THE STATE OF SOUTH CAROLINA
IN THE Supreme COURT

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S.C. Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge
Case No 2008-CP-2-1647

Alan Wilson, in his capacity as Attorney General of the State of South Carolina, Daryl J Brown, on behalf of his minor children, Lindsey B and Janise B , Deanna J Brown Thomas, on behalf of her minor child, Jason L , Yamma N Brown, on behalf of her minor children, Sydney L , Carrington L , and Tonya B , Vanisha Brown, Larry Brown, Tommie Rae Hynie Brown, and James B , through his Guardian ad Litem, Respondents,

v

Albert H Dallas, Alfred A Bradley, and David G Cannon, Individually and as (purported) Trustees of the James Brown 2000 Irrevocable Trust, Adele J Pope and Robert L Buchanan, Jr , Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust, Terry Brown, Romunzo Brown, Forlando Brown, Cinnamon N M Paris, LaRhonda Petitt, Jeanette Mitchell, and Russell L Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and The James Brown 2000 Irrevocable Trust,

of whom Robert L Buchanan, Jr , and Adele J Pope, as Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust are, Appellants,

and Albert H Dallas, Alfred A Bradley, and David G Cannon, Individually and as (purported) Trustees of the James Brown 2000 Irrevocable Trust, Terry Brown, Romunzo Brown, Forlando Brown, Cinnamon N M Paris, LaRhonda Petitt, Jeanette Mitchell, and Russell L Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and The James Brown 2000 Irrevocable Trust are Respondents

In re The Estate of James Brown and The James Brown 2000 Irrevocable Trust u/a/d August 1, 2000

FINAL BRIEF OF APPELLANTS

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STATEMENT OF QUESTIONS PRESENTED

I

Where the Attorney General set aside the trustees of a charitable trust and negotiated the settlement of a will contest in behalf of the trust, and where there was no evidence of a *bona fide* controversy about the validity of the will and charitable trust, was the settlement agreement negotiated by the Attorney General eligible for consideration by the court under S C Code Ann § 62–3–1102?

II

Where there was no evidence that the will and charitable trust were void as the product of undue influence, and where the settlement agreement replaced the testator's estate plan with a fundamentally different plan, did the circuit court err in finding that the settlement was just and reasonable?

III

Did the circuit court err in removing the appellants as trustees of the charitable trust and as personal representatives of the estate solely because they opposed the settlement agreement negotiated by the Attorney General?

STATEMENT OF THE CASE

James Brown died on December 25, 2006 The month after his death his will dated August 1, 2000 was admitted to probate in Aiken County, where the deceased resided He left his personal and household effects (PHE") to named adult children The balance of his estate poured over into his 2000 Irrevocable Trust ("the 2000 Trust") created the same day as his will was executed Mr Brown's primary assets were his publicity rights and the right to royalties from more than 800 published and unpublished songs Upon his death the 2000 Trust divided into two subtrusts a family educational trust funded with a maximum amount of $2,000,000 for the education of the issue of named children, and the James Brown I Feel Good" Trust (hereafter, "the charitable trust" or the 'I Feel Good Trust') for the education of needy and deserving students at South Carolina and Georgia schools

In December 2007, Tommie Rae Hynie Brown (hereafter, 'Tommie Rae") filed in probate court a challenge to the validity of the will and the 2000 Trust on the ground of undue influence On December 26, 2007, the last day for contesting the will, a will contest was filed on the same ground by six of Mr Brown's adult children The two will contests were removed to circuit court, as were all other matters filed in connection with the estate

The Attorney General of South Carolina, the Honorable Henry D McMaster, was joined as a party defendant in September 2007 in Case No 122, which involved claims for the removal of Messrs Dallas Bradley and Cannon as personal representatives and trustees

Appellants were appointed trustees of the 2000 Trust and personal representatives of the estate ("PR/Trustees) on November 20, 2007 They replaced Albert Dallas, David Cannon and Alfred Bradley, who resigned from those positions

By motion dated January 20, 2009, the Attorney General, Tommie Rae Hynie Brown, and five of the testator's adult children filed a motion requesting court approval under S C

Code Ann § 62–3–1102 of a settlement agreement reached on August 10, 2008 [1] In its essential features, the settlement agreement reduced the share of the charitable trust in the residuary estate from 100% (less $2,000,000 for the grandchildren's trust) to 50% and distributed the amount of this reduction half to Tommie Rae and half to the adult children participating in the settlement A new trust was created, to be controlled by the Attorney General The Attorney General negotiated the settlement and agreed to it on behalf of the 2000 Trust The appellants as trustees were not informed of the negotiations leading to the agreement and did not participate

The motion came on for hearing before the Honorable Doyet A Early, III, Resident Judge of the Second Judicial Circuit beginning January 30, 2009 Hearings continued on March 4, 5, 6, and 25, and April 4 and 6 On March 26, the proponents of the settlement filed modified documents evidencing modifications of the settlement agreement By the end of the hearings another adult son had joined in the settlement in consideration of the grant of a right of first refusal to buy the assets of the estate, and the share of the charitable trust was further reduced to 47 5% The charitable trust was agreed to be replaced with a new trust, called 'the Legacy Trust, the trustee of which would be named by the Attorney General who would control the new trust Expenses and taxes of the Legacy Trust were assigned as follows Tommie Rae 25%, the Brown Family LLC 25%, and the "I Feel Good" Trust 50%

By order dated May 26, 2009 Judge Early approved the settlement and removed the appellants as PRs/trustees, replacing them with Russell Bauknight This appeal followed,

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[1] Attached to the motion were three documents

1 An unsigned "Compromise and Agreement", subtitled "Terms of Private Settlement Agreement Dated August 10, 2008," with signature lines for Henry D McMaster, Attorney General of South Carolina, Tommie Rae Brown, Larry Brown, Venisha Brown Deanna J Brown Thomas, Yamma N Brown, Daryl J Brown and Tonya Brown

2 An undated, unsigned Addendum to Agreement , also entitled Contribution Agreement" with the same signature lines and

3 An undated unsigned "James Brown Legacy Trust" with Settlors Tommie Rae, AG McMaster and the Brown Family LLC [R pp 505–33]

and was consolidated with the appellants' appeal of subsequent orders appointing and reappointing Mr Bauknight in various fiduciary capacities [2]

The consolidated appeals were transferred from the Court of Appeals to the Supreme Court, and this appeal followed

STATEMENT OF FACTS

Throughout his lifetime, entertainment legend James Brown advocated the value of education He determined to leave the great bulk of his estate to that cause Ten years before he died, he engaged counsel and began planning The James Brown "I Feel Good" private foundation By early 1999, the components of a complete estate plan — including a will, a revocable trust and a durable power of attorney — were ready for Brown's signature These were executed on June 15 1999, four days after Brown completed a $26 million financing transaction for himself and his wholly-owned company, James Brown Enterprises, Inc ("JBE, Inc) in New York (the 'TIAA debt")

The will of 1999 gave Brown's entire residuary estate to the trust, which at Brown's death was to be divided as follows one-half for the education of the seven grandchildren, with a cap of $2 million,[3] and one-half for the "I Feel Good' private foundation, providing scholarships for students at Voorhees, U S C Aiken and U S C Salkehatchie [1999 Will, Item II, R p 415, 1999 Trust, Article V, R p 422]

Brown specifically excluded all past and future spouses and all children and other claimed heirs from inheriting his music empire *In terrorem* forfeiture clauses required his fiduciaries to vigorously defend any challenge to Brown s estate plan as an affront to his

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2 On August 3 and 6, 2009, the Attorney General and some respondents sought and obtained *ex parte* orders appointing Mr Bauknight as special PR and special trustee Requests to reconsider and vacate these orders were consolidated as Case 2009-CP-02-1810 ("Case 1810"), and denied

3 The cap was tied to the Generation Skipping Tax exemption available at Brown's death [1999 Trust, Article III, R p 420–21] Subject to the *in terrorem* forfeiture clauses and the spendthrift clause, each of the seven grandchildren had an education fund of about $285,000 00 by virtue of the 1999 will and revocable trust

wishes [1999 Will, Item X, R p 418, 1999 Trust, Article XIX, R p 431] A spendthrift clause confirmed that all funds would be used solely for education [1999Trust, Article XVII, R p 431]

Under the 1999 estate plan, Brown named as his fiduciaries daughter Deanna, attorney Dallas, accountant Cannon, road manager Bradley, friends Willie Glenn and Ella Overton, and office assistant Freida Carter NationsBank of South Carolina was named backup PR and trustee [1999 Will, Item II, R p 415, 1999 Trust, Intro and Article VI, R pp 420 423]

The following year, on August 1, 2000, Brown made minor modifications to his estate plan [2000 Trust, Article VII, R p 2083] He expanded the scholarships to include needy and deserving students attending schools in South Carolina and Georgia He made the Trust irrevocable and funded it with a deed to his 60-acre home estate at Beech Island in Aiken County, and with his stock in JBE, Inc , which held about two-thirds of the royalties to Brown s more than 800 published songs [4] Like the 1999 estate plan, the 2000 will and 2000 Trust contained *in terrorem* forfeiture clauses, and the Trust included a spendthrift clause

Mr Brown died at age 73 on December 25 2006 The part of his music empire that was not already in the 2000 Trust was devised to it It appeared that Brown had created possibly South Carolina's largest individual private foundation dedicated solely to educating

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4

As a result of Dallas' conflicting statements to the courts the question of who owns JBE, Inc — the estate or the 2000 Trust — was uncertain for some time Cannon confirmed that JBE, Inc , has been owned by the Trust since its inception In September 2007 Dallas filed a knowingly false stipulation asserting that JBE, Inc , had never been transferred to the Trust Dallas told AG Jones that he was forced to agree to the false stipulation He later testified he authorized the false stipulation in order not to be removed [R pp 106–07] In their appeal brief in the Court of Appeals Dallas and Bradley finally confirmed as Cannon had always asserted, that Brown transferred, and the trustees accepted, JBE, Inc , into the Trust in 2000 [R p 1018]

the needy [5]

Like the 1999 will, the 2000 will contained a "savings clause," incorporating the trust so that both the grandchildren's education trust and the "I Feel Good" Trust would be created even if the 2000 Trust were not in existence when Brown died The practical effect of these savings clauses was that four separate documents directed that Brown's music empire go to the Brown Family Education trust and the "I Feel Good" private foundation — the two subtrusts of, first, the 1999 (revocable) trust, and second, the 2000 (irrevocable) trust

Like the 1999 estate plan, Brown's final estate plan acknowledged as his heirs four of his five legitimate children, as well as two of his more than six claimed children not presumed to be heirs Among those excluded were three heirs who have qualified as children under the estate's DNA protocol established by original counsel after Brown's death [6] [1999 Will, Intro, R p 414, 1999 Trust, R p 420, Will, Intro, R p 2071, Trust, Art XXII, R p 2094]

For the next seven years the 2000 Trust, of record in two states, operated Brown's home estate at Beech Island The 2000 Trust also bought and sold a bank building in Augusta [R p 1104] and paid education benefits for four of the seven grandchildren

By 2007 Dallas and Cannon had ransacked at least $13 million of Brown s assets [R p 1230–71] It appears that neither Brown nor Deanna and Bradley, co-fiduciaries with

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5

The Estate/Trust's original tax counsel valued James Brown's assets at $80–$120 million with at least $20 million already in the 2000 Trust [R pp 2172, 2173] On June 15, 2008 Atlanta investor and branding executive Dr Terry Cox estimated the total value of the assets at about $100 million, with $40–50 million assigned to publicity rights (image/likeness) and $36–45 million to royalties for Brown's more than 800 published and unpublished songs [R pp 462–70]

