THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM AIKEN COUNTY

Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Trial Court Case No. 2008-CP-02-01647

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SC Court of Appeals

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Appellate Case No. 2016-001373

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In Re: The Estate of James Brown a/k/a James Joseph Brown

The Estate of James Brown; James Brown Irrevocable Trust Agreement, u/a/d August 1, 2000, by and through its fiduciaries Russell L. Bauknight, Personal Representative and Trustee, and David C. Sojourner, Jr., Limited Special Administrator and Limited Special Trustee, Respondents, and

Tonya Brown a/k/a Sarah LaTonya Brown, Vanisha Brown, Larry Brown, Deanna J. Brown Thomas, Jason Brown Lewis and Yamma N. Brown Lumar, individually and on behalf of her minor children, Sydney Lumar and Carrington Lumar, Respondents, and

~~Daryl~~ Brown and Terry Brown, Respondents below,

Of whom Terry Brown is the Appellant.

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

This matter came before the lower court on a joint motion filed by the Estate of James Brown ("Estate") and James Brown Irrevocable Trust Agreement, u/a/d August 1, 2000("Trust"), by and through its fiduciaries, Russell L. Bauknight, Personal Representative and Trustee, and David C. Sojourner, Jr., Limited Special Administrator ("LSA") and Limited Special Trustee, and Petitioners (collectively the "Challenging Children and Heirs") Tonya Brown, a/k/a Sarah LaTonya Brown, Vanisha Brown, Larry Brown, Deanna J. Brown Thomas, Jason Brown Lewis, and Yamma N. Brown Lumar, individually and on behalf of her minor children, Sydney Lumar and Carrington Lumar (collectively the

"Moving Parties").[1] The Moving Parties sought a ruling that they were authorized to enter into the settlement agreements attached as Exhibits A and B and thereafter have them entered on the record.[2] The settlement agreements specifically agreed that the Challenging Children and Heirs, who were part of the collective Moving Parties, would dismiss their claims against the Estate of James Brown which sought to dismantle the estate plan.[3] Specifically, one of the claims dismissed was the Challenging Children and Heirs claim for undue influence.[4] In exchange, the Challenging Children and Heirs received monetary consideration and both the Trust and Estate agreed that the in terrorem clauses in the respective documents would not be enforced against them.[5] As a result, the Challenging Children and Heirs were paid for filing a challenge against an estate plan that had in terrorem clauses in both the will and trust and placed back in the same position with the only heirs of the estate who did not challenge the estate plan, Terry Brown and his children.[6] Appellant Terry Brown filed a Response to the Joint Motion to Authorize Settlement dated December 23, 2015, which was subsequently amended on December 30, 2015. Appellant Daryl Brown filed an Opposition to Joint Motion to Authorize Settlement on December 29, 2015. The lower court held a hearing on January 14, 2016 on the Joint Motion and Oppositions. The lower court entered an order approving the settlement on March 7, 2016. Appellant Terry Brown filed a Motion to Alter, Amend or Reconsider on March 8, 2016. The court gave all parties until April 15, 2016 to respond to such motion. Only the LSA

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[1]Joint Motion to Authorize Settlement of Brown Children's Undue Influence Cases and to Dismiss Cases with Prejudice, filed December 7, 2015. (R., Vol. II, p. 363)
[2]Id.
[3]Id. at Exhibits A and B. (R., Vol. II, p. 371 and p. 395)
[4]Id.
[5]Id.
[6]Id.

filed a response in opposition to Appellant Terry Brown's Motion to Alter, Amend or Reconsider. The lower court held a hearing on May 16, 2016. Only Appellant Terry Brown and the LSA presented arguments. The lower court order was entered on May 31, 2016 and served via e-mail on all parties. Appellant Terry Brown filed a timely Notice of Appeal on June 29, 2016 appealing the two separate orders of the lower court of March 7, 2016 and May 31, 2016.

## STATEMENT OF FACTS

James Joseph Brown ("Mr. Brown") died Christmas day 2006. Mr. Brown left a Last Will and Testament dated August 1, 2000 ("Will") and Trust, which were very specific as to his intentions for the disbursement of his assets.[7] The Will devised all of his personal and household effects to six adult named children: Deanna J. Brown Thomas, Yamma N. Brown, Vanisha Brown, Darryl J. Brown, Larry Brown and Terry Brown. Mr. Brown left the remainder of his estate to the Trust.[8] Mr. Brown created the Trust under separate agreement, as part of his estate plan to provide financial assistance for the education of his grandchildren and disadvantaged youths.[9]

Upon Mr. Brown's death, the principal and income contained in the Trust, as augmented by Mr. Brown's General estate, was to be divided, by its terms, into two "shares" or subtrusts: (1) The Brown Family Educational Trust ("Family Trust"), which was capped in the amount of $2 million for tax purposes and designated for the education of Mr. Brown's grandchildren; and (2) The James Brown "I Feel Good" Trust ("Charitable Trust"), which Mr. Brown declared "shall be used solely for the tuition, educational expenses, and

[7] See Will and Trust. (R., Vol. IV, p. 958 and p. 964)
[8] Id.
[9] Id.

financial assistance of . . . poor and financially needy children, youth, or young adults (Who are both qualified and deserving) who seek and have need of such assistance to obtain and further their education at the many educational entities and/or institutions available in the States of South Carolina and Georgia."[10]

Mr. Brown's Will and Trust each contained a no-contest clause, which provided that any beneficiary who challenged the Will or the 2000 Irrevocable Trust "**shall** forfeit his or her entire interest thereunder."[11] Mr. Brown noted in both documents that the persons described therein, i.e. the six named children and their legitimate issue, comprised "the entire class . . . acknowledge[d] to be [his] heirs and issue."[12] Mr. Brown expressly disavowed any other potential beneficiaries, stating, "I have intentionally failed to provide for any other relatives or other persons, whether claiming, or to claim, to be an heir of mine or not."[13] Mr. Brown stated any person not provided for in his Will or Trust "whether or not claiming to be a beneficiary, party in interest, or otherwise **shall** not have standing or be qualified to contest, claim an interest in or otherwise dispute the disposition of [his] estate as he herewith disclaims and disinherits any such person."[14] Mr. Brown stated that any challenges by such persons to the disposition of his estate or the validity of the documents would "be considered an affront to [his] wishes," and "**shall be vigorously challenged as such by his fiduciaries.**"[15]

On December 21, 2007, five of the six adult children Mr. Brown named in his Will, along with their children, brought actions to set aside the Will and Trust so that Mr. Brown's

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[10] Id.
[11] Id.
[12] Id.
[13] Id.
[14] Id.

estate would pass to them directly, intestate, based on, among other claims, undue influence.[16] Other children, not named in Mr. Brown's will also brought actions so that Mr. Brown's estate would pass to them directly, intestate, based on undue influence.[17]

It is these Contesting Children and Heirs, that now jointly motion for settlement, who filed groundless undue influence challenges to the Will and Trust of the decedent.[18] The Will and Trust contain in terrorem clauses that preclude the above named beneficiaries from receiving any assets of the estate or trust.[19] As a result of the proposed settlement that the parties now seek to have approved, Terry Brown and his heirs would be injured by the Personal Representative and Trustee if this Court affirms the settlement order.[20]

## ARGUMENT

"On an appeal from the Court of Common Pleas, an appellate court review of a lower court approval of a compromise is based on an abuse of discretion standard. 'Upon appeal, '[t]he question [for an appellate court] is did the [ruling] court abuse its discretion in approving the compromise?' An abuse of discretion occurs when a court's order is controlled by an error of law or there is no evidentiary support for the court's factual conclusions." Wilson v. Dallas, 403 S.C. 411, 425, 2013 S.C. LEXIS 240, *19-20 (S.C. 2013) (citations omitted). Additionally, "[o]n appeal from a final order of the probate court, the circuit court must apply the same standard of review that an appellate court would apply on appeal. In re Howard, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993). The

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[15]Id.
[16]January 14, 2016 Hearing Transcript, p. 37:16. (R., Vol. II, p. 274, line 16)
[17]See Joint Motion to Authorize Settlement dated December 4, 2015. (R., Vol. II, p. 363)
[18]Id.
[19]See Will and Trust. (R., Vol. IV, p. 958 and 964)
[20]See Joint Motion to Authorize Settlement, Exhibits A (Section III) and B (Section III) (R., Vol. II, p. 376 and p. 400)

standard of review applicable to cases originating in the probate court depends upon whether the underlying cause of action is at law or in equity. In re Estate of Hyman, 362 S.C. 20, 25, 606 S.E.2d 205, 207 (Ct. App. 2004) (citation omitted); In re Thames, 344 S.C. 564, 568, 544 S.E.2d 854, 856 (Ct. App. 2001) (citation omitted).

