THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Trial Court Case Nos. 2013-CP-02-02849 and 2013-CP-02-02850
Appellate Case No. 2015-002417

RECEIVED
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S.C. SUPREME COURT

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

Tommie Rae Brown ..... Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown and Daryl Brown ..... Respondents below,

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

RECORD ON APPEAL – VOLUME II

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STATE OF SOUTH CAROLINA COUNTY OF AIKEN	))	IN THE PROBATE COURT CASE NUMBER: 2007-ES-02-0056
STATE OF SOUTH CAROLINA COUNTY OF AIKEN	))	IN THE COURT OF COMMON PLEAS CASE NUMBER: 2007-CP-02-0122
IN RE: THE ESTATE OF JAMES BROWN a/k/a JAMES JOSEPH BROWN	)))	AFFIDAVIT OF TOMMIE RAE BROWN IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT

PERSONALLY APPEARED before me Tommie Rae Brown who, first being duly sworn, states as follows:

1. I am a Petitioner in this case and ask the Court to recognize my ceremonial marriage to James Brown and declare that I was legally married to James Brown and that I am his widow.

2. I met James Brown in 1997 when I was a back-up singer with his band. We began a long-term relationship. We were very much in love despite unkind and sometimes racist comments from others. In 2000, I became pregnant with James' son, J. B.

3. We were married on December 14, 2001 in Aiken County, South Carolina by Reverend Larry Fryer. Attached hereto as Exhibit "A," is a copy of my marriage license to James.

4. In 2003, David Cannon told Mr. Brown that I was married to someone else, namely Javed Ahmed and had never been divorced. James and I both wanted our marriage to be legal and so James told me to have the marriage annulled. I had no funds to retain Mr. Rosen and James gave me the money to pay the legal fees for the annulment. See Exhibit "B." James and I continued to live as husband and wife. We attended events together, traveled together, spent a lot of time together and enjoyed each other's company.

5. I retained the services of Robert N. Rosen at Rosen, Rosen and Hagood in Charleston, South Carolina. Mr. Rosen brought an action to annul the purported marriage to Mr. Ahmed on December 15, 2003. A copy of the Summons and Complaint is attached hereto as Exhibit "C."

6. I kept James apprised of what I was doing. In fact, my attorney kept James's attorney, James Huff, apprised of the progress of the case for annulment. See letter dated February 5, 2004, attached as Exhibit "D" and "F."

7. I told Mr. Rosen all I knew about my marriage to Mr. Ahmed. I testified in the Family Court in Charleston on April 15, 2004. I explained to the judge that while I thought I was married to Mr. Ahmed. I also believed that marriage had been annulled before I married James. I also was told by Mr. Ahmed, after the marriage ceremony, that he would not live with me because he was married to three or more other females in Pakistan. Thus my purported "marriage" never existed. It was also never consummated. I believed Mr. Ahmed "married" me to become a U.S. citizen. Thus, I learned during the annulment proceeding that actually I was never legally married to Mr. Ahmed and so my marriage to James was legal and valid.

9:24 2007
Liz Leland
Clerk C.P.&G.S.
Shannon Jones
Deputy Clerk

Filed: 11-26-2007
Sue H. Roe
Judge of Probate
By: L. Duffie

8. The Court accepted my testimony and found that I was never married to Ahmed. The Final Order filed on April 15, 2004 is attached hereto as Exhibit E.

9. After the Order was issued, my attorney promptly sent it to James' attorney, Mr. Huff. See letter dated April 16, 2004, attached hereto as Exhibit F.

10. James always believed we were married and he was happy about the annulment. In his 2005 biography, "James Brown I feel Good, A Memoir of a Life of Soul" (New American Library: 2005) he wrote that "having married Tomi Rae Brown, I once again, much to my amazement, wanted children." (See Exhibit G, p.232)

11. It is true that after a physical altercation in which James was arrested for criminal domestic violence, his lawyer filed a pleading in family court to annul our marriage. However, this was the result of undue influences upon him by David Cannon and others and because he was upset about the criminal charge. He withdrew that action and we reconciled. See Consent Order of Dismissal dated August 16, 2004, attached hereto as Exhibit H.

12. Residence at 430 Dardesdr from February 17th 1997 ~~2006~~ James and I lived as husband and wife from December 14, 2001 until his death in December 2006. (February). not Correct. (1997–2006).

13. I am asking the Court to recognize my ceremonial marriage to James Brown and the legality and finality of the Order of the Family Court finding that I was never married to Javed Ahmed and therefore am legally married to James Brown.

TOMMIE RAE BROWN

Sworn and subscribed to me on this 6 day of November 2007

Notary Public for the State of _____

Comm. Exp. _____

State of California County of LOS ANGELES
Subscribed and sworn to (or affirmed) Before me on this 6TH day of NOV. 2007 by TOMMIE RAE BROWN
personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.
Signature Cynthia Keen Wilson
(Seal)

CYNTHIA KEEN WILSON
Commission # 1672047
Notary Public - California
Ventura County
My Comm. Expires Apr 23, 2009

LICENSE AND CERTIFICATE FOR MARRIAGE

STATE OF SOUTH CAROLINA

207020 — LICENSE NUMBER

AIKEN — COUNTY

GROOM-NAME (1)	(FIRST) JAMES	(MIDDLE)	(LAST) BROWN	BIRTHDATE (MONTH, DAY, YEAR) (2a)	1933 AGE (2b) 68
BIRTHPLACE (State or foreign country) (3)	SOUTH CAROLINA	RACE (4)	BLACK	RESIDENCE (Street and Number) (5a)	430 DOUGLAS DRIVE
CITY, TOWN OR LOCATION (5b)	BEECH ISLAND	COUNTY (5c)	AIKEN	STATE (5d)	SOUTH CAROLINA
NO OF THIS MARRIAGE (1st, 2nd, etc.) (6)	4				
BRIDE-NAME (7)	(FIRST) TOMMIE RAE	(MIDDLE)	(LAST) HYNIE	BIRTHDATE (MONTH, DAY, YEAR) (8a)	1969 AGE (8b) 32
BIRTHPLACE (State or foreign country) (9)	NEVADA	RACE (10)	WHITE	RESIDENCE (Street and Number) (11a)	430 DOUGLAS DRIVE
CITY, TOWN OR LOCATION (11b)	BEECH ISLAND	COUNTY (11c)	AIKEN	STATE (11d)	SOUTH CAROLINA
NO. OF THIS MARRIAGE (1st, 2nd, etc.) (12)	1				

MAIDEN NAME OF BRIDE (If Different From Above)

(13)

Application for a license was filed with this court at 3:15p M., on the 10 day of DECEMBER, 2001. These are, therefore, to authorize any person qualified to perform marriage ceremonies to perform the marriage ceremony for the persons above named and for the so doing this shall be sufficient warrant. Given under my hand and seal at 3:20 P.M., this the 11th day of December, A.D. 2001.

Signature of Issuing Officer — JUDGE OF PROBATE — Title of Issuing Officer

GROOM-Signature (14)

BRIDE-Signature (15)

I certify that the above named persons were married on (16) December 14 (MONTH) (DAY) (YEAR) 2001

Place of Marriage (17) Beech Island (CITY) Aiken (COUNTY) SOUTH CAROLINA

OFFICIANT-Signature (18a) Rev. Larry Fryer

OFFICIANT-Title (18b) Rev. Larry Fryer

OFFICIANT-Mailing Address (18c) 1115 - 6th Avenue, Augusta, Georgia 30901

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

MAR 16 2007

Liz Godard
C.C.C.P. & G.S., Aiken County, S.C.

Rosie Lowman
Deputy Clerk

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN THIS COURT WITNESS MY HAND AND SEAL OF THE COURT THIS THE 19th DAY OF March A.D. 2004

Lee H Roe
JUDGE OF PROBATE FOR AIKEN COUNTY, S.C.

BY Martha Bentley
CLERK

DHEC 0681 (12/1998)

PROBATE JUDGE

EXHIBIT

FILED
AIKEN COUNTY
MAY 06 2004
4:55p
CLERK OF COURT

Marriage Certificate

LICENSE NO. 207020

STATE OF SOUTH CAROLINA,
AIKEN COUNTY

PROBATE COURT

To Whom It May Concern:

THIS IS TO CERTIFY, That on the 14th day of DECEMBER, 2001

at BEECH ISLAND in Aiken County, State of South Carolina,

JAMES BROWN	BEECH ISLAND, SC	68	and
MAN'S NAME	ADDRESS	AGE	

TOMMIE RAE HYNIE	BEECH ISLAND, SC	32
WOMAN'S NAME	ADDRESS	AGE

were united in the Bonds of Matrimony by LARRY FRYER

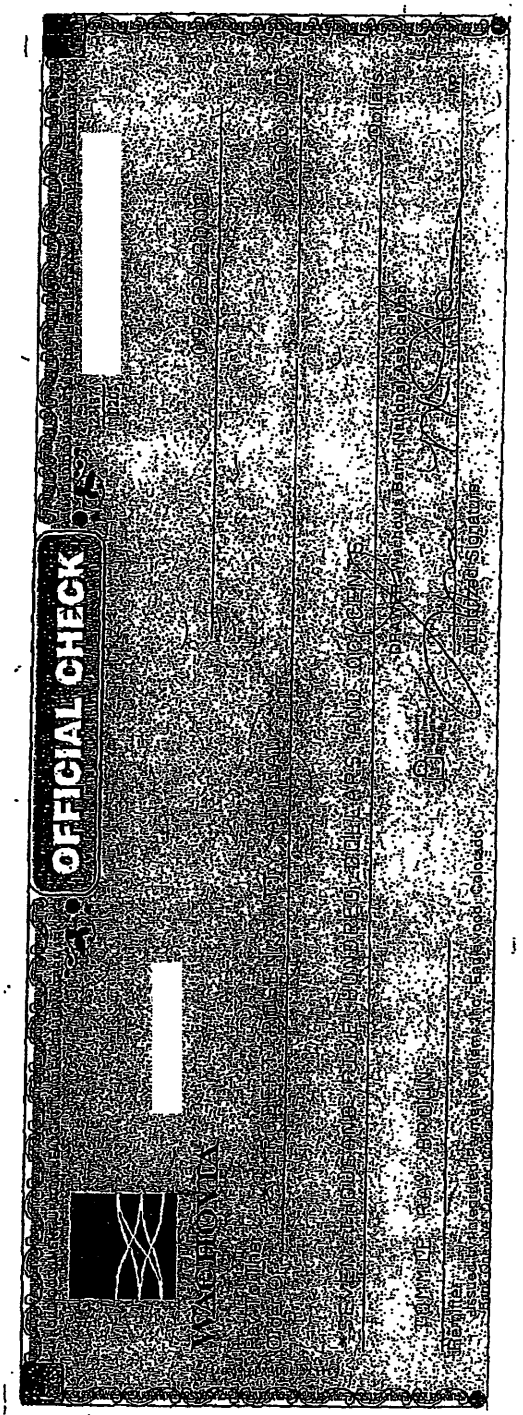
MINISTER in accordance with the law of South Carolina,
OFFICIAL TITLE

in such cases made and provided, and as shown by the records of this Court that the information given is that their race is BLACK/WHITE and their Nationality is American.

Witness my Hand and Seal of said Court, this the 8th day of JANUARY, 2003

A TRUE COPY

Attest: Sue H. Rice
JUDGE OF PROBATE



9.24.14
C.P.A.G.S.
Ohanian Q. a/c# 4260

EXHIBIT
B

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

TOMMIE RAE HYNIE, a/k/a
TOMMIE RAE BROWN,

Plaintiff,

-vs-

JAVED AHMED,

Defendant.

FILED
2003 DEC 15 PM 4:34
JULIE ARMSTRONG
CLERK OF COURT
BY

IN THE FAMILY COURT
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 03-DR-10-4609

SUMMONS

FILED
9 24 2004
Lisa Godard
CCP.&G.S.
Deputy Clerk

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you and to serve a copy of your Answer to said Complaint on the subscribers at their offices, The Rosen Law Firm, 134 Meeting Street, Suite 202, Post Office Box 1510, Charleston, South Carolina 29402, or to otherwise appear and defend, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, or otherwise to appear and defend, within the time aforesaid, the Plaintiff in this action will obtain a judgment by default against you for the relief demanded in the Complaint.

THE ROSEN LAW FIRM, LLC

By:_____
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(843) 377-1700- Office
(843) 377-1707-Facsimile
ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
December 15, 2003

EXHIBIT
C

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

TOMMIE RAE HYNIE, a/k/a
TOMMIE RAE BROWN,

Plaintiff,

-vs-

JAVED AHMED,

Defendant.

FILED
2003 DEC 15 PM 4:34
JULIE ARMSTRONG
CLERK OF COURT
BY

IN THE FAMILY COURT
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 03-DR-10-4609

COMPLAINT

TO: THE DEFENDANT NAMED ABOVE:

The Plaintiff above named would respectfully show unto this Honorable Court, as follows:

1. The Plaintiff is a citizen and resident of South Carolina, and has so resided in said state for at least one (1) year prior to the commencement of this action.
2. The Plaintiff is informed, and believes that the Defendant is a citizen and resident of Texas.
3. The Plaintiff is informed and believes that jurisdiction is proper in the Family Court pursuant to §20-7-420(6) and §20-1-530 of the South Carolina Code.
4. The Plaintiff alleges that in February 1997, the Defendant was an immigrant from Pakistan, who unbeknownst to Plaintiff, wanted to marry Plaintiff so that he could become a United States citizen.
5. On February 17, 1997, the Plaintiff and Defendant married in Harris County, Texas.
6. Thereafter, the Defendant refused to live with the Plaintiff and Plaintiff returned to her domicile. The Plaintiff alleges she never saw or heard from the Defendant again.
7. The Plaintiff alleges that the parties never lived together as husband and wife and never engaged in any sexual contact or activity whatsoever, therefore failing to consummate their marriage.
8. Plaintiff is informed and believes that prior to their marriage, the Defendant had three or more wives to whom he was lawfully married under Pakistani law when the parties married on February 17, 1997.
9. Plaintiff alleges there has been no collusion between the parties.
10. The Plaintiff now seeks to have this marriage annulled as the Defendant was already married to another woman, the Defendant perpetrated a fraud on the Plaintiff, and the parties did not consummate their purported marriage, nor did they live together as husband and wife, all of which constitute grounds for annulment pursuant to S.C. Code Ann. Section 20-1-530 (Lawyers Co-op 1976).

WHEREFORE, Plaintiff prays that this Honorable Court issue its Order as follows:

1. Granting the Plaintiff an annulment of the marriage between the parties; and
2. For any such other relief this Court deems just and proper.

THE ROSEN LAW FIRM, LLC

By: _____
ROBERT N. ROSEN
134 Meeting Street, Suite 200
Charleston, SC 29402
(843) 377-1700- Office
(843) 377-1707-Facsimile
ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
December 15, 2003

02/05/2004 11:13 FAX 8455111198 ROSEN LAW FIRM 001

****
*** TX REPORT ***
****

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ROSEN LAW FIRM, LLC

ATTORNEYS AND COUNSELORS AT LAW

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P.O. BOX 1510
CHARLESTON, SOUTH CAROLINA 29401
PHONE (843) 577-6726
FAX (843) 724-8036
WWW.ROSEN-LAWFIRM.COM

February 5, 2004

Via Facsimile 803-442-4422
James B. Huff, Esquire
P. O. Box 6488
N. Augusta, SC 29841

RE: Brown v. Ahmed
03-DR-10-4609

Dear Mr. Huff:

Enclosed you will find a copy of the Summons and Complaint with regard to the above-referenced matter.

Sincerely,

Marcia F. Jones
Paralegal to Robert N. Rosen

:mfj
xc: Tommie Brown

ROSEN LAW FIRM, LLC
ATTORNEYS AND COUNSELORS AT LAW

134 MEETING STREET, SUITE 202
P.O. BOX 1510
CHARLESTON, SOUTH CAROLINA 29401
PHONE (843) 577-6726
FAX (843) 724-8036
WWW.ROSEN-LAWFIRM.COM

February 5, 2004

4 24 14
Liz Holland
CC C.P.&G.S.
Deputy Clerk 12:2

Via Facsimile 803-442-4422
James B. Huff, Esquire
P. O. Box 6488
N. Augusta, SC 29841

RE: Brown v. Ahmed
03-DR-10-4609

Dear Mr. Huff:

Enclosed you will find a copy of the Summons and Complaint with regard to the above-referenced matter.

Sincerely,

Marcia F. Jones
Paralegal to Robert N. Rosen

:mfj
xc: Tommie Brown

EXHIBIT 1

STATE OF SOUTH CAROLINA)
) IN THE FAMILY COURT
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 03-DR-10-4609

FILED
2003 DEC 15 PM 4:34
JULIE ARMSTRONG
CLERK OF COURT
BY

TOMMIE RAE HYNIE, a/k/a
TOMMIE RAE BROWN,

Plaintiff,

-vs-

JAVED AHMED,

Defendant.

SUMMONS

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you and to serve a copy of your Answer to said Complaint on the subscribers at their offices, The Rosen Law Firm, 134 Meeting Street, Suite 202, Post Office Box 1510, Charleston, South Carolina 29402, or to otherwise appear and defend, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, or otherwise to appear and defend, within the time aforesaid, the Plaintiff in this action will obtain a judgment by default against you for the relief demanded in the Complaint.

THE ROSEN LAW FIRM, LLC

By:
ROBERT N. ROSEN
134 Meeting Street, Suite 200
Charleston, SC 29402
(843) 377-1700- Office
(843) 377-1707-Facsimile
ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
December 15, 2003

STATE OF SOUTH CAROLINA)
) IN THE FAMILY COURT
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 03-DR-10-4609

FILED
2003 DEC 15 PM 4:34
JULIE ARMSTRONG
CLERK OF COURT
BY D

TOMMIE RAE HYNIE, a/k/a
TOMMIE RAE BROWN,

Plaintiff,

-vs-

JAVED AHMED,

Defendant.

COMPLAINT

TO: THE DEFENDANT NAMED ABOVE:

The Plaintiff above named would respectfully show unto this Honorable Court, as follows:

1. The Plaintiff is a citizen and resident of South Carolina, and has so resided in said state for at least one (1) year prior to the commencement of this action.
2. The Plaintiff is informed, and believes that the Defendant is a citizen and resident of Texas.
3. The Plaintiff is informed and believes that jurisdiction is proper in the Family Court pursuant to §20-7-420(6) and §20-1-530 of the South Carolina Code.
4. The Plaintiff alleges that in February 1997, the Defendant was an immigrant from Pakistan, who unbeknownst to Plaintiff, wanted to marry Plaintiff so that he could become a United States citizen.
5. On February 17, 1997, the Plaintiff and Defendant married in Harris County, Texas.
6. Thereafter, the Defendant refused to live with the Plaintiff and Plaintiff returned to her domicile. The Plaintiff alleges she never saw or heard from the Defendant again.
7. The Plaintiff alleges that the parties never lived together as husband and wife and never engaged in any sexual contact or activity whatsoever, therefore failing to consummate their marriage.
8. Plaintiff is informed and believes that prior to their marriage, the Defendant had three or more wives to whom he was lawfully married under Pakistani law when the parties married on February 17, 1997.
9. Plaintiff alleges there has been no collusion between the parties.
10. The Plaintiff now seeks to have this marriage annulled as the Defendant was already married to another woman, the Defendant perpetrated a fraud on the Plaintiff, and the parties did not consummate their purported marriage, nor did they live together as husband and wife, all of which constitute grounds for annulment pursuant to S.C. Code Ann. Section 20-1-530 (Lawyers Co-op 1976).

WHEREFORE, Plaintiff prays that this Honorable Court issue its Order as follows:

1. Granting the Plaintiff an annulment of the marriage between the parties; and
2. For any such other relief this Court deems just and proper.

THE ROSEN LAW FIRM, LLC

By:_____
ROBERT N. ROSEN
134 Meeting Street, Suite 200
Charleston, SC 29402
(843) 377-1700- Office
(843) 377-1707-Facsimile
ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
December 15, 2003

****
*** TX REPORT ***
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TRANSMISSION OK

TX/RX NO	0023
RECIPIENT ADDRESS	18034424422
DESTINATION ID	
ST. TIME	02/05 17:13
TIME USE	01'13
PAGES SENT	4
RESULT	OK

ROSEN LAW FIRM, LLC
ATTORNEYS AND COUNSELORS AT LAW

134 MEETING STREET, SUITE 202
P.O. BOX 1510
CHARLESTON, SOUTH CAROLINA 29401
PHONE (843) 577-6726
FAX (843) 724-8036
WWW.ROSEN-LAWFIRM.COM

February 5, 2004

Via Facsimile 803-442-4422
James B. Huff, Esquire
P. O. Box 6488
N. Augusta, SC 29841

RE: Brown v. Ahmed
03-DR-10-4609

Dear Mr. Huff:

Enclosed you will find a copy of the Summons and Complaint with regard to the above-referenced matter.

Sincerely,

Marcia F. Jones
Paralegal to Robert N. Rosen

:mfj
xc: Tommie Brown

ROSEN LAW FIRM, LLC
ATTORNEYS AND COUNSELORS AT LAW

134 MEETING STREET, SUITE 202
P.O. BOX 1510 (29402)
CHARLESTON, SOUTH CAROLINA 29401
PHONE (843) 377-1700
FAX (843) 377-1709
WWW.ROSEN-LAWFIRM.COM

April 16, 2004

Via Regular Mail & Facsimile 803-442-4422
James B. Huff, Esquire
P. O. Box 6488
N. Augusta, SC 29841

RE: Brown v. Ahmed
Case No.: 03-DR-10-4609

Dear Jim:

I now enclose a certified copy of the Final Order in the above-captioned case. As you can see, the Family Court has granted the annulment; which ought to come as good news to Mr. Brown.

Now that this issue is resolved, I am hopeful this couple can reconcile their differences. If not, I would suggest mediation with Mark Andrews in Mr. Pleasant, South Carolina. I am sure that if you investigate Mr. Andrews, you will find that he is the leading domestic mediator in South Carolina.

Please advise if this suits your client.

Sincerely,

Robert N. Rosen

:mfj
xc: Mrs. James Brown

FILED
2004 APR 15 AM 9:34
JEAN C. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA)	IN THE FAMILY COURT
)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	CASE NO. 03-DR-10-4609
TOMMIE RAE HYNIE, a/k/a TOMMIE RAE BROWN,)	
Plaintiff,)	
-vs-)	FINAL ORDER
JAVED AHMED,)	
Defendant.)	

HEARING DATE:	April 15, 2004
JUDGE:	Honorable F. P. Segars-Andrews
ATTORNEY FOR PLAINTIFF:	Robert N. Rosen, Esquire Donald B. Clark, Esquire
ATTORNEY FOR DEFENDANT:	N/A
COURT REPORTER:	

This matter comes before the Court for a final hearing on April 15, 2004.

Present before the Court were the Plaintiff, Tommie Rae Brown, and her counsel Robert N. Rosen, Esquire, of the Rosen Law Firm, and Donald B. Clark, Esquire, of the Donald B. Clark Law Firm.

This matter was commenced by the filing of a Summons and Complaint by the Plaintiff to annul her marriage to the Defendant, Javed Ahmed.

The Plaintiff is a citizen and resident of the State of South Carolina and has resided in South Carolina for more than one year prior to the commencement of this action.

The Defendant, at the time of the marriage of the parties, was a resident of the State of Texas, and his last known address was in Houston, Texas. After the filing of the Summons and Complaint, the Defendant could not be located. The Plaintiff retained the services of a private investigator who attempted to locate the Defendant at his last known address. The Plaintiff testified that the last known address she had for the Defendant was in Houston, Texas. The private investigator found that the Defendant's Texas driver's license listed his address as Houston, Texas.

This Court issued an Order of Publication on February 3, 2004. This Court found that the Plaintiff made a diligent effort to locate the Defendant, and it appeared to the satisfaction of the

JSA 104

Court that the current address or whereabouts of the Defendant were unknown although his last known address was in Houston, Texas. The Court therefore ordered service could be had by publication pursuant to §15-9-710 and §15-9-740, SC Code Ann., and that the Summons would be published once a week for a total of three weeks in the *Houston Chronicle*, a newspaper of general circulation in the area of Houston, Texas.

An Affidavit of Publication signed by the Supervisor/Accounts Receivable of the *Houston Chronicle* was filed with this Court. The Court finds that the Defendant has been properly served by publication pursuant to South Carolina law.

This matter was originally set to be heard on March 26, 2004, but the case was continued by Order of the Court. The Defendant was given written notice of the hearing by regular mail and by certified mail, return receipt requested as appears from the affidavit of Marcia F. Jones. The Defendant was therefore properly notified of the final hearing pursuant to Rule 17 of the South Carolina Rules of Family Court.

FINDINGS OF FACT

The Court finds as follows:

1. Plaintiff is a citizen and resident of the State of South Carolina and has resided in the State of South Carolina for a period in excess of one year prior to the commencement of this action.

2. Plaintiff married Defendant, Javed Ahmed, on February 17, 1997 in Harris County, Texas. Thereafter Defendant refused to live with Plaintiff. Plaintiff never saw nor heard from Defendant again. Plaintiff never lived with the Defendant. The parties never lived together as husband and wife. The parties never engaged in sexual intercourse, sexual conduct or sexual activity of any kind and, therefore, failed to consummate their marriage.

3. No children were born of this marriage between the parties.

4. Plaintiff testified that she later learned that Defendant, a Pakistani immigrant, wanted to marry Plaintiff so that he could become a United States citizen. Plaintiff also later learned that Defendant had three or more wives to whom he was married under Pakistani law when the parties married on February 17, 1997.

5. The Court finds there has been no contact between the parties since shortly after February 17, 1997, and therefore there is no collusion between these parties.

6. The marriage between the Plaintiff and the Defendant was contracted by Plaintiff in good faith and without any knowledge of the Defendant's previous marriages or fraudulent intentions.

7. The Court finds that the Plaintiff is entitled to an annulment for the following reasons: (1) Defendant was already married to another woman or other women and therefore did not have the capacity to marry the Plaintiff; (2) Defendant perpetrated a fraud upon the Plaintiff in that she intended in good faith to marry Defendant but Defendant had no intention of marrying her and consummating a marriage; and (3) the parties did not consummate their marriage nor did they live together as husband and wife.

8. This Court finds that the Plaintiff is therefore entitled to an annulment of her marriage to Defendant, Javed Ahmed.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to hear and determine actions to determine the validity of marriages and to hear and determine actions for the annulment of marriage. §20-7-420(5) and (6), SC Code Ann.

2. This Court has jurisdiction to grant an annulment to the Plaintiff as she is domiciled in this state. Foster v. Nordman, 137 S.E.2d 600 (1964).

3. The Court concludes that the uncontradicted testimony shows that Plaintiff never cohabitated with the Defendant and never engaged in sexual intercourse with him and therefore, the marriage can be annulled as it was never consummated.

4. The Court concludes that Defendant was married at the time he entered into his marriage with Plaintiff and therefore he lacked the capacity to marry Plaintiff.

5. The Court concludes that Defendant represented to Plaintiff that he wished to marry her, but in fact he married her for a fraudulent purpose in an effort to obtain United States citizenship. A marriage which is procured by fraudulent means may be annulled in this state. Jaker v. Jaker, 102 S.E. 337 (1919).

6. The Court concludes that it has jurisdiction of the subject matter and of the parties.

7. The Court concludes that it has jurisdiction of the Defendant for the purposes of this proceeding and that the Defendant had been properly served and notified of this hearing. It is therefore,

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	0704
RECIPIENT ADDRESS	18034424422
DESTINATION ID	
ST. TIME	04/16 14:57
TIME USE	01'27
PAGES SENT	5
RESULT	OK

ROSEN LAW FIRM, LLC
ATTORNEYS AND COUNSELORS AT LAW

154 MEETING STREET, SUITE 202
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PHONE (843) 377-1700
FAX (843) 377-1709
WWW.ROSEN-LAWFIRM.COM

April 16, 2004

Via Regular Mail & Facsimile 803-442-4422
James B. Huff, Esquire
P. O. Box 6488
N. Augusta, SC 29841

RE: Brown v. Ahmed
Case No.: 03-DR-10-4609

Dear Jim:

I now enclose a certified copy of the Final Order in the above-captioned case. As you can see, the Family Court has granted the annulment, which ought to come as good news to Mr. Brown.

Now that this issue is resolved, I am hopeful this couple can reconcile their differences. If not, I would suggest mediation with Mark Andrews in Mr. Pleasant, South Carolina. I am sure that if you investigate Mr. Andrews, you will find that he is the leading domestic mediator in South Carolina.

Please advise if this suits your client.

Sincerely,

Robert N. Rosen

STATE OF SOUTH CAROLINA) IN THE FAMILY COURT
) FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO. 03-DR-10-4609

TOMMIE RAE HYNIE, a/k/a TOMMIE RAE BROWN,

Plaintiff,

-vs-

JAVED AHMED,

Defendant.

FILED
APR 15 2004
CLERK OF COURT

924 14
U.C.C.P.&G.S.

FINAL ORDER

Deputy Clerk

HEARING DATE: April 15, 2004
JUDGE: Honorable F. P. Segars-Andrews
ATTORNEY FOR PLAINTIFF: Robert N. Rosen, Esquire
Donald B. Clark, Esquire
ATTORNEY FOR DEFENDANT: N/A
COURT REPORTER:

This matter comes before the Court for a final hearing on April 15, 2004.

Present before the Court were the Plaintiff, Tommie Rae Brown, and her counsel Robert N. Rosen, Esquire, of the Rosen Law Firm, and Donald B. Clark, Esquire, of the Donald B. Clark Law Firm.

CC/RNR(P) 4-15-04

This matter was commenced by the filing of a Summons and Complaint by the Plaintiff to annul her marriage to the Defendant, Javed Ahmed.

The Plaintiff is a citizen and resident of the State of South Carolina and has resided in South Carolina for more than one year prior to the commencement of this action.

The Defendant, at the time of the marriage of the parties, was a resident of the State of Texas, and his last known address was in Houston, Texas. After the filing of the Summons and Complaint, the Defendant could not be located. The Plaintiff retained the services of a private investigator who attempted to locate the Defendant at his last known address. The Plaintiff testified that the last known address she had for the Defendant was in Houston, Texas. The private investigator found that the Defendant's Texas driver's license listed his address as Houston, Texas.

This Court issued an Order of Publication on February 3, 2004. This Court found that the Plaintiff made a diligent effort to locate the Defendant, and it appeared to the satisfaction of the

EXHIBIT E

Court that the current address or whereabouts of the Defendant were unknown although his last known address was in Houston, Texas. The Court therefore ordered service could be had by publication pursuant to §15-9-710 and §15-9-740, SC Code Ann., and that the Summons would be published once a week for a total of three weeks in the *Houston Chronicle*, a newspaper of general circulation in the area of Houston, Texas.

An Affidavit of Publication signed by the Supervisor/Accounts Receivable of the *Houston Chronicle* was filed with this Court. The Court finds that the Defendant has beer properly served by publication pursuant to South Carolina law.

This matter was originally set to be heard on March 26, 2004, but the case was continued by Order of the Court. The Defendant was given written notice of the hearing by regular mail and by certified mail, return receipt requested as appears from the affidavit of Marcia F. Jones. The Defendant was therefore properly notified of the final hearing pursuant to Rule 17 of the South Carolina Rules of Family Court.

FINDINGS OF FACT

The Court finds as follows:

1. Plaintiff is a citizen and resident of the State of South Carolina and has resided in the State of South Carolina for a period in excess of one year prior to the commencement of this action.

2. Plaintiff married Defendant, Javed Ahmed, on February 17, 1997 in Harris County, Texas. Thereafter Defendant refused to live with Plaintiff. Plaintiff never saw nor heard from Defendant again. Plaintiff never lived with the Defendant. The parties never lived together as husband and wife. The parties never engaged in sexual intercourse, sexual conduct or sexual activity of any kind and, therefore, failed to consummate their marriage.

3. No children were born of this marriage between the parties.

4. Plaintiff testified that she later learned that Defendant, a Pakistani immigrant, wanted to marry Plaintiff so that he could become a United States citizen. Plaintiff also later learned that Defendant had three or more wives to whom he was married under Pakistani law when the parties married on February 17, 1997.

5. The Court finds there has been no contact between the parties since shortly after February 17, 1997, and therefore there is no collusion between these parties.

6. The marriage between the Plaintiff and the Defendant was contracted by Plaintiff in good faith and without any knowledge of the Defendant's previous marriages or fraudulent intentions.

7. The Court finds that the Plaintiff is entitled to an annulment for the following reasons: (1) Defendant was already married to another woman or other women and therefore did not have the capacity to marry the Plaintiff; (2) Defendant perpetrated a fraud upon the Plaintiff in that she intended in good faith to marry Defendant but Defendant had no intention of marrying her and consummating a marriage; and (3) the parties did not consummate their marriage nor did they live together as husband and wife.

8. This Court finds that the Plaintiff is therefore entitled to an annulment of her marriage to Defendant, Javed Ahmed.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to hear and determine actions to determine the validity of marriages and to hear and determine actions for the annulment of marriage. §20-7-420(5) and (6), SC Code Ann.

2. This Court has jurisdiction to grant an annulment to the Plaintiff as she is domiciled in this state. Foster v. Nordman, 137 S.E.2d 600 (1964).

3. The Court concludes that the uncontradicted testimony shows that Plaintiff never cohabitated with the Defendant and never engaged in sexual intercourse with him and therefore, the marriage can be annulled as it was never consummated.

4. The Court concludes that Defendant was married at the time he entered into his marriage with Plaintiff and therefore he lacked the capacity to marry Plaintiff.

5. The Court concludes that Defendant represented to Plaintiff that he wished to marry her, but in fact he married her for a fraudulent purpose in an effort to obtain United States citizenship. A marriage which is procured by fraudulent means may be annulled in this state. Jaker v. Jaker, 102 S.E. 337 (1919).

6. The Court concludes that it has jurisdiction of the subject matter and of the parties.

7. The Court concludes that it has jurisdiction of the Defendant for the purposes of this proceeding and that the Defendant had been properly served and notified of this hearing. It is therefore,

ORDERED, ADJUDGED AND DECREED that the Plaintiff is entitled to an order and judgment annulling the marriage between the Plaintiff and the Defendant solemnized on February 17, 1997. It is further

ORDERED, ADJUDGED AND DECREED that the marriage between Tommy Rae Hynie a/k/a Tommie Rae Brown and Javed Anmed is annulled. It is further,

ORDERED, ADJUDGED AND DECREED that the marriage between Plaintiff and Defendant be, and is hereby, declared to be wholly null and void ab initio, and the parties are, and each of them is, freed from the obligations of such marriage.

AND IT IS SO ORDERED!

F. P. SEGARS-ANDREWS
JUDGE OF THE FAMILY COURT
NINTH JUDICIAL CIRCUIT

Charleston, South Carolina
April 15, 2004

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, FAMILY COURT
BY: _____
DEPUTY CLERK

ROSEN LAW FIRM, LLC
ATTORNEYS AND COUNSELORS AT LAW

134 MEETING STREET, SUITE 202
P.O. BOX 1510 (29402)
CHARLESTON, SOUTH CAROLINA 29401
PHONE (843) 577-1700
FAX (843) 577-1709
WWW.ROSEN-LAWFIRM.COM

April 16, 2004

Filed
Clerk C.P.&G.S.
Deputy Clerk

Via Regular Mail & Facsimile 803-442-4422
James B. Huff, Esquire
P. O. Box 6488
N. Augusta, SC 29841

RE: Brown v. Ahmed
Case No.: 03-DR-10-4609

Dear Jim:

I now enclose a certified copy of the Final Order in the above-captioned case. As you can see, the Family Court has granted the annulment, which ought to come as good news to Mr. Brown.

Now that this issue is resolved, I am hopeful this couple can reconcile their differences. If not, I would suggest mediation with Mark Andrews in Mr. Pleasant, South Carolina. I am sure that if you investigate Mr. Andrews, you will find that he is the leading domestic mediator in South Carolina.

Please advise if this suits your client.

Sincerely,

Robert N. Rosen

:mfj
xc: Mrs. James Brown

EXHIBIT F

FILED
2004 APR 15 AM 9:34
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA)	IN THE FAMILY COURT
)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	CASE NO. 03-DR-10-4609
TOMMIE RAE HYNIE, a/k/a TOMMIE RAE BROWN,)	
Plaintiff,)	
-vs-)	FINAL ORDER
JAVED AHMED,)	
Defendant.)	

HEARING DATE:	April 15, 2004
JUDGE:	Honorable F. P. Segars-Andrews
ATTORNEY FOR PLAINTIFF:	Robert N. Rosen, Esquire Donald B. Clark, Esquire
ATTORNEY FOR DEFENDANT:	N/A
COURT REPORTER:	

This matter comes before the Court for a final hearing on April 15, 2004.

Present before the Court were the Plaintiff, Tommie Rae Brown, and her counsel Robert N. Rosen, Esquire, of the Rosen Law Firm, and Donald B. Clark, Esquire, of the Donald B. Clark Law Firm.

This matter was commenced by the filing of a Summons and Complaint by the Plaintiff to annul her marriage to the Defendant, Javed Ahmed.

The Plaintiff is a citizen and resident of the State of South Carolina and has resided in South Carolina for more than one year prior to the commencement of this action.

