to minor grandchildren, Attorney General, James B., Daryl Brown (Daryl) and others to encourage support of "I Feel Good" Trust; fair-but-arms'-length Federal Copyright Act termination rights agreements; and an end to Case 4900. AG/Hynie's counsel files offers and moves to strike them as an attempt to divide the settling parties.
- Oct. 2012 Mediation unsuccessful. Levenson allowed to attend in place of 10 Plaintiff/Counterclaim Defendants, including two minors. Bell attends for Terry, but does not disclose Forlando owns Terry's former interest in Case 4900. Bauknight attends as agent for James B., without GAL. Hynie, exempted from attending mediation, posts on facebook:  
  
"This mediation today is to get rid of Adelle Pope an X trustee appointed by the state that has misappropriated and slandered this family with her hatred."
- Dec. 2012 Journalist covering James Brown case in Aiken sues for Hynie "diary", \$4.7 million appraisal and other documents.
- 2012 Bauknight pays Wingate \$563,000 in addition to 40% contingency.
- March 2013 Appellant & her Case 4900 counsel visit AG Wilson between *Wilson* decisions and explain problems being caused by \$4.7 million value; false felony claim; failure to protect copyrights; and AG/Bauknight's alliance with Hynie.
- 2013 - 2015 Bauknight fails to make changes with IRS about Hynie marital status or \$4.7 million claimed value. AG continues to claim he has never seen appraisal.

March 2013	AG tells Court he is seeking to be dropped as Case 4900 party, but files defective motion which is contrary to requests being made to Court by his counsel of record.
March 2013	AG tells Supreme Court AG McMaster did not authorize State to sue Buchanan and Appellant in Case 4900. This is inconsistent with filings in Court of Appeals and circuit court, where AG Wilson has defended right to share private attorney with Hynie and others.
April 2013	Bauknight moves to intervene in FOIA suit of Newberry journalist. AG and Bauknight seeks to transfer to Richland and subordinate it to Case 4900 discovery.
May 8, 2013	Final <i>Wilson v. Dallas</i> decision.
May 8-10, 2013	Bauknight obtains <i>ex parte</i> the first of several orders which leave him in control of "I Feel Good" Trust while he still serves as fiduciary for Hynie in Case 4900 and under the Legacy Trust.
May 10, 2013	AG/Hynie's counsel ask Case 4900 court to stay all Case 4900 matters and Appellant's 2 FOIA suits until all matters concluded in Aiken.
May 29, 2013	Hynie's counsel and Levenson announce request to go <i>In Camera</i> and reinstate AG's settlement. Hynie, Levenson Bauknight united in claim that Buchanan & Appellant must be removed from James Brown proceedings. AG expresses satisfaction with Bauknight & announces will be withdrawing from Aiken cases.
May 29, 2013	Bauknight files Notice of Disallowance with impending bar asserting Buchanan and Appellant improperly valued assets; neither entitled to any pay for their services; and both may have to disgorge SA fee from 2007.  Disallowance threatens approx. \$1.4 MM already allowed; court-approved; and earning interest at \$130,000 per year under order of Judge Early, and fair payment of about \$100,000 each to Tressa Hayes, Esq. & James Bailey, Esq., Forces Appellant to file suit within thirty days.
June 10, 2013	Appellant files suit to void Disallowance; to remove

Bauknight based on his continuing fiduciary service to Hynie, her son and the Levenson will contestants; etc.

June 13, 2013

Judge Early issues "June 13 Orders" which become the subject of this appeal. Orders purport to prevent Pope from *pro bono publico* service defending the 1999 backup Will; serving as a Probate/Federal Copyright Act Termination Rights advisor/expert to any party; serving as counsel to any party; filing a motion in any James Brown case; defending herself from Hynie's FOIA interference; or defending herself in Case 4900.

Clerk directed to remove three unheard motions from record and to refuse all future filings except in case filed three days earlier. [2013-CP-02-1337 ("Case 1337")].

July 2013

After Form 4 denial or reconsideration, Appellant files this appeal. Bauknight files petition to be sole PR/Trustee, and to appoint Sojourner under him. Fails to name or serve most heirs, devisees and creditors with proper demands for notice, including Appellant.

2013

Wingate returns \$500,000 of \$563,000 paid in 2012 without explanation or interest.

August 20, 2013

Bauknight testifies in federal court to commitment to reinstate AG's settlement. He says of assertion that Buchanan's and Pope's service in overturning the AG's settlement was of value to the Estate/2000 Trust:

That's poppycock. Pure speculation from your client [Pope]. Fantasy...I'm the person who actually looked at this. And I said it was a fair and reasonable settlement. I don't know where this fantasy is that \$50 million was gone away. Number one, your client made up that number. Your client did that in a self-serving fashion so that she could take \$5 million out of this estate for her retirement. So to say that this would have diminished is a load. A total load. I looked at this. I say. You have no clue how termination rights where [sic]. You don't know the value. . . She has no clue what she was dealing with and put stuff in the paper that it's just totally fabricated untrue. It blows me away that someone with a law degree can be so dishonest and get away with it. ...You know, what? That's set aside by the

Supreme Court. That's fine. I've got a new roadmap, and I'm going to follow this new roadmap to a T....

...[Y]our client raped this estate taking every dime out of it for her own fees and for Bob's fees and her lawyer's fees leaving it insolvent....Your client didn't even try. Your client didn't know the numbers. I know the numbers. There was no diminished Legacy Trust. That's fabrication from your client. [Emphasis supplied.]

At the same deposition Bauknight declared as confidential the "appraisal" claiming the value of Brown's music empire was less than \$4.7 Million.

- August 2013 - Today Sojourner refuses to meet to discuss how to protect copyrights under the Federal Copyright Act. Says this is not his responsibility.
- Sept. 4, 2013 Four Levenson clients contesting estate plan nominate Bauknight as PR/Trustee at "hearing" at which no notice given; no parties served with pleadings; and most heirs devisees are not named in Bauknight's petition. Judge Early is only person allowed to ask questions. Does not question Bauknight about his fiduciary service to Hynie; his fiduciary service to Will contestants; his failure to account for assets; \$4.7 million value; or his interference in three FOIA suits. Bauknight advises he will not serve if not allowed to serve as sole PR/Trustee.
- Sept. 27, 2013 Copyright lawyer Marc Toberoff, Esq. confirms on behalf of Deanna, Yamma, Nicole, Larry, Venisha and others their knowledge that Hynie is not Brown's spouse, and that she has no Federal Copyright Act termination rights.
- October 1, 2013 Judge Early appoints Bauknight sole PR/Trustee. Appoints Sojourner limited special trustee.
- Oct. 10, 2013 Probate Judge Sue Roe issues *ex parte* order without hearing appointing Sojourner limited special administrator to protect estate plan. Court hand-delivers order to member of Bauknight's law firm for service on "All Interested Parties." Not served on anyone.
- Late 2013 Appellant discovers *ex parte* Sojourner appointment order

and files timely motion to alter, amend or vacate.

- October 2013 Judge Early "double approves" service of Buchanan, all of which was joint with Appellant. Confirms Bauknight may keep funds he has, and is not subject to any disgorgement. Opens way for possible voiding of Buchanan's claimed "settlement" in Case 4900, where Estate funds were used to secure releases for Hynie, the AG, the Legacy Trust, etc.
- November 15, 2013 After AG/Hynie have resisted FOIA for more than 2 years, federal judge, over Bauknight's objection, declares Wingate Agreement is public document. [It says so on face.] Wingate agreement signed by Levenson, counsel for Hynie, Bell and Bauknight, not by most plaintiffs.
- Oct. - Dec. 2013 Sojourner, paid \$250,000 by Bauknight, seeks to undo heir status of 3 DNA-proven daughters acknowledged by the Estate in 2001, and incarcerated son. Levenson and Sojourner work to exclude DNA-proven heirs from Hynie spousal proceeding.
- 2013 Bell gloats to federal court of permanent stain placed on Buchanan and Pope by the *Wilson v. Dallas* decision, even though his client Forlando has asserted in his federal deposition that Bauknight's \$4.7 million value was "bogus"; that \$150 million offers were available in 2008; that Hynie was not Brown's spouse; and that she begged Brown to marry her.
- 2013 - 2015 Judge Roe does not conduct hearing on motion to alter or amend *ex parte* Sojourner appointment order. She apparently signs Order removing motion to Judge Early, who also fails to conduct hearing.
- 2013 Bell begins to siphon off termination rights agreements for Terry/Forlando. Claims to represent incarcerated son Michael, granddaughter Tonya, but appears for Daryl Brown at Hynie proceedings.
- Jan. 2014 Judge Early dismisses all claims to remove Bauknight, require him to account, etc. Appellant appeals. Appeal becomes Appellate Case No. 2014-000250

- July 2014 Judge Griffith declines to transfer journalist's FOIA suit to Richland Count and consolidate it with Case 4900, as requested by Bauknight and AG. Judge Manning declines repeated requests of Adam Silvernail to hear Appellant's 2011 FOIA Cases.
- 2014 AG/Hynie's counsel in Case 4900 makes formal motion to delay Case 4900 and all FOIA suits.
- Fall 2014 Bauknight claims Estate cannot pay any portion of Appellant's 2007 SA fee or Court-awarded PR/Trustee commission until Case 4900 concluded. Appellant advises Court that this is unfair because Bauknight has asked to stay Case 4900 for what may be years.
- November 3, 2014 Judge Early announces he and Judge L. Casey Manning will order joint mediation in Case 1337 and Case 4900.
- November 24, 2014 Judge Early conducts hearing on Hynie spousal claim. Only Levenson, Bell, Hynie and original parties to AG's 2008 settlement participate. Appellant excluded.
- January 2015 Lewis & Babcock, LLP, counsel for the James Brown Legacy Trust claims Legacy Trust no longer exists, but Case 4900 counsel making demands on behalf of Legacy Trust in relation to upcoming mediation.
- January 9, 2015 Appellant moves to add AG and Legacy Trust as Respondents to this appeal.
- January 2015 Appellant moves to require successors to the assets and liabilities of Legacy Trust, which has sued her for 4 ½ years, to appear at Court-ordered mediation.
- January 13-14,2015 Judge Early issues order declaring Hynie to be Brown's spouse. Order based on stipulated "facts" agreed to by Hynie and Sojourner which utterly fail to protect the "I Feel Good" Trust. Issued without deposition of Hynie; any discovery; or numerous facts of record which confirm Hynie is not the spouse.
- January 16, 2015 Judge Griffith issues an order in Newberry FOIA case. Requires AG to produce documents surrounding Hynie "diary."

- January 16, 2015 AG Wilson files Return to Appellant's Motion to make AG and Legacy Trust parties to this appeal. He does not disclose Judge Early's January 13 Order.
- January 20, 2015 Appellant serves her Reply to the AG's Return seeking not to be made a party to the appeal. She does not know about Judge Early's January 13 Order.
- January 20, 2015 Judge Early issues Order for joint mediation in Case 1337 and Case 4900. Does not disclose that he has ruled Hynie to be Brown's spouse.

In this unusual case the only two people who faithfully served the "I Feel Good" Foundation and Brown's estate plan, after not being reappointed as fiduciaries, were ejected from the James Brown Aiken cases for all purposes. The automatic stay imposed by Rule 205 SCACR should be applicable to the June 13, 2013 Orders, which are the subject of this appeal. The lower court refuses to grant Appellant any hearing in any of the fourteen cases affected by this appeal. Judge Early's order irreparably harms Appellant in her ability to protect herself against the Attorney General and Hynie in Case 4900. There is, at a minimum, a suggestion of reckless or collusive behavior on the part of those charged with protecting the "I Feel Good" Trust. Bauknight continues his fiduciary service to Hynie, and the Attorney General continues as her Co-Plaintiff in Case 4900. This damages Appellant and threatens the "I Feel Good" Foundation.

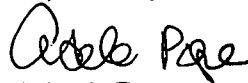
The situation is particularly troublesome since Hynie has now evaded being deposed for seven years, and Sojourner made no effort to depose her or insist on discovery. Judge Early's order disregards the widely-known "diary" contents, and confirms that he is proceeding with no discovery. These fundamental errors violate the

public trust. And Sojourner is consenting.

### CONCLUSION

For the reasons set forth herein, and to avoid irreparable harm to Appellant and the "I Feel Good" Foundation, this Court should supplement the record with the Order of Judge Early dated January 13, 2015, and the other requested documents. The Court should stay the Hynie spousal proceeding until the conclusion of Case 4900 or this appeal, where both the AG and Hynie succeeded in placing the issue of her claimed civil status before the Richland Court.