6

Those claimed and presumed heirs specifically excluded by the language of both the 1999 and 2000 estate plans are Deon (incarcerated), Lisa (born of first marriage), Jeanette (DNA protocol), LaRhonda (DNA protocol), Cinnamon (DNA protocol), James II (orally directed to take, but refused, a prepaid DNA protocol through GAL), Tonya (claimed grandchild, but no DNA and her counsel filed a statement omitting her as an heir) [R pp 184, 904–09]

Dallas and Cannon for seven years, knew of the massive pre-death misappropriations as they were taking place [7]

In December 2007, immediately after their appointment on November 20, appellants filed the long-overdue application for IRS recognition of the "I Feel Good" Trust, making small technical amendments to the Irrevocable Trust as allowed by the Trust, to assure IRS approval [8] By March 2008 they had assembled an Advisory Board for the 2000 Trust, including some of the distinguished leaders Dallas and Cannon had named but never called to serve [9]

In the final ten days of December 2007, the will and the 2000 Trust were challenged by some of the children and by Tommie Rae Hynie Brown on the ground of undue influence In March 2008, an amended complaint of some of the children was filed, but it failed to allege any facts to support the claim that Brown's 2000 Trust or the will were the product of undue influence [R p 1156–65][10]

No discovery took place, and pending dispositive motions were never heard Having been impleaded in an earlier action, the Attorney General took over as spokesman for the

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7

Brown never used the funds he had intended for retirement not only because they were misappropriated but also because he continued to be "the hardest working man in show business" until just before his death at 73 Brown grossed about $6 million per year in road appearances the last three years of his life Most of Brown s approximately $3 million per year in royalties was pledged to bring down the TIAA royalty-backed debt The TIAA debt had been reduced from about $17 million the summer before Brown's death to about $11 million when appellants' service was terminated on May 26, 2009

8

Like most private foundations, the "I Feel Good" Trust although irrevocable, gave the Trustees the authority to amend the Trust <u>solely</u> to assure IRS compliance

9

Appointed were Dr Leonard McIntyre, Interim President of S C State University Ms Inez Tenenbaum former S C Superintendent of Education Ret Judge Walter Williams and Ms Ann Carmichael of U S C Salkehatchie Ms Tenenbaum resigned to accept a federal post [*See* R pp 1005-06]

10

By administrative directive Case 872, which was originally filed with Case 122, was segregated by the Clerk about May 14, 2008 Earlier documents bear the civil action number of Case 122

2000 Trust and settled the undue influence claim and the omitted spousal claim of Tommie Rae in a mediation to which the appellants, as trustees of the 2000 Trust, were not invited to attend The Attorney General took over for the 2000 Trust and agreed for it to relinquish roughly half its devise in settlement of these claims Instead of about 98% of assets after expenses, with no estate taxes, the 2000 Trust would receive 47 5% percent after estate taxes, but then further reduced by $2 million — the amount required to fund the grandchildren's education trust [11] The only expert testimony offered at the hearings below on the subject of taxation was to the effect that the settlement would cause the loss of the estate tax deduction resulting in about 50% taxes and interest and moreover that the "Legacy Trust", created by the settlement, would likely cause the I Feel Good ' Trust to be disqualified as a Section 501(c)(3) private foundation, resulting in income taxation problems in addition to the estate tax generated [R pp 1900-03]

The proponents of the settlement offered no witnesses to support the contention that the claim of undue influence, allegedly voiding the will and the 2000 Trust, was supported by any evidence The circuit court did not purport to find merit in the claim of undue influence, but found that the claim was brought in good faith The court found that the Attorney General was entitled to control and speak for the 2000 Trust not the trustees, and that the Attorney General was empowered to settle the will contest and omitted spousal claim in its behalf The settlement negotiated by the Attorney General was found to be just and reasonable

11 *See* the charts used at trial and reproduced in the Addendum to this brief for a depiction of the effect of the settlement

ARGUMENT

I

The settlement agreement was not eligible for court consideration for two reasons First, the Trust did not agree to it Second, it was not a compromise of a *bona fide* challenge to the will But even if the settlement were eligible for consideration by the court, it did not meet the statutory standard required to nullify the testator's estate plan

The settlement agreement at issue takes away more than half the testator's bequest to his private foundation for the education of needy and deserving students and gives that share to his adult children, whom he intended to get no part of his musical empire, and to the woman with whom he lived, who had agreed not to claim common law wife status after his death It consigns control of his estate and his foundation to the Attorney General, operating with advice of the disinherited children and the omitted spouse claimant

All this was done on the back of a claim that the estate plan, developed over a four-year period and embodied in a will and irrevocable trust six years before death, leaving almost everything to education, was the product of undue influence The Attorney General set aside the trustees of the testator's private trust, purported to speak for the trust and agreed to this settlement of the will contest, replacing the testator's estate plan with one he would have detested

How such a breathtaking chain of events could possibly have happened requires a review of an obscure part of the probate code seen only once or twice in the appellate jurisprudence of this State

Two sections of the Uniform Probate Code deal materially here with settlements of rights in an estate The first is Section 3–1101, codified in South Carolina as S C Code Ann § 62–3–1101 (hereafter, "Section 1101") [12] The second is Section 3–1102, codified

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[12]

SECTION 62–3–1101 Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons

(continued)

here as S C Code Ann § 62–3–1102 (hereafter, "Section 1102")[13]

Section 1101 states the *effect* of a court-approved settlement, while Section 1102 does two things First, it prescribes the *elements* which a settlement must have to make it eligible for consideration by the court Second, it sets the standard essential for court approval of such a settlement Section 1102 is the key statute It is the statute which allows a court under extraordinary circumstances to do something which the courts of this State and all others have often said is contrary to our policy, with some exceptions, of allowing citizens to leave their property as they see fit Section 1102 allows a court to change the estate plan of the deceased, perhaps fundamentally, despite the testator's plainly expressed intentions

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[12](continued)

A compromise of a controversy as to admission to probate of an instrument offered for formal probate as the will of a decedent the construction validity or effect of a probated will the rights or interests in the estate of the decedent of a successor or the administration of the estate if approved in a formal proceeding in the court for that purpose is binding on all the parties including those unborn unascertained or who could not be located An approved compromise is binding even though it may affect a trust or an inalienable interest A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it A compromise approved pursuant to this section is not a settlement of a claim subject to the provisions of Section 62–5–433

[13]

SECTION 62–3–1102 Procedure for securing court approval of compromise

The procedure for securing court approval of a compromise is as follows

(1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained

(2) Any interested person including the personal representative or a trustee then may submit the agreement to the court for its approval and for execution by the personal representative the trustee of every affected testamentary trust and other fiduciaries and representatives

(3) After notice to all interested persons or their representatives including the personal representative of the estate and all affected trustees of trusts the court if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement Minor children represented only by their parents may be bound only if their parents join with other competent persons in execution of the compromise Upon the making of the order and the execution of the agreement all further disposition of the estate is in accordance with the terms of the agreement

These statutes deal with the settlement of all manner of claims and controversies but only two are at issue here the claim that Mr Brown's will is invalid as the product of undue influence, and the claim that the person with whom he lived is his widow These two claims were settled by the Attorney General in a single package

* * * * *

The agreement at issue here was joined in by the Attorney General, the disinherited adult children, and the woman who agreed not to claim to be Mr Brown's common law wife [R pp 1795–96] Conspicuous by its absence from the signators is the private foundation — the 2000 Trust — to which Mr Brown left the overwhelming bulk of his estate [14] The Attorney General purported to speak for the foundation but he had no authority to do so in South Carolina law

Nor was this agreement the compromise of a *bona fide* challenge to Mr Brown's will The proponents of the settlement did not even ***try*** to offer the court any testimony that the will contest had any basis in fact

But even if the agreement had met these two prerequisites for consideration by the court — (1) unanimity of all holders of beneficial interests and (2) the compromise of a *bona fide* challenge to the will — it was not just and reasonable by any standard which the court might apply The court erred in approving it

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14

In the scholarly literature and in much of the caselaw, entities such as the charitable subtrust of the James Brown 2000 Irrevocable Trust are commonly called foundations The organizational form — whether trust or corporation — is immaterial *See, e g , Gilbert v McLeod Infirmary,* 219 S C 174, 185 64 S E 2d 524 (1951)("'The directors or other members of the managing board are sometimes called trustees Their legal position is the same no matter by what name they are called whether directors, trustees or governors ' 1 BOGERT ON TRUSTS 61 ") There are approximately 65 000 such private foundations in the United States Carl Schramm, *Law Outside the Market The Social Utility of the Private Foundation,* 30 HARV J LAW & PUB POL Y 355, 383 n 113 (2006)

A The Trust's share of the estate could not be cut in half without the Trust's consent The Attorney General had no authority to speak for the Trust The Trust did not agree to the reduction The court had no authority to order the Trust to accept a reduction

James Brown devised to his adult children only his personal effects, and nothing to Tommie Rae Hynie Brown (hereafter "Tommie Rae') [15] He devised his entire residuary estate which included almost everything, to his 2000 Irrevocable Trust [Will, ITEM II, R p 2072] The Trust contains two subtrusts One is a private trust for the education of named grandchildren The other — and by far the larger — is a private charitable trust for the education of needy students [Trust, Article V, R p 2082]

Four months after having been brought into one of the pending actions, the Attorney General convened a mediation in Augusta, Georgia, to which the trustees of the 2000 Trust were not invited [*See* R pp 1311, 1326] Claiming the right to negotiate and speak for the Trust, the Attorney General agreed that the adult children should receive 25% and Tommie Rae should receive 25% of the residuary estate in settlement of the will contest and the claim to a spousal share [R p 2363, ¶ 2(d)] This reduced the Trust s devise from virtually everything to half of the residuary estate [16] The residuary estate was to pass to a new entity — ironically dubbed "the Legacy Trust" — run by a trustee selected by the Attorney General, advised by the adult children and Tommie Rae [R pp 2363, 2370, ¶ 11(A)] Thus, the testator s foundation will henceforth be controlled by the Attorney General of South Carolina[17] and by the very people whom the testator disinherited

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15 Tommie Rae and the adult children who contested the will are sometimes referred to hereafter as the contestants

16 By the time the hearings below concluded, the Trust's share had shrunk from 50% to 47 5% as the terms of the settlement agreement twisted and turned Even now, there is no single document constituting "the settlement agreement " It is a collection of different papers signed at different times by various parties

17 The settling parties told the circuit court that the trustee of the new "Legacy Trust" would be "controlled completely" by the Attorney General [R p 1946]

Asked to approve this agreement, the circuit court was offered two quite different rationales for the Attorney General's authority to take charge of the Trust, to negotiate for it, to settle these disputes in its behalf, to change the estate and trust documents, and to replace the testator's Trust with a new one deemed more suitable by the Attorney General, and then for the court's authority to approve what the Attorney General had done, to remove objecting fiduciaries, and to order the removed fiduciaries to signify their consent, following their removal

The Attorney General's rationale was simple The AG contended that, by authority of common law and statute, once he has entered any lawsuit to which a private charitable trust is party he has authority to control and settle the litigation in behalf of the trust as though he were the trust itself As the Attorney General's counsel often claimed "The general law is when the AG appears, he controls the litigation " [R p 1988, lines 15–16] "The Attorney General has exclusive authority over charitable trusts " [R pp 2930–31]