On appeal from an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses that no evidence supports them. Neely v. Thomasson, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005). Questions of law may be decided by this court without deference to the lower court. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). The standard of review for an action at law is the same whether the facts are found by a jury or the judge sitting without a jury. See Chapman v. Allstate Ins. Co., 263 S.C. 565, 567-68, 211 S.E.2d 876, 877 (1975) (stating in an action at law, the judge's findings are equivalent to a jury's findings for purposes of appellate review). On the other hand, if the probate proceeding is equitable in nature, then the circuit court—on appeal—may make factual findings according to its own view of the preponderance of the evidence. Howard, 315 S.C. at 361-62, 434 S.E.2d 254, 257-58 (citation omitted)." Sullivan v. Brown (In re Estate of Kay), 2016 S.C. App. LEXIS 63, *9-10 (S.C. Ct. App. June 15, 2016).

## I. THE LOWER COURT ABUSED ITS DISCRETION IN DETERMINING THAT THE SETTLEMENT ORDER WAS APPROVED IN ACCORDANCE WITH S.C. CODE ANN. § 62-3-105 AND THAT S.C. CODE ANN. § 62-3-1101 DID NOT APPLY.

### A. The lower court abused its discretion when it failed to apply S.C. Code Ann. §62-3-1101 and §62-3-1102 properly.

The lower court abused its discretion and misapplied the law when it determined that the Joint Motion was not filed pursuant to S.C. Code Ann. § 62-3-1101 and S.C. Code Ann.

§ 62-3-1102 as the Court was not being asked to "approve" the Settlement Agreement and that they would bind only the Moving Parties.[21] Instead, the lower court erroneously ruled that the "private" settlement agreements were being filed before the court in accordance with Rule 43(k), SCRCP and that the fiduciaries were simply seeking a ruling in accordance with S.C. Code Ann. § 62-3-105 to assist them in administering the estate.[22] The only problem with this argument is that S.C. Code Ann. § 62-3-912 requires that private settlements must be executed by all heirs. This did not occur in this matter. Therefore, lower court abused its discretion and misapplied the law when it allowed the entry of the settlement agreements.

As a result of the lower court's ruling, a hybrid court approval process would be created which end runs S.C. Code Ann. § 62-3-912, S.C. Code Ann. § 62-3-1101, and 1102. As further error in its attempt to explain why S.C. Code Ann. § 62-3-1101 did not apply, the court attempted to distinguish the 2009 Compromise Agreement that the South Carolina Supreme Court overturned in this matter in Wilson v. Dallas, 403 S.C. 411, 2013 S.C. LEXIS 240 (2013) from the one currently being filed by the Moving Parties.[23] Specifically, the lower court determined that the Settlement Agreement did not in "any way alter, modify, or amend the terms or distribution scheme of Decedent's Will or Trust."[24] These determinations were an abuse of discretion and factually incorrect. The settlement agreements allowed the Challenging Children and Heirs to avoid the application of the in terrorem clause which enables them to be either beneficiaries of the personal property or education trust. This directly altered the distribution scheme in that the Challenging

[21]Final Order dated February 24, 2016, p. 6 and footnote 4. (R., Vol. I, p. 147 and 144)
[22]Id. at 2. (R., Vol. I, p. 143)
[23]Id. at 6-7. (R., Vol. I, p. 147-148)

Children and Heirs would be allowed to receive an interest in the Estate after challenging the plan. The Will and Trust specifically exclude such an application.

As the South Carolina Supreme Court determined in Wilson v. Dallas:

> 'A compromise agreement is void unless executed in compliance with the governing statute.' In re Estate of Riley, 228 Ariz. 382, 266 P.3d 1078, 1080 (Ariz. Ct. App. 2011). Section 62-3-1102 of the South Carolina Code establishes the following procedure for securing court approval of a compromise agreement resolving an estate controversy:
>
> (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.* . . .
>
> (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.*

The Moving Parties attempted to end run the proper procedure for a settlement in this matter thereby creating an indirect procedure that allows "court approval" of a settlement agreement without having all of the necessary parties. The Moving Parties were aware that they did not have Appellant Terry Brown's consent to any of these settlements, as he was not contacted and did not sign them. Further, Appellant contends that they did not seek it because they knew he would not consent because it put the Challenging Children and Heirs back in the same position with him relative to the disposition of the personal property of the Estate. As a result, the Moving Parties attempt to create a veiled procedure whereby

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[24] Id. at 7. (R., Vol. I, p. 148)

fiduciaries may seek "court approval" without calling it that and enforce estate settlement agreements on heirs who do not consent. Such a process would eviscerate S.C. Code Ann. § 62-3-1101, S.C. Code Ann. § 62-3-1102 and S. C. Code Ann. § 62-3-912 making them unnecessary. This is not the correct statutory interpretation or the legislative intent. If it were, any time a beneficiary did not agree with a settlement reached by a fiduciary, the fiduciary need simply follow the Moving Parties mock "court approval" procedure and affect a disagreeable beneficiary's rights as they have done in this matter. S.C. Code Ann. § 62-3-1102(1) requires all parties to agree to the terms of the compromise when court approval is sought. That was clearly not the case here as Terry Brown and Darryl Brown were not involved in the settlement agreements. In a probate matter whether the settlement be a private settlement or court approved settlement all of the heirs must be involved based on the statutes. This did not occur either. Based on the foregoing, the lower court should be reversed and the settlement agreements overturned.

### B. The lower court abused its discretion when it determined that the fiduciaries had the authority, in accordance with S.C. Code Ann. § 62-3-105, to enter into the agreements as all necessary parties were not a part of the settlement agreement.

Terry Brown and Darryl Brown were not parties to the settlement agreement as it was not a family settlement.[25] As a result, all parties did not consent to the "private" settlement agreement that affected the non-consenting parties rights in accordance with S.C. Code Ann. § 62-3-912. Specifically, Terry Brown's rights relative to the personal property of the estate were changed by failing to enforce the in terrorem clauses against the Challenging Children and Heirs. All parties whose rights were to be affected by the in terrorem clause did not sign the settlement agreements. Therefore, there was no valid contract that could be formed

as to the in terrorem clause waiver as there was no meeting of the minds of all necessary parties to the in terrorem issue. "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Patricia Grand Hotel, L.L.C. v. MacGuire Enters., Inc., 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007). As such, it was an abuse of discretion for the lower court to determine that the fiduciaries had the authority to enter into a settlement agreement in accordance with S.C. Code Ann. § 62-3-105 as the underlying settlement agreements were not enforceable and void under contract law.

### C. The lower court abused its discretion when it failed to determine whether a good faith controversy existed and whether the settlement agreement was just and reasonable.

S.C. Code Ann. § 62-3-1102(3) states:

> Upon application to the court and 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.

S.C. Code Ann. § 62-3-1102.

The lower court abused its discretion when it determined that S. C. Code Ann. § 62-3-1101 and the procedures under S.C. Code Ann. § 62-3-1102 did not apply because the settlement agreements would only be binding on the Moving Parties when in fact the settlement agreements directly impacted the inheritance rights of Appellant Terry Brown by affirming

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[25]January 14, 2016 Hearing Transcript, 29:21-22. (R., Vol. II, p. 266, l. 21-22)

his siblings rights to share in the personal property of the estate and approving avoidance of the in terrorem clauses in both the Will and the Trust. This is the settlement of an estate controversy or item related to an estate that requires approval under South Carolina Code § 62-3-1101. Contrary to this lower court's contention in its ruling, the ruling does amend or change the distribution schemes in this estate by placing all of the siblings back in a position to receive personal property under the Will by determining that the in terrorem clause will not be enforced.[26] Further, the lower court failed to determine whether a good faith controversy existed that was just and reasonable to all heirs as required by Wilson v. Dallas. There is no way the proposed settlement is just and reasonable when it injures the one beneficiary and his heirs who have supported the Will and Trust for the last nine (9) years and rewards the heirs who have filed groundless undue influence claims. As with the last settlement attempt in this matter, this one fails for similar reasons that the South Carolina Supreme Court has already delineated in its prior ruling of Wilson v. Dallas. As a result, the lower court abused its discretion and misapplied the law when it failed to properly apply S.C. Code Ann. § 62-3-1101 and the procedures under S.C. Code Ann. § 62-3-1102 and should be reversed.

## II. THE LOWER COURT ABUSED ITS DISCRETION IN DETERMINING THAT THE PERSONAL REPRESENTATIVE AND TRUSTEE HAD NOT BREACHED THEIR FIDUCIARY DUTY TO APPELLANT TERRY BROWN.

### A. The Personal Representative and Trustee have a duty to enforce the in terrorem clause.

South Carolina law requires a Personal Representative to act as follows:

A personal representative is a fiduciary who shall observe the standards of care

[26]Final Order dated February 24, 2016, p. 5-7. (R., Vol. I, p. 146-148)

described in Section 62-7-804.[27] A personal representative has a **duty** to settle and distribute the estate of the decedent **in accordance with the terms of a probated and effective will** and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate. **He shall use the authority conferred upon him by this code, the terms of the will, and any order in proceedings to which he is party for the best interests of successors to the estate.** (Emphasis added.)

S.C. Code Ann. § 62-3-703.

