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

Case Nos. 2013-CP-02-02849, 2013-CP-02-02850

Appellate Case No. 2015-002417

Tommie Rae Brown .....Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown, Respondents below,

Of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown, and Daryl Brown are the.....Appellants.

AMENDED INITIAL BRIEF OF RESPONDENT TOMMIE RAE BROWN

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STATEMENT OF ISSUES ON APPEAL

The issue sub judice is whether Mrs. Brown[1] is the surviving spouse of James Brown for purposes of her elective share and omitted spouse's claims ("spousal claims"). Mrs. Brown asserted her spousal claims against the Estate of James Brown; consequently, the determination of her status as a surviving spouse is defined by the South Carolina Probate Code, more specifically S.C. Code Ann. § 62-2-802.

STATEMENT OF THE CASE

Mr. and Mrs. James Brown were married in a traditional ceremonial marriage in Aiken County, South Carolina on December 14, 2001, as evidenced by a marriage license and certificate issued by the Aiken County Probate Court. (Joint Stipulation of Facts at ¶¶ 4-5, Stipulation Ex. 4, p. 000005.) Their son, James Brown II, was born on June 11, 2001. (*Id.* at ¶ 3, Stipulation Ex. 2-3, p. 000003-04.) Mrs. Brown had previously attempted to marry Javed Ahmed in Texas in 1997 (*Id.* at ¶¶ 1-2, Stipulation Ex. 1, p. 000001-02.); however, he was married at the time. (Stipulation Ex. 12, p. 000029-32.) With funds provided for that purpose by Mr. Brown, Mrs. Brown hired Robert Rosen, who, in December 2003, brought an action on her behalf to obtain an annulment from Ahmed. (Joint Stipulation of Facts at ¶ 13.) In January 2004, soon after Mr. Brown was arrested in a domestic violence dispute, Mr. Brown brought an action in the Aiken County Family Court to obtain an annulment from Mrs. Brown. (*Id.* at ¶ 19.) On April 15, 2004, the Charleston County Family Court issued a final, unappealed order ruling,

[1] The Briefs of Appellants Terry Brown, Deanna Brown-Thomas, Yamma Brown, and Venisha Brown (but not the LSA's brief) refer condescendingly to Mrs. Brown as "Hynie," her maiden name. Counsel for Mrs. Brown has continuously requested throughout the course of this litigation that opposing counsel be civil and respectful to Mrs. Brown, the wife of James Brown and the mother of James Brown's son, and use her proper legal name, but so far to no avail.

inter alia, that Ahmed was already married at the time of the attempted marriage to Mrs. Brown in 1997 and that the putative Brown-Ahmed marriage was void *ab initio* for bigamy. (*Id.* at ¶ 11, Stipulation Ex. 12, p. 000029-32.) The family court therefore annulled the putative marriage between Ahmed and Mrs. Brown on the ground of Ahmed's bigamy and other grounds. The annulment order has never been appealed.

Three weeks later, Mr. Brown amended his complaint in the Aiken County case, stating therein that "[t]he Charleston County Family Court granted the Defendant an annulment on April 15, 2004. (A copy of this Order is attached hereto and incorporated by reference)."[2] He argued the "[t]he Charleston County Family Court made Findings of Facts," that "the Findings of Facts of the Charleston Family Courts are binding on [the Aiken County Family] Court," and that "[Mrs. Brown] is collaterally and judicially estopped from denying the allegations in this action."[3] Mr. Brown clearly accepted the benefits of the Charleston County Family Court order when he utilized the order to advance his own position in the Aiken County action.

In July 2004, Mr. and Mrs. Brown reconciled, and they signed a consent order dismissing Mr. Brown's annulment action against Mrs. Brown, as well as her counterclaim for divorce and support, effective August 16, 2004. (*Id.* at ¶ 19, Stipulation Ex. 19, p. 000085-86.) Neither Mr. Brown nor Mrs. Brown thereafter sought to terminate or annul their marriage through the date of his death on December 25, 2006.

For purposes of this summary judgment action, the parties signed a Joint Stipulation establishing certain facts. *See* Joint Stipulation of Facts, filed Sept. 5, 2014. Although the Stipulation resolves all of the *material issues* of fact before the trial court

[2] Joint Stipulation of Facts at ¶ 19, Stipulation Ex. 16, p. 000070, at ¶ 9.
[3] *Id.* at Stipulation Ex. 16, p. 000070, at ¶¶ 8, 10, 11.

regarding the validity of Mrs. Brown's marriage to Mr. Brown, none of these facts was necessary for the trial court's ruling on Mrs. Brown's Motion for Summary Judgment. The ruling was a matter of law based solely on appropriate judicial notice of South Carolina court records, to which the parties stipulated. The trial court agreed with Mrs. Brown and granted her motion for summary judgment that she is Mr. Brown's surviving spouse. The opposing parties now appeal.

Mrs. Brown stresses that this appeal presents only the limited question of whether she is the surviving spouse of Mr. Brown. Other matters involving her spousal claims have not yet been addressed, such as whether or not there is a valid prenuptial agreement between Mrs. and Mr. Brown. The surviving spouse issue is important as it, first and foremost, relates to the status of the Brown's minor child, James Brown II, as well as to Mrs. Brown's social security, retirement funds, health insurance, and other benefits regardless of her rights in the estate.

ARGUMENTS

I. INTRODUCTION

"In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005).

For purposes of this action, the South Carolina Probate Code sets forth the requirements to determine whether Mrs. Brown is the surviving spouse of Mr. Brown. The determination is made at the time of Mr. Brown's death. S.C. Code Ann. § 62-2-

802(a) provides that, because Mr. and Mrs. Brown engaged in a ceremonial marriage evidenced by a valid South Carolina marriage license, Mrs. Brown is the surviving spouse because she was not divorced from Mr. Brown nor had their marriage been annulled at the time of his death.

Appellants want to dispute the validity of Mrs. Brown's marriage to Mr. Brown by attacking the valid unappealed family court order holding that Mrs. Brown had no impediment to her marriage to Mr. Brown. The family court held that Mrs. Brown was never married to Ahmed because of Ahmed's bigamy. However, the trial court, addressing a probate matter, has no subject matter jurisdiction to relitigate that family court order. Only the family court has exclusive subject matter jurisdiction over annulments; neither a probate court nor a circuit court has subject matter jurisdiction over annulments. Thus, the family court order stands.

Even if the trial court had subject matter jurisdiction to relitigate the Brown-Ahmed annulment, Appellants lack standing to do so. Mr. Brown lacked standing to do so. Any rights of Appellants are derivative from Mr. Brown, so they similarly lack standing to relitigate the Brown-Ahmed annulment.

After a quarrel with Mrs. Brown, Mr. Brown availed himself of the one method to invalidate his marriage to Mrs. Brown: he brought his own annulment action. However, he dismissed that action and never again sought to invalidate his marriage to Mrs. Brown. Consequently, Mr. Brown died knowing he was married to Mrs. Brown. Even if Appellants had standing to do what Mr. Brown chose not to do – invalidate his marriage to Mrs. Brown – it is too late. One cannot obtain a posthumous annulment.

Nevertheless, Appellants want to undo what Mr. Brown did.

The Limited Special Administrator ("LSA") appeals, apparently, to protect Mr. Brown's purported 2000 will and trust. The LSA does so despite the fact that the purported 2000 will and trust were executed before Mr. Brown's marriage to Mrs. Brown and the birth of their son. The LSA is trying to protect a will and trust that are subject to claims of undue influence by the three discredited men[4] who controlled Mr. Brown while he was alive and who would benefit under those documents by being entitled to receive *fifty percent* of the *gross income, plus trustees' fees*, from his assets instead of these monies going to charity. Perhaps most importantly, the LSA does so to protect a purported trust that was irrevocable and not only gave these three men the right to *fifty percent* of the gross income from Mr. Brown's trust assets *while he was still alive*, but gave them *total discretion* to determine whether Mr. Brown would receive even one penny from those *assets while he was alive*. That Mr. Brown would willingly cede such total control over his assets while alive is incredible. The LSA ignores these obvious problems in a tunnel-visioned attempt to assert the dubious validity of the will and trust by attempting to undo what Mr. Brown wanted: his marriage to Mrs. Brown.

Failing to relitigate the validity of the family court order confirming that the putative Brown-Ahmed marriage was void *ab initio* for bigamy, Appellants attempt to pervert existing South Carolina statutory and case law by misinterpreting the opinions of this Court and the Supreme Court in the *Lukich* cases. Contrary to Appellants' position, *Lukich* and every other South Carolina case, in accordance with the requirement of S.C. Code Ann. § 20-1-80, holds that a bigamous marriage is void *ab initio* and never a

[4] One of these men was found to have lied under oath to the court. Another is under house arrest for stealing from Mr. Brown. The other is deceased. *See Wilson v. Dallas*, 403 S.C. 411, 420, 743 S.E.2d 746, 751 n.2 (2013).

marriage. Consequently, the putative Brown-Ahmed marriage was never valid, and Mrs. Brown had no impediment to her marriage to Mr. Brown, which remained valid up to the time of his death.

As noted by the trial court's order, Appellants entered into a binding private settlement agreement in which they agreed that Mrs. Brown was the surviving spouse of Mr. Brown – a position they asserted before the South Carolina Supreme Court.[5] The agreement provided that the settlement was binding despite the lack of any court approval. S.C. Code Ann. § 62-3-912 recognizes the binding nature of such a private settlement agreement, even without court approval. Although the Supreme Court in *Wilson v. Dallas*[6] overturned the trial court's approval of the settlement agreement for lack of sufficient evidence, the opinion did not address the alternative issue of the binding private nature of the settlement agreement.

II. SURVIVING SPOUSE STATUS IS DETERMINED UNDER THE SOUTH CAROLINA PROBATE CODE.

The issue before the court is whether Mrs. Brown is the surviving spouse of Mr. Brown. "Surviving spouse" is a defined term under S.C. Code Ann. § 62-2-802(a), which provides that:

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

(emphasis added).

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[5] Order Approving Settlement Agreement (May 26, 2009), p. 14 at ¶ 3 (stating "Tommie Rae was the legal wife of James Brown, during his lifetime and at the time of his death, and qualifies as his surviving spouse.").

[6] 403 S.C. 411, 420, 743 S.E.2d 746 (2013).

Mr. and Mrs. Brown had a valid marriage license and certificate evidencing their ceremonial marriage. Thus, for Mrs. Brown not to be Mr. Brown's surviving spouse under section 62-2-802, it must be determined that Mr. and Mrs. Brown were either divorced or that their marriage was annulled by the time of his death. Mrs. Brown's status as the surviving spouse is determined as of the time of Mr. Brown's death. Mr. and Mrs. Brown were never divorced and their marriage was never annulled. Consequently, she is the surviving spouse as defined in the South Carolina Probate Code.

In order for a divorce or annulment to preclude someone from being the surviving spouse of a decedent, the South Carolina Probate Code requires a *signed order* of divorce *or annulment filed* with the clerk of court. S.C. Code Ann. § 62-2-802(c). Under South Carolina law, that signed order must be filed with the court before the decedent's death. *Hatchell-Freeman v. Freeman*, 340 S.C. 552, 532 S.E.2d 299 (Ct. App. 2000); *Bayne v. Bass*, 302 S.C. 208, 394 S.E.2d 726 (Ct. App. 1990); Roy T. Stuckey, *Marital Litigation in South Carolina* § 1.E (3d ed. 2006). There is no such thing as a postmortem annulment. *See generally id.*

Because Mrs. Brown presented a valid marriage certificate and court records prove that the marriage of Mr. and Mrs. Brown was never terminated by divorce and never annulled, Mrs. Brown qualifies as Mr. Brown's surviving spouse.

Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013), did not rule on Mrs. Brown's status as surviving spouse. Instead, in concluding that the trial court lacked evidence to determine that the settlement agreement was just and reasonable,[7] the

[7] The practical result of the *Wilson* decision was to deprive the charitable trust of the extremely valuable contribution of certain federal termination rights by Mrs. Brown and the Brown children, as the agreement

Supreme Court suggested that there were two principal obstacles in the way of Mrs. Brown's spousal claims, neither of them being the issue before this Court, that she was not in fact the surviving spouse of Mr. Brown. First, as to Mrs. Brown's elective share claim, the Supreme Court assumed that Mrs. Brown executed a valid prenuptial agreement waiving all rights to Mr. Brown's property or any statutory claims against his estate, and observed that "[a] valid prenuptial agreement would normally preclude any right to an elective share." *Id.* at 440, 743 S.E.2d at 762. The Court seemed to presume that the alleged prenuptial agreement was valid even though that issue has not yet been determined. Second, as to Mrs. Brown's omitted spouse claim, the Supreme Court noted that Brown's testamentary documents state that he was specifically omitting any other beneficiaries or potential beneficiaries, including a future spouse or heirs, based on his desire to leave most of his estate to charity after providing for the education of his grandchildren. *Id.* at 441, 743 S.E.2d at 762. Similarly, his intent on that issue has yet to be determined in the trial court.

In short, were this Court to affirm the lower court, it gives Mrs. Brown nothing from the Estate. It only means she was, in fact, Mr. Brown's wife, which of course, is an extremely important ruling for her and her son. The issue of any waiver of the elective share is not a matter for this summary judgment, which addresses only the validity of the marriage with respect to Mrs. Brown's status as surviving spouse.

As to Mrs. Brown's status as surviving spouse, *Wilson v. Dallas* noted the language in the trial court's order that the *Lukich* case supported the validity of Mrs. Brown's marriage to Mr. Brown. *Wilson v. Dallas* did not reverse that conclusion

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had provided for, as well as to continue the extremely expensive estate litigation, at the ultimate expense of the charitable trust.

although the Supreme Court had the opportunity to do so.[8] Had the Supreme Court believed Mrs. Brown was not Mr. Brown's wife under *Lukich*, it could easily have said so. If the effect of *Lukich* was that Mrs. Brown was not Mr. Brown's wife, this would have been the most compelling point that the Supreme Court could have made to invalidate the settlement agreement. Apparently, the Supreme Court understood that, not only does *Lukich* not invalidate the marriage of Mrs. Brown and Mr. Brown, it confirms the validity of that marriage.

The resolution of the surviving spouse issue under S.C. Code Ann. § 62-2-802 is clear and simple. Consequently, Appellants have been forced to resort to two arguments about the validity of the marriage of Mr. and Mrs. Brown, neither of which is correct. They attempt to attack the validity of the Brown-Ahmed annulment order, and they attempt to turn the *Lukich* decisions upside down.

III. APPELLANTS LACK SUBJECT MATTER JURISDICTION AND DERIVATIVE STANDING TO ATTACK THE FINAL ORDER OF THE SOUTH CAROLINA FAMILY COURT RULING THAT MRS. BROWN WAS NEVER MARRIED TO AHMED.

Appellants attack the validity of the family court order obtained by Mrs. Brown in 2004 holding that, because her putative marriage to Javed Ahmed was bigamous, it was void *ab initio*. Despite the fact that Mr. Brown declined to seek an annulment after dismissing his family court action, Appellants would like the trial court to re-try the

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[8] The opinion expressly declined to comment on the *Lukich* issue:

> The circuit court noted the decision of the Court of Appeals in *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006), in which the Court of Appeals held that an annulment declaring a spouse's first marriage void could not retroactively validate the spouse's second marriage. The circuit court distinguished Brown's situation, opining that the rule in *Lukich* did not apply where the first marriage was never valid because one of the parties was already married. This Court has since affirmed *Lukich*, in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008). We express no opinion, however, on the circuit court's interpretation here.

