THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT AND FLORENCE COUNTY
Kenneth E. Fulp, Jr. Circuit Court Judge
Roger L Crouch, Circuit Court Judge

Case Nos. 2016-ES-01-00302, 2016-CP-21-1435, 2015-ES-21-00778
Appellate Case No. 2017-002290

Deborah B. Harwell, ... Respondent/Appellant,

v.

Robert Bryan Harwell, individually and as the Personal Representative of the Estate of David W. Harwell; and the South Carolina Department of Health and Environmental Control, Division of Vital Records, Defendants,

Of whom Robert Bryan Harwell, individually and as the Personal Representative of the Estate of David W. Harwell is the ..... Respondent/Appellant,

And the South Carolina Department of Health and Environmental Control, Division of Vital Records is the ..... Respondent,

v.

Law Office of Deidre W. Edmonds, P.A.
And Deidre W. Edmonds, Individually, ...Appellants/Respondents.

INITIAL APPELLANT'S BRIEF OF DEBORAH B. HARWELL

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STATEMENT OF THE CASE

A. Relevant Background

These cases were instigated by the actions of Federal District Judge Robert Brian Harwell who used his extensive network of political cronies to take malicious self-serving actions against his step mother Deborah Harwell who was married to his natural father the former Chief Justice of the South Carolina Supreme Court, David Harwell since November 21, 2001 until his death on September 30, 2015, a period of (14) years.[1] Deborah and David were never divorced and both planned, despite Bryan's opposition, to end the separation that David claimed was conceived and orchestrated by Bryan Harwell which effectively began on February 13, 2014.

On February 13, 2014, while Deborah was out running errands for her husband David, who was recovering from a knee operation, David later told Deborah that Bryan came and took him from their home in Florence against his will on that day. When Deborah returned home and found David missing she made numerous calls to individuals and could not locate him. Just as she was about to call the police Deborah received a call from Kevin Barth, a former law partner and best friend of her stepson, Bryan Harwell. Mr. Barth claimed David asked him to call Deborah and tell her he wanted a separation.

Deborah was unable to reach my husband for days after that call. When she finally reached him, he told her he was doing what Bryan wanted him to do, and that she just needed to play along so Bryan would leave us alone. David expressed fear for his life from Bryan on several occasions and warned Deborah that he would have no problem putting her in jail on trumped up charges or if necessary to shut her up by having her killed. David begged Deborah

[1] David and Deborah lived together and were engaged the immediate four years prior to their marriage.

to just cooperate with Bryan. so they could get our lives and be back together. Please see Deborah Harwell affidavit dated January 31, 2017, for detailed explanation.

A. STATEMENT OF ISSUES

This is an appeal from three (3) contempt orders issued by the Family Court against the widow of a former family court litigant. The orders were issued in response to pleadings filed by the Personal Representative of a deceased litigant in a previously finalized separate support and maintenance action. The deceased's other family member was offended by the Conduct of Appellant (both before and after the decedent's death) and the personal representative used the family court proceeding as a sword to eviscerate her for daring to hold herself out as the loving widow of her late husband (which she, in fact, was and is). The story is dramatic; the result engineered by the personal representative of the decedent's estate, and the family court, is clearly erroneous, and tragic. Appellant regrets that the private affairs of the late retired Chief Justice David W. Harwell are spread out for all the world to see, but she must defend herself. She did not start this litigation. The personal representative apparently sees this attack on his father's widow as somehow honoring his late father or has been found that they are hiding assets. Those of us who knew and worked with Justice Harwell should be horrified at this uncalled-for attack on his widow. Yet, there seems some hidden reason for his actions other than just attacking Mrs. Harwell for the fun of it. This woman adored her husband and according to all photographs and trips taken until the nearly the last moments of his life, he also adored her.

Appellant Deborah Harwell (hereafter Mrs. Harwell) and retired (South Carolina Supreme Court) Chief Justice David W. Harwell began residing together on March 25, 1997. They were married on November 21, 2001 (2015 Complaint p. 1)

A family court action was initiated by Justice Harwell on March 20, 2015, just as he emerged from the hospital from knee surgery, seeking the right to live separate and apart and enforcement of a prenuptial agreement executed on the day of their wedding. (2015 Complaint).

The complaint sought no restraining orders, no "no contact" orders and did not allege any risk of harm or interference by and between the spouses or any other persons.

Id. The complaint did not seek a divorce and made no allegations that grounds for a divorce existed.[2] *Id.* Justice Harwell actually wore his wedding ring until the day of his massive health attack that took his life. Mrs. Harwell continues to wear her wedding ring until this very day.

The parties entered into a mediated property settlement agreement on or about July 17, 2015 (Mediated Agreement, attached to "Final Decree" filed July 21, 2015). Paragraph 10 of the Mediated Agreement provided that:

> 10. The parties shall be mutually restrained from disparaging the other party, or any member of the other parties' family including children, children's spouses, and grandchildren, in any manner. The parties are further restraining from contacting or communicating with the other.

