THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM AIKEN COUNTY
Court of Common Pleas

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Appellate Case Number 2017-002344

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Donna M. Rosier, Appellant

vs.

Angelique Michelle Smith, Alexandria R. Downs, individually and as Personal Representative of the Estate of Barry E. Rosier and Savannah Rosier, Respondents.

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# FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES



STATUTES



RULES

## STATEMENT OF ISSUES ON APPEAL

Pursuant to Rules 208(b)(2) and 220(c), SCACR, the Respondents respectfully submit that the following issues are presented for the Court's consideration in this matter:

1. DID THE PROBATE COURT HAVE SUBJECT MATTER JURISDICTION TO CONSIDER THE CLAIMS PRESENTED BY THE APPELLANT IN HER PETITION FOR DECLARATORY JUDGMENT AND TO ISSUE THE RULINGS IT MADE IN THIS CASE?

2. DID THE CIRCUIT COURT ERR BY AFFIRMING THE ORDER OF THE PROBATE COURT AND BY CORRECTLY DETERMINING THAT THERE IS EVIDENCE CONTAINED IN THE RECORD FOR THIS MATTER TO SUSTAIN THAT COURT'S DECISION?

3. AS AN ADDITIONAL SUSTAINING GROUND, SHOULD THE DECISION OF THE CIRCUIT COURT BE AFFIRMED ON THE BASIS THAT THE APPELLANT IS QUASI-ESTOPPED FROM CLAIMING SHE IS MR. ROSIER'S LAWFUL OR SURVIVING SPOUSE?

## STATEMENT OF THE CASE

This matter involves an appeal from an Order of the Court of Common Pleas for Aiken County affirming an Order of the Probate Court for Aiken County. The Appellant in this case filed a Petition for a Declaratory Judgment in the Probate Court seeking a declaration that she is the lawful and surviving spouse of Barry E. Rosier, deceased, and also requesting that the Probate Court amend Mr. Rosier's Death Certificate, issued by the State of Georgia, to reflect that status. ( R. pp. 19 - 24). The sole purpose of the Appellant's Petition is to seek recovery of certain employment-related pension benefits which became available to Mr. Rosier's lawful beneficiaries upon his death. ( R. p. 49, lines 23 - 29).

Alexandria R. Downs, one of Mr. Rosier's three natural daughters, through counsel and in her capacity as Personal Representative of his estate, filed an Answer to the Appellant's Petition denying that the Appellant is the lawful surviving spouse of her father and by which she, and

on behalf of her sisters, joins with the Appellant in seeking the Court's determination and declaration in that regard. ( R. pp. 25 - 28).

A trial of the issues presented in this matter was held on January 23, 2017 in Aiken, South Carolina and before the Honorable Tonya L. Marchant, Probate Judge for Aiken County. Following that trial Judge Marchant issued her Order dated February 22, 2017, and by which she denied the relief requested by the Appellant ( R. pp. 10 -15).

The Appellant then filed a Motion to Alter or Amend Judge Marchant's decision in this matter, which was denied. ( R. p. 16). The Appellant then filed a Notice of Appeal to the Court of Common Pleas for Aiken County. A hearing to consider the Appellant's appeal was conducted before the Honorable Doyet A. Early, III, Judge of the Circuit Court, on October 11, 2017, following which he affirmed Judge Marchant's decision. ( R. pp. 17 -19).

The Appellant then filed a Notice of Appeal of Judge Early's decision affirming the decision of the Probate Court.

## ARGUMENTS

### I. THE PROBATE COURT HAD SUBJECT MATTER JURISDICTION TO CONSIDER THE CLAIMS PRESENTED BY THE APPELLANT IN HER PETITION FOR DECLARATORY JUDGMENT AND TO ISSUE THE RULINGS IT MADE IN THIS CASE.

As part of her appeal to this Court the Appellant initially challenges the Probate Court's jurisdiction to address the issues presented in this case and the manner in which it issued its ruling. Judge Marchant ruled, in part, that the Appellant was not the lawful wife of Mr. Rosier at the time of his death in 2015. ( R. pp. 10 -15). The Appellant contends that this ruling constitutes a formal decree of divorce, which only a Family Court has the power to issue and, therefore, the Probate Court lacked subject matter jurisdiction here.

The Respondents first, and respectfully, contend that this issue was not presented to the Circuit Court for its review, has not been preserved for review by this Court and has been abandoned by the Appellant. A close reading of the Appellant's appeal to the Circuit Court, and the record presented to that Court, reveals that she never asserted that Judge Marchant lacked the jurisdiction or authority to resolve issues pertaining to the Appellant's marital status. To the contrary, the Appellant presented numerous arguments before Judge Early in the Circuit Court that Judge Marchant simply misapplied the law pertaining to divorce in South Carolina to the facts of this case.