The Brown contestants gave lip service to the AG s claim to such authority when asked to do so, but their rationalization for the outcome here was more sophisticated It centered upon the provision in Section 1102 which allows the court to approve an agreement altering an estate plan over the objection of trustees if agreed upon by *all holders of beneficial interests in the estate* The Brown contestants contended that where a charitable trust holds a beneficial interest in the estate, this statute gives the court authority to *compel* the trust to agree to an alteration in the estate plan by *ordering* the trustees to sign the agreement, once approved by the court as just and reasonable When the court approves as just and reasonable the agreement of the other participants to alter the estate plan, the trust's consent is compulsory and the trustees are ordered to sign as a ministerial act, so the argument goes

Neither of these theories can be sustained The Attorney General has no right to set aside the trustees of a private charitable trust and to put himself in the position of super-trustee, managing the affairs of the trust in his discretion and settling a will contest as he

sees fit The fact that a will contest is pending gives him no authority not otherwise possessed, and the AG possessed no such authority to act for the trust The Attorney General is one person among others with authority to "enforce" charitable trusts (a term of art), not to take them over and speak for them No agreement exists under the Probate Code for the court to consider approving unless and until *all* the holders of a beneficial interest in the estate have joined in that agreement The 2000 Trust was overwhelmingly the chief holder of a beneficial interest in this estate, yet it was not represented in the settlement and did not agree There was no agreement for the court to consider [18]

> *1 The Attorney General is one of the persons authorized to enforce a trust This is a police power to ensure that the trust is administered according to its terms The Attorney General's power to enforce a trust gives him no authority to set aside the trustees, administer the trust, and settle its disputes*

The charitable subtrust of the 2000 Irrevocable Trust is at the same time a charity and a private trust Its property is not public property but private The nature of a charity administered by a private party was explained by the Court in *Strauss v Marlboro County Gen Hosp*, 185 S C 425, 194 S E 65 (1937) In that case a physician who was denied privileges at a private hospital sued to have the hospital declared a public corporation bound to admit him to practice because the hospital served the public Relying upon the celebrated case of the *Trustees of Dartmouth College v Woodward,* 4 Wheat 518 671 4 L Ed 629", the Court found that the hospital, although a charity, was a private entity in charge of its own affairs 194 S E at 65

James Brown's legacy to his Trust is the private property of that foundation, not public property subject to control by the Attorney General It is as true today as when Daniel Webster argued it to the Court in the *Dartmouth College* case "That all property, of which the use may be beneficial to the public, belongs therefore to the public is quite a

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18 Grandchildren Romunzo and Forlando did not join in the settlement agreement but filed objections to it as well since their share of the family education trust was reduced [R pp 584–85, 559–68] *See* S C Code Ann § 62–7–301(c) (representative's consent not effective where beneficiary objects)

new doctrine It has no precedent, and is supported by no known principle In such a case, no lawyer would or could say, that the legislature might divest the trustees, constituted by deed or will, seize upon the property, and give it to other persons, for other purposes " *Trustees of Dartmouth College v Woodward,* 17 U S (4 Wheat) 518, 573 (1819)

The Attorney General of South Carolina, like the attorneys general of all the States, has common law and statutory authority to enforce trusts domiciled in the State The General Assembly has conferred identical authority upon other actors as well S C Code Ann § 62–7–405(c) Thus, the Attorney General's enforcement authority is not exclusive This authority to enforce a trust is the authority to police the administration of the trust so as to detect and cure fraud and the like on the part of the trustees, and to ensure that the trustees are administering the trust as intended by the settlor The Hawaii court emphasized the difference between enforcement and displacement in this way

> The function of the attorney general as *parens patriae* of charitable trusts, is to oversee the activities of the trustees to the end that the trust is performed and maintained in accordance with the provisions of the trust document, and to bring any abuse or deviation on the part of the trustees to the attention of the court for correction * * * The authority of the attorney general over charitable trusts does not extend beyond the performance of that function M R FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT, 198 (1965)

Midkiff v Kobayashi, 54 Haw 299 507 P 2d 724 745 (1973) (citations omitted) In the case of charitable trusts, traditional doctrine has generally limited the attorneys general to ascertaining that trustee actions are permitted by, and not inconsistent with, the underlying trust instrument and safeguarding against fraud ' Mark Sidel *The Struggle for Hershey Community Accountability and the Law in Modern American Philanthropy,* 65 U PITTS L REV 1, 2 (2003)

The role of the state in the regulation of private foundations such as the charitable subtrust of the 2000 Trust is summarized by Professor Schramm in this way

> The private foundation is, of course, subject to regulation by

state attorneys general and the Internal Revenue Service In general, though government oversight is premised on a view of nonintervention in the substantive decision-making and operations of foundations The law's proper role is thus limited to two responsibilities

> [To ensure] that each charitable organization is carrying out the purposes for which it was established, and that its managers are not obtaining personal benefits from their positions at the expense of the charity With few exceptions, the law neither attempts to control the decisions of managers made in good faith as to how the purposes will be achieved, nor how their organizations will be administered

Generally, a state attorney general can pursue legal action against foundations in cases where charitable assets are in jeopardy (thus possibly violating donor intent), and in cases involving illegal actions

Carl Schramm, *Law Outside the Market The Social Utility of the Private Foundation,* 30 HARV J LAW & PUB POL'Y 355 372 (2006) [19] In the exercise of his enforcement authority the attorney general must not be allowed to "step over the line between oversight and management " Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement,* 79 IND L J 937, 974 (2004) *Accord* MARION R FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 301 (2004) ('[A] duty to enforce implies a duty to supervise (or oversee) in its broader sense *It does not, however, include a right to regulate, or a right to direct, either the day-to-day affairs of the charity or the action of the court* " Emphasis added), Jonathan Klick and Robert Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control Evidence from Hershey's Kiss-Off,* 108 COL L REV 749, 780–81 (2008) *quoting* JESSE DUKEMINIER, ROBERT SITKOFF, ET AL , WILLS TRUSTS, AND ESTATES 750 (7th ed 2005), Carl Schramm, *Law Outside the Market The Social Utility of the Private Foundation,* 30 HARV J LAW & PUB POL'Y 355 386 (2006) ("[T]he attorney

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19 *Quoting* A Kosaras, *A Conversation with Marion R Fremont-Smith*, FOUND NEWS AND COMMENT, Sept -Oct 2004 at 21–22 *See also* David Patton, *The Queen, the Attorney General, and the Modern Charitable Fiduciary A Historical Perspective on Charitable Enforcement Reform,* 11 U FLA J L & PUB POL'Y 131 165 (2000)

general ιs not a 'super' member of the board ")

In the case of a charitable trust, "the beneficial interest is not given to individual beneficiaries, but instead for purposes beneficial to the community " *Brown v Ryan, Attorney General,* 338 Ill App 3d 864, 788 N E 2d 1183, 1191 (2003), *citing* 4A A SCOTT & W FRATCHER, TRUSTS § 391, at 357 (4th ed 1989) "Thus, the community has an interest in enforcing the trust and the Attorney General represents the community in seeing that the trust is properly construed and that the funds are applied to their intended charitable uses " *Id* at 1191 That is the sum total of the attorney general's authority

In re Estate of Horton, 11 Cal App 3d 680, 90 Cal Rptr 66 (Ct App 1970), is a typical case rejecting an attorney general's claim that the authority to enforce is the authority to control

> We are cited no statutory or case law authority placing the Attorney General in the position of a super administrator of charities with control over, or right to participate in, the contractual undertakings of the charities He has undoubted standing to seek redress in the courts of contracts entered into by charities which are collusive, tainted by fraud or which demonstrate any abuse of trust management

90 Cal Rptr at 68

The attorney general s lack of authority to control, speak for, or act for a charity is expressed by Professor Brody a frequently quoted scholar on the subject, in these terms

> Where discretion is conferred on a charity's board, proper state enforcement action over fiduciary decisionmaking reduces to a single rule The role of the attorney general and courts is to guard against charity fiduciaries' wrongdoing, and not to interfere in decisionmaking carried out in good faith To this end, an attorney general is vested with the authority to seek to correct breaches of fiduciary duty that have not otherwise been remedied by the board *However, the attorney general is not a "super" member of the board*

Evelyn Brody *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement,* 79 IND L J 937, 976 (2004) (emphasis added) "In other words, an attorney general does not have the authority to act as co-trustee of a charitable trust " Jennifer

Komoroski Note, *The Hershey Trust's Quest to Diversify Redefining the State Attorney General's Role When Charitable Trusts Wish to Diversify,* 45 WM & MARY L REV 1769, 1784 (2004) *Accord In re Gebbie's Will,* 33 A D 2d 1093, 307 N Y S 2d 1002, 1004 (1970)

Not only is the Attorney General not authorized to act as trustee of a charitable trust, he is not authorized to act as *attorney* for the trustee in a will contest as the Missouri court held in the leading case of *Murphrey v Dalton,* 314 S W 2d 726, 730–31, 67 A L R 2d 1278 (Mo 1958) The court held that the attorney general s authority to intervene in a will contest gave him no right to represent a charitable trust in that contest The Kentucky court denies the attorney general the right even to intervene in a will contest since he has no proper role to play *Commonwealth ex rel Ferguson, Attorney General v Gardner,* 327 S W 2d 947, 74 A L R 2d 1059 (Ky 1959) The court observed

> The question presented is a new one in this jurisdiction It is significant that no record has been produced of any attempt by an attorney general, during the entire 167 years of the Commonwealth, to intervene in the many contests about the validity and establishment of wills involving charities

327 S W 2d at 948 As in Kentucky, it is no accident that the South Carolina Reports appear to reflect no previous instance of the Attorney General intervening in a will contest and attempting to take over the role of trustee *See also Spang v Cleveland Trust Co ,* 134 N E 2d 586 (Ohio Comm 1956) (The AG is not a necessary party to a will contest where the will, if valid created a mixed charitable/noncharitable trust since the object of the will contest was to determine whether the will was valid, not to terminate a charitable trust)

As settlor, James Brown conferred upon the Trust, acting through its trustees, and upon his estate, acting through his personal representatives, the power to compromise claims Trust, Article X(19), and Will, ITEM VI *See Takabuki v Ching,* 67 Haw 515, 695 P 2d 319 327 (1985), *Lefkowitz v Lebensfeld,* 51 N Y 2d 442, 446–47, 434 N Y S 2d

929, 415 N E 2d 919 (1980) [20] *In re Boston Reg Med Center,* 328 F Supp 2d 130, 146 (D Mass 2004) State attorneys general "do not have the power to manage the daily affairs of a charitable organization Nina Crimm, *Why All is Not Quiet on the "Home Front' for Charitable Organizations,* 29 N M L REV 1, 1–2 n 3 (1999), and authorities cited [21]

The proper role of the attorney general in a case of will *construction* is seen in *Watson v Wall,* 229 S C 500, 93 S E 2d 918 (1956), where the AG intervened to contend that a renounced devise would then pass, not by intestacy but to the residuary legatee, a charitable trust By contrast, the Attorney General has no substantive role to play in a will *contest*

The circuit court cited several examples in South Carolina's jurisprudence of the Attorney General s duty to enforce charitable trusts [R p 28] The court interpreted these traditional enforcement cases to mean that "when the Attorney General does appear in litigation involving a charitable trust , he has the right to take charge and control of that portion of the litigation which relates to the charitable trust ' [R p 29] The court then reasoned that the power "to take charge and control" includes the power to set aside the trustees, speak for the trust, and settle its disputes in his discretion No South Carolina cases even come close to suggesting such a power in the office of the Attorney General

The circuit court cited four cases from other jurisdictions to support the claimed authority of the Attorney General to act as he did These cases provide no more support than do the South Carolina cases upon which the court relied Two of these were trial court decisions in New York — one by a probate judge (in New York, a surrogate") and the other

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The *Lefkowitz* case involved a charitable corporation, but the form of the entity makes no difference in the law of charities