The Family Court approved the Mediated Agreement the next day in a hearing[3] which Mrs. Harwell was told not to go "so we could get a quick hearing" by the Mediation attorney Julian Derrick[4]. (June Tr. P. 18). She told her that it was a nothing hearing, and no one would

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[2] Justice and Mrs. Harwell had separated only a month earlier. (2015 Complaint).

[3] No hearing notice has been located. The record does not reflect how a hearing happened to convene the day immediately following the signing of the Mediated Agreement.

[4] Ms. Derrick did not indicate who the "we" were who wanted a "quick" hearing or whose interest was being served by handling the manner in such an expedited fashion or arranging to have Mrs. Harwell absent from the hearing.

go, and Mrs. Harwell was led to believe that it was the first part of a two-part agreement and the second part was the Pre-nuptial Agreement, where the Chief Justice Harwell owed his wife a repayment of living expenses, as cited in the Pre-nuptial Agreement.

The Family Court approved the Mediated Agreement the next day in a hearing, which Mrs. Harwell was told not to attend. Her attorney told her later that she did not represent her in the hearing and only represented her in the Mediation meeting and that she had no obligation to tell her anything that happened in the courtroom. In fact, Judge Harwell did attend. The Court entered a "Final Decree" filed July 21, 2015, which approve the mediated agreement, but acknowledge that no divorce had been sought by either party. (Final Decree), which is not the proper titling and appeared to be an effort to deceived in what the agreement was about. While the Family Court made the traditional findings that the mediated settlement agreement was voluntary and fair, the Court did not examine the physical, mental and emotional state of both parties. Judge Harwell was on oxygen and multiple mediations and Mrs. Harwell was emotionally distraught and had just been found in severe depression by her doctor at MUSC because of this situation. The Court also made no independent finding as to the validity or legality of the "no contact" language contained in Paragraph 10 of the mediated agreement. Id. Judge Harwell continued to have contact with Mrs. Harwell after the Mediated agreement. And thus forth. The "Final Decree" only reserved jurisdiction to issue any subsequent Orders necessary to accomplish the above division of property including any Qualified Domestic Relations Order." Id. Paragraph 3, unnumbered Page 5.

Subsequent to the entry of the "Final Decree," despite the "no contact" provision, Justice and Mrs. Harwell continued to interact with one another until his death on September 30, 2015.

Both wearing their wedding rings. (June Transcript p. 43, lines 4-10; p. 54, lines 9-18; p 85, lines 10-18). This is undisputed.

Justice Harwell was hospitalized just before his death. (May Transcript p. 69). Family members of Justice Harwell's family called and told Mrs. Harwell that she needed to hurry to the hospital and she did. (June transcript p. 71, lines 11-15). There is no evidence that Justice Harwell or anyone, other than Justice Harwell's son Bryan Harwell (who later became the personal representative of his father's estate), objected to Mrs. Harwell's presence at the hospital. The hospital room was glass and attached to the nurse's station.

The hospital drama is a complete fabrication. Bryan Harwell testified that Mrs. Harwell's visit to the hospital was "unannounced and I had to have her removed by hospital security." May Transcript p. 69, line 16-17). Upon questioning by his own counsel, however, Bryan Harwell's characterization of the event was revealed to be inflated and totally untrue.

After characterizing Mrs. Harwell's "removal" from the hospital by security, Bryan Harwell admitted that Mrs. Harwell had "voluntarily" left the hospital waiting room "after hospital security came up and spoke to her." (May Transcript p. 70, lines 5-6). He testified that "I told Debbie "It's time for you to leave, you're not supposed to be here." (May transcript p. 70, lines 1-2). Bryan Harwell acknowledged that Mrs. Harwell stepped outside" after he spoke to her, but to add drama, he added that Mrs. Harwell "sat down right outside and she wasn't supposed to be there" (although he offered no explanation for why she was not supposed to be there.") *Id.* By Bryan Harwell's own testimony, his characterization of having her "removed" was hyperbole since she left the hospital "voluntarily," to sit in the hospital parking lot for over an hour crying.

Mrs. Harwell was not aware of any restraining order that required her to stay away from the hospital or her husband. (June Transcript p. 71, lines 16-17). She never had anyone hand her an Order of any kind. She went because she was invited by more than one member of Judge Harwell's family, all of whom had equal authority (as compared to the future personal representative Bryan Harwell) to extend the invitation and she was and is still his legal wife. (June transcript p. 71, lines 11-15). She left when she was told by Bryan Harwell to leave and after she spoke with the security officers. Bryan Harwell had called to accost her. (May Transcript p. 70, lines 5-6). There was no drama.