Respectfully submitted,



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S.C. Bar No. 4501

January 23, 2015

STATE OF SOUTH CAROLINA )  
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COUNTY OF AIKEN )  
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IN RE THE ESTATE OF )  
JAMES BROWN A/K/A )  
JAMES JOSEPH BROWN )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT

Case Nos.: ~~2013-CP-02-02840-000~~  
2013-CP-02-02850 *cert. copy*

**ORDER RE PETITIONER TOMMIE RAE  
BROWN'S MOTION FOR SUMMARY  
JUDGMENT AND THE LIMITED  
SPECIAL ADMINISTRATOR'S MOTION  
FOR SUMMARY JUDGMENT**

This matter came before the court on November 24, 2014 on Petitioner Tommie Rae Brown's Motions for Summary Judgment filed October 30, 2007, November 26, 2007, and April 28, 2014, and the Limited Special Administrator's (LSA's) Motion for Summary Judgment dated May 29, 2014. Each of these Motions requests summary judgment determining whether Mrs. Brown is the surviving spouse of James Joseph Brown. All parties have submitted detailed memoranda in support of their respective positions as well as responsive memoranda, and all parties have consented to a Joint Stipulation of Facts filed September 5, 2014.

The following counsel appeared at the hearing: (1) Robert N. Rosen, S. Alan Medlin, M. Jean Lee, David L. Michel, and Corey T. L. Smith, counsel for Tommie Rae Brown; (2) John F. Beach, counsel for the LSA David C. Sojourner; (3) A. Peter Shahid, Jr., counsel for Guardian ad Litem Stephen M. Slotchiver; (4) Stephen M. Slotchiver, Guardian ad Litem for James Joseph Brown, II; (5) David B. Bell and Matthew D. Bodman, counsel for Daryl Brown; (6) John A. Donsbach and Scott Keniley, counsel for Terry Brown; (7) Louis Levenson, counsel for Deanna Brown Thomas, Yamma N. Brown, Venisha Brown, and Larry Brown; and (8) William Barr and Vera Gilford, counsel for amicus curiae Jeanette Mitchell.

**Exhibit A**

*113 15*  
~~11111~~  
*Liz Hodard*  
C.C.P. & G.S.  
*Thomas J. Barr*  
Deputy Clerk  
*#1*

**I. SUMMARY JUDGMENT STANDARD.**

The standard for granting summary judgment is clear:

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000).

*Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 42, 747 S.E.2d 178, 181-82 (2013).

**II. HISTORY OF THE CASE AND STATEMENT OF FACTS.**

**A. These Proceedings.**

Mrs. Brown filed a petition for Elective Share or Omitted Spouse's share on February 1, 2007, asserting she is the surviving spouse of Mr. Brown. She filed a Motion for Summary Judgment on October 30, 2007 on the issue of her ceremonial marriage to Mr. Brown and the legality of said marriage. Mrs. Brown filed the same motion along with the Affidavit of Tommie Rae Brown in Support of Her Motion for Summary Judgment on November 26, 2007.

On December 20, 2007, Mrs. Brown filed Petitions to Set Aside the Will and Trust. Similarly, on December 26, 2007, five of the six Devises from the 2000 will filed Petitions to Set Aside the Will and Trust. Before these Petitions were heard, Mrs. Brown and other parties to the estate litigation participated in mediation which resulted in a private settlement agreement. In the settlement agreement, Mrs. Brown was recognized by all parties thereto as the surviving spouse of Mr. Brown. The settlement agreement provided that it was a binding private agreement, regardless of court approval, and provided that it bound personal representatives and trustees, as allowed by law. The settlement agreement expressly provided that the provision

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recognizing Mrs. Brown as the surviving spouse survived regardless of whether the agreement was approved by a court.

On May 26, 2009, this Court issued an Order that, inter alia, approved the settlement agreement and found that the contest or controversy was in good faith and that the effect of the agreement on interested parties was just and reasonable in satisfaction with S.C. Code Ann. § 62-3-1102(3). This Court issued another Order which removed the then Personal Representatives and Trustees (Pope and Buchanan), and at the request of the settling parties, this Court appointed Russell Bauknight as Personal Representative and Trustee.

Pope and Buchanan appealed the order approving the settlement agreement and the order removing them from their fiduciary positions to the Court of Appeals, and at the request of the Court of Appeals the consolidated appeals were certified to the Supreme Court pursuant to Rule 204(b), SCACR. In reviewing this Court's finding that there was a good faith controversy under S.C. Code Ann. § 62-3-1102, the Supreme Court determined that the settlement failed the second element of the S.C. Code Ann. § 62-3-1102 test, *i.e.*, that the effect of the agreement on interested parties is just and reasonable. *Wilson v. Dallas*, 403 S.C. 411, 447, 2013 S.C. LEXIS 240, \*64 (2013). The Supreme Court upheld the removal of the prior fiduciaries, finding that they had irreconcilable differences with the estate and trust beneficiaries, but reversed and remanded the approval of the settlement because of a lack of evidence showing a fair and reasonable settlement of a good faith controversy. The Supreme Court also vacated Mr. Bauknight's appointments and remanded the case to this Court.

This Court held a status conference on May 29, 2013 concerning the Supreme Court Opinion and issued an Order on June 13, 2013 requiring all interested persons to submit applications to serve as fiduciaries of the Estate and Trust by July 29, 2013. Mr. Bauknight was



ordered to continue serving in a fiduciary capacity as Special Administrator and Special Trustee in the interim. This Court conducted a hearing to receive testimony from all applicants on September 4 and 11, 2013. This Court then issued its October 1, 2013 Order appointing Mr. Bauknight as the Personal Representative of the Estate and Trustee of the Trust and David C. Sojourner as Limited Special Trustee of the Trust. The Probate Court of Aiken County appointed Mr. Sojourner as the Limited Special Administrator (LSA) of the Estate by its Order filed October 10, 2013.

On March 10, 2014 the LSA served a Motion to Modify Protective Orders Related to Diaries of Tommie Rae Hynie Brown asking this Court to lift the Court's protective orders and to require Mrs. Brown to produce her diaries. Mrs. Brown filed a Return to Motion to Modify Protective Orders Related to Diaries of Tommie Rae Brown and Motion for Protective Order or Order of Confidentiality along with her supporting Affidavit on March 27, 2014, and a hearing was held on March 31, 2014. This Court determined that the LSA's Motion to Modify Protective Orders and all discovery would be held in abeyance pending resolution of Mrs. Brown's Motion for Summary Judgment and later indicated the parties should negotiate a scheduling order.

Mrs. Brown filed another Motion for Summary Judgment and supporting Affidavit on April 28, 2014. She filed a Motion for Protective Order and the Affidavit of Robert N. Rosen on May 12, 2014 requesting that, other than answering the LSA's First Requests to Admit, all discovery be stayed pending resolution of her Motion for Summary Judgment. Petitioner and the LSA subsequently entered an Agreement Resolving Petitioner's Motion for Protective Order dated May 16, 2014, and this Court issued a Scheduling Order filed June 10, 2014 staying all discovery (other than the LSA's April 23, 2014 1<sup>st</sup> Requests for Admission, 2<sup>nd</sup> Interrogatories,

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and 2<sup>nd</sup> Requests for Production) pending resolution of Mrs. Brown's April 24, 2014 Motion for Summary Judgment. The LSA subsequently served his own Motion for Summary Judgment on May 29, 2014.

The parties have served memoranda in support of their respective positions and responsive memoranda in accordance with the Scheduling Order, and a hearing was held on the aforementioned Motions for Summary Judgment at the Bamberg County Courthouse on November 24, 2014.

**B. Stipulated Facts.**

Petitioner Tommie Rae Brown ("Mrs. Brown") and James Joseph Brown ("Mr. Brown") were married by ceremonial marriage on December 14, 2001 at Beech Island in Aiken County, South Carolina.<sup>1</sup> Prior to their marriage, Mrs. Brown gave birth to Mr. Brown's biological son, James Brown, II on June 11, 2001.<sup>2</sup> Following their marriage, Mr. Brown learned that Mrs. Brown had participated in a putative marriage ceremony with another man, Javed Ahmed ("Ahmed") in February of 1997 in Texas, where both Mrs. Brown and Ahmed resided at the time. In December 2003, with Mr. Brown paying her attorney's fees, Mrs. Brown filed an action against Ahmed in the Family Court of South Carolina for an annulment on the grounds of bigamy, among other grounds.<sup>3</sup>

Mrs. Brown's counsel hired a licensed private investigator, Mr. Ronald Pannell, to locate Ahmed, and he was unable to do so. Mr. Pannell submitted an Affidavit of Attempted Service,

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<sup>1</sup> See Joint Stipulation of Facts, p. 3, ¶¶ 4-5 and Exhibit 4 at 000005-6 (License and Certificate for Marriage).

<sup>2</sup> See Joint Stipulation of Facts, p. 2, ¶ 3 along with Exhibit 2 (birth certificate) at 000003 and Exhibit 3 (LabCorp DNA Test Results) at 000004.

<sup>3</sup> *Id.* at 3, ¶ 7 and Exhibit 5 at 000007-9 (Summons and Complaint for Annulment). James Brown paid for Mrs. Brown's annulment, and Mrs. Brown's attorney kept Mr. Brown's attorney informed of the proceedings. *See id.* at 4, ¶¶ 13-14 and Exhibit 14 at 000050-64; Personal Representatives' Responses to Petitioner Tommie Rae Brown's Second Request for Admission, dated January 11, 2008, pp. 3-4, Request and Response Nos. 9 and 10.



filed in the Family Court on February 4, 2004, stating he conducted numerous searches in national databases in an attempt to locate Ahmed, and he found two addresses.<sup>4</sup> One address was 14403 Ella Blvd., #314, Houston, Texas, 77014. Mr. Pannell stated in his affidavit that Ahmed no longer resided at that address. The other address was 14365 Cornerstone Drive, #617, Houston, Texas, 77014, which Mr. Pannell stated in his affidavit was the address on Mr. Ahmed's driver's license issued in 1999. As a result, this address (14365 Cornerstone Drive, #617, Houston Texas, 77014) was Ahmed's last known address. Mr. Pannell stated in his affidavit that Ahmed no longer resided at that address either.

Mrs. Brown filed an Affidavit in the Family Court on February 4, 2004, with Mr. Pannell's Affidavit of Attempted Service, requesting an Order of Publication.<sup>5</sup> In her affidavit, Mrs. Brown stated that Mr. Pannell conducted a full skip trace report and was unable to locate Ahmed. She also said Mr. Pannell found an address where Ahmed apparently had resided since she last knew of his whereabouts. Judge Jocelyn B. Cate of the Family Court issued an Order of Publication on February 3, 2004 finding that Mrs. Brown had made a diligent effort to locate Ahmed and that it appeared to the satisfaction of the Family Court that Ahmed's current address and whereabouts were unknown.<sup>6</sup> The Order of Publication scheduled a Final Hearing for March 26, 2004 at 9:30 A.M. Mrs. Brown properly published the Summons and notice of the hearing in the Houston Chronicle, a newspaper of general circulation in the area, and filed an Affidavit of Publication as directed by the Order of Publication.<sup>7</sup> Ahmed was served by publication.

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<sup>4</sup> Joint Stipulation of Facts at 000010 (Affidavit of Ronald Pannell).

<sup>5</sup> *Id.* at 000016 (Affidavit of Tommie Rae Hynie, a/k/a Tommie Rae Brown).

<sup>6</sup> *Id.* at 000017 (Order of Publication).

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An Order of Continuance was filed by the Family Court on March 24, 2004, rescheduling the Final Hearing to April 15, 2004 at 9:00 A.M.<sup>8</sup> Mrs. Brown's counsel sent Ahmed notice of the rescheduled hearing by regular mail *and* certified mail, return receipt requested, to both of the addresses found by Mr. Pannell, which included Ahmed's last known address at 14365 Cornerstone Drive, #617, Houston, Texas, 77014, the address he had given to the Texas Department of Motor Vehicles.<sup>9</sup> Mrs. Brown's counsel therefore properly gave written notice of the rescheduled hearing pursuant to Rule 17, SCRFC as determined by Judge Segars-Andrews' April 15, 2004 Order.

At the trial in Family Court, Mrs. Brown testified that Ahmed told her he was married to several other women at the time of their purported marriage ceremony and that none of those marriages had been dissolved.<sup>10</sup> A final judgment was entered on April 15, 2014 annulling the purported marriage between Mrs. Brown and Ahmed ("the annulment order").<sup>11</sup> Judge Segars-Andrews found that Ahmed was already married at the time of his putative marriage ceremony to Mrs. Brown, that Ahmed lacked capacity to marry Mrs. Brown, and that the purported marriage between Mrs. Brown and Ahmed was "wholly null and void *ab initio*."<sup>12</sup>

The stipulated facts show that Mr. Brown was aware of the litigation between Mrs. Brown and Ahmed because (1) Mr. Brown paid Mrs. Brown's legal fees, (2) Mrs. Brown's

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<sup>7</sup> *Id.* at 000026-27 (Affidavit of Publication); *see also id.* at 000017-18 (Order of Publication).