Similarly, a Trustee under South Carolina law has a fiduciary duty to administer a trust as follows:

> A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

S.C. Code Ann. § 62-7-804.

Both the Will and Trust in this instance contain an in terrorem clause. Item X of the Will provides:

> **Provisions as to any Contest of My Estate Plan.** Should any beneficiary under this Will or my Irrevocable Trust, and as amended, dated prior to or of even date with this Will and as referred to herein, become an adverse party in a proceeding for the probate of my Will or in any manner contest the validity of my Irrevocable Trust, such beneficiary shall forfeit his or her entire interest thereunder and such interest shall pass to such other beneficiaries as would be entitled to take as if such beneficiary predeceased me. Furthermore, any person not provided for in this Will, my Irrevocable Trust or other such instrument, whether or not claiming to be a beneficiary or party in interest, shall not have standing or be qualified to contest, claim an interest in or otherwise dispute the disposition of my estate, as I herewith disclaim and disinherit any such persons. Any such alleged claim shall be considered an affront to my wishes and **shall be challenged as such by my fiduciaries.** (Emphasis added.)

Item XXI of the Irrevocable Trust states:

> **Provisions as to any Contest of Grantor's Estate Plan.** Should any beneficiary under this Irrevocable Trust or Grantor's Will dated after or of even date with this Trust and as referred to herein, become an adverse party in a proceeding for the probate of Grantor's Will or in any manner contest the validity of Grantor's

[27]Section 62-7-804 requires the Personal Representative to adhere to the "prudent person" rule provided for by Trustees.

> Irrevocable Trust, such beneficiary shall forfeit his or her entire interest thereunder and such interest shall pass to such other beneficiaries as would be entitled to take as if such beneficiary predeceased Grantor. Furthermore, any person not provided for in this Irrevocable Trust, Grantor's Will or other such instrument, whether or not claiming to be a beneficiary or party in interest, or otherwise shall not have standing or be qualified to contest, claim an interest in or otherwise dispute the disposition of Grantor's estate as he herewith disclaims and disinherits any such persons. Any such alleged claim shall be considered an affront to Grantor's wishes and **shall be vigorously challenged as such by his fiduciaries.** (Emphasis added.)

"In general, clauses in a will designed to penalize beneficiaries for contesting a will or instituting other proceedings relating to the estate are valid and enforceable." Russell v. Wachovia Bank, N.A., 370 S.C. 5, 12, 633 S.E.2d 722, 725 (2006). "Consequently, we find that the no-contest clauses in both the will and trust are valid and enforceable. To hold otherwise would undermine Testator's intent." Id. at 16. As a result of the Russell decision, "in terrorem" clauses in South Carolina in both wills and trusts are enforceable. The only exception to enforceability of in terrorem clauses in South Carolina occurs where a challenger of a will or revocable trust files such challenge with probable cause. See S.C. Code Ann. § 62-3-905 and § 62-7-605. No evidence that such exception applies in the current matter exists (see Section V hereinbelow).

The lower court abused its discretion when it determined that the Personal Representative and Trustee did not breach their fiduciary duty in the instant action with the joint motion. Failure to enforce the in terrorem clauses in this matter wherein no evidence presents of probable cause not only flies in the face of common sense but is directly contrary to the provisions contained in the Will and Trust. The decedent's documents indicated that his Personal Representative and Trustee "shall" challenge such actions. Nowhere in the documents does it say lay down and settle. The LSA argues that there is no duty to assert

the in terrorem clause.[28] Nothing could be farther from the truth. The Will and Trust specifically direct such enforcement. The LSA argument might carry more weight if there were not a specific directive in the documents to enforce such clauses. South Carolina does not appear to have addressed this specific issue. However, the California Court of Appeals in Doolittle v. Exchange Bank, 241 Cal. App. 4th 529, 2015 Cal. App. LEXIS 922 (2015) examined a similar situation.

Doolittle involved a trust with an in terrorem clause that had a directive to defend similar to the one contained in the Will and Trust in this matter wherein a beneficiary filed claims to invalidate the documents which included a claim for undue influence. Exchange Bank, the Trustee, sought direction and instructions from the court denoting that the trust imposes a duty to defend at the trust's expense. The language in Doolittle stated:

> Trustee is hereby directed to defend, at the expense of any trust estate governed by this Agreement, any contest or other attack of any nature on this Agreement, on any of its provisions and any amendments hereto, and on Trustor's Will, an attack of any nature on Trustor's estate planning and the inter vivos disposition, or disposition at death, of her assets and estate.[29]

The Doolitte court noted that ordinarily a Trustee must remain impartial as among the beneficiaries. However, in this instance, the Court noted that the Trustee's duties were modified by the language and the Trustee had a duty to defend. The Doolittle court specifically distinguished two other cases under California law wherein no similar duty to defend existed in documents in the other cases. The Doolittle court noted:

> The trust agreements in Whittlesey and Terry did not contain an explicit directive to the trustee to defend claims challenging the validity of the amendment at the trust's expense, as does the trust instrument in the present case. To avoid application of the

[28]See May 16, 2016 Hearing Transcript. (R., Vol. II, p. 358, l. 16-25)
[29]Doolittle v. Exchange Bank, 241 Cal. App. 4th 529, 534, 2015 Cal. App. LEXIS 922, *5 (Cal. App. 1st Dist. 2015)

> holding in Whittlesey, such a provision has been recommended in authoritative form books. These sources suggest inclusion in a trust or will of an optional provision reading, in the case of a trust: "The trustee is authorized to defend, at the expense of the trust estate, any contest or other attack of any nature on this trust or any of its provisions." According to the Continuing Education of the Bar (CEB) book on drafting revocable trusts, "Drafters may want to authorize the trustee to defend a contest or an attack on the trust. ... Without such a clause, the trustee might be hesitant to defend the trust because a court may rule that an attorney who represents the trustee in an unsuccessful defense of a trust contest is not entitled to have fees paid from the trust." **The authorization to defend in the documents before us is even more expansive than the provision suggested by the CEB, leaving no doubt as to the intention of the amendment's drafters.** (citations omitted and emphasis added.)

Doolittle v. Exchange Bank, 241 Cal. App. 4th 529, 538, 2015 Cal. App. LEXIS 922, *14-15 (Cal. App. 1st Dist. 2015).

As in Doolittle, the Will and Trust contain express directives to defend. There is no ambiguity. The LSA argued at the May 16, 2016 hearing that there was no duty to defend.[30] This is absolutely incorrect based on the plain meaning and language of the documents. Failure to enforce the in terrorem clauses without any evidence of probable cause is a breach of duty.

Further, there is no evidence or indication of probable cause for the undue influence claim filed by the Challenging Children and Heirs in this matter that would enable the Personal Representative and Trustee to disregard the in terrorem clause. In fact, the parties even admit in their motion that "limited written discovery has been conducted between the parties".[31] Terry Brown is only aware of one deposition taken in the last three years in this matter, which was that of the drafting attorney H. Dewain Herring, whose testimony further bolstered the idea that there was no undue influence in the execution of the Will and Trust, and certainly indicated what the decedent's intent was related to the enforcement of the in

[30]See May 16, 2016 Hearing Transcript. (R., Vol. II, p. 358, l. 16-25)
[31]See Joint Motion to Authorize Settlement, p. 3. (R., Vol. II, p. 365)

terrorem clauses.

Specifically, H. Dewain Herring stated that the idea for developing the estate plan as was ultimately signed and drafted began in 1997 as noted by his own personal notes of such meeting.[32] Further with regard to Mr. Brown's ability to be influenced, Mr. Herring emphatically stated:

> Well, the -- okay. From the time that I met James Brown he really impressed me -- or my impression of him was that he was a man that was in charge. He wanted to be in charge, and he was in charge, and if you didn't know that he was in charge he'd tell you. Everyone that I ever met with or talked with or just saw in passing going through his organization, a lot of people, he was clearly the man and was very respectful. Everyone in the organization was, as a matter of fact. Everyone referred to each other as Mr. or Ms. or Mrs. I mean, it was a titled existence, very polite.
>
> But he was -- he was -- he was not -- not a dictator, but he was a -- he was the boss. He was the man in charge and he could express himself very clearly, briefly, sometimes bluntly, and he wasn't really challenged a great deal when he got down to making his point. And he – I thought he always knew what he wanted. He commanded respect. He didn't demand respect, he commanded respect. There's a difference to me.
>
> And if I might, I will say that the first time I met him personally -- I'd seen him before in concert, but we were in a room a little smaller than this waiting on him. And so he comes in and he's got -- like I say to myself that he – he made his entrance, and dressed in all black, shoes, pants, shirt, hair fixed to -- you know, I mean, he was an immaculate person, but – gold medallion and such. But it was like he has arrived. You know, here's the man. And everybody kind of sat up a little bit, came to attention and, if you will, he held court.
>
> It was a very giving, exchanging type thing. I mean, nobody was intimidated, but I thought he -- he knew what he wanted and he went about his business. He didn't tarry.[33]