Justice Harwell died on September 30, 2015. (Contempt Complaint, Exhibit 5). At the time of Justice Harwell's death, Mrs. Harwell was and is his widow legally.[5] Bryan Harwell had not yet been named as the personal representative of the Estate of David W. Harwell at the time the funeral arrangements were made and neither he nor anyone else had the right to exclude Mrs. Harwell from the visitation and/or writing of the obituary. No funeral was ever held to Mrs. Harwell's horror and disappointment for her husband. Mrs. Harwell was not notified of her husband's death until a former partner texted her the message, "It's over." To this day, she has little closure on the death of her husband.

Following Justice Harwell's death, Mrs. Harwell found that her name had been left off of the Death Certificate and she retained counsel and filed the DHEC action, on March 1, 2016. (Complaint filed March 1, 2016). She also sought relief in the probate court. (Petition for Allowance of Claim (2) filed March 8, 2016.

Bryan Harwell was appointed personal representative of the estate of David Harwell on or about October 12, 2015[6] (Rule to Show Case p. 11, Paragraph 1). Without seeking an order of substitution or to permission to reopen the closed separate Support and Maintenance action in family court, a pleading entitled Complaint for Contempt (with accompanying executed Rule to Show Cause) was filed in family court in the name of the Estate of David Harwell on or about February 11, 2016, after Judge Harwell's death. (Order, RTSC, page 9).

The Complaint for Contempt sought relief based upon a provision incorporated into the "Final Decree" that approved the portion of the mediated agreement that purported to protect the rights of persons who were not parties to the original family court actions, i.e., Justice Harwell's adult sons, daughters-in-law, and grandchildren[7] (Complaint for Contempt 2-1-2016). Nothing was explained to Mrs. Harwell at the Mediation and her attorney stated that Bryan Harwell was in his truck at the courthouse on the cell phone regulating the Mediation. The Mediator told Mrs. Harwell that the third party was giving pushback during the Mediation. Mrs. Harwell asked her attorney who the Mediator was talking about and she said she didn't know.

The prayer in the Complaint for Contempt did not make a specific request for any particular type of contempt, nor did it request the imposition of period of incarceration as part of the relief requested. Instead, the Complaint for Contempt stated its purpose was "to stop the Defendant's misconduct and behavior which are designed to interfere with the P.R.'s ability to

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[7] The record does not reflect Bryan Harwell had any legal authority to act on behalf of his father prior to his father's death. Bryan Harwell therefore had no legal authority to direct or restrict hospital visitation. In the days following his father's death, Bryan Harwell had no legal representative status to direct the funeral arrangements and threaten Mrs. Harwell with legal arrest if she attended her husband's visitation but did so nonetheless.

manage the estate..." (Complaint for Contempt, Paragraph 9, Page 19). Mrs. Harwell was never read or explained any of the mediation and was under medications for depression that altered any comprehension that she possibly could have had.

Mrs. Harwell was unable to retain counsel to represent her in family court at the time the hearing on the Petition convened. (May Transcript 5-19-16, p. 6, line 1-p. 10, line 10). Her Columbia attorney, Carrie Warner, cited a conflict 48-hours prior to the hearing and continued to have Mrs. Harwell's files. Mrs. Harwell properly presented an Emergency Request for Extension of time to find another attorney to the Judge, but it was denied without even reading the list of attorneys that she had met with or talked to about representing her.

She was put up, with absolutely no law education again an attorney of 32-years of Family Law Experience and the US Federal Judge. The hearing was 95% completed on the first day but was re-convened for a second day for approximately 5% of the hearing (Transcript 6-16-16, pg. 4). Between the two hearings, some former colleagues of the late Justice Harwell "who were concerned that this had kind of taken an unusual turn of trying to incarcerate the Chief Justice's wife to destroy her reputation" prevailed upon attorney Cliff Welsh to appear with Mrs. Harwell for the second day of testimony. (June Transcript p.5, lines 9-13)[8].

On the second day, that represented approximately 5% of the trial, Mr. Welsh argued on Mrs. Harwell's behalf that the Court lacked subject matter jurisdiction, but the Court overruled his objection. (June Transcript p. 16, line 2-p 19, line 12; p 74, lines 9-14). Over the course of two days of testimony occurring on May 19, 2016 and June 16, 2016, the Court heard extensively about Mrs. Harwell's visit to her husband in the hospital, her attempt to view his

[8] The trial Judge tried to dissuade Mr. Welsh from representing Mrs. Harwell at the hearing telling him that he would be stuck with her if he represented her and discouraged him from doing so. (Transcript 6-16-16. Pp 5-6).

body at the funeral home, the extensive efforts of the "family" to exclude Mrs. Harwell from the funeral, and extensive testimony about the claims that Mrs. Harwell had filed against DHEC and the estate (although neither of those matters were included in the Complaint for Contempt). (Transcript 5—19-16, p 10-78 or portions thereof; 6-16-16, p. 4-199 or portions thereof). Mrs. Harwell had already pointed out that the Mediation Agreement stated that upon a Disagreement that the Mediator became the Arbitrator, but the trial Judge erred in even considering the document.