<sup>8</sup> *Id.* at 000028 (Order of Continuance).

<sup>9</sup> *Id.* at 000019-25 (Affidavit of Marcia F. Jones); 000010 (Affidavit of Ronald Pannell).

<sup>10</sup> *Id.* at 000040, lines 16-20; 00004, lines 13-15 (April 15, 2004 Transcript of Record).

<sup>11</sup> *Id.* at 000029-32 (April 15, 2004 Final Order).

<sup>12</sup> *Id.* at 000030-32 (April 15, 2004 Final Order).

counsel sent Mr. Brown's attorney a copy of the Summons and Complaint in February, 2004, and (3) Mrs. Brown's counsel sent Mr. Brown's attorney the Final Order in April, 2004.<sup>13</sup>

Mr. Brown filed an annulment action of his own against Mrs. Brown on January 29, 2004 in the Family Court of Aiken County.<sup>14</sup> Just weeks after the April 15, 2004 Final Order was filed, Mr. Brown filed an Amended Complaint for Annulment in the Family Court requesting the Court to issue a judgment that the "Findings of Facts of the Charleston Family Courts are binding on [the Aiken County Family Court]..." and that "[p]ursuant to the Order of the Charleston Family Court, Defendant is collaterally and judicially estopped from denying the allegations in [Mr. Brown's annulment action]."<sup>15</sup> Mrs. Brown counterclaimed for a divorce and other relief.<sup>16</sup> Mr. and Mrs. Brown reconciled in July 2004 and signed a Consent Order on August 16, 2014 dismissing Mr. Brown's action.<sup>17</sup>

Mr. Brown died on December 25, 2006, and his will, dated August 1, 2000 was filed with the Aiken County Probate Court on January 18, 2007.

### C. The Annulment Action.

Mrs. Brown properly brought the annulment action in South Carolina, properly served Ahmed, and properly notified him of the date of rehearing. The Family Court concluded that Ahmed "was married at the time he entered into his marriage with [Mrs. Brown] and therefore he lacked the capacity to marry [Mrs. Brown]."<sup>18</sup>

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<sup>13</sup> *Id.* at 4, ¶¶ 13-14 and Exhibit 14 at 000050-64 (Correspondence with James B. Huff, Esquire).

<sup>14</sup> *Id.* at 000065-67 (Mr. Brown's Summons and Complaint for Annulment).

<sup>15</sup> *Id.* at 000070, ¶¶ 10-11 (Mr. Brown's Amended Complaint for Annulment).

<sup>16</sup> *Id.* at 5, ¶ 19 and Exhibit 17 at 000072-82.

<sup>17</sup> *Id.* at 000085-86 (Consent Order of Dismissal).

<sup>18</sup> *Id.* at 000031, ¶ 4 (April 15, 2004 Final Order).

The Respondents have argued that the annulment order was improper because the summons and complaint were not properly served and notice of the final hearing was not given. The Court has already found that service and notice were proper. Mrs. Brown's counsel hired a licensed private investigator to locate the Defendant. That investigator's affidavit was found to be sufficient by the Family Court.

South Carolina law does not permit direct or collateral attacks upon an order authorizing service by publication:

An order for service by publication may be issued pursuant to S.C. Code Ann. § 15-9-710 (Supp.1999) when an affidavit, satisfactory to the issuing officer, is made stating that the defendant, a resident of the state, cannot, after the exercise of due diligence, be found, and that a cause of action exists against him. § 15-9-710(3). *When the issuing officer is satisfied by the affidavit, his decision to order service by publication is final absent fraud or collusion.*

*Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 428-29, 535 S.E.2d 128, 130 (2000) (emphasis added); *see also Hendrix v. Hendrix*, 296 S.C. 200, 203, 371 S.E.2d 528, 530 (1988).

The Respondents do not contend there was fraud in the procurement of the annulment. The order authorizing service by publication therefore cannot be attacked. *See also Schleicher v. Schleicher*, 310 S.C. 275, 277, 423 S.E.2d 147, 148-49 (Ct. App. 1992) (holding that service of the notice of the time and date for a merits hearing is effective upon mailing when sent by certified mail, return receipt requested and that Rule 5(b)(1), SCRCF, rather than Rule 4(d)(8), SCRCF, is the applicable rule).

Some of the Respondents object that the annulment action should have been filed in Aiken County, not Charleston County. This is a mere matter of venue, which has no effect on the validity of the judgment. In *Lillard v. Searson*, 170 S.C. 304, 170 S.E. 449 (1933), the court held that a defect in venue cannot be used to attack a final judgment:

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Since it clearly appears that the defendant named in the case was not a resident of Richland county, at the time the action was instituted against him, but was a resident of Allendale county, the action was instituted in the wrong county, and the proper course to have pursued was for the defendant to have moved to have the case transferred to Allendale county. . . . However, the defendant did not do this, and waited until judgment had been rendered in the cause before taking any steps in the matter. *Therefore the defendant waived the jurisdictional question, and, in effect, gave to the court of Richland County authority to hear the said case on its merits*, and judgment was thereafter rendered in said court against the defendant as in any other default case.

170 S.E. at 450-51 (1933) (emphasis added). Note that the judgment in *Lillard*, like the annulment in this case, was entered without entry of an appearance by the defendant.

"The failure to bring the proceedings within the proper venue, when such is determined by the place of residence, does not render them void, the error being in practice and not jurisdictional." *In re Lemack's Estate*, 207 S.C. 137, 144, 35 S.E.2d 34, 37 (1945) (quoting 32 C.J. 633). "The irregularity [in venue] complained of is not jurisdictional." *State v. Richardson*, 149 S.C. 121, 124, 146 S.E. 676, 677 (1928).

Under the above authority, venue is clearly not jurisdictional, and it is therefore not a sufficient basis for attacking a final judgment. The Family Court has statewide jurisdiction. See S.C. Code Ann. § 14-2-10 (establishing "the statewide family court system").

### **III. BECAUSE MRS. BROWN HAD NO IMPEDIMENT, HER MARRIAGE TO MR. BROWN IS VALID.**

#### **A. The Bigamy Statute.**

The South Carolina General Assembly has clearly spoken through S.C. Code Ann. § 20-1-80 that a bigamous marriage is "void" — i.e., never a marriage and never valid from the beginning.<sup>19</sup> This section reads as follows:

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<sup>19</sup> For more than a century, that statute has provided that bigamous marriages are void. This is consistent with the public policy against bigamous marriages. For example, entering into a bigamous marriage is a crime. Note, however, that *State v. Sellers*, 140 S.C. 66, 134 S.E. 873 (S.C. 1926), recognizes, as do all the other bigamy cases,

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All marriages contracted while either of the parties has a former wife or husband living shall be void. But this section shall not extend to a person whose husband or wife shall be absent for the space of five years, the one not knowing the other to be living during that time, not to any person who shall be divorced or whose first marriage shall be declared void by the sentence of a competent court.

S.C. Code Ann. § 20-1-80. A void marriage is treated differently from a voidable marriage. A voidable marriage is valid unless and until a court rules that such a marriage is invalid, but a void marriage is never valid for any purpose. *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006), *aff'd*, 379 S.C. 589, 666 S.E.2d 906 (2008), confirms the difference between a void marriage — void ab initio because of bigamy — and a merely voidable marriage — valid unless and until a court invalidates it, such as for intoxication. *Lukich* annulled two marriages: a bigamous marriage, held void ab initio, and a marriage annulled for intoxication, held voidable.

The South Carolina General Assembly demonstrates that it understands the difference between void and voidable. For example, S.C. Code Ann. § 62-3-713, governing self-dealing transactions by a personal representative, provides that such a transaction is “voidable” and can be invalidated at the request of an interested person.

Consequently, when the General Assembly uses the term “void” in the bigamy statute, the meaning is clear: a bigamous marriage is void ab initio and never valid.

**B. Case Precedent.**

**1. A Bigamous Marriage Is Void Ab Initio And Never A Marriage.**

The annulment order in this case was granted on the most serious and substantial of all grounds for rendering a marriage void: bigamy. It is against public policy and a crime to commit bigamy. A long line of South Carolina cases, including *Lukich*, holds that a bigamous marriage is not a marriage at all, at any point in time. In

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that a bigamous marriage is void ab initio, so that a void first marriage is not an impediment to a valid second marriage, and thus the second marriage is not bigamous and not a crime.



fact, every South Carolina case considering the issue has concluded that a bigamous marriage is void ab initio, and thus never a marriage:

At the time the parties began residing together in September 1983, and throughout their cohabitation, the respondent was legally married to another woman. Thus, any marriage between the parties while respondent had a subsisting marriage was void as a matter of public policy. S.C. Code Ann. § 20-1-80 (1985) ("All marriages contracted while either of the parties has a former wife or husband living shall be void"). It was void from its inception, not merely voidable, and, therefore, *cannot be ratified or confirmed and thereby made valid*.

*Johns*, 309 S.C. at 201, 420 S.E.2d at 858 (emphasis added).

A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, *is not a marriage at all*. Such a marriage is absolutely void, and not merely voidable.

*Day v. Day*, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) (emphasis added).

There could not have been a valid marriage between the appellant, Maggie (Craft) Blizzard, and William Blizzard, as William Blizzard had a lawful living wife at the time of the claimed marriage.

*Ex parte Blizzard*, 185 S.C. 131, 193 S.E. 633, 634 (1937).

When, however, there is an impediment to marriage, such as one party's existing marriage to a third person, *no common-law marriage may be formed*, regardless whether mutual assent is present.

*Callen v. Callen*, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005) (emphasis added). *See also*

*Splawn v. Splawn*, 311 S.C. 423, 425, 429 S.E.2d 805, 806 (1993); 52 Am. Jur. 2d, *supra*, § 57

("A marriage that occurs while one party is still legally married to another is void from its inception and cannot be retroactively validated by estoppel, by mutual agreement, or by the parties' conduct in holding themselves out as husband and wife.")<sup>20</sup> This is hardly surprising as

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<sup>20</sup> Every South Carolina case, as required by § 20-1-80, has concluded that the status of someone entering into a bigamous marriage is that of never having been married. It is Mrs. Brown's status that is critical here. At the time she married Mr. Brown, she had no impediment to their marriage because she had never been married before. Respondents cite several cases that deal with ancillary matters, but all of these cases follow the required rule about status: someone having entered into a bigamous marriage was never married. To the extent these cases also deal

the courts are required to follow the mandate from the legislature that bigamous marriages are void ab initio.

2. *Lukich v. Lukich.*

Both the Court of Appeals and Supreme Court decisions in *Lukich v. Lukich*<sup>21</sup> are in accord with § 20-1-80, case precedent, and Mrs. Brown's position. *Lukich* held that a bigamous marriage is void ab initio. *Lukich* also held that a marriage, annulled for intoxication rather than bigamy, could be treated as voidable.<sup>22</sup>

*Lukich* annulled two marriages: one void ab initio for bigamy and another voidable for intoxication. In *Lukich*, the wife sought alimony during a divorce from her second husband (Marriage 2). During the divorce proceeding, the second husband learned that the woman had previously been married (Marriage 1) and had never obtained a divorce or an annulment from the first husband. During the divorce case, the wife quickly obtained an annulment for Marriage 1, without her husband's knowledge and in another venue, on the ground of intoxication.<sup>23</sup> Both appellate courts concluded that Marriage 1 was voidable and refused to apply the annulment of Marriage 1 retroactively so that her status would allow her to enter Marriage 2. Marriage 1 in *Lukich* was properly voidable, rather than void, because the annulment was based on intoxication

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with ancillary matters, they are inapposite. See *Splawn v. Splawn*, 311 S.C. 423, 429 S.E.2d 805 (S.C. 1993) (bigamous marriage void ab initio but court had to deal with ancillary equitable apportionment of property issues); *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (S.C. App. 2004) (similar, citing *White v. White*, 283 S.C. 348, 323 S.E.2d 521 (S.C. 1984); *Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003) (second marriage bigamous and void ab initio — court had to decide impact on first husband's obligation to pay alimony, which had ostensibly ended if second marriage was valid, which it was not).

<sup>21</sup> 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006); 379 S.C. 589, 666 S.E.2d 906 (2008).