403 S.C. at 434 n.16.

Brown-Ahmed annulment case and presumably reach a different conclusion so they can argue that Mrs. Brown had an impediment to her marriage to Mr. Brown. That, of course, is not possible for a number of reasons.

A. Only the Family Court Has Subject Matter Jurisdiction over Annulments

The trial court has no subject matter jurisdiction to relitigate that family court order. Only the family court has jurisdiction over annulments. S.C. Code Ann. § 63-3-530(A)(6). This has been the law in South Carolina for a very long time. *See, e,g.*, *White v. White*, 283 S.C. 348, 323 S.E.2d 521 (1984); *Splawn v. Splawn*, 311 S.C. 423, 429 S.E.2d 805 (1993); *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004) (*Rodman* and *Splawn* affirm that equitable apportionment can occur after annulment, but that is authorized by S.C. Code Ann. § 20-3-620(A), which allows property division in "other marital litigation" which would certainly include annulments.). Neither the probate court nor the circuit court has jurisdiction over annulments.[9]

The Final Judgment annulling Mrs. Brown's marriage to Ahmed was rendered in the Family Court. (Joint Stipulation of Facts at ¶ 11, Stipulation Ex. 12, p. 000029-32.)

"The family court has exclusive jurisdiction . . . to hear and determine actions for the annulment of marriage." S.C. Code Ann. § 63-3-530(A)(6). Because the jurisdiction of the family court is exclusive, the court of common pleas has no jurisdiction over

[9] The spousal claims in this case were removed from the probate court to the circuit court. Thus, the trial court could properly rule, as it did, on summary judgment that Mrs. Brown is the surviving spouse under the South Carolina Probate Code, S.C. Code Ann. § 62-2-802, because the Brown-Brown marriage was not annulled or terminated by divorce, and the trial court did not have subject matter jurisdiction to otherwise contradict the validity of the Brown-Brown marriage or the Brown-Ahmed annulment. *See also* S.C. Code Ann. § 62-1-302(c) (giving the probate court concurrent jurisdiction only to *interpret* marital agreements — *not decide the validity of the marriage* — because the interpretation of a marital agreement, such as a prenuptial agreement or a postnuptial agreement, may impact rights in an estate. That section also gives the probate court concurrent jurisdiction to hear issues related to common law marriage, but that issue is not relevant here because Mrs. Brown relies on her ceremonial marriage.)

annulments. The trial court agreed. "To allow [Appellants] to challenge Mrs. Brown's annulment from Ahmed in this court would subvert the exclusive authority granted to the family court by the South Carolina General Assembly." (Order Granting Mot. Summ. J. (Jan. 13, 2015) p. 24.) "[T]he General Assembly prohibited all other courts from going behind the family court's annulment orders." (*Id.*)

Thus, for purposes of determining surviving spouse status for this probate case, the trial court has to assume the validity of the annulment order because the trial court lacks subject matter jurisdiction. Appellants have not been able to explain the trail back to the family court to relitigate the Brown-Ahmed annulment because there is none. Only Mrs. Brown and Ahmed could have done so, and neither did.

B. Appellants Lack Derivative Standing to Contest the Family Court Order

Even if subject matter jurisdiction did not preclude the circuit court from relitigating the Brown-Ahmed annulment, Appellants lack standing to do so.[10] Mr. Brown himself certainly could not do so. As noted in this Court's decision in *Lukich v. Lukich*, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (Ct. App. 2006), *aff'd*, 379 S.C. 589, 666 S.E.2d 906 (2008), Mr. Brown would not have had standing to intervene in the Brown-Ahmed annulment case. Any rights Appellants have are derivative from Mr. Brown and can certainly be no greater than the rights he had while alive.[11] In any event, Mr. Brown

[10] In addition to Appellants lack of subject matter jurisdiction to challenge the family court's order, there are several other reasons Appellants are bound by the annulment order. *See infra* Parts III.B, V, VI, IX.

[11] Heirs are generally in privity with their ancestors. *Thompson v. Hudgens*, 159 S.E. 807, 812 (S.C. 1931). Consequently, heirs are barred from asserting claims that their ancestors would have been barred from asserting. *Watson v. Watson*, 174 S.E. 33, 36 (1934). In *Watson*, the decedent was barred from attacking a divorce; the Court held that those in privity with him, such as his children, were likewise barred. These rulings are obvious because heirs and devisees of a decedent cannot acquire any greater rights through the decedent than the decedent had himself. *See also Neely v. Thomasson, 365 S.C. 345, 618 S.E.2d 884 (2005) ("As a result, Decedent's heirs are likewise barred from asserting claims that Decedent himself would have been barred from asserting. See Watson, 172 S.C. at 370-71, 174 S.E. at 36.").* Similarly, a personal

never attempted to collaterally attack the Brown-Ahmed annulment order. Indeed he relied on it himself.[12]

Mr. Brown availed himself of the one method he had available to him: he brought his own annulment action against Mrs. Brown to invalidate the Brown-Brown marriage.[13] Mrs. Brown counterclaimed for divorce. They mutually dismissed the action.[14] (Joint Stipulation of Facts at ¶ 19, Stipulation Ex. 19, p. 000085-86.) Obviously, Mr. Brown knew the one method to invalidate his marriage to Mrs. Brown was to seek an annulment – because he sought one – yet, after the consent dismissal, he never brought such an action again. Even if Appellants had standing to pursue an annulment, it is too late.

James Brown's estate and James Brown's heirs all claim through him, and they are successors in interest to whatever rights he had. If he was bound by the result of the annulment action, his estate and heirs are likewise bound.

IV. *LUKICH* DOES NOT INVALIDATE THE MARRIAGE OF MR. AND MRS. BROWN; *LUKICH* CONFIRMS THE VALIDITY OF THAT MARRIAGE.

A. Introduction

Mrs. Brown had no impediment to her marriage to Mr. Brown because her previous attempted marriage to Ahmed was void *ab initio* for *bigamy*, as held in the unappealed order of the family court. (Joint Stipulation of Facts at ¶ 11, Stipulation Ex.

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representative's relationship with the decedent exemplifies the classic case of privity with the decedent; it would be illogical for a personal representative, representing the decedent, to have greater rights through the decedent than the decedent had himself.

[12] *See infra* Parts V, VI.

[13] The only way to invalidate a marriage in South Carolina is by an annulment action. *See* Stuckey, *supra* at 3.A.

[14] Appellants, especially Terry Brown, take the absurd position that the dismissal of Mr. Brown's annulment action somehow granted him an annulment. *See, e.g.*, Appellant Terry Brown's Br. 35-36. Nor can Appellants credibly argue that, upon dismissing his annulment action, Mr. Brown was relying on *Appellants'* incorrect interpretation of the *Lukich* case, discussed *infra,* to form a belief that he was never married to Mrs. Brown, *because Lukich had yet to be decided.*

12, p. 000029-32.) Under the applicable South Carolina statute, S.C. Code Ann. § 20-1-80, and *all precedent*, Mrs. Brown's putative marriage to Ahmed was never valid. Mrs. Brown was unmarried when she married Mr. Brown in a proper ceremonial marriage.

Yet, Appellants propose that this Court accept Appellants' preposterous version of longstanding South Carolina law. Their position would completely overturn existing law. Appellants' argument is that the order annulling the putative Brown-Ahmed marriage as bigamous does not relate back – does not treat that putative marriage as void *ab initio* – and is prospective only. Thus, according to Appellants, Mrs. Brown was married when she married Mr. Brown, with that impediment rendering the Brown-Brown marriage invalid as bigamous. Appellants argue that *Lukich* holds that a bigamous marriage is valid unless and until a court order annuls it, and that such an order of annulment does not render the marriage void *ab initio*, but operates only prospectively – from the time of the order.

The Court of Appeals and Supreme Court opinions in *Lukich* do no such thing. Rather, both *Lukich* opinions follow the required statutory treatment of a bigamous marriage as void *ab initio* – never a marriage – as has *every* South Carolina case addressing the effect of a bigamous marriage. The South Carolina appellate courts have always held, as did the *Lukich* court, that *bigamous marriages* are void, rather than merely voidable. S.C. Code Ann. § 20-1-80 has always required that a *bigamous marriage* is void, not merely voidable. To hold otherwise would contravene clear legislative intent. It would be contrary to strong public policy to recognize a bigamous marriage as *ever* being valid. That strong public policy is further evidenced by the South Carolina statute that criminalizes bigamy. *See State v. Sellars*, 140 S.C. 66, 134 S.E. 873

(1926). Yet, according to Appellants, a bigamous marriage is *valid* unless and until a court order annuls it, and the annulment order is prospective only, thereby allowing a bigamous marriage to legally exist until annulled. No court has adopted Appellants' position.

Lukich deals with two *annulled* marriages. Marriage #1 was annulled after Wife entered into putative Marriage #2. During the divorce from Husband #2, Wife sneaked off to a different family court behind Husband #2's back and obtained an annulment from Husband #1 on the grounds of intoxication. (Unlike *Lukich*, Mr. Brown was not only aware of his wife's annulment, he paid for it. (Joint Stipulation of Facts at ¶ 13.)) An annulment for reasons of *intoxication* is voidable – that is, it is valid unless and until the parties have that marriage annulled. The Court of Appeals and the Supreme Court both ruled that the annulment for intoxication – a voidable marriage – did not relate back to the date of Marriage #1 for purposes of determining whether Wife had an impediment – bigamy – to putative Marriage #2. *Both appellate courts thus ruled that Marriage #2 was void ab initio – never valid – because of bigamy.* Thus, *Lukich* is just the latest in the seamless line of cases holding that bigamous marriages are void and never valid.

Either through misunderstanding or misstatement, Appellants refuse to recognize that this Court and the Supreme Court held in *Lukich* that the bigamous marriage – in that case, Marriage #2 – was void *ab initio*, and they refuse to recognize that the order of marriages in *Lukich* was different than the order of marriages in this case. In *Lukich*, it was Marriage #2 that was bigamous and void because the annulment of Marriage #1 was merely voidable. In this case, however, it is putative Marriage #1 (Brown-Ahmed) that

was bigamous and thus void – never a marriage. Because putative Marriage #1 was never a marriage, it was not an impediment to Marriage #2 (Brown-Brown).

Appellants argue that, despite the statute requiring a bigamous marriage to be void and every prior case so holding, *Lukich* overturned that rule and all precedent while citing the very cases that upheld that rule.

Even if Appellants' view of *Lukich* were accurate, which it is not, their argument would still fail. They contend that *Lukich* requires an order to annul a marriage, that a marriage is valid unless and until an annulment order is obtained. Appellants own "logic," when applied to the Brown-Brown marriage, would require this Court to find that Mrs. Brown is Mr. Brown's surviving spouse. Under their own theory, the Brown-Ahmed marriage was not annulled until after the Brown-Brown marriage, and the annulment was prospective only. Thus, according to Appellants, the Brown-Brown marriage was bigamous because Mrs. Brown had an impediment to that marriage. But, using Appellants' theory, the Brown-Brown "bigamous" marriage would nevertheless be valid until Mr. Brown obtained an annulment order, which he never did, and it is now too late to obtain one. Thus, under Appellants' theory of *Lukich*, the Brown-Brown marriage is valid because no annulment thereof was ever obtained and it is too late to obtain one. One cannot commence and obtain a posthumous annulment in South Carolina. *See generally* Stuckey, *supra*, at 1.E.

Examining the impact of *Lukich* on South Carolina jurisprudence first requires an examination of South Carolina law prior to *Lukich*.

B. The Bigamy Statute

The South Carolina General Assembly has clearly spoken through S.C. Code

Ann. § 20-1-80 that a bigamous marriage is "void" — i.e., never a marriage and never valid from the beginning.[15] This section reads as follows:

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

S.C. Code Ann. § 20-1-80.

A void marriage is treated differently from a voidable marriage. A voidable marriage can be valid unless and until a court rules that such a marriage is invalid, but a void marriage is never valid for any purpose.

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

"An annulment declares that a marriage never occurred because of some defect. Defective marriages may be either void or voidable. In a void marriage, the circumstances are such that the marriage could never have come into being. A voidable marriage is recognized under the law as a valid marriage until an action is brought to prove it invalid." Stuckey, *supra*, at 3.A. A bigamous marriage is void.[16] *Id.*

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[15] For more than a century, that statute has provided that bigamous marriages are void. This is consistent with the public policy against bigamous marriages. For example, entering into a bigamous marriage is a crime. Note, however, that *State v. Sellars*, 140 S.C. 66,134 S.E. 873 (1926), recognizes, as do all the other bigamy cases, that a bigamous marriage is void *ab initio*, so that a void first marriage is not an impediment to a valid second marriage, and thus the second marriage is not bigamous and not a crime. This is the Brown-Brown marriage situation.

[16] In fact, "a void [bigamous] marriage technically needs no judicial action to declare that it is void." *Id.*

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

C. Case Precedent: A Bigamous Marriage Is Void *Ab Initio* and Never a Marriage

The annulment order in this case was granted on the most serious and substantial of all grounds for rendering a marriage void: bigamy. It is against public policy and a crime to commit bigamy. A long line of South Carolina cases, including *Lukich*, holds that a bigamous marriage is not a marriage at all, at any point in time. In fact, every South Carolina case considering the issue has concluded that a bigamous marriage is void *ab initio*, and thus never a marriage:

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

Johns v. Johns, 309 S.C. 199, 201, 420 S.E.2d 856, 858 (Ct. App. 1992) (emphasis added).

"A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable." *Day v. Day*, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) (emphasis added).

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

the time of the claimed marriage." *Ex parte Blizzard*, 185 S.C. 131, 193 S.E. 633, 634 (1937).

"When, however, there is an impediment to marriage, such as one party's existing marriage to a third person, *no common-law marriage may be formed*, regardless whether mutual assent is present." *Callen v. Callen*, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005) (emphasis added); *see also Splawn*, 311 S.C. at 425, 429 S.E.2d at 806; 52 Am. Jur. 2d *Marriage* § 57 ("A marriage that occurs while one party is still legally married to another is void from its inception and cannot be retroactively validated by estoppel, by mutual agreement, or by the parties' conduct in holding themselves out as husband and wife.").[17]

This is hardly surprising because the courts are required to follow the mandate from the legislature that bigamous marriages are void *ab initio*.

D. *Lukich v. Lukich*

Both the Court of Appeals and Supreme Court decisions in *Lukich*[18] are in accord with S.C. Code Ann. § 20-1-80, case precedent, and Mrs. Brown's position. *Lukich* held that a *bigamous* marriage is void *ab initio*. *Lukich* also held that another marriage, annulled for i*ntoxication rather than bigamy*, could be treated as voidable. As explained above, *Lukich* involved the annulment of two marriages: one void *ab initio* for bigamy

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[17] Every South Carolina case, as required by § 20-1-80, has concluded that the status of someone entering into a bigamous marriage is that of never having been married. It is Mrs. Brown's status that is critical here. At the time she married Mr. Brown, she had no impediment to their marriage because she had never been married before. Appellants cite several cases that deal with ancillary matters, but all of these cases follow the required rule about status: someone having entered into a bigamous marriage was never married. To the extent these cases also deal with ancillary matters, they are inapposite. *See Splawn v. Splawn*, 311 S.C. 423, 429 S.E.2d 805 (1993) (bigamous marriage void *ab initio* but court had to deal with ancillary equitable apportionment of property issues); *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004) (similar, citing *White v. White*, 283 S.C. 348, 323 S.E.2d 521 (1984)); *Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003) (second marriage bigamous and void *ab initio* — court had to decide impact on first husband's obligation to pay alimony, which had ostensibly ended if second marriage was valid, which it was not).