Having not presented to Judge Early the specific question of whether or not the Probate Court had subject matter jurisdiction in this case, the Appellant may not raise that issue now. State of South Carolina v. Oxner, 391 S.C. 132, 705 S.E. 2d 51 (2011). While issues pertaining to the jurisdiction and power of a court to decide claims and causes of action generally may be raised at any time, they must be properly presented to lower appellate bodies in order to be preserved for review by higher courts. Id. If, however, this Court determines that the Appellant did properly

preserve issues related to jurisdiction for review, the Respondents submit that the Probate Court possessed the power to address the specific claims raised in the Appellant's Petition for Declaratory Judgment.

First, the Appellant chose the Court to consider her claims here. As part of her Petition for Declaratory Relief the Appellant requested that the Probate Court first declare that she is Mr. Rosier's "surviving spouse" and then order the State of Georgia to amend his Death Certificate to reflect her status in that regard. This Court need not decide whether or not the Probate Court for Aiken County has the power to order the State of Georgia to amend Mr. Rosier's Death Certificate, as Judge Marchant correctly decided the first issue presented.

Judge Marchant did not issue a decree of divorce in this case. While she framed her ruling in terms that the Appellant was not the "lawful wife" of Mr. Rosier at the time of his death, this conclusion was made within the confines of the Appellant's pursuit of monetary benefits arising as a result of that death, and as further outlined below. The Appellant sought a ruling from the Probate Court as to her status for purposes of recovery of those benefits, and Judge Marchant issued her decision solely for that purpose. That is, Judge Marchant made no other rulings typically associated with the dissolution of a marriage.

Given the issues presented between the Parties in this case, and the law applicable here, whether or not the Appellant and Mr. Rosier were formally divorced does not necessarily control the ultimate outcome of the identification of the proper beneficiary of his pension death benefits. Indeed, and given that he has died, no Court has the power to issue a decree of divorce between him and the Appellant. For the reasons set forth below, Judge Marchant correctly ruled that

the Appellant is not the "lawful wife" of Mr. Rosier, or his "surviving spouse", for purposes of recovery of those benefits.

II. THE CIRCUIT COURT DID NOT ERR BY AFFIRMING THE ORDER OF THE PROBATE COURT AND BY CORRECTLY DETERMINING THAT THERE IS EVIDENCE CONTAINED IN THE RECORD FOR THIS MATTER TO SUSTAIN THAT COURT'S DECISION.

Actions for declaratory judgement are neither legal nor equitable, but are determined by the nature of the underlying issue. Felts v. Richland County, 303 S.C. 354, 357, 400 S.E.2d 781, 782 (1991). Marriages are, in part, contracts between the parties in such a relationship. The validity of any contract of marriage between the Appellant and Mr. Rosier, and the nature of their relationship at the time of his death, is the heart of his case.

Actions concerning contracts are actions at law. Hofer v. St. Clair, 298 S.C. 503, 508, 381 S.E.2d 736, 739 (1989). When reviewing the decision of a Probate Court the Circuit Court and this Court should not disturb the lower court's finding of fact for proceedings concerning an action at law, unless review of the record discloses no evidence to support them. Matter of Howard, 315 S.C. 356 at 361, 434 S.E.2d 254 at 257 (1993); Neely v. Thomasson, 365 S.C. 345, 349, 618 S.E.2d 884, 886 (2005). In actions for declaratory relief, the party seeking a declaration, of course, bears his or her burden of proof by the greater weight of or preponderance of evidence presented. Vt. Mut. Ins. Co. v. Singleton, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994).

A Circuit Court considering an appeal from the Probate Court must apply the same rules of law that a higher Court would apply on appeal. Matter of Howard, 315 S.C. 356, 434 S.E.2d 254 (1993); S.C. Code Ann. § 62-1-308 (1976). Actions at law are distinguishable from questions of law. 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 (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 matter presently before this Court involves the Probate Court's identification and application of the relevant facts of the case to the law applicable to the issues presented in the case. As stated, jurisdiction of the Circuit Court as well as this Court should extend only to correct errors of law. The Probate Judge's factual findings should not be disturbed upon appeal unless they are found to be without evidence supporting them.

The evidentiary record for this case shows that Barry E. Rosier died intestate on August 16, 2015. ( R. pp. 20 - 21). As noted, the Respondents in this case, Angelique Michelle Smith, Alexandria R. Downs and Savannah Rosier are Mr. Rosier's three surviving and natural daughters. (Id.).