<sup>22</sup> "An annulment declares that a marriage never occurred because of some defect. Defective marriages may be either void or voidable. In a void marriage, the circumstances are such that the marriage could never have come into being. A voidable marriage is recognized under the law as a valid marriage until an action is brought to prove it invalid." Stuckey, *Marital Litigation in South Carolina*, Ch. 3.A. A bigamous marriage is void. In fact, "a void [bigamous] marriage technically needs no judicial action to declare that it is void." *Id.*

<sup>23</sup> The annulment at issue in *Lukich* was granted on the ground of intoxication. *Lukich*, 368 S.C. at 51, 627 S.E.2d at 756 ("[S]he and Havron were married during a night of heavy drinking, [and] had never lived together as husband and wife[.]").



rather than bigamy. One consequence of the *Lukich* court treating Marriage 2, the bigamous marriage, as void ab initio, is that the husband in Marriage 2 owed no alimony because Marriage 2 was “never a marriage.” If *Lukich* had not treated Marriage 2 as void ab initio because it was bigamous, as required by statute and precedent, the Court would have had to conclude that the husband of Marriage 2 would have owed alimony from the time of Marriage 2 until the annulment of Marriage 2.<sup>24</sup>

In short, a marriage entered into by intoxicated persons is not invalid until the parties decide to attack the marriage and not to waive the defect. Therefore, it is logical, as the *Lukich* Court held, that a voidable marriage is invalid only prospectively from the date of the annulment.

A void marriage, however, is different. A void marriage is never a valid marriage. The parties are not permitted to waive the defect; the marriage is automatically invalid. Both *Lukich* appellate courts concluded that Marriage 2 was void ab initio because it was bigamous. Consequently, Marriage 2 was never a marriage so that the divorce was unnecessary and the second husband could not owe alimony.

*Lukich* does not change, but is instead consistent with, S.C. Code Ann. § 20-1-80 and all South Carolina case precedent: a bigamous marriage (Marriage 2 in *Lukich*) is void ab initio and never a marriage. Respondents, in particular Terry Brown, cite the following language from the Supreme Court opinion in *Lukich* as somehow changing the treatment of bigamous marriages in this state:

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<sup>24</sup> The holding in *Lukich* as to Marriage 1 makes perfect sense, as a voidable marriage is invalid only if it is attacked. The parties to a voidable marriage always have the option of waiving the defect and ratifying the marriage. The annulment of Marriage 1 in *Lukich* was granted on the ground of intoxication. Intoxication is one of the classic grounds that render a marriage voidable, but not void. See 52 Am. Jur. 2d Marriage § 23 (Westlaw database updated Nov. 2014); *Abel v. Waters*, 373 So. 2d 1125, 1128 (Ala. Civ. App.), writ denied, 373 So. 2d 1129 (Ala. 1979); *Barber v. People*, 203 Ill. 543, 546, 68 N.E. 93, 94 (1903).

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Under the statute's terms, Wife's 'marriage' to Husband # 2 was 'void' from the inception since at the time of that marriage she had a living spouse *and that* marriage had not been 'declared void.' § 20-1-80.

*Lukich*, 373 S.C. at 592, 666 S.E.2d at 907 (Emphasis added).

Respondents contend that *Lukich* creates new law with respect to bigamous marriages. Respondents claim *Lukich* disregards the clear requirement of the bigamy statute and ignores or reverses all case precedent that bigamous marriages are void ab initio. Respondents base their contention on the words "and that" emphasized in the above quote. These words, Respondents argue, indicate that regardless of whether a marriage is void or voidable, one has an impediment to marriage and must obtain an annulment before remarriage. Contrary to Respondents' contention, however, the words "and that" do not refer to the bigamous marriage (Marriage 2 in *Lukich*); the words "and that" clearly refer to the intoxication marriage (Marriage 1 in *Lukich*). Thus, *Lukich* cannot be read to change a substantive rule of law, namely that a bigamous marriage is void only from the date of the annulment order. This would render a bigamous marriage voidable rather than void. *Lukich* does no such thing. Rather, *Lukich* confirms that a bigamous marriage is void ab initio and never a marriage because it treated Marriage 2 (the bigamous marriage in *Lukich*) as never having been a marriage, so that the second husband did not need a divorce and did not owe alimony to a wife he never married.

If Respondents were correct that *Lukich* created a new rule, then the *Lukich* court would instead have held that the second husband owed alimony until an annulment order for Marriage 2 was obtained. Moreover, if Respondents are correct, then the *Lukich* appellate courts favorably cite cases holding that bigamous marriages are void ab initio while somehow overturning those cases and ignoring § 20-1-80. The clear meaning of *Lukich* is that, as required by § 20-1-80 and all case precedent, bigamous marriages are void ab initio and never a marriage.

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Moreover, even if Respondents were correct in their position about *Lukich*, i.e., that even a bigamous marriage is valid unless and until an annulment order is obtained, they could still not prevail. Under their theory, *Lukich* changed the law about bigamous marriages so that a bigamous marriage remains valid unless and until an order of annulment is obtained. If that were correct, then under their theory Mrs. Brown had an impediment to marrying Mr. Brown and that marriage was therefore bigamous. But under Respondents' position, Mr. Brown's bigamous marriage to Mrs. Brown would be valid unless and until Mr. Brown obtained an order annulling their marriage, which he did not obtain during his lifetime. It is now too late for Mr. Brown to obtain an annulment.<sup>25</sup> So, even under Respondents' theory, the marriage between Mrs. Brown and Mr. Brown was valid at his death and cannot be invalidated because it is too late.

In this case, unlike *Lukich*, it is the first marriage (Marriage 1), rather than Marriage 2 in *Lukich*, that is bigamous and thus void. Consequently, Mrs. Brown's attempted marriage to Ahmed (Marriage 1) was void ab initio and never a marriage. Therefore Mrs. Brown had no impediment to her marriage to Mr. Brown, and that marriage (Marriage 2) is valid.

Despite the contentions of Respondents, *Lukich* is consistent with the bigamy statute and all precedent involving bigamous marriages: bigamous marriages are void ab initio and never have any effect --- they are "never a marriage." The only difference with respect to bigamous marriages between *Lukich* and this case is that, in *Lukich*, the bigamous marriage was the second marriage, while in this case, the bigamous marriage is the first marriage. That difference has no impact on the treatment of bigamous marriages. The bigamous second marriage in *Lukich* was void ab initio and never had effect. The bigamous first marriage in this case was void ab initio and never had effect, so that Mrs. Brown had no impediment to her marriage to Mr. Brown.

Were this Court to give only prospective effect to the annulment in this case, it

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<sup>25</sup> See the discussion at IV.C. below.



would be holding that a bigamous marriage was not invalid from its inception. Rather, it would be holding that a bigamous marriage was valid from the date of its inception until the date of the annulment.

This Court is unwilling to hold that a bigamous marriage, as determined by a family court of this state, was ever legal. There is no precedent for such a holding. South Carolina law precludes this Court from giving any effect whatsoever to a bigamous marriage. Because the Court cannot give any effect to a bigamous marriage, it is required to hold that the bigamous marriage was never a marriage.

Mrs. Brown and Ahmed never had a valid marriage at any point in time, and Mrs. Brown had no impediment to her valid marriage to Mr. Brown.

### 3. *Hallums v. Hallums.*

The LSA argued that *Hallums v. Hallums*, 74 S.C. 407, 54 S.E. 613 (S.C. 1906), was exactly on point and reached a different result. The LSA misses a critical factual distinction between *Hallums* and the current case: in *Hallums*, there was never a court determination that the first marriage (Marriage 1) was bigamous and, in fact, the court found that the Marriage 1 was not bigamous. By contrast, in the current case, there is a valid annulment order finding that the first marriage was bigamous.

*The Hallums paradigm actually supports Mrs. Brown's position.* If the *Hallums* court had determined that Marriage 1 was bigamous, then the *Hallums* opinion indicates that the second marriage (Marriage 2) would have been valid because there would have been no impediment to the wife entering into the second marriage (Marriage 2) with the decedent.

More specifically, in *Hallums*, a woman attempted to get a distributive share from

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the decedent's estate, claiming to be his surviving spouse. However, the estate contended that she was already married when she attempted to marry the decedent, and thus had an impediment to the attempted marriage to the decedent. The woman then contended that her attempted first marriage was invalid because her putative first husband was already married when they attempted to get married. So far, the LSA is correct: absent the critical distinction missed by the LSA's analysis, the *Hallums* paradigm is the same as the paradigm in the current case because in *Hallums*, the woman argues that she had no impediment to marrying the decedent (Marriage 2) because she was never married to her first husband (Marriage 1) as the first husband himself was already married.

In the current case, Mrs. Brown argues that she had no impediment to marrying the decedent (Marriage 2) because she was never married to her first husband (Marriage 1) as the first husband himself was already married. The *critical* difference between the two cases is that in *Hallums*, the woman *did not* have a separate annulment order invalidating Marriage 1 void ab initio and did not get one because the court concluded her first marriage was not bigamous. In the current case, Mrs. Brown *does* have an annulment order invalidating Marriage 1. In *Hallums*, the court was asked to consider the validity of both Marriage 1 and Marriage 2 at the same time. The *Hallums* court determined that Marriage 1 was valid because there was insufficient evidence that the husband in Marriage 1 was already married: consequently, Marriage 1 in *Hallums* was *not bigamous* and therefore was valid. Thus, the woman in *Hallums* had an impediment to Marriage 2. That is the critical factual difference between the facts in *Hallums* and the current case. In the current case, Marriage 1 was determined by a court to be bigamous and thus never valid. In the current case, Mrs. Brown thus had no impediment to Marriage 2 (her valid marriage to Mr.

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Brown).

*Hallums* actually supports Mrs. Brown's position. *Hallums* stands for the proposition that, if Marriage 1 had been bigamous and thus void ab initio, Marriage 2 to the decedent would have been valid and the woman would be entitled to her distributive share from the decedent's estate. That is exactly Mrs. Brown's position. Because she has an order confirming that Marriage 1 was void ab initio as bigamous, Marriage 2 is valid and she qualifies as a surviving spouse.<sup>26</sup>

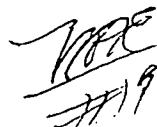
#### 4. All Bigamous Marriages Are Void.

Every bigamous marriage is void ab initio. A bigamous marriage is never valid — “never a marriage.” In S.C. Code Ann. § 20-1-80, the bigamy statute, the South Carolina General Assembly requires that a bigamous marriage is void ab initio. In accordance with this legislative mandate, every South Carolina case dealing with bigamous marriages, including *Lukich* and *Hallums*, holds that a bigamous marriage is void ab initio and never has effect. Although Respondents contend that *Lukich* somehow changes that rule and instead provides that a bigamous marriage is valid until an annulment order is obtained, that is not the holding in *Lukich* as to bigamous marriages. In *Lukich*, it is the second marriage that is bigamous and both appellate courts treat that second marriage as void ab initio, in accordance with the bigamy statute and all case precedent. In *Mrs. Brown's case*, it is the first marriage that is bigamous, and that first marriage is therefore void ab initio, meaning that Mrs. Brown had no impediment to her marriage to Mr. Brown.

Despite the contention of the LSA, *Hallums* is in accord with the bigamy statute,

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<sup>26</sup> Unlike this case, the court in *Hallums* looked at the first marriage after the decedent's death because: (1) there was no pre-existing annulment order from a court with exclusive jurisdiction over annulments, as there is today; (2) this was prior to the family court having exclusive jurisdiction over annulments — in fact, this was prior to the existence of family courts in South Carolina; (3) this was prior to § 62-2-802 defining surviving spouse for estate purposes and case law precluding postmortem annulments. See IV.C below.

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*Lukich*, and all other case precedent in treating bigamous marriages as void ab initio. Unlike Mrs. Brown's first marriage, which was *found to be bigamous and void*, the first marriage in *Hallums* was *found not to be bigamous and was therefore valid*. However, if the first marriage in *Hallums* had been found to be bigamous and void, the opinion indicates that the second marriage would have consequently been valid because the wife would have had no impediment to her second marriage and thus could inherit. That is exactly Mrs. Brown's case: her first marriage has been found to be bigamous and void, so that she had no impediment to her marriage to Mr. Brown: their marriage is valid and she is his surviving spouse.

#### IV. THE ANNULMENT ORDER IS FINAL AND BINDING.

##### A. Introduction.

Because the bigamy statute and case law, including *Lukich*, hold that a bigamous marriage is void ab initio, the annulment order confirms that Mrs. Brown had no impediment to her marriage to Mr. Brown.

Respondents contend that the annulment order is not valid and that this Court should refuse to recognize the annulment order or alternatively disregard the findings of fact of the annulment order. For a number of reasons, this Court concludes that the annulment order is final and binding. Nor will this Court re-open or re-litigate the underlying findings of fact of the annulment order, which in this case would have the same effect as disregarding the annulment order. All of these reasons are explained in greater detail below at IV.B-G, but generally the reasons are as follows:

First, only the family court has jurisdiction over annulments. This Court does not have jurisdiction over annulments. If this Court failed to recognize the annulment order as valid, then

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the result would be to re-litigate the annulment in this Court. If this Court does not have jurisdiction to hear an annulment action, it does not have jurisdiction to re-litigate an annulment action. Nor can this Court re-open or review the findings of fact underlying the annulment order. Even if this court had jurisdiction to do so, doing so would lead to only two possible results: (1) this Court's determination that the family court was correct or (2) that the family court reached an incorrect conclusion. This, presumably, would mean that the annulment order, which was not appealed, is rendered invalid by this Court. This Court simply does not have such jurisdiction.