[18] 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006); 379 S.C. 589, 666 S.E.2d 906 (2008).

and another voidable for intoxication.[19] Wife sought alimony during a divorce from her second husband (Marriage #2). During the divorce proceeding, the second husband learned that the woman had previously been married (Marriage #1) and had never obtained a divorce or an annulment from the first husband. During the divorce case itself, which was pending in one county, the wife quickly obtained an annulment for Marriage #1, without her husband's knowledge and in another venue, on the ground of intoxication.[20] Both appellate courts concluded that Marriage #1 was voidable and refused to apply the annulment of Marriage #1 retroactively so that her status would allow her to enter Marriage #2. Marriage #1 in *Lukich* was properly voidable, rather than void, because the annulment was based on intoxication rather than bigamy. Clearly the second husband was not required to pay alimony. If *Lukich* had not treated Marriage #2 as void *ab initio*, the Court would have had to conclude that the husband of Marriage #2 would have owed alimony.[21]

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[19] It is highly significant, however, that the annulment of the wife's first marriage in *Lukich* was based upon intoxication. A ceremony performed while the parties are intoxicated is not completely ineffective to create a marriage. The marriage is only voidable, not void. *See Barber v. People*, 203 Ill. 543, 546, 68 N.E. 93, 94 (1903) ("Intoxication at the time of entering into the marriage contract will not render the marriage void, but only voidable."); *Henley v. Foster*, 220 Ala. 420, 422, 125 So. 662, 664 (1930) ("A nullity decree may be and is properly granted . . . upon a voidable marriage, one subject to ratification, but not ratified, as in the case of drunkenness[.]"). Once the parties return to sobriety, they are free to waive the defect and have a legally recognized marriage. Heavily intoxicated people have the right to seek an annulment of their marriage, but they are not required to exercise that right.

A bigamous marriage, by contrast, is one of the least valid relationships possible. It is not a marriage at all, for any purpose known to the law. The defect cannot be waived or ratified; the law positively forbids the recognition of any form of marriage where one party to the marriage ceremony is already married to someone else.

[20] "[S]he and Havron were married during a night of heavy drinking, [and] had never lived together as husband and wife[.]" *Lukich*, 368 S.C. at 51, 627 S.E.2d at 756.

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

In short, a marriage entered into by intoxicated persons is not invalid until the parties decide to attack the marriage and not to waive the defect. Therefore, it is logical that a voidable marriage was invalid only prospectively from the date of the annulment. A void marriage, however, is different. A void marriage is never a valid marriage. The parties are not permitted to waive the defect.

In contrast to Mrs. Brown's situation, Mrs. Lukich's *first* husband was *not* already married when he married Mrs. Lukich, and consequently there was no impediment under the bigamy statute for this first husband to enter a marriage with Mrs. Lukich. Therefore, it was Mrs. Lukich's *second* marriage, to Mr. Lukich, that was void unless this second marriage fit under one of the three exceptions in the bigamy statute.

This Court expressly stated that its holding as to the intoxication annulment was limited to the facts of the marriage and would not apply to bigamous marriages *such as this very case, where Mrs. Brown's first marriage was void and not merely voidable*:

> We note that our holding is limited to the facts of the case at bar, e.g. the situation where the annulled marriage would be valid but for an annulment decree declaring the marriage *ab initio*. Our holding is not meant to affect a party who enters into one of the three types of marriages that never have legal validity in South Carolina, namely marriages that are void *ab initio* by operation of statute: (1) bigamous marriages, S.C. Code Ann. § 20-1-80 (Supp. 2004); (2) same sex marriages, S.C. Code Ann. § 20-1-15 (Supp. 2004); and (3) marriages of minors under the age of 16, S.C. Code Ann. § 20-1-100 (Supp. 2004).

Lukich v. Lukich, 368 S.C. 47, 55, 627 S.E.2d 754, 758 n. 2 (Ct. App. 2006).

The Supreme Court in its *Lukich* opinion did not overturn the obvious rule recognized by the Court of Appeals in its *Lukich* opinion. In fact, the Supreme Court opinion confirms that bigamous marriages are void *ab initio* and are never a marriage at

all. 379 S.C. at 593; 666 S.E.2d at 907. The Supreme Court opinion in *Lukich* also cites precedential authority for the same principle:

> *See e.g.*, *Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950) ('A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable.'); *Howell v. Littlefield*, 211 S.C. 462, 46 S.E.2d 47 (1947) ('[Husband's] existing marriage . . . incapacitated him . . . to contract another marriage . . . .').

Id. at 592-93, 666 S.E.2d at 907.

Contrary to Appellants' argument, *Lukich* does not change, but is instead consistent with, S.C. Code Ann. § 20-1-80 and all South Carolina case precedent: a bigamous marriage (Marriage #2 in *Lukich*) is void *ab initio* and never a marriage.

In their summary judgment arguments, Appellants, in particular Terry Brown, cited the following language from the Supreme Court opinion in *Lukich* as somehow changing the treatment of bigamous marriages in this state: "Under the statute's terms, Wife's 'marriage' to Husband #2 was 'void' from the inception since at the time of that marriage she had a living spouse and that marriage had not been 'declared void.' § 20-1-80." *Lukich*, 373 S.C. at 592, 666 S.E.2d at 907.

The words "*and that*," Appellants argued, indicate that regardless of whether a marriage is void or voidable, one has an impediment to marriage and must obtain an annulment before remarriage. Contrary to Appellants' contention, however, the words "and that" do not refer to the bigamous marriage (Marriage #2 in *Lukich*); the words "and that" clearly refer to the intoxication marriage (Marriage #1 in *Lukich*). Thus, *Lukich* cannot be read to change a substantive statutory rule of law: *Lukich* does not hold that a bigamous marriage is void only from the date of the annulment order. This would render

a bigamous marriage voidable rather than void. *Lukich* does no such thing. Rather, *Lukich* confirms that a bigamous marriage is void *ab initio* and never a marriage.

Appellants, especially Terry Brown, misstate and misplace the order of the marriages, trying to shoehorn the first marriage in *Lukich* into Mr. Brown and Mrs. Brown's marriage situation, but that shoe does not fit. The *Lukich* courts clearly distinguish a marriage void for bigamy – the second marriage in *Lukich* – from a marriage voidable for intoxication – the first marriage in *Lukich*. Terry Brown attempts to equate the putative first marriage of Mrs. Brown to Ahmed with the first marriage in *Lukich*, based simply on the order of marriages. *But it is the type of annulment that creates the critical distinction between Lukich and this case, not the order of marriages.* A bigamous marriage – the first putative marriage in this case and the second marriage in *Lukich* – is always void *ab initio* and never a marriage.

Appellants' misreading of *Lukich* would necessarily include both the Court of Appeals and the Supreme Court favorably citing the statute requiring and the cases holding that bigamous marriages are void and thus never valid, yet according to Appellants somehow overturning and contravening them without expressly saying so. For example, this Court in *Lukich* cited the following cases:

> Section 20-1-80 of the South Carolina Code Annotated sets forth the principle that "[a]ll marriages contracted while either of the parties has a former wife or husband living shall be void." This statute codifies the overriding public policy of this state against bigamy. *Johns v. Johns*, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992) (holding the public policy of not recognizing bigamous marriages overrides the public policy supporting the finality of judgments). A person who is married cannot enter into a valid marriage by participating in a marriage ceremony with a new person. *Day v. Day*, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) ("A mere marriage ceremony between a man and a woman, where one of them

> has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable.").

368 S.C. at 52, 627 S.E.2d at 756. The Supreme Court opinion in *Lukich* quoted the following cases:

> While an annulment order relates back in most senses, it does not have the ability to validate the *bigamous second 'marriage.'* Since there was no marriage under the plain terms of the statute when the ceremony between Wife and Husband # 2 was performed in 1985, there was nothing to be 'revived' by the annulment order in 2003. *See e.g., Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950) ("A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable"); *Howell v. Littlefield*, 211 S.C. 462, 46 S.E.2d 47 (1947) ("[Husband's] existing marriage . . . incapacitated him . . . to contract another marriage . . . ."). The statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective. Any other construction of § 20–1–80 would lead to uncertainty and chaos.

379 S.C. at 592-93, 666 S.E.2d at 907 (emphasis added).[22]

Appellants argue that the *Lukich* courts, without expressly saying so, somehow overruled the very cases they cited favorably for the proposition that bigamous marriages are void *ab initio* and contravened the bigamy statute that the *Lukich* courts cited. Of course, the *Lukich* courts did no such thing, but instead ruled consistently with the bigamy statute and all South Carolina precedent by holding that a bigamous marriage is never a marriage.[23] If Appellants were correct that *Lukich* created a new rule, then the

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[22] The italicized language clearly refers to the bigamous marriage as the second marriage in *Lukich*. The first marriage, annulled for intoxication, was voidable and, because voidable marriage annulments may be prospective only, did not alter the wife's status as already being married when she attempted to enter into a bigamous marriage with her putative second husband. Unlike Mrs. Lukich, it was Mrs. Brown's first putative marriage that was void *ab initio* for bigamy, so that she had a status of "not married" when she entered into her valid marriage with Mr. Brown because she had no impediment.

[23] In fact, a later decision cites both *Day* and *Lukich* in the same sentence for the proposition that bigamous marriages are void *ab initio*, without any suggestion that the latter overrules the former. *See Hill v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 405 S.C. 423, 426, 747 S.E.2d 791, 792-93 (2013).

Lukich court would instead have held that the second husband owed alimony until an annulment order for Marriage #2 was obtained.

Were this Court to give only prospective effect to the annulment in this case, it would be holding that a bigamous marriage was not invalid from its inception. *Rather, it would be holding that a bigamous marriage was valid from the date of its inception until the date of the annulment. There is no precedent for such a holding.* South Carolina law precludes giving any effect whatsoever to a bigamous marriage. Because a court cannot give any effect to a bigamous marriage, it is required to hold that the bigamous marriage was never a marriage.[24]

Lukich is consistent with *Hallums v. Hallums*, 74 S.C. 407, 54 S.E. 613 (1906), which held that bigamous marriages are void *ab initio*, in accord with all other cases considering the issue. The LSA argued that *Hallums* was exactly on point and reached a different result. The LSA missed a critical factual distinction between *Hallums* and the current case: in *Hallums*, there was never a court determination that the first marriage (Marriage #1) was bigamous and, in fact, the court found that the Marriage #1 was not bigamous. By contrast, in the current case, there is a valid annulment order finding that the first marriage was bigamous.

The Hallums paradigm actually supports Mrs. Brown's position. If the *Hallums* court had determined that Marriage #1 was bigamous, then the *Hallums* opinion indicates

[24] Terry Brown argues against following the bigamy statute and all precedent. He wants this Court to create a new rule that a bigamous marriage is effective until a court order finds it invalid. His proposed new rule would result in chaos for relationships and related rights and certainly violate the strong public policy against bigamy. Even if the Court would adopt his theory and create new law, the new rule could not apply to the marriage of Mr. and Mrs. Brown, but would have to be applied prospectively only. *See Boan v. Watson*, 281 S.C. 516, 316 S.E.2d 401 (S.C. 1984); *Wilson v. Jones*, 281 S.C. 230, 314 S.E.2d 341 (S.C. 1984).

that the second marriage (Marriage #2) would have been valid because there would have been no impediment to the wife entering into the second marriage (Marriage #2) with the decedent.

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

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

bigamous and therefore was valid. Thus, the woman in *Hallums* had an impediment to Marriage #2. That is the critical factual difference between the facts in *Hallums* and the current case. In the current case, Marriage #1 was determined by a court to be bigamous and thus never valid. In the current case, Mrs. Brown thus had no impediment to Marriage #2 (her valid marriage to Mr. Brown). Thus, *Hallums* supports Mrs. Brown's position.

The LSA in particular also misreads *Hallums* as to another issue. He asserts that *Hallums* is read to determine that Mrs. Brown's testimony in the family court was insufficient to prove that Ahmed was already married. But unlike the present case, the court in *Hallums* looked at the first marriage after the decedent's death because: (1) there was no pre-existing annulment order from a court with exclusive jurisdiction over annulments, as there is today; (2) this was prior to the family court having exclusive jurisdiction over annulments – in fact, this was prior to the existence of family courts in South Carolina; and (3) this was prior to § 62-2-802 defining surviving spouse for estate purposes and case law precluding postmortem annulments.

In the present case, unlike *Hallums*, the trial court is not deciding as a matter of first instance whether Mrs. Brown's purported ceremonial marriage to Ahmed was void for bigamy. That issue has already been decided; there is a final judgment holding that no valid marriage ever existed.

In other words, *Hallums* is distinguishable because the court was adjudicating the validity of both marriages. Here, the Court is not adjudicating the validity of both marriages, because a court has already ruled that the marriage between Mrs. Brown and Ahmed is void for bigamy. The LSA conflates the involvement of the family court and

the trial court into one fact-finding endeavor. But the LSA misses the point: the family court has already ruled, and the trial court has to abide by its finding that the Brown-Ahmed putative marriage was void as bigamous. It is not for the trial court in the present case to decide the strength of Mrs. Brown's testimony in the family court: the family court was the proper court to make that determination, and did so.[25]

Contrary to Appellants' arguments, the result is not any different merely because South Carolina law permits division of property after a bigamous marriage. *E.g.*, *White v. White*, 283 S.C. 348, 323 S.E.2d 521 (1984). South Carolina law has been clear for generations that a bigamous marriage "is not a marriage at all" for any purpose, at any point in time. *Day*, 216 S.C. at 338, 58 S.E.2d at 85. The mere fact that the General Assembly chose to permit division of property in an annulment action does not overturn years of South Carolina case law holding that bigamous marriages are entirely void. The General Assembly has simply chosen to allow division of property acquired in a relationship which was not a marriage.[26] The fact that a legislature chooses to allow equitable distribution after a relationship therefore does not necessarily mean that the relationship is a marriage. Equitable distribution is available upon annulment in South Carolina, but that does not mean that the General Assembly intended to disavow long-standing South Carolina case law holding that a bigamous marriage is void from its inception.

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[25] The LSA similarly cites *Yarbrough* for the same proposition he cites *Hallums*, and he is similarly incorrect.

[26] See S.C. Code Ann. § 20-3-620(A), allowing property division in "other marital litigation" which would certainly include annulments. This choice is not unusual. For example, New Jersey and Vermont allow equitable distribution following civil unions, *see* N.J. Stat. Ann. § 2A:34-23; *DeLeonardis v. Page*, 2010 VT 52, 188 Vt. 94, 998 A.2d 1072 (2010), and two states even allow equitable distribution after a relationship in which two people live together in a romantic relationship with no legal relationship whatsoever. *See Eaton v. Johnston*, 235 Kan. 323, 681 P.2d 606 (1984); *In re Marriage of Lindsey*, 101 Wash. 2d 299, 678 P.2d 328 (1984).