The Defendant, at the time of the marriage of the parties, was a resident of the State of Texas, and his last known address was in Houston, Texas. After the filing of the Summons and Complaint, the Defendant could not be located. The Plaintiff retained the services of a private investigator who attempted to locate the Defendant at his last known address. The Plaintiff testified that the last known address she had for the Defendant was in Houston, Texas. The private investigator found that the Defendant's Texas driver's license listed his address as Houston, Texas.

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JSA 104

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FINDINGS OF FACT

The Court finds as follows:

1. Plaintiff is a citizen and resident of the State of South Carolina and has resided in the State of South Carolina for a period in excess of one year prior to the commencement of this action.

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7. The Court concludes that it has jurisdiction of the Defendant for the purposes of this proceeding and that the Defendant had been properly served and notified of this hearing. It is therefore,

****
*** TX REPORT ***
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TRANSMISSION OK

TX/RX NO	0704
RECIPIENT ADDRESS	18034424422
DESTINATION ID	
ST. TIME	04/16 14:57
TIME USE	01'27
PAGES SENT	5
RESULT	OK

ROSEN LAW FIRM, LLC

ATTORNEYS AND COUNSELORS AT LAW

134 MEETING STREET, SUITE 202
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April 16, 2004

Via Regular Mail & Facsimile 803-442-4422
James B. Huff, Esquire
P. O. Box 6488
N. Augusta, SC 29841

RE: Brown v. Ahmed
Case No.: 03-DR-10-4609

Dear Jim:

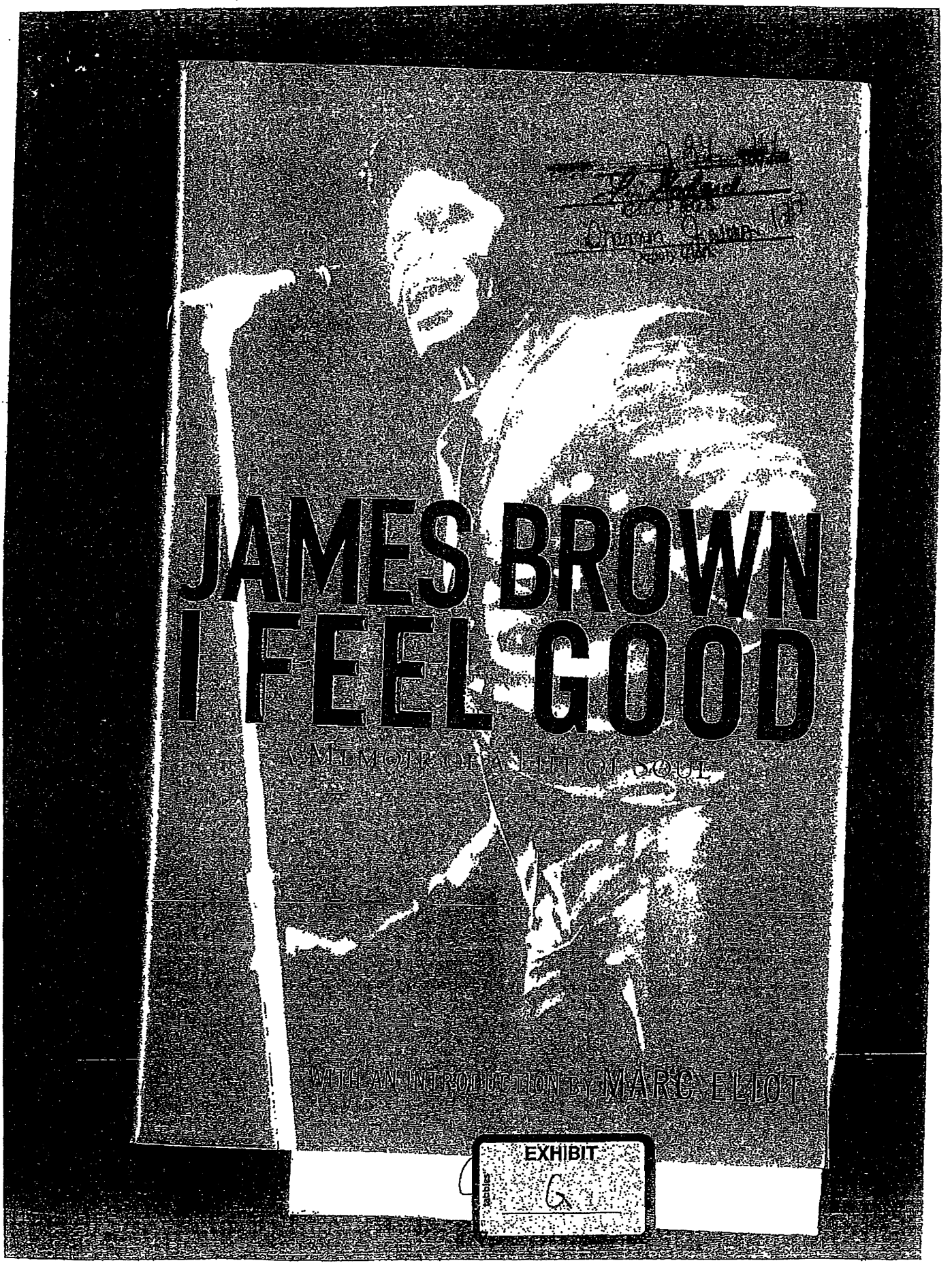
I now enclose a certified copy of the Final Order in the above-captioned case. As you can see, the Family Court has granted the annulment, which ought to come as good news to Mr. Brown.

Now that this issue is resolved, I am hopeful this couple can reconcile their differences. If not, I would suggest mediation with Mark Andrews in Mr. Pleasant, South Carolina. I am sure that if you investigate Mr. Andrews, you will find that he is the leading domestic mediator in South Carolina.

Please advise if this suits your client.

Sincerely,

Robert N. Rosen


JAMES BROWN
I FEEL GOOD
A MEMOIR OF A LIFE OF SOUL
WITH AN INTRODUCTION BY MARC ELIOT
EXHIBIT
6

James Brown with his wife, Tomi Rae Brown, receiving the prestigious Kennedy Center Honor for his lifetime contribution to the arts, on December 7, 2003, in Washington, D.C.
FROM THE COLLECTION OF THE AUTHOR

As long as the fire still burns in his heart, James Brown will continue to wow audiences worldwide. Here he is performing his trademark cape drama with longtime MC, Danny Ray.
FROM THE COLLECTION OF THE AUTHOR

points, and to operate at the same speed of life. Another problem is that both sides usually don't want the same things at the same time.

Children, for instance. It's very difficult to be the father of even one child in a man's life. I happen to be the father of many, but with a younger woman, the talk inevitably turns to starting a new family, and it's hard to go down that road all over again after you've seen your children from earlier marriages grow into adulthood. When a man is older, he has a tendency to feel he has done his part. He wants to relax and spend time with just his woman. A young girl, however, has all that ahead of her. This is an issue couples have to be straight on and agree on before they walk down that aisle; otherwise there is no way their marriage will survive.

Ironically, one of the biggest issues between Adrianne and me had been children. We both wanted them but couldn't seem to have them. I had built a beautiful home for her and the family we had both hoped to have. I had wanted her to feel she was living with an ambassador, which, in many ways, I had become. For myself, I never needed much. I could just as easily live in a small place and that would be just fine with me, but I wanted her to feel that she had the best.

Now, having married Tomi Rae Brown, I once again, much to my amazement, wanted children. And happily, so did she. We started living together in the big house in South

Form 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
FAMILY COURT

JUDGMENT IN A CIVIL CASE
CASE NO. 04-DR-02-157

JAMES JOE BROWN, JR. VS. TJOMMIE RAE BROWN

CHECK ONE:

[X] **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and an order rendered.

[ ] **ACTION DISMISSED** .(CHECK REASON): [ ] Rule 12 (b), SCRCP [ ] Rule 41(a), SCRCP (Vol. Nonsuit); [ ] Rule 43 (k), SCRCP (Settled) [ ] Other

[ ] **ACTION STRICKEN** (CHECK REASON): [ ] 27 Day Rule; [ ] Other

IT IS ORDERED AND ADJUDGED: [X] See attached order; [ ] Statement of Judgment by Court:

Dated at Aiken, South Carolina, this 16 day of AUGUST, 2004

JUDGE

This judgment/order was entered/filed on the 16 day of AUGUST, 2004
And a copy mailed/hand-delivered/boxed this 16 day of AUGUST, 2004
To attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY (S) FOR PLAINTIFF (S)

JAMES B. HUFF

ATTORNEY (S) FOR DEFENDANT (S)

ROBERT N. ROSEN
134 MEETING STREET STE. 202
CHARLESTON, SC 29402

GUARDIAN AD LITEM

CLERK OF COURT

By: CHRISTEE D. JOHNSON

EXHIBIT

SCRCP FORM 4-F (Revised 3/04)

STATE OF SOUTH CAROLINA)
COUNTY OF Aiken)

IN THE COURT OF COMMON PLEAS

☒ Plaintiff James Joe Brown, Jr.)

v.)

☐ Defendant. Lonnie Kae Hyde Ahrend Brown)

CASE NO. 04-DR-02-157

MOTION INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney: James B Huff , Bar No. Address: 1417 Ga. Avenue N. Augusta, SC 29841 phone: fax: (803) 278-2889 e-mail: other:	Defendant's Attorney: Mr. Rosen , Bar No. Address: 134 Meeting Street Suite 202 Charleston, SC. 29402 phone: fax: e-mail: other: 843-377-1700

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion Type

☐ Written motion attached
☒ Form Motion –
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☒ Other: Consent Order

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: CM Date Filed:

☑ MOTION FEE COLLECTED: 768269
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT
	)	
COUNTY OF AIKEN	)	SECOND JUDICIAL CIRCUIT
	)	
JAMES JOE BROWN, JR., Plaintiff	)	CASE NUMBER: 04-DR-02-175
	)	
vs.	)	**CONSENT ORDER OF DISMISSAL**
	)	
TOMMIE RAE HYNE AHMED BROWN, Defendant.	)	
	)	

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Gee, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina, do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office. Witness my hand and seal this 16 day of AUG 2004.
C.C.C.P. & G.S., Aiken County, S.C.
Deputy Clerk

FILED
AIKEN COUNTY
AUG 16 2004
CLERK OF COURT

HEARING DATE:	July 22, 2004
PRESIDING JUDGE:	Peter R. Nuessle
ATTORNEY FOR PLAINTIFF:	James B. Huff
ATTORNEY FOR DEFENDANT:	Robert N. Rosen
COURT REPORTER:	Lisa Hicklin

This matter was scheduled to come before the Court for a Temporary Hearing on the above listed date. Prior to the hearing the parties informed the Court that they had reached an Agreement in this matter. The Agreement is as follows:

1. The parties hereby dismiss their respective pleadings without prejudice to either party.

2. Plaintiff will pay the sum of $12,000.00 to Defendant for her attorney fees and costs in this matter. This will be paid within 10 days of the filing of this order.

3. Defendant agrees to and does hereby forever waive any claim of a common law marriage to the Plaintiff, both now and in the future.

4. The parties agree to seal the courts file in this matter.

Based upon the review of the court's file I make the following Findings of Fact:

1. The Agreement is fair and reasonable to both parties and should be approved by the Court.

2. The Court has considered the factors enunciated in SCRCP 41.1. I find that sealing the Courts file in this matter is proper. Both parties are entertainers. The parties have mutually consented to having the case dismissed without being litigated. The parties have resolved their differences and

are currently residing together. As such, the parties are entitled to retain their privacy as to the documents that have been filed with the Court. The parties mutual request and consent to seal the Courts file is in the best interest of both parties, will avoid disclosure of the parties private financial matters, avoid harm to any minor child involved with this case and causes no prejudice to either party or to any public interest with this case.

Based upon these Findings of Fact, I make the following Conclusions of Law:

1. That the parties and subject matter are properly before and subject to the jurisdiction of this Court.

Based upon the Findings of Fact and Conclusions of Law, it is hereby ORDERED:

a. That the agreement of the parties is approved by this Court.

b. The Courts' file shall be sealed and not opened to anyone without further court order of this court allowing such disclosure.

AND IT IS SO ORDERED:

Honorable Peter R. Nuessle
Family Court Judge
Second Judicial Circuit

Aiken, South Carolina

This 14 day of ~~July~~ Sept., 2004

I SO CONSENT:

James B. Huff, Esq.
Attorney for Plaintiff

I SO CONSENT:

Robert N. Rosen, Esq.
Attorney for Defendant

STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT
COUNTY OF AIKEN	)	SECOND JUDICIAL CIRCUIT
JAMES JOE BROWN, JR., Plaintiff	)	CASE NUMBER: 04-DR-02-157
vs.	)	**NOTICE OF MOTION AND MOTION**
TOMMIE RAE HYNE AHMED BROWN, Defendant.	)	

PLEASE TAKE NOTICE that the parties, by and through undersigned attorneys, intend to move and do hereby move before the Presiding Judge of the Family Court of the Second Judicial Circuit, on the 22nd day of July, 2004, at 11:00 A.M., or as soon thereafter as counsel may be heard for an Order sealing the record in the above listed matter.

Pursuant SCRCP 41.1 sealing of the Courts file in this matter is proper. Both parties are entertainers. The parties have mutually consented to having the case dismissed without being litigated. The parties have resolved their differences and are currently residing together. As such, the parties are entitled to retain their privacy as to the documents that have been filed with the Court. The parties mutual request and consent to seal the Courts file is in the best interest of both parties, will avoid disclosure of the parties private financial matters, avoid harm to any minor child involved with this case and causes no prejudice to either party or to any public interest with this case.

I SO MOVE:

James B. Huff, Esq.
Attorney for Plaintiff

July 21, 2004

I SO MOVE:

Robert N. Rosen, Esq.
Attorney for Defendant

FILED
AIKEN COUNTY
AUG 16 2004
8:30 AM

9:24-14
Deputy Clerk

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN)	Case Nos.: 2013-CP-02-02849
)	2013-CP-02-02850
IN RE: THE ESTATE OF)	
JAMES BROWN A/K/A)	AFFIDAVIT OF TOMMIE RAE BROWN
JAMES JOSEPH BROWN)	IN SUPPORT OF HER MOTION FOR
)	SUMMARY JUDGMENT
)	

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APR 28 2014
AIKEN COUNTY
CLERK OF COURT

PERSONALLY APPEARED before me Tommie Rae Brown who, first being duly sworn, states as follows:

1. I am a Petitioner in this case and ask the Court to recognize my ceremonial marriage to James Brown and declare that I was legally married to James Brown and that I am his widow.

2. James Brown and I were married on December 14, 2001 in Aiken County, South Carolina by Reverend Larry Fryer. Attached hereto as Exhibit "A," is a copy of my marriage license and marriage certificate to James.

3. In 2003, David Cannon told Mr. Brown that I was married to someone else, namely Javed Ahmed and had never been divorced. James gave me the money to pay the legal fees for the action to confirm that putative marriage was never valid. The Personal Representatives have admitted this fact. See Personal Representatives' Responses to Petitioner Tommie Rae Brown's Second Request for Admission, attached herein as Exhibit "B," Response to Request to Admit No. 9.

4. I retained the services of Robert N. Rosen at Rosen, Rosen and Hagood in Charleston, South Carolina. Mr. Rosen brought an action on December 15, 2003 to declare the purported marriage to Mr. Ahmed invalid.

5. I testified in the Family Court in Charleston on April 15, 2004. The Final Order filed on April 15, 2004 is attached hereto as Exhibit "C" and finds that I was never married to Ahmed.

6. After the Final Order was issued, my attorney sent it to James' attorney, Mr. Huff. Exhibit B, Response to Request to Admit No. 10.

7. I am asking the Court to recognize my ceremonial marriage to James Brown and the legality and finality of the Order of the Family Court finding that I was never married to Javed Ahmed and therefore am legally married to James Brown.

8. I am over the age of twenty-one (21) years and am competent to testify to the matters stated herein. I have read the foregoing paragraphs, and all matters stated therein are correct and true and are based on my own personal knowledge and belief, except those alleged on information and belief and as to those, I believe them to be true and accurate.

FURTHER DEPONENT SAYETH NOT.

TOMMIE RAE BROWN

Sworn and subscribed to me on this
23 day of APRIL, 2014

Notary Public for the State of NEVADA
Comm. Exp. DEC 2 2017

LEIGHA STEEN
Notary Public - State of Nevada
County of Clark
APPT. NO. 10-1240-1
My App. Expires Dec. 2, 2017

LICENSE AND CERTIFICATE FOR MARRIAGE
STATE OF SOUTH CAROLINA

207020 — LICENSE NUMBER
AIKEN — COUNTY

GROOM-NAME (1)	(FIRST) JAMES	(MIDDLE)	(LAST) BROWN	BIRTHDATE (MONTH, DAY, YEAR) (2a) 1933	AGE (2b) 68
BIRTHPLACE (State or foreign country) (3) SOUTH CAROLINA	RACE (4) BLACK	RESIDENCE (Street and Number) (5a) 430 DOUGLAS DRIVE			
CITY, TOWN OR LOCATION (5b) BEECH ISLAND	COUNTY (5c) AIKEN	STATE (5d) SOUTH CAROLINA		NO OF THIS MARRIAGE (1st, 2nd, etc.) (6) 4	
BRIDE-NAME (7)	(FIRST) TOMMIE RAE	(MIDDLE)	(LAST) HYNIE	BIRTHDATE (MONTH, DAY, YEAR) (8a) 1969	AGE (8b) 32
BIRTHPLACE (State or foreign country) (9) NEVADA	RACE (10) WHITE	RESIDENCE (Street and Number) (11a) 430 DOUGLAS DRIVE			
CITY, TOWN OR LOCATION (11b) BEECH ISLAND	COUNTY (11c) AIKEN	STATE (11d) SOUTH CAROLINA		NO. OF THIS MARRIAGE (1st, 2nd, etc.) (12) 1	

MAIDEN NAME OF BRIDE (If Different From Above)
(13)

Application for a license was filed with this court at 3:15p M., on the 10 day of DECEMBER, 2001. These are, therefore, to authorize any person qualified to perform marriage ceremonies to perform the marriage ceremony for the persons above named and for the so doing this shall be sufficient warrant. Given under my hand and seal at 3:20 P.M., this the 11th day of December, A.D. 2001.

Signature of Issuing Officer — JUDGE OF PROBATE — Title of Issuing Officer

GROOM-Signature (14)	BRIDE-Signature (15)
I certify that the above named persons were married on (16) December 14 (MONTH) (DAY) (YEAR) 2001	Place of Marriage (17) (CITY) Beech Island (COUNTY) Aiken SOUTH CAROLINA
OFFICIANT-Signature (18a) Rev. Larry Fryer	OFFICIANT-Title (18b) Rev. Larry Fryer
OFFICIANT-Mailing Address (18c) 1115 - 6th Avenue, Augusta, GA 30901	

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Holland, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

DHEC 0681 (12/1998)

PROBATE JUDGE

MAR 16 2007

Liz Holland
C.C.C.P. & G.S., Aiken County, S.C.
Rosie Lowman
Deputy Clerk

FILED
AIKEN COUNTY
MAY 06 2004
4:55p
CLERK OF COURT

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STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN THIS COURT WITNESS MY HAND AND SEAL OF THE COURT THIS THE 16th DAY OF March A.D. 20 04
Julie H. Rice
JUDGE OF PROBATE FOR AIKEN COUNTY, S.C.
BY Martha Bartley
CLERK

EXHIBIT
AIKEN COUNTY
CLERK OF COURT
187

Marriage Certificate

LICENSE NO. 207020

STATE OF SOUTH CAROLINA,
AIKEN COUNTY

PROBATE COURT

To Whom It May Concern:

THIS IS TO CERTIFY, That on the 14th day of DECEMBER, 2001

at BEECH ISLAND in Aiken County, State of South Carolina,

JAMES BROWN	BEECH ISLAND, SC	68	and
MAN'S NAME	ADDRESS	AGE	

TOMMIE RAE HYNIE	BEECH ISLAND, SC	32
WOMAN'S NAME	ADDRESS	AGE

were united in the Bonds of Matrimony by LARRY FRYER

MINISTER in accordance with the law of South Carolina,
OFFICIAL TITLE

in such cases made and provided, and as shown by the records of this Court that the information given is that their race is BLACK/WHITE and their Nationality is American.

Witness my Hand and Seal of said Court, this the 8th day of JANUARY, 2003

A TRUE COPY

Attest: Jesse H. Rice Jr.
JUDGE OF PROBATE

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	))	**IN THE COURT OF COMMON PLEAS** **CASE NUMBER: 2007-CP-02-0122**
IN RE: THE ESTATE OF JAMES BROWN a/k/a JAMES JOSEPH BROWN	)))	**PERSONAL REPRESENTATIVES' RESPONSES TO PETITIONER TOMMIE RAE BROWN'S SECOND REQUEST FOR ADMISSION**

Personal Representatives for the Estate of James Brown responds to Petitioner Tommie Rae Brown's First Requests for Admission dated December 10, 2007, as follows:

Request No. 1

were married in a ceremonial marriage on December 14, 2001, by the Reverend Larry Fryer.

Response No. 1

The Personal Representatives admit upon information and belief that Tommie Rae Brown, a/k/a Tommie Rae Hynie, and James Brown entered into a ceremonial marriage on December 14, 2001 by the Reverend Larry Fryer.

Request No. 2

The License and Certificate for Marriage attached hereto as Exhibit A is genuine and authentic.

Response No. 2

The Personal Representatives admit upon information and belief that the License and Certificate for Marriage attached as Exhibit A appears to be a copy of the genuine and authentic document.

Request No. 3

The marriage certificate attached hereto as Exhibit B is genuine and authentic.

Response No. 3

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APR 28 2014
AIKEN COUNTY
CLERK OF COURT
B

The Personal Representatives admit upon information and belief that the License and Certificate for Marriage attached as Exhibit B appears to be a copy of the genuine and authentic document.

Request No. 4

In 2004, Tommie Rae Brown, a/k/a Tommie Rae Hynie, brought a proceeding in the Family Court to annul her purported marriage to Javed Ahmed.

Response No. 4

The Personal Representatives admit upon information and belief that the April 15, 2004 Family Court Order alludes to an action brought by Ms. Tommie Rae Brown, a/k/a Tommie Rae Hynie to annul her marriage to Javed Ahmed.

Request No. 5

On April 15, 2004, the Family Court entered a Final Judgment in "Tommie Rae Hynie, a/k/a Tommie Rae Brown v. Javed Ahmed," Case Number 2003-DR-10-4609.

Response No. 5

The Personal Representatives admit upon information and belief that the April 15, 2004 Family Court entered a final judgment in the case captioned matter as reflected on the copy of the Family Court Order in Case No. 03-DR-10-4609.

Request No. 6

The Judgment and Order attached hereto as Exhibit C are genuine and authentic.

Response No. 6

The Personal Representatives admit upon information and belief that the Judgment and Order, dated April 15, 2004 as Exhibit C appears to be a copy of the genuine and authentic Order.

Request No. 7

The Final Order of the Family Court found as a fact that Javed Ahmed was married at the time he entered into his marriage with Tommie Rae Brown and therefore he lacked the capacity to marry Tommie Rae Brown.

Response No. 7

The Personal Representatives admit upon information and belief that the Family Court Order made the finding as set forth in the final order; however, as Personal Representatives were not parties to the action such finding is not binding upon them.

Request No. 8

The Final Order of the Family Court is binding on the estate of James Brown, any and all trusts and parties hereto and all third parties.

Response No. 8

Denied; the estate of James Brown, Jr. any and all trusts and parties hereto and all third parties were not parties to the original Family Court action.

Request No. 9

James Brown gave Tommie Rae Brown the funds to pay the legal fees for the annulment litigation.

Response No. 9

Admit upon information and belief.

Request No. 10

James Brown was aware of the annulment proceeding as his attorney received a copy of the Summons and Complaint in February 2004 and the Final Order of annulment in April 2004, as can be seen in exhibits to the Affidavit of Tommie Rae Brown notarized on November 15,

2007.

Response No. 10

Admit upon information and belief.

LAW OFFICE OF JAMES D. BAILEY, PC

By: _____

James D. Bailey, Esquire
Law Office of James D. Bailey, PC
100 Park Avenue SW
PO Box 2376
Aiken, South Carolina 29802
803/648-9529

Attorney for Defendants Robert L. Buchanan, Jr. and Adele J. Pope, as Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust

January 11, 2008

\\Server\docs\BROWN ADMINISTRATION\ELECTIVE SHARE\RESPONSE_REQUEST.ADMIT.SECOND.wpd

CERTIFICATE OF SERVICE – C/A 2007-CP-02-0122

I hereby certify that on this 11th day of January, 2008, a copy of the Personal Representatives' Responses to Petitioner Tommie Rae Brown's First Request for Admission and Personal Representatives' Responses to Petitioner Tommie Rae Brown's Second Request for Admission, have been mailed to counsel of record, postage prepaid and properly addressed to the address shown below:

Robert Rosen
Attorney at Law
P. O. Box 1840
Charleston, SC 29401

And

Louis Levenson
Attorney at Law
125 Broad St., SW
Atlanta, GA 30303

January 11, 2008

STATE OF SOUTH CAROLINA)
) IN THE FAMILY COURT
) FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO. 03-DR-10-4609

TOMMIE RAE HYNIE, a/k/a
TOMMIE RAE BROWN,

Plaintiff,

-vs-

JAVED AHMED,

Defendant.

FINAL ORDER

HEARING DATE: April 15, 2004
JUDGE: Honorable F. P. Segars-Andrews
ATTORNEY FOR PLAINTIFF: Robert N. Rosen, Esquire
Donald B. Clark, Esquire
ATTORNEY FOR DEFENDANT: N/A
COURT REPORTER:

This matter comes before the Court for a final hearing on April 15, 2004.

Present before the Court were the Plaintiff, Tommie Rae Brown, and her counsel Robert N. Rosen, Esquire, of the Rosen Law Firm, and Donald B. Clark, Esquire, of the Donald B. Clark Law Firm.

cc/RNR(P) 4-15-04

This matter was commenced by the filing of a Summons and Complaint by the Plaintiff to annul her marriage to the Defendant, Javed Ahmed.

The Plaintiff is a citizen and resident of the State of South Carolina and has resided in South Carolina for more than one year prior to the commencement of this action.

The Defendant, at the time of the marriage of the parties, was a resident of the State of Texas, and his last known address was in Houston, Texas. After the filing of the Summons and Complaint, the Defendant could not be located. The Plaintiff retained the services of a private investigator who attempted to locate the Defendant at his last known address. The Plaintiff testified that the last known address she had for the Defendant was in Houston, Texas. The private investigator found that the Defendant's Texas driver's license listed his address as Houston, Texas.

This Court issued an Order of Publication on February 3, 2004. This Court found that the Plaintiff made a diligent effort to locate the Defendant, and it appeared to the satisfaction of the

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EXHIBIT
APR 8 2014
AIKEN COUNTY
CLERK OF COURT

Court that the current address or whereabouts of the Defendant were unknown although his last known address was in Houston, Texas. The Court therefore ordered service could be had by publication pursuant to §15-9-710 and §15-9-740, SC Code Ann., and that the Summons would be published once a week for a total of three weeks in the *Houston Chronicle*, a newspaper of general circulation in the area of Houston, Texas.

An Affidavit of Publication signed by the Supervisor/Accounts Receivable of the *Houston Chronicle* was filed with this Court. The Court finds that the Defendant has been properly served by publication pursuant to South Carolina law.

This matter was originally set to be heard on March 26, 2004, but the case was continued by Order of the Court. The Defendant was given written notice of the hearing by regular mail and by certified mail, return receipt requested as appears from the affidavit of Marcia F. Jones. The Defendant was therefore properly notified of the final hearing pursuant to Rule 17 of the South Carolina Rules of Family Court.

FINDINGS OF FACT

The Court finds as follows:

1. Plaintiff is a citizen and resident of the State of South Carolina and has resided in the State of South Carolina for a period in excess of one year prior to the commencement of this action.

2. Plaintiff married Defendant, Javed Ahmed, on February 17, 1997 in Harris County, Texas. Thereafter Defendant refused to live with Plaintiff. Plaintiff never saw nor heard from Defendant again. Plaintiff never lived with the Defendant. The parties never lived together as husband and wife. The parties never engaged in sexual intercourse, sexual conduct or sexual activity of any kind and, therefore, failed to consummate their marriage.

3. No children were born of this marriage between the parties.

4. Plaintiff testified that she later learned that Defendant, a Pakistani immigrant, wanted to marry Plaintiff so that he could become a United States citizen. Plaintiff also later learned that Defendant had three or more wives to whom he was married under Pakistani law when the parties married on February 17, 1997.

5. The Court finds there has been no contact between the parties since shortly after February 17, 1997, and therefore there is no collusion between these parties.

6. The marriage between the Plaintiff and the Defendant was contracted by Plaintiff in good faith and without any knowledge of the Defendant's previous marriages or fraudulent intentions.

7. The Court finds that the Plaintiff is entitled to an annulment for the following reasons: (1) Defendant was already married to another woman or other women and therefore did not have the capacity to marry the Plaintiff; (2) Defendant perpetrated a fraud upon the Plaintiff in that she intended in good faith to marry Defendant but Defendant had no intention of marrying her and consummating a marriage; and (3) the parties did not consummate their marriage nor did they live together as husband and wife.

8. This Court finds that the Plaintiff is therefore entitled to an annulment of her marriage to Defendant, Javed Ahmed.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to hear and determine actions to determine the validity of marriages and to hear and determine actions for the annulment of marriage. §20-7-420(5) and (6), SC Code Ann.

2. This Court has jurisdiction to grant an annulment to the Plaintiff as she is domiciled in this state. Foster v. Nordman, 137 S.E.2d 600 (1964).

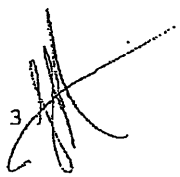
3. The Court concludes that the uncontradicted testimony shows that Plaintiff never cohabitated with the Defendant and never engaged in sexual intercourse with him and therefore, the marriage can be annulled as it was never consummated.

4. The Court concludes that Defendant was married at the time he entered into his marriage with Plaintiff and therefore he lacked the capacity to marry Plaintiff.

5. The Court concludes that Defendant represented to Plaintiff that he wished to marry her, but in fact he married her for a fraudulent purpose in an effort to obtain United States citizenship. A marriage which is procured by fraudulent means may be annulled in this state. Jaker v. Jaker, 102 S.E. 337 (1919).

6. The Court concludes that it has jurisdiction of the subject matter and of the parties.

7. The Court concludes that it has jurisdiction of the Defendant for the purposes of this proceeding and that the Defendant had been properly served and notified of this hearing. It is therefore,



ORDERED, ADJUDGED AND DECREED that the Plaintiff is entitled to an order and judgment annulling the marriage between the Plaintiff and the Defendant solemnized on February 17, 1997. It is further

ORDERED, ADJUDGED AND DECREED that the marriage between Tommy Rae Hynie a/k/a Tommie Rae Brown and Javed Anmed is annulled. It is further,

ORDERED, ADJUDGED AND DECREED that the marriage between Plaintiff and Defendant be, and is hereby, declared to be wholly null and void ab initio, and the parties are, and each of them is, freed from the obligations of such marriage.

. AND IT IS SO ORDERED!

F. P. SEGARS-ANDREWS
JUDGE OF THE FAMILY COURT
NINTH JUDICIAL CIRCUIT

Charleston, South Carolina
April 15, 2004

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, FAMILY COURT
BY: _____
DEPUTY CLERK

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
	)	
IN RE: THE ESTATE OF JAMES BROWN a/k/a JAMES JOSEPH BROWN	)	
	)	Case No.: 2013-CP-02-02849
	)	Case No.: 2013-CP-02-02850
	)	

BRIEF IN OPPOSITION TO TOMMIE RAE HYNIE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Matt Bodman
Matt Bodman P.A.
1500 Calhoun Street
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(803) 806-8605
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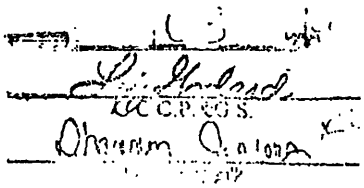
ATTORNEYS FOR RESPONDENT
DARYL BROWN



NOW COMES Daryl Brown, Respondent, and files this brief in opposition to Petitioner Tommie Rae Hynie's motion for partial summary judgment and shows the Court that genuine issues of material fact remain for trial as to whether Petitioner is the surviving spouse of James Brown.

STATEMENT OF FACTS

James Brown ("Brown"), a singer and entertainer known as "The Hardest–Working Man in Show Business" and "The Godfather of Soul," died in Atlanta, Georgia on December 25, 2006. Brown left an estate widely estimated to be worth anywhere from $5 million to over $100 million.[1]

By will dated August 1, 2000, Brown devised all of his personal and household effects to six adult named children: Deanna J. Brown Thomas, Yamma N. Brown, Vanisha Brown, Daryl J. Brown, Larry Brown, and Terry Brown. Brown left the remainder of his estate to The James Brown 2000 Irrevocable Trust via a pour-over provision in his will. Brown made know provision for Tommie Rae Hynie, Petitioner herein.

Brown created the 2000 Irrevocable Trust under a separate agreement, also dated August 1, 2000, as part of his estate plan to provide financial assistance for the education of his grandchildren and disadvantaged youths. Upon Brown's death, the principal and income contained in the 2000 Irrevocable Trust, as augmented by Brown's general estate, was to be divided, by its terms, into two "shares" or subtrusts: (1) The Brown Family Education Trust ("Family Trust"), which was capped in the amount of $2 million for tax purposes and designated

[1] Many of these facts are restated directly from the decision of the South Carolina Supreme Court in Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (May 8, 2013).

for the education of Brown's grandchildren; and (2) The James Brown "I Feel Good" Trust ("Charitable Trust"), which Brown declared "shall be used solely for the tuition, educational expenses, and financial assistance of ... poor and financially needy children, youth, or young adults (Who are both qualified and deserving) who seek and have need of such assistance to obtain and further their education at the many educational entities and/or institutions available in the States of South Carolina and Georgia." Thus, Brown's estate planning documents indicate Brown intended the bulk of his wealth to be used to support the Charitable Trust.

Brown noted in both documents that the persons described therein, i.e., the six named children and their legitimate issue, comprised "the entire class ... acknowledge[d] to be [his] heirs and issue." Brown expressly disavowed any other potential beneficiaries, stating, "I have intentionally failed to provide for any other relatives or other persons, whether claiming, or to claim, to be an heir of mine or not." Brown stated any person not provided for in his will or trust "whether or not claiming to be a beneficiary, party in interest, or otherwise shall not have standing or be qualified to contest, claim an interest in or otherwise dispute the disposition of [his] estate as he herewith disclaims and disinherits any such person." Brown stated that any challenge by such persons to the disposition of his estate or the validity of the documents would "be considered an affront to [his] wishes," and "shall be vigorously challenged as such by his fiduciaries." In the trust agreement, Brown declared that he was not then married and that he did not want the trust estate to ever go to a spouse: "It is the Grantor's [Brown's] intention that the trust estate be available only to the beneficiaries and not ... the Grantor's past or future spouse. The Trustee(s) are directed to enforce this provision."

At the time he executed his estate planning documents, James Brown was involved in a

relationship with Tommie Rae Hynie ("Tommie Rae")[2], a back up singer in his band. (Stip. Ex. 000037)) Tommie Rae gave birth to James Brown's biological child, J B , on 2001. (Stip. p. 3, Ex. 2 and 3)[3]

On November 27, 2001, Brown and Tommie Rae executed a Prenuptial Agreement in which she acknowledged that she was entering the agreement knowingly and voluntarily and that she had the opportunity to receive the advice of counsel of her own choosing. Tommie Rae waived any right to Brown's property or the receipt of alimony in the event of a separation or divorce from Brown, and she agreed to waive any claim for an interest in his estate in the event of his death, including the rights to a statutory share of Brown's estate or to any interest as an omitted spouse. On December 14, 2001, Brown and Tommie Rae participated in a marriage ceremony in Aiken County.

Prior to the marriage ceremony with James Brown, Tommie Rae had obtained a marriage license and participated in a marriage ceremony in 1997 in Texas with Javed Ahmed. (Stip. Ex. 1, 2) James Brown discovered Tommie Rae's prior marriage in 2003. On December 15, 2003, two years after her marriage ceremony with James Brown, Tommie Rae filed a complaint for annulment in the Family Court for the Ninth Judicial Circuit in Charleston. (Stip. Ex. 000008) Tommie Rae claimed her marriage to Ahmed had been procured by fraud because she had

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[2] This Respondent refers to Ms. Hynie as "Tommie Rae," following the example of the South Carolina Supreme Court in Wilson v. Dallas, *supra*.

[3] The status of J B is not at issue in this action. J B has been proven by valid DNA test to be the biological child of James Brown, and these parties do not contest this finding. As such, he stands in the same position as other children of James Brown who were born out of wedlock but who have established that they are legally heirs at law of James Brown. Like these other children, J B was born at a time when James Brown was not married to his mother.

discovered that Ahmed already had three or more wives in Pakistan and was merely seeking U.S. citizenship. Id. She also claimed Ahmed had refused to live with her as husband and wife, and she never saw or heard from the Ahmed again after the day they were married. (Stip. Ex. 000018, 000045). According to Tommie Rae, Ahmed's whereabouts were unknown, and he was served by publication. (Ex. 0000016-18)

James Brown was not a named party in Tommie Rae's annulment action against Ahmed. (Stip. p. 4 Par. 12) Tommie Rae's attorney sent a copy of the annulment action to counsel for Mr. Brown on February 5, 2004, more than seven weeks after the action was filed and after Mr. Brown had filed his own complaint for an annulment against Tommie Rae in Aiken County. (Stip. 000054, 000066) Mr. Brown did not have legal representation in Tommie Rae's annulment action and he did not participate as a party. (Stip. 4 Par. 12) James Brown was not called as a witness and he was not present at the hearing. (Stip. 000043-000048) At some point during the course of the proceedings James Brown gave Tommie Rae the funds to pay the legal fees for her annulment action. (Stip. p. 4 Par. 10) Neither Tommie Rae, Javed Ahmed nor James Brown were residents of Charleston County where the case was pending.