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The authorities cited include JAMES FISHMAN AND STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS 246–47 (1995) Marion R Fremont-Smith, *Trends in Accountability and Regulation of Nonprofits*, in THE FUTURE OF THE NONPROFIT SECTOR 75–76 (Hodgkinson et al eds 1989) Henry Hansmann *Reforming Nonprofit Corporation Law,* 129 U Pa L REV 497, 600–01 (1981), and Kenneth Karst, *The Efficiency of the Charitable Dollar An Unfulfilled State Responsibility,* 73 HARV L REV 433, 449–60 (1960)

by a trial judge (in New York, a "supreme court judge) First was a 1949 decision of a New York trial judge in the case of *In re Schlussel,* 195 Misc 1008, 89 N Y S 2d 47 (Sup Ct 1949) The Attorney General consented to a settlor's revocation of a trust where an indefinite contingent beneficiary was a charity and replaced it instead with a noncontingent gift The trial judge relied upon another trial court decision holding that if a charity were to compromise its rights, and the Attorney General assented to the compromise, the court could approve it From this the judge reasoned that "it could be true, then, that where indefinite charities with interests wholly contingent are concerned," the Attorney General might act to secure an absolute right for a specific charitable beneficiary in lieu of a contingent right for an indefinite beneficiary

The second New York case relied upon by the circuit court was *In re Smith's Estate,* 75 Misc 2d 895, 349 N Y S 2d 281 (Surr Ct 1973), a decision of the probate judge of Rockland County, New York His Honor stated with no citation of authority that Attorney General Lefkowitz had the authority to compromise a will contest where the testator left $25,000 00 to charity Several years later the New York Court of Appeals put a stop to Attorney General Lefkowitz' assertion of authority to control litigation involving charities The case was *Lefkowitz v Lebensfeld* 51 N Y 2d 442 446–47 434 N Y S 2d 929, 415 N E 2d 919 (1980), where the court stated

> If the Attorney-General were suing to obtain actual enforcement of a disposition or to require that it be applied for a stated or proper charitable purpose, there would thus be little question of his standing
>
> The problem here, however, is that the Attorney-General does not seek to attain any of these goals Rather, he is attempting to enforce obligations purportedly owing to charitable organizations In effect, the Attorney-General is stepping into the shoes of the charity without first making a demand upon the corporation or satisfying the other procedures normally associated with a derivative action He is endeavoring not to enforce a gift or a trust, but to enforce rights that arise from the ownership of charitable property originally received as a gift
>
> No authority has been furnished to this court that would sanction such an expansive reading of [the enforcement statute,] EPTL 8-1 1 (subd (f)) That provision was enacted

> in response to a particular problem and, although now broader than at its inception, it does not authorize a large scale incursion into the everyday affairs of charitable corporations Indeed, in these circumstances, to confer standing upon the Attorney-General under [the enforcement statute] would be to grant all but unlimited and uncontrolled power to act as the alter ego of the charitable organization Since most charitable holdings probably originated as gifts, as did the shares involved here, virtually all obligations owed a charity would be independently enforceable by the Attorney-General Such a result would require a strained interpretation of [the enforcement statute], a statute designed primarily to ensure that there is a party available to enforce charitable trusts on behalf of the ultimate beneficiaries

415 N E 2d at 931–32 In New York, the Attorney General has no authority to do what the South Carolina Attorney General did here

The circuit court cited the Oklahoma case of *Sarkeys v Independent Sch Distr #40,* 592 P 2d 529 (Okla 1979) In that case the Attorney General was requested by the visitors of a charitable corporation to intervene in his traditional capacity as charitable enforcer in an action to determine whether the charity s sale of stock constituted "indirect self-dealing" by the trustees The action was settled by the plaintiffs, the charity's trustees, and the charity's co-receivers The Attorney General joined the trustees and co-receivers together with the plaintiffs, in asking the court to approve the settlement, which it did Denying standing to a visitor, the court observed

> It is generally held that the Attorney General has a preclusive right to maintain proceedings to protect the trust and to prevent a misuse of property devoted to a public charity A number of states have statutes which expressly provide that the Attorney General may enforce charitable trusts
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> In Oklahoma, the authority of the Attorney General to enforce charitable trusts as parens patriae is derived from the common law and inferred from the statutory language of 60 O S 1971 § 175 18(B) which requires notice to the Attorney General and provides the Attorney General may intervene in an action concerning performance of a charitable trust It has long been recognized at common law that the Attorney General has the duty of representing the public interest in securing the enforcement of charitable trusts

592 P 2d at 533 The *Sarkeys* case is an example of the Attorney General's traditional enforcement authority — the authority to ensure that a charity's trustees are administering

the trust properly The Attorney General in the *Sarkeys* case did not take over the administration of the trust, speak for it, or purport to settle its claims

Finally, the circuit court relied upon the 1951 Illinois case of *Kolin v Leitch,* 343 Ill App 622, 99 N E 2d 685 (1951) The plaintiffs, asserting status as beneficiaries of a charitable foundation, brought an action to enforce the charity They joined the Attorney General as a party defendant The Attorney General moved to dismiss on the ground that the plaintiffs lacked standing to enforce the charity, but the Attorney General also answered denying that the directors of the foundation were acting in violation of the trust Like *Sarkeys*, this is a traditional charitable enforcement case This case does not remotely stand for the claim that the Attorney General may take over litigation involving a trust and settle the litigation as he sees fit

The inability of the Attorney General to marshal any appellate authority for his unprecedented claim to power in this matter is obvious

The Attorney General had no right to exclude the trustees and to speak for the Trust in regard to settlement of the will contest or the claim of the alleged widow

2 *The Trust was the sole beneficiary of the residuary estate The Trust was not a party to the settlement agreement The only parties were non-beneficiaries of the residuary estate, who agreed among themselves to divide it up and to leave to the Trust less than half of what the testator intended There was no Section 1102 agreement for the court to consider The Trust's consent to the agreement could not be manufactured by court order, after the fact, by ordering the removed trustees to sign*

The settling parties characterize these proceedings as a mere alteration of an estate plan to which all holders of a beneficial interest consent It is nothing of the kind It is the settlement of a will contest and a claim to an omitted spouse s share, brought by persons to whom the testator left nothing of substance — a settlement to which neither the chief beneficiary of the estate nor the personal representatives agreed

Section 1102 allows such a settlement over the objection of the personal representatives and trustees only when *all* holders of a beneficial interest in the estate agree and where the settlement is just and reasonable The overwhelming bulk of the

testator's estate was in the residue, and the sole beneficiary of that residue was the Trust The Trust did not agree to this settlement The contestants persuaded the circuit court that the Trust, as sole beneficiary of the residue in the person of its trustees could be ordered to agree to the settlement **after the fact**, by an order compelling the removed trustees/PRs to sign the agreement as a ministerial act Their *post hoc*, court-ordered signatures, then, would supply the agreement essential to a virtual destruction of the testator's estate plan That was the theory

As noted, the contestants' contention is based upon a provision of the Uniform Probate Code, enacted here as S C Code Ann § 62–3–1102 If the court finds that an agreement altering the estate plan has been signed by all those holding a beneficial interest and is just and reasonable, it may order trustees to sign This provision was written to deal with the case where all the beneficiaries of an estate have agreed to the settlement, along with all beneficiaries of any testamentary trust created under the will, but the personal representative or the trustee of the testamentary trust objects In this situation it is possible that the personal representative or trustee may be obstructing a just and reasonable settlement to which all holders of a beneficial interest — including the beneficiaries of the trust — subscribe This wise provision of the uniform act was never intended to apply where the beneficiary is *a charitable trust which has no beneficiaries in the usual sense and which does not itself agree to the reduction of its devise* Moreover, the provisions applicable to modification of a *trust* were not followed, nor was there any evidence that would have satisfied these requirements S C Code Ann §§ 62–7–410 –416

It is settled law that a charity has no identifiable beneficiaries as that term is known in the law of trusts In the case of a charitable trust, "the beneficial interest is not given to individual beneficiaries, but instead for purposes beneficial to the community " *Brown v Ryan, Attorney General,* 338 Ill App 3d 864, 788 N E 2d 1183, 1191 (2003), *citing* 4A A SCOTT & W FRATCHER, TRUSTS § 391, at 357 (4th ed 1989) The members of the public who may one day benefit from the trust are not identifiable JESSE DUKEMINIER, ROBERT

SITKOFF, ET AL , WILLS, TRUSTS, AND ESTATES 750 (7th ed 2005) They are represented and spoken for by the trust itself and the trust is represented and spoken for by its duly appointed and acting trustees The holder of the beneficial interest in a devise to a trust is the trust itself In the agreement before the Court today, not only did ***all*** the holders of a beneficial interest in Mr Brown's residuary estate **not** agree to the settlement — ***no holder*** of a beneficial interest agreed

In *University of Southern California v Moran,* 365 S C 270, 617 S E 2d 135 (Ct App 2005), our Court of Appeals correctly determined that where a trust is beneficiary of a devise, it is the trust acting through its trustee which alone has statutory authority to participate in a Section 1102 settlement agreement

Sections 1101 and 1102, read together, were meant to authorize a change — even, as here a *drastic* change — in the testator's estate plan only when the holders of *all* beneficial interests concurred, if and only if the settlement agreement is just and reasonable Here, a charitable trust was the sole holder of a beneficial interest in the testator's residuary estate, which comprised almost everything The authors of the uniform act, and our General Assembly, could not possibly have intended to empower the court to strip a charitable trust of most of its bequest upon a finding that it is just and reasonable to do so, compelling the trust in the person of its removed trustees to consent to this relinquishment after the fact as a ministerial act Yet that is the effect of the order under appeal

Because the court lacked authority to reduce the bequest to the Trust without the Trust's consent, and because there was no such consent, the order should be reversed

B It was unjust and unreasonable to forfeit 28 75% of the foundation s bequest in order to settle the claim of undue influence

Two claims against the estate were settled by the Attorney General, purporting to act for the Trust The first was a claim that the will and the Trust were the product of undue influence and hence void The second was the claim of Tommie Rae to an omitted

spouse's share or at least an elective share of the estate In compromise of those two claims, the Attorney General ultimately agreed to pay to the claimants 52 5% of the value of the residuary estate — 28 75% to those who claimed that the will was void as the product of undue influence, and 23 75% to Tommie Rae, who claimed to be a widow [22]

After days of testimony during which the settling parties had offered no evidence that the undue influence claim had any merit, Judge Early wondered aloud what the standard of reasonableness of a settlement might be, the settling parties having suggested no test His Honor directed his inquiry, not to the settling parties but to Mr Buchanan, one of the trustees who opposed the settlement His Honor wondered whether a settlement might be deemed reasonable if it were shown that the claim being settled was supported by enough evidence to get to a jury [R p 1622] As would any experienced trial lawyer, Mr Buchanan responded that such a showing would **not** be enough to judge the reasonableness of a proposed settlement One would need to know the ***strength*** of the claim [R pp 1623, 1677–80] The contestants responded to the court's query by saying, on the contrary, that the challenge to the will should be settled without knowing the evidence [R p 1677–78] Having been asked to produce any evidence of undue influence the settling parties produced none [R pp 1664–65] Knowing that there was no evidence of undue influence but only their alleged suspicions the contestants took the position that the burden of proof rested upon those ***objecting*** to the settlement agreement to prove a ***lack*** of undue influence, instead of the proponents being required to prove the existence of a *bona fide* controversy [R pp 1663–64, 2002–03, lines 16–19]

Even if this settlement had been negotiated by the trustees of Mr Brown's foundation and not by the Attorney General acting without authority, it should not have