At the end of the second day of trial, Mrs. Harwell began to see officers entering the room and attorney Kevin Barth and Judge Bryan Harwell laughing loudly at their table. The Family Court Judge found Mrs. Harwell in "civil contempt" via an Order issued on June 16, 2016, sentencing Mrs. Harwell to forty-five days in county jail, non-purgeable. (June 16, 2016 Civil Contempt Order). The Family Court's June 16, 2016 Order simply stated that it found Mrs. Harwell "in willful (sic) civil contempt of violation of this order and is sentenced to 45 days in the Detention Center. The Defendant is in willful (sic) violation of Allegations 1-5." (June 16, 2016 Order.). The Order does not state where the" Allegations 1-5" appear nor does it give any support for a "civil" sanction of forty-five days in jail. Mrs. Harwell was taken into custody in handcuffs and shackles at the conclusion of the hearing without any notice. The order did not reserve jurisdiction to issue a subsequent order changing the judge's ruling nor elaborating on it. (Order 6-16-16).

More than a month after the last day of hearing and well after Mrs. Harwell was released from the Detention Center, with no further request from the parties (even assuming the Personal Representative had standing to be a party for purposes of contempt), without having reserved jurisdiction and with matters not ruled upon, the Court issued a second contempt order. (July 20,

2016 Criminal Contempt Order for the same trial). This later, *sua sponte* order made detailed factual findings and changed the earlier order from civil contempt to criminal contempt for no apparent reason other than to bolster the previous Order which was not supported by the record. The Family Court included detailed factual findings that were missing from the written order dated June 16, 2016 and mostly written by attorney Kevin Barth, as indicated on the word document changes, more than 30-days earlier and had not been dictated on the record at the hearing. [9]

On August 1, 2016, Appellant filed a Motion to Reconsider or for a New Trial challenging the Family's Court's July 20, 2016 Order including, inter alia, her assertion that the Family Court lacked subject matter jurisdiction to enforce the personal restraints in the approved Mediated Agreement and arguing that the record contained no factual support for the Court's contempt findings. Following a hearing on September 1,4, 2016, the Family Court issued a detailed order denying Appellant's request for relief. (September 21, 2016 Order). This appeal followed.

ARGUMENT

Standard of Review

On appeal from a contempt finding in family court, this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Hawkins v Mullins, 359 S.C. 497, 597 S.E.2d 897 (Ct. App. 2004) (Citing Murdock v Murdock, 338 S.C. 332, 526 AS.E. 2ds 241 (Ct. App. 1999). "A trial court's determination regarding contempt is subject to

[9] At the hearing on the Motion to Reconsider, the trial judge attempted to justify her later *sua sponte* order by suggesting that Bryan Harwell's counsel did not have time to prepare an Order before Mrs. Harwell was jailed. It did appear that they had time to prepare the Judge's charge in a scripted manner, much of her condescending speech had nothing to do with what Mrs. Harwell was charged with. (September Transcript p. 50-53)

reversal where it is based on findings that are without evidentiary support or where there has been an abuse of discretion." Id. Quoting Henderson v. Puckett, 316 S.C. 171, 173, 447 S.E. 2ds 871, 872 (Ct. App. 1994). "An abuse of discretion occurs either when the court is controlled by some error of law or where the order, based upon findings of fact, lacks evidentiary support." *Id.* Quoting *Townsend v. Townsend,* 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct. App. 2003). "A determination of contempt is a serious matter and should be imposed sparingly; whether it is or is not imposed is within the discretion of the trial judge, which will not be disturbed on appeal unless it is without evidentiary support." *Miller v. Miller*, 375 S.C. 443, 452-53 (Ct. App. 2007) (citing Floyd v Floyd, 365 S.C. 56, 72, 615 S.E.2d 465, 473 (Ct. App. 2005) and *quoting Haselwood v. Sullivan*, 283 S.C. 29, 32-33, 320 S.E.2d 499, 501 (Ct. App. 1984).

I. THE FAMILY COURT IMPROPERLY SANCTIONED MRS. HARWELL WHEN THE RIGHT TO ENFORCE ANY PRIOR PERSONAL RESTRAINTS DIED WITH JUSTICE HARWELL. THE FAMILY COURT LACKED SUBJECT MATTER JURISDICTION TO PUNISH MRS. HARWELL FOR OFFENDING OTHER MEMBERS OF THE HARWELL FAMILY AFTER JUSTICE HARWELL'S DEATH.

Despite the personal representative's assertion that he stands in the shoes of the now deceased Justice Harwell and may prosecute a Rule in his name, in actuality, he has no such right. First, the personal representative had no standing to step into the shoes of Justice Harwell following his demise without following the Rules of Civil Procedure requiring the Estate's substitution in the Family Court proceedings.