Tommie Rae has stipulated that she can identify no documents or other tangible evidence showing that Javed Ahmed was married to another person when she and Ahmed were married on February 17, 1997. (Stip. p. 4 Par. 9) At no time has she produced any testimony other than her own showing Ahmed was married prior to his marriage to her in 1997. (Stip. p. 4 Par. 10) Based solely on Tommie Rae's testimony, her request for an annulment from Ahmed was granted by the family court in Charleston County on April 15, 2004. (Stip. Ex. 12, p. 000029 - 000032)

Although Tommie Rae claimed she was unable to locate Ahmed in 2003, David Bell, an

attorney who has represented parties to the James Brown will and trust cases, was able to locate Ahmed in Pakistan in 2008.[4] (Aff. Of Bell) Bell found an individual, Mr. Ali Sayed, in St. Louis Missouri who knew Mr. Ahmed. Mr. Sayed supplied Bell with a telephone number for Mr. Ahmed in Pakistan. (Id. at Par. 6) Bell spoke with Javed Ahmed on the telephone, and Ahmed confirmed he was the same Javed Ahmed who had married Tommie Rae Hynie on February 12, 1997. (Id. at Par. 7) Ahmed stated that he married Tommie Rae in Texas on February 12, 1997 and he was not married to anyone else when he married Tommie Rae. (Id. at Par. 8-9) Mr. Ahmed stated he and Tommie Rae lived together as husband and wife for a period of time following their February 12, 1997 marriage. (Id. at Par. 10) When asked whether he would provide further information, Ahmed stated he would first have to talk to Tommie Rae. (Id. at Par. 11)

Mr. Bell engaged Taha Alizai, an attorney in Pakistan, for the purposes of interviewing and obtaining an affidavit from Mr. Ahmed and arranging to take Ahmed's deposition. (Bell Aff. Par. 12) Taha Alizai conducted an extensive in-person interview of Mr. Ahmed toward the end of February, 2008, and followed up shortly thereafter through a telephone call with Mr. Ahmed. (Bell Aff. Par. 13) Mr. Alizai was unable to obtain an affidavit from Mr. Ahmed or Mr. Ahmed's agreement to give a deposition. However, Alizai provided the affidavit attached to Bell's affidavit which confirmed the information provided by Ahmed to Mr. Bell. The affidavit

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[4] Although hearsay, Mr. Ahmed's statements to Mr. Bell and Mr. Alizai are admissible pursuant to S.C. R. Ev. 804. Under Rule 804(b)(4), a statement regarding a declarant's personal family history, including his marriage or divorce, is admissible if the declarant is unavailable. A declarant such as Mr. Ahmed is unavailable if he is absent from a hearing and the proponent of his statement is unable to procure his attendance or testimony by process or other reasonable means. S.C. R. Ev. 804(a)(5).

was filed with the Court in these cases on October 9, 2008. (Id. at Par. 14)

Weeks after Tommie Rae filed her annulment action in Charleston, on January 29, 2004, James Brown brought annulment proceedings against Tommie Rae in the Family Court for the Second Judicial Circuit in North Augusta. (Stip. 000066) After the Family Court in Charleston granted Tommie Rae an annulment of her marriage to Ahmed, Mr. Brown reaffirmed his Complaint against Tommie Rae by filing an Amended Complaint for Annulment in Aiken County on May 6, 2004. (Stip. Ex. 16, 000069 - 000071) Brown continued to assert that his marriage to Tommie Rae was invalid due to her prior marriage to Ahmed. Tommie Rae counterclaimed for a divorce from Brown on the ground of physical cruelty. (Stip. 000072 - 000082)

Eventually, James Brown and Tommie Rae dismissed their respective suits in a consent order filed August 16, 2004, in which Tommie Rae agreed to "forever waive any claim of a common law marriage to [Brown], both now and in the future." (Stip. Ex. 19, 000085) The parties thereafter had an on-and-off-again relationship up until Brown's death on December 25, 2006.

Procedural History

Mr. Brown's will was filed with the Aiken County Probate Court on January 18, 2007. Later the same year, five of the six adult children Brown named in his will as well as Tommie Rae brought actions to set aside Brown's will and the 2000 Irrevocable Trust based on undue influence. They alleged Brown's estate should, instead, pass by the laws of intestate succession. Tommie Rae claimed that she was entitled to an elective share or an omitted spouse's share of

Brown's estate and that her son, James B. (via a guardian ad litem), was entitled to a share of the estate as an omitted child. The probate court transferred these claims and all filings thereafter to the circuit court.

After ongoing negotiations directed by the South Carolina Attorney General, the parties entered into a compromise agreement at an informal mediation session on August 10, 2008. The settling parties named in the agreement were Tommie Rae, the children and grandchildren of Brown, and the South Carolina Attorney General. James Brown's son Terry Brown joined the agreement in January, 2009. As part of the agreement, Tommie Rae waived any spousal rights that she might have and the children waived any rights to Brown's assets that they might otherwise have beyond any share to be received in the compromise.

The agreement was thereafter submitted to the circuit court for its approval pursuant to S.C.Code Ann. § 62–3–1102 (2009). Section 62-3-1102 requires a finding that 1) the will contest was made in good faith and 2) the agreement was just and reasonable. Acting as Special Administrators of Brown's probate estate, Adele Pope and Robert Buchanan objected to approval of the settlement agreement. Pope and Buchanan sought to dismiss Tommie Rae's spousal claims because 1) her marriage to Brown was void under Lukich v. Lukich, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006), *aff'd* Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (2008); and 2) her claims were barred by her agreement of August 16, 2004 to forever waive any claim of common law marriage to James Brown.

This court approved the compromise agreement by order of May 26, 2009.[5] With regard

[5] The Court also removed Adele Pope and Bob Buchanan and appointed Russell L. Bauknight as Special Administrator for Brown's estate and Special Trustee of the 2000 Irrevocable Trust.

to Tommie Rae, this Court found a good faith controversy existed regarding the assertion of Tommie Rae for either an elective share or an omitted spouse's share of the estate. The court stated that, although Tommie Rae had undergone a purported marriage ceremony in 1997 with another man before she had a marriage ceremony with Brown in 2001, Tommie Rae had obtained an annulment of her marriage to Ahmed on April 15, 2004 on the basis Ahmed did not have the capacity to marry. Thus, there was no impediment to her marriage to Brown. This Court also found that the agreement Tommie Rae executed in August of 2004 in which she agreed never to assert a common law marriage with Brown had no bearing on Tommie Rae's claim as a surviving legal spouse. Moreover, after that agreement was executed, Brown published an autobiography in which he referred to Tommie Rae as his "wife" and to James B. as his "son," so this court concluded Tommie Rae's legal status was muddled by the actions of the parties.

Approval of the settlement agreement was appealed to the Supreme Court of South Carolina, which rendered its final opinion in Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (May 8, 2013). The Supreme Court held that, while the circuit court did a commendable job in attempting to sort out this difficult situation, a consideration of the record and the positions of the numerous parties seeking a share of Brown's estate resulted in the conclusion that the settlement was not a fair and just resolution of a good faith controversy and that court approval was not appropriate. The court found there was no reasonable basis for the undue influence claim asserted by the parties contesting James Brown's will, other than as a means to dismantle Brown's estate plan, and no reasonable basis to support a finding that the contesting parties had acted in good faith. 403 S.C. at 439, 743 S.E.2d at 761. With regard to whether a good faith controversy existed as to the spousal claims of Tommie Rae, the Supreme Court said:

> Even if Tommie Rae were able to establish a claim as Brown's surviving spouse, she executed a prenuptial agreement, in which she indicated that she had the opportunity to consult with counsel of her own choosing and waived all rights to Brown's property or any statutory claims against his estate. A valid prenuptial agreement would normally preclude any right to an elective share. See S.C.Code Ann. § 62–2–204 (2009) ("The right of election of a surviving spouse ... may be waived ... by a written contract ... signed by the party waiving after fair disclosure."). She also executed an agreement waiving any claim to status as a common-law spouse. Tommie Rae's waiver of any claim for status as a common-law wife begs the question of the necessity to do so if she was, in fact, the legal spouse of Brown. Moreover, the timing of the waiver raises additional questions because it arose from Brown's filing of an annulment action. Although the circuit court correctly noted the agreement to waive any claim as a common-law spouse would not be dispositive of Tommie Rae's claim that she was a surviving spouse, the circuit court did not acknowledge the sizeable bar posed by a prenuptial agreement.

Furthermore, the court found the evidence did not support the finding that the compromise was just and reasonable. The result of the settlement would be to take a large portion of Brown's estate that Brown had designated for charity and to turn over these amounts to the family members and purported family members who were, under the plain terms of Brown's will, given either limited devises or excluded.

The case was remanded to the circuit court for further proceedings consistent with the Supreme Court's decision. Additional discovery in the case was limited. The parties agreed to a limited stipulation of facts and Tommie Rae moved for partial summary judgment on the issue of whether she is the surviving spouse of James Brown.

ARGUMENT AND CITATION OF AUTHORITY

Tommie Rae cannot establish that she is the surviving spouse of James Brown. Because she was previously married to Javed Ahmed, and she had not obtained an annulment or divorce from him prior to her marriage to James Brown, her purported marriage to James Brown was

invalid. Under Lukich v. Lukich, *supra*, her annulment would not retroactively revive her void marriage to James Brown.

The judgment of the Family Court in Charleston was not binding upon James Brown or upon the Respondents in this action. The doctrine of collateral estoppel does not apply because neither James Brown nor Respondents were party to the annulment action. Furthermore, the issue of the validity of the alleged marriage between Tommie Rae and James Brown was not decided in the annulment action.

Summary Judgment Standard

Tommie Rae has filed a motion for partial summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Where a claimant seeks summary judgment, judgment sought shall be rendered if the pleadings, depositions[6], answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. S.C. R. Civ. Pro. 56.

Burden of Proof

Tommie Rae has asserted claims as an omitted spouse (Case No. 2013-CP-02-02849) and/or for an elective share (Case No. 2013-CP-02-02850).[7] In order to succeed on either of

[6] Respondents have not had the opportunity to depose Tommie Rae. Respondents contend that additional facts would be discovered through deposition which would preclude summary judgment. Due to extremely limited and incomplete discovery, Tommiee Rae's motion for summary judgment should be denied.

[7] S.C. Code Ann. § 62-2-301 provides for an omitted share as follows: if a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse, upon compliance with the procedure outline in subsection ©, will receive the same share of the estate he would have received if the decedent left no will unless:
(1) it appears from the will that the omission was intentional; or
(2) the testator provided for the spouse by transfer outside the will and the intent that the transfer

these claims, she must be the "surviving spouse" of James Brown. She bears the burden of proving this element.

Once a marriage is shown to exist, the person attacking its validity has the burden of proving its invalidity. Yarbrough v. Yarbrough, 280 S.C. 546, 314 S.E.2d 16 (S.C. App. 1984). As between a party who had an alleged prior marriage and a subsequent spouse, the subsequent spouse is not at fault for bringing about the controversy as to whether the first marriage existed and the subsequent spouse should not bear the burden of proving that the other spouse's first marriage was nonexistent. *See* Id., 280 S.C. 546, 550, 314 S.E.2d 16, 18 (S.C. App. 1984).

In this case, the marriage of Tommie Rae to Javed Ahmed has been shown by the marriage license (Stip. Ex. 1) as well as by declarations of Javed Ahmed to David Bell and Taha Alizai. James Brown and his divisees are not at fault for the controversy regarding Tommie Rae's prior marriage and they should not bear the burden of proving that her first marriage was not existent.

Tommie Rae's purported marriage to James Brown was void due to her prior marriage, and the annulment of the prior marriage did not retroactively validate her marriage to James Brown.

In Lukich v. Lukich, 368 S.C. 47, 56, 627 S.E.2d 754, 758 (Ct.App.2006), *aff'd* 369 S.C.47, 627 S.E.2d 754 (2008), the court held that an annulment declaring a spouse's first marriage void ab initio could not retroactively validate the spouse's second marriage. The court in Lukich relied upon S.C.Code Ann. § 20–1–80 (Supp.2007), titled "Bigamous marriage shall

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be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

Under S.C. Code Ann. Sec. 62-2-201 a surviving spouse may exercise the right of elective share of one-third of the decedent's probate estate.

be void: exceptions," and providing all marriages contracted while either of the parties has a former wife or husband living shall be void, but this section shall not extend to a person whose husband or wife shall be absent for the space of five years, the one not knowing the other to be living during that time, nor to any person who shall be divorced or whose first marriage shall be declared void by the sentence of a competent court. Like Tommie Rae, after allegedly marrying her second husband the wife in Lukich obtained an annulment from her first husband with a declaration that the first marriage was void ab initio. The court in Lukich found that the wife's "marriage" to Husband # 2 was "void" from the inception since at the time of that marriage she had a living spouse and that marriage had not been "declared void." The South Carolina Court of Appeals held, "[e]ven if Wife was acting under a good faith belief, South Carolina will not recognize her bigamous second marriage because to do so would violate public policy." Affirming the Court of Appeals, the South Carolina Supreme Court found that an annulment does not have the ability to validate the bigamous second "marriage," and since there was no marriage under the plain terms of the statute when the ceremony between the wife and Husband # 2 was performed, there was nothing to be "revived" by the annulment order. The Supreme Court cited Day v. Day, 216 S.C. 334, 58 S.E.2d 83 (1950), "A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all." Furthermore, the court noted that, "Any other construction of § 20–1–80 would lead to uncertainty and chaos."

The South Carolina Supreme Court recently reiterated it position regarding prior bigamous marriages. In Hill v. Bert Bell / Pete Rozell NFL Player Retirement Plan, 405 S.C. 423, 747 S.E.2d 791 (2013), the South Carolina Supreme Court answered a question certified by

the U.S. Court of Appeals for the Third Circuit. The Supreme Court declined to adopt the putative spouse doctrine, finding that it is contrary to South Carolina's statutory law and marital jurisprudence. The court based its decision on S.C.Code Ann. § 20–1–80 (Supp.2012), "All marriages contracted while either of the parties has a former wife or husband living shall be void."

Tommie Rae would distinguish her case from Lukich, arguing that her first marriage to Ahmed void ab initio because it was bigamous while the first marriage of the wife in Lukich was merely voidable. However, as shown above, Respondents have presented evidence that Tommie Rae's first marriage was not bigamous - that Javed Ahmed was not married to anyone else at the time of his marriage to her. As shown below, Respondents are not bound by the decision of the Family Court, and the evidence of Tommie Rae's prior valid marriage creates a genuine issue of material fact which precludes summary judgment.

Neither James Brown nor the Respondents are Precluded from Contesting the Status of Tommie Rae as the Surviving Spouse.

The doctrine of collateral estoppel, or issue preclusion, provides that issues finally determined on the merits in one action precludes relitigation of those issues in a subsequent action based on different claims between the same parties or their privies. See Carrigg v. Cannon, 347 S.C. 75, 79–80, 552 S.E.2d 767, 770 (Ct.App.2001) That both actions be between the same parties or their privies is basic a basic requirement of the doctrine. Jordan v. Jordan, 284 S.C. 342, 326 S.E.2d 416 (1985); H.G. Hall Construction Co., Inc. v. J.E.P. Enterprises, 321 S.E.2d 267 (Ct.App.1984).

Tommie Rae contends that James Brown and those in privity with him are estopped from

contesting the Order of the Family Court finding that Tommie Rae's marriage to Javed Ahmed was void. However, neither Mr. Brown nor his privies are bound by the Family Court Order because they were not parties to the action in Family court.

South Carolina courts have held that a person who was not a party to a case involving the dissolution of a marriage will not be precluded from contesting issues arising from the divorce in a subsequent action. For example, in Westbury v. Bauer, 293 S.C. 224, 359 S.E.2d 515 (S.C. App. 1987), a former father-in-law brought and action against his former son-in-law on a debt for money allegedly lent to former son-in-law while he was married to the plaintiff's daughter. In the divorce action, the plaintiff father-in-law had testified about gifts to the Bauers and loans to Bauer. In the plaintiff's action upon the debt, the son-in-law moved to dismiss the complaint on the grounds that the issue of his indebtedness to his former father-in-law was considered by the family court judge in making an equitable distribution award to Mrs. Bauer in the divorce action and the plaintiff was, therefore, collaterally estopped to prosecute the action on the alleged debt. The court in Westbury found that, although he was a witness who testified in the divorce, the father-in-law had no opportunity to litigate the issue of Bauer's indebtedness to him in the divorce action. The father-in-law had no remedy in the Family Court. Because the father-in-law did not have a full and fair opportunity to litigate relevant issues effectively in the prior trial he was not estopped from asserting his claims.

Similarly, a dissolution of a marriage action between a husband and wife would not bar a subsequent child support action on behalf of their child. Such was the case in Jordan v. Jordan, 284 S.C. 342, 326 S.E.2d 416 (1985), where the child was not a party to the first action. Furthermore, where the issue of the child's paternity was not raised in the divorce action, the

former wife was not collaterally estopped from bringing a child support action on behalf of the child.

James Brown did not have an opportunity to participate in the annulment action so as to be precluded by the decision of the Family Court. Although James Brown was notified of the annulment action weeks after the complaint was filed, he was never a party to the action. He did not attend the hearing, and there is no evidence that he had an opportunity to procure the testimony of Mr. Ahmed. While he may have given Tommie Rae money to pay for her attorney's fees there is no evidence to support Tommie Rae's contention that he was "the driving force" (Petitioner's Memorandum, p. 22) behind the annulment. Furthermore, he did not avail himself of any benefit from the annulment. While the annulment action was pending, he filed his own action seeking a determination that his marriage was void. He reaffirmed that assertion by filing an Amended Complaint even after Ms. Rae was granted her annulment. The only benefit he desired was a decision that he was not legally married to Tommie Rae. This benefit was only received when Tommie Rae agreed, as part of the consent order dismissing Mr. Brown's case, that she would not make any future claims as a common law spouse.

CONCLUSION

Because neither James Brown nor Respondents were parties to Ms. Hynie's annulment action against Javed Ahmed and they had no opportunity to litigate the issue of the validity of her prior marriage, Respondents are not precluded from contesting the martial status of Tommie Rae Hynie. Evidence in the record shows at Tommie Rae's marriage to Javed Ahmed was valid and not bigamous. Therefore, genuine issues of material fact remain for trial as to whether Tommie Rae could be the surviving spouse of James Brown, and her motion for partial summary

judgment should be denied.

This 3rd day of Oct., 2014.

DAVID B. BELL
Geogia State Bar No. 047750
619 Greene St. Greene St.
Augusta, GA 30901
(706) 724-1882

MATT BODMAN
SOUTH CAROLINA BAR NO. 11143
1500 CALHOUN STREET
COLUMBIA, SC 29201
(803) 806-8605

Counsel for Daryl Brown

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
	)	C/A Nos. 2013-CP-02-02849, 2013-CP-02-02850
Tommie Rae Brown,	)	
	)	
Petitioner,	)	
	)	
v.	)	**AFFIDAVIT OF DAVID B. BELL**
	)	
David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown and Daryl Brown,	)	
	)	
Respondents,	)	
	)	
IN RE:	)	
THE ESTATE OF JAMES BROWN A/K/A JAMES JOSEPH BROWN	)	

PERSONALLY appeared before me, David B. Bell, Esquire, who, being duly sworn, deposes and states that the following is based upon his own personal knowledge, except those averments stated upon information and belief, and as to those matters he believes them to be true:

1. I am over the age of eighteen and am of sound mind to give the testimony provided in this affidavit.

2. I have personal knowledge of and am competent to swear to the facts set forth in this affidavit.

3. I am an attorney licensed to practice in the State of Georgia and have been so licensed since 1977.

10:3 PM
FILED
CCP.C.C.S.
Deputy Clerk

4. I own my own practice known as the David Bell Law Firm and I primarily practice in Georgia.

5. I am an attorney of record in various lawsuits related to the will and trust of James Brown, including without limitation Case No. 2008-CP-02-1647 (collectively, the "James Brown Will and Trust Cases"). Along with Matthew Bodman, Esquire, who is licensed to practice in the State of South Carolina, I have represented certain parties to the James Brown Will and Trust Cases since 2007. On April 9, 2007, I filed a Motion for Admission Pro Hac Vice which was granted by the Honorable Doyet A. Early on April 26, 2007.

6. During 2008 I searched for Javed Ahmed. I found an individual, Mr. Ali Sayed, in St. Louis Missouri who had lived in Houston Texas and knew Mr. Ahmed. Mr. Sayed gave me a telephone number for Mr. Ahmed in Pakistan.

7. Around February, 2008, I arrived at work early because of the time difference between Augusta and Pakistan, and called the telephone number Mr. Sayed had provided. Javed Ahmed answered the call almost immediately and confirmed to me he was the same Javed Ahmed who had married Tommie Rae Hynie ("Petitioner") on February 12, 1997.

8. Mr. Ahmed acknowledged he married Petitioner in Texas on February 12, 1997.

9. Mr. Ahmed stated he was not married to anyone else when he married Petitioner.

10. Mr. Ahmed stated he and Petitioner lived together as husband and wife for a period of time following their February 12, 1997 marriage.

11. I asked Mr. Ahmed whether he would provide further information and he stated he would have to talk to Petitioner before he could answer my request.

12. Following my telephone call with Mr. Ahmed I engaged Taha Alizai, an attorney in Pakistan, for the purposes of interviewing and obtaining an affidavit from Mr. Ahmed, and arranging to take his deposition.

13. Taha Alizai conducted an extensive in-person interview of Mr. Ahmed toward the end of February, 2008, and followed up shortly thereafter through a telephone call with Mr. Ahmed. Mr. Alizai was unable to obtain an affidavit from Mr. Ahmed or Mr. Ahmed's agreement to give a deposition.

14. Taha Alizai provided to me the affidavit attached as Exhibit 1, which was filed with the Court in these cases on October 9, 2008 and which I submit now, along with this affidavit, in opposition to Petitioner's Motion for Partial Summary Judgment.

FURTHER AFFIANT SAYETH NAUGHT.

David Bell

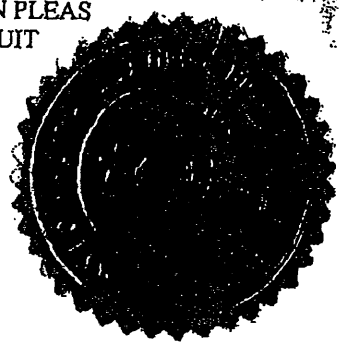
SWORN TO BEFORE ME THIS 30th
DAY OF September 2014

NOTARY PUBLIC FOR THE STATE OF GEORGIA

MY COMMISSION EXPIRES:

ROBERTA H. BUSH
NOTARY PUBLIC
Expires
4-17-15
RICHMOND COUNTY, GEORGIA

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN) SECOND JUDICIAL CIRCUIT
)
) CASE NO. 2007-CP-02-0122
IN RE: THE ESTATE OF)
JAMES BROWN a/k/a)
JAMES JOSEPH BROWN)
)



AFFIDAVIT OF TAHA ALIZAI

Before an officer duly authorized to administer oaths comes Taha Alizai, who, after having been duly sworn, deposes and says as follows:

1. He is Taha Alizai and the facts contained herein are based upon his personal knowledge and are known by him to be true and correct.

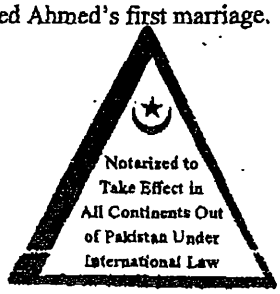
2. Attached hereto as Exhibit "A" is a copy of the marriage certificate where Javed Ahmed married Tommie Rae Hynie on February 17, 1997. On several occasions he has spoken with Javed Ahmed about the wedding. Furthermore, Javed Ahmed showed him photographs of the February 17, 1997 wedding when Javed Ahmed married Tommie Rae Hynie.

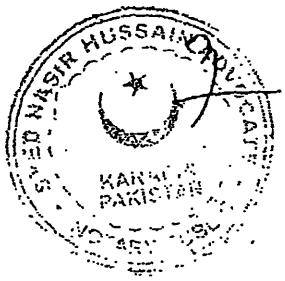
3. Javed Ahmed told him that Javed Ahmed first met Tommie Rae Hynie at the Crystal Nightclub in Houston, Texas.

4. Javed Ahmed told him that Javed Ahmed and Tommie Rae Hynie were together for a significant amount of time.

5. Javed Ahmed told him that Javed Ahmed's marriage to Tommie Rae Hynie was consummated and they did live together as husband and wife for a significant amount of time.

6. Javed Ahmed told him that Javed Ahmed was not married when he and Tommie Rae Hynie exchanged their marital vows and Javed Ahmed's marriage to Tommie Rae Hynie was Javed Ahmed's first marriage.





7. Javed Ahmed told him that Javed Ahmed never divorced Tommie Rae Hynie, and until recently Javed Ahmed was unaware that the marriage had been dissolved in any legal proceeding or annulment.

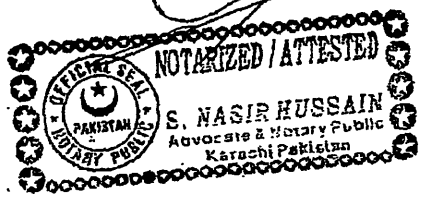
8. Javed Ahmed told him that Javed Ahmed did not marry Tommie Rae Hynie to obtain U.S. citizenship, Javed Ahmed did consummate his marriage to Tommie Rae Hynie, and Javed Ahmed's marriage to Tommie Rae Hynie was a real marriage.

This 11th day of September, 2008.

Taha Alizai, Affiant

Sworn subscribed before me

this 11th day of September, 2008.



11 SEP 2008

95-18-0466

MARRIAGE LICENSE

The State of Texas, County of Harris

To any person authorized by the laws of the State of Texas to celebrate the Rites of Matrimony in the State of Texas

Greeting:

You are hereby authorized to conduct the Rites of Matrimony between

JAVED AHMED *and*

TOMMIE RAE HYNIE

and make due return to the County Clerk of Harris County, Texas, within thirty days of performing the marriage, certifying your action under this license.

Witness my official signature and seal of office in Harris County, Texas at

03:30 P.M. *on* 12TH FEBRUARY 1997

Beverly B. Kaufman
County Clerk, Harris County, Texas

Deputy JOHN M. ANGUIANO

Officer's Return

This certifies that I have united in marriage the parties named above on this

17TH *day of* FEBRUARY, *19* 97.

Signature

JUDGE DALE M. GORCZYNSKI
Printed or Typed Name

JUSTICE OF THE PEACE 1-1
Title

HOUSTON, HARRIS, T E X A S
City and County in which ceremony was performed

520

JAVED AHMED
Male

TOMMIE RAE HYNIE
Female

02 12 97
Date of Issuance

Name of Proxy (if any)

-- 69
Date of Birth

69
Date of Birth

Seventy-two (72) hour exemptions:

Active Military I.D.#

Date of District Court Order

195-18-0467

1997 FEB 17 11:10:41

T 28734

02/12/97 . 1100020895
Marriage License $31.00

Return License To:

MR. & MRS. J.AHMED
14403 ELLA BLVD. #1314
HOUSTON TEXAS 77014

PERSONS AUTHORIZED TO CONDUCT CEREMONY

Section 1.83, Family Code. (a) The following persons are authorized to conduct marriage ceremonies: (1) licensed or ordained Christian ministers and priests; (2) Jewish rabbis; (3) persons who are officers of religious organizations and who are duly authorized by the organization to conduct marriage ceremonies; and (4) justices of the supreme court, judges of the court of criminal appeals, justices of the courts of appeals, judges of the district, county, and probate courts, judges of the county courts at law, courts of domestic relations and juvenile courts, retired justices and judges of such courts, justices of the peace, retired justices of the peace, and judges and magistrates of the federal courts of this state.

Section 1.81, Family Code. (a) A marriage license expires at the end of the 30-day period immediately following the date that the license was issued if the marriage ceremony has not been conducted within that period. The person who is to conduct the marriage ceremony shall determine this information from the county clerk's endorsement on the license.

This license is not valid for seventy-two (72) hours from the time of issuance.

Accompanied by TDH Material as required by Section 1.07(c) Family Code

STATE OF SOUTH CAROLINA COUNTY OF AIKEN Tommie Rae Brown, Petitioner, v. David C. Sojourner, Jr., in his Capacity as Limited Special Administrator and Limited Special Yamma Brown, Vanisha Brown, Larry Brown, Terry Brown and Daryl Brown Respondents. IN RE: The Estate of James Brown a/k/a James Joseph Brown	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT Case No. 2013-CP-02-2849 (Omitted Spouse Claim) Case No. 2013-CP-02-2850 (Elective Share Claim) **AFFIDAVIT OF SCOTT KENILEY**

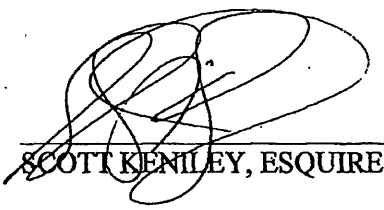
FILED 10-16-14
C.C.P.&G.S.
Deputy Clerk

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, SCOTT KENILEY, who after being duly sworn, states on oath his personal knowledge as follows:

1. My name is Scott Keniley, I am of legal age and under no legal disability to testify. I give this affidavit based upon my personal knowledge.
2. I am an attorney authorized to practice law in the State of Georgia since November 1992.
3. I am a member in good standing of the State Bar of Georgia and other professional organizations associated with the practice of law. I have always been in good standing with the State Bar of Georgia.
4. I am a partner at the law firm Keniley-Kumar, LLC.

5. I am legal counsel to Mr. Terry Brown and William Forlondo James Brown.
6. I have associated South Carolina licensed attorney John Donsbach of the law firm Donsbach & King in this matter.
7. On or about September 2014, I contacted the Harris County, Texas Court Clerk inquiring about the Marriage License between Tommie Rae Hynie and Javed Ahmed.
8. In response to my request, the Court representative, Ms. Ashby, located the marriage license application sworn to and filed by Tommie Rae Hynie and Javed Ahmed.
9. Upon providing written request for certified copies of said application, credit card payment application and a fedex account number for delivery to my home, Ms. Ashby authorized certified copies and delivery of the same.
10. Ms. Ashby therein emailed to me a copy of the marriage license application and mailed via fedex a certified copy. I received such at my home the next day.
11. I provide this affidavit in opposition to Petitioner's Motion for Partial Summary Judgment.

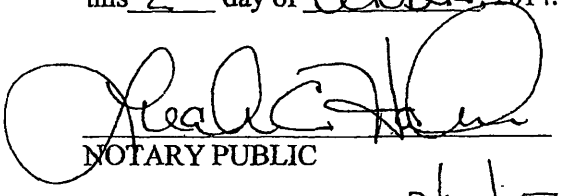
FURTHER AFFIANT SAYETH NOT.



SCOTT KENILEY, ESQUIRE

Sworn to and subscribed before me

this 2 day of October, 2014.



NOTARY PUBLIC

My Commission Expires: 8/31/15

95-18-0466

MARRIAGE LICENSE

The State of Texas, County of Harris

To any person authorized by the laws of the State of Texas to celebrate the Rites of Matrimony in the State of Texas

Greeting:

You are hereby authorized to conduct the Rites of Matrimony between

JAVED AHMED *and*

TOMMIE RAE HYNIE

and make due return to the County Clerk of Harris County, Texas, within thirty days of performing the marriage, certifying your action under this license.

Witness my official signature and seal of office in Harris County, Texas at

03:30 P.M. *on* 12TH FEBRUARY 1997

Beverly B. Kaufman
County Clerk, Harris County, Texas

Deputy JOHN M. ANGUIANO

Officer's Return

This certifies that I have united in marriage the parties named above on this

17TH *day of* FEBRUARY, *19* 97.

Signature

JUDGE DALE M. GORCZYNSKI
Printed or Typed Name

JUSTICE OF THE PEACE 1-1
Title

HOUSTON, HARRIS, T E X A S
City and County in which ceremony was performed

524

JAVED AHMED
Male

TOMMIE RAE HYNIE
Female

02 12 97
Date of Issuance

Name of Proxy (if any)

-- -- 69
Date of Birth

69
Date of Birth

Seventy-two (72) hour exemptions:

*Active Military I.D.#*_____

Date of District Court Order _____

1997 FEB 17 11:04:41

T 28734

02/12/97 1100020895 $31.00
Marriage License

Return License To:

MR. & MRS. J.AHMED
14403 ELLA BLVD. #1314
HOUSTON TEXAS 77014

PERSONS AUTHORIZED TO CONDUCT CEREMONY

Section 1.83, Family Code. (a) The following persons are authorized to conduct marriage ceremonies: (1) licensed or ordained Christian ministers and priests; (2) Jewish rabbis; (3) persons who are officers of religious organizations and who are duly authorized by the organization to conduct marriage ceremonies; and (4) justices of the supreme court, judges of the court of criminal appeals, justices of the courts of appeals, judges of the district, county, and probate courts, judges of the county courts at law, courts of domestic relations and juvenile courts, retired justices and judges of such courts, justices of the peace, retired justices of the peace, and judges and magistrates of the federal courts of this state.

Section 1.81, Family Code. (a) A marriage license expires at the end of the 30-day period immediately following the date that the license was issued if the marriage ceremony has not been conducted within that period. The person who is to conduct the marriage ceremony shall determine this information from the county clerk's endorsement on the license.

This license is not valid for seventy-two (72) hours from the time of issuance.

Accompanied by TDH Material as required by Section 1.87(e) Family Code

1940-81-95

T 28734

APPLICATION FOR MARRIAGE LICENSE, HARRIS COUNTY, TEXAS

02/12/97 1100020895 $31.00

BEVERLY B. KAUFMAN, COUNTY CLERK, HARRIS COUNTY, TEXAS Marriage License

WARNING
THE PENALTY FOR KNOWINGLY MAKING A FALSE STATEMENT IN THIS FORM CAN BE 2 - 10 YEARS IN PRISON AND A FINE OF UP TO $10,000. (HEALTH AND SAFETY CODE, SEC. 195.003)

MALE

1 FULL NAME — FIRST: JAVED — MIDDLE: AHMED — LAST:

2 SOCIAL SECURITY NUMBER:

3 USUAL RESIDENCE — STREET NAME AND NUMBER: — CITY: HOUSTON — STATE: TEXAS

4 DATE OF BIRTH: 69

5 PLACE OF BIRTH — CITY: DADU SHIND — COUNTY: PAKISTAN — STATE:

6 PROOF OF IDENTITY AND AGE: TDL

7 If divorced, did divorce occur within last 30 days? YES ☐ NO ☐

8 I am not presently married TRUE XXX FALSE ☐

9 The other applicant is not related to me as an ancestor or descendant, by blood or adoption, a brother or sister of the whole or half blood or by adoption, or a parent's brother or sister of the whole or half blood, or a son or daughter of a brother or sister of the whole or half blood or by adoption TRUE XXX FALSE ☐

FEMALE

10 FULL NAME — FIRST: TOMMIE — MIDDLE: RAE — LAST: HYNIE

11 MAIDEN SURNAME:

12 SOCIAL SECURITY NUMBER: 8898

13 USUAL RESIDENCE — STREET NAME AND NUMBER: 432 HAWTHORNE — CITY: HOUSTON — STATE: TEXAS

14. DATE OF BIRTH: 69

15 PLACE OF BIRTH — CITY: LAS VEGAS — COUNTY: CLARK — STATE: NEVADA

16 PROOF OF IDENTITY AND AGE: TDL

17. If divorced, did divorce occur within last 30 days? YES ☐ NO ☐

18 I am not presently married TRUE XXX FALSE ☐

19. The other applicant is not related to me as an ancestor or descendant, by blood or adoption, a brother or sister of the whole or half blood or by adoption, or a parent's brother or sister of the whole or half blood, or a son or daughter of a brother or sister of the whole or half blood or by adoption TRUE XXX FALSE ☐

OATH: I solemnly swear (or affirm) that the information I have given in this application is correct.

Signature of Male Applicant

Signature of Female Applicant

I certify that the applicant did not appear personally but the pre-requisites for the license have been fulfilled as prescribed by Section 1.05 of the Family Code

Subscribe and sworn to before me at 03:30 P.M. AM / PM on FEBRUARY 12 1997

BEVERLY B. KAUFMAN, County Clerk, Harris County, Texas

BEVERLY B. KAUFMAN, County Clerk, Harris County, Texas

Deputy

Dale M. Borowski - J.P.