Second, even if this Court had jurisdiction to not recognize or to re-litigate the annulment order, the appropriate parties would not be available. Mrs. Brown and Ahmed would be the necessary parties, and Ahmed is not a party to this action nor should he be. If this Court allowed Ahmed to participate as a party in the re-litigation of the order, this would allow him to collaterally attack a family court order he cannot now directly attack. The only way to invalidate a marriage in South Carolina is to bring an annulment action. Mr. Brown obviously knew that because he brought an annulment action, which he eventually dismissed. Annulment actions cannot be brought postmortem. Nor can Respondents do so. Any right they may have is derived from Mr. Brown, and they cannot have greater rights than he did.

Third, a court has to have a reason to refuse to recognize an order, and the only reason is the failure of due process, either by failure to obtain personal jurisdiction or a lack of subject matter jurisdiction. Even if this Court had jurisdiction concerning the annulment order, it finds that there is no defect in personal jurisdiction —i.e., the service was proper — and the family court had subject matter jurisdiction. There is no failure of due process and so there is no reason to refuse to recognize the order.

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Fourth, even if this Court had jurisdiction, the issue of the finality of the annulment order — i.e., whether it is binding on those not parties to the action — in this case applies only to Mr. Brown because, as noted, Respondents at best stand in his shoes. The Respondents concede that an annulment is an in rem action, and in rem actions are binding on non-parties as to status. Even if Mr. Brown was not precluded by the reasons stated above, and for other reasons, he would be bound by the status determination of an in rem action. The status determination of the annulment order was that Mrs. Brown was never married to Ahmed and thus her status at the time of her marriage to Mr. Brown was that she had no impediment to that marriage. Mrs. Brown's status is the only relevant issue here.

Finally, to disregard or relitigate the annulment order would create a chaotic precedent. No marital determination of status — validation of marriage, invalidation of marriage (annulment) or termination of marriage (divorce) — would ever be final and binding. Families are critically affected by the status of family court actions and their status determinations must be sacrosanct. To allow any third party to attack a status determination would permit endless litigation over family matters and continuing uncertainty over such critical relationship matters as paternity and legitimacy, as well as a person's ability to enter into valid marriages. Some examples of unacceptable problems which would result in this case are as follows:

1. Mr. Brown brought and dismissed an annulment action attacking his marriage to Mrs. Brown. This Court takes judicial notice that Mr. Brown did not thereafter attempt to file an action in court to invalidate their marriage, which he obviously knew how to do if he wished. Mr. Brown did not annul his marriage to Mrs. Brown before his death, but Respondents now wish to do so.
2. The annulment order legitimizes James Brown II. Because the annulment action confirmed that Mrs. Brown had no impediment to her marriage to Mr. Brown, their marriage makes James II, born before the marriage, legitimate. Effectively overturning the annulment order would render James II illegitimate, affecting critical rights of his.

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3. If Ahmed is not a party to relitigation of the annulment order, an overturning or disregard of that order could impact his family status. According to the sworn affidavit of Daryl Brown's attorney in this matter, David Bell, Ahmed has known for at least six years that his marriage to Mrs. Brown was annulled. This Court takes judicial notice that Mr. Ahmed has taken no judicial action to attack the annulment order. Relying on the validity of the annulment order, Ahmed may have married subsequently and had children: if the annulment order is overturned, then his marriage would be invalidated and his children rendered illegitimate.

**B. This Court Lacks Subject Matter Jurisdiction To Relitigate Or Disregard The Annulment Order.**

Respondents would have this Court relitigate or disregard the annulment order issued by the family court. However, this Court does not have jurisdiction over annulments. *Only* the family court has jurisdiction over actions for annulments. S.C. Code Ann. § 63-3-530(A)(6)<sup>27</sup> provides that the family court has *exclusive* jurisdiction over annulments.

The only way for Mr. Brown to have invalidated his marriage to Mrs. Brown would have been through an annulment of their ceremonial marriage. "Annulments are actions to establish the invalidity of marriages." See Stuckey, *Marital Litigation*, Ch. 3.A. Mr. Brown obviously understood that an annulment action is the method to seek an invalidation of a marriage because he brought an action to annul his marriage to Mrs. Brown. As discussed above, Mr. Brown dismissed that action through a consent order. It is now too late for Mr. Brown, or anyone acting for or through him, to bring an annulment action to invalidate his marriage to Mrs. Brown. See the discussion at IV.C below.

Consequently, if this Court lacks subject matter jurisdiction over annulments, it cannot relitigate or disregard the family court annulment order. Redetermining the underlying facts of

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<sup>27</sup> Formerly S.C. Code § 20-7-140.

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the annulment order would be engaging in an annulment action, which this Court lacks jurisdiction to do.

Having this Court relitigate or disregard an existing valid family court order would create a precedent resulting in chaos.<sup>28</sup> If a third party is allowed to attack an order of annulment or divorce obtained during a decedent's lifetime, relationships relied on by the decedent during his lifetime and taken to his grave could be undone, and great damage would be done to the public policy of stability of marriage.

S.C. Code Ann. § 63-3-530(A)(6) grants the family court exclusive jurisdiction over annulments. To allow the Respondents to challenge Mrs. Brown's annulment from Ahmed in this Court would subvert the exclusive authority granted to the family court by the South Carolina General Assembly.<sup>29</sup> According to the plain language of the statute, the General Assembly granted exclusive jurisdiction over annulments to the family court.<sup>30</sup> In so doing, the General Assembly prohibited all other courts from going behind the family court's annulment orders.

*Lukich* fits this statutory scheme because it involved an appeal from the family court, which had jurisdiction over annulments. *Lukich* did not allow an annulment order to be challenged in a court outside of the family court. Unlike Mr. Lukich, Mr. Brown withdrew his family court action for annulment during his lifetime. The legislative scheme did not give Mr.

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<sup>28</sup> See, e.g., *Neely*, discussed below.

<sup>29</sup> "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' Black's Law Dictionary 602 (7th ed. 1999)." *Hodges v. Rainey*, 533 S.E.2d 578, 582, 341 S.C. 79, 86 (2000).

<sup>30</sup> In S.C. Code § 63-3-530(A)(6), the Legislature says that "[t]he Family Court has exclusive jurisdiction...to hear and determine actions for annulment of marriage".

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Brown the ability to challenge the annulment order outside of the family court during his lifetime, and his heirs likewise cannot go behind a family court order in this Court.

**C. Even If This Court Had Jurisdiction, A Postmortem Annulment Action Is Not Possible.**

The issue before this Court on summary judgment is whether Mrs. Brown is the surviving spouse of Mr. Brown. South Carolina Probate Code § 62-2-802 is the statute governing the determination of surviving spouse qualification. Section 62-2-802 specifically addresses annulment in this context. It provides that a surviving spouse is someone from whom the decedent did not get a divorce or an annulment:

**Section 62-2-802. Effect of divorce, annulment, decree of separate maintenance, or order terminating marital property rights.**

(a) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death. A decree of separate maintenance that does not terminate the status of husband and wife is not a divorce for purposes of this section.

Section 62-2-802(c) requires that any divorce decree or annulment be signed by the court and filed in the office of the clerk of court. It is too late for Mr. Brown, or those acting for or through him, to bring such an annulment action. In *Hatchell-Freeman v. Freeman*, 340 S.C. 552, 532 S.E.2d 299 (Ct. App. 2000), the Court of Appeals, addressing S.C. Code § 62-2-802, held that a divorce decree was invalid when it was filed three days after the husband's death, although his death occurred more than a week after the final divorce hearing. In *Bayne v. Bass*, 302 S.C. 208, 394 S.E.2d 726 (Ct. App. 1990), the wife committed suicide after the trial judge orally granted her request for divorce but before he signed a divorce decree. The judge signed the decree two days after she died but vacated it on motion by the husband's counsel. The Court of Appeals held that the order granting the divorce was void and that the court properly vacated its own order. Mr. Brown neither divorced nor had his marriage to Mrs. Brown annulled during his

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lifetime. Therefore, under the Probate Code Mrs. Brown was still his wife at the time of Mr. Brown's death, and she is his surviving spouse.

Respondents – in privity with Mr. Brown and deriving any rights they have through him - are attempting to do after his death what he chose not to do in life. The exclusive method to invalidate a marriage is to bring an annulment action in the Family Court. Mr. Brown obviously knew that because he brought an annulment action in the Family Court, which he dismissed.<sup>31</sup> Again, this Court has no jurisdiction over annulment actions, but even if it did, it is too late for Mr. Brown to collaterally attack an annulment order. Annulment actions cannot be brought postmortem. Nor can Respondents do so.

**D. Even If This Court Had Jurisdiction Over Annulments And Did Not Lack Necessary Parties, There Is No Reason To Disregard The Annulment Order.**

A court has to have a reason to refuse to recognize an order, and the only reason is the failure of due process, either by failure to obtain personal jurisdiction or a lack of subject matter jurisdiction. *Yarbrough v. Collins*, 293 S.C. 290, 360 S.E.2d 300 (S.C. 1987) (“A judgment may be collaterally attacked if the court lacked jurisdiction and the lack of jurisdiction appears on the face of the record. *Turner v. Malone*, 24 S.C. 398 (1886).”); *Miles v. Lee*, 319 S.C. 271, 460 S.E.2d 423 (S.C. App. 1995) (similar); *Henry v. Cottingham*, 253 S.C. 286, 170 S.E.2d 387 (S.C. 1969) (“The decree of a Probate Court admitting a will to probate is final and conclusive if not reversed by the appellate court, or set aside and revoked by direct proceeding, and cannot be questioned collaterally. *Weinberg v. Weinberg*, 208 S.C. 157, 37 S.E.2d 507; *Reed v. Lemacks*, 204 S.C. 26, S.E.2d 441; *Davis v. Davis*, 204 S.C. 26, 28 S.E.2d 441.” . . . . “*In Wilkinson v. Wilkinson*, 178 S.C. 194, 182 S.E. 640, this court said: ‘As a proceeding to probate a will is a

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<sup>31</sup> Notably, even in Mr. Brown's short-lived annulment action, he did not attack the annulment order but rather insisted that it was binding on Mrs. Brown.

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judicial one, a judgment or decree admitting a will to probate stands on the same footing as a judgment of any other Court of competent jurisdiction; and while it is not conclusive in the sense that a person having a requisite interest may not attack it by a direct proceeding within the period of time allowed by statute, without a statute conferring the right to contest, the order admitting the will to probate would be final on all parties.”) *McCampbell v. Warrich Corporation*, 109 F.2d 115 (7<sup>th</sup> Cir. 1940) ( a collateral attack “is not permissible if the court had jurisdiction over the parties and the subject matter.”); *Burlington Data Processing, Inc. v. Automated Medical Systems, Inc., Clinical Management Systems, Inc., and William Carlson*, 492 F.Supp. 821 (D. Vermont 1980) (“A final, valid judgment, though erroneous, is not subject to collateral attack unless it can be shown that the court rendering it was without jurisdiction. *See Midissa Television Co. v. Motion Pictures for Televisions, Inc.*, 290 F.2d 203 (5th Cir. 1961), *cert. denied* 368 U.S. 827, 82 S.Ct. 47, 7 L.Ed.2d 30 (1961). *Anderson v. Tucker*, 68 F.R.D. 461 (D.Conn.1975). *1B J. Moore, Federal Practice*, s .407.”); *Popp Telcom v. American Sharecom, Inc.*; 210 F.3d 928 (8<sup>th</sup> Cir. 2000) (“When a judgment is alleged to be simply erroneous or attacked on the basis of anomalies unrelated to the court's jurisdiction, collateral attack is not an option.”). *See also Fouché v. Royal Indemnity Company*, 217 S.C. 147, 60 S.E.2d 73 (S.C. 1950) (“The probate court of Orangeburg County which rendered the judgment in this case is a court of record, and had full jurisdiction over the administration proceedings. It has been held in many cases in this state that a judgment is not open to successful collateral attack unless void on its face, or upon an inspection of the judgment roll. This principle seems to be self evident, and the authority of adjudged cases support it.”....“As heretofore stated, the record in the probate court of Orangeburg County does not affirmatively disclose that the court was without jurisdiction of these appellants, hence their collateral attack on the judgment cannot succeed, and the order of

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discharge is binding upon them.”)

Even if this Court had jurisdiction concerning the annulment order, it finds that there is no defect in personal jurisdiction —i.e., the service was proper — and the family court had subject matter jurisdiction. There is no failure of due process and so there is no reason to refuse to recognize the order.