South Carolina rule of Civil Procedure 25(a)(1) requires the estate of the decedent be substituted for the deceased party "within a *reasonable time* of Decedent's death." (Emphasis added.) "If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party. Counsel of record for such deceased party shall give notice to all other parties of the death of such party as soon as practicable after obtaining such knowledge and of

the name an address of the proper parties who should be substituted." Id. Not only was there no order of substitution sought or issued, the personal representative simply filed the complaint for contempt using the family court case number on the already concluded case, rather than bringing a new action.

Rule 25(a)(1) is substantially the same as Federal Rule 25(a) that states substitution must occur within ninety (90) days of the party's death. In this case, the Family Court action had ended with the approval of the parties' mediated agreement by the Family Court in July of 2015 and Justice Harwell died at the end of September 2015. Assuming it otherwise had the right to revive this action, if the Estate wished to petition the Family Court for relief ancillary to the mediated agreement, the Estate was obligated to petition for substitution. It did not do so and so the PR had no standing or right to petition the Family Court for relief in Justice Harwell's name. Second, any right to enforce the purported restraint against personal contact contained in Paragraph 10 of the mediated agreement was personal to Justice Harwell and died with him. *Louthian & Merritt P.A. v. Davi,s* 272 S.C. 330, 251 S.E.2d 757 (1979) (holding that a party's death abated the entire divorce action and deprived the circuit court of subject matter jurisdiction to award ancillary relief including attorneys' fees and noting that an action for divorce is purely personal and terminated on the death of either spouse); *Hatchell-Freeman v Freeman,* 340 S.C. 552, 532 S.E. 2d 299 (Ct. App. 2000). While there is no South Carolina case law that specifically states restraints are personal to the litigants (and therefore end at death), the equitable maxim action *personalis moritur cum persona* – a personal action dies with the person, should apply. It is a rule of the common law, which has a long been followed in the State unless changed by statute that a personal action ex delicto dies with the person. I C. J. S., Abatement and Revival, §§ 143, 145, pages 196, 200. This principle is set forth in the old maxim *"action*

personalis moritur cum persona". This common law rule has been amended by legislative act in various instances, to cover certain designated action for tort. *Carver v. Morrow*, 213 S.C. 199 (S.C. 1948) (cause of action for libel or slander dies with the person). "at common law, a personal action *ex delicto* did not survive the death of either party." *Bennett v. Spartanburg Ry., Gas & Elec. Co.,* 97 S.C. 27, 81 S.E. 189 (1914).

While South Carolina's adoption of Lord Campbell's Act, 19 S.C.L.R 220, 221 (1967), commonly referred to as the survivability statute, has provided for the non-abatement of most tort actions, S.C. Code Ann.§ 15-5-90 (1996), South Carolina case law has continued to recognize a common law exception regarding causes of action for personal harms such as fraud or deceit. *Ferguson v. Charleston Lincoln Mercury, Inc.,* 349 S.C. 558 (2002) (*citing Mattison v. Palmetto State Life Ins. Co.,* 197 S.C. 256, 15 S.E.2d 117 (1941) (finding a cause of action for fraud did not survive the death of a person who was allegedly defrauded by an apparent cancellation of an insurance policy). Personal restraining orders issued by our Family Courts are clearly equitable remedies that are designed to protect specific individuals from particularized, personal harm. The rights protected and normally vindicated by a contempt action are highly personal to the parties and should treated as analogous to libel and slander causes of action especially in this case as the provisions allegedly violate involved both personal contact and non-disparagement.

A survey of other states shows general support for the concept that contempt actions abate at the death of one of the parties. For example, in *Estate of Hackler v. Hackler*, 44 Va. App. 51 (Va. Ct. App. 2004), the Virginia Court of Appeals ruled specifically that once a party dies, even if he violated a court order prior to his death, the aggrieved party could not receive relief as the contempt is personal to the party in contempt and dies with him. *Estate of Hackler v.*

Hackler, 44 Va. App. 51 (Va. Ct. App. 2004). Similarly, in cases where other domestic litigants have sought to old a deceased spouse in contempt for violations of order prior to death, those appear to abate at the offending parties' death. See e.g., *Standard Ins. Co. v. Schwalbe*, 755 P.2d 802, 805-06 (Wash. 1988) (equitable interpleader action brought by life insurere to determine distribution of proceeds; court recognized that the death of husband who violated an injunction precluded a remedy at law in the form of a contempt proceeding); *Investors Title Ins. Co. v Herzig*, 785 N.W.2d 863, 2010 N.D. 138 (2010)(remedial award of attorneys' fees did not abate at death of obligor but contempt sanctions could only be calculate up to the day of death and then stopped); *Frederickson v. Frederickson*, 159 111.Appl3d 743, 512 N.E.2d 1080 (1987); *Rhodes v. Pederson,* 229 S.E.3d 62 (2007); *Socha v Socha,* 183 Wis2d 390, 515 N.W.2d 337 (1994); *Simendinger v. Simendinger,* 2015 VT 118, 131 A3d 744 (2015). Those courts that have found continuing jurisdiction after death of a party to a family court action have done so only with respect to property division issues. Similarly, here, this Court should apply the equitable maxims and hold that enforcement of the personal restraints from the parties' mediated agreement abated at the death of Justice Harwell. [10] Such a ruling would also be consistent the limited nature of the Family Court's statutory jurisdiction. The primary basis of the claim for and citation of contempt against Mrs. Harwell, whether civil or criminal, seems to be Paragraph 10 of the mediated settlement agreement (the "no contact" and non-disparagement provisions). The jurisdiction of the family court is strictly limited to that provided by statute. S.C. Code Ann. Section 63-3-10.