Name and Title of Person Performing Marriage

2-17-97

Date of Marriage

Harris

County of Marriage

Mail executed license to: 14403 ELLA BLVD. #1314 — Street Address

HOUSTON TEXAS 77014 — City, State and Zip Code

875 0533 — Local Phone Number

FORM NO. CC-B-03-31-01 (Rev. 07/24/96)

495-18-0468

526

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)
)
Tommie Rae Brown,)
)
)
Petitioner,)
)
v.)
)
David C. Sojourner, Jr., in his)
Capacity as Limited Special)
Administrator and Limited Special)
Trustee, Deanna Brown Thomas,)
Yamma Brown, Vanisha Brown,)
Larry Brown, Terry Brown and)
Daryl Brown)
)
Respondents.)
)
IN RE:)
)
The Estate of James Brown a/k/a)
James Joseph Brown)
)

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Case No. 2013-CP-02-2849 - drug
(Omitted Spouse Claim)

Case No. 2013-CP-02-2850 - cert copy
(Elective Share Claim)

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF RESPONDENT TERRY BROWN'S COUNTERARGUMENTS

FILED 10.Oct.14
Liz Godard
C.C.P.&G.S.
Anita Knoepple 12:55
Deputy Clerk

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Respondent Terry Brown files this Memorandum of Law in Opposition to Petitioner's Motion for Partial Summary Judgment and in Support of Respondent Terry Brown's Counterarguments that Petitioner is not the spouse of James Brown and shows the following:

I. STATEMENT OF FACTS

Tommie Rae Hynie ("Ms. Hynie") knowingly and fraudulently entered into a bigamous marriage to the unknowing James Joseph Brown, Jr. ("Mr. Brown") on December 14, 2001 ("Brown-Hynie Marriage).[1] Ms. Hynie was married to Javed Amed ("Mr. Ahmed") in Harris County, Texas on February 17, 1997 and neither divorced nor sought annulment until after the purported nuptials with Mr. Brown.[2] As a result of the newly acquired information regarding Ms. Hynie's marriage to Mr. Ahmed, Mr. Brown filed for annulment from Ms. Hynie on January 29, 2004 in Aiken County, South Carolina ("Brown Annulment Action").[3] On August 16, 2004, Mr. Brown and Ms. Hynie entered into a Consent Order ("Brown-Hynie Consent Order") wherein Ms. Hynie agreed and stipulated that she was not Mr. Brown's spouse and would not claim common law marriage.[4] Mr. Brown never married Ms. Hynie once her marriage to Ahmed was terminated and after the Brown-Hynie Consent Order. In fact, the evidence proves the parties did not consider themselves married.[5]

Ms. Hynie, after Mr. Brown's death, attempts to portray herself as Mr. Brown's widow.[6] She argues ineffectively, unsupported and uncorroborated that her marriage to Mr. Ahmed was a bigamist marriage thereby making her purported marriage to Mr. Brown legitimate.[7] Ms. Hynie

---

[1] See License and Certificate of Marriage, Exhibit 4 to Joint Stipulation of Facts.
[2] See. Joint Stipulation of Facts, Paragraph 2.
[3] Id. at Paragraph 19.
[4] Id. at Paragraph 19, Exhibit 19.
[5] Id.
[6] See. Affidavit of Tommie Rae in Support of her Motion for Summary Judgment, Paragraph 1.
[7] See. Memorandum in Support of Tommie Rae's Motion for Partial Summary Judgment

refuses to provide this Court, or any other court for that matter, any evidence demonstrating Mr. Ahmed's prior marriages.[8] Ms. Hynie further provides vacuous arguments that Mr. Brown supported Ms. Hynie's efforts to seek an annulment to void ab initio her marriage to Mr. Ahmed.[9] The facts and law do not support this position.

Ms. Hynie filed for annulment from Mr. Ahmed on December 14, 2003 (Hynie Annulment Action") in Charleston County Family Court in Charleston, South Carolina.[10] Ms. Hynie further elaborates that Mr. Ahmed only married her to get into the country and become a U.S. citizen.[11] Although a novel approach to re-enter Mr. Brown's vast and prosperous estate, the claims are without merit and unsupported by facts, law or common sense. Mr. Ahmed, conveniently, was neither personally served nor present to defend himself against the fraudulent and criminal allegation.[12] Interestingly, the annulment proceeding, for the Harris County, Texas marriage, took place in Charleston, South Carolina where neither Ms. Hynie, nor Mr. Ahmed lived.[13]

It is important to note that even though Mr. Brown paid the attorney's fees on behalf of Ms. Hynie, Mr. Brown filed his own Brown Annulment Action a mere forty-six (46) days after the Hynie Annulment Action was filed.[14] This evidences Mr. Brown's state of mind that even-though he may have paid for the Hynie Annulment Action, he by no means supported Ms. Hynie's fictional outcome that Mr. Brown and Ms. Hynie were married.[15]

---

[8] Joint Stipulation of Facts , Paragraph 9 and Paragraph 18.
[9] See. Memorandum in Support of Tommie Rae's Motion for Partial Summary Judgment.
[10] Id.
[11] Joint Stipulation of Facts, Exhibit 12, Page 10, lines 16-18.
[12] Id. at Page 3, lines 1-25 and Page 4, lines 1-2.
[13] Id. at Cover Page.
[14] Joint Stipulation of Facts, Paragraph 19.
[15] Id.

Ms. Hynie was granted an annulment on April 15, 2004 ("Hynie Annulment Order") subsequent to a hearing where Ms. Hynie's unsupported, uncorroborated, self-serving hearsay testimony, which was laced with allegations of behavior that is fraudulent and criminal in nature against Mr. Ahmed, and his attorney, as the sole grounds and evidence before the Charleston County Family Court ("CCFC").[16] Mr. Ahmed, conveniently, was not personally served with process in the matter and was therefore unavailable to testify or defend himself against the criminal allegations.[17] Additionally and conveniently, neither was Mr. Ahmed's immigration attorney who was also implicated in fraudulent and criminal activity of the nature that could cause his disbarment. No witnesses to the marriage, marriage license application or corroborating witnesses to the events Ms. Hynie relied upon to secure the annulment, testified.[18] No document evidence was tendered or reviewed by the CCFC.[19] Fortunately, for this Court, Mr. Ahmed's sworn, corroborated and witnessed testimony that he was not married at the time he married Ms. Hynie is available.[20]

It is additionally important to note that the Brown-Hynie Consent Order wherein Ms. Hynie agreed and stipulated that she was not Mr. Brown's spouse and that she would not claim common law marriage was entered into after the Hynie Annulment Order.[21] The Brown-Hynie Consent Order further evidences Mr. Brown's and Ms. Hynie's states of mind in light of the Hynie Annulment Order and that neither party perceived Ms. Hynie to be his wife.[22] In addition to the fact that Ms. Hynie was not married to James Brown, it has been noted on several occasions that Ms. Hynie not only entered into a prenuptial agreement to never seek collection

[16] Id. at paragraphs 9, 10, 11.
[17] Id. at paragraph 17.
[18] Id. at paragraphs 9, 10, 11.
[19] Id.
[20] Affidavit of Scott Keniley with attached Exhibit.
[21] Joint Stipulation of Facts, Paragraph 19.
[22] Id.

from Mr. Brown's estate, signed the Brown-Hynie Consent Order stating she was not Mr. Brown's wife and that she would not seek a claim of common law marriage, but also she made similar party admissions through a recorded recollection that indicated her present sense impression and statements of her existing mental state in her own handwritten documents that have been presently sealed by this Court.[23] By giving up the right to seek a common law marriage now or in the future, both Mr. Brown and Ms. Hynie were indicating that they were not married by the very terms of the Brown-Hynie Consent Order because it would be pointless to include language regarding a claim of common law marriage if the parties considered themselves married.[24] From the date of the Brown-Hynie Consent Order until Mr. Brown's death Sixteen (16) Months and Nine (9) days elapsed.[25]

Ms. Hynie is now attempting to revoke any and all planning that Mr. Brown may have performed as it relates to her during his lifetime. Mr. Brown and Ms. Hynie entered into a Prenuptial Agreement that addressed all issues should the parties alleged marital relations conclude.[26] The Prenuptial Agreement provided that upon conclusion to the purported Brown-Hynie Marriage, Ms. Hynie agreed to waive any claim or right to a claim for alimony. See. Prenuptial Agreement, Section 3. Further, in the event Ms. Hynie filed for divorce she was only entitled to Fifty Thousand ($50,000.00) Dollars. Id. at Section 8. Ms. Hynie filed for divorce against Mr. Brown ("Hynie-Brown Divorce Action").[27] Ms. Hynie, disregarding agreements to the contrary, i.e. the Prenuptial Agreement, greedily sought economic advantage including, but not limited to alimony, mortgage payments, utility bill payments, pool and yard maintenance,

---

[23] Id.
[24] Id.
[25] Id. at paragraphs 19 and 20.
[26] Id. Introductory paragraph.
[27] Id. at paragraph 19, Exhibit 17.

multiple cars and a Two Million ($2,000,000) Dollar life insurance policy on Mr. Brown's life for her benefit.[28]

Mr. Brown died on December 25, 2006.[29] Fortunately, he left a will and trust document that expressed his last wishes. The ("Will") dated August 1, 2000 and *James Brown "I Feel Good" Irrevocable Trust* ("Trust") dated the same date were very specific as to its gifts. Most notable regarding the issues sub judice, it specifically excluded any wife he had. Therefore, Ms. Hynie, even if found to be his wife, was specifically excluded from Mr. Brown's estate by his own intent and devise. The Will also distributed all of his tangible personal property to six named children, Terry Brown, Deanna J. Brown, Yamma N. Brown, Venisha Brown and Larry Brown. The residue of his estate and music empire would provide the assets and funding for the Trust. The Trust magnanimously provided two directives, (1) to pay the educational expenses for his grandchildren and (2) to provide educational expenses to needy children from Georgia and South Carolina. Mr. Brown was so insistent that his legacy be preserved in his Will and Trust, that both the Will and Trust contain an in terrorem clause that would exclude any potential beneficiaries who contest Mr. Brown's last wishes. Mr. Brown's son Terry, also named in the Will, is the only beneficiary who did not contest his father's Will and Trust.

Ms. Hynie, in typical fashion, objects to Mr. Brown's educational Trust benefitting needy children from Georgia and South Carolina and demands the money for herself. Ms. Hynie, even though she is: (1) not Mr. Brown's actual or common law spouse; (2) has agreed by court order she is not Mr. Brown's spouse; (3) agreed to a Prenuptial Agreement to never seek collection from Mr. Brown's estate, if she were actually his spouse; and (4) was excluded from Mr.

[28] Id.
[29] Joint Stipulation of Facts, Paragraph 20.

Brown's Will, has filed actions contesting the Will and Trust to be determined Mr. Brown's widow in an effort to cash in on a large economic benefit.

In order to advance her financial interests in Mr. Brown's estate, Ms. Hynie must disprove the fact she was married to Mr. Ahmed at the time she married Mr. Brown. Ms. Hynie, now, takes the position that she was never married to Mr. Ahmed because Mr. Ahmed knowingly and fraudulently entered into the marriage with Ms. Hynie as a bigamist.[30] Ms. Hynie further argues that even though the CCFC issued an order based on unsupported self-serving hearsay where Mr. Ahmed was not present and Mr. Brown was not a party, that such an Order binds this Court and these parties. Additionally, Ms. Hynie provides in support of her arguments attempting to prove she is Mr. Brown's widow the conduct or statements made in compromise negotiations for the settlement agreement that was voided by the South Carolina Supreme Court. Such evidence, again, by clear rule, is likewise not admissible.

Ms. Hynie seeks designation as Mr. Brown's spouse/widow for economic purposes both inclusive and exclusive of the Will and Trust as well as this cause of action's primary focus. To be specific, Ms. Hynie's designation as spouse/widow potentially has substantial economic impact on various parties' interests in Mr. Brown's copyright recapture rights as provided by the Copyright Act. Mr. Brown's copyrights are significantly the most valuable part of the Trust and arguably may revert to his heirs with a spouse receiving fifty (50%) percent ownership.

Ms. Hynie's smoke and mirrors brief is nothing more than Ms. Hynie's "last ditch" "Hail Mary" attempt to divert this Honorable Court's attention to the simple fact which is: Mr. Brown and Ms. Hynie were never married.

[30] Joint Stipulation of Facts, Paragraph 10.

II. SUMMARY JUDGMENT STANDARD

Rule 56 of the South Carolina Rules of Civil Procedure provides that: "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002). "To withstand a motion for summary judgment 'in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence." Id. at 330-31, 673 S.E. 2d at 803.

In the instant matter, there is overwhelming evidence that Ms. Hynie was not the spouse of Mr. Brown. The only admissible evidence that has been submitted proves that she was married at the time she married Mr. Brown. At the very least, the evidence submitted by Respondents meets their burden as the non-moving party to Ms. Hynie's motion for partial summary judgment with the presentation of a mere scintilla of evidence in opposition to her motion. But more importantly, carries the day with regard to Respondent's burden on its own motion for partial summary judgment as Ms. Hynie has failed to present any admissible evidence that she was not married to Mr. Ahmed at the time she married Mr. Brown.

III. ARGUMENT

A. Ms. Hynie is a Bigamist.

Ms. Hynie attempts to back door herself into spousal designation, in light of her bigamous marriage, by asserting a "prove it" defense. There is nothing left to prove. Ms. Hynie was legally married to Mr. Ahmed at the time she married Mr. Brown.[31] First, Ms. Hynie stipulated that she married Mr. Ahmed on February 17, 1997.[32] Second, Ms. Hynie stipulated she married Mr. Brown less than five (5) years later on December 14, 2001.[33] Third, Ms. Hynie further stipulated there was no divorce proceeding as evidenced by the fact she filed an annulment to the Ahmed marriage in 2003.[34]

B. Mr. Ahmed was not married at the time he married Ms. Hynie.

By sworn testimony, Mr. Ahmed stated he was not married at the time he married Ms. Hynie ("Ahmed-Hynie Marriage License Application").[35] Ms. Hynie signed the Ahmed-Hynie Marriage License Application right below Mr. Ahmed also claiming that she was not married.[36] Additionally, Mr. Ahmed took the opportunity to discuss his marriage to Ms. Hynie with attorney David Bell and his advocate in Pakistan, Taha Alizai, wherein he stated to both gentlemen that he was not married to anyone else when he married Ms. Hynie and that they lived together as husband and wife for a period of time following their marriage.[37] The Pakistani affidavit therein provides additional corroborating evidence supporting the provided information.[38]

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[31] Joint Stipulation of Facts, Paragraph 6.
[32] Id. at Paragraphs 1 and 2.
[33] Id. at Paragraph 5.
[34] Id. at Paragraphs 6 and 7.
[35] Affidavit of Scott Keniley with attached Ahmed-Hynie Marriage License Application Exhibit.
[36] Id.
[37] Affidavit of David Bell.
[38] Id.

It is indisputable and stipulated that Ms. Hynie married Mr. Ahmed and that the married couple never divorced prior to her purported marriage to Mr. Brown.[39] The Brown-Hynie Consent Order further provides that Ms. Hynie agreed she was not Mr. Brown's spouse and that she would never seek acknowledgment as his common law spouse.[40] Further, it is indisputable that Mr. Ahmed was not absent for five (5) years prior to Ms. Hynie's purported marriage[41] to Mr. Brown as required by S.C. Code Ann § 20-1-80 which states:

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

Based on the foregoing, Ms. Hynie has failed to prove that she and Mr. Ahmed were not married at the exact moment in time that she purportedly married Mr. Brown. As a result, her purported marriage to Mr. Brown is void.

C. Ms. Hynie has the burden to prove she is married to Mr. Brown.

Ms. Hynie bears the burden of proving that her marriage to Mr. Brown is valid. "Once a marriage is shown to exist, the person attacking its validity has the burden of proving invalidity. Day v. Secretary of Health and Human Services, 519 F. Supp. 872, 878 (D.S.C. 1981); 52 Am. Jur. (2d) *Marriages* Section 129 (1970)." Yarbrough v. Yarbrough, 280 S.C. 546, 550, 314 S.E.2d 16, 18 (Ct. App. 1984). Ms. Hynie and Mr. Ahmed's marriage has been proven to be valid.[42] That fact is undisputed and stipulated to by the parties. The onus is therefore on Ms. Hynie to prove how her marriage to Mr. Ahmed was void so that her purported marriage to Mr.

[39] Joint Stipulation of Facts, Paragraphs 5 and 6.
[40] Id. at Paragraph 19, Exhibit 19.
[41] Id. at paragraphs 5 and 6.
[42] Id. at Paragraph 1 and 2.

Brown could be valid. Ms. Hynie has failed in meeting this burden in every way. She has failed to prove that she did not enter into the admitted bigamous marriage. She has failed in intervening time to produce a shred of evidence related to the purported marriages of Mr. Ahmed. As a result, her bigamy voids any chance that she entered into a marital relationship with Mr. Brown.

1. Fraudulent Annulment.

Ms. Hynie ineffectually attempts to utilize the third prong of SCCA *§ 20-1-80* by filing the Hynie Annulment Action and securing a sentence of a competent court. Neither Mr. Ahmed nor any corroborating witness or credible supporting evidence was produced.

i. Suspect Jurisdiction.

Ms. Hynie filed for annulment from Mr. Ahmed on December 15, 2003 in the Charleston County Family Court located in the city of Charleston, South Carolina.[43] Interestingly enough, neither Ms. Hynie, nor Mr. Ahmed lived in or near Charleston County, South Carolina.[44] Ms. Hynie claims to have lived across the state of South Carolina in Aiken County, South Carolina.[45] Ms. Hynie testified that Mr. Ahmed's last known address was 14403 Ella Boulevard, Apartment Number 314, Houston, Texas 77014.[46]

ii. Mr. Ahmed was not personally served.

Mr. Ahmed, we know, was not personally served with service of process, but was arguably served by publication when, conveniently, Ms. Hynie's Texas process server allegedly

[43] Id. at Paragraph 7, Exhibit 5.
[44] Id.
[45] Id.. at Paragraph 8, Exhibit 13, page 4, line 25, page 5, lines 1-4.
[46] Id. at page 15, lines 10-18.

was unable to locate Mr. Ahmed.[47] The alleged service by publication was in the Houston Chronical buried on page 2 of the classified section.[48] Rule 2 of the South Carolina Family Court rules indicates that the South Carolina Rules of Civil Procedure shall apply to Family Court actions. See. Rule 2 of the South Carolina Rules of Family Court. Ms. Hynie, knowing Mr. Ahmed was from Pakistan, made no effort to perform due diligence to locate and serve Mr. Ahmed in Pakistan pursuant to Rule 4 (h)(5) of the South Carolina Rules of Civil Procedure for foreign service of process and utilizing the service of process rules prescribed by the Hague Service Convention. Specifically, Ms. Hynie's service by certified mail was not valid in accordance with Rule 4(d)(8) of the South Carolina Rules of Civil Procedure in that an ex parte, default judgment against Mr. Ahmed was entered. "Service pursuant to this paragraph shall not be the basis for an entry of a default or judgment by default unless the record contains a return receipt showing the acceptance by the defendant." See. Rule 4(d)(8) of the South Carolina Rules of Civil Procedure. Ms. Hynie's return receipt attached is blank.[49] Further, her service by affidavit failed as Mr. Ahmed was located outside of the United States. Finally, her service failed in accordance with the Hague Service Convention, T.I.A.S. No. 6638, 20 U.S.T. 361 (1965). Pakistan is a non-member signatory to the Convention On The Service Abroad Of Judicial And Extrajudicial Documents In Civil Or Commercial Matters and provides as the proper address for service documents as: The Solicitor, Ministry of Law and Justice, R Block, Pak. Sectt., Islamabad, Pakistan. Since Mr. Brown's death, Mr. Ahmed was easily found by attorneys involved with this action.[50]

[47] Id. at Paragraph 7, Exhibits 6, 7, 8, 9.
[48] Id.
[49] Id. at Paragraph 7, Exhibit 9.
[50] Affidavit of David Bell.

In a decision regarding an appeal of an action brought in both North Carolina and South Carolina, the South Carolina Supreme Court determined the affidavit requesting publication was "fatally defective, under the North Carolina law, on its face, in that it does not show that due diligence was used to find the defendant." Ray v. Pilot Fire Ins. Co., 128 S.C. 323, 324, 121 S.E. 779, 779-80 (1924). The Ray court noted the applicable statute required a showing of due diligence in order to secure the order of publication. Id. In support of its decision, the Ray court noted multiple North Carolina cases that had approved the holding in Wheeler v. Cobb, 75 N.C. 21 (1876), where the Supreme Court of North Carolina held that the service of summons by publication was fatally defective and did not conform to the requirements of the statute because the affidavit requesting service by publication failed to allege that the defendant could not, after due diligence, be found within the state. Id. at 325, 121 S.E. at 780. The affidavit submitted by Ronald Tannell, clearly did not identify due diligence was made to ascertain the whereabouts of Mr. Ahmed, but merely that a "national" data base search did not provide a valid address.[51] In fact, the Tannell affidavit even states: "The results were inconclusive." Id. It said nothing about searching immigration data bases or in Pakistan. Ms. Hynie was clearly aware that Mr. Ahmed was from Pakiston and testified to the same in her testimony at the annulment hearing.[52]

To avoid resolving litigation by default, strict compliance with the publication statutes is appropriate. See Rochester v. Holiday Magic, Inc., 253 S.C. 147, 152, 169 S.E.2d 387, 390 (1969) (noting that the statute applicable to vacating a default judgment "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits" Therefore, the affidavit for service by publication was defective on its face since Ms. Hynie specifically avoided searching and serving Mr. Ahmed where she knew she would most likely

[51] Joint Stipulation of Facts, Paragraph 7, Exhibit 6.
[52] Id. at Paragraph 7, Exhibit 13, Page 7, lines 7-9.

find him. As such, the Order for publication was obtained without the necessary diligence that is required to serve an individual under South Carolina law thereby making service defective.

iii. Self-Serving Hearsay Evidence is the only evidence presented by Ms. Hynie.

Ms. Hynie's prior statements regarding Mr. Ahmed's marital status are not admissible in this proceeding as such statements are hearsay. See. Rule 801 of the South Carolina Rules of Evidence. Ms. Hynie was granted an annulment on April 15, 2004 ("Hynie Annulment Order") subsequent to a hearing where solely Ms. Hynie's unsupported, uncorroborated, self-serving hearsay testimony laced with allegations fraudulent and criminal in nature against Mr. Ahmed, and his attorney, were provided as the sole grounds and information before the court.[53] In Ms. Hynie's Complaint for Annulment, she claims without corroboration, Mr. Ahmed wanted to marry her to become a United States Citizen.[54] She also indicated that she was informed by Mr. Ahmed that he had three or more wives to whom he was lawfully married under Pakistani law when the parties married on February 17, 1997.[55] The only indisputable fact in the Hynie Annulment Complaint is that they were married on February 17, 1997 confirming Ms. Hynie married Mr. Ahmed. The rest is unsupported speculation and/or hearsay at best.

There was a hearing for the annulment on April 15, 2004.[56] Ms. Hynie was the only party to testify before the Charleston County Family Court in support of her Complaint for Annulment.[57] Most notably absent was her husband, Mr. Ahmed, to defend against the criminal allegations alleged by Ms. Hynie. Additionally absent was her "guitar player" whom she testified was with her the day she claims Mr. Ahmed told her he was already married to three

[53] Id. at Paragraph 7, Exhibit 12.
[54] Id. at Paragraph 7, Exhibit 13, Page 10, lines 14-20.
[55] Id. Page 10, lines 11-13.
[56] Id.
[57] Id.

wives and just married her to get United States citizenship.[58] Equally as important, Mr. Ahmed's immigration attorney was absent who could have testified if it were true, that he was given $350.00 and a signed piece of paper by Ms. Hynie to terminate the marriage.[59] Apparently, like all of Ms. Hynie's evidence, the lawyer has vanished as well.[60]

Rule 802 of the South Carolina Rules of Evidence indicates that the general rule of evidence with regard to hearsay is that it is not admissible unless an exception applies. "[W]here there is difficulty in obtaining other equally probative evidence and in the particular circumstances of the case there are sufficient guarantees that it is trustworthy, hearsay may be admitted as an exception to the general rule of exclusion." Need alone is not sufficient, though, State v. Thomas, 159 S.C. 76, 156 S.E. 169 (1930). There must also be sufficient guarantees of trustworthiness to serve as the substitute for cross-examination. *See* Idaho v. Wright, 497 U.S. 805 (1990). The proponent of a statement alleged to be within a hearsay exception bears the burden of proving that the requirements of the particular exception are satisfied. *See* Marshall v. Thomason, 241 S.C. 84, 127 S.E.2d (177) (1962). When the requirements of the proposed exception are not satisfied, the offered statement or record is inadmissible hearsay. *See* Anders v. Nash, 356 S.C. 102, 108 S.E. 2d 878 (1971).

Ms. Hynie's prior statements about Mr. Ahmed's marital status, while proven to be untrue by Mr. Ahmed's own testimony on the Ahmed-Hynie Marriage License Application, are not admissible because of the hearsay rules. Ms. Hynie attempts to admit such statements to prove the truth of the matter asserted (i.e. that he was previously married). She has failed to meet her burden by proving that such statements are not hearsay or subject to an exception. As a

[58] Id. at Page 8, lines 10-20.
[59] Id. at Page 11, lines1-21.
[60] Id.

result, this Court should not consider such evidence and should exclude the same thereby leaving the only evidence that is admissible is that Ms. Hynie was married to Mr. Ahmed at the time she married Mr. Brown.[61]

iv. Even if admitted as a hearsay exception, Respondents have a right to have a trier of fact judge the credibility of such hearsay statements made by Ms. Hynie.

Credibility of the witness and the declaration may always be challenged and can be attacked by proof that they are uncorroborated. Bagwell v. McLellan Stores Co., 216 S.C. 207, 57 S.E.2d 257 (1949). Rule 607 and Rule 806 of the South Carolina Rules of Evidence allows any party to attack the credibility of a witness. The Ahmed-Hynie Marriage License Application does more that impeach the credibility of Ms. Hynie. It effectively calls her a liar as she signed the form right below the line where Mr. Ahmed signed indicating he had never been married.[62] So when it is convenient for her to be married to one individual or another she chooses the set of facts that apply. When it was time to be married to Mr. Ahmed, he had no wives in 1997, but when it was time to be married to Mr. Brown, Mr. Ahmed had many wives in 2003. Ms. Hynie can point to no other documents or witnesses that can prove that Mr. Ahmed was previously married other than her own contrived hearsay statements.[63] Respondents have a right to challenge this in front of a trier of fact as there is more than a scintilla of evidence that she was legally married at the time she married James Brown.

[61] Joint Stipulation of Facts, Paragraphs 1 and 2.
[62] Affidavit of Scott Keniley with attached Ahmed-Hynie Marriage License Application Exhibit.
[63] Joint Stipulation of Facts, Paragraphs 9, 10, 18.

v. Common sense dictates that Ms. Hynie's citizenship assertions are fabricated for economic gain.

Ms. Hynie alleged in her self-serving, non-corroborated, non-cross examined testimony that Mr. Ahmed told her on her wedding day that "he just needed to stay in the country."[64] She further testified that she went to Mr. Ahmed's immigration attorney and told him "This guy just wanted to get into the country."[65] As part of fabrication before this Court, Ms. Hynie asserts that she had to obtain the annulment thereby making her marriage to Mr. Ahmed void ab initio because Mr. Ahmed merely married her in order to stay in the United States. She further added that the marriage to Mr. Ahmed was never consummated.[66] If a marriage ceremony was the only requirement to staying in the United States, Ms. Hynie's testimony might have some shred of credibility. However, United States immigration law regarding marriage for a green card requires substantially more.

Immigration law is concerned more with the couple's matrimonial intention at the time of marriage, rather than consummation or engaging in sexual relations. Immigration marriage fraud is governed by the Immigration Marriage Fraud Amendment ("IMFA") of 1986. (8 U.S.C. § 1186a(g) (2000). The IMFA specifically provides that couples married for less than twenty-four months are subject to more scrutiny and must wait an additional two years before obtaining permanent residence. (INA § 216 (c)-(d)8 U.S.C. § 1186a(c)-(d) (2000). During that time, the immigrant spouse has only "conditional" permanent residency and is subject to deportation if the marriage is determined to not be bona fide. Id § 216 (b). With the passage of IMFA, the Immigration Naturalization Services ("INS") promulgated regulations illustrating how a couple could demonstrate that their marriage was bona fide when entered. Under the regulation, the

[64] Id. at Paragraph 17, Exhibit 13, Page 8, lines 19-20..
[65] Id. at Page 9, lines 4-8.
[66] Id. at Page 10, lines 2-10.

couple must attach evidence to their joint petition that demonstrates that the marriage was not entered into for the purposes of evading United States immigration law. In the leading case of Bark v. INS, 573 F.2d 1200, 1201 (9th Cir. 1975), that the marriage is a sham if the bride and groom did not intend to establish a life together at the time that they married. Although different than the standard applied by the IMFA, nevertheless, the regulations encourage petitioners to produce evidence in support of their petitions that is responsive to both Bark and IMFA. Such evidence includes: (1) documentation showing joint ownership of property, (2) lease showing joint tenancy of a common residence, (3) documentation showing commingling of financial resources, (4) birth certificates of children born to the marriage, (5) affidavits of third parties having knowledge of the bona fides of the marital relationship, and (6) other documentation establishing that the marriage was not entered into in order to evade the immigration laws of the United States. 8 C.F.R. 216.4(a)(5)(i)-(iv). All of these factors involve events that happen after the marriage and courts use these events to try to determine what the couple intended at the moment of marriage. Bark, 573 F.2d at 1202 (conduct occurring after the wedding may be considered to the extent that it "bears upon the subjective state of mind" at the time of the wedding.")

In order to prove the bona fide marriage and ultimately for Ahmed to receive status to stay in the United States, retroactive to the laws of 1997 (the year of the Hynie-Ahmed Marriage), several documents needed to be filed. First, Ms. Hynie would be required to file a Form I-130 Alien Relative Visa Petition to adjust Mr. Ahmed's immigration status on the basis that they were husband and wife. Mr. Ahmed, concurrently, would file a Form I-485 Application to Register Permanent Residence or to Adjust Status. Thereafter, there shall, in the facts of the marriage between Ms. Hynie and Mr. Ahmed, be a Form I-130 Petition interview. In

the Hynie-Ahmed Marriage, as the facts stated by Ms. Hynie in her testimony on April 15, 2004, the I-130 and I-485 would have been concurrently filed. With few exceptions, the I-130 Petition Interview would have been mandatory. *See* Operating Instruction 245.28 C.F.R. §§ 1245.6; Operating instruction 245.2.

This begs the question, why would Mr. Ahmed marry a United States Citizen to acquire permanent residential status and a green card and not go through all of the steps required, i.e. filing a concurrent I-130 Form and I-485 Form and the required I-130 interview? Maybe Ms. Hynie presumes Mr. Ahmed did not know there were procedural steps after the marriage ceremony. Ms. Hynie, interestingly disposed of this possibility when she testified that Mr. Ahmed had an immigration attorney and it therefore should be assumed that the attorney knew the steps required subsequent to the marriage and counseled his clients accordingly.[67] The marriage for a green card argument does not hold water. If that was the case, the above documents would be available and Respondents should have the right to seek them further in discovery, which has currently been stayed in this matter. If they do not exist, then Ms. Hynie's testimony is a fabrication that was created to further her own interests.

D. Mr. Brown is not bound by the Charleston County Family Court Order to defend his right to determine that he was not married due to bigamy.

1. Mr. Brown was not a party to the Hynie Annulment Action.

Ironically, Ms. Hynie argues in her brief that Mr. Brown was not a party to the Hynie Annulment Action and had no right to appeal citing Lukich. It is indisputable that Mr. Brown did not participate in the Hynie Annulment Action, however, Ms. Hynie attempts to draw a conclusion that Mr. Brown supported and acquiesced to the Hynie Annulment Action and Hynie

[67] Id. at Page 8, lines 23-24.

Annulment Order by referencing payments to Ms. Hynie's attorney and referencing the Hynie Annulment Action facts.

Ms. Hynie's suggestion that because Mr. Brown paid Ms. Hynie's attorney meant that he acquiesced to the outcome and desired a void ab initio result is neither factually nor chronologically sound. Mr. Brown filed his own annulment proceeding against Ms. Hynie merely 46 days later.[68] Additionally, Rule 1.8(f) of the South Carolina Rules of Professional Conduct requires that a lawyer obtain consent of the client before accepting compensation from someone other than the client. The lawyer also must not allow the person paying the fees to interfere with the exercise of judgment, South Carolina Rule of Professional Conduct 1.8(f)(2) and 5.4(c), and must not disclose protected information to that person unless permitted under South Carolina Rule of Professional Conduct 1.6. This begs the question, did Ms. Hynie's attorney withhold important information from Mr. Brown as the attorney could have and should have? The fact of the matter is, Ms. Hynie's attorney could not, by code of conduct, accept any direction from Mr. Brown. He could only accept his money. Mr. Brown was not his client and not a party to the action. As the South Carolina Rules of Professional Conduct clearly indicate, payment of money does not make one a party to an action or even a client for an attorney. As such, Mr. Brown's payment of money is completely irrelevant to the issue of whether or not he was a party to the Hynie Annulment Action.

Ms. Hynie, in her brief, spends inordinate amount of time arguing that Mr. Brown had no right to Intervene. This intervention argument, in addition to South Carolina Rules of Professional Conduct 1.8(f), 1.8(f)(2), 5.4(c) and 1.6, and Mr. Brown's immediate filing of the Brown Annulment Action, certainly contradict Ms. Hynie's allegations of Mr. Brown's

[68] Joint Stipulation of Facts, Paragraph 19.

involvement in Ms. Hynie's annulment action. Not to mention, the fact that immediately after the Hynie Annulment Order, Mr. Brown and Ms. Hynie entered into the Brown-Hynie Consent Order wherein Ms. Hynie agreed she was not his spouse and would never make a claim of common law marriage.[69]

2. The Charleston Family Court's order does not apply to the case sub judice.

Again, painstakingly, Ms. Hynie argues to this Court in her brief that regardless of the value of Ms. Hynie's testimony and lack of facts tendered to the CCFC, Mr. Brown and any in privy to him are bound by the Charleston County Family Court's order.[70] This falsehood would create a public policy entwined in complete chaos should South Carolina allow third parties to ultimately, and dramatically, be affected by cases to which they could not intervene to protect their interests. Mr. Brown could not and did not intervene in the CCFC. The CCFC in the Hynie Annulment Action based its decision on self-serving hearsay evidence and conjecture.[71] No authenticated evidence or testimony other than Ms. Hynie's was provided.[72] Res judicata and collateral estoppel should not and could not be applied to the vacuous legal proceeding to which Ms. Hynie has used as the foundation to grab an economic interest in Mr. Brown's estate to which she already agreed she was not Mr. Brown's wife.[73]

Ms. Hynie attempts to mislead this honorable Court that neither Mr. Brown, nor his privies have any ability to intervene, question, appeal or otherwise challenge the factual details and order from CCFC annulment proceeding (of which Mr. Brown was not a party) because such judgment is protected by res judicata and collateral estoppel. Effectively, Ms. Hynie wants this

[69] Id. at Exhibit 19.
[70] Memorandum in Support of Tommie Rae Brown's Motion for Summary Judgment, Section IV.
[71] Joint Stipulation of Facts, Paragraphs 9,10, 18.
[72] Id.
[73] Id. at Paragraph 19, Exhibit 19.

Court to rule that non-parties and their successors are bound by court orders from actions that they had no right to challenge or be considered a party. Such a result offends even the basic sense of due process and fair dealing, and violates all of the rules of res judicata and collateral estoppel.

3. Res judicata and Collateral Estoppel.

i. Res Judicata does not preclude Mr. Brown from proving that he was not married due to bigamy.

"The doctrine of res adjudicata (or res judicata) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action." First Nat'l Bank v. United States Fid. & Guar. Co., 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945). Under this doctrine, a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action. Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 417 S.E.2d 569 (1992); Treadaway v. Smith, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996); Foran v. USAA Cas. Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999); Rogers v. Kunja Knitting Mills, U.S.A., 336 S.C. 533, 520 S.E.2d 815 (Ct. App. 1999). In the matter sub judice, clearly and indisputably, neither Mr. Brown, nor his privies (heirs) were parties to the CCFC proceeding. Res judicata prevents a litigant "from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Hilton Head

Ctr. of South Carolina, Inc. v. Pub. Serv. Comm'n of South Carolina, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987); accord Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). The Hynie Annulment Action was not litigated and was by all essence a default judgment. (see discussion supra). "Res judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. Res judicata ends litigation, promotes judicial economy and avoids the harassment of re-litigation of the same issues." James F. Flanagan, South Carolina Civil Procedure 642 (2d ed. 1996).

To establish res judicata, the defendant must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986); Rogers, 336 S.C. at 537, 520 S.E.2d at 817; Owenby v. Owens Corning Fiberglas, 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993). Clearly, all three prongs fail as it relates to Mr. Brown. Mr. Brown was not a party. The subject matter of the Hynie Annulment Action was the annulment of a marriage that was not Mr. Brown's. Mr. Brown currently seeks to have his own marriage declared void due to bigamy which was not litigated in the CFCC proceeding.

Even when the defendant meets all of the required elements, res judicata will not be applied "where it will contravene other important public policies; the courts must weigh the competing public policies." Johns v. Johns, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992). In Mr. Brown's case, the application of res judicata fails the public policy reason as well. The competing public policy that is violated is the lingering effect that a third party's legal action, involving an ex parte, default court proceeding wherein a court is tendered and issues orders on inadmissible hearsay evidence or no evidence at all as in the Hynie Annulment Action and Hynie Annulment Order, will have on Mr. Brown's estate and possible legal obligations

during his lifetime. Bearing in mind that the application of res judicata fails on many other levels, this Court should not enforce the issue on the simple principle that to do so would violate public policy.

ii. Collateral Estoppel does not preclude Mr. Brown from proving that he was not married due to bigamy.