When further asked about his understanding of Mr. Brown's capacity and ability to execute

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[32]Depo. H. Dewain Herring dated November 18, 2015 (52:1-25, 53:1-25, 54:1-25, 55:1-25, 56:1-25, Exhibit 8) (R., Vol. IV, p. 762, l. 1-25, 763, l. 1-25, 764, l. 1-25, 765, l. 1-25, 766, l. 1-25, and 773) and December 9, 2015 (400:10-25, 401:1-25, 402: 1-7, Exhibit 8) (R., Vol. IV, p. 780, l. 10-25, 781, l. 1-25, 782, l. 1-7 and 825)

an estate plan, Mr. Herring stated:

> Q. And you indicated that you'd met James Brown several times in this case?
>
> A. Yes, Sir.
>
> Q. Both professionally and then several times socially as well, correct?
>
> A. Well, yes, but – yes. I mean, it was like at birthdays parties that he would have in Augusta from different times, yes.[34]
>
> ...
>
> Q. Okay. And let – let me rephrase that. What – what concerns, if any, did you have after those numerous meetings with Mr. Brown about mental capacity?
>
> A. I didn't have any.
>
> Q. What about physical capacity?
>
> A. I didn't have any.
>
> Q. Okay. And in developing Mr. Brown's estate plan were there ever any times that you were concerned about that?
>
> A. No, Sir.[35]

Finally, when asked if the documents represented Mr. Brown's intent Mr. Herring stated, "Absolutely, Yes."[36] When asked who had the final say as to the content and final draft Mr. Herring responded, "Mr. Brown....."[37] When asked who made the final decision to sign the documents, Mr. Herring stated, "He did." (referring to Mr. Brown)[38]

With regard to the in terrorem clause, Mr. Herring stated clearly and convincingly

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[33]Depo. H. Dewain Herring November 18, 2015 (78:1-25, 79:1-13) (R., Vol. IV, p. 771, l. 1-25, 772, l. 1-13)
[34]Depo. H. Dewain Herring December 9, 2015 (503:25, 504: 1-7) (R. Vol. IV, p. 789, l. 25, 790, l. 1-7)
[35]Id. at (504:18-25, 505:1-3) (R. Vol. IV, p. 790. l. 18-25, 791, l. 1-3)
[36]Id. at (506:9) (R. Vol. IV, p. 792, l. 9)
[37]Id. at (514:17) (R. Vol. IV, p. 800, l. 17)
[38]Id. at (516:14) (R. Vol. IV, p. 802, l. 14)

what Mr. Brown's intent was as it related to such clauses. He noted:

Q. Let me ask you this. Based on your understanding of this clause and your understanding of his intent, what would happen if one of the heirs challenged this plan?

A. They should forfeit whatever interest they would have under it. It would be left to them.

Q. Okay. Would that include their decendents as well?

A. Yes, sir.

Q. Okay. So the intent was that it would exclude children and all of their descendents if they challenged?

...

THE WITNESS: Well, if -- yes, sir. And, you know, it would just stand to reason that if the child contest was not provided for and forfeits that child's interest because of that contest there is nothing for that heir to receive.

Q. What about a child's children? Could that child challenge and his children receive it?

...

The Witness: I would think that they would be

Q. Would be included or –

A. Defeated. Excluded.

Q. Was that the intent here?

...

The Witness: Yes, sir. A – a contest was a contest, was an affront to Mr. Brown's wishes, and if someone chose to do that they had a choice. You could contest it. If it were possible for you to be – to prevail the law would speak to that. If you did not prevail obviously you would forfeit. And part of the intent was that if you even contested it, period, from the get-go, I mean, initially, that said, okay, I'm going to file this document to this will and I'm out. It was an automatic exclusion, if you will. That was the intent.

> Q. And it's your understanding based on years of practice in drafting that this provision does that, that it excludes both child –
>
> A. I created that and drafted that provision and that's what it intended to be and I hope I did a good job with it.[39]

The foregoing testimony points to complete and utter lack of undue influence and clear and convincing intent as it relates to the in terrorem clauses. Based on the little bit of discovery that has occurred so far, the Personal Representative and Trustee have no idea whether probable cause exists. Worse yet, all parties failed to cite any evidence or facts in the joint motion which would prove that the undue influence claims in this matter where brought with probable cause indicating that adequate "consideration" even existed to enter into a settlement agreement as required by Wilson v. Dallas. As a result, it is questionable whether a controversy exists that can be settled. Further, such settlement is clearly not just and reasonable in light of the circumstances. Finally, it is disingenuous for either the Personal Representative and Trustee to argue that entering the settlement would be a savings to the Estate or Trust related to litigation and an abuse of discretion and error for the court to rule the same[40] since Tommie Rae Hynie Brown's undue influence claim has not been settled[41] and the same discovery and depositions would be necessary to address her claims. Based on the foregoing, the lower court ruling should be reversed.

**B. The lower court abused its discretion when it determined that the Trust did not have to enforce the in terrorem clause because no probable cause exception exists for irrevocable trusts.**

The Trustee of the Trust may not rely on the probable cause exception to the enforcement of an in terrorem clause if a beneficiary brings an undue influence claim (or

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[39]Id. at (524:15-25, 525:1-2, 4-11, 13-18, 20-25, 526:1-13) (R., Vol. IV, p. 806, l. 15-25, p. 807, l. 1-2, 4-11, 13-18, 20-25, 808, l. 1-13)
[40]Final Order dated February 24, 2016, p. 4. (R., Vol. I, p. 145)

any claim for that matter). It was an abuse of discretion and misapplication of the law for the lower court to apply such exception. No statutory grounds exist for the trustee of an irrevocable trust to apply a probable cause exception under South Carolina law. The only statutory provisions that relate to in terrorem clauses in South Carolina for trusts are those related to revocable trusts. See. S.C. Code Ann. § 62-7-605. Such section does not include **irrevocable** trusts. The Trust is this matter was clearly an irrevocable trust. The only other code section relevant to a probable cause exception is for wills.[42] If the legislature wanted the exception to apply to irrevocable trusts, they would have written code sections that specifically address irrevocable trusts rather than one section about revocable trusts and one about wills. S.C. Code Ann. § 62-7-605 would refer to trusts rather than revocable trusts. Incidentally, the lack of a probable cause exception for irrevocable inter vivos trusts makes complete sense. Presumably individuals take greater care in setting them up and attorneys take greater care in making sure the Settlor has the capacity to create the trust because the trusts are irrevocable. Revocable trusts and wills are ambulatory in nature and do not become permanent until date of death. Further, the evidence of undue influence should be more pronounced for inter vivos irrevocable trusts as a result of their permanency. As a result, there is no probable cause exception for irrevocable trusts under South Carolina law. It is also important to note in this matter that both the Will and Trust indicate that if a challenge to either document occurs that it triggers the in terrorem clause in both documents. As a result, a challenge to the Trust would invoke the Will in terrorem clause and vice versa. Therefore, the lack of a probable cause exception in this instance for the Trust impacts the Will as well because the clauses tie the documents together. The lower

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[41]Joint Motion to Authorize Settlement, footnote 2. (R., Vol. II, p. 364)

court legislated a probable cause exception into its Final Order for irrevocable trusts that does not exist. This is error.

"A trust is voidable to the extent its creation was induced by fraud, duress, or undue influence" S.C. Code Ann. § 62-7-406. As a result, any filing against an irrevocable trust would be a breach of the in terrorem clause and must be enforced by the Trustee. Irrevocable trust beneficiaries are not afforded a similar probable cause exception under the South Carolina law. They must prevail on an action under S.C. Code Ann. § 62-7-406. Otherwise, a contesting beneficiary should be excluded from a trust when they challenge it and their action under S.C. Code Ann. § 62-7-406 fails. The Trustee's failure to enforce the in terrorem clause is a breach of its fiduciary duty and must not be allowed by this Court. The lower court's ruling should be reversed and remanded with instructions that the Trustee must enforce the in terrorem clause.

**C. The lower court abused its discretion when it determined that the Personal Representative and Trustee had not breached their fiduciary duty when it determined that there was evidence to prove probable cause.**

The South Carolina Supreme Court in Wilson v. Dallas specifically addressed the lack of evidence in this matter as it related to the ability of the beneficiaries in this matter to invoke the probable cause exception to enforcement of in terrorem clauses in the Will and Trust. The South Carolina Supreme Court, in a rather lengthy discussion, noted:

> The circuit court's scant references to alleged improprieties in the handling of Brown's will, while troubling, do not bear directly on the issue of whether Brown's desires for the disposition of his estate were overborne to such an extent that the resulting distribution was not the product of his own free will. In particular, although the circuit court focused on the later imprisonment of the attorney who drafted the will, the imprisonment was for a crime totally unrelated to his services as an estate planner. This fact has no bearing on the execution of Brown's testamentary documents and sheds no light on whether Brown's will was somehow overcome at

[42]See S.C. Code Ann. § 62-3-905

the time he signed the documents finalizing his estate plan.