[10] Such a ruling would be consistent with the normal rule that only property division survives the death of a party and the divorce itself abates. Hodge v hodge, 305 S.C. 521, 409 S.E2d 436 (Ct.App. 1991).

While the Family Court had jurisdiction to entertain, and rule upon, the original complaint for "separate maintenance and suppor, legal separation and ... for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal of the marriage. ..." S.C. Code Ann. Section 63-3-530(A)(2), between Justice and Mrs. Harwell, its jurisdiction as to third parties is extremely limited. The original family court complaint did not seek to bring before the court any third parties for purposes of a "no contact" order or disparagement provision. (2015 DR Complaint). The family court's jurisdiction over third parties is strictly limited to jurisdiction over third parties "charted with or alleged to be interfering with the marital relationship between husband and wife. . ." or "whose presence to the proceedings may be found necessary to a complete determination of the issues therein. . . " Id. Section (A)(19).

Justice Harwell's grown sons, their unidentified spouse and Justice Harwell's unidentified grandchildren were not parties to the family court action (nor could they have been unless they had been added based on possessing allegedly marital property or had been added properly based on alleged interference in the parties' relationship). The Family Court lacked both subject matter and personal jurisdiction over them when the "Final Decree" was issued and at all times thereafter. The trial judge's argument that she was not hearing any challenges to the original order was simply a creative way of dodging the real issue before her, *i.e.,* she had an obligation to consider the enforceability of the order before addressing the question of whether Mrs. Harwell had violated it. (Sept. Tr. P. 6, line 8–p. 11, line 18). Rather than address this issue, which she characterized as "willy nilly", the trial judge simply pretended the jurisdictional issue was not her problem. *Id.* At line 20. The nature of the family court's subject matter jurisdiction over third parties is limited and no one other than the parties was made a party to this action prior

to the issuance of the "Final Decree." The Court therefore had no jurisdiction to issue a "no-contact" order that included anyone other than the parties themselves. Thus the "Final Decree" could not have issued an order that vested Judge Harwell's grown children of their families with any rights under the "Final Decree." With the exception of Mrs. Harwell's visit to her husband's bedside immediately prior to his death (which was at the invitation of other Harwell family members), the Court's contempt citation all relates to matters which occurred after Justice Harwell's death, to which the "no contact" order could not be applied (since the family court could not order equitable relief as to persons who were not parties to the action, as discussed above).

The court's later, *sua sponte* contempt order (issued in July, 2016, after its jurisdiction ended) focuses on Mrs. Harwell's harm to the "family" and the "family's grief" after Justice Harwell's death and was intemperate in its language and tone referring to Mrs. Harwell's attempts to be listed as the Justice's widow and to participate in his funeral as "despicable" and "disrespectful." The family court judge clearly lost her focus when she included such vitriolic descriptions of Mrs. Harwell's conduct, so as to almost appear to be personally offended herself. The family court judge was angered that Mrs. Harwell did not properly bow to the all-powerful and mighty Bryan Harwell, even ignoring the defects in the original order to allow these proceedings to go forward.

These were not issues that could be encompassed within the right personal to Justice Harwell had to enforce the "no contact" order. To the extent that the Court also found Mrs. Harwell in contempt for "disparaging" Judge Harwell's family members, this too was beyond the scope of the family court's permissible jurisdiction. These actions occurred after Judge Harwell's death and third parities (such as the Personal Representative and son and other family members)

had no right granted to them by the family court. The Family lacked jurisdiction to address those matter at all no matter how personally offended it was on behalf of Judge Bryan Harwell or any of his relatives.

Indeed, the family court's jurisdiction to issue a "no contact" order is limited by statute, to those circumstances set forth in 63-3-530(A)(18), "in cases where the spouse's conduct or condition or his or her cruel or inhuman behavior made it unsafe or improper for the deserting spouse to continue to live with him of her." Only under those circumstances may the family court issue a "no contact" order. ID. Section (A)(18)(a) and (c). The statute does not provide the family court with express or implied jurisdiction to issue a "no contact" order when granting relief only under Section 63-3-530(A)(2), as was the case here (although "no contact" clauses are apparently included in marital orders of all kinds, the statute does not expressly permit it).