Collateral estoppel differs from res judicata. This distinction is explained in Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984):

> The doctrines of res judicata and collateral estoppel are . . . two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, . . . the second action is based upon a different claim and the judgment in the first action precludes re-litigation of only those issues 'actually and necessarily litigated and determined in the first suit.' Id. at 369 n.1, 315 S.E.2d at 190 n.1.

"Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the re-litigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim." Richburg v. Baughman, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986); see also State v. Bacote, 331 S.C. 328, 330, 503 S.E.2d 161, 162 (1998) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim."); McNaughton-McKay Elec. Co. of N.C. v. Andrich, 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1996) (noting that collateral estoppel will bar re-litigation of an issue that was actually litigated and necessary to the outcome of the prior lawsuit).

A party may assert non-mutual collateral estoppel to thwart re-litigation of a previously litigated issue unless the party sought to be precluded did not have a full and fair opportunity to litigate the issue in the first proceeding, or unless other circumstances justify providing the party an opportunity to re-litigate the issue. Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998). The factors to consider in determining whether the defense of collateral estoppel exists and whether the issues were actually litigated in the first suit include: whether privity exists, whether the doctrine is used offensively or defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). In this action, Ms. Hynie uses the vacuous Order as a weapon and indisputably, Mr. Brown never had any opportunity, much less than a full and fair opportunity to litigate the issue determining his own marital status. The party asserting collateral estoppel must prove that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment. Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001); Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984). Ms. Hynie has provided this Court no proof the matter was actually litigated. In fact, all evidence to the contrary, she has merely shown an ex parte, default judgment that ultimately cast Mr. Ahmed as a criminal.[74] Only a party to a prior action or one in privity with the party can be precluded from re-litigating an issue on the basis of offensive collateral estoppel. Carrigg, 347 S.C. at 80, 552 S.E.2d at 770. Again, how can it be argued that Mr. Brown was a party when Ms. Hynie goes to such extreme lengths to prove he had no right to intervene. Mr. Brown was not in privity with Ms. Hynie and as such the doctrine of collateral estoppel cannot apply.

[74] Id. at Paragraph 7, Exhibit 12.

iii. Exceptions to Res Judicata and Collateral Estoppel allowing Mr. Brown to prove he was not married due to bigamy.

There are numerous exceptions to the application of res judicata and collateral estoppel.

In Pye, the court adopted the Restatement (Second) of Judgments section 28, which states:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, re-litigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
>
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
>
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. Pye, 325 S.C. at 437-38, 480 S.E.2d at 460-61.

In Beall v. Doe, the court adopted section 29 of the Restatement (Second) of Judgments:

> A party precluded from re-litigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to re-litigate the issue. The

circumstances to which considerations should be given include those enumerated in § 28 and also whether:

(1) Treating the issues as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

(2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined; Procedural opportunities?

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

(8) Other compelling circumstances make it appropriate that the party be permitted to re-litigate the issue. Beall, 281 S.C. at 371, 315 S.E.2d at 190-91.

The elements outlined in In Beall v. Doe, adopting section 29 of the Restatement (Second) of Judgments express exactly the issues in this case. Mr. Brown and his heirs were not party and had no right to intervene in the Hynie Annulment Action that was not fully litigated. As a result, they now have the right to challenge any of the facts and issues that may have been presented in that matter that are now a part of this action.

iv. Mr. Brown was not in privity with the Hynie and Ahmed marriage and as such has the right to prove he was not married due to bigamy.

In regard to res judicata or collateral estoppel, privity "does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation." Wyndam v. Lewis, 292 S.C. 6, 8, 354 S.E.2d 578, 579 (Ct. App. 1987). "Privity" means one so identified in interest with another that he represents the same legal right. Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001). In Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998), this court discussed privity by stating:

> Privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between entities. To be in privity, a party's legal interests must have been litigated in the prior proceeding. Having an interest in the same question or in proving or disproving the same set of facts does not establish privity. Nor is privity found when the litigated question might affect a person's liability as a judicial precedent in a subsequent action. Id. at 317, 498 S.E.2d at 687 (citations omitted).

Mr. Brown's legal interests were not even addressed. Ms. Hynie argues that Mr. Brown had an interest in whether Mr. Ahmed was married at the time he married Ms. Hynie. Legally and according to Wade, it does not matter whether he did or did not have an interest in Mr. Ahmed's marital status. The fact of the matter is there is no privity, therefore neither do his heirs and all avenues of challenge as to the claims Ms. Hynie is making are available to the heirs and the estate, including the right to argue she was legally married to Mr. Ahmed (which the evidence clearly indicates) at the time of her marriage to Mr. Brown.

v. Public Policy dictates that Mr. Brown was not married due to bigamy.

Even when the elements of res judicata and collateral estoppel have been met, they will not be rigidly or mechanically applied, and the application of the doctrines may be precluded where unfairness or injustice results, or public policy requires it. Id.; Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001). "Thus application of res judicata will not be applied where it will contravene other important public policies; the courts must weigh the competing public policies." Johns v. Johns, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992).

In Johns, a husband and wife signed a consent order where the family court found they were married at common law and ordered their legal separation. At the time the parties entered into the consent order, the husband was married to another person. The wife brought suit against the husband seeking a divorce, custody of the couple's child, an increase in alimony and child support, and attorney's fees. The husband contested the divorce, arguing the parties were not married. The wife sought to use the consent order declaring they were married at common law to bar the husband's defense under res judicata and collateral estoppel grounds. This court did not allow the wife to assert res judicata or collateral estoppel to bar the husband's defense because public policy declaring bigamous marriages void overrode the policy concerns for res judicata.

This matter is the same as Johns. A bigamous marriage existed. Public policy concerns allowing Mr. Brown to challenge the validity of his own marriage as a result of the bigamous relationship of Ms. Hynie outweigh and override any policy concerns for collateral estoppel or res judicata.

vi. As the Charleston County Family Court Order was a Default Judgment, Mr. Brown is not precluded by res judicata or collateral estoppel to prove that he was not married due to bigamy.

In essence and procedurally, Mr. Ahmed's failure to respond to the Hynie Annulment Action and failure to appear for the hearing would be treated as a default. Ms. Hynie's counsel at her annulment hearing went so far as to note this in the transcript of the hearing.[75] In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation. 50 C.J.S. Judgments § 797 (1997). 331 S.C. 328, 330-31, 503 S.E.2d 161, 162-63 (1998). South Carolina does not allow default judgments to have preclusive effect under the collateral estoppel doctrine because no issues were actually litigated."); Powell v. Lane, 289 S.W.3d 440, 451 (Ark. 2008) (Wills, J., dissenting) South Carolina courts have consistently followed the Restatement (Second) of Judgments with regard to the issue of collateral estoppel. See, e.g., S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) (adopting the general rule set forth in the Restatement for offensive use of collateral estoppel); Beall v. Doe, 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct. App. 1984) ("[A] fair rule regarding the application of issue preclusion in subsequent litigation with different parties is the rule recently formulated by the American Law Institute [in the Restatement (Second) of Judgments]."). The Restatement takes the position that default judgments have not been "actually litigated," and therefore cannot be used as the basis for collateral estoppel in subsequent actions. See Restatement (Second) of Judgments § 27 cmt. e (1982) ("In the case of a judgment entered by . . . default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action."). The Restatement's position is the view taken by the majority of the courts throughout our nation. *See* Powell, 289 S.W.3d at 450 (Wills, J., dissenting) (stating that the "majority view" is that default judgments cannot serve as the basis for collateral estoppel); 50 C.J.S. Judgments §

[75] Joint Stipulation of Facts, Paragraph 7, Exhibit 13, Page 4, lines 6-8.

1049 (2013) ("Although a party against whom a default judgment is entered certainly had an opportunity to litigate, most courts have concluded that an opportunity to litigate should not be given the same effect as actual litigation . . . ." (emphasis added)).

As the Hynie Annulment Action was a ex parte, default judgment because Mr. Ahmed failed to appear due to insufficient service among other items, none of the issues were actually litigated. Based on the foregoing, Mr. Brown and/or his heirs have every right to challenge the facts and issues whether Ms. Hynie was married at the time she married Mr. Brown. The evidence has unequivocally proven this to be true. As a result, Ms. Hynie was not married to Mr. Brown.

E. **The Settlement Agreement and conduct or statements made in compromise negotiations are not admissible evidence.**

Petitioner attempts to argue to this Court that because previous counsel or certain parties conducted themselves in a certain manner or made certain statements in a settlement agreement or settlement negotiations that those statements bind the parties in the subsequent litigation.[76] Such statements and conduct are clearly not admissible as evidence under South Carolina law. Rule 408 of the South Carolina Rule of Evidence provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. ... (Emphasis added.)

The law wants parties to settle their cases and promotes this idea by excluding evidence of negotiations and offers to compromise. Chandler v. Geraty, 10 S.C. 304 (1878). Use of

[76] Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment, Section V.

settlement negotiations has the effect of prejudicing a party in subsequent litigation if the settlement fails. Smith & Furbush Mach. Co. v. Johnston, 102 S.C. 130, 86 S.E. 489 (1915). "This rule contemplates that the parties need to feel free to make certain assumptions for the purpose of settlement negotiations and that those statements are assumed by the author to be true only for the purpose of compromise negotiations. The rule codifies the longstanding principle that evidence of conduct or statements made in compromise negotiations is not admissible." Fesmire v. Digh, 385 S.C. 296, 308, 683 S.E.2d 803, 809 (2009) In the instant case, it is clear that the settlement negotiations failed. The settlement agreement was not approved by the Supreme Court of South Carolina.[77] As a result the litigation did not conclude. The Petitioner now points to statements made in the settlement agreement and to conduct that occurred while attempting to negotiate the settlement agreement and get it approved before the court as evidence in this matter. Rule 408 clearly states that such evidence is not admissible. The Petitioner even goes so far as to characterize the items as something "expressly" stated in the settlement agreement and accepting the terms of the settlement agreement through conduct.[78] This is exactly the type of effort that Rule 408 was designed to quell. Those statements and conduct were done in an effort to settle this matter not bind or admit certain facts as evidence. Petitioner is barred from using any of this settlement information and conduct in this manner.

F. **Mr. Brown has the right to claim that his wife is a Bigamist regardless of the Charleston County Family Court Order.**

Petitioner has completely missed the point as to the argument in Lukich. Petitioner actually makes the argument that Judge Anderson of the South Carolina Court of Appeals made in his dissent in Lukich. Justice Anderson argued that the Family Court order bound the parties

[77] Wilson v. Dallas, 403 S.C. 411, 450-451, 2013 S.C. LEXIS 240, 69-71 (2013).
[78] Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment, Section V, Pages 32 and 33.

and that the marriage was "void ab initio". These are the same arguments that Petitioner clings to in this matter, which the remainder of the Court of Appeals as well as the South Carolina Supreme Court rejected in Lukich.[79] As a result, the vast majority of Petitioner's argument is based on a dissenting opinion of one Justice of the South Carolina Court of Appeals.

The CCFC Order only bars Mr. Ahmed (which is arguable based on the facts surrounding the manner in which the order was obtained) from claiming that he is married. The Order has no effect as to Mr. Brown's right to declare Ms. Hynie as a bigamist. Mr. Brown was not a party to the CCFC action and as discussed above is not collaterally estopped from arguing that Ms. Hynie is a bigamist. Such Order had no binding effect as to Mr. Brown. As to Mr. Brown, the Lukich facts are directly on point.

"While an annulment order relates back in most senses, it does not have the ability to validate the bigamous second 'marriage'. Since there was no marriage under the plain terms of the statute when the ceremony between Wife and Husband #2 was performed in 1985, there was nothing to be 'revived' by the annulment order in 2003. The statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective. Any other construction of § 20-1-80 would lead to uncertainty and

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[79] The Supreme Court most recently reasserted its position on this matter when it indicated in its most recent Order in this matter that it was not going to agree with the Circuit Court's interpretation of Lukich when it stated the following:

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

As the Supreme Court is noting, it is not affirming the Circuit Court's interpretation but appears to be inferring that it will still enforce its decision as previously determined in *Lukich* and likely apply the same result to the matter at hand.

chaos." Lukich v. Lukich, 379 S.C. 589, 592 (2008), 666 S.E.2d 906, 907 (2008). The South Carolina Court of Appeals in Lukich referenced the general rule applicable in situations exactly like Mr. Brown's by citing to 52 Am.Jur. 2d Marriage §57 which states:

> [A]part from statute, bigamous marriage does not acquire validity when the prior subsisting marriage is legally terminated by divorce or by the death of the first spouse. The same rule is generally followed where the prior subsisting marriage is annulled after the second marriage is contracted, even though the purpose of an annulment proceeding is to declare that no valid marriage ever took place between the parties or that no valid marriage relation ever existed between the parties. Even where the annulment decree expressly declares the first marriage null and void ab initio, it does not relate back so as to validate the second marriage. In order for the subsequent marriage to be valid, it has been held that there must be a new ceremony following the termination of the earlier marriage. (Emphasis added). Lukich v. Lukich, 368 S.C. 47, 55, 627 S.E.2d 754, 758 (Ct. App. 2006)

If the Petitioner's conduct in this matter were allowed to stand under South Carolina, it would promote bigamy for economic gain in this state rather than quell it and lead to the uncertainty and chaos contemplated in Luckich.

The example is easy. A man and women are legally married. The man and women are not presently married at the time of their marriage to each other. They become separated and the man moves out of the state. Women attempts to marry a second much richer man four years after husband leaves her by participating in a marriage ceremony with second man while still married. The women knows she is still married, but has a nicer life with the richer purported second husband, and seeks and annulment. She has difficulty locating the poor husband and attempts to serve him but fails. He is served by publication and does not show up for the hearing. The women at the hearing testifies with self-serving, hearsay evidence that the poor husband was married beforehand and he should be found guilty of bigamy. The only proof she provides of bigamy is her own statements. He is found guilty of bigamy and the marriage

annulled. Second man finds out about hearing and cannot believe that his purported wife was previously married. On the way from the hearing, the second man is so enraged that he speeds off in his car and has and accident in which he dies. His will leaves his multi-million dollar estate to his wife if she is his wife at the time of death and then to his six children. The wife files a claim in the estate for the entire estate as a beneficiary.

If the Petitioner's argument were correct, the annulment that the women received in this example would suddenly validate her second marriage and she would receive the entire estate. This is the chaos of which the Lukich decision speaks. Under Lukich, the second man's children win their claim because she was never the second man's wife because the relationship was void from the beginning. If the wife's self-serving testimony were allowed to stand to "create" the capacity to marry and therefore make the second marriage valid, it would be in direct contravention of the statute which does not contemplate either a prospective or retroactive application. According to the South Carolina Supreme Court, the status of the parties at the time they enter into their marriage must be examined. The Court has affixed one singular point in time that you review, the time of the actual marriage ceremony. No subsequent court orders or actions can change the facts as they exist at this one moment in time. Further, if Petitioner's argument were allowed to stand it would encourage bigamist relationships in South Carolina for economic gain, which is exactly what Ms. Hynie is attempting. Allowing a rule such as that proposed by Ms. Hynie would encourage perjury for economic gain and disallow any challenges by uninvolved impacted parties. This contempt of public policy would result in chaos and thereby thrust our judicial system of due process aside.

As in the above example, the undisputed status of Mr. Brown and Ms. Hynie at the time of their purported marriage was that Ms. Hynie was married to another man and Mr. Brown was

not married.[80] There is no dispute of material facts as to this situation or a scintilla of evidence to prove otherwise. As such, the purported Brown-Hynie marriage was void from the beginning in accordance with Luckich. For purposes of the evidence related to Mr. Brown's right to claim that he was never legally married, Ms. Hynie has failed to prove to this Court that her marriage to Mr. Ahmed was void. In fact the only admissible evidence before this Court, is evidence that Ms. Hynie's marriage to Mr. Ahmed was valid and not void ab initio.[81] There is no evidence that Mr. Brown and Ms. Hynie were married after her annulment action to Mr. Ahmed was granted. As a result, the Court can reach but one conclusion as it relates to the purported marriage between Mr. Brown and Ms. Hynie based on Lukich. Ms. Hynie was married at the time she attempted to marry Mr. Brown. As such, there was no marriage between Mr. Brown and Ms. Hynie because she was still married. There is no scintilla of evidence to prove otherwise. Mr. Brown and Ms. Hynie were never married.

IV. CONCLUSION

Ms. Hynie is a bigamist. She has failed to submit any evidence or scintilla of proof to prove otherwise. Her marriage to Mr. Brown never happened. Ms. Hynie fails to meet her burden of proof. Further, any alleged evidence she has attempted to submit fails under Rules 802 and Rule 408 of the South Carolina Rules of Evidence. She attempts to present testimony from a highly suspect annulment proceeding where the Defendant (Mr. Ahmed) was never properly served thereby creating a default judgment for annulment. At the very least, Mr. Brown and his heirs have the right to challenge the validity of her testimony under Rules 607 and 806 of the South Carolina Rules of Evidence to address her bigamy as it relates to Mr. Brown. Ms Hynie couples her self-serving hearsay testimony from such defective annulment proceeding with

[80] Joint Stipulation of Facts, Paragraphs 1, 2 and 6.
[81] Affidavit of Scott Keniley with attached Ahmed-Hynie Marriage License Application Exhibit.

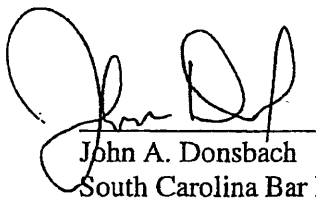
statements and conduct that occurred while the parties were in settlement negotiations and wants this Court to take those items as valid evidence and proof. Common sense indicates that Ms. Hynie's arguments are tenuous at best and most likely fabricated.

She further compounds the problem when she demands that the Charleston County Family Court Order binds Mr. Brown and his heirs from challenging her bigamy as a result of the doctrines of res judicata and collateral estoppel. As Mr. Brown was never a party to the action, never involved in the action litigated (i.e. annulment of Hynie-Ahmed marriage), and has not adjudicated the actual issue in this matter which is that Ms. Hynie is a bigamist which proves Mr. Brown is not married, the doctrines of res judicata and collateral estoppel cannot apply. Such doctrines fail on almost every element necessary to be proven, privity does not exist, and public policy dictates that such a result is abhorrent. As a result, Mr. Brown and his heirs are not precluded from proving Ms. Hynie's bigamy, which they have done without one scintilla of opposing evidence. As such, Mr. Brown was never married to Ms. Hynie.

Finally, Luckich is directly on point in this matter. As discussed herein, the South Carolina Supreme Court has been very clear in indicating that you look to one point in time to determine if you have bigamy. The test is whether or not either party was married at that time that they attempted to enter into a ceremonial marriage. Subsequent proceedings to annul do not have any impact on this one moment in time. If either party is already married at such time, no marriage can occur. That is exactly what happened in this matter. It is indisputable that Mrs. Hynie was married at the time she purportedly married Mr. Brown. As a result, Lukich very clearly strikes down any chance that a valid marriage existed between the parties. Mr. Brown and Ms. Hynie were never married.

In closing, the only admissible evidence that has been submitted proves that Ms. Hynie was married at the time she married Mr. Brown. At the very least, the evidence submitted by Respondents meets their burden as the non-moving party to Ms. Hynie's motion for partial summary judgment with the presentation of a mere scintilla of evidence in opposition to her motion. As such, Ms. Hynie's motion for partial summary judgment should be denied.

Most importantly, Respondents' presentation of evidence carries the day with regard to Respondents' burden on its own motion for partial summary judgment as Ms. Hynie has failed to present any evidence that she was not married to Mr. Ahmed at the time she married Mr. Brown. As a result, Ms. Hynie provides this Court with no evidence, not even a scintilla, to meet her burden of proof as a non-moving party. As a result, Respondents motion for partial summary judgment should be granted.



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STATE OF SOUTH CAROLINA COUNTY OF AIKEN Tommie Rae Brown, Petitioner, v. David C. Sojourner, Jr., in his Capacity as Limited Special Administrator and Limited Special Yamma Brown, Vanisha Brown, Larry Brown, Terry Brown and Daryl Brown Respondents. IN RE: The Estate of James Brown a/k/a James Joseph Brown	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT Case No. 2013-CP-02-2849 (Omitted Spouse Claim) Case No. 2013-CP-02-2850 (Elective Share Claim) **AFFIDAVIT OF SCOTT KENILEY**

FILED 10-Le 14
Liz Godard C.C.C.P.&G.S.
Anita Knoepfle 12a 55
Deputy Clerk

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, SCOTT KENILEY, who after being duly sworn, states on oath his personal knowledge as follows:

1. My name is Scott Keniley, I am of legal age and under no legal disability to testify. I give this affidavit based upon my personal knowledge.
2. I am an attorney authorized to practice law in the State of Georgia since November 1992.
3. I am a member in good standing of the State Bar of Georgia and other professional organizations associated with the practice of law. I have always been in good standing with the State Bar of Georgia.
4. I am a partner at the law firm Keniley-Kumar, LLC.

5. I am legal counsel to Mr. Terry Brown and William Forlondo James Brown.
6. I have associated South Carolina licensed attorney John Donsbach of the law firm Donsbach & King in this matter.
7. On or about September 2014, I contacted the Harris County, Texas Court Clerk inquiring about the Marriage License between Tommie Rae Hynie and Javed Ahmed.
8. In response to my request, the Court representative, Ms. Ashby, located the marriage license application sworn to and filed by Tommie Rae Hynie and Javed Ahmed.
9. Upon providing written request for certified copies of said application, credit card payment application and a fedex account number for delivery to my home, Ms. Ashby authorized certified copies and delivery of the same.
10. Ms. Ashby therein emailed to me a copy of the marriage license application and mailed via fedex a certified copy. I received such at my home the next day.
11. I provide this affidavit in opposition to Petitioner's Motion for Partial Summary Judgment.

FURTHER AFFIANT SAYETH NOT.

SCOTT KENILEY, ESQUIRE

Sworn to and subscribed before me

this 2 day of October, 2014.

NOTARY PUBLIC

My Commission Expires: 8/31/15

LEAH C. HAHN NOTARY PUBLIC FORSYTH COUNTY GEORGIA EXPIRES August 31, 2015

95-18-0466

MARRIAGE LICENSE

The State of Texas, County of Harris

To any person authorized by the laws of the State of Texas to celebrate the Rites of Matrimony in the State of Texas

Greeting:

You are hereby authorized to conduct the Rites of Matrimony between

JAVED AHMED

and

TOMMIE RAE HYNIE

and make due return to the County Clerk of Harris County, Texas, within thirty days of performing the marriage, certifying your action under this license.

Witness my official signature and seal of office in Harris County, Texas at

03:30 P.M. *on* 12TH FEBRUARY 1997.

Beverly B. Kaufman
County Clerk, Harris County, Texas

Deputy JOHN M. ANGUIANO

Officer's Return

This certifies that I have united in marriage the parties named above on this

17TH *day of* FEBRUARY, *19* 97.

Signature

JUDGE DALE M. GORCZYNSKI
Printed or Typed Name

JUSTICE OF THE PEACE 1-1
Title

HOUSTON, HARRIS, T E X A S
City and County in which ceremony was performed

574

195-18-0467

JAVED AHMED
Male

TOMMIE RAE HYNIE
Female

02 12 97
Date of Issuance

Name of Proxy (if any)

69
Date of Birth

69
Date of Birth

Seventy-two (72) hour exemptions:

Active Military I.D.# _____

Date of District Court Order _____

1997 FEB 17 11:04:41

T 28734

02/12/97 1100020895 $31.00
Marriage License

Return License To:

MR. & MRS. J.AHMED
14403 ELLA BLVD. #1314
HOUSTON TEXAS 77014

PERSONS AUTHORIZED TO CONDUCT CEREMONY

Section 1.83, Family Code. (a) The following persons are authorized to conduct marriage ceremonies: (1) licensed or ordained Christian ministers and priests; (2) Jewish rabbis; (3) persons who are officers of religious organizations and who are duly authorized by the organization to conduct marriage ceremonies; and (4) justices of the supreme court, judges of the court of criminal appeals, justices of the courts of appeals, judges of the district, county, and probate courts, judges of the county courts at law, courts of domestic relations and juvenile courts, retired justices and judges of such courts, justices of the peace, retired justices of the peace, and judges and magistrates of the federal courts of this state.

Section 1.81, Family Code. (a) A marriage license expires at the end of the 30-day period immediately following the date that the license was issued if the marriage ceremony has not been conducted within that period. The person who is to conduct the marriage ceremony shall determine this information from the county clerk's endorsement on the license.

This license is not valid for seventy-two (72) hours from the time of issuance.

Accompanied by TDH Material as required by Section 1.87(e) Family Code

575

T 28734

APPLICATION FOR MARRIAGE LICENSE, HARRIS COUNTY, TEXAS 02/12/97 1100020895 $31.00

BEVERLY B. KAUFMAN, COUNTY CLERK, HARRIS COUNTY, TEXAS Marriage License

WARNING
THE PENALTY FOR KNOWINGLY MAKING A FALSE STATEMENT IN THIS FORM CAN BE 2 - 10 YEARS IN PRISON AND A FINE OF UP TO $10,000. (HEALTH AND SAFETY CODE, SEC. 195.003)

MALE

1 FULL NAME — FIRST: JAVED — MIDDLE: AHMED — LAST:

2 SOCIAL SECURITY NUMBER:

3 USUAL RESIDENCE — STREET NAME AND NUMBER: — CITY: HOUSTON — STATE: TEXAS

4 DATE OF BIRTH: -- -- 69

5 PLACE OF BIRTH — CITY: DADU — COUNTY: SHIND — STATE: PAKISTAN

6 PROOF OF IDENTITY AND AGE: TDL

7 If divorced, did divorce occur within last 30 days? YES ☐ NO ☐

8 I am not presently married — TRUE ☒ FALSE ☐

9 The other applicant is not related to me as an ancestor or descendant, by blood or adoption, a brother or sister of the whole or half blood or by adoption, or a parent's brother or sister of the whole or half blood, or a son or daughter of a brother or sister of the whole or half blood or by adoption — TRUE ☒ FALSE ☐

FEMALE

10 FULL NAME — FIRST: TOMMIE — MIDDLE: RAE — LAST: HYNIE

11 MAIDEN SURNAME:

12 SOCIAL SECURITY NUMBER:

13 USUAL RESIDENCE — STREET NAME AND NUMBER: 432 HAWTHORNE — CITY: HOUSTON — STATE: TEXAS

14. DATE OF BIRTH: -- -- 69

15 PLACE OF BIRTH — CITY: LAS VEGAS — COUNTY: CLARK — STATE: NEVADA

16 PROOF OF IDENTITY AND AGE: TDL

17. If divorced, did divorce occur within last 30 days? YES ☐ NO ☐

18 I am not presently married — TRUE ☒ FALSE ☐

19. The other applicant is not related to me as an ancestor or descendant, by blood or adoption, a brother or sister of the whole or half blood or by adoption, or a parent's brother or sister of the whole or half blood, or a son or daughter of a brother or sister of the whole or half blood or by adoption — TRUE ☒ FALSE ☐

OATH: I solemnly swear (or affirm) that the information I have given in this application is correct.

Signature of Male Applicant

Signature of Female Applicant

I certify that the applicant did not appear personally but the pre-requisites for the license have been fulfilled as prescribed by Section 1.05 of the Family Code

Subscribe and sworn to before me at 03:30 P.M. AM / PM on FEBRUARY 12 1997

BEVERLY B. KAUFMAN, County Clerk, Harris County, Texas

BEVERLY B. KAUFMAN, County Clerk, Harris County, Texas

Deputy

Deputy

Dale M. Gorczynski - J.P.

Name and Title of Person Performing Marriage

2-17-97 Harris

Date of Marriage — County of Marriage

Mail executed license to: 14403 ELLA BLVD. #1314 — Street Address

HOUSTON TEXAS 77014 — City, State and Zip Code

875 0533 — Local Phone Number

FORM NO. CC-B-03-31-01 (Rev. 07/24/96)

495-18-0468

576

STATE OF SOUTH CAROLINA COUNTY OF AIKEN Tommie Rae Brown, Petitioner, v. David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown and Daryl Brown, Respondents, IN RE: **THE ESTATE OF JAMES BROWN A/K/A JAMES JOSEPH BROWN**	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT Civil Action No. 2013-CP-02-02849 -DNG- Civil Action No. 2013-CP-02-02850- cert/copy **MEMORANDUM OF LAW SUPPORTING LIMITED SPECIAL ADMINISTRATOR'S ("LSA") MOTION FOR SUMMARY JUDGMENT AND OPPOSING TOMMIE RAE BROWN'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF SURVIVING SPOUSE** FILED 10:16 and 14 Liz Godard C.C.P.&G.S. Anita Knuepfle 12:55 Deputy Clerk

TO: ROBERT N. ROSEN, ESQ., AND S. ALAN MEDLIN, ESQ., ATTORNEYS FOR PETITIONER TOMMIE RAE BROWN; LOUIS LEVENSON, ESQ., ATTORNEY FOR DEANNA BROWN THOMAS, YAMMA BROWN, AND VENISHA BROWN, JOHN DONSBACH, ATTORNEY FOR TERRY BROWN; AND DAVID B. BELL, ESQ., AND MATTHEW D. BODMAN, ESQ., ATTORNEYS FOR LARRY BROWN AND DARYL BROWN:

David C. Sojourner, Jr. (the "LSA"), as Limited Special Administrator for the Estate of James Brown and Limited Special Trustee of the James Brown August 1, 2000 Irrevocable Trust Agreement (collectively, the "Estate") submits this memorandum of law in support of the LSA's June 2, 2014 Motion for Summary Judgment and opposing Petitioner Tommie Rae Brown's ("Petitioner" or "Tommie Rae") April 24, 2014 Motion for Partial Summary Judgment. The sole issue before the Court is whether Petitioner is James Brown's ("Decedent's") "surviving spouse."

PROCEDURAL HISTORY

Decedent died December 25, 2006 in Aiken County, South Carolina. Following his death, Petitioner brought an action in probate court to set aside Decedent's will based upon undue influence and fraud (Petitioner's "Undue Influence Claim"), and, separately, claimed Petitioner was entitled to an elective share or an omitted spouse's share of the Estate (Petitioner's Undue Influence Claim and elective share/omitted spouse claims, collectively, "Petitioner's Will and Trust Challenges"). The probate court transferred Petitioner's Will and Trust Challenges to the circuit court ("trial court" or "lower court").

Following limited discovery and court-ordered replacements of the original personal representatives and trustees, some of the heirs and claimed-heirs, along with the Attorney General (collectively, the "Settling Parties"), entered into a compromise settlement agreement (the "Compromise Agreement") following a mediation on August 10, 2008. The Estate was not a party to the Compromise Agreement.

Through the Estate's Personal Representatives and Trustees, Buchanan and Pope, the Estate actively opposed the Compromise Agreement, by filing motions and presenting testimony and arguments, as the Settling Parties were developing the Compromise Agreement and while they were seeking its approval by the trial court.

After a seven-day hearing, on May 26, 2009 the trial court issued an order approving the Compromise Agreement (the "Order Approving Settlement Agreement"), ordering Buchanan and Pope removed as Personal Representatives and Trustees, and appointing Bauknight as the new Personal Representative and Trustee.

Buchanan and Pope, in their capacities as the Estate's Personal Representatives and Trustees, appealed the trial court's approval of the Compromise Settlement, their removal as

Personal Representatives and Trustees, and Bauknight's appointment. The Court of Appeals consolidated the appeals (the "Appeal") and, upon the Court of Appeals' request, transferred the Appeal to the South Carolina Supreme Court.

On August 3 and 6, 2009 the trial court and probate court, respectively, issued temporary orders appointing Bauknight Special Trustee and Special Administrator to "protect, preserve, and manage the Estate assets, and secure the Estate's proper administration" during pendency of the Appeal.

On May 8, 2013, the South Carolina Supreme Court issued its final ruling on the Appeal. *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). The Supreme Court affirmed the trial court's removal of Buchanan and Pope, invalidated the trial court's approval of the Compromise Agreement, and voided the trial court's appointment of Bauknight. The Supreme Court characterized the effect of ruling as "invalidating the compromise agreement"[1] and "invalidating the circuit court's approval of the compromise agreement."[2] The Supreme Court remanded this case to the trial court with instructions to appoint fiduciaries to oversee these matters in accordance with the provisions of Decedent's estate and trust documents.

On October 1 and 10, 2014, the Circuit Court and Probate Court appointed David C. Sojourner, Jr. to serve as the LSA, solely, specifically, and exclusively to defend the Trust and the Estate against the Will and Trust Challenges. In that Order, the trial court expressly stated:

> This interim appointment is made with the requirement that Mr. Sojourner, in his limited capacity, shall remain independent from Mr. Bauknight, [and] shall act with sole and absolute authority in his limited capacity....

See Order of Appointment (October 1, 2013) at page 20.

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[1] *Wilson v. Dallas*, 403 S.C. 411, 449, 743 S.E.2d 746, 767 (2013)

[2] *Id.*, 450, 743 S.E.2d 746, 768

The present motion arose as a result of the LSA's motion to modify protective orders the trial court had issued in 2008 so the LSA could view Petitioner's writings ("Petitioner's Diaries") and the Parties could use Petitioner's Diaries in litigating the Will and Trust Challenges. During a hearing on the LSA's motion (the "March 31, 2014 Hearing"), Petitioner's attorneys argued against producing Petitioner's Diaries or further responding to discovery and, as an alternative, stated they would file a motion for partial summary judgment in which Petitioner would show as a matter of law Petitioner was Decedent's "surviving spouse" under S.C. probate law, without reference to any disputed fact, including whatever evidence might or might not be contained in Petitioner's Diaries.[3]

Petitioner's attorneys contended she is entitled to a ruling that Petitioner is Decedent's surviving spouse based solely upon the legal effect of the Charleston Family Court's April 15, 2004 annulment of Petitioner's February 1997 marriage to Javed in the case captioned Ahmed in *Tommie Rae Hynie, a/k/a Tommie Rae Brown v. Javed Ahmed*, 2003-DR-10-4609 (the "Ahmed Annulment Action").[4] Petitioner argued the April 15, 2004 Order (the "Ahmed Annulment Order"[5]) is "binding on the world" and Petitioner is, accordingly, entitled to summary judgment based entirely "on the law and not the facts."[6] Petitioner sought a stay of discovery in these cases pending her filing of, and the Court's ruling upon, a summary judgment motion limited to the "surviving spouse" issue.

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[3] March 31, 2014 Hearing Transcript, pp. 54-61 (relevant pages attached as **Exhibit 1**)

[4] *Joint Stipulation of Facts*, filed September 5, 2014, Exhibit 12.

[5] Stipulation Exhibit 12.

[6] March 31, 2014 Hearing Transcript, p. 54.

The Court allowed Petitioner to file her motion and granted a stay of discovery, but ruled if Petitioner's motion turned upon any contested facts "the summary judgment goes out the window."[7] The Court decided if the question of surviving spouse involved factual issues, then the Court would not grant Petitioner's motion and discovery would recommence.[8]

Around April 24, 2014, Petitioner filed her motion for partial summary judgment. On June 2, 2014, the LSA filed a motion for summary judgment, also limited solely to the question of whether Petitioner is Decedent's surviving spouse. The LSA presents this Memorandum supporting its motion for summary judgment and opposing Petitioner's motion for partial summary judgment.

In an effort to eliminate genuine disputes of material fact, the Parties entered into a Joint Stipulation of Facts (with Exhibits) (hereinafter, "Stipulation" and "Stipulation Exhibits") which the Parties filed with the Court on September 5, 2014. This Stipulation sets forth all of the undisputed material facts that apply to Petitioner's and LSA's summary judgment motions on the issue of "surviving spouse."[9]

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." S.C. R. Civ. P. 56(c). In considering a motion for summary judgment, the Court "must

[7] *Id.*, p. 60.

[8] *Id.*, p. 61.

[9] In light of the Court's March 31, 2014 ruling that brought us here, Petitioner's reliance upon many additional and disputed facts, including those she alleges in two affidavits she filed in support of her motion, is fatal to Petitioner's motion for partial summary judgment.

view the facts in a light most favorable to the non-moving party." Nonetheless, a court "cannot ignore facts unfavorable to the party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Bloom v. Ravoria*, 339 S.C. 417, 529 S.E.2d 710, 713 (2000).

Based upon this standard, the Court should grant summary judgment to the LSA on the issue of surviving spouse and deny Petitioner's motion for partial summary judgment. In this regard, the Court should conclude, as a matter of law, (1) when Petitioner participated in the December 14, 2001 marriage ceremony with Decedent, Petitioner was still lawfully married to Javed Ahmed; (2) it was legally impossible for Petitioner to marry Decedent in December 14, 2001 because of South Carolina's law against bigamous marriages; (3) Petitioner cannot use the Ahmed Annulment Order to retroactively validate her bigamous December 14, 2001 marriage to Decedent; (4) Petitioner was not lawfully married to Decedent when he died on December 25, 2006; and (5) Petitioner is not Decedent's surviving spouse. Based on these conclusions of law, the Court should deny Petitioner's motion for partial summary judgment, grant the LSA's motion for summary judgment, and dismiss with prejudice Petitioner's omitted spouse and elective share claims.

LEGAL SIGNIFICANCE OF THE QUESTION OF "SURVIVING SPOUSE"

Petitioner has the burden of proving she is Decedent's "surviving spouse" in each of Petitioner's Will and Trust Challenges. If Petitioner cannot carry her burden on this threshold element, the Court must dismiss each of her actions. *See Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d. 788 (1983); *Calhoun v. Calhoun*, 277 S.C. 527, 290 S.E.2d 415 (1982).