> Similarly, the fact that one provision regarding management fees in the trust could be deemed 'generous' would support at most reformation of the document, but would not justify the complete destruction of Brown's estate plan.
> All indications in the record are that Brown was of sound mind and strong physical constitution until the time of his death, as he had only recently returned from touring and was making preparations for future performances when he suddenly became ill and passed away.
>
> It appears Brown painstakingly developed his estate plan over the course of several years, and in various drafts, including the will in dispute here, Brown made it clear that he intended the bulk of his estate to be used for the education of disadvantaged youths, as he had provided for his family members during his lifetime. His estate documents explicitly state that he had named all of those he wished to be the beneficiaries of his estate, and that any further claimants, including future spouses or those purporting to be heirs, were purposefully excluded. Another strong indicator of Brown's intent is his inclusion of no-contest clauses in both his will and trust.
>
> The record contains numerous references to the fact that Brown repeatedly made his intentions known during his lifetime to his family, friends, and business associates, and he had even met with family members not too long before his unexpected death and had reaffirmed his intentions in this regard. Brown had a reputation as a strong-willed individual who did not take orders from others, and he made his desires abundantly clear during his lifetime. We find there is no reasonable basis for the undue influence claim asserted here other than as a means to dismantle Brown's estate plan. The result is to enable those who were disinherited to obtain Brown's assets to the detriment of the charitable entity that Brown so fervently desired. Because he knew that it would be a source of dispute, Brown went to remarkable lengths to protect his right to designate the appropriate legacy for his life's work, including having numerous provisions in his estate documents and informing family members of his intentions in advance. We see no reasonable or substantial basis to support a good faith finding here.
> The AG acknowledged during oral arguments in this matter that he undertook no inquiry into the undue influence claims of the Respondents and the circumstances surrounding Brown's execution of his will. (citations omitted)

Wilson v. Dallas, 403 S.C. 411, 437-440 (2013).

As noted above, the South Carolina Supreme Court was particularly troubled by the lack of evidence of any undue influence that would support a claim and allow for settlement of the action at hand. Amazingly, in the almost three (3) years since the issuance of this opinion,

there is no more evidence than existed at the time the South Carolina Supreme Court entered its opinion in Wilson v. Dallas. Incredibly, there is actually more evidence that it was clearly the decedent's intent to exclude the beneficiaries if they challenged the documents as noted in the above deposition excerpts. The drafting attorney made this clear and convincing in his deposition of December 9, 2015.[43] Unbelievably, after the drafting attorney made it clear that the decedent's intent with the in terrorem clause was to exclude all heirs and their beneficiaries that challenge the will, LSA's counsel began asking questions which could only be described as an attempt to assist the contesting parties with an end run on the in terrorem clause.[44] Such actions directly subverted the decedent's intent and wishes with regard to the in terrorem clauses which were confirmed clearly and convincingly by the drafting attorney, H. Dewain Herring at the December 9, 2015 deposition.[45] Additionally, the Moving Parties provided no real evidence with their joint motion to provide the consideration necessary to enter into the settlement agreements and invoke the probable cause exception. In fact, they filed no evidence with their joint motion. Based on the foregoing, the lower court should be reversed.

## III. THE LOWER COURT ABUSED ITS DISCRETION IN ALLOWING AN ATTORNEY REPRESENTING A PARTY TO TESTIFY AS A WITNESS.

### A. The lower court abused its discretion when it allowed Louis Levenson ("Levenson") to testify on behalf of his clients in violation of Rule 6, SCRCP.

Rule 6(d), SCRCP provides:

(d) For Motions--Affidavits. A written motion other than one which may be heard ex

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[43]Depo. H. Dewain Herring December 9, 2015 (524:15-25, 525:1-2, 4-11, 13-18, 20-25, 526:1-13) (R., Vol. IV, p. 806, l. 15-25, p. 807, l. 1-2, 4-11, 13-18, 20-25, 808, l. 1-13)
[44]Id. at (541:25, 542:1 through 555:14) (R., Vol. IV, p. 810, l. 25, p. 811, l. 1 through p. 824, l. 14)
[45]Id. at (524:15-25, 525:1-2, 4-11, 13-18, 20-25, 526:1-13) (R., Vol. IV, p. 806, l. 15-25, p. 807, l. 1-2, 4-11, 13-18, 20-25, 808, l. 1-13)

> parte, and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing, unless a different period is fixed by these rules or by an order of the court. Such an order may for cause shown be made on ex parte application. **When a motion is to be supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served not later than two days before the hearing, unless the court permits them to be served at some other time. The moving party may serve reply affidavits at any time before the hearing commences.** In all cases where a motion shall be granted on payment of costs or on the performance of any condition, or where an order shall require such payment or performance, the party whose duty it shall be to comply therewith shall have 20 days for that purpose, unless otherwise directed in the order. (Emphasis added.)

As denoted by Rule 6, SCRCP the moving party must include all affidavits and evidence that are to be provided either with the initial filing or prior to the hearing. The Moving Parties (specifically the Challenging Children and Heirs) failed to do so in this matter. This issue alone allows this Court to remand to the lower court with instructions to find that probable cause does not exist thereby resulting in enforcement of the in terrorem clauses in the Trust and Will. It was the Moving Parties responsibility to provide the evidence. They came to the lower court in December 2015 with a motion to settle. The evidence that was available at the time they filed their claims in 2007 has not changed. The failure of the Moving Parties to provide any evidence of undue influence is their issue. Wilson v. Dallas gave the parties a roadmap for settling this matter and instructed the parties what evidence was necessary. Almost three (3) years later, the Moving Parties failed to provide the evidence required to invoke the probable cause exception, which can lead to but one conclusion. There is none. Based on this, the Court should reverse the lower court and remand with instructions finding that the Challenging Children and Heirs violated the in terrorem clauses and did not meet the requirments of the probable cause exception for enforcement.

Further, the testimony of Levenson should have been denied as there was no preliminary

indication that he would testify at the hearing as required by Rule 6, SCRCP. Appellant Terry Brown was never given an opportunity to provide opposing affidavits or prepare for such testimony. Further, such ambush, surprise testimony was a violation of due process. In fact, it was clear that Levenson was offering evidence for the first time that none of the parties had seen or heard to which Appellant objected.[46] Appellant Terry Brown objected to the testimony at the hearing.[47]

Allowing the testimony of Levenson without: 1) any prior notice of such testimony; 2) adequate opportunity to prepare or be heard; 3) the right to introduce evidence in rebuttal of a "surprise" witness; 4) the right to **meaningfully confront and adequately** cross examine a witness was a violation of both substantive due process and procedural due process in accordance with Rule 6(d), SCRCP, U.S. Const. am. XIV, § 1, and S.C. Const. art. I, § 3. The result was prejudice to Appellant Terry Brown as the lower court relied almost solely on such testimony in its Final Order.[48] Allowing the testimony of Levenson, and then relying on it, resulted in a violation of Appellant Terry Brown's due process rights by arbitrarily and capriciously reducing his inheritance by not requiring the fiduciaries in this matter to enforce the in terrorem clauses in the Will and Trust. As a result, such actions arbitrarily and capriciously deprived Appellant of due process to have a property right (i.e. his right to an inheritance) adequately adjudicated and were error. See. Moore v. Moore, 376 S.C. 467 (2008); State v. Brown, 178 S.C. 294 (1935); South Carolina Dep't of Health & Environmental Control v. Armstrong, 293 S.C. 209 (1987); State v. Fussell, 299 S.C. 162 (1989) (making findings without evidentiary support is an abuse of discretion). "The

[46]January 14, 2016 Hearing Transcript, pp. 45:14-25; 52:6-16. (R., Vol. II, p. 282, l. 14-25, p. 52, l. 6-16)
[47]January 14, 2016 Hearing Transcript, 41:6-17. (R., Vol. II, p. 278, l. 6-17)

moving party may serve reply affidavits at any time before the hearing commences." Simmons v. Berkeley Elec. Coop., Inc., 404 S.C. 172, 181, 744 S.E.2d 580, 585 (S.C. Ct. App. 2013). Furthermore, if the lower court relies on the evidence that is presented in violation of Rule 6 it is an abuse of discretion. Id.

In this instance, there was no indication that Levenson would testify in this matter. His testimony was sprung on the lower court and opposing party during the hearing.[49] Furthermore, the lower court clearly relied on the testimony as it spanned five (5) pages of citation in a twenty (20) page order. Additionally, it was error for the lower court to determine in footnote 55 of its Final Order that Appellant had an adequate and meaningful opportunity to cross-examine Levenson. No notice was given that an attorney acting as an advocate in the case would become a witness. No opportunity given for counsel to adequately and meaningfully prepare for cross-examination or prepare rebuttal or other evidence to use in cross-examination. In short, due process failed. Appellant raised this issue as well as many others related to the process.[50] All of the foregoing was a clear abuse of discretion and the lower court order should be reversed.