Some Appellants argue that the Court of Appeals in *Lukich* intended to hold that an annulment cannot retroactively invalidate a marriage, and therefore must prospectively validate the marriage, based upon material in a quotation from *American Jurisprudence 2d.* (*See* Appellant Terry Brown's Br. 10-11.) It would be remarkable if the Court of Appeals intended that language to be controlling, as this court expressly stated in footnote 2 that its holding did not apply to marriages that were void *ab initio*.[27]

Moreover, other language in *American Jurisprudence 2d* expressly adopts Mrs. Brown's position:

> A person who has entered into a marriage that is void, as distinguished from one that is merely voidable, may thereafter legally enter into another marriage *without taking any steps to have the first marriage dissolved.* However, where a prior marriage is voidable, a second marriage generally cannot be entered into until the prior marriage has been legally dissolved.

52 Am. Jur. 2d, *supra*, § 58 (emphasis added). This language reaches the exact same result as footnote 2. The earlier marriage is never valid if the marriage is void *ab initio*, but is invalid only prospectively if the marriage is only voidable. A bigamous marriage, of course, is void *ab initio*.

Appellants further claim that the public policy against bigamous marriages somehow supports their position. But it is Appellants, not Mrs. Brown, who ask this Court to hold that Mrs. Brown's bigamous marriage to Ahmed is valid only prospectively, and therefore to become the first court ever in the history of South Carolina to give any legal effect at all to a bigamous marriage. Moreover, Appellants' position is that the policy against bigamy would be gravely violated if this Court gives any effect at all to the marriage between Mrs. Brown and Mr. Brown, but they contend that the policy against

[27] *See Lukich v. Lukich*, 368 S.C. 47, 55, 627 S.E.2d 754, 758 n. 2 (Ct. App. 2006).

bigamy is not violated at all if the Court gives legal effect to the bigamous marriage between Mrs. Brown and Ahmed. Appellants' position, of course, is completely inconsistent: they want the Court to find the Brown-Ahmed bigamous marriage merely voidable while finding the "bigamous" marriage – as they see it – between Mr. and Mrs. Brown to be void *ab initio*. They are flailing to get the result they want even though that result requires disparate treatment of bigamous marriages.

For the reasons stated above, that annulment should bind all third parties; otherwise the court will be faced with endless actions to rule upon the validity of a marriage every time its validity is at issue as against a different third party. The bigamous nature of Mrs. Brown's first purported marriage is established in binding fashion by a final family court judgment.

V. THE BROWN-AHMED ANNULMENT ORDER IS BINDING ON ALL THIRD PARTIES.

In addition to Appellants being bound derivatively because Mr. Brown could not contest the Brown-Ahmed annulment order, as discussed above at Part III.B., Appellants are also bound by the order for other reasons that would bind all third parties.

Appellants agreed at the hearing on their motion to reconsider that the "*Lukich* issue" was dispositive, without the need to attempt to attack the family court order.[28]

The background of why the Brown-Ahmed annulment action was brought is not material, but it is misstated in the briefs of Appellants, so Mrs. Brown will address the

[28] Order Re Respondent's & Amici Curiae's Motions to Alter, Amend or Reconsider Order Re Petitioner's Motion for Summary Judgment and the Limited Special Administrator's Motion for Summary Judgment, p. 2 (filed Oct. 26, 2015) ("At the hearing on Respondents' Motion to Alter, Amend or Reconsider held on June 30, 2015, Appellants argued that *Lukich* was dispositive of this matter and agreed that this Court's determination of the impact of *Lukich* on this case would be determinative.").

issue.[29] Discussion of the annulment began during the marriage between Mr. Brown and Mrs. Brown, when David Cannon, an associate of Mr. Brown who is currently under house arrest for stealing from Mr. Brown, expressed doubt over the validity of the Brown-Brown marriage.[30] (Amended Aff. of Mrs. Brown Supp. Summ. J., dated Nov. 15, 2007 and filed Dec. 26, 2007 [hereinafter "Brown Aff."] ¶ 4.) Specifically, Mr. Cannon expressed a belief that the marriage was bigamous because Mrs. Brown was previously married to Javed Ahmed. Mrs. Brown has never denied the attempted marriage to Ahmed, but the marriage was void because Ahmed had several previous wives in Pakistan, from whom he had not been divorced. (*Id.* ¶ 7.) "James and I both wanted our marriage to be legal and so James told me to have the marriage [to Ahmed] annulled." (*Id.*) Because Mrs. Brown lacked the funds to file the action, it is stipulated that Mr. Brown gave her money to pay the necessary legal fees. (*Id.*; *see also* Joint Stipulation of Facts at ¶ 13.)

The purpose of the annulment action was to address the doubts raised by Mr. Cannon. Mrs. Brown has always believed that her marriage to Ahmed was void and that her marriage to Mr. Brown was valid. (Brown Aff. ¶ 7.) There was a difference of opinion on that subject between Mr. Cannon and Mrs. Brown, and Mrs. Brown brought the annulment action, with Mr. Brown paying Mrs. Brown's attorney's fees, to have that

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[29] Appellants also misstate the reason Mrs. Brown sought this summary judgment. Appellants claim that the summary judgment was a result of the LSA's motion to modify protective orders. However, Mrs. Brown first asked for this summary judgment in 2007, years before the LSA was even appointed.

[30] The concern of Mr. Cannon, along with his co-conspirators Mr. Dallas and Mr. Bradley, is understandable. Mrs. Brown's marriage to Mr. Brown gave her spousal rights in his estate, which would disrupt the putative will and trust purportedly executed before that marriage. The putative will and trust, if valid, would give Mr. Cannon et al. fifty percent of gross income, plus trustee fees, along with the complete discretion to decide whether Mr. Brown would receive any distributions at all from the trust while he was alive.

difference resolved authoritatively. Mr. and Mrs. Brown desired, as any reasonable person in that situation would, to resolve those doubts.

Mrs. Brown's Summons and Complaint against Ahmed were filed on December 15, 2003. Mr. Brown was later arrested on a domestic violence charge involving Mrs. Brown on January 28, 2004, and Mr. Brown's attorney brought an annulment action against Mrs. Brown in Aiken County.[31] Over three months later (and three weeks after the Charleston County Family Court filed its Final Order), Mr. Brown amended his complaint. In his Amended Complaint for Annulment, Mr. Brown said "[t]he Charleston County Family Court granted the Defendant an annulment on April 15, 2004. (A copy of this Order is attached hereto and incorporated by reference)."[32] He argued that "[t]he Charleston County Family Court made Findings of Facts," that the "Findings of Facts of the Charleston Family Courts are binding on [the Aiken County Family] Court," and that "[Mrs. Brown] is collaterally and judicially estopped from denying the allegations in this action."[33] Mr. Brown clearly accepted the benefits of the Charleston County Family Court when he utilized the Order to advance his own position in the Aiken County action.

Unlike the *Lukich* case, Mr. Brown was no mere bystander to the Brown-Ahmed annulment litigation. He paid the attorney's fees which made the action possible,[34] which suggests he had a strong interest in the subject matter of the action. Indeed, he had just as much interest in determining the legal status of his marriage to Mrs. Brown as she did. He was sent copies of both the initial complaint and the final judgment. (Joint Stipulation of Facts at ¶ 14, Stipulation Ex. 14, p. 000050-64.)

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[31] *See* Brown Aff. ¶ 11.
[32] Joint Stipulation of Facts at ¶ 19, Stipulation Ex. 16, at p. 000070.
[33] *Id.*
[34] Joint Stipulation of Facts at ¶ 13; Brown Aff. ¶ 4.

Had Mr. Brown not wanted Mrs. Brown to be his wife, his own annulment action gave him a perfect chance to obtain that result. But he did not press the action; instead, he reconciled with Mrs. Brown and dismissed the action. (*See id.* at ¶ 19, Stipulation Ex. 19, p. 000085-86.) ("The parties have resolved their differences and are currently residing together.").) Mr. and Mrs. Brown then continued to reside together as husband and wife until Mr. Brown's death.

As a condition of the settlement of Mr. Brown's annulment action, Mrs. Brown agreed to "waive any claim of a common law marriage" to Mr. Brown. (*Id.* at p. 000085.) Contrary to arguments made by Appellant Terry Brown, this statement was clearly not a waiver of Mrs. Brown's right to claim a statutory marriage to Mr. Brown. If such a waiver had been intended, it could easily have been expressed simply by removing two words – "common law" – from the above language. Also, if Mr. Brown had truly intended not to be married to Mrs. Brown, surely he would have pursued his annulment action to its conclusion. Instead, he reconciled with Mrs. Brown and agreed to dismiss his annulment action, which prevented Mrs. Brown only from claiming a *common law* marriage.

The public policy of stability of marriage requires that a method exists for determining *authoritatively* the validity of a marriage which has been questioned: to seek an annulment of a marriage. Mrs. Brown used that method, with the full support of Mr. Brown. She presented the issue to the family court. That court determined that Mrs. Brown's prior marriage was void from its inception.

The position taken by Appellants in this case is that there was no way for Mrs. Brown to determine authoritatively whether her marriage to Mr. Brown was valid or

invalid. No matter how many judges found the marriage valid (and the Brown-Ahmed putative marriage invalid), Appellants insist that Mrs. Brown was required to foresee every possible third party who might possibly ever question the validity of the marriage, and join those persons as parties to the annulment action.[35] Appellants argue that, if Mrs. Brown failed to name any third person—and she could not possibly foresee every third party who would ever question the marriage in the future—that third party was not bound by the annulment. The practical result would be that Mrs. Brown would spend the rest of her life in court, continually defending the annulment against yet another collateral attack filed by a person not joined as a party to the original action. *For example, if Mrs. Brown remarries and divorces in the future, her next husband (under Appellants' legal theory that they are not bound by the annulment), can claim she is still married to Ahmed.*

Of course, a critical flaw in Appellants' argument is that, as with Mr. Brown, none of Appellants could have been parties to the annulment action because they are obviously not parties to the marriage. Yet they effectively want to be parties now. Mrs. Brown respectfully submits, and the trial court found, that she is not required to spend the rest of her life relitigating the merits of the annulment action. *The annulment is binding on the world just as divorce decrees are.* That action was a final resolution of the status of the marriage between Mrs. Brown and Ahmed, and it binds all third parties. If this is not the law, it will be impossible to ever obtain an authoritative determination of the validity of a questioned marriage.

Mrs. Brown relies initially upon S.C. Code Ann. § 20-1-80, which provides:

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[35] Which, of course, would not have been allowed in the family court action. *See, e.g.*, this Court's recognition in its *Lukich* opinion of the family court judge's refusal to let "Husband #2" intervene in the wife' annulment action against Husband #1 because "Husband #2" was not a party to the marriage.

> All marriages contracted while either of the parties has a former wife or husband living shall be void. But this section shall not extend to a person whose husband or wife shall be absent for the space of five years, the one not knowing the other to be living during that time, *no[r] to any person who shall be divorced or whose first marriage shall be declared void by the sentence of a competent court.*

(emphasis and bracketed correction added). This statute means just what it says: a bigamous marriage is void and, moreover, a second marriage is not void for bigamy if a first marriage "shall be declared void by the sentence of a competent court." *Id.* That is exactly what happened in this case. The statute makes no reference to who was or was not a party to the annulment action. It makes no reference to whether the first marriage was declared void before or after the date of the second marriage. The statute states, simply and directly, that a bigamous marriage is void and that a marriage is not void for bigamy if a prior marriage has been declared void. There is no question that a court has declared the marriage between Mrs. Brown and Ahmed was void on the ground of Ahmed's bigamy. Indeed the Final Order granting the annulment is stipulated by Appellants. (Joint Stipulation of Facts at ¶ 11, Stipulation Ex. 12, p. 000029-32.)

The effect of S.C. Code Ann. § 20-1-80 is to make annulments binding upon all third parties. This is the strong general rule nationwide. "[*A*]*nnulment decrees are binding upon non-parties* as well as parties respecting the validity of the marriages involved." 1 Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 3.6 (2d ed. 1987) (emphasis added). Professor Clark continues:

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

> the termination of the marriage. It is the writer's view that a decree of annulment should have the same effect.

Id.

Professor Clark's position was expressly adopted by the South Carolina courts in *Joye v. Yon*, 345 S.C. 264, 547 S.E.2d 888 (Ct. App. 2001). There, a husband and wife were divorced, and the husband was ordered to pay alimony. Some years later, the wife remarried. Six months later, her remarriage was annulled for bigamy, as the second husband had never divorced his prior wife. The first husband refused to resume paying alimony after the annulment, and the wife filed a contempt action to enforce the original decree. The first husband then argued that the wife's remarriage, bigamous though it may have been, still terminated his obligation to pay support.

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

> Yon also argues the court erred in reinstating his alimony obligation because he was not a party to Joye's annulment action. He asserts that he should have been made a party to the annulment action because its outcome directly affected him. We disagree.
>
> Generally, a person must be joined as a party to an action if his absence precludes complete relief among those already parties or his interest in the subject matter is so intertwined that he would not receive

> complete relief or resolution without his participation. Rule 19(a), SCRCP; *see First Citizens Bank & Trust Co. v. Strable*, 292 S.C. 146, 148, 355 S.E.2d 278, 279 (Ct. App. 1987).
>
> *Since Yon had no standing to challenge the granting of the annulment, it was not necessary for Joye to include him as a party to the action.* Moreover, Yon suffered no prejudice by not being made a party to the action. Under South Carolina law, Joye's marriage to Vance was void *ab initio* and Yon's presence as a party to the action could not have altered the decision to grant the annulment.

Id. at 276, 547 S.E.2d at 894 (emphasis added). Just as the first husband in *Joye* was bound by the annulment of the marriage between the wife and her second husband, so is the estate of James Brown bound by the annulment of Mrs. Brown's previous marriage to Ahmed.

Mrs. Brown recognizes that *Joye* was reversed as to *the effect* of a bigamous remarriage, but as to a prior obligation for *alimony*. The Court of Appeals held that alimony always terminates upon a voidable remarriage and never terminates upon a void remarriage. The South Carolina Supreme Court rejected the absolute void/voidable distinction, holding instead that the effect of an annulled remarriage upon a previous alimony obligation should be determined under a case-by-case approach. *Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003).

But the Supreme Court necessarily agreed with the Court of Appeals regarding the husband's standing to attack the annulment. The Supreme Court's opinion ordered the trial court to apply the case-by-case approach as to the alimony issue. The court therefore accepted that a valid annulment had occurred; otherwise there would be no annulled remarriage to which the case-by-case approach could be applied. By accepting the existence of an annulment, the Supreme Court agreed with the Court of Appeals that the

annulment was binding upon the first husband, even though he was not a party to the annulment proceedings. The Court of Appeals was reversed as to the *effect* of the annulment upon the prior *support obligation*, and *not* as to the *existence* or *validity* of the annulment. Had the Supreme Court intended to hold that the husband was not bound by the annulment of the wife's remarriage, the court would have held that alimony absolutely terminated; there would have been no need to remand the case for application of a rule (the case-by-case approach) which applies only in the presence of a valid annulment.

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

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

S.C. Code Ann. § 20-1-520 (emphasis added). Since "all persons concerned" are bound by a court determination that a marriage is valid, "all persons concerned" should likewise be deemed bound by a court's finding that a marriage is invalid—that is, by a decree of annulment. Indeed, the decree of annulment is in substance a holding which affirmed the validity of Mrs. Brown's marriage to Mr. Brown. Under § 20-1-520, such an affirmation is binding upon third parties.