The original family court action was filed on March 20, 2015. For whatever reason, the matter was expedited and resulted in a "Final Decree" issued on July 21, 2015. No further request for relief remained pending at that time. When Justice Harwell died on September 30, 2015, no matters remained pending and the family court's subject matter jurisdiction over anything ended at his death. [1011]

The Court issued its order finding Mrs. Harwell in "civil contempt" on June 16, 2016 (an filed that date). (June 16, 2016 order). The Order did not reserve jurisdiction to the Court to issue a supplemental order. More than a month later, with no further request from the parties (even assuming the Personal Representative had standing to be a party for purposes of contempt),

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[11] Had property division not been finally addressed by the family court at the time of Judge Harwell's death, the family court would have retained jurisdiction for the limited purpose of completing an equitable division of the marital property. *Hodge v. Hodge,* 305 S.C. 521, 409 S.E.2d 436 (Ct. App. 1991). This rule applies only when the marital estate has been identified by the filing of marital litigation prior to the death of one of the parties.

without having reserved jurisdiction, and with no further matters under advisement, the Court issued a second order on July 20, 2016. This second order, issued when nothing remained pending before the family court, made detailed factual findings and change the earlier order of civil contempt to criminal contempt in an obvious attempt to cover some of the errors of the proceeding up to that point. The Court had no jurisdiction to issue the July 20, 2016 order. The only jurisdiction the Court retained by that time, *ie.,* more than thirty (30) days after issuance of the order of civil contempt, would be to correct clerical errors pursuant to Rule 60(a), applicable to the family court, Rule 2, rules of Family Court. Instead, the Court's order changed the fundamental nature of the contempt citation (from civil to criminal) for no apparent reason. The Court also included detailed factual findings that were missing from the written order dated June 16, 2016. The only possible reason for the Court to issue this subsequent order was to make specific factual findings to supposedly support the contempt citation which ti had issued more than thirty 9300 days earlier and try to support the original ruling. The June 16, 2016 order was fatally flawed because of the absence of factual findings (which were not contained in the oral order either) and therefore was subject to reversal on appeal. *Dimarco v. Dimarco,* 393 S.C. 604, 713 S.E.2d 631 (2011); *Miller v Miller*, 375 S.C. 443, 652 S.E.2d 754 (Ct. App. 2007). The June 16, 2016 order also did not determine that Mrs. Harwell's contempt had been establish by proof beyond a reasonable doubt, a requirement for a finding of criminal contempt. Nothing permitted the Court to issue a better order or a more detailed order after the matter was concluded. Especially, the Court had no authority to change its findings from civil contempt to criminal contempt, especially with no notice to Mrs. Harwell that it was considering a request to do so. The Family Court was clearly outside her authority to sanction Mrs. Harwell for her purported violation of the restraint against personal contact and for "offending" other members of the

Harwell family after Justice Harwell's death. Therefore, this Court should reverse the Family court's finding of contempt against Mrs. Harwell.

I. THE FAMILY COURT ERRED IN FINDING APPELLANT IN CONTEMPT WHERE APPELLANT COULD HAVE HDAD NO WAY OF KNOWING THAT HER ATTEMPTS TO EXERCISE HER RIGHTS AS THE SURVIVING SPOUSE COULD BE CONSIDERED CONTEMPTUOUS AND WHERE APPELLANT HAD NO NOTICE THAT CRIMINAL CONTEMPT SANTION WERE POSSIBLE BASED ON THE COMPLAINT FILED BY THER PERSONAL REPRESENTATIVE OF HER DECEASE HUSBAND'S ESTATE.

The prayer in the Complaint for Contempt did not make a specific request for any particular type of contempt and did not request the imposition of period of incarceration as part of the contempt proceedings. [12] The essence of Complaint for Contempt was the offense the PR of Justice Harwell's estate took from Mrs. Harwell's actions just prior to an just after Justice Harwell's death and to gain the Family Court's assistance (as opposed to the Probate Court's assistance) in compelling Mrs. Harwell to perform as he desired with regard to matter involving the administration of the Estate. In *Poston v. Poston*, 331 S.C. 106, 502 S.E 2d 86 (1998), the Supreme Court defined civil contempt of court and criminal contempt of court, ,and clarified that a definite non-purgeable jail sentence is a criminal contempt sanction and that the burden of proof for a criminal contempt proceeding is beyond a reasonable doubt. Id citing State v. Bowers 270 S.C. 124, 241 S.E2d 409 (1978); *State v. Bevilacqua*, 316 S.C. 122 447 S.E. 2d 213 (Ct. App. 1994)("If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.").

[12] The complaint for contempt did not designate whether the contempt sought was civil or criminal, although it suggest it was seeking only civil contempt, since the Personal Representative said he brought this action "to stop the Defendant's . . . misconduct can behavior which are designed to interfere with the P.R.'s ability to manage the estate. . . " (Complaint for Contempt, Paragraph 9, Page19).

