

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Doyet A. Early, Circuit Court Judge

---

Case No. 2017-002344

---

RECEIVED  
JUN 07 2018  
SC Court of Appeals

Donna M. Rosier,

Appellant,

v.

Angelique Michelle Smith,  
Alexandria R. Downs,  
individually and as personal  
representative for the Estate of  
Barry E. Rosier, and Savannah  
Rosier,

Respondents.

---

FINAL BRIEF OF APPELLANT

---

LAWYERLISA, LLC  
Lisa M. Hostetler (SC Bar #76138)  
David Ziegler (SC Bar #102415)  
534 St. Andrews Road, Suite B  
Columbia, SC 29210  
P: (803) 563-5163  
F: (888) 958-7850  
Lisa@LawyerLisa.com  
David@LawyerLisa.com  
ATTORNEYS FOR APPELLANT

## TABLE OF CONTENTS

Table of Authorities .....	ii
Statement of Issues on Appeal .....	1
Statement of the Case .....	1
Statement of the Facts .....	2
Standard of Review .....	3
Arguments	
I.    BECAUSE THE PROBATE COURT DOES NOT HAVE JURISDICTION TO HEAR AN ACTION FOR DIVORCE, THE PROBATE COURT ERRED IN DECLARING APPELLANT AND DECEDENT WERE NO LONGER MARRIED AT THE TIME OF DECEDENT'S DEATH. . . . .	4
II.   BECAUSE THE APPEAL FROM THE PROBATE COURT CHALLENGED THE PROBATE COURT'S APPLICATION OF THE FACTS TO THE LAW, THE CIRCUIT COURT ERRED IN SHOWING DEFERENCE TO THE PROBATE COURT .....	7
III.  BECAUSE THERE IS NO EVIDENCE IN THE RECORD THAT APPELLANT AND DECEDENT WERE NOT LEGALLY MARRIED, THE CIRCUIT COURT ERRED IN FINDING EVIDENCE TO SUPPORT THE DECISION OF THE PROBATE COURT .....	8
IV.  BECAUSE THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT ALL OF THE ELEMENTS FOR JUDICIAL ESTOPPEL, THE CIRCUIT COURT ERRED IN AFFIRMING THE PROBATE COURT'S APPLICATION OF THE DOCTRINE OF JUDICIAL ESTOPPEL .....	12
Conclusion .....	14

TABLE OF AUTHORITIES

CASES

*Moriarty v. Garden Sanctuary Church*, 341 S.C. 320, 534 S.E.2d 672 (2000) .....3

*Neely v. Thomasson*, 365 S.C. 345, 349, 618 S.E.2d 884, 886 (2005) .....3

*Dean v. Kilgore*, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (Ct. App 1993).....3

*Nocher v. Nocher*, 268 S.C. 503 (1977).....4,7

*Vt. Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 446 S.E.2d 417 (1994).....7

*Lorick & Lowrance v. Julius H. Walker & Co.*, 153 S.C. 309, 150 S.E. 789 (1929) .....7

*Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950).....9,10

*Johns v. Johns*, 309 S.C. 199, 420 S.E.2d 856 (Ct. App. 1992) .....10,11

*Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006) .....10

*Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004) .....12,13

*Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997) .....13

STATUTES

S.C. Code Ann. § 63-3-50 (1962).....3

S.C. Code Ann. § 62-1-302 (2013).....4,11

S.C. Code Ann. § 63-3-530 (2014).....4

S.C. Code Ann. § 20-3-130 (2002).....4,5,6

S.C. Code Ann. § 62-2-802 (2013).....5,7

S.C. Code Ann. § 20-3-140 (1979).....6

S.C. Code Ann. § 20-3-10 (1979).....9,11,12

S.C. Code Ann. § 20-3-60 (1985).....9

S.C. Code Ann. § 20-1-80 (1990) .....9  
S.C. Code Ann. § 16-15-10 (1962) .....11