**E. The Annulment Order Is Binding On All Parties.**

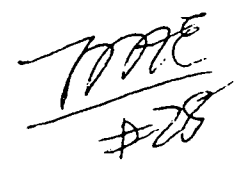
The annulment order is binding on all parties. South Carolina provides:

All marriages contracted while either of the parties has a former wife or husband living shall be void. But this section shall not extend to a person whose husband or wife shall be absent for the space of five years, the one not knowing the other to be living during that time, not [sic] to any person who shall be divorced or whose first marriage shall be declared void by the sentence of a competent court.

S.C. Code Ann. § 20-1-80.

The validity of the attempted marriage between Mrs. Brown and Ahmed has already been addressed by the South Carolina court with jurisdiction. That court issued a final judgment invalidating the attempted marriage between Mrs. Brown and Ahmed, on the ground of bigamy. This annulment order is binding on Mr. Brown, and consequently is binding on Respondents.

In addition to *Lukich v. Lukich*, other South Carolina case law confirms this rule. In *Joye v. Yon*, 345 S.C. 264, 547 S.E.2d 888 (Ct. App. 2001), a husband and wife were divorced, and the husband was ordered to pay alimony. Some years later, the wife remarried. Six months later, her remarriage was annulled for bigamy, as the second husband had never divorced his prior wife. The first husband refused to resume paying alimony after the annulment, and the wife filed a contempt action to enforce the original decree. The husband then argued that the wife's remarriage, bigamous though it may have been, still terminated his ability to pay support.

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The court of appeals resolved the main issue in the case by holding that a bigamous remarriage, which is void ab initio, does not terminate a prior spousal support obligation. The husband then argued in the alternative that the wife's remarriage could not be treated as bigamous *against him*, as he was not a party to the annulment action in which the remarriage was declared void. This is the same argument that Respondents make in the present case. But the court of appeals rejected this argument. It held directly that the annulment was binding upon the first husband even though he was not a party to the action:

Yon also argues the court erred in reinstating his alimony obligation because he was not a party to Joye's annulment action. He asserts that he should have been made a party to the annulment action because its outcome directly affected him. We disagree.

Generally, a person must be joined as a party to an action if his absence precludes complete relief among those already parties or his interest in the subject matter is so intertwined that he would not receive complete relief or resolution without his participation. Rule 19(a), SCRPC; see *First Citizens Bank & Trust Co. v. Strable*, 292 S.C. 146, 148, 355 S.E.2d 278, 279 (Ct. App. 1987).

Since Yon had no standing to challenge the granting of the annulment, it was not necessary for Joye to include him as a party to the action. Moreover, Yon suffered no prejudice by not being made a party to the action. Under South Carolina law, Joye's marriage to Vance was void ab initio and Yon's presence as a party to the action could not have altered the decision to grant the annulment.

*Id.* at 276, 547 S.E.2d at 894 (emphasis added). For exactly the same reasons, Respondents have no standing to question the invalidation of Mrs. Brown's previous attempted marriage to Ahmed because of Ahmed's bigamy.<sup>32</sup> That order can be questioned only in a direct attack by those who

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<sup>32</sup> A leading authority on family law supports this South Carolina rule. "[A]nnulment decrees are binding upon nonparties as well as parties respecting the validity of the marriages involved." 1 Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 3.6 (2d ed. 1987). Professor Clark recognizes that this issue highlights the tension between the opportunity to be heard, on the one side, and the need for finality on the other. Although he recognizes that the rights of third persons may be affected by whether or not a marriage exists, he concludes: "No matter how clearly these [third-party] rights may depend on the existence of a marriage, they are not of the same degree of importance, seriousness or consequence as the interests of the spouses themselves in the marriage. It is perhaps this factor that has led to the well-established rule that a decree of divorce is conclusive on third parties with respect to the termination of the marriage. It is the writer's view that a decree of annulment should have the same effect."

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were party to it, and only if that direct attack was timely and properly brought. Just as the first husband in *Joye* was bound by the annulment of the marriage between the wife and her second husband, so is the estate of Mr. Brown bound by the order invalidating ab initio the attempted marriage between Mrs. Brown and Ahmed.

In *Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003), the Supreme Court necessarily agreed with the court of appeals regarding the husband's standing to attack the annulment. The Court of Appeals was reversed as to the *effect* of the annulment upon the prior support obligation, and not as to the *existence* or *validity* of the annulment.<sup>33</sup>

The result reached in *Joye* is further consistent with S.C. Code § 20-1-520, which provides that third parties were generally bound by a court's determination that a marriage is valid:

When the validity of a marriage shall be denied or doubted by either of the parties, the other may institute a suit for affirming the marriage and, upon due proof of the validity thereof, it shall be decreed to be valid and *such decree shall be conclusive upon all persons concerned*.

S.C. Code Ann. § 20-1-520 (emphasis added).<sup>34</sup>

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<sup>33</sup> The effect of the final and binding Family Court order invalidating the attempted marriage between Mrs. Brown and Ahmed is that the Brown-Brown marriage is valid, per the *Lukich* case, as discussed below.

<sup>34</sup> If third parties were able to contest family court orders, the order would never be final and chaos in family relations would ensue. See *Neely v. Thomasson*, 365 S.C. 345, 618 S.E.2d 884 (2005). As to precedent regarding finality, the Court of Appeals in *Neely* cited cases as follows:

*Adickes v. Allison & Bratton*, 21 S.C. 245, 259 (1884) (alteration and emphasis added) (quoting Freeman Judgments § 12), cited with approval in *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993). A decree of divorce is generally a final judgment of the court. *Culbertson v. Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996); cf. *Corbin v. Kohler Co.*, 351 S.C. 613, 621, 571 S.E.2d 92, 97 (Ct. App. 2002) ("The final written order contains the binding instructions which are to be followed by the parties.")...See *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (*holding an unappealed ruling is the law of the case and cannot be later challenged*).

*Neely v. Thomasson*, 355 S.C. 521, 536, 586 S.E.2d 141, 144 (Ct. App. 2003) (emphasis added).

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An annulment action and an action to validate a marriage, as described in § 20-1-520, are symmetrical: one brings an action to validate a marriage to confirm a marriage's validity while one brings an annulment action to confirm a marriage's invalidity. See Stuckey, *Marital Litigation in South Carolina*, Ch. 3-A. Thus, because "all persons concerned" are bound by a court determination that a marriage is valid, "all persons concerned" are likewise bound by a court's finding that a marriage is invalid. If third parties were able to contest final family court orders, the order would never be final and chaos in family relations would ensue.

Other states have held that annulments cannot be collaterally attacked by those who are not parties to the action. See, e.g., *Johnson County National Bank & Trust Co. v. Bach*, 189 Kan. 291, 369 P.2d 231 (1962) (certain beneficiaries made exactly the same argument that Respondents make—that the annulment was not binding on third parties – and the Kansas Supreme Court agreed with the wife that the annulment was dispositive and that it could not be questioned by third parties).

Just as the annulment decree in *Bach* was conclusive on the validity of the alleged marriage in that case, so is the annulment in this case likewise dispositive. The annulment can be attacked only in a prior direct attack filed by the parties to the action—Mrs. Brown and Ahmed.

A New York court stated the fundamental principle of law that underlies South Carolina's position:

It is ancient law that a judgment in rem is res judicata to all the world with regard to the res or status that is determined therein. In a matrimonial action the condition of marriage or non-marriage is involved. An essential issue is, therefore, one of status—or, put another way, there is a marital res subject to in rem jurisdiction. As a consequence, in ordinary circumstances a judgment determining marital status is binding on the whole world, and it is not confined in effect to the immediate parties to the action in which the

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*judgment determining status was rendered.*

*Presbrey v. Presbrey*, 6 A.D.2d 477, 480, 179 N.Y.S.2d 788, 792 (1958) (emphasis added), *aff'd*, 8 N.Y.2d 797, 168 N.E.2d 135, 201 N.Y.S.2d 807 (1960); *see also Luke v. Hill*, 137 Ga. 159, 73 S.E. 345, 346 (1911) (“So far as the adjudication fixes the status of the parties, the judgment concludes both parties and strangers[.]”).

The *Restatement (Second) of Judgments* states the rule as follows:

*A status determination is ordinarily binding on non-parties* because it effects a transformation of the legal status of the person involved which others have no legal authority to challenge. In this respect it is similar to status changes that parties are free to make without adjudicative proceedings, such as entry into marriage, renunciation of citizenship, or voluntary surrender of one’s property to a conservator or trustee.

Restatement (Second) § 31 cmt. *f* (emphasis added); *see also id.* § 31 cmt. *a* (“Proceedings for the determination of status include divorce and annulment actions[.]”).

The annulment order involves Mrs. Brown’s status, and this status cannot be collaterally attacked by any third party. Because Mrs. Brown’s putative marriage to Ahmed was void ab initio for bigamy, Mrs. Brown’s status at the time of her marriage to Mr. Brown was that she had no impediment to that marriage.

Therefore, the Respondents have no legal authority to challenge the Family Court Order of annulment.

**F. The Family Court Order Is Binding On Respondents Who Are in Privity with Mr. Brown.**

Respondents are bound by the Family Court order. Heirs are in privity with their ancestors. *Thompson v. Hudgens*, 161 S.C. 450, 463, 159 S.E. 807, 812 (1931). Consequently, heirs are barred from asserting claims that their ancestors would have been barred from asserting. *Watson v. Watson*, 172 S.C. 362,369-71, 174 S.E. 33, 36 (1934). In *Watson*, the decedent was

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barred from attacking a divorce; the Court held that those in privity with him, such as his children, were likewise barred. These rulings are obvious because heirs and devisees of a decedent cannot acquire any greater rights through the decedent than the decedent had himself. Similarly, a personal representative's relationship with the decedent exemplifies the classic case of privity with the decedent. It would be illogical for a personal representative, representing the decedent, or Respondents, claiming through the decedent, to have greater rights than the decedent had himself.

More generally, "[t]he term 'privity' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." *H.G. Hall Constr. Co. v. J.E.P. Enters.*, 283 S.C. 196, 204, 321 S.E.2d 267, 271 (Ct. App. 1984). *Carolina Baking Co. v. Geilfuss*, 169 S.C. 348, 168 S.E. 849, 852 (1933), held that a judgment is binding upon nonparties who "sought, consented to, or acquiesced in" the judgment. *Id.* To similar effect is *Tillman v. Tillman*, 93 S.C. 281, 76 S.E. 559 (1912). There, a father executed a deed giving custody of his children to his parents. A custody action then followed between the father's parents and the mother, in which the mother prevailed. The court held that the father was bound by the judgment:

It is true that [the father] was not a formal party to that proceeding, but he submitted an affidavit therein making no claim on his own behalf, but insisting on the claim of his father and mother, to whom he had solemnly conveyed all his rights of custody. *It is clear that by this action he became bound by the decree rendered in the former proceeding.*

*Id.* (emphasis added). By supporting his parents in the custody case, therefore, the father became bound by the result.

In *Neely v. Thomasson*, 365 S.C. 345, 618 S.E.2d 884 (2005), the decedent was divorced from his wife during his lifetime, and the divorce decree held that a daughter was born during the

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marriage. After the decedent's death, the decedent's heirs argued that they were not parties to the divorce case, that they were not bound by the court's decision, and that the daughter was actually not the child of the decedent. The South Carolina Supreme Court held that the decedent was bound by the judgment, and that the heirs were likewise bound:

Because the issue of paternity was raised and ruled upon in a prior action, Decedent, if alive, would have been barred from challenging paternity at a later date. *See Eichman*, 285 S.C. at 380, 329 S.E.2d at 766. As a result, Decedent's heirs are likewise barred from asserting claims that Decedent himself would have been barred from asserting. *See Watson*, 172 S.C. at 370-71, 174 S.E. at 36. Moreover, we find that it would be unjust to allow Decedent's siblings to assert a claim that Decedent himself never chose to assert during his lifetime. In fact, there is no evidence in the record that Decedent took any steps whatsoever during his lifetime to disclaim Nancy as his daughter. To the contrary, Decedent acknowledged, on more than one occasion, that Nancy was his child. Therefore, we hold that Decedent's siblings should not have been permitted to challenge the prior paternity determination.

*Id.* at 354-55, 618 S.E.2d at 889 (emphasis added). The stipulated facts show that Mr. Brown supported the annulment litigation by paying Mrs. Brown's legal fees. After signing the Consent Order of Dismissal concerning his own annulment action, Mr. Brown never again sought to annul his marriage to Mrs. Brown. As such, the Respondents, in privity with Mr. Brown, are bound by the Family Court's order.

**G. Binding Effect Of In Rem Judgments.**

**1. General Rule.**

The LSA and other Respondents argue that this Court is not bound by the factual findings set forth in the judgment annulling Mrs. Brown's marriage to Ahmed. The Court respectfully disagrees.