The Appellant has been married a total of five times. ( R. pp. 10 -15). In 1978 she married Wayne Smith. ( R. p. 45, lines 24 - 25). In 1982 she married Rusty McKenzie. ( R. p. 46, lines 11 - 14). She married Mr. Rosier in August 1985, she married Carl Holling in the early 1990's and finally married James Morris in 2014. ( R. p 43, lines 12 - 17). She remains married to Mr. Morris today and uses his last name. ( R. p. 45, lines 3 - 9).

Significantly, the Appellant and Mr. Morris obtained their marriage license in Rowan County, North Carolina, were married in that State and continue to reside there today. ( R. p. 43, lines 12 - 17). Perhaps equally significant, as part of her application for a license to marry Mr. Morris the Appellant affirmatively swore, under oath, before the Rowan County Register of Deeds in 2014, that she was currently divorced. ( R. p. 79; R. p. 50, lines 16 - 29).

Mr. Rosier and the Appellant resided together as husband and wife for less than two years. ( R. p. 47, lines 18 - 23). The Respondent Savannah Rosier was born of their marriage.

( R. pp. 1 - 5). In 1987, the Appellant filed an action in the Family Court for Aiken County seeking a legal separation and payment of child support for Savannah as well as payment of alimony for herself. (Id.).

The Aiken County Family Court issued two orders in that case that year. The first order established the legal separation of the parties and also ordered Mr. Rosier to pay child support for the benefit of Savannah and alimony to the Appellant. (Id.). Of note, the second order terminates payment of alimony to the Appellant. ( R. pp. 6 - 9). Neither of these orders specifically states that the parties are divorced, but arguably established permanently the rights of the parties with respect to their marital rights, including the division of any marital property. ( R. pp. 1 - 9).

The Appellant had virtually no contact with Mr. Rosier during the twenty-eight year period between their separation and his death in 2015. ( R. p. 51, lines 17 - 20). When she learned that he had died the first thing she did was to contact the Boilermaker-Blacksmith National Pension Trust, who maintained the benefit plan for Mr. Rosier which is noted above, and inquired as to whether or not she was entitled to any monetary benefits as a result of this death. ( R. p. 52, lines 12 - 17). She was informed by the administrator of the plan that benefits are in fact payable to either a "surviving spouse", if one existed, or to Mr. Rosier's surviving children. ( R. p. 53, lines 2 - 9).

Fully aware that she is presently married to Mr. Morris, the Appellant filed the Petition for Declaratory Judgment involved here in the Probate Court for Aiken County, asking that the Court declare that she is the surviving or lawful spouse of Mr. Rosier, and also asking the Court order the State of Georgia to amend his death certificate to reflect such status. ( R. pp. 22 - 27). As noted, the Appellant admits that the singular purpose of her Petition is an attempt to facilitate her collection of money available through Mr. Rosier's pension plan.

At trial the Appellant testified that she believed that she was still married to Mr. Rosier at the time of his death in 2015 and was, in fact, his surviving spouse. ( R. p. 44, lines 25 - 28). Having married Mr. Holling in the 1990's and Mr. Morris in 2014, she was questioned regarding the law of bigamy. ( R. p. 53, line 22 - p. 54, line 33). She admitted she understood that it is against the law to be married to more than one person at the same time, and that such an act is bigamy and a criminal offense. (Id.)

While the Appellant was questioned at trial regarding the law of the State of South Carolina, in actuality, and upon her own admission, she is violating the laws of the State of North Carolina. See N.C.G.S. § 14-183 (2016). She also testified that she understood why bigamy is a crime and against public policy. ( R. p. 53, lines 22 - 27).

At the trial in the Probate Court the Appellant testified that she obtained divorce decrees with respect to her marriages to Mr. Smith and Mr. McKenzie, her first and second husbands. ( R. p. 45, lines 30 - 31; R. p. 46, lines 19 - 24). She, however, produced no documentary or other proof of such court decrees. ( R. p. 10 -15). She admits that she has lived in multiple states over several years. ( R. p. 55, lines 4 - 8). Savannah Rosier testified that the Appellant abandoned her when she was 11-years-old. ( R. p. 66, lines 13 - 15). When that occurred Savannah entered foster care. (Id., lines 3 - 8).

Judge Marchant personally observed the witnesses who appeared before her at the trial of this case, and heard and considered their testimony. She is in the best position to have judged the strength of their credibility. She clearly expressed doubts as to the truthfulness of the Appellant. ( R. pp. 10 -15).