RULES

Rule 8(b), SCRCPP .....7  
Rule 8(c), SCRCPP .....8  
Rule 2, SCRCrimP .....11

## **STATEMENT OF ISSUES ON APPEAL**

- I. DID THE PROBATE COURT HAVE JURISDICTION TO DECLARE THE PARTIES WERE NO LONGER MARRIED AT THE TIME OF DECEDENT'S DEATH?
- II. DID THE CIRCUIT COURT ERR IN GIVING DEFERENCE TO THE PROBATE COURT'S APPLICATION OF THE BURDEN OF PROOF?
- III. DID THE CIRCUIT COURT ERR IN FINDING THAT THERE WAS EVIDENCE TO SUPPORT THE DECISION OF THE PROBATE COURT?
- IV. DID THE CIRCUIT COURT ERR IN FINDING THAT THERE WAS EVIDENCE TO SUPPORT THE APPLICATION OF JUDICIAL ESTOPPEL?

## **STATEMENT OF THE CASE**

On October 11, 2016, Appellant Donna M. Rosier ("Appellant") brought this declaratory judgment action against Angelique Michelle Smith, Alexandria R. Downs, individually and as Personal Representative for the Estate of Barry E. Rosier ("PR"), and Savannah Rosier n/k/a Savannah Ziegler asking the Aiken County Probate Court ("Probate Court") to declare that she is the surviving spouse of Barry E. Rosier ("Decedent"). Neither Ms. Smith nor Ms. Ziegler answered. Ms. Downs answered in her capacity as the PR ("Respondent") and alleged that Appellant and Barry E. Rosier were divorced at the time of his passing. A hearing was held on January 23, 2017. The Probate Court issued an Order dated February 22, 2017, finding (1) Appellant married the Decedent on August 1, 1985; (2) Appellant and Decedent were legally separated in 1987 by Order of the Aiken County Family Court ("Family Court"); (3) there is no evidence Appellant and Decedent were divorced in the State of South Carolina; and (4) Appellant was not the lawful wife of Decedent at the time of his death.

Appellant timely filed a Motion to Alter or Amend the Order, which was subsequently

denied. Appellant appealed the Probate Court's Order to the Circuit Court. Oral Arguments for the appeal were heard October 11, 2017. The Circuit Court affirmed the Probate Court's decision on October 12, 2017.

Appellant served the Notice of Appeal to the Court of Appeals on Respondent Downs on November 10, 2017.

### **STATEMENT OF THE FACTS**

Appellant lawfully married Decedent Barry Rosier on or about August 1, 1985, in Aiken County, South Carolina (R. p. 26,77). The Decedent and Appellant remained together in the marital home through the birth of their daughter, Ms. Ziegler, before separating in 1987 (R. p. 1, lines 10-12). Appellant filed an action for Separate Maintenance and Support with the Family Court (R. p. 1, lines 1-3). By order dated July 8, 1987 (the "July Family Court Order"), the Family Court found that Appellant and Decedent were husband and wife and awarded alimony and child support to Appellant (R. p. 1, line 10-p. 2, line 1). The July Family Court Order did not divorce Appellant and Decedent (R. pp. 1-5). The July Family Court Order was modified by a subsequent Order of the Family Court dated September 16, 1987 (the "September Family Court Order") (R. pp. 6-9). The September Family Court Order did not divorce Appellant and Decedent (R. pp. 6-9). Divorce proceedings were never filed, initiated, or ruled on between Decedent and Appellant prior to Decedent's death.

Prior to her marriage to Decedent, Appellant was married and divorced from 2 separate individuals (R. p. 45, line 20- p. 47 line 1). Following her separation from Decedent, Appellant attempted to marry Carl Holling and James Michael Morriss (R. p. 41, line 11-15; R. p. 43, lines 12-17).

Decedent was a resident of Aiken County at all times relevant to this action (R. p. 56, lines 11-15; R. p. 63, lines 29-31; R. p. 70, lines 2-8). Since her separation from Decedent, Appellant has

resided in South Carolina, Georgia, Arizona, and North Carolina (R. p. 34, line 31- p. 35, line 13).

### **STANDARD OF REVIEW**

Questions of law concern the application and recognition of statutes. *Moriarty v. Garden Sanctuary Church*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). Questions of law do not require deference to the lower court. *Neely v. Thomasson*, 365 S.C 345, 349, 618 S.E.2d 884, 886 (2005).