Other states have held that annulments cannot be collaterally attacked by those who are not parties to the action. *See Johnson Cnty. Nat'l Bank & Trust Co. v. Bach*, 189 Kan. 291, 369 P.2d 231 (1962) (holding that an annulment could not be questioned by third parties). Specifically, that court held that:

> The appellees [the other beneficiaries of the trust] argue that whatever the effect of the Arizona decree annulling the appellant's remarriage may have been as against the parties thereto, it cannot affect the rights of third parties whose rights had previously vested upon the occurrence of the vesting condition; that is, the appellant's remarriage.
>
> The argument of the appellees throughout their brief fails to distinguish between a marriage which is voidable, such as a marriage induced by fraud where one of the parties has an option to continue the marriage or to set it aside, and a marriage which is absolutely void, such as here a bigamous marriage. *No decree is necessary to declare a bigamous marriage void.*[36] Under the law applicable to this case it was impossible for the appellant to marry Emerson. There being no marriage, other than the inefficacious marriage ceremony in Wyoming, the condition precedent to the vesting of rights in third persons did not occur. Under these circumstances the rights of third persons could not have been affected by the Arizona decree of annulment.

Id. at 298-99, 369 P.2d at 236 (emphasis added).

Just as the Arizona decree in *Bach* was conclusive on the validity of the alleged marriage in that case, so is the annulment in this case likewise dispositive. The annulment can be attacked only in a prior direct attack filed by the parties to the action—Mrs. Brown and Ahmed. *See also Michelli v. Michelli*, 527 So.2d 359, 361 (La. Ct. App. 1988) (annulment cannot be attacked).

A New York court generalized the fundamental principle of law which underlies the above cases:

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

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[36] *Bach* serves as additional authority that a bigamous marriage is void, even without a court determination. *See* Stuckey, *supra*, at 3.A.

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

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

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

Restatement (Second) of Judgments § 31 cmt. f (Westlaw Mar. 2016 Update) (emphasis added); *see also id.* § 31 cmt. a ("Proceedings for the determination of status include divorce and annulment actions.").

The Restatement (First) of Judgments states the same rule: "In a proceeding *in rem* with respect to a status *the judgment is conclusive upon all persons* as to the existence of the status." Restatement (First) of Judgments § 74(1) (Westlaw Mar. 2016 Update) (emphasis added).

Indeed, even some of Appellants recognize that the annulment is binding on third persons on the question of status. (*See* Appellant Sojourner's Br. 16 ("Such a judgment is binding as to third persons as to the status of the marriage only.").)

Appellants' position is that this case somehow does not involve an issue of status. However, it clearly does. The entire question being litigated is whether Mrs. Brown had a valid marriage to Ahmed such that she could not then have a valid marriage to Mr. Brown. This is obviously a question of status.

Appellants also try to argue that *findings of fact* contained in a judgment regarding status are not binding on third parties. But Mrs. Brown does not assert the findings of fact from the family court order, but merely the family court's order as to the status of her putative marriage to Ahmed: that is was void *ab initio*. In response to Appellants' argument about the binding effect of findings of fact, if the findings of fact contained in a judgment are not binding, the conclusions of law which are based upon those findings cannot possibly be binding either, so this is effectively just another way of saying that a *judgment* of status does not bind *any* third parties—a rule which is not supported by the law. If accepted, such a rule would effectively mean that annulments are never final.

In support of their position, Appellants cite Restatement (First) of Judgments § 74(2), which provides: "[a] judgment in such a proceeding will not *bind anyone personally* unless the court has jurisdiction over him, and it is not conclusive as to a fact upon which the judgment is based except between persons who have actually litigated the question of the existence of the fact." (emphasis added). This provision comes immediately after section 74(1), quoted above, which states a general rule that judgments of status are binding on all third parties. It is therefore a limited exception to a broad general rule. If section 74(2) means that factual findings never bind any third party, then a judgment of status itself never binds any third party and section 74(2) has completely swallowed section 74(1).

The trial court held that section 74(2) applies only to factual findings on matters collateral to status. (Order Granting Mot. Summ. J. Jan. 13, 2015, p. 40.) This holding is consistent with section 74(2), which states that a judgment does not "bind anyone

personally" unless the court has jurisdiction over him. That is, a judgment *in rem* cannot have the binding effect of a judgment *in personam* unless the court has personal jurisdiction over the defendant. But a judgment which cannot be binding *in personam* can still be binding *in rem*. The status change itself is clearly an in rem action. As regards the issue of status itself, the judgment binds everyone. But as to issues *other than status*, which may require *in personam* jurisdiction, the judgment is not binding.

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

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

Restatement (First) of Judgments § 74 cmt. b (emphasis added).

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

Section 74(2), therefore, is aimed only at issues other than the status change itself.

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

This rule is good and logical policy. *In rem* jurisdiction allows the court to adjudicate only the question of status. It cannot be used as a jurisdictional piggyback to allow the court to decide issues other than the question of status, which are not properly a basis for *in rem* jurisdiction. The effect of section 74(2) is that *in rem* judgments bind third parties only as to issues that are proper subjects for *in rem* jurisdiction, such as status. An *in rem* judgment cannot be used to bind third parties on an issue that is not subject to personal jurisdiction.

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

The Oregon case cited by Appellants, *In re Rowe's Estate*, 172 Or. 293, 141 P.2d 832 (1943), is distinguishable on several grounds. To begin with, the case involved a decree of divorce, not a decree of annulment. A decree annulling a bigamous marriage

has a much broader preclusive effect because it determines that no marriage ever existed. A divorce decree, by contrast, merely terminates a marriage.

More importantly, the issue in *Rowe's Estate* was whether a finding of desertion in the divorce decree conclusively established lack of access for purpose of paternity. The fact at issue was therefore not the status of marriage itself, but rather a fact collateral to status. Here the issue is purely one of status: if the decree annulled Mrs. Brown's marriage to Ahmed, then her marriage to Mr. Brown was not bigamous. The *Rowe's Estate* court expressly held that the divorce was binding on issues of status. "[T]he decree in a divorce suit as a decree *in rem* binds the whole world as to the status of the parties, to the extent that their status is the res adjudicated[.]" *Id.* at 302, 141 P.2d at 836. The status of Mrs. Brown's marriage to Ahmed is exactly the matter adjudicated by the present decree of annulment.

The Court should likewise reject the strange argument made by Deanna Brown et al. that giving preclusive effect to a prior judgment would somehow violate the rule against hearsay evidence.[37] To begin with, no hearsay objection along these lines was made in the trial court. "An appellant must make a specific objection to the admission of evidence to preserve the issue for appeal." *Abba Equip., Inc. v. Thomason*, 335 S.C. 477, 486, 517 S.E.2d 235, 240 (Ct. App. 1999). "[A]bsent a contemporaneous objection identifying the particular comments complained of and the basis for the objection, Janssen has waived its right to complain about this issue on appeal." *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 59, 777 S.E.2d 176, 190 (2015). Because this issue was not preserved in the trial court, it cannot be raised upon appeal.

[37] *See* Appellants Deanna Brown, et al.'s Br. 17-18.

Assuming that the issue was preserved, Appellants' argument is apparently that the entire doctrines of res judicata and collateral estoppel, followed by the courts for centuries, must now be overturned. This is not the law. When the court gives preclusive effect to a prior judgment, it does not merely treat the judgment as admissible evidence; rather, it holds that the judgment itself is legally binding on the issues resolved therein. If the judgment itself is somehow hearsay, then no prior judgment can ever be binding on any issue.

Appellants rely on *Nipper v. Snipes*, 7 F.3d 415 (4th Cir. 1993). But other courts have held that *Nipper* does not apply when the issue is res judicata or collateral estoppel:

> The plaintiff argues that a judicial finding in one case is inadmissible hearsay when proffered as evidence in another action. *See Nipper v. Snipes*, 7 F.3d 415, 417-18 (4th Cir.1993); *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 141 F.Supp.2d 320, 323 (E.D.N.Y.2001).
>
> That proposition is fine as far as it goes. However, *the cases cited by Torah Soft do not address the possibility that judicial findings in the earlier case may have preclusive effects in the latter*. In *Blue Cross*, for example, there was no issue of *res judicata* or collateral estoppel because the proffered judicial finding concerned the credibility of an expert witness in a prior, unrelated case, a finding that could not now bind parties who had played no role in the earlier litigation. 141 F. Supp. 2d at 322. Similarly, in *Nipper*, although the parties were the same in both the first and second cases, the actions involved different transactions, *and the court did not engage in an analysis of preclusion* but simply found that the hearsay exception for public records does not apply to judicial findings of fact. 7 F.3d at 416-18.

Torah Soft Ltd. v. Drosnin, No. 00 CIV. 0676 (JCF), 2003 WL 22024074, at *1 (S.D.N.Y. Aug. 28, 2003) (emphasis added).

Nipper therefore did not intend to hold that the hearsay rule overturns the settled doctrines of res judicata and collateral estoppel. Indeed, there is no suggestion in *Nipper*

that the prior judgment at issue had any preclusive effect at all upon persons who were not parties. Here, Mrs. Brown's entire argument is that the prior judgment does have preclusive effect because annulments always bind third parties as a matter of law and because this specific annulment binds Mr. Brown and his heirs. *Nipper* applies only when prior judgments are used *as evidence*, not where they are used *for their preclusive effect*. Otherwise, years of case law under res judicata and collateral estoppel will be overturned.

Mrs. Brown is not arguing that Appellants are bound by the findings of fact in the judgment annulling her marriage to Ahmed; she is arguing that Appellants are bound by the conclusion of law that the marriage between Mrs. Brown and Ahmed was void *ab initio* for Ahmed's bigamy. A conclusion of law is not evidence and cannot constitute hearsay. Indeed, appellants themselves cite numerous cases in their briefs and argue that the court is bound by the conclusions of law reached in those cases. If conclusions of law are inadmissible hearsay, the entire system of legal precedent is invalid. The court should reject Appellants' attempt to use the law of hearsay to overrule the doctrines of res judicata and collateral estoppel.

The court should therefore hold that the judgment annulling the marriage between Mrs. Brown and Ahmed is conclusive against all third parties on the central issue of whether that marriage was or was not bigamous. If this is not the law, then Mrs. Brown is required to prove the merits of her annulment all over again every time the issue arose against a different third party. Mrs. Brown should not be required to do that. Once annulled, a marriage is invalid against all persons, regardless of whether they were parties to the annulment action.

A critical flaw in Appellants' position that an annulment order is not binding on third parties stems from subject matter jurisdiction. In South Carolina, only family courts have jurisdiction over annulments.[38] Appellants, eager to retry a final family court order, have no standing in family court. Probate and circuit courts have no subject matter jurisdiction over annulments. This matter is *res judicata*. Appellants propose to allow the circuit court, sitting in probate, without jurisdiction over annulments, to retry the case (which is the effect of their not being bound by the family court order). How else could the circuit court decide whether Appellants are bound? The choice would be either to effectively relitigate the case or disregard a final family court order without determining why it should be disregarded. As anxious as Appellants are to change history, they have not explained the jurisdictional path to accomplish that.

VI. EVEN IF THE ANNULMENT AT ISSUE DOES NOT BIND APPELLANTS DERIVATIVELY AND THIRD PARTIES GENERALLY, IT BINDS APPELLANTS IN THIS CASE.

As discussed above at Section V., judgments of annulments bind all third parties on the central question of the status of the marriage. If this is not true, the public policy of stability of marriage will be thrown into chaos. This Court should adopt the view expressed by Professor Clark in his definitive treatise *The Law of Domestic Relations in the United States* § 3.6 (2d ed. 1987).

Assuming for the sake of argument that annulments do not bind third parties generally, Mrs. Brown submits that the annulment in this case is binding upon these specific Appellants. The elements of collateral estoppel are as follows:

[38] *See supra* Part III.A. *See also* S.C. Code Ann. § 63-3-530 (A)(6).

> Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.

Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). There is no question here that the validity of the marriage between Mrs. Brown and Ahmed was necessarily determined in the annulment action. Determining the validity of the marriage was the entire purpose of the annulment action. A finding that the marriage was invalid was obviously necessary to support a judgment annulling the marriage.

The annulment was also actually litigated. While Ahmed did not appear, South Carolina law places upon the court a solemn duty to approach all annulment cases with careful skepticism, and grant an annulment only in the presence of strong supporting evidence:

> The marriage status being a matter of the deepest public interest and concern, the trial judge has the power, *and it is his duty*, to see that such a status is not disturbed except under circumstances and for causes fully sanctioned by law. In this class of cases, probably more than all others, the state exercises a jealous and exclusive dominion. These fundamental considerations are, or should be, scrupulously regarded and enforced, and it is of great importance that the presiding judge shall, when necessary, prevent, to the utmost exercise of his judicial power, the dissolution of a marriage contract by collusion, default, or coercive pressure exerted upon either or both of the parties.

Fogel v. McDonald, 159 S.C. 506, 512, 157 S.E. 830, 833 (1931) (emphasis added).

> In a controversy relating to marriage the Court is concerned not only with the rights of the individuals involved but also with the public interest. A duty rests upon the Court to encourage the parties to live together, to see

> that the marriage status is not disturbed except under circumstances and for causes fully sanctioned by law, and to prevent fraudulent and collusive divorces.

Davis v. Davis, 236 S.C. 277, 284, 113 S.E.2d 819, 823 (1960) (quoting *Holliday v. Holliday*, 235 S.C. 246, 253-54, 111 S.E.2d 205, 210 (1959).

It is axiomatic that the state has a strong interest in preserving marriages. The effect of *Fogel* is to make the state a third party to every annulment, and to charge the judge with a duty to review the evidence carefully. An annulment case is therefore never a default judgment, in the normal sense of a judgment entered routinely and automatically simply because the defendant fails to respond. The court was required to review the evidence carefully, and not simply assume that the annulment should be granted because no one opposed it.

In addition, counsel for Mrs. Brown expressly asked the court *not* to issue a default judgment, but rather to comply with its legal duty to examine the sufficiency of the evidence:

> The Defendant, I guess, arguably, is in default *but we're not moving to put him in default*. He has notice of this—he has been served by publication as will appear by affidavit. He was given notice of this hearing pursuant to Rule 17, proper notice, as will appear by affidavit. So, we're here to proceed.

(Joint Stipulation of Facts at ¶ 8, Stipulation Ex. 13, p. 000036, at 4:7-12 (emphasis added).) Counsel did this because it was not in Mrs. Brown's interest to obtain an annulment which was not binding on anyone who did not appear. The entire purpose of the annulment action was to resolve the uncertainty over the state of Mrs. Brown's marriage in a manner which would bind third parties, so that the uncertainty would cease to be an issue in Mr. Brown and Mrs. Brown's life.

The court in the annulment action accepted Mrs. Brown's request. It did not issue a default judgment, but rather examined the evidence presented and found it sufficient to meet Mrs. Brown's burden of proof. The annulment was therefore actually litigated.

When the requirements of collateral estoppel are met, the judgment is binding at least on the parties to the action. But the preclusive effect of a judgment is not limited to named parties. It also applies to persons who provide essential support for the litigation. For example, in *Tillman v. Tillman*, 93 S.C. 281, 76 S.E. 559 (1912), a father executed a deed giving custody of his children to his parents. A custody action then followed between the father's parents and the mother, in which the mother prevailed. The court held that the father was bound by the judgment:

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

Id. at 284, 76 S.E. at 559 (emphasis added). By supporting his parents in the custody case, therefore, the father became bound by the result.

More generally, "[u]nder the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties *and their privies* in any subsequent action based upon a different claim." *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986) (emphasis added). "The term 'privy' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." *H.G. Hall Constr. Co. v. J.E.P. Enters.*,

283 S.C. 196, 204, 321 S.E.2d 267, 271 (Ct. App. 1984). Courts in other states have identified at least three types of privity:

> People can be in privity in at least three ways: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action.

Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 653 (Tex. 1996).

> A privy is defined as: 1) a non-party who has succeeded to a party's interest in property (a successor in interest); 2) a non-party who controlled the original suit; or 3) a non-party whose interests were adequately represented by a party in the original suit (through "virtual" or "adequate" representation).

Doyle v. Smith, 202 P.3d 856, 866, 2009 OK CIV APP 5, ¶ 48 (Okla. Civ. App. 2008) (quoting *Asahi Glass Co. v. Toledo Eng'g Co.*, 505 F. Supp. 2d 423, 434 (N.D. Ohio 2007)).

In the present case, it is stipulated that Mr. Brown paid Mrs. Brown's attorney's fees in the annulment action. (Joint Stipulation of Facts at ¶ 13.) It is further stipulated that James Brown was informed separately of the results of the action. (*Id.* at ¶ 14, Stipulation Ex. 14, p. 000050-64.) *These facts establish, at a minimum, that James Brown supported the annulment action to at least the same extent that the father supported his parents' action in Tillman.* He did not assert a claim of his own; he supported Mrs. Brown's claim by paying the attorney's fees necessary for her to make it.

In addition, paying a party's attorney's fees constitutes, as a matter of both law and common sense, supporting an action in the sense that that term was used in the above cases. Mr. Brown evidently agreed that his interests in the annulment action were represented by Mrs. Brown, and paid Mrs. Brown's attorney.

Courts in other states have held that a party who pays another party's attorney's fees is bound by the result of the litigation. In *Piney Oil & Gas Co. v. Scott*, 258 Ky. 51, 79 S.W.2d 394 (1934), the Kentucky Supreme Court held that paying part of another party's attorney's fees is sufficient to establish privity. *Piney Oil* holds that a nonparty is bound by a judgment if the nonparty even *contributed* to a party's attorney's fees. Here, Mr. Brown did not pay only part of Mrs. Brown's attorney's fees; he paid her *entire* attorney's fees.

Appellants cite case law from other states holding that those who pay the attorney's fees of a party are not bound by the result of litigation. But *Piney Oil* shows, at a minimum, that nationwide case law on this subject is divided. Moreover, South Carolina has held in *Tillman* that those who support an action or consent to an action are bound by the result, even if they are not named parties. South Carolina law is therefore similar to Kentucky law as set forth in *Piney Oil*, and not similar to the law set forth in the cases cited by Appellants.

The result reached by *Tillman* and *Piney Oil* is good public policy and equitable in this case. The preclusive effect of litigation should not be strictly limited to those who are named as parties. *When a person supports, encourages, and insists upon litigation, and most importantly pays for litigation, the person should be bound by the result of the litigation he or she has fostered.* To do otherwise would allow persons of means to litigate through agents, gathering the fruits of victories, and avoiding losses on grounds that only the named parties are bound by the judgment.

Appellants cannot avoid collateral estoppel on the ground that the annulment was a default judgment. For the reasons stated above, there is no such thing as a default

judgment in an annulment case, as the court is required to make an independent determination of the sufficiency of the evidence. *E.g.*, *Davis*, 236 S.C. at 284, 113 S.E.2d at 823. That is especially true here, where counsel for Mrs. Brown expressly stated at the annulment hearing that "we're not moving to put [the defendant] in default." (Joint Stipulation of Facts at ¶ 8, Stipulation Ex. 13, p. 000036, at 4:7-12)

In addition to paying Mrs. Brown's attorney's fees, Mr. Brown also accepted substantial benefits of the judgment during his lifetime. The evidence is uncontested that Mr. Brown was aware at all times of Mrs. Brown's annulment action and that he paid Mrs. Brown's attorney's fees. The effect of the annulment was to resolve uncertainty as the validity of a marriage to which both spouses were parties, and Mr. Brown therefore benefited as much from the judgment as Mrs. Brown did.

Further, as set forth above, Mr. Brown later filed an annulment action in Aiken County against Mrs. Brown and said that "the Findings of Facts of the Charleston Family Courts are binding on [the Aiken County Family] Court" (*id.* at ¶ 19, Stipulation Ex. 16, p. 000070, at ¶ 10) and that "[Mrs. Brown] is collaterally and judicially estopped from denying the allegations in this action." (*Id.* at Stipulation Ex. 16, p. 000070, at ¶ 11.) *Mr. Brown clearly accepted the benefits of the Charleston County Family Court Order when he utilized the Order to advance his own position in the Aiken County action.* This is the essence of estoppel. Mrs. Brown counterclaimed for a divorce, and the parties ultimately entered into a Consent Order of Dismissal. (Joint Stipulation of Facts at ¶ 19, Stipulation Ex. 19, p. 000085.)

A party who has accepted the benefits of a judgment, or even a substantial part of the benefits, is estopped from later contesting the validity of that judgment. The

equitable justification for this rule has been stated in various ways. For instance, a "litigant cannot treat a judgment as both right and wrong." *Dorai v. Dorai*, No. 01-12-00308-CV, 2013 WL 1694866, 2013 Tex. App. Lexis 4812 (Apr. 18, 2013). "It is the settled rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom. The rule is based on the principle that 'the right to accept the fruits of the judgment and the right to appeal therefrom are wholly inconsistent, and an election to take one is a renunciation of the other.'" *Satchmed Plaza Owners Ass'n v. UWMC Hosp. Corp.*, 167 Cal. App. 4th 1034, 1041, 84 Cal. Rptr. 3d 585, 590 (2008). "The acceptance of the benefits of the judgment is inconsistent with a claim that the judgment is erroneous. More importantly, in the circumstances here present, it is inequitable and unjust to permit plaintiff to accept the benefits and attack the judgment on appeal." *Tassie v. Tassie*, 357 A.2d 10, 15, 140 N.J. Super. 517, 525-26, (App. Div. 1976). "The general rule is that when a litigant voluntarily accepts the benefits of an order or judgment, [the litigant] cannot take an appeal to reverse the judgment. This is because the right to proceed on a judgment and enjoy its fruits, and to attack it on appeal, are totally inconsistent positions." *George v. George*, 991 S.W.2d 679, 680-81 (Mo. Ct. App. 1999).

The acceptance of the benefits doctrine has been in effect in South Carolina for well over a century at least, as evidenced by *Whaley v. Lawton*, 57 S.C. 256, 35 S.E. 558 (1900). In that case the trial court issued an order granting the plaintiff leave to amend his complaint after it had initially sustained the defendant's demurrer, and granted the defendant leave to answer the amended complaint. The defendant answered the amended complaint but then appealed the order allowing the amendment. At oral argument before

the Supreme Court of South Carolina, the plaintiff asserted for the first time that the defendant had waived his right to appeal by accepting the benefit of the appealed order, namely, the leave to file an answer to the amended complaint. The Supreme Court agreed that "it is quite true that a party, by accepting the benefit of an order, waives his right to appeal from such order," but held the rule had no application in the case because the defendant had received no "benefit" from the order. *Id.* at 562.

The rule was still in effect 70 years later when the Supreme Court of South Carolina decided *Edwards v. Edwards*, 254 S.C. 466, 176 S.E.2d 123 (1970), and held that a party who accepts the benefits of even a *void* judgment is estopped from attacking it. There the husband had appealed an order finding him in contempt for refusing to convey certain real estate to the wife as required by their divorce decree. The husband's defense was that the divorce decree was void, arguing that "while the Juvenile and Domestic Relations Court of Spartanburg had jurisdiction to grant divorces and alimony, it had no authority to order the transfer of his property to his wife as an incident to such jurisdiction." *Id.* at 469, 176 S.E.2d at 124. It appears there may have been some merit in the husband's argument but the Supreme Court stated that it need not reach that issue and in fact "may assume the correctness of the appellant's position." *Id. It held that because the husband had accepted benefits granted to him by the divorce decree he was estopped to challenge its validity, even if the court that issued it lacked subject-matter jurisdiction*: "Since he proposed the transfer of the property and has accepted the benefits accruing to him therefrom, he is now estopped to assert the invalidity of the judgment." *Id.* at 470, 176 S.E.2d at 125; *see also Schleicher v. Schleicher*, 310 S.C. 275, 423 S.E.2d 147 (Ct. App. 1992).

In the present case, Mr. Brown accepted, during his lifetime, the full benefit of the annulment judgment. Because he did these things, Mr. Brown was bound by the annulment judgment during his lifetime, even if annulments are not binding against all third parties generally.

The LSA in particular argues that a default judgment in family court cannot have preclusive effect. Under his theory, every family court default order can be re-litigated by those who were not parties to the marriage. Although the family court order in the Brown-Ahmed annulment was not a default order, it would be binding on Appellants even if it were.

VII. THE ANNULMENT IS NEITHER FRAUDULENT NOR PROCEDURALLY INVALID.

Appellant Terry Brown accuses Mrs. Brown's counsel and Mrs. Brown of fraud. (Appellant Terry Brown's Br. 41-48.) Not one shred of evidence supports this baseless and outrageous allegation. Mr. Brown paid for Mrs. Brown's attorney's fees. She retained Robert N. Rosen, an attorney who practices in Charleston, South Carolina. In order to save legal fees, the suit was brought in the Charleston County Family Court which has, as all family courts have, statewide jurisdiction. This is not a "suspicious jurisdiction" as argued by Appellants.

Appellants also raise a series of alleged procedural problems with the annulment. These alleged procedural problems have no effect upon the validity of the judgment. Although Appellants have no standing and there is no subject matter jurisdiction to do so, the family court order is nonetheless valid despite the alleged procedural problems.

To begin with, Appellants claim that Ahmed was not properly served with process by publication. The Court need not reach the merits of this objection, as Appellants lack standing to raise it. The court in the annulment action issued an Order of Publication, which expressly found that Mrs. Brown "has made a diligent effort to locate the Defendant, Javed Ahmed, or some current address for the Defendant, and it appears to the satisfaction of this Court that the current address and whereabouts of the Defendant are unknown[.]" (Joint Stipulation of Facts at ¶ 7, Stipulation Ex. 8, p. 000017-18.) Under South Carolina law, an order allowing service by publication cannot be attacked collaterally:

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

Wachovia Bank of S.C. v. Player, 341 S.C. 424, 428-29, 535 S.E.2d 128, 130 (2000) (emphasis added). Appellants allege no admissible evidence of fraud or collusion. The order authorizing service by publication therefore cannot be attacked. The trial court correctly so held. (*See* Order Granting Mot. Summ. J. Jan. 13, 2015, p. 9.)

Even if the order authorizing service by publication can be attacked, it can be attacked only by the defendant who was allegedly improperly served. *See Howell v. Atl. Coast Line R.R.*, 79 S.C. 493, 60 S.E. 1114, 1114 (1908) (summarily dismissing objection by one party to validity of service upon another); *Koven v. Saberdyne Sys.*, 128 Ariz. 318, 321, 625 P.2d 907, 910 (Ct. App. 1980) ("[Q]uestions regarding service of process are personal to the person upon whom service was made and cannot be urged by another[.]");

Superior Outdoor Adver. Co. v. State Highway Comm'n of Mo., 641 S.W.2d 480, 483 (Mo. Ct. App. 1982) ("[T]he issue of defective service of process may be raised only by the one on whom the attempted service was made[.]"); *cf. Brown v. Wilson*, 45 S.C. 519, 23 S.E. 630, 633 (1896) ("[T]he appellant cannot assign for error matters that do not prejudice him, but affect other parties, who are not before the court.").

The rule applies specifically to service by publication. "Without deciding whether the certificate of publication would be sufficient, if called in question by someone who was injuriously affected thereby, we think a sufficient answer to appellants' contention in this regard is that, whatever error may have been committed in respect to the certificate of publication, it does not injure appellants, and they cannot complain of it." *Donham v. Joyce*, 257 Ill. 112, 117, 100 N.E. 524, 525-26 (1912).

Any error in serving Ahmed by publication can therefore be raised only by Ahmed, and not by Appellants in this action.

Assuming for argument's sake that the Court can reach the merits of this issue, the Order of Publication is based upon an affidavit by a licensed private investigator, Ronald Pannell. (Joint Stipulation of Facts at ¶ 7, Stipulation Ex. 6, p. 000010-11.) Pannell stated that he conducted searches in several national databases and found only a Texas address for Ahmed. (*Id.*) He further stated that he had run a full skip trace report on Ahmed. (*Id.*) While Appellant Terry Brown's brief questions the integrity of everyone involved, in fact the service by publication was handled in accordance with South Carolina law. Indeed, Mrs. Brown had every reason to find Ahmed.

Based on Pannell's affidavit, the Order of Publication expressly found that "the Plaintiff has made a diligent effort to locate the Defendant, Javed Ahmed[.]" (Joint

Stipulation of Facts at ¶ 7, Stipulation Ex. 8, p. 000017.) Assuming that the Order of Publication can be attacked, and the trial court properly found that it cannot, *see Wachovia Bank*, 341 S.C. 424, 535 S.E.2d 128, Pannell's affidavit was sufficient evidence that "the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State." S.C. Code Ann. § 15-9-710. The statute requires only evidence that the defendant cannot be found "within the State" (*id.*); it does not require evidence that the defendant cannot be found in another state or country. Pannell nevertheless erred on the side of caution and searched several national databases. He was not required to search for Ahmed in Pakistan.

Notice was properly sent to Ahmed's last known residence. That residence was 1440 Ella Boulevard #314 in Houston, Texas, as used consistently on almost all documents from the annulment. An apartment number of #1314 appears in Mrs. Brown's affidavit. (Joint Stipulation of Facts at ¶ 7, Stipulation Ex. 7, p. 000016.) Mrs. Brown stated that the last known address she had was 14403 Ella Boulevard #1314, "but in an effort to locate the Defendant in order to personally serve him . . . I hired a licensed private investigator in the state of Texas, Ronald Pannell, who located a subsequent address, also in Houston, Texas, where the Defendant had apparently resided since the time I knew of his whereabouts." (*Id.*) An affidavit by the licensed private investigator states that he found an apartment number of #314 after "conduct[ing] several searches in numerous national databases[.]" (Joint Stipulation of Facts at ¶ 7, Stipulation Ex. 6, p. 000010-11.) The correct address was clearly #314, and that is where notice was sent.

The fact that the notice published stated a hearing date of March 26, 2004 is not a defect. The hearing was set for March 26, but was continued. A copy of the order

continuing the hearing is found as an attachment to the Affidavit of Marcia F. Jones, at Joint Stipulation Exhibit 9 page 000021, and the following page shows that notice was properly sent to Ahmed. It is not necessary to serve again a defendant who was properly served by publication, merely because the trial was continued. Notice of a hearing in Family Court is governed by Rule 17, SCRFC. Appellant Terry Brown argues that service was invalid under Rule 4(d)(8), SCRCP. The Court of Appeals has made it clear that Rule 17 clearly governs in this case:

> Rule 2(a) of the South Carolina Rules of Family Court makes applicable certain rules of the South Carolina Rules of Civil Procedure. Among them is Rule 5(b)(1), SCRCP, which provides in part: "Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint." When Rule 5(b)(1), SCRCP, and Rule 17, SCRFC, are read together, as they must be, the only reasonable conclusion that can be drawn is that service of the notice of the time and date of the merits hearing became effective when Mrs. Schleicher's attorney mailed the notice to Mr. Schleicher "at his last known address, by certified mail, return receipt requested" and not at the time Mr. Schleicher actually received the notice. *See* 66 C.J.S. *Notice* § 18e, at 664 (1950) ("By force of statute . . . , service may be effective when the notice is properly mailed, regardless of its receipt by the addressee; in such case the risk of miscarriage or failure to deliver is on the addressee."); 58 Am.Jur.2d *Notice* § 34, at 596 (1989) ("Where service of notice by registered mail is authorized, service is effective when the notice is properly addressed, registered, and mailed. . . .")
>
> Had a rule other than the one adopted here been intended, an express provision adopting the different rule would have been made a part of Rule 17(a), SCRFC. *See, e.g.*, Rule 4(d)(8), SCRCP ("Service [of a summons and complaint] is effective upon the date of delivery as shown on the return receipt."); *Jacobson v. Sternberg*, 305 S.C. 337, 338, 408 S.E.2d 245, 246 (1991) (noting that under Rule 4(d)(8), SCRCP, "the return receipt establishes acceptance of process"); see also 82 C.J.S. *Statutes* § 328, at 635 (1953) ("[A]s a general rule the court cannot, under its powers of construction, supply omissions in a statute, especially where it appears that the matter may have been intentionally omitted.").