The LSA expressly cites section 73 of the Restatement (First) of Judgments. That section applies on its face only to "Proceedings with Respect to Property." This case is governed by section 74, which applies to "Proceedings with Respect to Status." The validity

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of the marriage between Mrs. Brown and Ahmed is a matter of status, not a matter of property. There is no question that a judgment annulling a marriage is a judgment in rem.

Section 74 of the Restatement provides:

- (1) In a proceeding in rem with respect to a status the judgment is conclusive upon all persons as to the existence of the status.
- (2) A judgment in such a proceeding will not bind anyone personally unless the court has jurisdiction over him, and it is not conclusive as to a fact upon which the judgment is based except between persons who have actually litigated the question of the existence of the fact.

Restatement § 74.

2. Section 74(1).

The above language states two competing rules. The first rule provides that an in rem judgment is binding upon "all persons" when the issue is the existence of the status. The drafters elaborate:

*Effect of judgment on the status.* Where in a proceeding for the creation or termination or judicial determination of a status a competent court has after proper notice given a valid and final judgment, the judgment is binding on all persons in the world as to the existence of the status. The judgment is not subject to collateral attack by anyone. . . . *As far as the status is concerned, the judgment is binding not only on persons who were subject to the jurisdiction of the court which rendered the judgment, but also on persons not personally subject to the jurisdiction of the court.*

Restatement § 74 cmt. a. As regards the existence of the status itself, therefore, a judgment of annulment binds everyone, including persons not parties to the action or otherwise not subject to personal jurisdiction.

Mrs. Brown provides compelling authority in support of section 74(1). "[A]nnulment decrees are binding upon non-parties as well as parties respecting the validity of the marriages involved." 1 Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 3.6 (2d ed. 1987) (emphasis added). Professor Clark

continues:

No matter how clearly these [third-party] rights may depend on the existence of a marriage, they are not of the same degree of importance, seriousness or consequence as the interests of the spouses themselves in the marriage. It is perhaps this factor that has led to the well-established rule that a decree of divorce is conclusive on third parties with respect to the termination of the marriage. It is the writer's view that a decree of annulment should have the same effect.

*Id.*

Clark's rule has been followed in South Carolina. *See Joye v. Yon*, discussed above.

The holding of a New York decision is squarely on point:

It is ancient law that a judgment in rem is res judicata as to all the world with regard to the res or status that is determined therein. In a matrimonial action the condition of marriage or non-marriage is involved. An essential issue is, therefore, one of status—or, put another way, there is a marital res subject to in rem jurisdiction. As a consequence, in ordinary circumstances *a judgment determining marital status is binding on the whole world*, and it is not confined in effect to the immediate parties to the action in which the judgment determining status was rendered.

*Presbrey v. Presbrey*, 6 A.D.2d 477, 480, 179 N.Y.S.2d 788, 792 (1958) (emphasis added), *aff'd*, 8 N.Y.2d 797, 168 N.E.2d 135, 201 N.Y.S.2d 807 (1960).

In *Johnson County Nat. Bank & Trust Co. v. Bach*, 189 Kan. 291, 369 P.2d 231 (1962) and *Michelli v. Michelli*, 527 So.2d 359, 361 (La. Ct. App. 1988), courts directly held that annulments were binding upon third parties. These decisions did not draw any distinction between the facts and the law. They held, consistently with § 74(1) of the first Restatement, that in rem judgments of status bind all parties on the issue of status itself.

Another similar case is *Headen v. Pope & Talbot, Inc.*, 252 F.2d 739, 744 (3d Cir. 1958), where the court, dealing with South Carolina facts, expressly acknowledged the exception of § 74(2), but held that the case was controlled by the general rule of § 74(1). An in rem judgment of status binds the world on the question of status itself. Third parties are not bound only as to

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questions collateral to status. As to status, and necessarily the facts determining status, all parties are bound. *See also Bair v. Bair*, 91 Idaho 30, 31, 415 P.2d 673, 674 (1966) (denying decedent's heirs' attempt to attack a divorce decree obtained by decedent's widow and stating that the heirs "as strangers to the divorce decree, have no right to attack its validity. To hold otherwise could cause chaos and uncertainty in the lives of thousands of persons" and that "[o]nce a divorce decree is final, it should not be disturbed by strangers who had no preexisting rights or interests adversely affected by such judgment); *Brown v. United States*, 196 F.2d 777, 777-78 (D.C. Cir. 1952) ("Appellant was a stranger to the divorce proceedings. She had no interest in the same; no right or standing to qualify as a party to the proceedings and oppose a divorce").

The rule was applied to an annulment in *Deyette v. Deyette*, 92 Vt. 305, 104 A. 232 (1918). That case was a Vermont divorce action. The wife had been previously married, but the marriage had been annulled in New York on grounds that the parties were underage. The husband attempted to collaterally attack the judgment on grounds that the wife and her first husband were not actually underage, but the court held that he lacked standing. 104 A. at 234.

The Court further finds that the rule of section 74(1) is good policy. If annulment judgments are not binding upon third parties, then there would be no such thing as a final judgment of annulment. Persons whose marriages are annulled would never have any security, because the judgment would always be subject to collateral attack by persons not parties to the original action. For example, if a woman's first marriage is dissolved by annulment, and she then marries again, the facts of the annulment would not be binding on third parties. She would be required to prove the merits of her annulment every time the validity of her second marriage becomes a contested issue. That would happen not only in her divorce action after the second marriage, but also when she takes title to property with

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her second husband or files a joint federal or state income tax return. The LSA's argument boils down to an assertion that a decree of annulment is itself a nullity if the facts are contested.

There are strong reasons why annulments should be binding upon all third parties on issues of status—that is, as to the invalidity of the marriage annulled. The Court finds that on the issue of status, the judgment annulling Mrs. Brown's marriage to Ahmed is binding on all third persons, regardless of whether they were parties to the proceedings. Specifically, on the issue of status, the judgment is binding on Mr. Brown and his heirs.

### 3. Section 74(2).

The LSA recognizes the rule of section 74(1), but argues that this case is controlled by another rule. The LSA at points cites section 73 for this rule, but section 73 applies only to property judgments and not to status judgments. But the LSA also cites section 74(2), and as noted above, that section clearly does apply to status judgments.

The LSA argues under section 74(2) that the annulment does not bind James Brown on issues of fact. The LSA misconstrues section 74(2). That subsection again provides:

A judgment in such a proceeding will not *bind anyone personally* unless the court has jurisdiction over him, and it is not conclusive as to a fact upon which the judgment is based except between persons who have actually litigated the question of the existence of the fact.

Restatement § 74(2) (emphasis added). The LSA construes this section to hold that an in rem judgment does not bind anyone on questions of fact. This position sweeps too broadly.

The Restatement provides, in section 74(1), that judgments of annulment are binding on all third parties *as to the existence of the status itself*. But if a judgment is binding on the issue of status, both its findings and its conclusions are necessarily binding. Indeed the

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LSA and Respondents claim that they are not disputing Mrs. Brown's status. It is nonsensical to say that a person is bound only by a court's conclusions, and not by the factual findings that lead inevitably to those conclusions. If the factual findings are not binding, then the court in a future action is free to find different facts and reach a different result, and nothing is binding at all.

The LSA's position uses section 74(2) to functionally destroy section 74(1). The Court rejects that position. The Court holds that where the issue is the existence (or necessarily, the nonexistence) of a status itself, an in rem judgment regarding status binds all third parties. It is binding not only as to its conclusions, but also as to its factual findings.

This result is completely consistent with section 74(2). The key phrase in that section is highlighted in the quotation above. A judgment does not "bind anyone personally" unless the court has jurisdiction over him. That is, a judgment in rem cannot have the binding effect of a judgment in personam unless the court has personal jurisdiction over the defendant. But a judgment that cannot be binding in personam can still be binding in rem. The status change itself is clearly an in rem action, so as regards the issue of status itself, the judgment binds anyone. But as to issues *other than status*, which may require in personam jurisdiction, the judgment is not binding.

Comment *b* to section 74 sheds considerable light upon the relationship between section 74(1) and (2). That comment states:

*Personal liabilities.* Although a valid judgment in rem is binding on all the world as to the existence of a status which is the subject of the action, it will not bind anyone personally over whom the court does not have jurisdiction. The court cannot impose a personal liability upon a person who is not subject to the power of the court. *The question of the power of the court to impose a personal liability in a proceeding in rem to affect a status arises most frequently in a suit for divorce with respect to a judgment for alimony.*

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*Id.* § 74 cmt. *b* (emphasis added).

The emphasized last sentence gives a direct example of the distinction between section 74(1) and (2). The drafters had in mind the well-known rule that a divorce binds everyone as to the validity of the divorce itself (and necessarily the grounds of the divorce). But when the issue is not the existence of a status, but rather personal liability for alimony, the judgment does not even bind the named defendant unless the court had personal jurisdiction over him. See *Estin v. Estin*, 334 U.S. 541, 548-49 (1948); *Kreiger v. Kreiger*, 334 U.S. 555 (1948) (companion case to *Estin* reaching the same result); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

Section 74(2), therefore, is aimed only at issues other than the status change itself. Section 74(2) says that on issues collateral to status, the judgment is binding only on persons who appear, and over whom the court has jurisdiction. Likewise, factual findings in a status change judgment cannot be binding on issues other than status, because those issues require personal jurisdiction and not merely in rem jurisdiction.

This rule makes perfect sense. In rem jurisdiction allows the court to adjudicate only the question of status. The status here is Mrs. Brown's marital or non-marital status when she married Mr. Brown. If the order is binding, her status was unmarried. It cannot be used as a jurisdictional piggyback to allow the court to decide issues other than the question of status, which are not properly a basis for in rem jurisdiction. The effect of section 74(2) is that in rem judgments bind third parties only as to issues that are proper subjects for in rem jurisdiction, such as status. An in rem judgment cannot be used to bind third parties on an issue that is not subject to personal jurisdiction.

But the LSA seeks to give a broader effect to section 74(2). The LSA argues under

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section 74(2) that the factual findings in an in rem judgment do not bind third parties on the central issue of the status change itself. That is going too far. If the factual findings do not bind third parties on issues of status, the third parties are necessarily not bound by the entire judgment, and section 74(1) is pointless. If section 74(1) is to have any effect at all, an in rem judgment must be functionally binding on all issues regarding the status change itself. The judgment is not functionally binding unless both its factual findings and its conclusions are binding. To say that the latter is binding, but the former is not, is to reject the entire premise of section 74(1).

The Court therefore holds that the annulment order in this case binds all third parties on the question of status itself. Third parties are bound on status issues by both the judgment's factual findings and its conclusion. On issues other than the status change itself, however, the annulment does not bind third parties unless they were subject to the personal jurisdiction of the court.

The cases cited by the LSA are consistent with this discussion. For example, in *Gratiot County State Bank v. Johnson*, 249 U.S. 246 (1919), the Supreme Court held:

The [bankruptcy] adjudication is, for the purpose of administering the debtor's property, that is, in its legislative effect, conclusive upon all the world. Compare *Shawham v. Wherritt*, 7 How. 627, 643, 12 L. Ed. 847. So far as is [sic] declares the status of the debtor, even strangers to the decree may not attack it collaterally. *Michaels v. Post*, 21 Wall. 398, 428, 22 L. Ed. 520; *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S. 656, 661, 662, 23 L. Ed. 336. Compare *Hebert v. Crawford*, 228 U. S. 204, 208, 209, 33 Sup. Ct. 484, 57 L. Ed. 800. But an adjudication in bankruptcy, like other judgments in rem, is not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto.

*Id.* at 248.

The LSA cites the last sentence and argues that the Court held that the factual findings

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in the bankruptcy case were not binding anywhere. But the Supreme Court expressly held, in the first two sentences, that the bankruptcy judgment was "conclusive upon all the world," *id.*, as regards the issue of status. If the factual findings in the bankruptcy judgment were not likewise binding against the world, *on the issue of status*, then the Court's third sentence completely destroyed its first two sentences. That was not the Court's intent. *Gratiot County* recognizes the same two competing rules as section 74(1) and (2). It simply held on the facts that the issue in the later action was not one of status.

In *Hunter v. Hunter*, 111 Cal. 261, 43 P. 756 (1896), the issue was the effect of a divorce judgment. The court held that the judgment "was conclusive against all the world that the plaintiff in that suit was no longer the wife of Joseph Milam, and it was an adjudication of nothing else." *Id.* at 265, 43 P. at 757. Likewise, the present annulment is conclusive against all the world that Mrs. Brown was never validly married to Ahmed.

In *Becher v. Contoure Laboratories*, 279 U.S. 388 (1929), the first case was a state court action to declare a party trustee of a patent, while the second case was a federal court action for patent infringement. The Supreme Court very emphatically pointed out that these were different cases, presenting different issues. Whether the patent was placed in a trust said nothing about whether the patent was infringed. *Becher* therefore involved a collateral right, not a direct question of status.