22 The claimants agreed to contribute any copyright rights which might come to them in the future There is no evidence of what value these rights may have [R p 1333]

been approved There was no *bona fide* controversy Even if one had existed, this agreement was unjust and unreasonable by *any* standard

Section 1102 is part of a uniform act The hope always is that the jurisprudence which unfolds across the country in the train of such an act will indeed create a uniform national fabric This has happened with Section 1102 and the statutes which inspired it Decisions from North Carolina, Minnesota, Illinois, Michigan, Massachusetts, and Arizona show that agreements settling a challenge to the will and altering the clearly stated estate plan of the testator must meet a high standard of review under Section 1102 Most emphatically, the proponents of such agreements must show by **evidence** that the challenge to the will is substantially meritorious and that the settlement is reasonable in relation to the strength of the claim

In *Holt v Holt,* 304 N C 137, 282 S E 2d 784 (1981), the court said

> "The mere fact that a [will contest] has been filed, standing alone, is not sufficient ground for modification of the dispositive provisions of the will The outcome of the litigation must be in doubt to such extent that it is advisable for persons affected to accept the proposed modifications rather than run the risk of the more serious consequences that would result from an adverse verdict

282 S E 2d at 787 *quoting O'Neil v O'Neil,* 271 N C 106 112, 155 S E 2d 495 500 (1967)

> This requirement that the outcome of litigation over the will be in doubt most often expressed in terms of the need for a *bona fide* dispute permeates our case law on family settlements

282 S E 2d at 788

> Whether there is a *bona fide* dispute depends, furthermore, not on what any particular party to the alleged compromise may subjectively believe about it, but whether the *bona fides* of the disagreement may, under all the facts and circumstances of the case, be reasonably found to exist by the trier of fact

Id The court held that "there must appear from all the facts and circumstances a reasonable basis upon which to challenge the validity of a testamentary instrument "

Id at 790

The provisions of the Michigan Code, from whence Sections 3–1101 and 3–1102 of the Uniform Probate Code derived, were at issue in *Hay v LeBus,* 317 Mich 698, 27 N W 2d 309 (1947) Disapproving a settlement agreement, the court there stated 'that to approve the settlement agreement and distribute the estate accordingly is to do nothing more or less than to make a new will for [the] deceased, which in very material respects would alter the disposition he by his will made of his estate [T]he statute providing for settlement agreements is not operative, and the statute cannot be used to defeat the lawful will of a deceased in the absence of compelling circumstances to the contrary 27 N W 2d at 313 The court approved the observations of the Massachusetts supreme court construing a similar statute

> The statute does not confer power to make a new will or to render the allowance of a will subject to approval as to the wisdom of its terms by interested parties and the court That is not its scope The statute imposes a duty of the most scrupulous care to see that the compromise, *viewed with reference to the basis for contest*, is just and reasonable in all its aspects

Copeland v Wheelwright, 230 Mass 131, 119 N E 667, 669 (1918) (emphasis added)

Construing the provisions of the Minnesota settlement agreements act, materially identical to the provisions of the Uniform Probate Code the court in the case of *In re Estate of Schroeder,* 441 N W 2d 527 (Minn 1989), dealt with a case very like the case at bar The testatrix died nine years after making her will (Here, it was six) Two beneficiaries challenged the will on the grounds of revocation, mistake, and undue influence The testatrix had provided for the income from a trust to be paid to a beneficiary for life, with the corpus to go under certain circumstances to a charity Without the agreement of the trustee, the contestants agreed to abolish the trust so that the beneficiary would receive the bequest free of trust with certain restrictions The charity was to receive an immediate lump sum payment, which it agreed to accept No evidence of revocation mistake, or undue influence was offered to the lower court, which nonetheless found that a good faith will contest existed and that the settlement agreement was just and reasonable

Reversing, as an initial matter the Minnesota Court of Appeals found that the personal representative/trustee who objected to the settlement had standing to appeal since a personal representative "'is under a duty to see that the assets constituting the testator's estate are not diverted from the course prescribed by the testator '"[23] 441 N W 2d at 529, *quoting In re Healy's Estate,* 247 Minn 205, 209, 76 N W 2d 677, 680 (1956) *Accord Altemeier v Harris,* 335 Ill App 130, 81 N E 2d 22 (1948)

> If a personal representative cannot appeal, no one remains who can challenge a settlement agreement which aids the beneficiaries, yet emasculates the testator's intent To hold otherwise would mean that nominated executors and testamentary trustees do not have standing to challenge orders which are in derogation of their fiduciary responsibilities

441 N E 2d at 529 Moving on to the merits and citing Minnesota's version of Section 1102, the court noted that the statute provides that

> a court must approve a settlement agreement if (1) the will contest or controversy is in good faith, and (2) the effect of the agreement upon the interests of the parties represented by fiduciaries is just and reasonable Both parts of this two-part test must be satisfied to approve a settlement agreement

Id The court of appeals noted that the lower court's finding that a good faith contest existed and that the settlement agreement was just and reasonable was not based upon **evidence** but upon the representations of the settling parties — just as happened in the case at bar The trial court's determinations are thus legal conclusions which are not binding upon this court ' *Id* Addressing the question of whether the will contest was *bona fide* the court of appeals began by observing that "[t]he decedent was a competent testatrix who executed her will with all the requisite formalities Her will is thorough and professional " *Id* "Respondents nevertheless objected on the grounds of revocation, mistake, and undue influence " The court articulated the obvious — that "[t]o constitute a

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[23] In the case at bar the respondents object to the appellants' standing When the respondents have raised this point in their briefs the appellants will reply

good faith will contest, such objections must have legal merit" Reviewing the objectors' attempt to show the grounds for their objections, the court rejected them one by one

> The respondents' objection based on revocation is meritless The respondents' objection based on mistake is also meritless The decedent's independence coupled with the very limited and modest devise to [the alleged undue influencer], clearly demonstrates no undue influence was exercised
>
> The decedent's will is unquestionably valid Because respondents' objections are meritless, the will should have been admitted to probate To deny probate on such frivolous grounds threatens the fundamental principle that wills executed with the requisite formalities will be admitted to probate The will settlement agreement statute was not intended to allow circumvention of this principle *We will not undermine this principle by allowing a valid will to be set aside based on meritless objections*

Id at 531–32 (emphasis added) Next the court observed that the second prong of the test — the justice and reasonableness of the settlement agreement — "is not reached unless there is a determination that the contest or controversy is in good faith Although we hold that no good faith contest existed here, we nevertheless choose to address the 'just and reasonable' requirement" *Id* at 532 The court approved Professor Scott's conclusion that the beneficiaries cannot "vary the terms of a trust under the guise of a compromise agreement merely because they wish to do so" *Id*, *quoting* FRATCHER, IV SCOTT ON TRUSTS § 337 6 (4th ed 1989) The court concluded

> We will not give our imprimatur to an estate plan which so flagrantly violates a testator's intent We therefore hold that the estate plan in the settlement agreement was not just and reasonable This was a mere moot case trumped up for the purpose of getting collusive destruction of the trust Bogert, *Trusts* § 152 (6th ed 1987) To approve such a settlement agreement threatens to unravel two fundamental principles of probate law (1) the paramount importance of carrying out the intention of the testator, and (2) the requirement that a testator express his intention with the requisite formalities We cannot approve such a settlement agreement

Id at 533–34

The Arizona Court of Appeals considered a similar case in *In the Matter of the Estate of Ward,* 200 Ariz 113, 23 P 3d 108 (2001) The personal representative/trustee appealed a finding that a settlement agreement "constituted a valid 'compromise' of a 'good faith contest or controversy" under Arizona's versions of Sections 1101 and 1102

> We find that it does not and accordingly reverse, principally because the heirs' Family Settlement Agreement eviscerates the essence of the law of wills and trusts

23 P 3d at 109

> This case presents a textbook example of abuse of the estate plan procedure described in [Arizona's sections 1101 and 1102] The heirs' initial petition affirmatively admitted that Ward's will was validly executed, and was indeed her last will, and that they were unaware of any instrument revoking it Despite these admissions, which they later contradicted, the heirs sought to have the probate court override her will so that her assets would pass to them free of the limitations and delays entailed by Ward's planned pour-over to the trust
>
> The heirs urge the existence of a controversy " The one that does exist now is entirely of their own making, namely, whether the heirs' Family Settlement Agreement qualified as a "compromise" under [sections 1101 and 1102] A controversy born only of their impatience with the will's provisions does not approach the good faith envisioned by [section 1102]

23 P 3d at 112 The court added this comment

> It is ironic that the heirs fault the Trustee for expending attorneys' fees when they themselves began this dispute lacking good faith The Trustee could have easily capitulated to the heirs' settlement agreement Doing so would have sacrificed Ward's testamentary intent and breached the Trustee s fiduciary responsibility to her, although in such a way as likely to escape complaint from anyone living

Id

In Illinois, the Court of Appeals applied a trust settlement statute in *Fleisch v First American Bank,* 305 Ill App 3d 105, 710 N E 2d 1281 (1999) The court began its review of the proposed settlement agreement, rejected by the lower court, by observing that such settlement agreements "are subjected to close scrutiny to determine whether the disputes they purport to resolve are genuine or simply ill-conceived threats concocted to subvert the

settlor's intent " 710 N E 2d at 1283–84 Reviewing the ground offered to dispute the trust, the court concluded

> It is apparent to us, as it was to the trial court, that there is no reasonable or substantial basis for finding a *bona fide* family dispute in this case

Id at 1284

These cases from Minnesota, North Carolina, Illinois, Michigan, Massachusetts, and Arizona share common threads, variously expressed in the carefully considered opinions of these courts The same themes appear again and again '[T]he statute cannot be used to defeat the lawful will of a deceased in the absence of compelling circumstances to the contrary " "The statute imposes a duty of the most scrupulous care to see that the compromise viewed with reference to the basis for contest, is just and reasonable in all its aspects " Such settlements "are subjected to close scrutiny to determine whether the disputes they purport to resolve are genuine or simply ill-conceived threats concocted to subvert the settlor s intent " Beneficiaries — much less *nonbeneficiaries* — cannot "vary the terms of a trust under the guise of a compromise agreement merely because they wish to do so " "We will not give our imprimatur to an estate plan which so flagrantly violates a testator's intent " "A controversy born only of [the beneficiaries] impatience with the will's provisions does not approach the good faith envisioned by [section 1102] " The will contest must be **objectively** *bona fide,* whether subjectively brought in good faith or not — although if brought in subjective bad faith (i e , concocted or trumped up), that is the end of the inquiry A *bona fide* dispute about the validity of the will must be demonstrated by **evidence**, not merely by the claims of counsel The proponent of the settlement must demonstrate by evidence — and not simply by the lawyers saying so — that the grounds of challenge to the validity of the will are substantial "The outcome of the litigation must be in doubt to such extent that it is advisable for persons affected to accept the proposed modifications rather than run the risk of the more serious consequences that would result from an adverse verdict" The challenge to the will "must have legal merit

1 *The circuit court was offered no evidence of undue influence*

James Brown had little formal education and knew that his success in life was due to his hard work and artistic genius — a gift bestowed upon only a few He was devoted to the cause of education He decided to leave his fortune almost solely to that cause He would leave to his children his personal effects only [Will, Item I, R p 2071] He would leave nothing to the woman with whom he lived [24] He would provide generously for the education of his grandchildren [Trust, Article VI, R p 2083] But the vast bulk of his estate he would leave to the private foundation he created in 2000 The endowment of this foundation would be used for the education of needy students at South Carolina and Georgia schools