### B. The testimony by Levenson was hearsay in violation of Rule 801, SCRE and 802, SCRE and no hearsay exception applies.

Rule 801, SCRE defines hearsay as any statement made by someone other than declarant that is offered into evidence to prove the truth of the matter asserted. Rule 802, SCRE provides that "[h]earsay is not admissible except as provided by these rules or by

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[48]Final Order dated February 24, 2016, pp. 10-15. (R., Vol. I, p. 151-156)
[49]January 14, 2016 Hearing Transcript, 36:3-26, 37:1-2 (R., Vol. II, p. 273, l. 3-26, p. 274, l. 1-2)
[50]Id. at 41:6-17; 43:25; 44:1-8; 48:12-25; 51:1-8; 52:6-25; 53:1-3; 70:22-25; 71:1-3; 85:12-17; 91:2-11. (R., Vol. II, p. 278, l. 6-17, p. 280, l. 25, p. 281, l. 1-8, p. 285, l. 12-25, p. 288,

other rules prescribed by the Supreme Court of this State or by statute." There is no doubt that the statements offered by Levenson in this matter were inadmissible hearsay offered for the truth of the matter asserted. Appellant objected numerous times to the same. Specifically, Levenson testified:

1. it became apparent to his clients in December 2007 that certain people who were close to Decedent, and who also held confidential relationships with him,[51] were involved in preparing documents for Decedent to sign.[52]
2. that some of the witnesses he interviewed were also aware of contracts, some oral and some written, prepared by Messrs. Cannon, Dallas, and Bradley which purported to give them each five percent of Decedent's gross revenue.[53]
3. he was informed there was a pattern of Messrs. Cannon, Dallas, and Bradley asking Decedent to sign blank documents without reading them.[54]
4. In his discussions with Tommie Rae Brown, he was informed Ms. Brown had allegedly observed Decedent signing documents during instances when he was under the influence of certain controlled substances. [55]
5. Ms. Brown also told him [Levenson] that Messrs. Cannon, Dallas, and Bradley would visit Decedent at home during times of the day when they allegedly knew he was under the influence of substances in order to get him to sign documents.[56]

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l. 1-8, p. 289, l. 6-25, p. 290, l. 1-3, p. 307, l. 22-25, p. 308, l. 1-3, p. 322, l. 12-17, p. 328, l. 2-11)

[51] Id. at 81:5-10. (R., Vol. II, p. 318 l. 5-10)

[52] Id. at 55:2-16. (R., Vol. II, p. 292, l. 2-16)

[53] Id. at 56:10-15. (R. Vol. II, p. 293, l. 10-15)

[54] Id. at 55:23 through 56:1. (R. Vol. II, p. 292, l. 23 through p. 293, l. 1)

[55] Id. at 63:7-19. (R. Vol. II, p. 300, l. 7-19)

[56] Id.

6. that Ms. Brown accusations were purportedly corroborated by Ms. Elif Crawford, Decedent's personal assistant or secretary.[57]
7. his clients were informed and believed at the time they filed the subject Petitions that Decedent did not read many of the documents he signed and/or was incapable of understanding or reading the documents due to his altered condition.
8. that such information, when set alongside information Levenson obtained from Dr. Richardson and Loric Yanel, painted a troubling picture from the perspective of Levenson's clients in 2007. Dr. Richardson informed Levenson about Decedent's commitment to a facility in Atlanta, Georgia for alleged substance dependence.[58] Mr. Yanel further indicated Decedent's European tour ended prematurely in July 2000 because of Decedent's behavior during the tour caused by his alleged substance dependence.[59]
9. that after 1999, but before approximately 2002 or 2003, large sums of money were being transferred from Decedent's Morgan Stanley account upon the sole authorization of Mr. Cannon.[60] Levenson stated that by 2002, Decedent's Morgan Stanley account had lost significant value due to transfers by Mr. Cannon.[61] These transactions were believed by Levenson and his clients, to have all occurred under the direction of Mr. Cannon and without the direct knowledge of Decedent.[62]

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[57] Id.
[58] Id. at 49:17-20. (R. Vol. II, p. 286, l. 17-20)
[59] Id. at 49:9-16. (R. Vol. II, p. 286, l. 9-16)
[60] Id. at 58:16-24. (R. Vol. II, p. 295, l. 16-24)
[61] Id. at 58:25; 59:7. (R. Vol. II, p. 295, l. 25 through p. 296, l. 1-7)
[62] Id. at 59:8-13. (R. Vol. II, p. 296, l. 8-13)

10. he also recounted details regarding alleged substituted and/or altered documents.[63] For example, Mr. Dallas testified during a hearing on February 8, 2008 before this Court that a document attached as Exhibit B to Decedent's 2000 Irrevocable Trust was a document Mr. Dallas himself substituted *after* Decedent's death.[64] This testimony corroborated the belief by Mr. Levenson's clients that Decedent's "confidantes" were substituting their judgment for that of Decedent and that Decedent had been unduly influenced.

11. he further testified regarding his clients' concern about Decedent's engagement of Mr. H. Dwaine Herring, Esquire, for the purpose of preparing Decedent's 1999 and 2000 Will and Trust.[65] Levenson testified his clients' were concerned because Mr. Herring had not been a lawyer their father had traditionally used with respect to the management of his business or legal affairs.[66] Levenson testified his clients believed Mr. Herring was an attorney who had been referred to Decedent through Messrs. Dallas or Cannon and therefore the circumstances of his employment by Decedent were suspicious to Petitioners.[67]

12. he testified he interviewed Mr. Herring in 2007[68] and learned that although Mr. Herring had communicated with Decedent himself on a few occasions, Messrs. Cannon, Dallas, and/or Bradley were present when those conversations took

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[63] Id. at 60:22; 61:20. (R., Vol. II, p. 297, l. 22 through p. 298, l. 20)
[64] Id. at 60:25; 61:4. (R., Vol. II, p. 297, l. 25 through p. 298, l. 4)
[65] Id. at 69:10-14. (R., Vol. II, p. 306, l. 10-14)
[66] Id. at p. 71:7-19; 69:16; 70:18 (R., Vol. II, p. 308, l. 7-19, p. 307, l. 16, p. 308, l. 18) (stating Decedent had previously retained Joel Katz, Jay Ross, and Leon Friedman and testifying: "there's nothing wrong with a person getting their own lawyer totally different from any lawyer they've ever used.) Id. at 88:20; 89:5. (R., Vol. II, p. 325, l. 20, p. 326, l. 5)
[67] Id. at 70:18-21. (R., Vol. II, p. 308, l. 18-21)

place, further corroborating Petitioners' belief that their father had been unduly influenced with respect to signing the 1999 and 2000 Wills and Trust Agreements.[69]

Based on the foregoing, the lower court abused its discretion when it relied on hearsay evidence that was inadmissible. See Allegro, Inc. v. Scully, 409 S.C. 392 (2014). The lower court order should be reversed.

### C. The testimony by Levenson was a violation of the rules of professional conduct and should not have been allowed.

Allowing testimony of Levenson was a violation of Rule 3.7, RPC, Rule 407, SCACR as he was counsel of record and an advocate in this matter at the time of the testimony. It was error and abuse of discretion not to disqualify him as a witness at the time of objection. As noted in comment 2 to such rule "The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation." Clearly it prejudiced the matter as the lower relied almost exclusively on such testimony. As such, Appellant's objection to Levenson testifying should have been sustained and the lower court order reversed.

### D. The testimony by Levenson was a violation of Rule 43(h), SCRCP.

Allowing Levenson to testify in narrative format was a violation of Rule 43(h), SCRCP related to the examination of witnesses. Appellant objected to the same.[70] There was no counsel examining Levenson. As a result, a proper record based on direct, cross-examine and objections was unable to be adequately created. Further, his narrative

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[68] Id. at 75:12-13. (R., Vol. II, p. 312, l. 12-13)
[69] Id. at 84:5-18; 86:10; 88:18. (R., Vol. II, p. 321, l. 5-18, p. 323, l. 10, p. 325, l. 18)

testimony was clearly prejudicial as this Court spent five pages of the twenty pages of its Final Order referencing the same. Such result was error and prejudicial to Appellant. The lower court order should be reversed.

## IV. IT WAS AN ABUSE OF DISCRETION FOR THE LOWER COURT TO DETERMINE THAT PROBABLE CAUSE EXISTED TO AVOID THE APPLICATION OF THE IN TERROREM CLAUSE.

The lower court erred when it determined that the Challening Children and Heirs had probable cause to file an undue influence claim and avoid the interrorem clause in accordance with S.C. Code Ann. § 62-3-905 and §62-7-605. The lower court boldly stated that probable cause did not need to be determined[71], but then found that such existed. Such a statement alone is error. However, in this matter there are even larger issues.