In *Hendrick v. Biggar*, 209 N.Y. 440, 442, 103 N.E. 763, 764 (1913), the issue was whether a judgment in a divorce case finding that a spouse committed adultery was binding in a later action for alienation of affections. The issue in the alienation of affections case was not the validity of the divorce; it was whether the defendant had alienated the affections of a spouse. The second action was therefore a question collateral to status, on which personal



jurisdiction was required.

*Fromm v. Glueck*, 161 Misc. 502, 293 N.Y.S. 530 (Sup. Ct. 1937), involved an in rem judgment from another state. The case involved jurisdictional issues not present here, where both the former and present actions arise in South Carolina. The court also recognized that the judgment was binding on direct questions of status. "[I]t must be conceded that, even though personal jurisdiction of the defendant had not been obtained, the Court of Chancery had the full power to decree the foreclosure of the mortgage and the sale of the property." *Id.* at 504, 293 N.Y.S. at 533.

Finally, *In re Rowe's Estate*, 172 Or. 293, 141 P.2d 832 (1943), is distinguishable on several grounds. To begin with, the case involved a decree of divorce, not a decree of annulment. The issue was whether a finding of desertion in the divorce decree conclusively established lack of access for the purpose of paternity. The fact at issue was therefore again not the status of marriage itself, but rather a fact collateral to status. The court expressly held that the divorce was binding on issues of status. "[T]he decree in a divorce suit as a decree in rem binds the whole world as to the status of the parties, to the extent that their status is the res adjudicated[.]" *Id.* at 302, 141 P.2d at 836.

In short, all of the cases cited by the LSA recognize the same basic two rules stated in section 74(1) and (2). An in rem judgment binds the world on the direct question of status. It does not bind any nonparty on collateral issues, which are not subject to in rem jurisdiction, and which require that the court have personal jurisdiction over the defendant. The textbook example, cited expressly in the *Restatement* comments, is alimony in a divorce case.

Having stated the competing rules of section 74(1) and (2), the Court must now decide which of those two competing rules applies here. The issue presented here is whether Mrs.

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Brown is Mr. Brown's surviving spouse. Mrs. Brown has presented a valid marriage certificate, placing upon the Respondents the burden of proving that her most recent marriage is invalid. They seek to defeat Mrs. Brown's claim by proving that her marriage to Mr. Brown was bigamous. But it is bigamous only if Mrs. Brown had a valid marriage to someone else at the time she married Mr. Brown. To prove that Mrs. Brown's marriage to Mr. Brown was bigamous, the Respondents must prove that Mrs. Brown's marriage to Ahmed was valid.

The issue here is therefore directly one of status: Was Mrs. Brown's marriage to Ahmed valid? The judgment of annulment held that it was not. The Respondents argue that the judgment of annulment was wrong. If the judgment of annulment was wrong, it would obviously affect Mrs. Brown's status. The entire issue turns upon whether the annulment judgment correctly held that Mrs. Brown's status had been that of a single person all along, because her marriage to Ahmed was void from its inception.

Because the central issue in this case is the effect of the annulment judgment upon Mrs. Brown's status, this case falls squarely under section 74(1). Section 74(2) states that the factual findings in an in rem judgment are not binding, but only on issues other than the status change itself, which turn upon jurisdiction in personam and not upon jurisdiction in rem: *Section 74(2) cannot be used to attack the factual findings of an in rem judgment on the question of status itself.* To permit that is to allow section 74(2) to completely destroy section 74(1). Regarding the issue of status itself, the judgment annulling Mrs. Brown's marriage to Ahmed is binding upon all third parties, including Mr. Brown and his heirs.

The LSA and most, if not all, of the Respondents agreed in their arguments before

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the Court that Mrs. Brown's marriage to Ahmed was legally annulled. They stated that they were not questioning her status. They agreed that the annulment order is binding "on all the world." Their disagreement is on the facts underlying the annulment. However, this Court cannot separate the judgment from the facts. If Mrs. Brown's marriage to Ahmed was annulled, it was annulled on the grounds set forth in the Order. It could not be annulled for no reason. The factual findings are binding on direct questions of status, although, arguably, factual findings on collateral matters are not binding.

To that end, the Respondents have cited no case holding that the factual findings of an annulment or divorce are not binding when the issue being raised in the second action is the direct question of status itself, and not a collateral issue. For the foregoing reasons, the Family Court Order of annulment is binding on the Respondents.

#### V. CONCLUSION.

This Court finds that the conclusion it has reached is not unfair or inequitable to Mr. Brown or the estate. Mr. Brown was well aware of Mrs. Brown's annulment action. He paid Mrs. Brown's legal fees. He was copied on pleadings. He sought to have the findings of fact set forth in the annulment order adopted in his own later annulment case. It has long been settled that a person who accepts the benefits of even a void order is estopped to question its validity. *Edwards v. Edwards*, 254 S.C. 466, 176 S.E.2d 123 (1970) ("Since [husband] proposed the transfer of the property and has accepted the benefits accruing to him therefrom, he is now estopped to assert the invalidity of the judgment."); *Scheper v. Scheper*, 125 S.C. 89, 118 S.E. 178 (1923) ("Even where one who did not procure it accepts the benefits of a void judgment, he is estopped to assert its invalidity.").

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Mr. Brown knew he could pursue an annulment from Mrs. Brown as he initiated such an action himself. If he wanted to annul his marriage, he could have proceeded with the action he commenced. But he decided not to proceed with it. As he never obtained an annulment during his lifetime, his marriage was never annulled and he was married to Mrs. Brown at the time of his death, certainly for the purposes of surviving spouse pursuant to S.C. Code Ann. § 62-2-802, which required him to take action. Further, in this case, Mr. Brown affirmatively sought to benefit specifically from the Findings of Fact in the annulment order. These are the very Findings of Fact the LSA now wants this Court to ignore. He alleged in his own short-lived annulment action that the “Findings of Facts of the Charleston Family Courts” were binding.<sup>35</sup>

Therefore, it is hereby ORDERED, DECREED and ADJUDGED that Tommie Rae Brown is the surviving spouse of James Joseph Brown. The Family Court’s April 15, 2004 Final Order is binding on James Joseph Brown and his heirs and must be respected by this Court.

It is further ORDERED, DECREED and ADJUDGED that the Petitioner Tommie Rae Brown’s Motion for Summary Judgment on her status as James Joseph Brown’s wife and surviving spouse is granted, and the Limited Special Administrator’s Motion for Summary Judgment is denied.

It is further ORDERED, DECREED and ADJUDGED that all other issues, including the validity of the prenuptial agreement between Tommie Rae Brown and James Joseph Brown are reserved for a future determination.

This 13 day of January 2015, at Rock, South Carolina.

  
DOYET A. EARLY, III  
JUDGE, SECOND JUDICIAL CIRCUIT

<sup>35</sup> Joint Stipulation of Facts at 000070, ¶ 10 (Mr. Brown’s Amended Complaint for Annulment).

FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF AIKEN  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2013CP0202850

Tommie Rae Hynie-Brown	David Soujourner Deanna Brown Thomas Vanisha Brown Daryl Brown Michael Deon Brown	Terry Brown Yamma Brown Larry Brown Jeanette Mitchell
PLAINTIFF(S)		DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge	Judge Code	Date
For Clerk of Court Office Use Only		

This judgment was entered on 14th day of January, 2015, and a copy mailed first class or placed in the appropriate attorney's box on 14th day of January, 2015, to attorneys of record or to parties (when appearing pro se) as follows:

Robert N. Rosen 18 Broad Street Suite 201 Charleston, SC 29401

J. David Black PO Drawer 2426 Columbia, SC 29202-2426  
John Fisher Beach 1501 Main St., 5Th Floor Columbia, SC 29201

Matthew Day Bodman 1500 Calhoun St. Columbia, SC 29201

William Joseph Barr 108 N. Academy St. Kingstree, SC 29556-3422

John Andrew Donsbach Sr. PO Box 212139 Martinez, GA 30917-2139

ATTORNEY(S) FOR THE PLAINTIFF(S)

*probate*

Court Reporter

ATTORNEY(S) FOR THE DEFENDANT(S)

*Liz Godard by Shannon Jaurer*  
Liz Godard - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF AIKEN  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2013CP0202849

Tommie Rae Hynie-Brown	David Special Administrato Soujourner Deanna Brown Thomas Vanisha Brown Daryl Brown Michael Deon Brown	Terry Brown Yamma Brown Larry Brown Jeanette Mitchell
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PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	Judge Code	1/14/2015 Date
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**For Clerk of Court Office Use Only**

This judgment was entered on **14th day of January, 2015**, and a copy mailed first class or placed in the appropriate attorney's box on **14th day of January, 2015**, to attorneys of record or to parties (when appearing pro se) as follows:

Robert N. Rosen 18 Broad Street Suite 201 Charleston, SC  
29401

J. David Black PO Drawer 2426 Columbia, SC 29202-2426  
John Fisher Beach 1501 Main St., 5Th Floor Columbia, SC  
29201  
Matthew Day Bodman 1500 Calhoun St. Columbia, SC  
29201  
William Joseph Barr 108 N. Academy St. Kingstree, SC  
29556-3422  
John Andrew Donsbach Sr. PO Box 212139 Martinez, GA  
30917-2139

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ATTORNEY(S) FOR THE PLAINTIFF(S)

*probate*

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ATTORNEY(S) FOR THE DEFENDANT(S)

*Liz Godard by Shannon J. ...*  
Liz Godard - Clerk of Court

Court Reporter

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**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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### **Appellant's Proposed Supplement to the Record on Appeal**

1. Order of the Honorable Doyet A. Early, III, dated January 13, 2015
2. Handwritten Notes of Tommie Rae Hynie - Copy in Possession of Aiken Clerk of Court
3. Sworn Statement of Albert Dallas dated July 20, 2012, Case 4900, pp.1, 19-20
4. Deposition of Forlando Brown, April 10, 2013, Case 03:08-cv-00014-WOB pp.1, 14-15, 24-26, 115-118
5. Deposition of Russell L. Bauknight, August 20, 2013, Case 3:08-cv-00014-WOB, pp.1, 104 - 105 and Exhibits: \$4.7 million appraisal (filed under seal) and Wingate Litigation Agreement (filed under seal, but made public)
6. Stipulation of Facts used by Sojourner and Hynie for Summary Judgment

## **Exhibit B**

STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

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Appellate Case No. 2013-001649

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Alan Wilson, in his Capacity as Attorney General of  
South Carolina; and others, ..... Plaintiffs,

v.

Albert H. Dallas and others, ..... Defendants,

Of whom Adele J. Pope, Individually and on behalf of Others under South  
Carolina Trust Code Section 62-7-405, is the.....Appellant,

And Terry Brown, Forlando Brown, James B., David G. Cannon, Albert H. Dallas  
and Tommie Rae Hynie are.....Respondents

And Alan Wilson in his Capacity as Attorney General of South Carolina, Deanna  
J. Brown Thomas and Robert L. Buchanan, Jr., are..... Additional Interested  
Persons.

In Re: The Estate of James Brown and The James Brown 2000 Irrevocable  
Trust u/a/d August 1, 2000, Respondents.

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PROOF OF SERVICE

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I certify that on the 23rd day of January, 2015, I have served a copy of the  
MOTION TO SUPPLEMENT RECORD AND STAY SPOUSAL  
PROCEEDINGS AND MEMORANDUM IN SUPPORT OF MOTION on the  
Respondents and The Honorable Alan Wilson, Attorney General, by depositing a  
copy of same in the United States Mail, postage prepaid, addressed to them or their  
attorneys of record, as follows:

Tanya A. Gee, Esquire  
PO Drawer 2426  
Columbia, South Carolina 29202-2426  
*Counsel for Estate/2000 Trust*

David G. Cannon  
P. O. Box 865  
Barnwell, SC 29812

Eugene C. Covington, Jr., Esquire  
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Greenville, SC 29602  
*Counsel for Respondent Albert H. Dallas'*

Robert N. Rosen, Esquire  
18 Broad Street, Suite 201  
Charleston, SC 29401  
*Counsel for Respondent Tommie Rae Hynie*

Albert P. Shahid, Jr., Esquire  
89 Broad Street  
Charleston, South Carolina 29401  
*Counsel for Respondent James B.*

John A. Donsbach, Sr., Esquire  
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Augusta, Georgia 30907  
*Counsel for Respondents Terry Brown and Forlando Brown*

The Honorable Alan Wilson  
South Carolina Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211-1549



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Adele J. Pope  
1228 Walnut Street  
Newberry, South Carolina 29108  
Telephone: 803-413-0753  
Email: [adele@popelawfirm.com](mailto:adele@popelawfirm.com)  
S. C. Bar No. 4501

January 23, 2015