“The standard of review by an appellate court of matters originating in the probate court is controlled by whether the cause of action is at law or in equity.” *Dean v. Kilgore*, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (Ct. App 1993) (internal citations omitted). “To make this determination, the appellate court must look to the essential character of the cause of action alleged by the petitioners in the court below. If the essential character of the petitioner's cause of action is grounded on equitable rights and equitable relief is sought, the case is regarded as equitable and the appellate court has jurisdiction to make findings in accordance with its own view of the preponderance of the evidence.” *Id.* “Actions for divorce from the bonds of matrimony shall, except as otherwise provided, be only in the equity jurisdiction of the court of common pleas.” S.C. Code Ann. § 20-3-50 (1962).

The instant appeal involves issues regarding the Probate Court’s jurisdiction and the application of the burden of proof when a party raises divorce as an affirmative defense to marriage. Both issues appear to be novel questions of law, and therefore this Court is not required to give deference to the lower court.

The instant appeal also involves issues regarding the application of the facts of the case to the law of the case. The underlying issue in this case is whether a divorce occurred between Appellant and Decedent. Divorce actions are actions in equity. Therefore, this Court is entitled to make findings in accordance with its own view of the preponderance of the evidence.

## ARGUMENTS

### **I. BECAUSE THE PROBATE COURT LACKED JURISDICTION TO DECLARE AN ANNULLMENT OR DIVORCE, THE CIRCUIT COURT ERRED IN AFFIRMING THE DECISION OF THE PROBATE COURT.**

Both the probate court and the family court are statutory courts created by the legislature, with only the jurisdiction granted by the legislature in the respective enabling statutes. “The probate court has jurisdiction to hear and determine issues relating to paternity, common-law marriage, and interpretation of marital agreements in connection with estate [...] actions pending before it, concurrent with that of the family court.” S.C. Code Ann. § 62-1-302(c) (2013). “The family court has exclusive jurisdiction to hear and determine actions for divorce a vinculo matrimonii, separate support and maintenance, [...] and in other marital litigation between the parties [and] to hear and determine actions for the annulment of marriage.” S.C. Code Ann. §§ 63-3-530(A)(2) (2014) and -530(A)(6) (2014). “The cause of action for a [legal separation] does not exist in South Carolina, either by virtue of the common law or statutes.” *Nocher v. Nocher*, 268 S.C. 503, 510 (1977).

“In proceedings for divorce from the bonds of matrimony, and in actions for separate maintenance and support, the court may grant alimony or separate maintenance and support in such amounts and for such term as the court considers appropriate as from the circumstances of the parties and the nature of case may be just.” S.C. Code Ann. § 20-3-130(A) (1985). The purpose of [separate maintenance and support] may include, but is not limited to, circumstances where a divorce is not sought, but it is necessary to provide for support of the supported *spouse* by way of separate maintenance and support when the parties are living separate and apart. S.C. Code Ann. § 20-3-130(B)(5) (1985) (emphasis added). In making an award of alimony or separate maintenance and support, the court must consider and give weight in such proportion as it finds appropriate to all of the following factors: (1) the duration of the *marriage* together with the ages of the parties at the time

of the marriage and at the time of the divorce or separate maintenance action between the parties [...].

S.C. Code Ann. § 20-3-130(C)(1) (1985) (emphasis added).

Pertaining to the effect of a divorce on an individual's estate, the South Carolina Probate Code states that "a decree of separate maintenance that does not terminate the status of husband and wife is not a divorce." S.C. Code Ann. § 62-2-802(a) (2013).

There are three ways the Probate Court could conclude that Appellant and Decedent were no longer married at the time of Decedent's death: (1) find the marriage between Appellant and Decedent (the "Marriage") was invalid; (2) recognize an annulment of the marriage from a court of competent jurisdiction; or (3) recognize a valid final divorce decree from a court of competent jurisdiction. In determining whether parties who were lawfully married are no longer married at the time of one of the party's death, the Probate Court's authority is limited to recognizing actions by another court of competent jurisdiction. In other words, the Probate Court's jurisdiction does not extend to declaring two parties who were lawfully married were divorced at the time of one of the party's death.