To succeed on Petitioner's claim as an omitted spouse, she has the burden to prove: (1) the Decedent executed a valid will, (2) the Decedent married Petitioner after executing the will,

(3) the Petitioner qualifies as Decedent's surviving spouse under the Probate Code, and (4) the Will does not "provide for" the surviving spouse; *unless* (a) it appears from the Will that the omission was intentional; or (b) the Decedent provided for Petitioner by transfer outside of the Will and the intent that the transfer be in lieu of a testamentary provision is shown by Decedent's statements, from the amount of the transfer, or other evidence. *See* S.C. Code Ann. § 62-2-301 (emphasis added).

For Petitioner to have a "right of election to take an elective share" of Decedent's Estate, Petitioner has the burden to prove: (1) Decedent was a married person domiciled in South Carolina and (2) Petitioner qualifies as Decedent's "surviving spouse" under the Probate Code. *See* S.C. Code Ann. § 62-2-201 (emphasis added). A "surviving spouse" otherwise entitled to an elective share may waive her right, either before or after the marriage, by a written contract, agreement or waiver voluntarily signed by the surviving spouse after the surviving spouse has been given fair and reasonable disclosures, in writing, of the Decedent's property and financial obligations. *See* S.C. Code Ann. § 62-2-204. In South Carolina, the right to an elective share "is a statute of creation, and strict compliance with its terms is mandatory . . . ." *Gallagher v. Evert*, 353 S.C. 59, 66, 577 S.E.2d 217, 221 (Ct. App. 2002).

Whether Petitioner meets her burden of proving she is Decedent's "surviving spouse" also governs whether she has standing to pursue her Undue Influence Claim. *See Michael P. v. Greenville County Dep't of Soc. Servs.*, 385 S.C. 407, 415-16, 684 S.E.2d 211, 215 (Ct. App. 2009) ("Generally, to have standing, a litigant must have a personal stake in the subject matter of the litigation."). Petitioner lacks standing to pursue her Undue Influence Claim if she is not Decedent's "surviving spouse," because she was not named as a beneficiary in Decedent's Last

Will and Testament or a beneficiary under Decedent's Irrevocable Trust Agreement. *See* S.C. Code Ann. §§ 62-2-101 through 62-2-114.

FACTS

RELEVANT TO QUESTION OF SURVIVING SPOUSE

There are many facts associated with these cases that serve as "context" to Petitioner's claims and/or that will be relevant to whether Petitioner can ultimately prevail in her omitted spouse and elective share claims. Most of these are immaterial to whether Petitioner is Decedent's "surviving spouse." Because this motion only deals with that narrow question, the following limited facts are the only ones relevant to the Court's decision.[10]

On February 12, 1997, Petitioner and Javed Ahmed obtained a State marriage license in Texas.[11] Petitioner and Ahmed were married on February 17, 1997 in Harris County Texas.[12]

On December 10, 2001, Petitioner and Decedent obtained a State marriage license in South Carolina and participated in a marriage ceremony in Beech Island South Carolina on December 14, 2001.[13]

From the February 17, 1997 marriage ceremony between Petitioner and Javed Ahmed through the December 14, 2001 marriage ceremony between Petitioner and Decedent, no order of any court ended or caused to end the February 1997 marriage LSA asserts existed between

[10] The Parties have stipulated to most of these facts through the Stipulation and Stipulation Exhibits.

[11] Stipulation 1, Stipulation Exhibit 1.

[12] Stipulation 2.

[13] Stipulation 4, 5, Stipulation Exhibit 4.

Petitioner and Javed Ahmed.[14] Petitioner also stipulates no other occurrence of which Petitioner is aware ended or caused to end the alleged marriage between Petitioner and Ahmed.[15] For the purpose of the present motions, the only "other occurrence" relevant to the Court's decision would be Ahmed's death.[16]

On December 15, 2003, Petitioner filed the Ahmed Annulment Action in Charleston County South Carolina Family Court seeking an annulment of her marriage to Javed Ahmed.[17] Petitioner apparently made certain efforts to locate and serve Ahmed with the Complaint, but she never served him personally, and Ahmed never appeared, answered, or otherwise pled in that matter. Ahmed did not participate in the Ahmed Annulment Action in any way.[18]

A hearing was held on April 15, 2004 at which the only evidence was the Petitioner's own unopposed verbal testimony.[19]

The Charleston County Family Court issued the Ahmed Annulment Order granting Petitioner and Ahmed an annulment on April 15, 2004.[20] The Court based the entire Ahmed

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[14] Stipulation 6.

[15] Stipulation 6.

[16] S.C. Code Ann., §20-1-80 states in relevant part: "All marriages contracted while either of the parties has a former wife or husband ***living*** shall be void."

[17] Stipulation 7; Stipulation Exhibit 5. The LSA believes Petitioner had no connection with Charleston County other than that her counsel in that action was a Charleston County domestic lawyer. Petitioner did not live in Charleston County, she and Ahmed had never lived in Charleston County, and Ahmed apparently lived in Texas. Neither the record in that action nor the April 15, 2004 Final Order explain why the case was in Charleston County.

[18] Stipulation 17; Stipulation Exhibit 13 (the "Ahmed Annulment Transcript.")

[19] Stipulation 18; Stipulation Exhibit 13.

[20] Stipulation Exhibit 12.

Annulment Order solely upon Petitioner's unopposed verbal testimony, as that is all Petitioner put into evidence.[21]

Even today Petitioner can identify no documents or other tangible evidence showing Javed Ahmed was married to another person when Petitioner and Javed Ahmed participated in the February 17, 1997 marriage ceremony.[22]

Similarly, Petitioner can identify no person (except, Petitioner asserts, Javed Ahmed and the wives to whom Petitioner claims Ahmed was married[23]) who can testify that Javed Ahmed was married to another person when Petitioner and Javed Ahmed participated in the February 17, 1997 marriage ceremony.[24]

James Brown gave Petitioner funds to pay her legal fees for the Ahmed Annulment Action. James Brown was also aware the Ahmed Annulment Action existed, as Petitioner's attorney sent Decedent's attorney a copy of the Summons and Complaint in February 2004 and a copy of the April 15 Final Order on April 16, 2004.[25]

Decedent was not a named party to the Ahmed Annulment Action and never became a party, through intervention or otherwise. Decedent did not participate in the hearing or any other

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[21] Stipulation 18; Stipulation Exhibit 13

[22] Stipulation 9; Stipulation Exhibits 5-13.

[23] Petitioner's parenthetical reference in the Stipulation to Ahmed and his wives is superfluous to the present motions. Petitioner has no evidence of the wives' existence, cannot name or identify them, and can produce no testimony or documents from Ahmed or anyone else that supports Petitioner's contention Ahmed was already married when he married Petitioner in 1997.

[24] Stipulation 10; Stipulation Exhibit 13.

[25] Stipulations 13 and 14, Stipulation Exhibit 14.

facet of the Ahmed Annulment Action, and was not a client of Petitioner's attorney in that Action.[26]

LEGAL ARGUMENTS

Petitioner is unable to succeed on the merits of her claims because Petitioner cannot meet her burden of proving Petitioner and James Brown were lawfully married to each other at the time of Decedent's death and, accordingly, that Petitioner is Decedent's "surviving spouse." Because there is no genuine issue of fact, the LSA is entitled to an order concluding as a matter of law that Petitioner cannot meet the statutory requirements of her omitted spouse or elective share claims. Petitioner is therefore entitled to an order denying Petitioner's motion for partial summary judgment and granting the LSA summary judgment against Petitioner on both of Petitioner's claims.

I. Petitioner is not entitled to summary judgment because she supports her motion with her own affidavits and by asserting "facts" that are actively in dispute.

Without having to address Petitioner's substantive arguments, it is clear Petitioner is not entitled to partial summary judgment because she supports her motion with two affidavits and no party has had the opportunity to depose Petitioner and test her statements through questioning under oath. [27]

In her Initial Memorandum[28] Petitioner also supports her motion by asserting many disputed "facts." Petitioner could only establish these facts, if at all, either through the Court's

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[26] Stipulations 12, 15, and 16; Stipulation Exhibit 13.

[27] *See Harrods Ltd. v. Sixty Internet Domain Names*, 402 F.3d 214 (4th Cir. 2002) (recognizing that "summary judgment prior to discovery can be particularly inappropriate when a case involves complex factual questions").

[28] Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment, September 12, 2014 (hereinafter, "Petitioner's Initial Memorandum.")

review and acceptance of Petitioner factual assertions in her affidavits or through acceptance of the bare assertions Petitioner makes in her Initial Memorandum. The LSA directly disputes every one of these allegations and believes each would be disproven through discovery, which would at least include reviewing Petitioner's Diaries and other writings and taking the depositions of Petitioner and others[29].

Petitioner asserts the following disputed facts in her Initial Memorandum:

1. That Petitioner filed the Ahmed Annulment Action "at Mr. Brown's insistence."[30]
2. That Petitioner filed the Ahmed Annulment Action "with support from Mr. Brown."[31]
3. "Mrs. Brown testified that Ahmed told her he was married to several other women at the time of their purported marriage and that none of those marriages had been dissolved."[32]
4. Petitioner asserts by reference all of the factual findings set forth in the April 15, 2014 Final Order in the Ahmed Annulment Action, each of which the LSA disputes and asserts do not bind the LSA or this Court.[33]

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[29] On several occasions during this case, Petitioner has avoided standing for deposition or providing certain discovery through various (often last – minute) maneuvers. Indeed, the Court is hearing Petitioner's present motion because Petitioner proposed it as alternative to producing her diaries and other writings to the LSA and responding to the LSA's existing discovery requests. See, March 31, 2014 Hearing Transcript, pp. 54-61.

Petitioner is attempting to unfairly benefit from her avoidance of discovery by obtaining summary judgment based upon disputed facts that opposing parties could have refuted through depositions and other discovery Petitioner has so far avoided.

[30] Petitioner's Initial Memorandum, p. 1.

[31] *Id.*

[32] *Id.*, pp. 1-2.

5. That Decedent filed his January 29, 2004 Summons and Complaint for Annulment against Petitioner "[a]s a result of a physical altercation on January 28, 2004, in which Mr. Brown assaulted Mrs. Brown."[34]

6. That "Ahmed was Pakistani and wanted to become a U.S. citizen by marrying Mrs. Brown."[35]

7. That "Mr. and Mrs. Brown reconciled in July of 2004."[36]

8. That "[b]oth before and following their reconciliation and entry of the Consent Order, Mr. and Mrs. Brown lived together as husband and wife until Mr. Brown's death."[37]

9. That "It is undisputed that Mr. Brown continued to hold Mrs. Brown out to be his wife until his death."[38]

10. That the Ahmed Annulment Order was obtained "with Mr. Brown's...consent."[39]

11. That "Mr. Brown had control over the family court action to invalidate the attempted Brown-Ahmed marriage..."[40]

12. That "Indeed, the driving force behind the annulment action was Mr. Brown."[41]

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[33] *Id.*, p. 2

[34] *Id.*

[35] *Id.*

[36] *Id.*, p. 3.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*, p. 22.

[41] *Id.*

13. That "Mr. Brown supported Mrs. Brown's action to invalidate her putative marriage to Ahmed."[42]

14. That "Mr. Brown was aware *at all times* of Mrs. Brown's action to secure the annulment judgment..."[43] [emphasis added]

15. That "Mr. Brown sent Mrs. Brown's attorney a cashier's check dated September 22, 2003 to pay for her annulment action...."[44]

None of this "evidence" Petitioner asserts in support of her motion for partial summary judgment has been stipulated by the parties or tested by the LSA or any other party, either through deposing Petitioner and testing her statements under oath, deposing others who had involvement during the Ahmed Annulment Action, reviewing Petitioner's Diaries, or reviewing other discovery evidence Petitioner has avoided producing.

Petitioner heightens the clear need to deny her motion by asserting the evidence of her marriage ceremony to Decedent alone creates a "presumption" she is Decedent's surviving spouse[45] and the LSA can only rebut this presumption with "strong evidence."[46] Petitioner argues the LSA can only overcome this presumption "by *disproving every reasonable possibility.*"[47] Petitioner asserts she is entitled to win her motion because "Contestants cannot disprove every reasonable probability that Mrs. Brown is the surviving spouse of Mr. Brown."[48]

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[42] *Id.*

[43] *Id.*, p. 27.

[44] *Id.*

[45] *Id.*, p. 14.

[46] *Id.*, p. 15.

[47] *Id.*, pp. 14-15. (emphasis added)

[48] *Id.*, p. 15.

Petitioner cites *Newburgh v. Arrigo*, 88 N.G.529, 443 A.2d 1031 (1982) for the proposition:

> One attacking the validity of the most recent of multiple marriages is under a heavy burden to establish its invalidity *by clear and convincing evidence*. The challenger must *disprove* every reasonable possibility that could vitiate the prior marriage... [emphasis added][49]

In Petitioner's March 31, 2014 arguments to the Court, Petitioner's attorney asserted Petitioner could prove she was the Decedent's surviving spouse through purely legal means.[50] The LSA contended if Petitioner asserted the LSA was estopped by the Ahmed Annulment Order (Petitioner's main argument now) then Petitioner would have to support her estoppel argument with disputed facts.[51] In response, the Court ruled if Petitioner did assert disputed facts, "the summary judgment goes out the window."[52] "If it involves factual issues, obviously I would not rule on it; I will say you have to have an opportunity to complete discovery before I rule to determine whether or not there were genuine issues of material fact in dispute."[53]

The following interchange at that hearing further solidifies the Court's ruling:

> MR. BEACH: The question is, if Mr. Rosen files a motion for summary judgment on his claim and that motion for summary judgment on his claim requires the Court to decide upon factual issues, then we're going to be moving forward with discovery....

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[49] *Id.*, p. 16.

[50] March 31, 2014 Hearing Transcript, p. 60.

[51] *Id.*

[52] *Id.*

[53] *Id.*, p. 61.

THE COURT: That's correct...Because I don't think I would be fair to anybody ruling on summary judgment if there were factual issues to be considered."[54]

The LSA directly disputes every one of these non-stipulated facts asserted by Petitioner.

In light of the multiple factual issues in dispute, the Court should deny Petitioner's motion and either grant the LSA's Motion for Summary Judgment or give the Parties an opportunity to seek discovery, including the requested use of Petitioner's Diaries and deposing Petitioner and other persons possessing information material to this dispute.

II. The facts establish a presumption Petitioner's purported marriage to James Brown was bigamous and Petitioner can only overcome that presumption by proving, through the current presentation of evidence, that her marriage to Javed Ahmed was bigamous.

The burden of proving surviving spouse status is on the person claiming an interest in the estate, in this case, Petitioner.[55] Petitioner asserts she has met that burden by producing a valid certificate of marriage, showing that she and Mr. Brown were married on December 14, 2001.[56] Petitioner's assertion is not correct.

The LSA acknowledges Petitioner has established the existence of her marriage to Decedent through the Stipulation and its Exhibits. However, this only serves to shift the burden to the LSA to prove Petitioner's marriage to Decedent invalid.[57] In spite of Petitioner's hyperbole, the LSA's precise burden at this point is as follows:

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[54] *Id.*, p. 63.

[55] *See Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d. 788 (1983); *Calhoun v. Calhoun*, 277 S.C. 527, 290 S.E.2d 415 (1982).

[56] *See* Memorandum of Petitioner at p. 14, citing Exhibit 4 to Joint Stipulation of Facts (Marriage Certificate).

[57] Yarbrough v. Yarbrough, 280 S.C. 546, 549, 314 S.E.2d 16, 18.

> Where the evidence shows that the same person entered into a conflicting marriage, a presumption arises that the former marriage was dissolved ***by death or divorce.***[58]

The Stipulation proves Petitioner entered into a conflicting marriage with Javed Ahmed on February 17, 1997.[59]

The Stipulation rebuts the presumption recognized in Yarbrough that the Petitioner/Ahmed marriage was dissolved by divorce. In this regard, Stipulation 6 states:

> From the February 17, 1997 marriage ceremony between Petitioner and Javed Ahmed through the December 14, 201 marriage ceremony between Petitioner and Decedent, no order of any court or other occurrence of which Plaintiff is aware at this time ended or caused to end any marriage that certain parties assert existed between Petitioner and Javed Ahmed.

Yarbrough also requires the LSA to overcome the presumption the Petitioner/Ahmed marriage was dissolved by death. The LSA overcomes this presumption in three ways, any one of which would be sufficient:

First, the LSA is informed that attorneys for Michael Deon Brown have submitted the September 30, 2014 affidavit of David Bell into evidence related to these motions. The LSA attaches a copy of that Affidavit as **Exhibit 2**. In that affidavit, Mr. Bell provides detailed testimony regarding how he tracked down Javed Ahmed in 2008 and obtained his telephone number in Pakistan. Mr. Bell testifies he spoke to Mr. Ahmed over the telephone around February 2008. Mr. Bell further testifies he subsequently engaged an attorney in Pakistan who conducted an extensive in-person interview of Mr. Ahmed toward the end of February, 2008 and followed up shortly thereafter through a telephone call with Mr. Ahmed.[60]

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[58] Id., 280 S.C. 546, 550, 314 S.E.2d 16, 18 (*citing* Hallums v. Hallums, 74 S.C. 407, 54 S.E. 613 (1906) (emphasis added)).

[59] *Stipulation*, 1, 2; *Stipulation Exhibit* 1.

[60] *Id.*

Second, Petitioner stipulates no other occurrence of which Petitioner is aware ended or caused to end the alleged marriage between Petitioner and Ahmed.[61] For the purpose of the present motions, the only "other occurrence" relevant to the Court's decision would be Ahmed's death.[62] Petitioner therefore stipulates she has no evidence Ahmed died before the December 2001 marriage ceremony between Petitioner and Decedent.

Third, in December 2003 Petitioner brought an action in Charleston County Family Court to annul her marriage with Javed Ahmed. In this regard, the holding in *In re Watts Estate*, 185 A.2d 781, 787 (Pa. 1962) is instructive. There, the Supreme Court of Pennsylvania recognized the law will not presume "a vain and useless act." In doing so, it found a presumption that a person's first marriage had not been dissolved by divorce: "It can hardly be disputed that the parties had not been divorced up until 1945 at the time decedent instituted his divorce action in Philadelphia. The fact that decedent instituted this action renders clearly unlikely and highly improbable that up until that time he had secured a divorce; we cannot attribute to the decedent a vain and useless act." *Id.* Clearly if Javed Ahmed were dead, Petitioner would not have had to bring the Ahmed Annulment Action, and the law allows the Court to presume from her actions that Javed Ahmed was alive in December 2003. *See id.*

Having overcome the presumption Petitioner's marriage to Ahmed was dissolved by death or divorce, a presumption the Petitioner/Ahmed marriage was valid and not bigamous now arises. This presumption is established by the South Carolina Supreme Court's ruling in Hallums v. Hallums, 74 S.C. 407, 54 S.E.2d 613, 614 (1906), the case the Yarbrough decision was based upon.

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[61] Stipulation 6.

[62] S.C. Code Ann., §20-1-80 states in relevant part: "All marriages contracted while either of the parties has a former wife or husband ***living*** shall be void."

The facts of Hallums are virtually identical to the case at hand and the Court's ruling is directly on point. The Court succinctly states the facts as follows:

> On the 24th day of December, 1895, the plaintiff and one Bill Williams were married. Subsequently, during the year 1899, a marriage ceremony was performed between the plaintiff and one Nero Hallums, now deceased; and as the alleged widow of Nero Hallums she claims in this action to be entitled to a distributive portion of his estate. Her claim is resisted by the defendants, on the ground that her alleged intermarriage with Nero Hallums was an illegal and void marriage; she at that time, as is contended, having a living husband, to wit, Bill Williams.
>
> The vital questions are: (1) Was the marriage ceremony between the plaintiff and Bill Williams on the 24th day of December, 1895, a valid contract of marriage? And (2) if so, was he living at the time of the performance of the marriage ceremony between the plaintiff and Nero Hallums?
>
> It is contended by the plaintiff that, on the 24th day of December, 1895, at the time of her marriage with Bill Williams, he was then a married man, and that therefore the marriage with him was void, and that consequently she was free to make a contract of marriage with Nero Hallums. There was a formal actual marriage ceremony performed between the plaintiff and Bill Williams in the year 1895, and a formal actual marriage ceremony performed between the plaintiff and Nero Hallums in the year 1899. But there is no evidence of an actual marriage of Bill Williams with another woman previous to December, 1895.

Id.

The Court's analysis and ruling is so well-stated and apply so directly to the case at hand, the LSA again quotes the opinion here verbatim:

> There was direct testimony to the effect that the plaintiff and Nero Hallums entered into the contract of marriage which was solemnized in accordance with the usual ceremony. This was sufficient in the first instance to establish the fact of marriage, and there was no necessity to resort to the doctrine of presumption in favor of its validity. So, on the other hand, when there was direct and positive testimony that the plaintiff and Bill Williams entered into the contract of marriage (which was likewise solemnized according to the usual ceremony), which showed prima facie that the marriage was valid. The appellant, however, contends that the presumption is that the marriage between the plaintiff and Bill Williams was illegal. The effect of such presumption would be against the innocence of Bill Williams, and the law will not raise the presumption of his guilt in order to protect the rights of the plaintiff.

> While we have been referred to cases in which there was a presumption of a divorce or death of one of the contracting parties since the prior marriage in order to sustain the second marriage, we have not been able to find any case in which there was a presumption that the first marriage was illegal at the time it was solemnized in due form. The reason that no such cases are to be found is that all presumptions are in favor of innocence."

Hallums v. Hallums, 74 S.C. 407, 54 S.E.2d 613, 614 (1906).

The Yarbrough Court's decision to follow Hallums shows Hallums is still good law today. *See Yarbrough*, 280 S.C. at 550, 314 S.E.2d at 18. Such holding establishes the presumption Petitioner's marriage to Javed Ahmed is valid and was not dissolved by divorce, death, or a prior marriage. Yarbrough, in turn, holds the burden is shifted to Petitioner:

> If the law raises a presumption in favor of one party to litigation, the burden of going forward with the evidence devolves on the other party. Citing 52 Am. Jur 2d *Marriages* Section 130(1970).

Yarbrough, 280 S.C. at 550, 314 S.E.2d 16, 18.

In accordance with Yarbrough and Hallums, the Petitioner is required to present evidence proving Javed Ahmed was previously married to another when he and Petitioner married in Texas on February 17, 1997 in order to overcome the presumption that now exists in favor of the Petitioner/Ahmed marriage's validity. If Petitioner fails to present sufficient evidence to overcome this presumption of validity, then, also in accordance with Hallums, Petitioner's purported marriage to Decedent is bigamous, and, therefore a nullity, in which case Petitioner is not Decedent's surviving spouse.

III. Petitioner cannot establish her marriage to Ahmed was bigamous through the Ahmed Annulment Order.

A. Because the Ahmed Annulment Order is a judgment *in rem*, it is only binding on non-parties to that action as to the marital status of Petitioner and Javed Ahmed going forward and not as to the findings of fact and conclusions of law upon which that judgment was based.

A decree dissolving the marital status of the parties, whether by divorce or annulment, is a judgment in rem. *Carnie v. Carnie*, 262 S.C. 471, 167 S.E.2d 297 (1969); 4 S.C. Jur. *Action* § 5. The terms "in personam" and "in rem" are used to distinguish between actions that have as their object a personal judgment against the defendant ("in personam") and those for the purpose of obtaining a judgment which operates only upon a specific property or status ("in rem"). *See* 4 S.C. Jur. *Action* § 5; C.J.S., *Actions* § 69; 1 Am. Jur. 2d, *Actions* §§ 39, 40. It is commonly stated that a judgment "in rem" is "binding on all persons in the world." *See* Restatement (First) of Judgments § 73 (1942), note a. However, "[a]lthough a valid judgment in rem is binding on all the world as to the existence of a status which is the subject of the action, *it is not conclusive as to a fact upon which the judgment is based in any subsequent action* . . . except as to persons who have appeared and actually litigated the question of the existence of the fact." *Id.* at cmt. c (emphasis added). *See also Rediker v. Rediker*, 221 P.2d 1 (Cal. 1950) (en banc).

In South Carolina it is undisputed that "a decree awarding simply a divorce, dissolving the marital status of the parties, is a judgment in rem, and for such purpose the jurisdiction of a nonresident may be obtained by constructive service." *Carnie v. Carnie*, 252 S.C. 471, 475, 167 S.E.2d 297, 299 (1969). Such a judgment is binding as to third parties as to the status of the marriage only. *See Fitchette v. Sumter Hardwood Co.*, 145 S.C. 53, 142 S.E. 828, 833 (1928) ("Judgments in rem are considered binding on third persons, as are judgments or *decrees determining the status* or relations of individuals, as, for instance, decrees of divorce and

adjudications as to the mental condition of persons, judgments of a public nature, and, for the purpose of proving title, judgments under which a sale of land has taken place.") (*id.*). Though the "decree" itself is valid against third parties, such judgments are not permitted to be used as *res judicata* as to facts set forth within the decree. *Gratiot County State Bank v. Johnson*, 249 U.S. 246, 39 S.Ct. 263, 63 L.Ed. 587 (1919) ("judgments in rem [are] not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto") (citations omitted). *See also Phillips v. Yon*, 61 S.C. 426, 39 S.E. 618, 625 (1901.

Courts in other jurisdictions have fully expressed the general rule that judgments in rem are not binding against third parties beyond the status adjudicated therein. *Hunter v. Hunter*, 43 Pac. 756 (Cal. 1896); *Hendrick v. Biggar*, 103 N.E. 763 (N.Y. 1913); Restatement (First) *Judgments* § 74(2) (1942); Freeman, *Judgments* § 910 (5th ed. 1925). The United States Supreme Court expressed the rule as follows: "Establishing a fact and giving a specific effect to it by judgment are quite distinct. A judgment in rem binds all the world, but the facts on which it necessarily proceeds are not established against all the world, ... and conversely establishing the facts is not equivalent to a judgment in rem." *Becher v. Contoure Labs.*, 279 U.S. 388, 391, 49 S.Ct. 356, 357, 73 L.Ed. 752 (1929) (citation omitted). In other words, findings of fact or conclusions of law necessarily determined by the judgment are not binding against non-parties to the action. *See Fromm v. Glueck*, 161 Misc. 502, 504-505, 293 N.Y.S. 530 (1937). *See also Hunter v. Hunter*, 43 P. 756 (Cal. 1896) (holding judgment of divorce did not bind defendant thereto as he "was not served with summons and was without the state, and the action was therefore strictly *in rem*").

The facts of *In re Rowe's Estate*, 141 P.2d 832 (Ore. 1943), are substantially similar to the facts of this case. There the court was asked to determine whether a decedent, Edwin Rowe, died with a surviving child or whether the child was only a stepson of decedent and not entitled to inherit under Oregon law. *Id.* at 833-34. Following the decedent's death, Alzina Rowe, the decedent's widow, and Alonzo Rowe, decedent's "son" from a previous marriage, filed petitions alleging that they were decedent's only heirs. *Id.* at 833. The administrator of decedent's estate filed an amended final account wherein he alleged that he had ascertained from an investigation that Alonzo, the alleged son of the decedent, was only a stepson of decedent, being born to decedent's previous wife when she was still married to another man. *Id.* Upon such basis, the administrator concluded Alonzo was not entitled to any distributive portion of the estate. *Id.* The administrator relied on evidence purporting to show that at the time of Alonzo's birth, his mother was married to another man and his mother's subsequent marriage to the decedent did not make him the decedent's son. *Id.*

Alonzo attempted to submit as evidence a divorce decree between his mother and her previous husband, which was filed upon a claim that the previous husband deserted and abandoned her. *Id.* at 836. Alonzo argued the findings of fact in the divorce decree established the mother's husband had deserted her and argued the finding conclusively established the husband did not have access to his mother during the period of desertion. *Id.* Alonzo argued the presumption that the decedent was his father, based on his mother's subsequent marriage to the decedent following Alonzo's birth, conclusively determined his legitimacy. *Id.*

The Supreme Court of Oregon held:

> While the decree in a divorce suit as a decree in rem binds the whole world as to the status of the parties, to the extent that their status is the res adjudicated, with that limitation it is subject to the usual rule that estoppels must be mutual and ***is therefore not conclusive for or against any third person in reference to the facts***

> ***which it necessarily affirms or denies.*** Judgments in rem, as such, are not res judicata with respect to facts incidentally though necessarily determined, except as to the res adjudicat[ed]. As between strangers or between parties and strangers, a decree of divorce does not establish the previous validity of the marriage, since the res involved and adjudicated is the condition of subsequent singleness of the parties and not the valid prior existence of marital relations between them.

Id. at 836. The Oregon Supreme Court held that Alonzo could not rely on the findings of fact from the decree of divorce to establish that his mother's previous husband had deserted his mother at the time he was conceived. *Id.*

As the foregoing is applied to this case, the Charleston County family court order decreeing an annulment between Petitioner and Javed Ahmed is only binding on third parties only to the extent that it conclusively establishes the parties are thereafter free to remarry so far as any relation to each other is concerned. Any finding that Javed Ahmed and Petitioner were never legally married because he was previously married to other women cannot be *res judicata* against third parties to that action, including the LSA.

Petitioner's arguments in her Initial Memorandum loosely quote cases holding that divorce and annulment decrees are "binding upon the entire world" but completely ignore the *in rem* nature of such decrees and the profound effect that has upon their actual binding effect. Because Petitioner's arguments are based upon a misstatement of the applicable law on the effect of a decree of divorce or annulment, her arguments should be rejected.

B. The LSA is not estopped by the Ahmed Annulment Order's findings of fact or conclusions of law because James Brown was not a party to the Ahmed Annulment Action.

The *in rem* nature of the Ahmed Annulment Order means it only binds the whole world as to the marital status of Petitioner and Javed Ahmed going forward. Petitioner attempts to cover her position by also asserting that the doctrine of collateral estoppel binds James Brown in

particular (and, thus, the LSA) to the Ahmed Annulment Order's finding Javed Ahmed was already married to "other women"[63] when he married Petitioner.

"Under South Carolina law, '[c]ollateral estoppel, also known as issue preclusion, prevents **a party** from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same.'" *Kunst v. Loree*, 404 S.C. 649, 653, 746 S.E.2d 360, 362 (Ct. App. 2013) (*quoting Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009)). (emphasis added) "**The party** asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) **actually litigated in the prior action;** (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* (emphasis added).

"Even where all the elements for collateral estoppel are met, it will not be rigidly or mechanically applied, and the application of the doctrine may be precluded where unfairness or injustice results, or public policy requires it." *Carrigg v. Cannon*, 347 S.C. at 81, 552 S.E.2d at 770 (*citing State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998)). One area in which the application of the doctrine has been held not to apply is where the previous order was obtained by default: "In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation." *Kunst v. Loree*, 404 S.C. at 654, 746 S.E.2d at 362 (citations omitted).

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[63] The Ahmed Annulment Order states "Plaintiff also later learned that Defendant had three or more wives to whom he was married under Pakistani law..." Polygamy is legally impossible in South Carolina. Moreover, a spouse's previously existing marriage must be one recognized under South Carolina (not Pakistani) law in order for a subsequent purported marriage to be bigamous. *See Nash v. Tindall Corp.*, 375 S.C. 36, 41, 650 S.E.2d 81, 83-84 (Ct. App. 2007) (*quoting Boone v. Boone*, 345 S.C. 8, 14, 546 S.E.2d 191, 193 (2001) ("[U]nder the 'public policy exception,' the Court will not apply foreign law if it violates the public policy of South Carolina."). "[F]oreign law may not be given effect in this State if 'it is against good morals or natural justice.' " *Boone*, 345 S.C. at 13, 546 S.E.2d at 193.

It is stipulated the Decedent was not a named party to the Ahmed Annulment Action and never became a party, through intervention[64] or otherwise.[65] The Decedent did not participate in the hearing or any other facet of the Ahmed Annulment Action, and was not a client of Petitioner's attorney in that Action.[66]

It is axiomatic that in South Carolina, as in virtually every jurisdiction, collateral estoppel only applies to *parties* to the previous action and their privies. Indeed many quotes contained in Petitioner's Initial Memorandum on the issue of collateral estoppel includes the essential word "party."[67] *See Carman v. South Carolina Alcoholic Beverage Control Com'n*, 317 S.C. 1, 451 S.E.2d 383 (1994). *See also McClain v. Pactiv Corp.*, 360 S.C. 480, 602 S.E.2d 87 (Ct. App. 2004), reh'g denied, (Sept. 22, 2004) (holding that the doctrine prevents "a **party** from relitigating in a subsequent action an issue actually and necessarily litigated and determined in a prior action") (emphasis added); *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994) (holding relitigation of issues is "precluded as to **parties and their privies** in any subsequent action based upon different claim") (emphasis added).

Petitioner focuses her Initial Memorandum on Stipulations 13 and 14 and relies upon the fact that James Brown gave Petitioner funds to pay the legal fees for the Ahmed Annulment

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[64] *Ex parte Morris*, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006) ("As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation.") (*quoting Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996)). Moreover, in *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006), "[second husband] made a motion to intervene in [w]ife's annulment proceeding[,] [arguing] he had standing due to the effect [of] the annulment . . . on his [marriage to wife] [and] his pending action . . . to void their marriage on the ground of bigamy." The trial court "denied [second husband's] motion to intervene, finding he did not have standing because he was not a party to the marriage." *Id.*

[65] Stipulations 12, 15, and 16; Stipulation Exhibit 13.

[66] *Id.*

[67] See Petitioner's Initial Memorandum, pp. 21-28.

litigation and James Brown was aware of that litigation. Petitioner fails to cite why a non-party's one-time payment of legal fees is sufficient to collaterally estop such non-party to the findings of fact and conclusions of law in a case the non-party was not a party to and did not control. In fact, the vast majority of persuasive authority is to the effect that such payment is irrelevant for purposes of issue preclusion.

"It is not sufficient [for collateral estoppel] that the [non-party] merely contributed funds or advice in support of the party, supplied counsel to the party, or appeared as amicus curiae." Restatement (Second) of Judgments § 39, cmt. c (1982). *See also McKeown v. Wheat*, 231 F.2d 540 (5th Cir. 1956); *Sheldon v. Amperex Electronic Corp.*, 52 F.R.D. 1 (E.D.N.Y. 1971), *aff'd*, 449 F.2d 146 (2d Cir. 1971); *Minton v. Cavaney*, 364 P.2d 473 Cal. 1961).

In *Martin v. American Bancorp. Retirement Plan*, 407 F.3d 643, 652-53 (4th Cir. 2005), the United States Court of Appeals for the Fourth Circuit held the mere fact that parties to a second action helped finance a party in a prior action "is not sufficient, without other facts, to warrant the application of res judicata . . . ." *Citing General Foods Corp. v. Mass. Dept. of Public Health*, 648 F.2d 784, 788 (1st Cir. 1981) (noting the general rule that "a non-party is not bound by a judgment *merely* because he paid the expenses of a litigation"). *See also Litchfield v. Crane*, 8 S.Ct. 210, 123 U.S. 549, 31 L.Ed. 199 (1887) (holding one whose rights were similar to those of certain parties to a suit who interested herself in obtaining a decision favorable to her own interest and paid a part of the expenses was not estopped).

Additionally, in *Phoenix Bd. of Realtors v. U.S. Department of Justice*, 521 F.Supp. 828 (D.Ariz. 1981), the U.S. District Court for the District of Arizona held "[i]t is clear . . . that more than the mere provision of funding for litigation is required for principals of collateral estoppel to operate against a non-party." Similarly, in *McKeown v. Wheat*, 231 F.2d 540 (5th Cir. 1956), the

Fifth Circuit held "in Georgia the furnishing of counsel, the payment of counsel's fees is not sufficient" for non-party issue preclusion. *McKeown* at 544 (*citing May v. Loeb*, 196 S.E. 268, 271 (Ga. App. 1938). "For the 'outsider' to become bound, Georgia requires that he virtually be substituted as a party openly and avowedly in the management, direction and control of the case." *Id.* Petitioner's contention that Decedent and therefore the Estate are bound by the findings of fact and conclusions of law in the Ahmed Annulment Order based merely on his provision of legal fees to Petitioner's counsel is unpersuasive.

For these same reasons, Petitioner's contention Decedent and his Estate are bound by the Ahmed Annulment Order because Decedent "accepted the benefits"[68] of the Ahmed Annulment Order also fails. Most if not all of the cases cited by Petitioner proceed under the doctrine of collateral estoppel, and, therefore, only apply this concept to parties to an action. Because Decedent was not a party to the Ahmed annulment action, any purported "acceptance of the benefits" of the resulting order do not create the basis for estoppel as to the underlying factual findings and legal conclusions contained therein. Moreover, to the extent Decedent relied upon the judgment as it established the future status of Petitioner and Javed Ahmed in relation to each other, that judgment was *in rem* and, as explained above, does not bind non-parties to the issues decided within the judgment.[69]

As a final point, the Ahmed Annulment Order could not be used for collateral estoppel purposes because it was procured against a party in default. Even if it were found Petitioner properly served Mr. Ahmed by publication as authorized by the Charleston County family court,

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[68] *See* Initial Memorandum at pages 23-28.