As noted, her marriage to Mr. Rosier ended in a legal separation in 1987 after being

married less than two years and approximately twenty-eight years prior to his death. Judge Marchant also recognizes, although there is no evidence of a South Carolina Court's decree of divorce between her and Mr. Rosier, it is clearly possible to obtain a divorce in other states of this Country with no reasonable way of being able to make a determination as to whether or not the same may have occurred.

Judge Marchant further makes reference to the Appellant's affirmative and sworn statement to the Rowan County, North Carolina Register of Deeds in 2014 that she was currently divorced, and based upon which she obtained a license to marry Mr. Morris. ( R. p. 79; pp. 10 -15). If the Appellant now contends that she was married to Mr. Rosier at the time of his death in 2015, then she also knew of that alleged status when she made her sworn statement in 2014 in order to achieve the benefit of marrying Mr. Morris. She also had to possess such knowledge when she married Mr. Holling. Whether in South Carolina or North Carolina, such actions are not only in violation of legislated law, but also violative of well-reasoned public policies.

The Probate Court expresses difficulty in being sympathetic to the Appellant's pleas in this case. ( R. pp. 10 -15). Again, her relationship with Mr. Rosier lasted less than two year and for all real purposes dissolved approximately twenty-eight years ago. ( R. p. 51, lines 17 - 22). She had little or no contact with him after they separated in 1987. She abandoned the daughter she had with him. She told Judge Marchant that she filed this action solely and simply as part of her attempt to collect his pension benefits - specifically, that she filed for the money. ( R. p. 52, lines 23 - 29).

The Appellant argues that the Respondents in their pleadings for this matter admitted that she and Mr. Rosier entered into a valid marriage. This argument is without merit and has no real bearing on the ultimate issue to be decided in this case.

The Petition for Declaratory Judgment alleges that the Appellant and Mr. Rosier were married on August 1, 1985, as shown on the Marriage Certificate. The Respondents, by admitting this allegation, simply state that there was a marriage ceremony on that date between the parties.

The Appellant may not have it both ways in this case: either she made untruthful statements as part of her application to marry Mr. Morris or she is untruthful in her testimony before Judge Marchant. The Court having the opportunity to view the witnesses is entitled to rely upon Appellant's earlier sworn statement that she was divorced at the time of her marriage to Mr. Morris. Further, the Court has no way to determine whether Appellant and Decedent were divorced in a state other than South Carolina.

The Appellant also argues that the burden of proof is upon Respondents to prove that Appellant was divorced at her time of marriage to Mr. Rosier. This argument is also without merit. The Appellant initiated this action to establish that she is Mr. Rosier's surviving spouse, and she shoulders the burden of proof in that regard throughout the course of this case.

Judge Marchant found that the Appellant is not Mr. Rosier's surviving spouse. This factual finding and legal conclusion are based upon several factors, including the fact that the Appellant introduced no evidence of her divorces from Mr. Smith and Mr. McKenzie, her first and second husbands, and her sworn affidavit in North Carolina. The fact that no evidence of divorce was found in the State of South Carolina is but one factor. The Probate Court was well within its authority to make the factual finding that Appellant was not Mr. Rosier's "lawful spouse" nor his "surviving spouse" at the time of his death, and for purposes of her recovery of the pension benefits.

Judge Marchant also concluded that the Appellant is judicially estopped from claiming that she is Mr. Rosier's surviving spouse, and based upon her having executed the affidavit

in North Carolina to obtain a license to marry Mr. Morris. The Appellant first contends that this defense was not asserted in the Respondents' Answer to the Petition for Declaratory Judgment, and the Probate Court improperly considered it.

Judicial estoppel is not an enumerated affirmative defense under the provisions of Rule 8, SCRCP. If this defense otherwise constitutes one which should be specifically pled, it was considered without objection by way of the evidence presented to Judge Marchant and otherwise tried with the consent of the Parties in this case.

The doctrine of judicial estoppel is an appropriate defense in this case.[1] It was established as the law in South Carolina in the matter of Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997). In that case, the South Carolina Supreme Court found that the sworn testimony of an individual in a prior proceeding is binding upon that individual in a subsequent action, although the subsequent action is pending in a different court and regards a different matter. The doctrine precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. It does not apply to conclusions of law, but does apply to inconsistent statements of fact.

Judge Marchant properly applied this doctrine to the facts of this case in that the Appellant signed a sworn affidavit to Rowan County Register of Deeds, and affirmatively declared that she was legally divorced at the time of her marriage to Mr. Morris. Although this affidavit was not presented to a court in a formal legal action, it was tendered by the Appellant to the Register of Deeds and filed in the Rowan County Probate Court. ( R. p. 79).