To help him craft his estate plan he employed an attorney certified as an expert in that field [*See* R pp 708–11] By 1999 his plan was complete and was embodied in a will in that year, accompanied by the creation of a revocable trust [R p 1782–83] The plan was refined in its details the next year with a new will and the creation and initial funding of the James Brown 2000 Irrevocable Trust of which the foundation is a subtrust The 2000 will, in effect upon Mr Brown's death six years later is nine pages long The 2000 Trust document is 21 pages long These are sophisticated complex documents befitting the size of the testator/settlor's estate and the generosity of his estate plan

The contestants of the will include some but not all the adult children of the testator Their father had made his estate plan — and their virtual disinheritance — known to all for years before his death [25] During his lifetime there was never a suggestion that their father had been unduly influenced to leave his fortune to education rather than to them [*See* R

24

She had agreed to make no claim as common law wife [R p 190] In the event that an earlier ceremonial marriage were found to be valid, her share would be limited by a prenuptial agreement [R pp 2641–51]

25

[R p 1775] The 2000 Trust document was executed on August 1, 2000 and filed for record in Aiken County six days later [R p 1768]

pp 708–11] On the last day before the statute of lımitatıons would have run on contestıng the wıll, some of the dısınherıted chıldren, represented by an Atlanta fırm, came forth wıth a claım that the wıll and the Trust were the product of undue ınfluence [R pp 1758–59]

In explaınıng to the court the basıs for theır challenge to the wıll, the contestants stated that they had "a **suspıcıon** that there was undue ınfluence " [R p 1674 (emphasıs added)] They further explaıned theır suspıcıon that Mr Brown's three agents " **may have unduly ınfluenced** " hım ın order to procure a sıngle provısıon ın the estate plan, namely, that these three would be named trustees of the foundatıon [R p 1723 (emphasıs added)] The trustees were lımıted to expendıng no more than 50% of the *ıncome* (not the prıncıpal) of the trust ın management expenses — not a grant of authorıty but a *lımıtıng* provısıon [Trust, Artıcle X(2) R p 2086] The contestants' theory apparently was that these three ınıtıal trustees would be ın a posıtıon to embezzle or at least to mılk the foundatıon to that extent, followıng Mr Brown's death For example, ıf the foundatıon were eventually funded wıth one hundred mıllıon dollars, ıt mıght earn somethıng on the order of $2,500,000 ıncome annually [26] Under thıs hypothetıcal, the trustees would then have the opportunıty one way and the other, to feather theır own nests wıth up to $1 250 000 annually ın management expenses Hence the contestants suspected that these people mıght have unduly ınfluenced Mr Brown to set up hıs foundatıon, wıllıng ıt almost everythıng, and to name them as ınıtıal trustees Therefore, the wıll ıs voıd That was the claım

26
Some ıdea of the potentıal ıncome to be generated by the trust's prıncıpal ıs gleaned from the ınterest obtaınable on long term treasury bılls — the gold standard of any conservatıvely managed trust At the date of the fırst hearıng below, January 30, 2009, the long term real average rate on treasury bılls was 2 50%
http //www ustreas gov/offıces/domestıc-fınance/debt-management/ınterest-rate/real_ltc ompositeındex_hıstorıcal shtml (last vısıted September 27, 2010)

(a) The law of undue influence placed insuperable obstacles in the path of the claimants

A client and its attorneys faced with a claim of testamentary undue influence, and receiving a demand for many millions — perhaps tens of millions — in settlement, obviously would begin to assess that demand in light of the law by which the claim would be judged. There is no sign in the proceedings below that any such assessment was made. After assessing the law, the party defending the will would then evaluate the strength of the evidence of undue influence, measuring that evidence in light of the legal standard.

Chancellor Dunkin's early summary of the meaning of undue influence is unchanged today. *Parris v. Cobb,* 26 S.C. Eq. (5 Rich Eq.) 450, 458 (1853). The question is not one of intent. In undue influence cases the question is not whether the weaker party intended to enter into the transaction. Rather, it is ***how*** that intention was induced. *See* Green, *Fraud, Undue Influence and Mental Incompetency: A Study in Related Concepts,* 43 COL. L. REV. 176 (1943).

Successful challenges to a will on the ground of undue influence are rare, with good reason. The law places upon the party seeking to destroy a will on this ground one of the most onerous burdens known to the civil law.

> For a will to be invalidated for undue influence, the influence must be the kind of mental coercion which destroys the free agency of the creator and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition. *Last Will and Testament of Smoak v. Smoak,* 286 S.C. 419, 334 S.E.2d 806 (1985). Undue influence must be shown by unmistakable and convincing evidence, which is usually circumstantial. *Id.* The evidence must show that the free will of the testator was taken over by someone acting on testator's behalf. *Id.* Undue influence is demonstrated where the will of the influencer is substituted for the will of the maker. *Id.* Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship. *Hembree v. Estate of Hembree,* 311 S.C. 192, 428 S.E.2d 3 (Ct. App. 1993). The "mere existence of influence is not enough to vitiate a Will. ... A mere showing of opportunity and even a showing of motive to exercise undue influence does not justify a submission of that issue to a jury, unless there is additional

> evidence that such influence was actually utilized " *Last Will and Testament of Smoak, supra,* at 424, 334 S E 2d at 809

Russell v Wachovia Bank, 353 S C 208, 578 S E 2d 329, 333 (2003) *Accord Last Will and Testament of Smoak v Smoak,* 286 S C 419, 334 S E 2d 806 (1985) (testator was bedridden, beneficiary drove testator to attorney's office for will signing, directed verdict against contestant should have been granted), *Mock v Dowling,* 266 S C 274, 277, 222 S E 2d 773, 774 (1976) (for will to be void due to undue influence, "[a] contestant must show that the influence was brought directly to bear upon the testamentary act "), *Hairston v McMillan,* 387 S C 439, 692 S E 2d 549 (Ct App 2010), *In re Estate of Anderson,* 381 S C 568, 674 S E 2d 176 (Ct App 2009)

"Dominion " "imposition " and "weakness" are words often seen in South Carolina's undue influence jurisprudence Almost always present is some degree of mental weakness on the part of the testator or grantor *See, e g , Gaddy v Douglass,* 359 S C 329, 597 S E 2d 12 (Ct App 2004) Undue influence is the process of unfair persuasion by which an individual is made to do something which he or she would not have done in the exercise of unfettered judgment The victims of such unfair persuasion are almost always lacking in the normal amount of mental ability and self-reliance The Court has never tired of quoting Justice Story s observation that [t]he acts and contracts of persons of weak understanding and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning artifice or undue influence '[27]

> Almost without exception in these cases the one allegedly subjected to "undue influence" possessed an abnormal personality of some sort — most commonly, senile dementia

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27 Quoted in *Owens v Sweat,* 227 S C 112 123, 86 S E 2d 886 (1955), *Page v Lewis,* 209 S C 212, 242, 39 S E 2d 787 (1946), *Wille v Wille,* 57 S C 413 427, 35 S E 804 (1900), *Gaston v Bennett,* 30 S C 467, 473, 9 S E 515 (1888) *Banker v Hendricks,* 24 S C 1, 12 (1885), *Parris v Cobb,* 5 Rich Eq 450 (1853)

> — was weak in body or mind or both, or presented other indicia of mental or emotional subnormality Such circumstances would seem reasonably to increase the probability that any "undue influence" exercised was yielded to

Note, *Undue Influence in Intervivos Transactions*, 41 COL L REV 707, 708 (1941) [28]

A circumstance to which the courts of this State have always given great weight is whether the testator or grantor acted with the aid of the competent and independent advice of a disinterested third party *See, e g , Way v Central Union Life Ins Co* , 61 S C 501, 504, 506, 39 S E 742 (1901) *Accord* Note, *supra,* at 720, 2 BLACK ON RESCISSION § 244 (1929), DAN DOBBS, HANDBOOK ON THE LAW OF REMEDIES 677 (1973)

Lastly even in those cases where the testator might have been unduly influenced, the effect of any undue influence is deemed to have dissipated where a long time has passed since the execution of the will, during which time the testator could have made a new will [29]

28

The courts of South Carolina have described the grantor s mental condition in typical undue influence cases in terms such as these "We are firmly persuaded that Ms M's dementia, chronic and progressive in nature, clearly rendered her incapable of possessing contractual capacity " *Gaddy v Douglass, supra,* 597 S E 2d at 21, "[T]he [grantor s] mental faculties were at least so impaired at the time of the transaction as to subject him to the undue influence which the record reflects " *Owens v Sweat, supra,* 227 S C at 116, "[The grantor] was of such a weak understanding that she could be easily induced to shower her affections upon most any of her relatives," *Parker v Bowen,* 156 S C 381, 386, 153 S E 346 (1930) "great mental weakness, not amounting to incapacity to execute a valid deed, *Hodge v Shea,* 252 S C 601, 608, 163 S E 2d 82 (1968), "a very weak man, though capable of understanding the ordinary transactions of life " *Bunch v Hurst,* 3 Des 273 (1811) "his mind was enfeebled by age and other causes," *Wille v Wille,* 57 S C 413, 426, 35 S E 804 (1900), "a person of such weak intellect as to render him liable to imposition " *Gaston v Bennett, supra,* 30 S C at 478, 'considerable mental weakness on the part of this aged man," *Page v Lewis, supra*, 209 S C at 227

29

> Where the testator has an unhampered opportunity to revoke a will or codicil subsequent to the operation of undue influence upon him, but does not change it, the court as a general rule considers the effect of undue influence destroyed *Smith v Whetstone,* 209 S C 78, 39 S E 2d 127 (1946), as quoted in *Estate of Cumbee,* 333 S C 664, 511 S E 2d 390 (Ct App 1999)

Russell v Wachovia Bank, 353 S C 208, 578 S E 2d 329, 333–34 (2003) *Accord Calhoun v Calhoun,* 277 S C 527, 290 S E 2d 415 (1982) (testator was confined to nursing

(continued)

In the context of these legal principles, the claim of an unduly influenced will to charity by James Brown was to be measured

(b) <u>The payment of more than a quarter the estate's value to settle the undue influence claim was unreasonable by any standard</u>

There was no showing that James Brown was weak of mind, nor could there have been There was no showing that he was dominated by his agents, nor could there have been [30] There was no showing that the testator failed to have independent advice, nor could there have been He had the advice of a certified estate planner who helped him to develop and perfect his thoughtful and generous estate plan over a period of four years [R p 1778–79] There was no showing that his financial advisors influenced him to create a private foundation as the vehicle for his largess, or to leave almost everything to charity by means of the foundation, or to appoint them as initial trustees or to insert a provision *limiting* the portion of annual income which could be used to manage the trust, or to do anything else Satisfied with his plan, the testator left it unchanged for six years until his death during which time he had access to many lawyers [R p 1779]

Neither the Attorney General nor the contestants made any effort to demonstrate to the circuit court that there was any **evidence** to support the claim of undue influence The mere ***existence*** of this claim was the only basis for settling it with an enormous payoff The circuit court disclaimed any finding that 'the undue influence claim has merit '
[R p 31] Instead the court pointed to seven "circumstances" which led it to conclude — **not that the undue influence claim had merit** — but that the claim has a foundation in

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[29](continued)
home in feeble condition yet continued to conduct business affairs for three years after execution of will, directed verdict should have been granted), *First Citizens Bank v Inman,* 296 S C 8 370 S E 2d 99 (1988) (testator "exhibited a pattern of changing her will over the years [S]he went through a consistent procedure of talking with her lawyer [I]t appears she was the ultimate decision maker " Directed verdict was proper)