There is no evidence presented to date that would support an undue influence claim or give rise to an undue influence claim.[72] Undue influence requires proof that the influence destroyed the free agency of the maker and prevented the maker to exercise judgment and free choice.[73] Further, it requires actual force and coercion.[74] Inferences are not enough.[75] Finally, and most importantly, the influencing individuals must have replaced the Testator's intent and desires with their own.[76] The evidence presented in this matter does not reflect these elements were ever met or occurred at any point in time. Other than the hearsay

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[70]January 14, 2016 Hearing Transcript, p. 43:25; 44: 1-5. (R., Vol. II, p. 280, l. 25 through p. 281, l. 1-5)
[71]Final Order dated February 24, 2016, p. 16. (R. Vol. I, p. 157)
[72]This is true even if this Court were to determine that Levenson's testimony is admissible as there is no evidence anywhere in his testimony or evidence presented by the moving parties as part of the Joint Motion that would support the idea that James Brown's intent and free agency was destroyed and replaced by the alleged unduly influencing parties.
[73]See Wilson v. Dallas, 403 S.C. 411, 437 (2013).
[74]Id.
[75]Id.
[76]Id.

testimony of Levenson, which even if admissible does not provide the evidence required for proof of all elements of undue influence, and some limited discovery, no other evidence was cited or produced in the record proving each element of undue influence had at least a minimal factual basis thereby creating probable cause. In fact, the opposite is true. The evidence as presented actually proves that most of the elements of undue influence were not present.

The lower court erred in not adequately considering Deanna's deposition wherein she concurred that it was her father's intent to leave his estate to provide financial assistance for the education of his grandchildren and disadvantaged youths. Deanna provided a deposition on October 31, 2007 less than two (2) months prior to contesting her father's Will and Trust on the ground of undue influence seeking for the Will and Trust to pass to her and her siblings intestate and not to provide financial assistance for the education of his grandchildren and disadvantaged youths as Mr. Brown wished. Deanna, in her deposition, only disputed who was appointed trustees. As the following testimony reflects, she did not object to the terms of the Will or Trust as not being her father's wish, desire and intent and confirmed Mr. Brown was of sound mind when the documents were executed:

Q. Do you understand that to have been the last will and testament of your father?

A. Yes

Q. Do you believe your father had full capacity when he executed that document?

A. Yes

Q. Do you have any reason to believe that he did not have full capacity when he executed his last will and testament?

A. Not to my knowledge.

Q. Do you have any problem with the will?

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A. No, I don't have a problem with the will, no.

Q. Do you—is it within your interest to follow your father's wishes as are contained in the will?

A. Yes[77]

***

Q. Do you have any-can you articulate any other problem you have with the trust document other than the decision your father made as to the three trustee?

A. No

Q. Other than the selection that your father made of Cannon, Bradley and Dallas as trustees, are you willing to cooperate with all of the terms of the James Brown Irrevocable Trust?

A. I can't say fully, but most of, yes.

Q. What parts of the James Brown irrevocable trust would you not want to cooperate with other than the selection of the trustees?

A. Other than that—

Q. Yes

A. –I can't think of anything right now.[78]

***

Q. You're aware of an audiotape that's been given to the news?

A. yes

Q. Have you heard the audiotape?

A. yes

Q. Do you believe that audiotape is in fact your Dad's voice?

A. Yes[79]

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[77]Deanna Depo, 16: 5 through 19: 1(R., Vol. III, p. 585, l. 5 through 588, l. 1)
[78]Id. at 24: 2 through 25: 7. (R., Vol. III, p. 593, l. 2 through p. 594, l. 7)
[79]Id. at 62: 10-17. (R., Vol. III, p. 631, l. 10-17)

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Q. In that tape he talks about his desires for his legacy and his estate; is that correct?

A. He mentions that he wants to see poor children taken care of and given an opportunity that he didn't have. . . .

Q. Do you have any disagreement with seeing his words of looking out for poor children implemented?

A. No, I do not.[80]

***

Q. Do you believe that the last will and testament that you saw in December of 2006 does fulfill what he represented to you that you and the other children would be taken care of?

A. Yes[81]

* * *

Q. Let's just say what do you want to see the Trust to be doing right now?

A. Providing the educational money for his grandchildren and a criteria put into place for needy children.[82]

* * *

Q. Just thinking out loud, who do you think would be best to carry out these wishes?

A. Other than me and my brothers and sisters, I don't know.

Q. Would that be your preference that the brothers and sisters carry it out?

A. I know that – I know that we want what Dad wanted. And we know these children can be blessed and that's who – you know, that's who should be blessed, people who can't afford it . . . [83]

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[80]Id. at 63:5-15. (R., Vol. III, p. 632, l. 5-15)
[81]Id. at 72: 9-13. (R., Vol. III, p. 641, l. 9-13)
[82]Id. at 170: 22 through 171: 5. (R., Vol. III, p. 739, l. 22 through p. 740, l. 5)
[83]Id. at 163: 16-25, 164: 2. (R., Vol. III, p. 732, l. 16-25 through p. 733, l. 2)

Q. You said your father was a generous man.

A. Yes

Q. That's certainly clear. What was his heart on the topic of education for poor people, poor children?

A. He wanted to be able to assist poor children getting an education.[84]

In addition to the above testimony, the testimony of the drafting attorney, as quoted in Section II.A of this brief could not have been clearer that there was no undue influence. The other siblings also knew it was their father's intent to leave his estate to educate his grandchildren and needy children. [85] Additionally, the lower court erred in not considering the admittedly limited discovery performed by the Personal Representative and Limited Special Administrator, Trustee and Limited Special Trustee. There were very few depositions taken and very limited discovery. The settlements were even executed prior to taking the deposition of the attorney that drafted the Will and Trust. This is particularly suspect in light of the fact that Levenson testified that he had interviewed the drafting attorney in 2007 and then did not attend the deposition of the same.[86] The simple conclusion that can be drawn from these actions is that he knew what the drafting attorney

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[84]Id. at 160: 20-25; 161: 1-3. (R., Vol. III, p. 729, l. 20-25, p. 730, l. 1-3)

[85]Deanna Depo, pages 14 through 23; 61 through 66; 160 through164; (R. Vol. III, p. 583 through 592, p. 630 through 635, p. 729 through 734, Larry Brown's Responses to LSA Ints. and RFP Response 10 (4) (R., Vol. IV, p. 924); Deanna Brown's Responses to LSA Ints. and RFP Response 10(4) (R., Vol. IV, p. 881) ; Depo. H. Dewain Herring dated November 18, 2015 (52:1-25, 53:1-25, 54:1-25, 55:1-25, 56:1-25, Exhibit 8 (R., Vol. IV, p. 762, l. 1-25, 763, l. 1-25, 764, l. 1-25, 765, l. 1-25, 766, l. 1-25, and 773), (78:1-25, 79:1-13) (R., Vol. IV, p. 771, l. 1-25, p. 772, l. 1-13) and December 9, 2015 (400:10-25, 401:1-25, 402: 1-7, Exhibit 8, 524:15-25, 525:1-2) (R., Vol. IV, p. 780, l. 10-25, p. 781, l. 1-25, p. 782, l. 1-7, p. 826, p. 806, l. 15-25, p. 807, l. 1-2)

[86]January 14, 2016 Hearing Transcript, p. 74:16-25, 75:1-14. (R., Vol. II, p. 311, l. 16-25, p. 312, l. 1-14)

would say (prior to filing his claim with purported probable cause) and did not like it. The South Carolina Supreme instructed the parties in this matter that this evidence was an important factor that needed to be considered. Specifically, the South Carolina Supreme Court noted:

> The AG acknowledged during oral arguments in this matter that he undertook no inquiry into the undue influence claims of the Respondents and the circumstances surrounding Brown's execution of his will. While we do not believe a full-blown, formal investigation is required before a compromise may be reached, we believe something more than a mere accusation and the subjective opinion of the Respondents is necessary to justify court approval of a compromise that seeks to vitiate the decedent's entire estate plan on the on the basis of a vague allegation of undue influence. *Cf.* Russell, 353 S.C. at 220, 578 S.E.2d at 335 (noting 'the circumstances surrounding the execution of the Will . . . is the critical issue when evaluating an undue influence case"); In re Last Will and Testament of Smoak, 286 S.C. 419, 427, 334 S.E.2d 806, 810-11 (1985) (stating a witness's testimony that the will was the result of undue influence was a conclusion "obviously drawn out of thin air" as the witness "knew absolutely nothing about the circumstances under which the Will was executed"; the court noted "one of the basic rights known to our civilization is the privilege of disposing of property by Will as one elects").

Wilson v. Dallas, 403 S.C. 411, 440 (S.C. 2013).

The Contesting Children and Heirs have neither taken any depositions nor made any attempt to schedule depositions and merely provided interrogatories filled with allegations.[87] Moving Parties have failed to submit evidentiary documents into evidence which support all elements of undue influence which would potentially provide a probable cause exception to the in terrorem clauses. As a result, it was error for the lower court to find probable cause existed as the evidence does not support such a ruling. The lower court order should be reversed.