The validity of the Marriage was not a contested issue in this action. Respondent admitted in her pleadings that Appellant and Decedent entered into a valid marriage (R. p. 24, lines 4-5 and R. p. 28, line 12). In so far as the validity of the Marriage was at issue, the Probate Court found that "[Appellant] subsequently married Decedent on August 1, 1985." (R. p. 11, line 17). In the same Finding of Fact, the Probate Court also found the existence of "An Order by the Family Court for Decedent to pay alimony and support to [Appellant], dated July 8, 1987. [A] Consent Order dated September 16, 1987 was also entered in the Family Court regarding payments of support and alimony." (R. p. 11, lines 20-22). A family court can award alimony in an action for divorce, separate support and maintenance, and other marital litigation. S.C. Code Ann. § 20-3-130(A)

(1985) and S.C. Code Ann. § 20-3-140 (1985). The first factor that the family court must consider is the duration of the marriage, S.C. Code Ann. § 20-3-130(C)(1) (1985) (emphasis added). The remaining factors the court must consider use the terms marriage and spouse to describe the relationship between the parties involved. See S.C. Code Ann. § 20-3-130(C) (1985). Based on these statutes of South Carolina, it is axiomatic that a finding of a valid marriage is necessary before the Family Court can award alimony or separate maintenance or support. Further, the Probate Court found the Marriage ended in legal separation, which necessarily means the Marriage was valid prior to the alleged legal separation. Therefore, the Probate Court implicitly found that the marriage between Appellant and Decedent was valid.

As the Marriage was valid, the Probate Court needed to find either the existence of an annulment or a legal divorce granted by a court of competent jurisdiction in order to conclude Appellant and Decedent were no longer lawfully married at the time of Decedent's death. Respondent never alleged that the Marriage ended in an annulment, and there is no mention of an annulment in the record. In fact, the Probate Court found the Marriage "ended in a legal separation in 1987." (R. p. 13, lines 23-24). Accordingly, the Probate Court found the Marriage did not end in annulment.

Therefore, the Probate Court could only reach its decision by recognizing a legal divorce granted by a court of competent jurisdiction. The Probate Court found "There are no records in Aiken County, South Carolina indicating that there was ever a Final Decree of Divorce between the parties." (R. p. 11, lines 22-24). Further, The Probate Court concluded that "[Appellant's] marriage to Decedent ended in a legal separation in 1987" and "there is no evidence that [Appellant] and Decedent were divorced in the State of South Carolina." (R. p. 13, lines 24-25). However, legal separation does not exist as a cause of action in South Carolina. See *Nocher*. Further, a decree for

separate maintenance *is not a divorce* unless it terminates the status of husband and wife. See S.C. Code Ann. § 62-2-802(a) (2013) (emphasis added). Neither Family Court Order regarding separate maintenance terminated the Marriage. (R. pp. 1-10). While Respondent alleged the Marriage was ended by a legal divorce, Respondent testified that she had no personal knowledge that a divorce had occurred between Decedent and Appellant. (R. p. 57, lines 13-15 and R. p. 62, lines 6-7). Ms. Ziegler also testified that she had no personal knowledge of a divorce between Decedent and Appellant and that she was not able to find any documents showing a divorce action had been filed by Decedent or Appellant. (R. p. 69, line 30 -p. 38, line 28). The Probate Court did not, and could not, based on the evidence, find that a legal divorce had previously been granted by a court of competent jurisdiction.

To reach its decision, the Probate Court considered circumstantial facts and evidence, and posthumously granted Decedent a “common law” divorce based on the conduct of the parties. However, the power to hear actions for divorce rests solely with the *family court*. The Probate Court exceeded its jurisdiction by declaring the parties were not legally married at the time of the Decedent’s death. Therefore, the Circuit Court erred in affirming the Probate Court’s decision.