[30] By definition, embezzlement is committed by people who are ***unable*** to dominate the victim Embezzlement is done in the dark, without the victim's knowledge

good faith "[31] *Id* First was the provision limiting managerial expenses to 50% of the trust's income Second was the fact that the PRs had sued Cannon, Dallas, and Bradley for stealing money from Mr Brown during his lifetime, and in that action had alleged in shotgun-style fraud, undue influence, or other wrongs If they may have unduly influenced him once, reasoned the court, they may have done it again Third, Cannon was said to have claimed that "he could have half of Mr Brown's estate if he wanted " *Id* at 24 Fourth, during his lifetime Mr Brown signed a blank deed, for which there was no apparent explanation, thereby evidencing that any document prepared for him by his estate planner might be invalid Fifth, only one bit of correspondence between Mr Brown and his estate planner had been found Sixth, there was evidence that Mr Brown's estate planner was 'good friends with Cannon Seventh, the credibility of four witnesses "to the validity of the 2000 will and trust is questionable Three of these were identified by the court as Dallas, Cannon, and Bradley, "whose veracity is suspect and at times contradictory " *Id* at 24–25 How these three might be witnesses "to the validity of the 2000 will and trust" is not explained

If the 2000 will and Trust were void as the product of undue influence, then the very similar 1999 will and Trust would take their place The court reasoned that if the 2000 will and Trust were void, then so might be the 1999 will and trust

All this is the sheerest speculation None of these seven circumstances, singly or together, provide the slightest evidence that the will was the product of undue influence As the court acknowledged, it made no finding that the claim of undue influence had merit Without such a finding, and an evaluation of the strength of such a claim, the court lacked authority to approve an agreement destroying this testator s estate plan

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[31] Subjective good faith, even if it were present — which assuredly it is not — is irrelevant *Holt v Holt,* 304 N C 137, 282 S E 2d 784 788 (1981)

Experienced clients and litigators know that unsupported claims — if settled at all — are settled to avoid litigation costs Here, more than a quarter of this massive estate was forfeited to avoid the cost of defending a frivolous will contest The cost of defending the claim, although potentially large in dollars, would have been small in relation to the size of the estate The sponsors of this settlement made no effort to show otherwise [32]

Where the proponents of the settlement offered no evidence to show that the undue influence claim had substance, by *any* standard the circuit court erred in finding that the claim was *bona fide* and that the settlement was just and reasonable

2 *The only evidence is that the settlement was likely to have disastrous tax consequences for the foundation*

The only evidence is that the settlement agreement is likely to have catastrophic tax consequences for the foundation [R pp 1900–01, 1903 lines 6–9] The newly coined "Legacy Trust" agrees in the settlement agreement, per the Attorney General to pay half of the estate taxes which will become due as a result of the settlement [33] R p 1337, lines 13–16] Part of the problem arises because one of the testator's children was given a right of first refusal in the sale of the estate's assets [34] Like the rest of this agreement, giving one of his disinherited children such a right would cause the testator to turn over in his grave Of more practical concern, however, are the provisions of the Internal Revenue

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32 *See* Tr 3/25/09 268 The contestants suggested that more than $10,000 in legal fees might be incurred in conducting discovery on the question of undue influence [Tr 4/6/09 74]

33 With the Attorney General speaking for the Trust "[t]hat suited the charity to do that" [R p 1355, lines 7–8]

34 [R pp 1903–04] The negotiation for this provision was apparently completed in the hallway of Aiken County Courthouse minutes before the hearings below began on January 30, 2009 [R p 1306] The terms of the agreement continued to shift as the hearings went along [*See* R pp 1305, lines 10-11, 1307-08] When the hearings began, the agreement was for the Trust to receive 50% of the residuary estate [R p 1356, lines 7-8] By the end of the hearings the number was down to 47 5% [*See* R pp 1334–36] Late in the hearings, the contestants told the court that some of the settlement documents were still not finished [R p 1603]

Code which forbid self-dealing by a tax-exempt charity The 2000 Trust will likely pay a catastrophic price for this concession, added to the mix at literally the last minute to achieve unanimity among the testator's children as they strove to defeat his will

The settling parties offered no evidence to refute the evidence of a likely tax disaster Instead their counsel reassured the court that they had been told that this disaster could be averted and that they were "dedicated' to preventing it [R pp 1928–30] They assured the court that they would try whatever it took to prevent a loss of the charitable deduction as, for example, by converting the 2000 Trust or "the Legacy Trust" — they weren't clear which — from a private foundation to a public charity [R p 1932] The lengthy discussion of tax consequences in the Order of May 26th [R pp 46–52] is based upon no evidence, since the proponents of the settlement presented none It was put together by the contestants at the order-writing stage

The probable tax consequences of the settlement alone precluded a finding that the settlement was just and reasonable, even if the will contest had been *bona fide* and substantial

> 3 *The Attorney General agreed to pay too much to settle the alleged widow's claim, but there is no need to reach that question The settlement was unitary If half of it was unreasonable, the entire settlement must fail*

Tommie Rae claimed an omitted spouse's share or in the alternative an elective share as the alleged widow of the testator

Mr Brown obtained from her an agreement not to claim a common law marriage [R p 190] After his death, indeed she did *not* claim a common law marriage **but a ceremonial one** Although married to another when she married James Brown her contention was that the earlier marriage had been annulled following her marriage to Mr Brown, thereby legitimating her ceremonial marriage to him Her counsel contended that her claim would survive the decision of the Supreme Court in *Lukich v Lukich*, 379 S C 589, 666 S E 2d 906 (2008) (annulment of Marriage #1 does not retroactively validate

bigamous Marriage #2) because of a footnote in the earlier decision of the Court of Appeals That footnote disappeared in the Supreme Court's opinion

The Attorney General on behalf of the Trust agreed to pay nearly a quarter of the value of the estate to settle this claim This was in the range of half and perhaps three-quarters of the amount which the claimant would have realized if she had prevailed in her claim [35]

Whatever the merits of this claim and the Attorney General's open-handed settlement of it, there was no need for the circuit court to decide whether the settlement of this claim was reasonable The settlement agreement was a unitary package presented to circuit court for approval as a whole and not in pieces Since there was no semblance of merit to the undue influence claim it was error to approve the settlement agreement as a whole *See Midkiff v Kobayashi,* 54 Haw 299, 507 P 2d 724, 744 (1973) ("Inasmuch as the [first] agreement and the [second] agreement were negotiated as a single package, our holding on the former has sealed the fate of the latter ")

* * * * *

The order of May 26, 2009 shows that the circuit court was motivated by one factor more than any other in approving this agreement The circuit court was persuaded to find that the Brown estate was embroiled in controversy and that this settlement would end it This settlement would end the claims resulting from the contestants' groundless challenge to the will and the omitted spousal claim Surely it was wrong — unjust and unreasonable in the phrase of the statute — to allow the contestants to create this imbroglio, then offer this settlement as a means of freeing the estate from its effects *See In the Matter of the Estate of Ward,* 200 Ariz 113, 23 P 3d 108, 112 (2001) Controversies about the content

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35 An omitted spouse's share would have been half the value of the estate An elective share would have been one-third [*See* R pp 1715–16] If married to the testator, her prenuptial agreement limited her claim [R pp 2641–51] Because the will specifically omits her, her maximum claim would be one third of the net estate The Attorney General agreed to give her nearly one-quarter of the value of the Estate in settlement

of property in an estate, or the identity of heirs, or the omission of a spouse, or the pretermission of a child are resolved in the administration of estates far smaller than this one There is nothing "mind boggling," as the circuit court found, about the task of resolving estate controversies of this nature But regardless of whether such issues are routine or extraordinary, they cannot be avoided by simply rejecting the testator's estate plan and replacing it with another The desire to simplify the administration of an estate cannot justify the rejection of the testator's estate plan and the dividing-up of the estate by those to whom the testator intended to leave little or nothing In the absence of a genuine controversy about the validity of the will and the Trust on the ground of undue influence, these secondary issues are never reached

There was no good faith controversy about whether the will and Trust were valid Even if such a controversy existed, it was not just and reasonable to shred the testator's estate plan and replace it with one which would have been anathema to him

III

The circuit court erred in removing the appellants from their duties because they opposed the settlement agreement, and then ordering them to sign the agreement after their removal

The settlement agreement calls for the removal of the appellants as personal representatives of the estate and as trustees of the 2000 Trust They are to be replaced by persons chosen by the Attorney General and the contestants of the will [R p 2363] This was done, without complying with S C Code Ann §§ 62–3–611, –614, or –616 No statutory ground was claimed or found for removing the appellants as trustees *See* S C Code Ann § 62–7–706 ("Removal of trustee") They were removed because theirs were the sole voices raised in opposition to the shredding of the testator's estate plan Since their removal was part and parcel of the approval of the settlement agreement and without good cause, this part of the order of May 26th should be reversed if the Court reverses the approval of the settlement itself

The appellants moreover submit that it was error to order them to sign the settlement agreement They were deemed removed the moment that the circuit court's order was entered If anyone should have been ordered to sign the agreement, it was Mr Bauknight, the appellants replacement, chosen by the Attorney General and the contestants, who was glad to sign [36]

Moreover, the settlement agreement contains many provisions immaterial to the substance of the settlement, such as a contractual promise not to speak out against the settlement [R p 2362] Surely the statute which allows the court to require fiduciaries ministerially to sign an approved settlement agreement was never intended to force persons being removed to agree to such personal *contractual* terms as these, with which they personally and adamantly disagree

The Trust Code provides amply for the ways and means to remove fiduciaries for good reason Those methods are always available It is a myth propagated by the settling parties that the appellants hungered for the task assigned to them by the circuit court in this estate which assuredly they did not seek Their professional careers have been severely damaged by this service [37] The court could replace them at any time for good cause — but opposition to this unbelievable settlement is not a good cause

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36

If the approval of the settlement agreement is reversed, then Mr Bauknight's fiduciary appointment in the Order of May 26, 2009 and in subsequent appealed orders should also be vacated The appointment of a successor trustee must follow the terms of the trust on that subject, S C Code Ann § 62–7–704, but that was not done here On remand, the circuit court would be free to determine all issues regarding the service of fiduciaries in this matter as may arise

[37] *See, e g* , R p 1478

CONCLUSION

The case at bar is a case in equity, as the Attorney General often affirmed to the circuit court [R pp 1321, 1390, lines 4-5] But it makes no difference whether the procedure devised by Section 1102 is characterized as equitable or at law The settlement agreement at issue here fails the statutory test at every stage by any measure The Trust is not a party to this agreement The claim that this will and this Trust were the product of undue influence is frivolous The proponents of the settlement made no effort to carry their burden of proving by evidence that there was any factual basis for the claim This record is utterly devoid of any evidence tending to demonstrate that this will was signed or this trust was created by James Brown acting as the mere puppet of others For six years after he completed his complex and generous estate plan — four years in the making — the testator/trustor left his estate plan in place and untouched until his death The very notion that a will leaving perhaps 98% of one's estate to a mostly charitable trust of one's own creation is the product of undue influence is preposterous on its face

The only conclusion which this record will bear is that the settlement agreement did not spring from a good faith controversy about the validity of the will or the Trust Even if it did, it was not just and reasonable by any test which could measure that standard

For these reasons the appellants urge the Court to reverse the approval of the settlement agreement and related orders

Respectfully submitted,

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April 25, 2011

By James B. Richardson, Jr
Attorneys for Appellants

ADDENDUM

Chart 1
James Brown's <u>INTENTIONS</u> in his Last Will & Trust (2000)