Schleicher v. Schleicher, 310 S.C. 275, 277, 423 S.E.2d 147, 148-49 (Ct. App. 1992).

The Court of Appeals thus clearly dispensed with any application of Rule 4(d)(8) suggested by Terry Brown. In the present case, the notice was mailed to Ahmed's last known address by certified mail, return receipt requested. Moreover, the licensed private investigator determined that Ahmed's last known address was in Texas, which shows he was not in South Carolina, thus establishing literal compliance with the statute.

Any error on service of process could have been raised only by Ahmed, and cannot be raised even by him over ten years after the event. *See Peoples Bank of Beaufort, S.C. v. Exchange Realty, Inc.*, 273 S.C. 537, 257 S.E.2d 733 (1979). Further, Appellant Terry Brown's discussion of North Carolina case law is obviously of no consequence as this case is in South Carolina.

Contrary to Appellant Terry Brown's argument, there was no need to serve Ahmed with process under Rule 4(d)(8), SCRCP or the provisions of the Hague Convention on Service of Process Abroad, 20 U.S.T. 361, T.I.A.S. No. 6638 (1965). Ahmed was not served by certified mail in Pakistan; he was served by publication. Because Ahmed was not served in Pakistan, the Hague Convention did not apply.

VIII. NO NEED FOR DISCOVERY.

Finally, Appellants protest that it was unfair to deny them discovery in this action. First, all parties agreed to the Stipulation of Facts. Appellants have a right to take discovery on *material contested issues*, but they do not have a right to conduct discovery on issues which are immaterial. Mrs. Brown contends, and the trial court found, that all of the *material* factual issues in this action are resolved by the Joint Stipulation. "Under the well-settled rule, facts not appearing in the record as agreed upon, and referred to only in an exception, will not be considered on appeal." *Jackson v. Jackson*, 256 S.C.

127, 129, 181 S.E.2d 266, 267-68 (1971). "Because the notes do not constitute a part of the record on appeal, they cannot be considered." *Robert Harmon & Bore, Inc. v. Jenkins*, 282 S.C. 189, 196, 318 S.E.2d 371, 375 (Ct. App. 1984).

The only possible purpose Appellants have to seek additional discovery is to relitigate the family court annulment order. Although the trial court's order stands on matters of law only, Mrs. Brown repeats again the key facts, all stipulated, which support the trial court's decision to grant summary judgment. Annulment judgments must be binding on third parties, or there will be no such thing as a final judgment of annulment. Every time a marriage is annulled, it will be annulled only as to the persons who were parties to the annulment. Persons who obtain annulments will have to spend the rest of their lives in court, forever defending the annulment against a collateral attack from yet another person who was not a party to the original action. Litigants will never be able to rely upon the finality of annulment and assume that the annulled marriage is truly dead. The courts will face endless series of collateral attacks upon annulments, raising the same issues over and over again.

Mrs. Brown respectfully submits that there is such a thing as a final judgment of annulment. When the court grants an annulment, the court's judgment is binding as against all third parties. This result is not unfair, because the trial court when it grants an annulment is required by law to rule on the sufficiency of the evidence. Because the trial court is required to rule upon the evidence, there is no such thing as a default judgment of annulment.

The question of whether annulments bind third parties is a question of law, not a question of fact. No fact learned by Appellants in discovery could have any effect upon

how this issue is resolved. Discovery is therefore immaterial to this action as it is based on the law and stipulated and uncontested facts.

Even if annulments do not bind third parties, they surely bind persons who offered essential support for the litigation and sought to enforce the annulment order in another court. Mrs. Brown stated by affidavit, and there are no contesting affidavits on this point, that she brought the action with Mr. Brown paying her attorney's fees. (Brown Aff. ¶ 4.) It is not unfair for Mr. Brown to be bound by an annulment for which he paid. If Mr. Brown is bound, Appellants are likewise bound, as they claim through him, and their rights cannot be greater than his rights.

The uncontested facts show that the annulment is binding upon third parties in general, and upon these Appellants in particular. Further discovery would have addressed only immaterial issues. The material points necessary to decide this case were all set forth in the Joint Stipulation of Facts.

IX. APPELLANTS ARE ESTOPPED FROM ATTACKING THE VALIDITY OF THE BROWNS' MARRIAGE BECAUSE THEY ENTERED INTO A BINDING PRIVATE SETTLEMENT AGREEMENT DECLARING MRS. BROWN TO BE THE SURVIVING SPOUSE.

Although the trial court order mentioned the private settlement agreement, this argument was not specifically ruled upon by the trial court, which accepted other arguments in Mrs. Brown's favor. While Mrs. Brown did not file a Notice of Appeal, she is permitted to raise alternate grounds for sustaining the trial court's decision. "An appellate court may affirm the circuit court's ruling using any sustaining grounds that are both raised by the respondent's brief and found within the record." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 490, 593 S.E.2d 480, 483 (Ct. App. 2004). "We can affirm a

judgment on any ground appearing in the record," even if no exception was taken. *City of Aiken v. Cole*, 289 S.C. 239, 242-43, 345 S.E.2d 760, 762 (Ct. App. 1986).[39]

Appellants were among the parties who agreed to and accepted a settlement agreement that expressly provided that Mrs. Brown is the surviving spouse regardless of whether the agreement was approved by a court. The settlement agreement provided that it was a binding private agreement, regardless of court approval, and provided that it bound personal representatives and trustees, as allowed by law.[40] The settlement agreement expressly provided that the provision recognizing Mrs. Brown as the surviving spouse survived regardless of whether the agreement was approved by a court.[41] *See* Original Settlement Agrmt. of Aug. 10, 2008, ¶¶ 1, 6, and Addendum thereto, incorporating Original Settlement Agrmt., ¶¶ 23, 26. Appellants cannot now take a contrary position. Having accepted through his conduct the terms of the settlement agreement, including the provision recognizing the validity of the Browns' marriage regardless of court approval of the validity of the settlement agreement, Mr. Bauknight

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[39] This argument was expressly raised in the trial court. *See* Pl.'s Mem. Supp. Summ. J. 32-35. *See also* Order Re Pet'r Tommie Rae Brown's Mot. for Summ. J. & the Limited Special Administrator's Mot. for Summ. J., p. 2 (filed Jan. 13, 2015) ("Mrs. Brown and other parties to the estate litigation participated in mediation which resulted in a private settlement agreement. In the settlement agreement, Mrs. Brown was recognized by all parties thereto as the surviving spouse of Mr. Brown. The settlement agreement provided that it was a binding private agreement, regardless of court approval . . . . [and] expressly provided that the provision recognizing Mrs. Brown as the surviving spouse survived regardless of whether the agreement was approved by a court.").

[40] S.C. Code Ann. § 62-3-912 allows successors to enter into a binding private settlement agreement that binds the parties thereto, as well as personal representatives (except to the extent a nonparty's interest could be affected), even without court approval.

[41] The settlement agreement includes a severability provision that continues the binding effect on those provisions not found invalid. (Addendum to Private Agrmt. of August 10, 2008 to Include Agrmt. with Terry Brown Creating Restated & Amended Private Agrmt. ¶ 23 (filed Mar. 26, 2009).) Although the South Carolina Supreme Court ruled that the trial court's approval of the settlement agreement needed additional evidence that the settlement was just and reasonable, that opinion did not address the binding private settlement agreement issue, nor did it address the issue of the parties' recognition of the validity of family status, including Mrs. Brown's status as surviving spouse. Consequently, under both the binding private settlement agreement analysis and the severability clause, the provision confirming Mrs. Brown's status as Mr. Brown's surviving spouse remains binding.

cannot now disavow that provision and contest the validity of the marriage. Nor can Mr. Sojourner, who is acting for Mr. Bauknight in these litigated matters. Moreover, as allowed by South Carolina law, the binding private settlement agreement provides that its provisions are binding on personal representatives and trustees. S.C. Code Ann. § 62-3-912 (allowing binding private settlement agreements without court approval); *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013).

Throughout the appellate process, Mr. Bauknight administered the Estate in accordance with the provisions of the settlement agreement, as approved by the lower court. In full compliance with his fiduciary duties, Mr. Bauknight retained counsel to uphold the validity of the settlement agreement. Moreover, on his behalf, Mr. Bauknight's counsel signed the Respondents' brief to the Supreme Court in *Wilson v. Dallas*. On behalf of the other parties to the settlement agreement, including the remaining Appellants, their counsel signed the Respondents' brief to the Supreme Court.[42] *The Respondents' brief asserted that the court's order that approved the settlement agreement was correct.* Both the Respondents' brief and the court's order that approved the settlement agreement stated that Mrs. Brown was the surviving spouse and that the *Lukich* case, discussed above, supported that conclusion.[43] At oral argument before the Supreme Court, counsel retained by Mr. Bauknight presented on their behalf the settling parties' position to uphold the court's order which approved the settlement agreement, and the argument by Mr. Bauknight's counsel included the correct assertion

[42] The Attorney General's Office also signed the Respondents' brief.
[43] *See* Respondent's Final Reply Br. (filed May 2, 2011), pp. 30-31, n.31.

that *Lukich* supports the validity of Mrs. Brown's marriage to Mr. Brown.[44] Thus, the settling parties, including Appellants, correctly contended in the Supreme Court that the *Lukich* case, discussed above, supported and asserted the position that Mrs. Brown had *no* impediment to her marriage to Mr. Brown.

X. AS THE PARTIES ATTACKING MR. BROWN'S MOST RECENT MARRIAGE, APPELLANTS BEAR THE BURDEN OF PROOF IN THIS ACTION.

Although Mrs. Brown would prevail even if she had the burden of proof, the burden of proof is on Appellants.

A. When the Same Person is Married Twice, There Is an Extremely Strong Presumption that the Most Recent Marriage is Valid

Appellants object that the marriage certificate presented by Mrs. Brown is invalid because they contend Mrs. Brown was previously married to another man, Javed Ahmed, from whom she was never divorced. In support of this allegation, they have presented a marriage certificate, dated February 12, 1997, between Mrs. Brown and Ahmed. (Joint Stipulation of Facts ¶ 1, Stipulation Ex. 1, p. 000001.)

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[44] *See* Oral Argument at 42:40, Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (No. 27227), where Mr. Wilkins argued that

> [a]s far as Mrs. Brown is concerned, she certainly had a serious claim as an omitted spouse, and certainly a slam dunk claim as an elective share. . . . In *Lukich*, marriage number one, there was no impediment to that marriage, so when marriage number two came along, she had to reach back to have that marriage number one, that was a good marriage, annulled. . . . Had . . . [Mrs. Brown's marriage to Ahmed] not been annulled, the second marriage [to Mr. Brown] still would have been a good marriage, because the first marriage, by itself standing alone, was invalid because [Ahmed] had been married at least twice. . . . You can't get married to someone who's already married, and that's what happened with Mrs. Brown. So that first marriage in Texas was null from the very beginning. . . . [T]he [Family Court] recognized that the [marriage to Ahmed] was invalid, from the beginning.

Further, acting on behalf of the charitable beneficiaries, the Attorney General's office also made a presentation at oral argument before the Supreme Court to uphold this Court's order that, inter alia, approved the settlement agreement.

"Where the evidence shows that the same person entered into a conflicting marriage, a presumption arises that the former marriage was dissolved by death or divorce." *Yarbrough v. Yarbrough*, 280 S.C. 546, 550, 314 S.E.2d 16, 18 (Ct. App. 1984). Mrs. Brown's putative marriage to Ahmed is a former marriage. There is accordingly a presumption that the former marriage was dissolved. Appellants, as the parties arguing that the prior marriage was not dissolved, bear the burden of rebutting the presumption. "The party attacking the validity of a marriage bears the burden of proof." *E.D.M. v. T.A.M.*, 307 S.C. 471, 475, 415 S.E.2d 812, 815 (1992).[45]

The presumption in favor of the validity of the most recent marriage is extremely strong, and it can be rebutted only with strong evidence. Our Supreme Court has said

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[45] Texas, the state where the purported Brown-Ahmed marriage occurred, imposes a very strict burden upon those who argue that a person's most recent marriage is invalid:

> The presumption in favor of the validity of a marriage which, as in this case, has been duly shown to have been contracted is one of the strongest, if, indeed, not the strongest, known to law. "The presumption is, in itself, evidence, and may even outweigh positive evidence to the contrary. The strength of the presumption increases with the lapse of time, acknowledgments by the parties to the marriage, and the birth of children; and the fact that the legitimacy of a child may be involved is a factor in sustaining the validity of the marriage." 55 C.J.S., *Marriage*, § 43, pages 892-893. It is well that the presumption should be so regarded, for it is grounded upon a sound public policy which favors morality, innocence, marriage, and legitimacy rather than immorality, guilt, concubinage, and bastardy. *Nixon v. Wichita Land & Cattle Co.*, 84 Tex. 408, 19 S.W. 560; *Holman v. Holman*, Tex. Com. App., 288 S.W. 413; *Carter v. Green*, Tex. Civ. App., 64 S.W.2d 1069, error refused; *Hudspeth v. Hudspeth*, Tex. Civ. App., 198 S.W.2d 768, error refused, n. r. e.; 35 Amer. Jur., *Marriage*, § 191 et seq. Many cases from various jurisdictions supporting the rule that marriage, once being shown, is presumed to be valid are collated in annotations in 34 A.L.R. 464, 77 A.L.R. 729, and 14 A.L.R.2d 7.

Tex. Emp'rs Ins. Ass'n v. Elder, 155 Tex. 27, 30, 282 S.W.2d 371, 373 (1955). The South Carolina and Texas position is the general rule nationwide:

> In case of conflicting marriages of the same spouse, [1] the presumption of validity operates in favor of the second marriage, and the party attacking the second marriage has the burden of proving its invalidity and of showing a valid prior marriage; and [2] where a valid prior marriage is shown, it is presumed to have been dissolved by divorce or death so that the attacking party has the burden of adducing evidence to the contrary.
>
> In the case of conflicting marriages of the same spouse, the presumption of validity operates in favor of the second marriage, which presumption continues to operate until evidence is adduced that the spouse of the first marriage is living. Accordingly, the party attacking the validity of such second marriage has the burden of proving such invalidity, even though it involves the proving of a negative; and the burden of showing a valid prior marriage is on the party asserting it.