**II. BECAUSE THE PROBATE COURT ERRED IN APPLYING THE BURDEN OF PROOF ON THE AFFIRMATIVE DEFENSE OF DIVORCE, THE CIRCUIT COURT ERRED IN SHOWING DEFERENCE TO THE PROBATE COURT.**

In actions for declaratory relief, the party seeking the declaration meets its burden upon a showing by “greater weight or preponderance of the evidence.” *Vt. Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994). General defenses are those in which a party admits or denies averments. Rule 8(b), SCRPC. This is distinguished from affirmative defenses, which present charges sufficient to establish Respondent as an actor in the suit. See *Lorick & Lowrance v. Julius H. Walker & Co.*, 153 S.C. 309, 150 S.E. 789, 792 (1929); Rule 8(c), SCRPC. Affirmative defenses

must be proven by a preponderance of the evidence by the party pleading such a defense. *Id.*

Here, the pleading of divorce, a legal status only obtained by application to a court, is more than a mere denial or affirmation of an allegation. Significantly, Respondent raised a “Second Defense” wherein she specifically alleged that Appellant legally divorced Decedent prior to his death. (R. p. 29, line 5). Therefore, Respondent’s allegation of a legal divorce constitutes an affirmative defense, and Respondent bears the burden of proving that a legal divorce was granted by a court of competent jurisdiction.

As such, the Circuit Court likewise did not review the evidence in the record under the correct burden of proof, and the Circuit Court erred by showing deference to the lower court when reviewing the decision of the Probate Court.

**III. BECAUSE THERE IS NO EVIDENCE IN THE RECORD THAT APPELLANT AND DECEDENT WERE LEGALLY DIVORCED, THE CIRCUIT COURT ERRED IN FINDING THERE WAS SOME EVIDENCE TO SUPPORT THE DECISION OF THE PROBATE COURT.**

The Circuit Court erred in finding there was any evidence to support the Probate Court’s decision. As discussed in Argument I above, the Probate Court necessarily had to either find the Marriage was invalid; recognize an annulment of the marriage from a court of competent jurisdiction; or recognize a valid final divorce decree from a court of competent jurisdiction. Since the Probate Court found the Marriage was valid by recognizing the July Family Court Order and September Family Court Order, the Probate Court was limited to finding there was an annulment or a divorce. Annulment was never raised in this action nor ever considered by the Probate Court. Therefore, the Probate Court was left to consider whether the Marriage ended in divorce.

South Carolina has a high bar to break the bonds of matrimony. Grounds for divorce are limited to the following: (1) adultery; (2) desertion for a period of one year; (3) physical cruelty; (4)

habitual drunkenness; and (5) on the application of either party after living separately without cohabitation for at least a year. S.C. Code Ann. § 20-3-10 (1962). Furthermore, there are jurisdiction and venue limits for divorce proceedings. Jurisdiction is limited to the court of common pleas as discussed in Argument I above. Venue is limited to the county of the Defendant's residence, the county in which both parties last resided, or the county of the Plaintiff's residence if: (1) Defendant is a nonresident and (2) after due diligence, the Defendant cannot be found. S.C. Code Ann. § 20-3-60 (1985).

In this case, the record does not contain any evidence of a final divorce decree or other evidence that a court of competent jurisdiction terminated the Marriage in a legal divorce. Instead, the Probate Court based its decision on Appellant's prior and subsequent marriages, alleged criminal violations, and the family history between Appellant, Decedent, and their child. Each of these circumstances, even when considered by a court of competent jurisdiction, are statutorily insufficient grounds to grant a divorce between Appellant and Decedent as discussed below. If these decisions are allowed to stand, the Probate Court and Circuit Court have created a cause of action for "common law" divorce in South Carolina. Two parties could declare themselves divorced by entering into a subsequent marriage, living apart, or simply signing an affidavit. Such a cause of action could have far reaching implications on both the South Carolina family court system and probate system, and there is nothing in the South Carolina Code of Law that indicates the legislature intended for common law divorce to exist in South Carolina.

**A. Appellant's Prior and Subsequent Marriages**

Any marriage contracted while either party has a living wife or husband is void. S.C. Code Ann. § 20-1-80 (1990). "A mere marriage ceremony between a man and woman, where one of them has a living wife or husband, is not a marriage at all and is absolutely void, and not merely voidable."