2/09

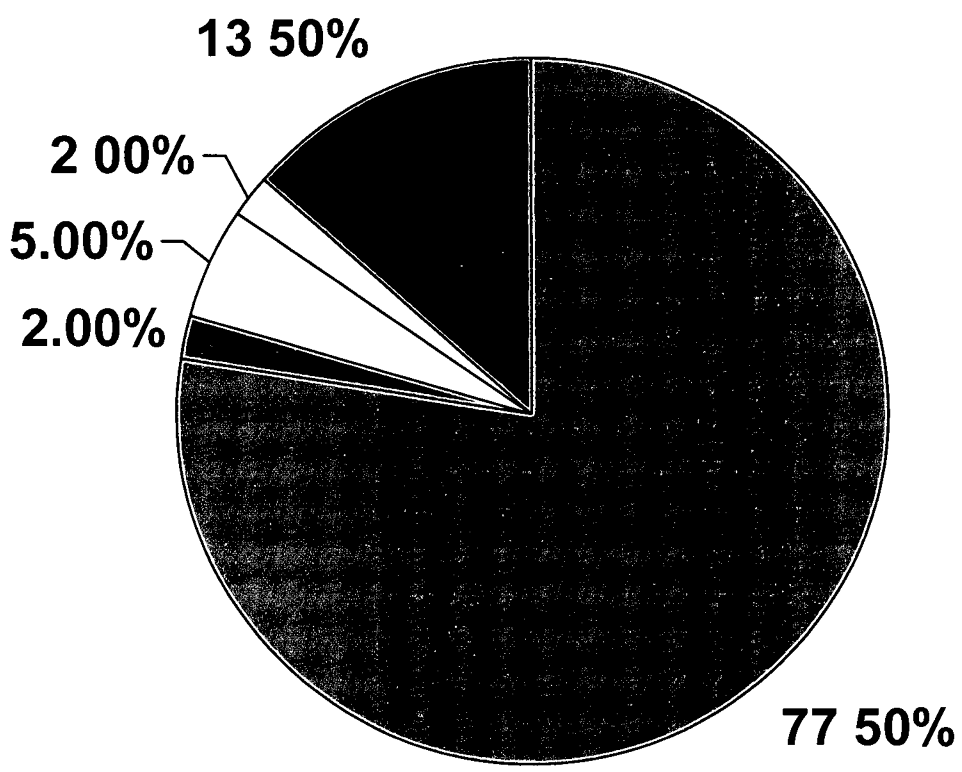
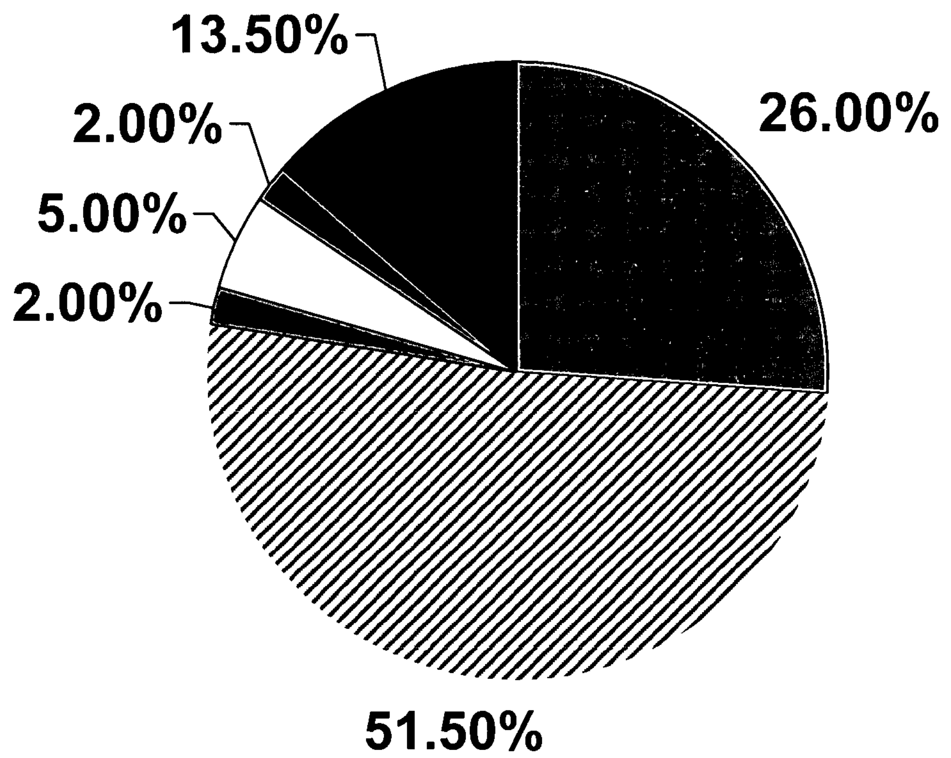


Chart 3

HOW THE PROPOSED "SETTLEMENT" DESTROYS/IGNORES JAMES BROWN'S INTENTIONS

James Brown Estate/Trust Settlement Proposal
(Hynie Brown/AG/8 of 13+ potential Heirs)

(Over objection of PR/Trustees Buchanan and Pope)
(2/09)

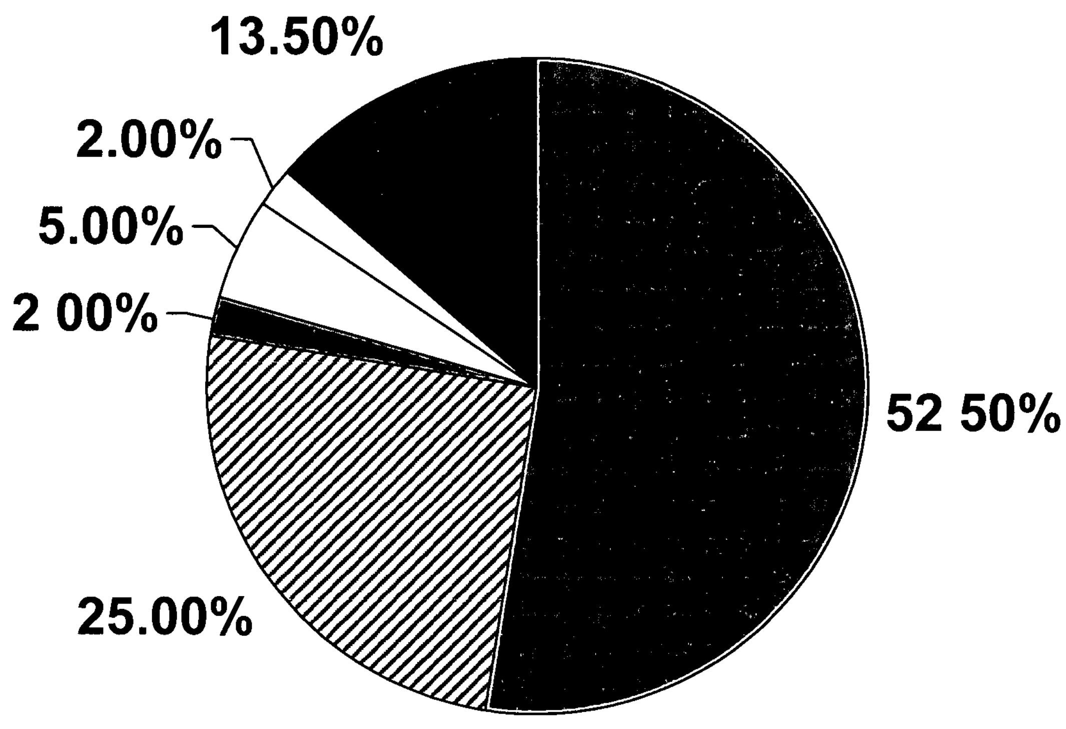


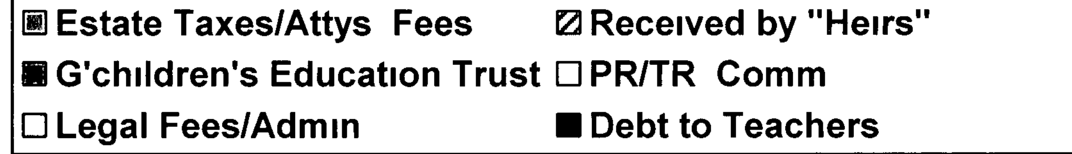
- Educational Trust
- Settling Parties, their Attys , taxes, etc
- G'children's Education Trust
- PR/Tr Comm
- Legal Fees/Admin
- Debt to Teachers

Chart 4

WHAT THE "SETTLING" PARTIES WOULD GET IF THEY SET ASIDE BROWN'S INTENTIONS EXPRESSED IN HIS 2000 & 1999 WILLS/TRUSTS

2/09





<u>Division of 25% "Heirs" receive if 2000 and 1999 Wills and Trusts declared void</u>:

<u>If no spouse and 12 "Heirs"</u>:

Each "Heir" receives 2.08% of Estate/Trust

<u>If spouse and 12 "Descendant/Heirs"</u>:

1. **Hynie Brown receives 12.5%**
2. **Each Descendant/Heir receives 1.04%**

<u>Possible Descendant/Heirs (Parties to Case 872, and Parties not joined)</u>:

1. Daryl Brown
2. Larry Brown
3. Terry Brown
4. Deanna Thomas
5. Vanisha Brown
6. Yamma B. Lumar
7. Tonya Brown
8 James Brown II
9 LaRhonda Petit
10 Cinnamon Parris
11. Jeanette Mitchell
12. Deon Brown – not joined
13. Doe Defendants

MAY - 2 2011

S C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE Supreme COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge
Case No 2008-CP-2-1647

Alan Wilson, in his capacity as Attorney General of the State of South Carolina, Daryl J Brown, on behalf of his minor children, Lindsey B and Janise B , Deanna J Brown Thomas, on behalf of her minor child, Jason L , Yamma N Brown, on behalf of her minor children, Sydney L , Carrington L , and Tonya B , Vanisha Brown, Larry Brown, Tommie Rae Hynie Brown, and James B , through his Guardian ad Litem, Respondents,

v

Albert H Dallas, Alfred A Bradley, and David G Cannon, Individually and as (purported) Trustees of the James Brown 2000 Irrevocable Trust, Adele J Pope and Robert L Buchanan, Jr , Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust, Terry Brown, Romunzo Brown, Forlando Brown, Cinnamon N M Paris, LaRhonda Petitt, Jeanette Mitchell, and Russell L Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and The James Brown 2000 Irrevocable Trust,

of whom Robert L Buchanan, Jr , and Adele J Pope, as Personal Repre-sentatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust are, Appellants,

and Albert H Dallas, Alfred A Bradley, and David G Cannon, Individually and as (purported) Trustees of the James Brown 2000 Irrevocable Trust, Terry Brown, Romunzo Brown, Forlando Brown, Cinnamon N M Paris, LaRhonda Petitt, Jeanette Mitchell, and Russell L Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and The James Brown 2000 Irrevocable Trust are Respondents

In re The Estate of James Brown and The James Brown 2000 Irrevocable Trust u/a/d August 1, 2000

CERTIFICATE OF COUNSEL

I certify that appellant's final brief complies with Rule 211(b), SCACR

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April 28, 2011

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
IN THE Supreme COURT

MAY -2 2011

S C Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge
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In re The Estate of James Brown and The James Brown 2000 Irrevocable Trust u/a/d August 1, 2000

CERTIFICATE OF SERVICE

The undersigned certifies that he served a copy of the Final Brief of Appellants upon the respondents by first class mail, postage prepaid, addressed to their respective

attorneys, namely

Attorney General Henry Dargan McMaster
Assistant Deputy Attorney General Robert D Cook
Senior Assistant Attorney General C Havird Jones
Assistant Attorney General J C Nicholson, III
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R Wayne Byrd, Esq
Robert N Rosen, Esq
T Heyward Carter, Jr , Esq
S Alan Medlin, Esq
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addressed to them at their respective addresses of record, on April 27, 2011

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April 27, 2011

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