55 C.J.S. *Marriage* § 55 (Westlaw June 2016 Update) (bracketed numbers added) (footnotes omitted).

"[t]his is especially true in a case involving legitimacy. The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy. *When there is enough to create a foundation for the presumption of marriage, it can be repelled by only the most cogent and satisfactory evidence."* *Jeanes v. Jeanes*, 255 S.C. 161, 166-67, 177 S.E.2d 537, 539 (1970) (quoting *In re Estate of Foels*, 146 Misc. 428, 430, 263 N.Y.S. 327, 329 (N.Y. Sup. Ct. 1933) (emphasis added).[46] This presumption can only be overcome "by disproving every reasonable possibility." *Jeanes*, 255 S.C. at 167, 177 S.E.2d at 540 (quoting *In Re Estate of Foels*, 146 Misc. at 430, 263 N.Y.S. at 329).[47]

It is undisputed that Mr. and Mrs. Brown are the biological parents of James Brown, II.[48] Thus, there is a strong presumption that their marriage is valid. To declare

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[46] In *Smith v. Goldsmith*, 223 Ala. 155, 162, 134 So. 651, 657 (1931), the Supreme Court of Alabama recognized the validity of a marriage contracted in Tennessee which otherwise would have been declared invalid if contracted within Alabama. The Court said:

> [W]e think much greater harm is likely to arise by declaring such marriages invalid than by adhering to the construction generally given to such statutes. As was said in the Estate of Wood, [*137 Cal. 129, 60 P. 900*]: 'An opposite conclusion to that declared by the court would nullify hundreds of marriages, *place the stamp of illegitimacy upon scores of children*, and change the source of title to great property interests. Unless the law plainly points to that end, such a conclusion should not be declared, and as the court views the law, it is not plainly to that end, but plainly to the contrary.'

Id. (emphasis added). *See also Newburgh v. Arrigo*, 88 N.J. 529, 536, 443 A.2d 1031, 1034 (1982):

> Where marital partners have engaged in prior marriages, *a strong presumption supports the validity of their prior divorces and the last marriage. Kazin v. Kazin*, 81 N.J. 85, 96 (1979). Reasons for the presumption are readily apparent. *The presumption reflects a belief that parties would not willingly commit bigamy or illegitimize their children. Sparks v. Ross*, 72 N.J. Eq. 762, 765 (Ch. 1907), *aff'd*, 75 N.J. Eq. 550 (E. & A. 1909). The presumptive validity of the latest of multiple ceremonial marriages comports with the expectation of marital partners and lends stability to human affairs.

(emphasis added).

[47] *See also Newburgh*, 88 N.J. at 538, 443 A.2d at 1035 ("One attacking the validity of the most recent of multiple marriages is under a heavy burden to establish its invalidity by clear and convincing evidence...The challenger must disprove every reasonable possibility that could vitiate the prior marriage...") (internal citations omitted); *Wood v. Paulus*, 524 S.W.2d 749, 757-58, 1975 Tex. App. LEXIS 2721, *14-16 (Tex. Civ. App. Corpus Christi 1975) ("It is well settled that where two or more marriages of a person are alleged, the most recent marriage is presumed to be valid as against each marriage which precedes it until one who asserts the validity of a prior marriage proves the continuing validity of the prior marriage.") (citations omitted).

[48] James Brown, II took a DNA test early on in the litigation, proving that he was the biological son of James Brown. Upon the insistence of the LSA, James II also had to undergo a second DNA test, which

their marriage invalid would impact the status of James Brown, II. In any event, Appellants cannot disprove every reasonable probability that Mrs. Brown is the surviving spouse of Mr. Brown.

B. Because Mr. Brown's Most Recent Marriage Is Presumed Valid, Appellants Bear the Burden of Proving that Mrs. Brown's Marriage to Ahmed Remained Valid When She Married Mr. Brown

All of the opposing briefs in this case are built on the foundation that Mrs. Brown had the burden of proving that her marriage to Mr. Brown was not bigamous. *This premise is fundamentally wrong.* Mrs. Brown met her burden of proof by presenting a facially valid marriage certificate for James Brown's most recent marriage. A presumption then arose that all prior marriages of either spouse were dissolved before Mrs. Brown married Mr. Brown. The burden of proof lies fully and completely upon the parties who seek to rebut that presumption.

Appellants recognize the *Yarbrough* presumption (*see* Appellant Sojourner's Br. 8), last paragraph, but then claim that "the stipulated facts reveal [Mrs. Brown] was married to another man." (*Id.* at 9) The stipulated facts reveal nothing of the sort, and in fact the trial court held expressly to the contrary. The stipulated facts show the existence of a marriage certificate between Mrs. Brown and Ahmed, but they do not show that the certificate established a valid marriage. Under *Yarbrough*, there is a presumption that Mr. Brown's most recent marriage (to Mrs. Brown) is valid, and Appellants therefore bear the burden of proving that Mrs. Brown's marriage to Ahmed was initially valid and

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confirmed – again – that he is the biological son of James Brown. *See* Joint Stipulation of Facts ¶ 3, Stipulation Ex. 3, p. 000004.

remained valid as of the date she married Mr. Brown. The trial court held that Appellants had not met this burden.

Likewise, Deanna Brown et al. mistakenly claim that Mrs. Brown stipulated that "no other occurrence ended the marriage between her and Ahmed." (Appellants Deanna Brown et al.'s Br. ["Brown Br."] 16.) The source cited is Joint Stipulation paragraph 6, but that source does not support the statement made. Instead, paragraph 6 states that no occurrence "of which Plaintiff [Mrs. Brown] is aware" ended the putative marriage. (Joint Stipulations of Fact ¶ 6.) Mrs. Brown need not be aware of any "other occurrence" ending the putative marriage because it was never a marriage. Even if it were, it is Appellants' burden to prove that the marriage was not otherwise dissolved.

Because Mr. Brown's most recent marriage is presumed valid, it is Appellants' burden, not Mrs. Brown's burden, to prove that Ahmed did not die or divorce Mrs. Brown, without her knowledge, before Mrs. Brown married Mr. Brown. "[W]here a valid prior marriage is shown, *it is presumed to have been dissolved by divorce or death* so that the attacking party has the burden of adducing evidence to the contrary." 55 C.J.S., *supra*, § 55 (emphasis added). The fact that Mrs. Brown was not aware of such a dissolution is not sufficient to meet Appellants' burden of proving that no such dissolution occurred.[49]

Mrs. Brown's statement in the present case is no evidence that a divorce was not obtained *by Ahmed.* A divorce can be sought by either spouse, in any jurisdiction in which either party is domiciled. *Williams v. North Carolina*, 325 U.S. 226 (1945).

[49] Other courts have expressly held that a stipulation that a spouse was not aware of a divorce is not a stipulation that no divorce took place. *See Tex. Emp'rs Ins. Ass'n*, 155 Tex. at 31, 282 S.W.2d at 374

Appellants have not met their burden of proving that Ahmed did not divorce Mrs. Brown ex parte, without her knowledge.

Appellants also rely upon a statement by Ahmed in applying for his Texas marriage license with Mrs. Brown, stating that he was not previously married. That statement is an out-of-court declaration made by Ahmed, which is being used for the truth of the matter asserted. It is therefore inadmissible hearsay.

The application does not fall within the scope of the hearsay exception for public record and reports. Rule 803(8), SCRE. The application is an application, not a public record. It does not reflect any official action; it is simply a request for official action. The exception applies only to "(A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report." *Id.* The application certainly is not a report of the activities of an agency, and it is not a report of matters observed by any agency. Hearsay does not cease to be hearsay merely because it is reported to the government.

In addition, there is nothing at all trustworthy about the statement made by Ahmed on the marriage license. Mrs. Brown testified (Joint Stipulation of Facts at ¶ 8, Stipulation Ex. 13.), and the Family Court held that Ahmed married her in order to obtain a more favorable immigration status. (Joint Stipulation of Facts at ¶ 11, Stipulation Ex. 12, p. 000031.) Given that Ahmed's intent was to defraud the government, any statement he made is inherently suspect.

If hearsay ceases to be hearsay when reported to the government, a considerable volume of hearsay evidence will suddenly become admissible. Hearsay statements, made to police officers and repeated in their reports, will be admissible in civil cases. A party

desiring to have hearsay evidence admitted need only attach a copy of the statement to a document filed with a public official, and suddenly the statement will become official. Tolerating this sort of practice is not the purpose of the public records exception.

It is also useful to take note of the evidence which the appellant did not present in the trial court. "In order to rebut the presumption that a prior marriage was dissolved, it is necessary to rule out divorce proceedings where a spouse might reasonably have been expected to have pursued them." *Jordan v. Jordan*, 938 S.W.2d 177, 179 (Tex. App. 1997). This is normally done by presenting evidence that no record of a divorce is found in the divorce records of the states in which the parties to the first marriage lived after their separation and before the date of the second marriage. Failure to check the records of any such jurisdiction prevents rebuttal of the presumption. *Id.* at 179-80; *see also Smith v. Weir*, 387 So. 2d 761, 764 (Miss. 1980).

Here, none of the opposing parties have checked the divorce records in any jurisdiction, let alone all relevant jurisdictions. Absent a search of divorce records in Pakistan and other places where Ahmed was domiciled, Appellants cannot meet their burden to prove that Ahmed never obtained an ex parte divorce from Mrs. Brown without her knowledge.

Adoption of Appellants' position in this case would create chaos in the law of marriage. Given modern divorce rates, a significant number of citizens of this state are married more than once. Appellants' position seems to be that all persons who are married once must be prepared to prove, at a moment's notice, to every third party who seeks to contest the issue, the validity of their second marriage. The law has quite reasonably provided otherwise for years, presuming that the most recent marriage is valid

and placing the burden of proof upon the parties who seek to attack it. *Yarbrough v. Yarbrough*, 280 S.C. 546, 550, 314 S.E.2d 16, 18 (Ct. App. 1984). That rule is sound and wise, and the court should reaffirm it in this action.

Because Appellants bear the complete burden of proof, Mrs. Brown is not required to prove that her marriage to Ahmed was bigamous. Rather, it was Appellants' burden to prove that the marriage was not bigamous. On the facts, Appellants cannot meet that burden. But the Court need not even reach the facts, because Appellants have a much greater problem: they are legally bound by a family court judgment holding that Mrs. Brown's marriage to Ahmed was void from its inception.

Regardless of who has the burden of proof, Mrs. Brown proves as a matter of law that she is the surviving spouse of James Brown.

CONCLUSION

Appellants lack standing to contest the Browns' marriage. They are in the wrong court to assert subject matter jurisdiction over annulments. Because they are in privity with Mr. Brown, they cannot assert claims that he could not assert during his lifetime. Mr. Brown could not attack the validity of the family court order invalidating as void *ab initio* the putative marriage between Mrs. Brown and Ahmed because Ahmed was already married and thus precluded by the bigamy statute from marrying Mrs. Brown. Therefore, Appellants cannot do what Mr. Brown could not do and cannot attack that order.

Appellants are estopped from contesting Mrs. Brown's marital status, (1) having agreed to a settlement agreement with a term recognizing the marriage as valid, regardless of whether a court approved that settlement agreement, (2) having asserted the

validity of that marriage to the Supreme Court, and (3) Mr. Brown having sought affirmative relief in his own family court action asking the Aiken Family Court to adopt the findings of the Charleston Family Court.

Even if Appellants do have standing and are not estopped, the order of the family court finding the putative marriage of Mrs. Brown and Ahmed void *ab initio* because of Ahmed's bigamy is final and the law of the case. A probate court cannot override that family court order. Thus, it is the law of the case that Mrs. Brown had no impediment to her marriage to Mr. Brown. The burden of proof is on Appellants, and they have no ability to overcome that burden.

All relevant precedent supports the indisputable conclusion that Mrs. and Mr. Brown's marriage was valid. *Lukich* provides that the family court order is final and the law of the case.

Even if Appellants were correct in their mistaken reading of *Lukich*, the "logic" of their attempt to apply it to the Browns' situation is horribly flawed as set forth above because, under their theory, Mr. and Mrs. Brown's marriage, even if bigamous, is valid until an annulment order is obtained, and it is too late to do so.

For Appellants to prevail, this Court would have to conclude all of the following:

1. That Appellants have standing to attack the Brown-Ahmed final family court order, even though Mr. Brown did not have standing under applicable law and even though Mr. Brown himself in his amended complaint, in his own action, asserted that the order was final and binding;

2. That Appellants are not bound by their own agreement that Mrs. Brown is the surviving spouse of Mr. Brown;

3. That Appellants are not bound by their own assertion to the Supreme Court that Mrs. Brown is the surviving spouse of Mr. Brown;

4. That a court in a probate matter has authority to overturn a final binding family court order, despite the chaos such a precedent would create, and despite the state statute and all South Carolina precedent to the contrary, and even though Mr. Brown himself in his complaint asserted that the family court order was final and binding;

5. That *Lukich* and all other relevant South Carolina precedent about bigamous marriages being void *ab initio* hold for the opposite result that these cases actually hold;

6. That a bigamous marriage is valid unless and until a court finds that the marriage is bigamous — i.e., that the policy of this state, despite its bigamy statute, is to allow valid bigamous marriages unless and until someone complains in court and gets a court order;

7. That the incorrect view of the *Lukich* holding held by Appellants applies only when they want it to — i.e., they want their mistaken view to apply to the putative Brown-Ahmed marriage but not to the Browns' marriage; and

8. That the family court's finding of fact and conclusion of law that Mrs. Brown is the surviving spouse is not the law of the case.

Mrs. Brown asserts that none of these eight conclusions asserted by Appellants is correct under the law, let alone all eight that would have to apply for Appellants to prevail. And, of course, all of this discussion falls within the context of the burden of proof being on Appellants.

These are all issues of law and not subject to factual dispute. For the reason stated throughout this Brief, Mrs. Brown respectfully requests that the decision of the trial court be affirmed.

This 9TH day of March 2017.

Respectfully submitted,

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TOMMIE RAE BROWN

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

Case Nos. 2013-CP-02-02849, 2013-CP-02-02850

Appellate Case No. 2015-002417

Tommie Rae Brown .....Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown, Respondents below,

Of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown, and Daryl Brown are the.....Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amended Initial Brief of Respondent Tommie Rae Brown has been served on all counsel of record by depositing a copy of same in the United States Mail, postage prepaid on March 9th, 2017, and addressed as follows:

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March 9, 2017

By U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Estate of James Brown a/k/a James Joseph Brown
Tommie Rae Brown, Respondent v. David C. Sojourner, Jr., et al.
Appellate Case No. 2015-002417

Dear Ms. Kitchings:

Enclosed for filing is an original and one copy of the **Amended Initial Brief of Respondent Tommie Rae Brown** and **Amended Designation of Matter to Be Included in the Record on Appeal** in the above-referenced matter together with the **Proofs of Service**. Please file the original and return the clocked-in copy in the enclosed pre-addressed, pre-stamped envelope.

By copy of this letter, I am serving a copy of these documents on all attorneys of record.

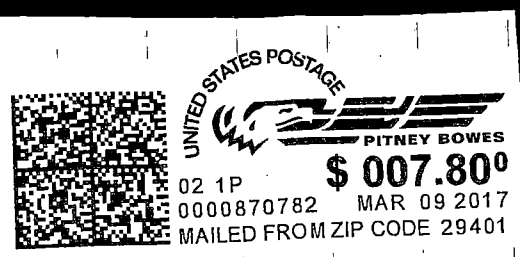
Thank you for your assistance, and please feel free to contact our office if you have any questions.

Sincerely,

Robert N. Rosen

RNR/ecc
Enclosures

cc: All Counsel of Record (w/ enclosures)
Tommie Rae Brown (via email)



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