Here, the Family Court's imposition of a definite, non-purgeable jail sentence was clearly criminal in nature an required the Court to find beyond a reasonable doubt that Mrs. Harwell's conduct amounted to willful violations of the prior Family Court order. The Court made no such findings in its first order, and while correctly reciting the law of contempt in South Carolina, the Family Court's *sua sponte* July 2016 finding of criminal contempt is not supported by the evidence and circumstances.

While Mrs. Harwell may have understood the effect of the mediated agreement as it pertained to the allocation of certain assets, it is clear from the record that she believed that her status as the legal widow of Justice Harwell did entitle her to participate in certain things following his death including his funeral and obituary.

As much as the testimony established anything, it established that Mrs. Harwell may not have understood the intricacies of how death laws work or how death certificates are issued or who could have used their considerable influence to control their issue. It is absolutely true that the content of the death certificate was erroneous (an has now been corrected), so the judge's reliance and reference to Mrs. Harwell's efforts through that litigation are inappropriate. Even if Mrs. Harwell's assertion that the personal representative may have acted deliberately in excluding her from the death certificate, she has a right to litigate that issue separately. Allegation set forth in a civil pleading are not "disparagement." They are privileged statements in a pleading.

The record does not support the Family Court's finding that Mrs. Harwell's actions were deliberately intended to interfere with the administration of her late husband's estate. Even if the allegation of her pleadings in circuit court included a baseless allegation and "disparaging" comments those could not, as a matter of law, amount o contempt of court.

Moreover, the Family Court's recitation of what may or may not have occurred at the parties' mediation is wholly improper, as was the testimony from Mrs. Harwell's own family court lawyer as to the discussions she had with Mrs. Harwell at the mediation.

The family court's finding that the mediated agreement provide "various restraining orders were put in place to prevent communication between the parties, and the Defendant with the Decedent's family," is a misstatement of the restraints in place. Nothing in the mediate agreement prohibited communication between Mrs. Harwell and the non-party family members of Justice Harwell – it merely prohibited "disparagement" of such person. This misstatement of fact was repeated and compounded by the Family Court in its September 21, 2016 Denial of the Motion to Reconsiders and for a New Trial where, at paragraph 2 on page 6, the Family Court again falsely claimed that mediated agreement "restrained the parties from communicating with one another as well certain family members of the parties from communicating with one another as well certain family members of the parties' respective families." Again, no such restraint existed, and therefore, no conduct by Mrs. Harwell involving the family members could violate the existing restraints.

Moreover, the Family Court's finding that Mrs. Harwell's publication of a separate obituary which listed her as the widow (which she is legally is) amounted to despicable and disrespectful conduct towards other members of Justice Harwell's family is also clearly not appropriate and cannot form for the basis for a criminal contempt finding. The mediated agreement imposed no duty of "respect" towards anyone nor did it specify that Mrs. Harwell would be barred from exercising the customary rights of a widow. Contrary to the Family Court's baseless assertion that the mediate agreement meant Mrs. Harwell "was clearly not to be a part of the process and should not have cause such a disruption to the family of the

Decedent," (July 206 order at Para. 14), the absence of any mention in the mediated agreement of funeral arrangements an such could just as easily mean the parties intended for the customary rules to apply. Mrs. Harwell's interpretation of the law and the effect of the mediated agreement are just as valid if not more so that the PR's or the Family Court's.

III. THE FAMILY COURT ERRED IN ASSESSING ATTORNEY'S FEES AND COST AGAINST MRS. HARWELL.

As discussed above, the personal representative was not a proper party before the family court and had no right to request (or be awarded) attorney fees. This was a closed case in which the personal representative did not seek to intervene or be substituted as a party. Instead, he simply stepped up and filed a Complaint for Contempt using the caption of a closed family court file, and making no effort to even do so correctly. The relevant statute, Section 63-3-530(38) permits attorney fees and cost be awarded to a "party" and the personal representative was not a "party" to the already-closed action.

Moreover, the ruling adjudicating Mrs. Harwell to be in contempt of court (for whatever reason) was error, was not supported by the record, and was issued despite the absence of the family court's original jurisdiction to grant the "no contact" or disparagement" provision of the mediate agreement. Reversal of the contempt citation necessarily requires that the attorney's fee award be vacated as well. Please see expert witness report and analysis of Burnele Venable Powell.

CONCLUSION

Bryan Harwell, the personal representative of the Estate of the late Justice Harwell, mixed up a big batch of Kool-aid. The trial judge drank it dry, never noticing the bitterness which permeated it and ignoring her lack of jurisdiction to grant the relief requested. The late Justice Harwell deserved better, much better.

The Court findings of contempt and sanctioning of Mrs. Harwell should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned herby certifies that on the date indicated below she served the counsel of record with a copy of the **INITIAL APPELLANT'S BRIEF OF DEBORAH B. HARWELL** by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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