*Day v. Day*, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950). “[A subsequent marriage] is void *at its inception* [...] 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). The underlying marriage is given substantial weight, where even upon termination of the underlying marriage, the subsequent marriage does not relate back so as to become valid. See *Lukich v. Lukich*, 368 S.C. 47, 56, 627 S.E.2d 754, 758 (Ct. App. 2006).

Prior to entering into the Marriage, Appellant married and subsequently divorced two other individuals (R. p. 45, line 20- p. 47 line 1). The Probate Court noted that Appellant did not provide any proof that Appellant had divorced either of her prior husbands (R. p. 13, lines 22-23). A prior marriage that had not been terminated prior to a subsequent marriage would render the subsequent marriage invalid. See S.C. Code Ann. § 20-1-80 (1990). A prior marriage that had been terminated would have no legal effect on a subsequent marriage. Respondent did not raise the prior marriages nor contest the Marriage in her Answer (R. pp. 28-31), so Appellant was not required to establish proof that she had divorced her prior husbands. The issue of the validity of the Marriage was necessarily before the Family Court in the 1987 proceedings. As discussed in Argument I, the Family Court necessarily found that the Marriage was valid in issuing the July Family Court Order and the September Family Court Order. As such, Decedent either did not or was unable to successfully raise the prior marriages as a defense to the validity of the Marriage during the Family Court Proceedings, and Respondent is not entitled to raise the prior marriages now.

Following her separation from Decedent, Appellant attempted to enter into two subsequent marriages. South Carolina law is clear that any attempted marriage while one of the parties is still married to a third party is void *from its inception* and has no legal bearing on the underlying marriage. See *Johns* at 201. As such, Appellant’s subsequent attempts at marriage are void, have no

legal bearing on the Marriage, and are immaterial to the determination of whether the Marriage ended prior to the Decedent's death.

**B. Appellant's Alleged Criminal Violations**

The Probate Court is given jurisdiction over specific probate matters, which do not include criminal offenses. S.C. Code Ann. § 62-1-302 (2014).

Here, the Probate Court provides an interpretation of S.C. Code Ann. § 16-15-10 (1962) concerning its applicability (R. p. 13, lines 4-8). The Probate Court then provides an impermissible conclusion of Appellant's guilt concerning this criminal statute, to which Appellant has not been charged with nor been given a preliminary hearing on pursuant to Rule 2, SCRCrimP (R. p. 14, lines 11-14). As established, the Probate Court lacks the jurisdiction to make a finding of guilt under a criminal statute. Furthermore, this conclusion is impermissible as a ground for divorce. Divorce is limited to pleading statutorily established factors, none of which include S.C. Code Ann. § 16-15-10 (1962). S.C. Code Ann. § 20-3-10 (1962). Thus, the Probate Court erred in considering alleged violations of S.C. Code Ann. § 16-15-10 (1962) to find the Marriage ended prior to the Decedent's death.

**C. Appellant's Family History**

Divorce is only granted upon a showing of the statutory factors established in the South Carolina Code. S.C. Code Ann. § 20-3-10 (1962). Relevant facts must relate to the evidence of the factors of divorce.

The Probate Court relied on extraneous and improper facts in establishing divorce as reasoned in the Conclusions of Law (R. p. 14, line 21-p.15, line 2). Here, the Probate Court legally concludes that the quality of Appellant's relationship with Decedent and Decedent's children has a bearing on whether Appellant and Decedent are divorced. (R. p. 14, line 21-p.15, line 2). Further,

the Probate Court legally concludes that the length of time Appellant and Decedent have been separated has a bearing on whether Appellant and Decedent are divorced. (R. p. 14, line 21-p.15, line 2). While the length of separation does have a bearing on the parties' ability to file for divorce based on one-year separation, a divorce based on this ground can only be granted upon application to the family court by one of the parties. See S.C. Code Ann. § 20-3-10 (1979). As discussed previously, there is no evidence either party ever filed for a divorce based on any of the statutory grounds. Therefore, the Probate Court erred in its application of the evidence of Appellant and Decedent's family history to find the Marriage ended prior to the Decedent's death.

These legal conclusions are plain error and impermissibly circumvent the statutory grounds established by the legislature in S.C. Code Ann. § 20-3-10 (1962). The Probate Court is creating a new cause of action in South Carolina for common law divorce, which contradicts the intention of the Legislature. Therefore, the Circuit Court erred in affirming the Probate Court's decision.