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[1] As discussed below the doctrine of quasi-estoppel is also a viable defense for the Respondents in this case.

The Appellant then argues that the doctrine may not be applied in this case, due to the fact that the contrary positions were not taken in the same or related proceedings involving the same party or parties. This argument presents a distinction without a difference. Both matters might be viewed in the Probate Court, one in North Carolina and one in South Carolina. Both actions involve the lawful validity of the marriage of the Appellant and Mr. Rosier. The Appellant seeks to establish that she is the surviving spouse of Mr. Rosier. However, her sworn affidavit in North Carolina directly conflicts with her testimony at the trial of this matter before Judge Marchant. Judge Marchant was perfectly within her right to consider this important evidence, introduced without objection, at the trial held before her.

As stated in Hayne Federal Credit Union, in order for the judicial process to function properly, litigants must approach it in a truthful manner:

> Although parties may vigorously assert their version of the facts, they may not represent those facts in order to gain advantage in the process. The doctrine does punish those who take the truth-seeking function of the system, lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him. It is certainly conceivable that the parties may want to present model legal theories, which may require changing one's previously legal theory; however, the truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly discovered evidence.
>
> Hayne Federal Credit Union, 327 S.C. at 253, 489 S.E.2d at 477.

If the Appellant in this case is allowed now to change her version of the historical facts of her marital relationships she will be given permission, through misrepresentations, to gain a benefit to which she is not entitled. There clearly is evidence in the record established by the Aiken County Probate Court to sustain its decision here. As such, the Circuit Court correctly affirmed Judge Marchant's decision.

III. AS AN ADDITIONAL SUSTAINING GROUND, THE DECISION OF THE CIRCUIT COURT SHOULD BE AFFIRMED ON THE BASIS THAT THE APPELLANT IS QUASI-ESTOPPED FROM CLAIMING SHE IS MR. ROSIER'S LAWFUL OR SURVIVING SPOUSE.

As outlined above the Appellant married Mr. Rosier in South Carolina in 1985, then married Mr. Holling in the early 1990's and then Mr. Morris in North Carolina in 2014. Further, the Appellant remains married to and resides with Mr. Morris today. There is no evidence in the record for this case to show anything other than the fact that the Appellant enter into lawful marriages with Mr. Holling and Mr. Morris, freely and voluntarily.

As discussed, one cannot be married to more than one person at the same time, under either South Carolina or North Carolina law. S.C. Code Ann. §16-15-10 (1976); N.C.G.S. § 14-183 (2016). Any such marriages in both States are void as a matter of law. Id.[2] The Respondents respectfully submit that it necessarily follows that one cannot be a "lawful spouse" or a "surviving spouse" of a previous spouse, and claim certain advantages flowing from that prior marital relationship, if they have knowingly and voluntarily chosen to enter into a subsequent and bigamous marriage, or marriages.

The Appellant here, or course, attempts to achieve the status of Mr. Rosier's "surviving spouse" by theorizing that since her marriage to him never officially ended, she remained married to him until his death, and her marriages to Mr. Holling and Mr. Morris, as bigamous relationships, are void and never existed. The Respondents contend that the Appellant should not be allowed to take advantage of her own wrongful behavior to achieve a benefit flowing solely to herself.

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[2] As the Appellant married Mr. Morris in North Carolina, and remains a resident of that State today, the law of North Carolina governs the validity of her marriage there as well as the consequences of her self-described bigamous conduct.

At least in North Carolina a party may be estopped from asserting the invalidity of a bigamous marriage if they are undertaking to do so to gain for themselves a particular benefit. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987), McIntyre v. McIntyre, 211 N.C. 698, 191 S.E. 507 (1937). In both of these cases the party seeking relief attempted to use their own wrongful conduct to obtain a result which favored only them and disadvantaged another. The Supreme Court of North Carolina held in each instance that the doctrine of quasi-estoppel prohibits one from using a bigamous and unlawful relationship, that they created, to achieve an advantage for themselves over another.

The Appellant in this case similarly seeks to do so. She attempts to convince this Court that her marriages to both Mr. Holling and Mr. Morris are void and she remained the wife of Mr. Rosier until the time of his death. Having then admitted that she on two occasions had engaged in bigamous conduct, she should not be allowed under the law of this State, as well as established public policy, to now achieve an end result founded upon such wrongful conduct.

## CONCLUSION

For the reasons stated above, the Respondents respectfully submit that the Order of the Circuit Court should be affirmed.

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