Additionally, the lower court erred in its application of the probable cause standard as it relates to the point in time when it should be analyzed. Specifically,

Levenson testified that he was running a statute of limitations near the end of 2007 and needed to file his claims.[88] This is not true as to an undue influence claim. Such claims are equitable in nature and do not have a statute of limitations.[89] The lower court even noted that more information was learned after the filing.[90] The statutes make it clear that the time at which the probable cause must exist is at the time of filing. Deanna Brown Thomas, at deposition, clearly denoted there was no undue influence. The lower court did not inquire what was learned in the intervening fifty-six (56) days between deposition and filing of the claim that created probable cause. Appellant contends there was nothing as nothing has been presented. Levenson even testified that some of the evidence that he was relying on was found after filing, which would denote a lack of probable cause.[91] The lower court failed to do a proper inquiry into this evidence and probable cause relative to timing of the same which is reversible error.

Further, the lower court erred when it accepted certain evidence as true that was factually incorrect based on the documents. The Court referenced the unusual compensation provision to which Levenson referred.[92] The only problem is that this "unusual" compensation provision under Article X(2) of Trust and Item IV(3) of the Will are not compensation provisions at all, but instead, tax allocation and administration provisions that limit the amount of income that can be allocated to certain

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[87]Deanna, Yamma and Larry Responses to LSA Req. for Int. and RPD (R., Vol. IV, p. 827, p. 870, p. 914)
[88]January 14, 2016 Hearing Transcript, pp. 59:24-25; 60:1-6. (R., Vol. II, p. 297, l. 24-25, p. 298, l. 1-6)
[89]See Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005).
[90]See January 14, 2016 Hearing Transcript, p. 60:7-10. (R., Vol. II, p. 298, 7-10)
[91]Id. at p. 39:19-25, 40:1-2. (R., Vol. II, p. 276, l. 19-25, p. 277, l. 1-2)

expenses for tax puprposes. They do not in any way effect the actual compensation paid to the Personal Representative or Trustee. The Will and Trust both clearly state that fiduciary compensation should be reasonable compensation. Those are not unusual compensation provisions. To construe otherwise is error. The Court erred in accepting this evidence as it is not what the actual documents say.

Finally, as there was no probable cause the fiduciaries could not settle this matter. The lack of probable cause meant there was no consideration to support the settlement agreements because the in terrorem clause should be enforced as there is no good faith challenge to surrender that would constitute consideration for the settlement. The Supreme Court of South Carolina made this clear in the prior ruling in this case in Wilson v. Dallas when it stated:

> In general, a threat to contest a will must be made in good faith in order for the surrender of the right to constitute consideration for a family settlement, and if it is made in bad faith to extort a settlement, or if the claim is known to be frivolous and without foundation, then it is not in good faith.

Wilson v. Dallas, 403 S.C. 411, 435 (S.C. 2013).

Based on the foregoing, when the actual evidence of no undue influence is coupled with the absolute lack of evidence proving undue influence and improper temporal application of the probable cause standard, only one result can be reached. The lower court abused its discretion in determining that probable cause existed and misapplied the law and evidence. The court further erred when it determined there was actual consideration for the settlement agreements as a result of the existence of probable cause to bring an undue influence claim. The lower court's ruling should be

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[92]Final Order dated February 24, 2016, p. 15 (R., Vol. I, p. 156); January 14, 2016 Hearing

reversed and remanded with instructions finding that probable cause exception for enforcement of the in terrorem clauses does not exist thereby excluding the Challenging Children and Heirs from the Estate.

## V. THE LOWER COURT ERRED IN DETERMINING THAT APPELLANT SIGNING A SETTLEMENT AGREEMENT WAS A VIOLATION OF THE IN TERROREM CLAUSES.

The lower court erred in footnote 10 of the Final Order dated February 24, 2016 when it determined that Appellant would be in violation of the in terrorem clause for signing the 2009 settlement agreement that was struck down as illegal by the South Carolina Supreme Court in Wilson v. Dallas. That settlement agreement failed as it was illegal, lacked consideration and was rescinded thereby making the settlement agreement void ab initio and a nullity. See Crowe v. Cherokee Wonderland, Inc., 379 F.2d 51 (1967) (failure of consideration nullifies a contract); Groesbeck v. Marshall, 44 S.C. 538 (1895) (contract based on illegal consideration is null and void); Rice & Santos, Inc. v. Jones, 279 S.C. 201 (1983) (rescission occurs where the parties are returned to the status quo). Further, execution of the 2009 settlement agreement logically cannot be a violation of an in terrorem clause because such a result would mean that no document involving an in terrorem clause could ever be settled if litigation arose over estate documents because signing a settlement agreement would violate the clause. Additionally, the other siblings, who have been rewarded by the lower court's Final Order dated February 24, 2016, signed the same 2009 settlement agreement. Footnote 10 of the lower court's Final Order places the Trustee and Personal Representative in quandary (which proves that it is incorrect). If signing the 2009 settlement agreement is a violation of the in terrorem clause, the Trustee and Personal

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Transcript p. 90:3-11; 91:5-24. (R., Vol. II, p. 327, 3-11, p. 328, l. 5-24)

Representative should never have filed the joint motion that led to the settlements being appealed in this case. Instead, the fiduciaries should have pursued all of the siblings in violation of the in terrorem clause. Failure to do anything else is a breach of fiduciary duty to the charitable remainder beneficiary assuming the lower court's determination is correct. If the lower court's ruling in footnote 10 is correct, the Joint Motion, as filed, approving the settlement with the five (5) children and their heirs is a breach of duty by the Personal Representative and Trustee. This would be a clear abuse of discretion to unevenly apply a law or ruling differently against similarly situated parties in the same case. Logically, such determination cannot be correct. Signing a settlement agreement is not a breach of an in terrorem clause. The lower court erred when it determined that signing a settlement agreement was a breach of an in terrorem clause. Finally, the lower court provided no evidence or case law in support of its ruling in footnote 10. The ruling was an abuse of discretion and should be reversed.

## VI. THE LOWER COURT ERRED WHEN IT ALLOWED A PARTY WITH NO STANDING TO PARTICIPATE IN THE PROCEEDING WHEN IT WAS RULED THAT SUCH PARTY DID NOT HAVE STANDING.

It was error for the lower court to invite Mr. Medlin to be involved in the proceeding in any fashion as it was determined that he did not have standing to be involved in the motion hearing by the lower court.[93] The Court specifically asked him if he wanted to be involved: "Anyone else? Professor Medlin."[94] Mr. Medlin attempted to tell the Court he was not a party, but the Court invited him to testify.[95] Further, while Mr. Medlin is an accomplished and distinguished attorney and professor in South Carolina, it reflects a bias

[93]January 14, 2016 Hearing Transcript, p. 75:15-21; 100:1-25; 101:1-25. (R., Vol. II, p. 312, l. 15-21, p. 337, l. 1-25, p. 338, l. 1-25)
[94]Id.

of the lower court when he is referred to as "Professor" while he is acting as an advocate for a client in open court. Based on this issue, the lower court ruling should be reversed for procedural deficiencies.

## CONCLUSION

In conclusion, for the reasons stated above, the Appellant respectfully requests that this Court reverse the judgment of the Circuit Court. The lower court abused its discretion and erred in the application of law and evidence. The settlement agreements were legally and procedurally improper. The in terrorem clauses in the Will and Trust were improperly ignored. In fact, the lower court failed to properly apply the evidence in this matter and should have found that there is no probable cause for the undue influence claims filed by the Challenging Children and Heirs. Further, as a result of such finding, the in terrorem clauses in the Trust and Will should have been enforced against such individuals thereby ending their interest in this matter. The lower court abused its discretion and misapplied and misconstrued the law when it ruled otherwise. Therefore, this Court should reverse the lower court ruling and remand with instructions that the lower court find that no probable cause exists for the Challenging Children and Heirs to bring and undue influence claim and that they have no further interest in the Estate as a result of the application of the in terrorem clause.

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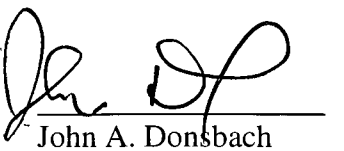
[95] Id.

This 12th day of January, 2017.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals



APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge
Trial Court Case No. 2008-CP-02-01647

Appellate Case No. 2016-001373

In Re: The Estate of James Brown a/k/a James Joseph Brown

The Estate of James Brown; James Brown Irrevocable Trust Agreement, u/a/d August 1, 2000, by and through its fiduciaries Russell L. Bauknight, Personal Representative and Trustee, and David C. Sojourner, Jr., Limited Special Administrator and Limited Special Trustee, Respondents, and

Tonya Brown a/k/a Sarah LaTonya Brown, Vanisha Brown, Larry Brown, Deanna J. Brown Thomas, Jason Brown Lewis and Yamma N. Brown Lumar, individually and on behalf of her minor children, Sydney Lumar and Carrington Lumar, Respondents, and

Daryl Brown and Terry Brown, Respondents below,

Of whom Terry Brown is the Appellant.

## CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

January 12, 2017.

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