**IV. BECAUSE THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT ALL OF THE ELEMENTS FOR JUDICIAL ESTOPPEL, THE CIRCUIT COURT ERRED IN AFFIRMING THE PROBATE COURT'S APPLICATION OF THE DOCTRINE OF JUDICIAL ESTOPPEL.**

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant previously asserted in the *same or related proceeding*. *Cothran v. Brown*, 357 S.C. 210, 215 (2004) (emphasis added). The following elements are necessary for judicial estoppel to apply: 1) two inconsistent positions taken by the same party or parties in privity with one another; 2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; 3) the party taking the position must have been successful in maintaining that position and have received some benefit; 4)

the inconsistency must be part of an intentional effort to mislead the court; and 5) the two positions must be totally inconsistent. *Cothran* at 216. “In South Carolina, the doctrine of judicial estoppel applies only to matters of fact, not conclusions of law.” *Cothran* at 215 (citing *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251 (1997)). Whether a marriage was terminated by divorce is a legal conclusion that must be reached by a Court of competent jurisdiction, and judicial estoppel would not apply.

The Probate Court determined that Appellant was judicially estopped from claiming that she was still married to Decedent based on Appellant’s marriage license from her attempted marriage to James Morriss. Appellant signed an Application, License, and Certificate of Marriage in Rowan County, North Carolina (“NC Affidavit”) when she attempted to marry James Morriss (R. p. 79). Appellant stated in the affidavit that her previous marriage had ended in divorce (R. p. 79).

However, the application of judicial estoppel to the instant case fails for several reasons. First, there is no evidence in the record that Appellant ever engaged in any litigation with Decedent or his heirs asserting that she was legally divorced from Decedent. Further, the NC Affidavit is the result of a ministerial process for the application for a marriage license and is not litigation. Importantly, the NC Affidavit is not signed by a judge, but by the Deputy Register of Deeds (R. p. 79). Even if the application for a marriage license is deemed to be a litigious proceeding, the parties to this application would be Appellant and James Morriss. Therefore, there is no evidence in the record that Appellant has taken conflicting positions in any legal proceedings and judicial estoppel fails under the second element.

Further, there is no evidence in the record to support the third element of judicial estoppel. The third element requires Appellant to have been successful in asserting her position and to have received some benefit from asserting that position. Respondent asserts that the disputed position is

whether Appellant was divorced from Decedent (R. p. 74, lines 6-7). As previously discussed, Appellant's marriage to Mr. Morriss is *void ab initio* which renders unsuccessful any position Appellant may have asserted in the NC Affidavit. As such, Appellant did not receive the benefit of a valid marriage from the NC Affidavit. Therefore, the judicial estoppel argument fails under the third element.

Finally, there is no evidence in the record that Appellant intentionally mislead the courts. Her lack of understanding and legal knowledge is evident from the record. (R. p. 41, line 11-p. 12, line 5).

There is no evidence in the record to support all of the necessary elements for judicial estoppel, therefore the Probate Court erred in determining this doctrine applied to Appellant.

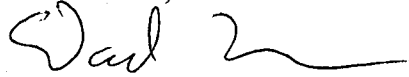
### **CONCLUSION**

For the reasons stated herein, this Court should reverse the Orders of the Circuit Court and the Probate Court wherein the Probate Court found the Marriage ended in legal separation, which is an error of law, and find the Appellant was legally married to the Decedent at the time of Decedent's death. Alternatively, this Court should remand the matter to the Probate Court for a specific determination of whether the Marriage was terminated by an annulment or legal divorce issued by a court of competent jurisdiction.

[Signature on the Following Page]

Respectfully submitted,

LAWYERLISA, LLC



---

Lisa M. Hostetler (SC Bar #76138)

David Ziegler (SC Bar #102415)

534 St. Andrews Road, Suite B

Columbia, SC 29210

P: (803) 563-5163

F: (888) 958-7850

Lisa@LawyerLisa.com

David@LawyerLisa.com

ATTORNEYS FOR APPELLANT

June 4, 2018