[69] Petitioner asserts the Ahmed Annulment Order is the "law of the case." Petitioner's assertion is only worthy of a footnote, as the law of the case doctrine clearly does not encompass orders issued in entirely separate lawsuits between entirely different parties. *Walker v. Hannon*, 191 S.C. 14, 3 S.E.2d 243 (1939); *see also* Note, John R. Knight, *The Law of the Case Doctrine: What Does It Really Mean?*, 43-OCT Fed. Law. 8 (1996) (*quoting Arizona v. California*, 460 U.S. 605, 618 (1983)).

South Carolina does not allow default judgments to be used for collateral estoppel purposes. *State v. Bacote*, 331 S.C. 328, 503 S.E.2d 161 (1998).

South Carolina appellate courts, federal courts, and other state courts have interpreted *Bacote* "as establishing the rule that default judgments cannot be used to preclude subsequent litigation under the doctrine of collateral estoppel." *Kunst v. Loree*, 404 S.C. at 656, 746 S.E.2d at 363 (*citing In re Springhart*, 450 B.R. 725, 727 (Bankr. S.D. Ohio 2011) ("After reviewing the doctrine of collateral estoppel or issue preclusion, as adopted in South Carolina, the court concludes that the default judgment and order awarding damages cannot be afforded preclusive effect.... First, South Carolina does not allow default judgments to have preclusive effect under the collateral estoppel doctrine because no issues were actually litigated.")); *Powell v. Lane*, 375 Ark. 175, 289 S.W.3d 440, 451 (2008) (Wills, J., dissenting) (citing *Bacote* as an example of state law which "adhere[s] to the general rule" that default judgments cannot be used under the doctrine of collateral estoppel)).

As discussed previously, the Ahmed Annulment Order's finding of fact and conclusions of law are not binding against the LSA because of the order's *in rem* nature. In addition, these findings and conclusion are not even binding against Ahmed, because he was in default and the Court lacked *in personam* jurisdiction over him. Javed Ahmed never filed a notice of appearance in the Charleston County Family Court action and there is no evidence that he had actual knowledge of the proceedings against him. On April 15, 2004, the Family Court entered a Final Order granting Petitioner an annulment against Mr. Ahmed.[70] Because the annulment decree of the Charleston County Family Court was obtained against Mr. Ahmed by default and in the absence of *in personam* jurisdiction, its findings of fact and conclusions of law have no preclusive effect, not only against the LSA, but even against Javed Ahmed himself. The only

[70] Stipulation Exhibit 12.

person against whom the findings of fact and conclusions of law are binding are Petitioner herself under principles of estoppel.

IV. The evidence actually before the Court establishes Ahmed was not married to another person when he married Petitioner.

The only evidence before the Court that Ahmed was already married when he married Petitioner is Petitioner's own, self-serving, hearsay testimony. In addition to lacking in probative value, this testimony is also inadmissible.

Petitioner's testimony in the Charleston County family court proceeding amounted to an attempt to testify to what Mr. Ahmed (the declarant) purportedly stated to Petitioner - that he was married to more than one woman in Pakistan at the time he married Petitioner. Petitioner, at the time of the Charleston County family court proceeding and now, attempts to introduce Mr. Ahmed's alleged out-of-court statement for the purpose of proving the truth of the matter asserted, that Mr. Ahmed was in fact married at the time he purported to marry Petitioner. Petitioner's statements in the Charleston County Family Court action and in her affidavits constitute inadmissible hearsay under Rule 801, SCRE, which defines hearsay as an out-of-court "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* at Rule 801(c), SCRE. Petitioner's hearsay testimony is inadmissible under Rules 801 and 802, SCRE.

In contrast, the record now contains sworn, non-hearsay testimony that Javed Ahmed was *not* married when he married Petitioner in 1997. This evidence is Javed Ahmed's own sworn, notarized statement on the Texas Marriage License Application that: "I am not presently married." Application for Marriage License attached as **Exhibit 3**. Because Petitioner and

Ahmed's Marriage License Application is a sworn statement, and a certified public record[71], it is admissible in this proceeding. S.C. Code Ann. § 19-5-10; Rules 803(8), 902(4) and 1005, SCRE.

V. Petitioner cannot establish through the Compromise Agreement that she is James Brown's surviving spouse.

Petitioner asserts the Court and the Parties are bound by an agreement contained in the Compromise Agreement's that Petitioner is Decedent's Surviving Spouse. The Estate is not bound by the Compromise Agreement because the Estate was not a party to the Compromise Agreement. Moreover, throughout the settlement hearings, the Estate, through its Personal Representatives, actively fought the settlement in general and the Compromise Agreement in particular.[72] During the settlement negotiations and hearings, the Estate filed motions[73], made arguments[74], and presented testimony opposing the Compromise Agreement, asserting there was not enough evidence to determine that Petitioner was James Brown's surviving spouse.[75] The Personal Representatives asserted that Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (2008),

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[71] The LSA is informed that attorney or record John Donsbach will file a certified copy of this Application for Marriage License on or around October 3, 2014. In the event Mr. Donsbach does not file this document in its certified form, the LSA will file a certified copy of this document within the next week.

[72] Hearing Transcript (January 30, 2009) at page 21, lines 13-17 (Buchanan answering the Court: "Yes, sir, we oppose the present agreement at the present time."); *id.* at page 155, line 24 – page 156, line 6 (Pope on cross examination: "I believe that there's not been adequate due diligence" and therefore the compromise agreement is not fair and reasonable); *id.* at p. 159, line 18 – page 160, line 6. Hearing Transcript (March 4, 2009) at p. 65, line 22 – page 66, line 9.

[73] *See* PR/Trustees' Motion for Partial Summary Judgment, filed September 15, 2008; PR/Trustees' Motion for Partial Summary Judgment, filed January 20, 2009; PR/Trustees' Supplemental Motion to Dismiss (where applicable), and for Partial Summary Judgment, filed March 17, 2009; PR/Trustees' Brief . . . Supporting Validity and Incontestability of 2000 Trust; Lack of Probable Cause to Challenge Will or Trust; . . . and Related Relief, filed April 23, 2009

[74] *See* Hearing Transcript (March 25, 2009) at page 141, line 24 – page 150, line 13.

[75] *See generally* Hearing Transcripts (January 30, March 4-6, March 25-26, April 6, 2009).

barred use of the Ahmed Annulment Order to retroactively validate Petitioner's bigamous marriage to Decedent.[76]

Bauknight's actions during the settlement negotiations and approval process cannot bind the Estate. At that time, Bauknight was serving "for the limited purpose of providing input and recommendations to the court regarding the compromise agreement."[77] In contrast, "[t]he circuit court ordered [Pope and Buchanan] to continue [during the settlement approval proceedings] serving in their fiduciary capacities [as the Estates Personal Representatives and Trustees]...."[78] The Court heard and considered Pope and Buchanan's positions opposing approval of the settlement agreement in their fiduciary capacities in relation to the Estate and Trust.[79]

Another reason the Compromise Agreement does not bind the Estate now is because the Wilson v. Dallas decision of the South Carolina Supreme Court ended any potential effect the Compromise Agreement might have had. In this regard, the Court described its decision as "invalidating the compromise agreement."[80]

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[76] *See* Hearing Transcript (March 4, 2009) at page 69, lines 8-23; Hearing Transcript (March 5, 2009) at page 260, lines 4-23, page 263, lines 7-13, page 305, line 25 – page 306, line 4.

[77] Wilson v. Dallas, at. 420, 743 S.E.2d 746, 751. *See also* Hearing Transcript (January 30, 2009) at page 40, lines 6-25, page 59, lines 7-18 (Court stating: "I appointed him to report to this Court his opinion as to the fairness of the agreement"). Bauknight himself testified that "I certainly found that the [order of appointment] was very, very narrow in scope [and therefore] [I] tried to limit my work to exactly what the order told me to do." Hearing Transcript (January 30, 2009) at p. 100, lines 8-14.

[78] *Id.*

[79] *See generally* Hearing Transcripts (January 30, March 3-5, 25-26, April 6, 2009).

[80] Wilson v. Dallas, *supra*, at 449, 743 S.E.2d 746, 767.

VI. Petitioner cannot establish through the briefs and oral arguments presented in the Wilson v. Dallas appeal that she is James Brown's surviving spouse or bind the Estate or Court to the Settling Parties' application of *Lukich*.

Petitioner attempts through the doctrine of judicial estoppel to bind the Estate to the assertions made by the Settling Parties in their briefs and oral arguments in Wilson v. Dallas. Petitioner fails in this attempt because the concept of judicial estoppel does not apply to the settling parties' arguments before the Supreme Court. Moreover, the arguments cited by Petitioner cannot be attributed to the Estate.

In *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997), the South Carolina Supreme Court adopted judicial estoppel as it relates to matters of fact. "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997); *Cothran v. Brown*, 357 S.C. 210, 593 S.E.2d 629 (2004). The *Hayne* court stated "[t]he purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of courts rather than to protect litigants form allegedly improper or deceitful conduct by their adversaries." 327 S.C. at 251, 489 S.E.2d at 477 (relying on 31 C.J.S. *Estoppel & Waiver* § 139 (1996)). *See also Hawkins v. Bruno Yacht Sales, Inc.*, 342 S.C. 352, 368 536 S.E.2d 698, 706 (Ct. App. 2000) ("[J]udicial estoppel focuses on the relationship between the litigants and the judicial system."). Since judicial estoppel precludes parties from misrepresenting facts in order to gain an unfair advantage, once "a party has formerly asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." *Hayne*, 327 S.C. at 252, 489 S.E.2d at 477.

All five of the circumstances set forth below are generally required to exist in order to judicially estop a party:

(1) two inconsistent positions must be taken by the same party or parties in privity with each other;

(2) the positions must be taken in the same or related proceedings involving the same parties or parties in privity with each other;

(3) the party taking the position must have been successful in maintaining the first position and must 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 v. Brown, 357 S.C. 210, 216, 592 S.E.2d 629, 632 (*citing Carrigg v. Cannon*, 347 S.C. 75 at 83, 552 S.E.2d 767 at 772 (*citing* 28 Am. Jur. 2d *Estoppel & Waiver* § 74 (2000); *see also Lowery v. Stovall*, 92 F.3d 219, 223-24 (4th Cir. 1996) (noting common elements of judicial estoppel))). Petitioner's assertion of judicial estoppel fails on elements 1, 3, and 4.

The positions cited by Petitioner as taken in briefs and oral arguments in the Wilson v. Dallas Appeal were not "taken by the same party" as the LSA represents (that is, the Estate) in this litigation.

After failing in their efforts on behalf of the Estate to defeat approval of the Compromise Agreement, Adele Pope and Robert Buchanan, in their official capacities "as Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust" appealed the lower court's approval to the Court of Appeals (their Appeal was subsequently transferred to the Supreme Court). The Supreme Court concluded Pope and Buchanan had standing to appeal "based on their fiduciary capacities" as Personal Representatives and Trustees.[81] In their capacities as fiduciaries for the Estate, Pope and Buchanan argued in briefs and orally that Petitioner was not Decedent's surviving spouse, that

[81] Wilson v. Dallas, at 424, 743 S.E.2d 746, 753.

Petitioner's marriage to Decedent was bigamous because of her existing marriage to Javed Ahmed, and that Lukich barred Petitioners use of the Ahmed Annulment Order to retroactively validate Petitioner's bigamous marriage to Decedent. It would be inequitable to conclude, for judicial estoppel purposes, the Settling Parties and Bauknight were arguing in the Appeal on behalf of the Estate, as Pope and Buchanan were making directly opposing arguments in that same Appeal "in their fiduciary capacities" as the Estate's Personal Representatives.

Moreover, Bauknight and the Settling Parties were not "successful in maintaining the first position" nor did they "receive some benefit" from so doing. *Cothran v. Brown*, 357 S.C. at 216, 592 S.E.2d at 632. Indeed, those parties were wholly unsuccessful in maintaining their position—which was that the lower court's approval of the compromise agreement should be upheld—as the South Carolina Supreme Court rejected that argument and reversed the order of this court. They also received no benefit from their position.

Finally, the inconsistency between the position asserted by Bauknight and the Settling Parties during the Appeal, and the opposing position now asserted by the LSA is clearly not part of an intentional effort to mislead the court.

For these reasons, Petitioner's efforts at judicial estoppel fail.

VII. Petitioner cannot establish through the lower court's Order Approving Settlement Agreement that she is James Brown's surviving spouse or bind the Court and the Estate to the Settling Parties interpretation of *Lukich*.

Petitioner is attempting to bind the Court and the Estate to statements the Court made in the Order Approving Settlement. Petitioner's efforts here must fail as well.

The Court's May 26, 2009 Order Approving Settlement Agreement issued only three rulings: It approved the Compromise Agreement; removed Pope and Buchanan from their

fiduciary positions; and appointed Bauknight to fill those positions. There are no parts of the Order that served another purpose or function than to support these three rulings and it is clear which sections of the Order addressed and supported which rulings.

The Supreme Court in Wilson v. Dallas reversed the lower court's approval of the Compromise Agreement and its appointment of Bauknight. The Supreme Court affirmed the lower court's removal of Pope and Buchanan.

In overturning the lower court's approval of the Compromise Agreement, the Supreme Court described its decision as "invalidating the court's approval of the compromise agreement." Wilson v. Dallas, 403 S.C. at 449, 743 S.E.2d at 768

An appellate court has the power to reverse part of a lower court order and leave the other part in place. Petitioner is asserting here the Supreme Court reversed certain rulings of the lower court, but somehow left intact all of the lower court's analysis upon which it based those rulings. Petitioner's position is unsupportable.

All of the findings Petitioner asserts bind the Court now were part of the Court's analysis of whether it would approve the Compromise Agreement. It was that part of the Order the Supreme Court reversed.

Because the Supreme Court's decision "invalidated" the lower court's approval of the Compromise Agreement, every part of the Order supporting the lower court's approval has no further force and effect. A judgment that has been reversed on appeal is deprived of all conclusive effect. *See* 1B Moore's Federal Practice, 0.416[2] at 517 (1984). *See also Christy v. Christy*, 317 S.C. 145, 452 S.E.2d 1 (Ct. App. 1994) (holding that where appellate court reverses a trial court's order, "the parties are restored to their [previous] positions").

It is also fatal to Petitioner's position that the lower court's Order approving the Compromise Agreement was not a ruling on the merits of Petitioner's claims.

First, the lower court's Order did not result from an evidentiary hearing on the merits[82]. Nor could it have, as the settlement hearing on which that Order was based occurred well before any party could complete, or even seriously begin, discovery. The hearing did not include any live testimony from fact witnesses or the introduction of exhibits from which the merits could be determined.

Second, the Order's quotes to which Petitioner now seeks to bind the Court appear in the Court's analysis of whether the respective positions of the Parties created a "good faith controversy" under South Carolina Code Section 62-3-1102. All of the quoted statements appear in Section II. B. of the Order Approving Settlement Agreement. The beginning of that section fully explains the intention and meaning of the Court's analysis that follows:

> **B. Standard for Approving Settlement**
>
> South Carolina Code Section 62-3-1102 provides that the Court shall approve the settlement and direct the fiduciaries to execute the agreement if it: (1) finds the contest or controversy is in good faith, and (2) the effect of the agreement on interested persons is just and reasonable.
>
> **1. Good faith controversy**
>
> Based on the history of matters involving the Estate and other issues related to James Brown, I find that it is incontrovertible that a good faith controversy exists. Any of the factors discussed hereinafter could constitute grounds for finding that a good faith controversy exists. The cumulation of these issues creates an overwhelming set of grounds for finding that a good faith controversy exists. Some of the more salient issues are as follows:...

Order, p. 23.

[82] Indeed, during the hearing, when Petitioner's attorney attempted to place Petitioner's and Decedent's marriage license into evidence, upon objection, the Court excluded it, stating "We're not going to try that case here today" and holding the question before the Court was whether there was a good faith controversy. March 5, 2009 Hearing Transcript, pp. 260, l. 4 – 464, l. 3.

Following that introduction, the Court discusses strengths and weaknesses of the Parties' respective positions. Petitioner asserts the Court is now bound to treat quotes from this section of the Order *as rulings on the merits of Petitioner's claims.*

Later in that same Section B. of the Order the court states: "...significant arguments can be made to recognize Mrs. Brown's spousal share claims, as discussed above." Order, p. 35. This, again, shows the court was analyzing the strengths of Petitioner's arguments and not ruling upon their merits.

Finally, and not surprisingly, the Court's findings and conclusions set forth on the last two pages of the Order do not contain any rulings or other mention of Petitioner's status as Decedent's surviving spouse, or any other specific element of Petitioner's claim. The only rulings in any way related to the merits of Petitioner's claims are "4. The controversy is in good faith; and 5. The settlement is fair, equitable, and reasonable." Order, p. 44.

Any discussion by the lower court regarding Petitioner's status as surviving spouse and/or how Lukich might apply to Petitioner's claims were, therefore, only part of the lower court's analysis of whether a "good faith controversy" existed. Petitioner's attempt to bind this Court to those findings as if they were rulings on the merits of her claim mischaracterize the Court's intent and is certainly not supported by any valid legal theory.

VIII. Petitioner cannot use the Ahmed Annulment Order to retroactively validate Petitioner's and Decedent's bigamous marriage.

A. Lukich bars Petitioner from retroactively applying the Ahmed Annulment Order.

The Supreme Court in Lukich. 379 S.C. 589, 666 S.E.2d 906, held without limitation that an annulment order finding a wife's first marriage void *ab initio* does not "relate back" so as to validate a wife's second bigamous marriage. *Id.* at 592-93, 666 S.E.2d at 907. The Supreme Court opinion makes no distinction between marriages that are annulled as voidable and those that are annulled because they never possessed legal validity pursuant to a South Carolina statute,[83] and appears to apply its holding to both in equal measure.

The Supreme Court chose to express its holding in Lukich but exclude the Court of Appeals' limiting language in footnote 2. *See Lukich v. Lukich*, 368 S.C. 47, 55 note 2, 627 S.E.2d 754, 758 note 2 (Ct. App. 2006). The Court further suggested its holding was not so-limited by noting "under South Carolina's current view of bigamy, the family court has jurisdiction to decide all ancillary matters where it annuls a marriage and declares it void *ab initio*." at 593, 666 S.E.2d at 907. In support of this point the Court cited Rodman v. Rodman, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004). This reference makes it clear the Supreme Court intends its Lukich holding to apply in *all cases*.

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[83] Petitioner emphasizes footnote 2 of the Court of Appeals' Lukich decision limiting that Court's holding to the facts of that case. Footnote 2 stated the Court of Appeals' holding did not address situations where the annulled first marriage was one that never has legal validity in South Carolina, including "(1) bigamous marriages...; (2) same sex marriages...; and (3) marriages of minors under the age of 16....." While the Court of Appeals decision left this question open, the Supreme Court closed it by excluding any similar limitation in its final Lukich ruling. Morever, the Court of Appeals in Lukich based its decision on Scarboro v. Morgan, 233 N.C. 449, 64 S.E.2d 422 (N.C. 1951). Like Lukich, Scarboro held a wife could not use a decree annulling her first marriage to give retroactive validity her second bigamous marriage. It is telling that Scarboro's ruling applied to an annulment decree declaring the wife's first marriage void ab initio because wife had been a minor under statutory age, *one of the three marriage types named by our Court of Appeals in footnote 2.*

Rodman stands for the proposition that the Family Court may annul a marriage on the basis of bigamy, and still maintain jurisdiction over the parties' property distribution.[84] If the annulment "relates back" so that the annulled marriage never existed, then the family court would not have jurisdiction over the annulled-couple's property distribution. The Rodman court's ruling rejects this interpretation. In commenting on Rodman, the Supreme Court in Lukich signals its intentions regarding the broad scope of the Lukich ruling:

> It would be inconsistent at best to hold that a marriage declared void *ab initio* never existed for bigamy purposes, yet can serve as the foundation for a family court's division of property, alimony, and/or child support.[85]

Lukich's reference to the Rodman Court's holding strongly suggests that Lukich intends its bar to applying annulment orders retroactively, applies even when, as in the present case, the first marriage was annulled as bigamous.

B. The Ahmed Annulment Order is an order *in rem*.

As discussed above, because the Ahmed Annulment Order is an order *in rem*, as to third parties, it establishes only the future status of the parties in relation to each other. "It does not establish the previous validity of their marriage against third persons who were not and had no right to be heard thereon..." In re Rowe's Estate, 141 P.2d 832, 836 (Ore. 1943).

C. The Ahmed Annulment Order was a default judgment.

Lukich is surprisingly similar to the present case in on respect: the Wife in Lukich, during the pendency of the second husband's Beaufort County proceeding to void his marriage to Wife as bigamous, Wife went to Charleston County and hastily obtained an order from Charleston Family Court Judge Frances Segars-Andrews annulling her marriage to her first

[84] Rodman v. Rodman, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004).
[85] Lukich v. Lukich, 379 S.C. 589, 593, 666 S.E.2d 906, 907 (2008)

husband.[86] However, unlike Petitioner, the wife in Lukich supported her testimony in the Charleston Family Court annulment hearing with an affidavit from her first husband, who stipulated that he agreed with wife's position.[87]

In the present case, Petitioner appears to have made some efforts to locate Javed Ahmed, but ultimately served him by publication. It is stipulated she never served him personally, and Ahmed never appeared, answered, or otherwise pled in that matter. Ahmed did not participate in the Ahmed Annulment Action in any way.[88]

While Petitioner may try to characterize it otherwise, the Ahmed Annulment Order was a default judgment and was issued in the absence of *in personam* jurisdiction over Javed Ahmed. As such, it cannot serve as the basis for collateral estoppel. "In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation." *Kunst v. Loree*, 404 S.C. at 654, 746 S.E.2d at 362 (citations omitted). *See also State v. Bacote*, 331 S.C. 328, 503 S.E.2d 161 (1998) ("In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation.")

The clear and unambiguous holding of *Lukich* is that an annulment order does not relate back so as to retroactively validate a subsequent technically bigamous marriage. 379 S.C. 589, 666 S.E.2d 906. Petitioner attempts to hang her hat on dicta contained in a footnote of the South

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[86] Lukich v. Lukich, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (S.Ct. 2006)

[87] *Id.*

[88] Stipulation 17; Stipulation Exhibit 13 (the "Ahmed Annulment Transcript.")

Carolina Court of Appeals' decision in *Lukich* but such ruling is not binding. *See Sloan Const. Co., Inc. v. Southco Grassing, Inc.*, 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011) (rulings must have been "explicitly decided" or "necessarily decided" by the trial court), *see also* (J. Pleicones, dissenting) (*citing Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011) (appellate court comments on unpreserved issue must be viewed as *dicta*).

CONCLUSION

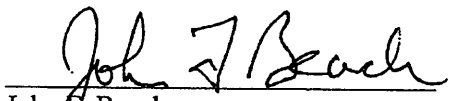
Petitioner is unable to succeed on the merits of her claims because Petitioner cannot meet her burden of proving Petitioner and James Brown were lawfully married to each other at the time of Decedent's death and, accordingly, that Petitioner is Decedent's "surviving spouse."

The LSA is therefore entitled to an order finding: (1) when Petitioner participated in the December 14, 2001 marriage ceremony with Decedent, Petitioner was still lawfully married to Javed Ahmed; (2) it was legally impossible for Petitioner to marry Decedent in December 14, 2001 because of South Carolina's law against bigamous marriages; (3) Petitioner cannot use the Ahmed Annulment Order to retroactively validate her bigamous December 14, 2001 marriage to Decedent; (4) Petitioner was not lawfully married to Decedent when he died on December 25, 2006; and (5) Petitioner is not Decedent's surviving spouse.

Based on these findings, the Court should deny Petitioner's motion for partial summary judgment, grant the LSA's motion for summary judgment, and deny Petitioner's omitted spouse and elective share claims.

Respectfully submitted,

ADAMS AND REESE LLP



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October 3, 2014

State of South Carolina

County of Aiken

Court of Common Pleas

IN RE: The Estate of James Brown, A/K/A James Joseph Brown

Transcript of Record
2013-CP-02-02849
2013-CP-02-02850
2013-CP-02-02851
2013-CP-02-1647

March 31, 2014
Bamberg, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

A P P E A R A N C E S:

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Louis Levenson, Esquire
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Bethanie K. Patterson
Circuit Court Reporter

know is if someone brings the --

THE COURT: All right. Mr. Barr, I'm going to give you 20 days to amend your submission to me to include what agreement that you're referring to that would have caused her to sort of be lulled, quote, unquote, into not seeking some type of adjudication within the statutory timeframe. And I'll hold it in abeyance to let you get me that within 20 days, and then I'll rule on it after, whatever you submit to me. All right?

MR. BARR: All right.

THE COURT: Anything else by anyone on that issue?

The last one is the diary question. All right. This is the motion by Mr. Sojourner in his capacity to amend the -- or modify the protective order related to the diary. And as I understand, they want access to the diary for purposes of defending the Estate in the various litigations going in, but they acknowledge that it should be subject to a protective order as outlined in their motion.

Mr. Rosen has, first off all, said, no, shouldn't be given to anybody because it was allegedly stolen from the house and she was barred from going back in until she came before me and I

allowed her back in. But if that's -- and has some type of common law and/or privilege that would preclude the submission of the diary for these proceedings.

In the alternative, in the event that I say it should be subject to discovery in this litigation, that the protective order should include a confidentiality provision that he sets out in his motion to protect the contents of that diary being disseminated in any manner whatsoever other than for the purposes of this litigation and then to be returned back to Ms. Tommie Rae Brown at the conclusion of all of this -- is that sort of where we are?

MR. ROSEN: Yes, sir.

THE COURT: Mr. Rosen, what common law -- you cite in your memo keeping the diary is protected by both common law and statutory provisions, and then you sort of segue into something else about a 403 analysis. Is there a statutory provision that I'm unaware of?

MR. ROSEN: No.

THE COURT: Privilege?

MR. ROSEN: No, there isn't, Your Honor. But I have an argument I want to make on this. I want to

hand up to the Court, these are just -- I want to run through a little bit of history of this thing because I think it's important to my argument.

THE COURT: Sure.

You don't mind that I let him go first, because I'm --

MR. BEACH: No.

MR. ROSEN: I understand the burden is on me. Your Honor, let me hand these up. I'm not really filing anything; these are things already on file with the Court. I'm really just asking the Court to take judicial notice of its own file. So I'm asking the Court to look at our motion for summary judgment -- I'll explain why that is important in a minute -- filed in October of 2007. How I wish we had proceeded seven years ago, but anyway --

THE COURT: Hindsight is 20/20.

MR. ROSEN: It always is. Motion for summary judgment, motion for limited discovery, pending motion for summary judgment, or your order. You've probably got your orders all in front of you. These are the orders, motion to require --

THE COURT: There's a thousand orders.

MR. ROSEN: No. I mean, the orders related to the diary. I've had to go back and relive the whole

thing myself, Your Honor. You know the kind of stress that puts on one.

THE COURT: That's the main concern of this Court is the stress that Mr. Rosen is under.

MR. ROSEN: Well, it should be Your Honor. Anyway, Motion to Require All Prior and Current Personal Representatives to Return the Diaries.

Petitioner Tommie Rae Brown's Motion to Return Personal Property -- this is all relevant to the argument I'm going to make -- Motion For Protective Order and Sanctions, Motion For Protective Order Legal Fees, her original affidavit, memorandum in support of her motion, order regarding the diaries, et cetera. This is sort of a -- the history of the thing; not all of it, but --

THE COURT: I know the diary has created a lot of angst and --

MR. ROSEN: Well, it has, Your Honor. Let me say this: The -- and of course she's filed another affidavit, which Your Honor has. So, I mean, I think what's undisputed, and I think the Court went back -- and I've got transcripts from February 14th, 2008, transcripts from February 20th, 2008. Essentially what it amounts to -- and I'll try to say this in a non-argumentative way: When Mr. Brown

died, Tommie Rae Brown -- and I know people in here keep referring to her as Tommie Rae Hiney and all these different names, and I wish they would call her by her proper name. But I can't make them be polite, but I'm requesting that they do.

She was living with Mr. Brown and she had a ceremonial marriage with Mr. Brown, and as far as Mr. Brown was concerned, they were married. He died. She was in California. She got back, she was locked out of her house, trying to get her stuff, couldn't get her stuff. And we went through about a year of litigation. We went through filing all kinds of motions to get her stuff, which the personal representative -- not these personal representatives, but the personal representative of the Estate.

THE COURT: I thought we had a hearing early on that I allowed her to go back in the house and it was on TV and you were out there and --

MR. ROSEN: I was on TV and my car was on TV. But more importantly --

THE COURT: Didn't she get back in the house?

MR. ROSEN: She -- it went on -- I mean, if you go back and look at this, it went on for months and months. And she got back in and they wouldn't let

her take her things and they had taken things that we didn't know about. Then later, like a year later, we had to file a motion to get her stuff, and then it was all put in storage. And of course at this point, we didn't even know they had the diaries because that had been hidden from us. And this was all in this record. No one has gone back and looked at it.

And basically we had to file all kinds of motions and spend all kinds of time just to get her stuff back. In fact, there's an order ordering Cannon and those people to file an affidavit about exactly how they took the diary, which they order they've never obeyed and never going to obey. But in any event, as best I can piece together the information -- I don't even think there's even anybody in the room that's even going to contest this: Her things were at the house. Whether she was married to him legally or not married, they were living together and her things were there, which they had no right to take; they had no right to take it as evidence, they had no right to take it, period. They may have had a right to store it and give it to her. But they took it, they took it and they carried it away and kept possession of it,

which is the definition of larceny, and they invaded her privacy, stole her stuff, and hid it and hid it from the Court and hid it from us, and we spent an enormous amount of time -- in fact, until I went over all this, I had forgotten all the time we spent on it.

And then at some point, Wayne Byrd wrote a letter saying, oh, and by the way, we have a diary, which we didn't even know about, and I've given it to everybody and it's been disseminated all over the world, to the lawyers anyway. So what we have is about the most outrageous conduct one can imagine. The woman is living with a man as husband and wife. They say they were not married, I understand that. But she's still a human being, still a citizen of South Carolina, they were still the personal representatives of the estate appointed by the Court with a fiduciary duty to treat people properly, and they took her stuff illegally.

And then, despite Court orders and requests, they were not returned. We never knew about a diary. And then all of a sudden -- and this is all in the record -- Mr. Byrd sends out to everybody copies of her diary, which was outrageous and which the Court found to be outrageous. And we then

moved, several motions, several orders, to get the diary back. So now the diaries are resting -- the original is in my office which, remarkably, after seven years, I still have them. And -- but in any event, there's copies that were floated around, e-mails and all kinds of things.

Now, no one is supposed to have those things, no one. So I don't know -- and I know the personal representatives have never read them because they never had them. They're asking they be produced. And their motion is very to careful to say they want things based on topic areas that they think might be in the diary. But we all know -- I say we all know. I know, I believe, people still have copies of it. So what we have --

THE COURT: Well, I haven't heard in a long time that anybody has disseminated any portions of the diary. It hadn't been brought to my attention.

MR. ROSEN: It hasn't been brought to my attention either, because if it happened, I'd rule them in in five minutes.

THE COURT: I know you would have. And we did have a hearing in Lexington and left it like it was, which is, it's with you and it's not to be used in any manner whatsoever.

MR. ROSEN: Well, I'm going to represent to the Court I have the originals, they're in the same condition they were in when they were given to me. And anyway, there's e-mail copies that we have, so, I mean, the actual diaries are there.

Now, I don't think the Court should allow anybody to have these diaries, and that's based on Rule 26 (C), protective order. And, you know, I've spent a lot of time doing a lot of research on this, and this is my belief: Upon motion by a party or by the party from whom discovery is sought -- that's us -- and for good cause shown -- and I think I've just articulated to you the good cause. The good cause is, when people break into your -- I say break in. They didn't break into the house; they had a right to go in James Brown's house. But when they come in the house and illegally and maybe criminally take something and then want to use it in litigation, I don't think the Court, which is the court of equity, and this is an equity proceeding, should allow that, period.

Upon motion by a party or by a party from whom discovery is sought, and for good cause shown -- which I've just shown you -- the Court in which the action is pending, the Court where the deposition

has to be taken, may make such order which justice requires -- well, I think justice requires it -- to protect a party, Tommie Rae, from annoyance, embarrassment, oppression or undue burden, including one or more of the following, that discovery not be had. That's what I'm asking for, not be had, and it not be had because the personal representatives have violated the law, have acted highly improperly, have done really terrible things that I think are actionable, and I think that her -- that this should not be done.

Now, in addition, she's filed an affidavit saying this: These diaries are random thoughts. At the time they were written, she was in a tumultuous marriage of James Brown -- which is a matter of public record, I mean, you can go on the internet and find this -- and they were fighting and fussing. And one court on the annulment and another court in Aiken on the divorce and all kinds of things are going on, and she's writing her private thoughts, she's also in a 12 Step Program, she was in California at a rehab center; there's things in there literally addressed to God, literally addressed to Jesus, literally written down for her sponsor in AA, and all kinds of things. And, you

know, there's no reason for this to even come into this case.

And let me go further. There are motions pending to limit the discovery in this case. You know, seven years ago I filed a motion for summary judgment. And my position then and my position now is the same; she's either married to James Brown or she is isn't. And that's a decision for you to make and maybe ultimately for the Supreme Court to make. Whether she's married or not really depends on the law and not the facts. It doesn't really matter what anybody says.

In the first instance, either the ceremonial marriage and the annulment of the Javed Ahmed marriage together, the court order of the family court means, under whatever authority you want to take, that the marriage is legal. And if the marriage is legal, we don't need any discovery at all. In fact, I've already got a motion to limit discovery. You already issued an order, actually, limiting discovery in view of the fact that our motion for summary judgment was going to be heard seven years ago. So they don't need the diary; they don't need it because it's not relevant. And the reason it's not relevant is -- and it can't be

relevant because either Tommie Rae Brown, when she married James Brown, either was married to Javed Ahmed or she was not married to Javed Ahmed. And there's nothing that anybody can say that can change that because the annulment says she wasn't married, and that order is binding on this Court in my view, not binding on this Court in others'. That's a legal issue. And what I'm trying to say today is --

THE COURT: Well, is that motion still viable for summary judgment?

MR. ROSEN: Well, I don't know. It was filed, it was never ruled on. But to --

THE COURT: A lot of things happened after that.

MR. ROSEN: A lot of things happened after that. So probably what I'm going to is file an amended and supplemental motion for summary judgment. I'm going to file a motion for protective order. They've sent me 30 pages of interrogatories and requests to produce, which that's their job, and I'm going to move for a protective order that the discovery not be had at least until the summary judgment motion is heard, because we can take depositions from now till Doomsday, spend $250,000, fly all over the country, and there's really

nothing -- there's no point in it, because either the annulment is a valid annulment and the marriage to James Brown is a valid marriage or it isn't. And I think that's a legal matter for the Court, ultimately.

THE COURT: Then why don't you file your motion for summary judgment?

MR. ROSEN: That's what I think we ought to do. I don't want to argue it today but, I mean, I would like to argue it.

And so --

THE COURT: What is your position to let him file that and then depending on how you rule, then it may be needed in discovery? But we don't need the diary for your motion for summary judgment.

MR. ROSEN: That's what I'm saying, we don't need the diary.

THE COURT: Because it's a legal argument on annulment, and if it was annuled, and if not, could be married to two people at once.

MR. ROSEN: Right. The family court issued a final order that's binding on the world, according to us -- is not binding on the --

THE COURT: Let me hear from Mr. Beach. It is a -- the diary and the whole surrounding of how the

diary was acquired, it's not the most tasteful thing in the world. But on the other side of the coin, if this thing has factual issues that preclude summary judgment, then there may be a lot of stuff in there that could be -- some stuff that may be, I don't know, relevant to the issues at hand. And some of the stuff obviously is not, but it may require in-camera review. I certainly don't want to take on that.

MR. BARR: Your Honor, before Mr. Beach starts, I'd like to bring to the Court's attention that I filed a special appearance notice for this motion and the protective order because we were never served on that either.

THE COURT: Thank you. When did you file it?

MR. BARR: I handed it to the Court this morning.

THE COURT: Thank you.

MR. BARR: Thank you. I just wanted to get that on the record.

THE COURT: Thank you. You're on the record.

So if it's truly a legal argument -- and you may not gree with that, Mr. Beach -- but seems to me that if we could hear the motion for summary judgment, depending on how I go with that, then we

could hear the diary. If I say, fellows, there's factual issues that's got to be developed, then I think the diary probably should be discoverable after somebody maybe does an in-camera review to determine, obviously, what she's alleging to her 12 step people or her religious beliefs probably don't have a thing to do with it if she's in there talking about -- if she is or she isn't, I don't know what she -- I've never seen them, never even looked at them. There may be some things in there that are relevant to this particular litigation and those things may be discoverable. Everything in the diary, I don't know that that's discoverable, so we may need to work around that.

But I guess my question is, Mr. Rosen is saying his case rises or falls on a legal argument, seems like to me you'd give him that shot to file it quickly and let's move on it. And then if I rule with it, y'all go Columbia and if I rule against it, y'all go to Columbia. Let's see where we are.

MR. BEACH: Well, Judge, we do agree that his case could fall on the question of whether Tommie Rae Brown is the surviving spouse. We think he could lose the case based --

THE COURT: Surviving spouse. But to be a

surviving spouse, she's got to be a spouse.

MR. BEACH: Correct.

THE COURT: And to be a spouse, she has to have a valid marriage.

MR. BEACH: Exactly. And we think --

THE COURT: Is the question --

MR. BEACH: I'm sorry.

THE COURT: I didn't mean to cut you off.

MR. BEACH: No, no.

THE COURT: Is the question of the validity of the marriage, is that a legal question or does -- or do you have to develop facts to protect your client on that matter? And you may not want to answer that right now, you may want to think about it. But it seems to me if it's strictly a legal question, then maybe we get around all this discovery and save some money and just hear that motion and then go from there. That's just me thinking out loud a little bit.

MR. BEACH: Your Honor, I think the question of whether the decision that was made in the Charleston family court in 2004 -- I think it was April 15th of 2004 -- that annulled Tommie Rae Brown's marriage to -- 1997 marriage to Javed Ahmed, the question of whether that under the Lucas decision legally can

be -- can relate back, if you will, to the marriage so that it would make her subsequent marriage to James Brown in 2001 valid, that question is, in fact, a legal question, and we agree that that is a legal question.

THE COURT: Well, Mr. Rosen, is that sort of where your summary judgment is headed to?

MR. ROSEN: Yes, sir. Yeah. Yeah. We have the argument that the annulment is binding and that she's there for the spouse.

THE COURT: Well --

MR. BEACH: Now, Judge, there are -- that simple question could be a legal question. On the other hand, if Mr. Rosen asserts that the -- if Mr. Rosen asserts that James Brown is estopped by that order, then Mr. Rosen is probably going to have to assert some facts to support that estoppel argument because Mr. Brown --

THE COURT: Well, if he does -- if he does that, then I think the summary judgment goes out the window.

MR. BEACH: I think so, because Mr. Brown was not a party -- a named party to that case. So the only thing that we can assume Mr. Rosen might argue on that is that Mr. Brown was a de facto party to

the case and therefore should be estopped from that. And those are factual questions. So even the question of whether the annulment order is -- bars her claim, could end up turning on some factual decision.

THE COURT: Well, here's what I may do, Mr. Beach, in trying to be efficient and not sending you all over the world and spending a quarter of a million dollars, as Mr. Rosen said: I may hold this motion in abeyance for 30 days, giving Mr. Rosen an opportunity, if he chooses to do so, to file a motion for summary judgment, and depending on how that goes, if it's strictly a legal question, that may be dispositive. If it involves factual issues, obviously I would not rule on it; I will say you have to have an opportunity to complete discovery before I rule to determine whether or not there were genuine issues of material fact in dispute.

MR. BEACH: Okay.

THE COURT: And then depending on how I rule on that, if need be, we'll come back and revisit the production of the Tommie Rae Brown's diary. But my thoughts on that would probably be if there's factual issues involved, that it would be something that would be discoverable, it would be subject to a

very strict protective order, and probably would want some type of in-camera review. And since I'm going to be listening to a lot of stuff in this case, I probably might appoint a special person to have the in-camera review so I will not have read all of that other stuff that may not be germane to this. That's sort of going through my mind.

MR. BEACH: Well, that is sort of going through our mind too, Your Honor. So we're thinking along the same lines.

MR. ROSEN: That sounds very reasonable, Judge.

THE COURT: All right. Let's do this: Mr. Rosen, I'll give you 30 days -- I'll give Mr. Rosen 30 days to file a motion for summary judgment, if he intends to do so. If he does not, then I will reconvene this or either issue an order. Mr. Rosen, I think we've made a record of --

MR. ROSEN: Thank you.

THE COURT: Are we okay with that? I'm sorry.

MR. BEACH: Your Honor, I'm sorry, my client was trying to give me some thoughts and --

THE COURT: I know you've got a -- I won't comment.

I said that I'm going to give Mr. Rosen 30 days to file a motion for summary judgment, and if he

files it, we'll have that hearing, hold this in abeyance. If he presents factual issues, I'll just go ahead and rule on what we have here today.

But my thoughts are to make it discoverable with a real strict protective order and probably some type of in-camera review, perhaps not by me, but by someone independent with some judicial background so I don't get influenced by what I would read conducting an in-camera review. I don't think I need to be privy to that.

MR. BEACH: Okay. And, Your Honor --

THE COURT: Is that a workable solution?

MR. ROSEN: That's fine.

MR. BEACH: The question is, if Mr. Rosen files a motion for summary judgment on his claim and that motion for summary judgment on his claim requires the Court to decide upon factual issues, then we're going to be moving forward with discovery and --

THE COURT: That's correct.

MR. BEACH: Okay.

THE COURT: Because I don't think I would be fair to anybody ruling on summary judgment if there were factual issues to be considered.

MR. ROSEN: I can't argue with that, Your Honor.

THE COURT: All right. We'll leave it at that.

Anything else by anyone?

MR. BEACH: Your Honor, I will say this, and this is a point that Mr. Sojourner has raised: We don't think that Mr. Rosen will be able to file a motion for summary judgment in his client's favor under the statutory actions that she has filed without there being factual issues involved because there are several components of the statute that are in addition to just surviving spouse. That's only a threshold requirement.

THE COURT: I'm going to give him that shot.

MR. BEACH: Yes, sir.

MR. ROSEN: Thank you, Your Honor.

THE COURT: All right. Gentlemen, ladies, Mr. Barr, please file your motions that you've made mention of here today so they can get on the motion calendar and we can set those for disposition.

MR. BARR: Yes, sir. I'm going to mail them; is that all right?

THE COURT: That's fine. I'm not telling you how to do it, I'm just saying please do it now. You've also got to serve everybody.

MR. BARR: Yes, sir. Well, I served everybody, but I'll re-serve them; is that all right?

THE COURT: I'm just saying that you need to.

MR. BARR: Okay.

MR. LEVENSON: Your Honor, may it please the Court, before we wrap up --

THE COURT: Are we on the record or off the record?

MR. LEVENSON: On the record, Your Honor. I had filed pro hac vice motions for Mr. Bell in the three new severed cases because they are new case numbers. I hadn't heard any objections from any of the parties, I don't know if there are or not.

MR. ROSEN: I just can't think of one. I'm still thinking.

THE COURT: He did -- I think you filed a motion, but you did not send me a proposed order.

MR. ROSEN: I did not because I did not know whether --

THE COURT: All right. Gentlemen, I'm going to sign those, send me the orders. Unless I hear an objection from anybody, I'll sign one day next week.

MR. LEVENSON: I'll send them to all the parties when I send them to you. Thank you, Your Honor.

THE COURT: Anything else?

MR. BARR: Well, I served everybody who I

thought --

THE COURT: Mr. Barr, I'm not telling you how to do it, I'm just saying that you -- you may have already done it, I don't know.

MR. BARR: I was wondering whether that was acceptable or not.

THE COURT: I don't -- I don't give advice for --

MR. BARR: Okay.

MR. LEVENSON: May I be heard on just another scheduling issue?

THE COURT: On the record or off?

MR. LEVENSON: On the -- well, either one, it doesn't matter.

-- END OF PROCEEDINGS --

C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie Patterson, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the captioned cause, relative to appeal in the Common Pleas Court for Aiken County, South Carolina, on the 31st of March, 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

April 30, 2014

Bethanie Patterson
Circuit Court Reporter

STATE OF SOUTH CAROLINA COUNTY OF AIKEN Tommie Rae Brown, Petitioner, v. David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown and Daryl Brown, Respondents, IN RE: **THE ESTATE OF JAMES BROWN A/K/A JAMES JOSEPH BROWN**	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT C/A Nos. 2013-CP-02-02849, 2013-CP-02-02850 **AFFIDAVIT OF DAVID B. BELL**

PERSONALLY appeared before me, David B. Bell, Esquire, who, being duly sworn, deposes and states that the following is based upon his own personal knowledge, except those averments stated upon information and belief, and as to those matters he believes them to be true:

1. I am over the age of eighteen and am of sound mind to give the testimony provided in this affidavit.

2. I have personal knowledge of and am competent to swear to the facts set forth in this affidavit.

3. I am an attorney licensed to practice in the State of Georgia and have been so licensed since 1977.

4. I own my own practice known as the David Bell Law Firm and I primarily practice in Georgia.

5. I am an attorney of record in various lawsuits related to the will and trust of James Brown, including without limitation Case No. 2008-CP-02-1647 (collectively, the "James Brown Will and Trust Cases"). Along with Matthew Bodman, Esquire, who is licensed to practice in the State of South Carolina, I have represented certain parties to the James Brown Will and Trust Cases since 2007. On April 9, 2007, I filed a Motion for Admission Pro Hac Vice which was granted by the Honorable Doyet A. Early on April 26, 2007.

6. During 2008 I searched for Javed Ahmed. I found an individual, Mr. Ali Sayed, in St. Louis Missouri who had lived in Houston Texas and knew Mr. Ahmed. Mr. Sayed gave me a telephone number for Mr. Ahmed in Pakistan.

7. Around February, 2008, I arrived at work early because of the time difference between Augusta and Pakistan, and called the telephone number Mr. Sayed had provided. Javed Ahmed answered the call almost immediately and confirmed to me he was the same Javed Ahmed who had married Tommie Rae Hynie ("Petitioner") on February 12, 1997.

8. Mr. Ahmed acknowledged he married Petitioner in Texas on February 12, 1997.

9. Mr. Ahmed stated he was not married to anyone else when he married Petitioner.

10. Mr. Ahmed stated he and Petitioner lived together as husband and wife for a period of time following their February 12, 1997 marriage.

11. I asked Mr. Ahmed whether he would provide further information and he stated he would have to talk to Petitioner before he could answer my request.

12. Following my telephone call with Mr. Ahmed I engaged Taha Alizai, an attorney in Pakistan, for the purposes of interviewing and obtaining an affidavit from Mr. Ahmed, and arranging to take his deposition.

13. Taha Alizai conducted an extensive in-person interview of Mr. Ahmed toward the end of February, 2008, and followed up shortly thereafter through a telephone call with Mr. Ahmed. Mr. Alizai was unable to obtain an affidavit from Mr. Ahmed or Mr. Ahmed's agreement to give a deposition.

14. Taha Alizai provided to me the affidavit attached as Exhibit 1, which was filed with the Court in these cases on October 9, 2008 and which I submit now, along with this affidavit, in opposition to Petitioner's Motion for Partial Summary Judgment.

FURTHER AFFIANT SAYETH NAUGHT.

David Bell

SWORN TO BEFORE ME THIS 30th
DAY OF September 2014

NOTARY PUBLIC FOR THE STATE OF GEORGIA

MY COMMISSION EXPIRES:

ROBERTA H. BUSH NOTARY PUBLIC Expires 4-17-15 RICHMOND COUNTY, GEORGIA

Exhibit 3 to LSA Memo in Support

T 28734

APPLICATION FOR MARRIAGE LICENSE, HARRIS COUNTY, TEXAS 02/12/97 1100020695 $31.00

BEVERLY B. KAUFMAN, COUNTY CLERK, HARRIS COUNTY, TEXAS Marriage License

WARNING
THE PENALTY FOR KNOWINGLY MAKING A FALSE STATEMENT IN THIS FORM CAN BE 2 - 10 YEARS IN PRISON AND A FINE OF UP TO $10,000. (HEALTH AND SAFETY CODE, SEC. 195.003)

MALE

1 FULL NAME — FIRST: JAVED — MIDDLE: AHMED — LAST:

2 SOCIAL SECURITY NUMBER:

3 USUAL RESIDENCE — STREET NAME AND NUMBER: — CITY: HOUSTON — STATE: TEXAS

4 DATE OF BIRTH: 69

5 PLACE OF BIRTH — CITY: DADU SHIND — COUNTY: — STATE: PAKISTAN

6 PROOF OF IDENTITY AND AGE: TDL

7 If divorced, did divorce occur within last 30 days? YES ☐ NO ☐

8 I am not presently married — TRUE XXX FALSE ☐

9 The other applicant is not related to me as an ancestor or descendant, by blood or adoption, a brother or sister of the whole or half blood or by adoption, or a parent's brother or sister of the whole or half blood, or a son or daughter of a brother or sister of the whole or half blood or by adoption — TRUE XXX FALSE ☐

FEMALE

10 FULL NAME — FIRST: TOMMIE — MIDDLE: RAE — LAST: HYNIE

11 MAIDEN SURNAME:

12 SOCIAL SECURITY NUMBER:

13 USUAL RESIDENCE — STREET NAME AND NUMBER: 432 HAWTHORNE — CITY: HOUSTON — STATE: TEXAS

14 DATE OF BIRTH: 69

15 PLACE OF BIRTH — CITY: LAS VEGAS — COUNTY: CLARK — STATE: NEVADA

16 PROOF OF IDENTITY AND AGE: TDL

17 If divorced, did divorce occur within last 30 days? YES ☐ NO ☐

18 I am not presently married — TRUE XXX FALSE ☐

19 The other applicant is not related to me as an ancestor or descendant, by blood or adoption, a brother or sister of the whole or half blood or by adoption, or a parent's brother or sister of the whole or half blood, or a son or daughter of a brother or sister of the whole or half blood or by adoption — TRUE XXX FALSE ☐

OATH: I solemnly swear (or affirm) that the information I have given in this application is correct.

Signature of Male Applicant

Signature of Female Applicant

I certify that the applicant did not appear personally but the pre-requisites for the license have been fulfilled as prescribed by Section 1.05 of the Family Code

Subscribe and sworn to before me at 03:30 P.M. AM / PM on FEBRUARY 12 1997

BEVERLY B. KAUFMAN, County Clerk, Harris County, Texas

BEVERLY B. KAUFMAN, County Clerk, Harris County, Texas

, Deputy

Dale M. Gorczynski - J.P.
Name and Title of Person Performing Marriage

2-17-97
Date of Marriage

Harris
County of Marriage

Mail executed license to: 14403 ELLA BLVD. #1314 HOUSTON TEXAS 77014 875 0533
Street Address — City, State and Zip Code — Local Phone Number

FORM NO. CC-B-03-31-01 (Rev. 07/24/96)

8940-18-0495

648

STATE OF SOUTH CAROLINA) COUNTY OF AIKEN)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
IN RE:)	[redacted]
)	CASE No. 2013-CP-02-02850
THE ESTATE OF JAMES BROWN A/K/A JAMES JOSEPH BROWN)	**JEANETTE MITCHELL AND AMICUS CURIAE RETURN TO MOTION FOR SUMMARY JUDGMENT OF TOMMIE RAE HYNIE BROWN**

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C.C.P.&G.S.
Deputy Clerk

1

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TO: ALL PARTIES OF RECORD

NOW COMES, Claimant, Jeanette Mitchell, (hereinafter referred to as "Mitchell") and Amicus Curiae by and through the undersigned counsel and files this Return to the Motion for Summary Judgment filed by Tommie Rae Hynie Brown ("Hynie"), to be declared the spouse of James Brown and in support hereof state as follows:

STATEMENT OF FACTS

(1) On April 24, 2014, Hynie filed a Motion for Summary Judgment pursuant to SCRCP, Rule 26 (c) on the issue of Hynie's ceremonial marriage to James Brown and the legality of said marriage.

(2) In support of her Motion for Summary Judgment, Hynie filed affidavits dated March 21, 2014 (Attached as Mitchell Exhibit 21 ("M")) and April 23, 2014 (Exhibit 22 M). The file also contains affidavits dated February 2, 2004, (Exhibit 7 Joint Stipulation of Facts "JSF") and November 8, 2007 (Attached as Mitchell Exhibit 20). (Exhibits 1-19 are included in the Joint Stipulation of Facts "JSF").

(3) Mitchell objects to Hynie's Motion for Partial Summary Judgment on the basis of genuine issues of material fact and that Hynie's ceremonial marriage to Ahmed was never annulled due to invalid service and improper notice to Ahmed rending the April 15, 2004, Final Judgment (Exhibit 12 JSF) void. Therefore, James Brown who had no standing to intervene is denied due process if his interest is affected without an opportunity to collaterally attack that annulment for lack of jurisdiction.

(4) A Final Order dated April 15, 2004, in the case of Tommie Rae Hynie v Javed Ahmed (Case No. 03-DR-10-4609) annulled the marriage of Hynie to Javed Ahmed (Exhibit 12 JSF). Present at the hearing were the Plaintiff, Tommie Rae Hynie and her attorney Robert Rosen. The Defendant, Javed Ahmed ("Ahmed") was not present at the hearing.

(5) Page one of the Final Order (Exhibit 12 JSF) states (a) that after the filing of the summons and complaint (Exhibit 5 JSF) the Defendant, Ahmed, could not be located, (b) that Plaintiff testified that the last known address for the Defendant was 14403 Ella Boulevard # 314, in Houston, Texas, and that (d) the Court issued an Order of Publication (Exhibit 8 JSF) on February 3, 2004.

(6) Page two of the April 15, 2004 Final Order states that (a) the court ordered that service could be had by publication pursuant to SC Code Ann. §§ 15-9-710 and 15-9-740, and that the Summons would be published once a week for a total of three weeks in the Houston Chronicle. After an Affidavit of Publication (Exhibit 10 JSF) was signed by the Supervisor/Account Receivable of the Houston Chronicle the Court found that Ahmed had been properly served by publication pursuant to South Carolina law.

(7) The final hearing was originally set to be heard on March 26, 2004, but was continued and heard on April 15, 2004.

(8) The hearing on April 15, 2004 was the only hearing in the matter to annul the marriage between Hynie and Ahmed.

(9) The Court concluded that it had jurisdiction to determine the validity and order an annulment of the marriage between Hynie and Ahmed pursuant to 20-7-420(5) and (6), S.C. Code Ann. and Foster v. Nordman, 137 S.E. 2d 600 (1964), and relied upon Hynie's testimony and affidavits of Ronald Pannel (Exhibit 6 JSF); Hynie's 2/4/04 Affidavit (Exhibit 7 JSF); Compliance with the Court's 2/4/04 Order of Publication (Exhibit 8 JSF); Affidavit of Marcia F. Jones (Exhibit 9 JSF); and Affidavit of Publication. (Exhibit 10 JSF)

(10) Based upon Hynie's testimony the Court concluded that Ahmed

was married at the time he married Hynie therefore Ahmed never had the capacity to marry Hynie and furthermore that he married Hynie for the fraudulent purpose of obtaining United States Citizenship.

(11) Concluding that Ahmed married Hynie for a fraudulent purpose to obtain United States Citizenship, the court found that it had jurisdiction of the subject matter and the parties and that Defendant, Ahmed, had been properly served. The Court entered an Order of Annulment of the marriage, declaring it to be null and void ab initio. (Exhibit 12 JSF).

(12) An Affidavit of Attempted Service of the private investigator, Ronald Pannell, was filed in Hynie's annulment case (No 03-DR-10-4609). The Affidavit (Exhibit 6 JSF) is sworn to and subscribed on January 12, 2003, but states that "on December 30, 2003 I attempted to locate the defendant, Javed Ahmed." There is an obvious error in the affidavit in that it would be impossible for the private investigator to swear in January 2003 that he attempted to serve Ahmed in December 2003, when that date has not yet arrived. **For this reason the Affidavit of Attempted Service sworn to by Ronald Pannell (Ex. 6 JSF) is unreliable as evidence to support that Ahmed was properly served in the annulment proceeding.**

(13) Hynie's affidavit dated February 2, 2004 (Exhibit 7 JSF) states that the last known address Hynie had for Ahmed was 14403 Ella Blvd **#1314**, Houston, TX. This is also the address used for mailing the marriage license to Mr. and Mrs. Ahmed. (Exhibit 26 Mitchel ("M")). However, this is inconsistent with her testimony at the final hearing on April 15, 2004 where she stated that Ahmed's last known address was 14403 Ella Blvd **#314**, Houston, TX (Exhibit 13 JSF). Also, the address listed in the private investigator's affidavit (EX 6 JSF) where he could not locate Ahmed was #314 rather than #1314. In addition the Final Judgment listed Ahmed's last known address as #314 rather than 1314.

(14) The address where the private investigator attempted to serve Ahmed was #314. However, Unit #1314 was the last known address according to Hynie's February 2, 2004 affidavit (Exhibit 7 JSF).

(15) The private investigator's affidavit (Ex 6 JSF) does not state that he attempted to locate Ahmed at his last known address, which was # 1314. For this **second reason**, the affidavit of the private investigator (Ex 6 JSF) is **unreliable evidence** to support that Ahmed was properly served in the annulment proceeding.

(16) The Affidavit of Attempted Service by Ronald Pannell, the private investigator (Ex 6 JSF) states that Javed Ahmed no longer resides at 14403 Ella Blvd # 314, Houston, Texas 77014.

(17) An affidavit of Marcia F. Jones (Ex 9 JSF), executed on April 14, 2004, one day before the final hearing states, Ms. Jones states that she is a paralegal of the Rosen Law Firm, LLC. Paragraph 2 of her affidavit states "Mr. Tannell found the defendant's address is 14403 Ella Blvd # 314, Houston, TX 77014. However, the affidavit of Ronald Pannell (Ex 6 JSF) states, "Javed Ahmed no longer resides at this address." For this **third reason** the Affidavit of Marcia F. Jones (Ex 9 JSF) is **unreliable evidence** to establish that Ahmed was properly served.

(18) Also, the affidavit of Marcia Jones states that she sent Ahmed notice of the date of the final hearing (April 15, 2004)..." Attached to the affidavit of Marcia Jones is an envelope addressed to Javed Ahmed at 14403 Ella Blvd # **314**, (not 1314) Houston, TX and an unsigned return receipt showing that Ahmed never signed for this mail. For this **fourth reason** the Affidavit of Marcia F. Jones (Ex 9 JSF) is **unreliable evidence** to establish that Ahmed was properly served notice of the final hearing.

(19) Furthermore, the date stamped on the envelope shows March 31, 2004,

which would have been after the March 26, 2004 date advertised by the Houston Chronicle. The envelope was returned to sender on 4/14/04 (one day before the final hearing) stamped "not deliverable as addressed, "Unable to Forward", no forward order on file," this being a **fifth reason** why the affidavit of Marcia Jones is **unreliable evidence** to establish that Ahmed was properly served the summons or notice of the annulment proceeding.

(20) The affidavit of Marcia F. Jones, Rosen's employee states, "the Defendant has had notice of the hearing scheduled for April 15, 2004 at 9:30 a.m. This statement amounts to a legal conclusion and should be disregarded.

(21) Marcia F. Jones is an employee that works for Hynie's lawyer, Robert Rosen. South Carolina courts hold that affidavits from the lawyer are invalid as proof of service in an annulment proceeding.

(22) For this **sixth reason** the evidence in Marcia Jones' Affidavit (Ex 9 JSF) is **unreliable evidence** to establish that Ahmed was properly served notice of the annulment proceeding.

(23) Hynie's affidavit dated February 2, 2004 (~~Mitchell~~ JSF Exhibit ~~2~~ 7), States, "I am further informed and believe that I am entitled to an order setting a time and date for the final hearing in this matter so that notice of this hearing may simultaneously be published in order to give the defendant notice as required by Rule 17(a) SCRFC."

(24) An Order of Publication, (Ex 8 JSF) states that the final hearing on this matter is hereby scheduled for March 26, 2004 at 9:30 O'clock A.M. in the Charleston County Family Court and that **notice of this final hearing may likewise be published in the same manner as that summons in the Houston Chronicle, which upon completion shall constitute satisfaction of the Notice requirements of Rule 17(a) SCRFC** (emphasis added).

(25) An affidavit of Publication executed by Gail Feagin

Supervisor, Accounts Receivable at the Houston Chronicle, (Ex 10 JSF) states that the publication attached therein was a true and correct copy published on February 19, February 26, and March 4, 2004. Attached to the affidavit is the actual notice of what was advertised in the Houston Chronicle. It states, "Notice of Hearing. Please note that a final hearing to annul the marriage is scheduled on March 26, 2004 at 9:30 A.M. in the Charleston Family Court located at 100 Broad Street in Charleston, SC 29401."

(26) The Final Order annulling Hynie's marriage to Ahmed (Ex 12 JSF) shows that the hearing took place on April 15, 2004 not on March 26, 2004.

(27) The Final Order (Ex 12 JSF) states, this Court issued an Order of Publication on Feb 3, 2004 (Ex 8 JSF). The Order of publication states that "in an affidavit of a person employed as the said newspaper (Houston Chronicle) that publication has been so completed shall be filed with this Court and shall act as proof of service in the matter. However, there was a discrepancy in the date published, which was not the date of the final hearing,

(28) For this **seventh reason**, the discrepancy in the notice of the hearing date published in the Houston Chronicle pursuant to the Order of Publication (Ex 8 JSF) and the actual hearing date (April 15, 2004) for the hearing to annul the marriage contract between Hynie and Ahmed, is further evidence to show on its face of the affidavit that **Ahmed was not properly served notice of the annulment hearing.**

(29) In the proceeding to annul her marriage with Ahmed, Hynie's affidavit dated February 2, 2004, (Exhibit 7 JSF) states, "I am unsure of the current whereabouts of Javed Ahmed, the Defendant, as I have not seen or heard from him in approximately seven years and **believed our marriage had been annulled in Harris County, Texas.**

(emphasis added). Since the April 15, 2004 annulment had not yet happened, Hynie could not have been referring to that annulment. Therefore, if she believed there had been an earlier annulment, it is inconsistent that she would file a subsequent action to annul the marriage with Ahmed. Further questions that raise lack of credibility in her statement are, why would it matter that "David Cannon told James Brown that she was married to someone else," if she believed that marriage had already been annulled. as she stated in her affidavit dated 11/8/2007, (Mitchell's Exhibit 20). Hynie stated, "I explained to the judge that while I thought I was married to Mr. Ahmed, I also believed that marriage had been annulled before I married James."

(30) This is inconsistent with Hynie's Responses to LSA, First Request for Admission # 6, (Mitchell Exhibit 25) which asked, "When you participated in the 2001 marriage ceremony with the decedent nothing had occurred since 2/12/97 to end or cause to end any marriage that may have existed between you and Javed Ahmed. Response by Hynie was, Denied. I was never married to Javed Ahmed as he was already married at the time of my purported marriage to him. There was no mention that Hynie believed her marriage to Ahmed had been annulled before she married James Brown.

(31) For this **eighth reason**, indicating **lack of witness credibility**, the testimony of Hynie is **unreliable as evidence** that there was fraud by Ahmed intending to marry Hynie for the purpose of obtaining US citizenship or that the marriage was never consummated or that Ahmed was already married or that Ahmed was properly served.

(32) In addition, Hynie had an interest in the outcome of the proceeding. The fact that she qualifies as a **biased witness with an interest** in the proceeding to annul her marriage with Ahmed is a **ninth reason** why her **testimony** should not be allowed to establish the annulment of her marriage to Ahmed. (SCRE, Rule 608 (c).

(33) In Hynie's affidavit in support of her Motion for Summary Judgment, executed November 8, 2007 (Mitchell Exhibit 20), paragraph 4 Hynie states that, "in 2003, David Cannon told Mr. Brown that I was married to someone else, namely Javed Ahmed and had never been divorced. James and I both wanted our marriage to be legal so James told me to have the marriage annulled. I had no funds to retain Mr. Rosen and **James gave me the money to pay the legal fees for the annulment** (emphasis added).

(35) Hynie's annulment action against Ahmed was filed December 15, 2003 (Ex 5 JSF). Attached as Mitchell's Exhibit 28 is a receipt dated December 15, 2003 showing $100 paid by Rosen Law Firm for the court cost for case number 2003-DR-10-004609, Hynie vs Ahmed.

(34) Furthermore, a month later James Brown filed a complaint to annul his marriage with Hynie. (Exhibit 15 JSF). In that complaint James Brown states that the parties separated on January 28, 2004 and requested that the Court Order Hynie to permanently vacate the marital residence which was owned by him prior to their marriage contract. He also stated that prior to entering into the marital contract the parties entered into a pre-nuptial agreement dated November 19, 2001 (Mitchell Exhibit 31) wherein all matters of equitable division, attorney fees and alimony were resolved.

(38) In addition, Hynie's claim that she lived with James Brown at the time of his death (Exhibit 21 M, ¶ 2) is inconsistent with James Brown's intentions stated in his complaint (Exhibit 15, JSF) and also inconsistent with her statement in ¶ 3 of that same affidavit that after James Brown's death "the personal representatives did not allow me to enter my home." Considering that her statements are contrary to James Brown's statements in his complaint, it raises questions of material fact as to whether she did in fact lived there since she could not access the house.

(39) Also, after Hynie's annulment from Ahmed was final, James

Brown amended his Complaint to clearly state that he believed Hynie should be responsible for any reasonable and necessary attorney's fees and costs in the bringing of this action. Paragraph 13 of the Amended Complaint further states that should Hynie not contest his request for an annulment, James Brown would withdraw his request for attorney's fees and costs. (Exhibit 16 JSF). Certainly James Brown's intentions are clear that he should not pay attorney's fees.

(40) In her testimony at the April 15, 2004 Final Hearing to obtain an annulment from Ahmed, Hynie stated that Ahmed refused to live with her, that she and Ahmed did not live together as husband and wife, that she and Ahmed never engaged in any sexual intercourse, that Ahmed had three or more wives prior to their marriage, and that Ahmed perpetrated fraud on Hynie by marrying her for the purpose of obtaining U.S. citizenship. (Exhibit 13 JSF, Pg. 8, Ln 18-19; Pg. 10, Lines 1-18).

(41) Also, Petitioner Tommie Rae Brown's Supplemental Responses to the LSA's First Request for Admissions, Second Interrogatories and Second Request for Production (Mitchell's Exhibit 24) states as her response to ROG # 8, "Ahmed told me that he was married to others at the time of my purported marriage to him."

(42) However, in direct contradiction to Hynie's above statements and creating genuine issues of material facts is Mitchell's Exhibit 26 attached, which is the Affidavit of Taha Alizai filed in the Estate of James Brown (Case Number 2007-CP-02-122) stating: (a) That the proponent, Taha Alizai is personally known to Javed Ahmed; (b) That he has seen Ahmed's photographs of the February 17, 1997 marriage between Hynie and Ahmed; (c) That Ahmed told him that Ahmed and Hynie did live together as husband and wife for a significant amount of time and that Hynie and Ahmed's marriage was consummated; (d) That Javed Ahmed was not married when he and Hynie exchanged their marital vows; (e) That Javed Ahmed's

marriage to Hynie was Ahmed's first marriage; (g) That Ahmed never divorced Hynie; and (h) That Ahmed did not marry Hynie to obtain U.S. citizenship. The statements in the affidavit of Taha Alizai directly contradict the statements of Hynie in her testimony in the April 15, 2004 hearing and contradicts her responses to Interrogatories and create genuine issues of material fact. Furthermore, Attached as Mitchell Exhibit 30 is the 21-page Application for United States Citizenship (Form N-400) obtained from www.uscis.gov/form) showing that citizenship through marriage requires the applicant to have been married to the same US citizen-spouse for 3 years. The above is a **tenth reason** why **Hynie's testimony is inconsistent, contradicted, biased and not credible evidence** to support that Ahmed was properly served notice of the annulment proceeding.

(43) Attached to Taha Alizai's Affidavit (Mitchell Exhibit 26) is the marriage license of Javed Ahmed and Tommie Rae Hynie and a page reflecting the marriage license was to be mailed to Mr. & Mrs. J. Ahmed at 14403 Ella Blvd **# 1314**, Houston, TX 77014.

(44) This address at # 1314 is the same last known address stated by Hynie in her 2/2/04 affidavit (Exhibit 7 JSF), but is not the last known address used by private investigator Ronald Pannell in his attempt to serve Ahmed the summons and complaint for the annulment proceeding (Exhibit 6 JSF) and is not the address used by Rosen's employee Marcia Jones to mail notice of the final hearing (Exhibit 9 JSF) and is not the last known address stated in Hynie's testimony at the April 15, 2004 final Hearing (Exhibit 13 JSF, Pg. 15, lines 10-18) and is not the last known address reflected on the fact of the Final Order (Exhibit 12 JSF). For this **eleventh reason** why this evidence is not reliable and should not be allowed to establish that Ahmed was properly served or received notice of the summons, the complaint or notice of the April 15, 2004, final hearing.

(45) Hynie admits that James Brown did not intervene in the

Annulment action. (Admission # 16, Supplemental ROG, Mitchell Ex 24), states, the defendant (James Brown) did not intervene as a party in the Ahmed annulment action. Ans. "Admitted. He encouraged me to bring the suit and in fact he asked me to bring the suit."

(46) Hynie's suit to annul her marriage from Ahmed concluded with the final hearing on April 15, 2004, (Exhibit 12 JSF). About three months later Hynie and James Brown entered into a Consent Order of Dismissal, dismissing his suit in the Aiken Family Court against Hynie. (Exhibit 19 JSF), wherein Hynie agreed to forever waive any claim of a common law marriage to James Brown both now and in the future.

(47) In Petitioner Tommie Rae Brown's Supplemental Responses to LSA First Request for Admission, ROG #7 (Mitchell Exhibit 24M) states, There has been no communication between you and Javed Ahmed since January 1, 1998. Answer: "Admitted." However, this is inconsistent with her testimony at the April 15, 2004 Final Hearing that she had not seen him since the day of the marriage on February 17, 1997. (Exhibit 13 JSF, pg12, lines 10-25)

(48) In her Complaint (Exhibit 5 JSF, ¶ 5 and 6) Hynie alleges that on February 17, 1997 she and Ahmed married in Harris County, Texas. Thereafter the Defendant refused to live with her and she returned to her domicile. Hynie alleges that she never saw or heard from Ahmed again.

(49) In her Affidavit dated November 8, 2007, (Mitchell Exhibit 20, ¶ 7) Hynie states, "I was also told by Mr. Ahmed, after the marriage ceremony, that he would not live with me because he was married to three or more other females in Pakistan..." and in her testimony at the Final Hearing she stated that she never saw or spoke to Ahmed after she married him on 2-17-97. (Exhibit 13 JSF, pg 12, lines 13-17)

(50) Paragraph 7 of the complaint (Exhibit 5, JSF) Hynie alleges that

she and Ahmed never lived together as husband and wife and never engaged in any sexual contact or activity whatsoever.

(51) Petitioner Tommie Rae Brown's Supplemental Responses to the LSA's First Request for Admissions, Second Interrogatories and Second Request for Production (Exhibit 24 M) states as follows: When you participated in the 2001 marriage ceremony with the decedent no order of divorce in annulment had been issued between you and Javed Ahmed. Hynie's answer was, "Admitted."

(52) At the Final Hearing on April 15 2004, Hynie's testimony was the only evidence before the court that Javed Ahmed was married at the time he entered into his marriage with Hynie. (Exhibit

(53) In her affidavit dated 11/8/2007, (Exhibit 20 (M)) Hynie states, "I explained to the judge that while I thought I was married to Mr. Ahmed, I also believed that marriage had been annulled before I married James."

(54) However, in Hynie's Responses to LSA, First Request for Admission # 6, (Mitchell Exhibit 25) which asked, "When you participated in the 2001 marriage ceremony with the decedent nothing had occurred since 2/12/97 to end or cause to end any marriage that may have existed between you and Javed Ahmed. Response by Hynie was, Denied. I was never married to Javed Ahmed as he was already married at the time of my purported marriage to him. There was no mention that Hynie believed her marriage to Ahmed had been annulled before she married James Brown.

LEGAL ARGUMENT:

I. THE FAMILY COURT LACKED JURISDICTION

A. IMPROPER SERVICE IN ANNULMENT PROCEEDING

The April 15, 2004 Final Order of Annulment (Exhibit 12 JSF) states that service by publication could be had pursuant to S.C. Code Ann. §§ 15-9-710

and 15-9-740. It cites Jaker v. jaker, 102 SE 337 (1919). However in the facts of that case the Defendant was served but failed to appear.

South Carolina Code Ann. § 1-1-10 (Supp.2002), provides that "The sovereignty and jurisdiction of this State extends to all places within its bounds...."

South Carolina Code Ann § 15-9-710 (8) provides that service by publication in an annulment proceeding may be had when the person on whom the service of the summons is to be made **cannot, after due diligence, be found within the State and (a) that fact appears by affidavit** to the satisfaction of the court or judge thereof... and (b) it in like manner appears that a cause of action exists against the defendant in an annulment proceeding.

S.C. Code Ann. § 15-9-740 provides "... The court, judge, clerk, master or judge of probate shall also direct that a copy of the summons be forthwith deposited in the post office directed to the person to be served at his place of residence, unless it appears that such residence is neither known to the party making the application nor can, with reasonable diligence, be ascertained by him.

When service is made by publication the ten days' notice of application for judgment to be made at chambers as required in contested cases of certain kinds as provided by law may be inserted in the first or any subsequent publication mailed to the last known residence of the defendant.

S.C. Code Ann. § 20-1-540 provides for service by publication, "When the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State and (a) that fact appears by affidavit to the satisfaction of the court or judge thereof... and (b) it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made or that he is a proper party to an action relating to real property in this State, the court or judge may grant an

order that the service be made by the publication of the summons... when the defendant is a party to an annulment proceeding.

The burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction. When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction. Graham v. Lloyd's of London, 296 S.C. 249, 251 n. 1, 371 S.E.2d 801, 802 n. 1 (Ct.App.1988).

The affidavit of Attempted service (Exhibit 6, JSF), makes no reference to "due diligence." Also, it makes no reference to any attempt to locate Ahmed within the State of South Carolina.

The Court in Caldwell v Wiquist, 402 S.C. 565, 741 S.E2d 58383 (SC App. 2013), stated that Section 15-9-710 permits service by publication when a **defendant cannot be found within the State**, however, Caldwell's affidavits requesting service by publication only provided that Wiquist could not be served in Beaufort County and contained no information regarding whether or not she could be found in the State. The affidavits requesting publication were **found to be defective on their face** because they stated that Caldwell tried to serve a non-resident of Beaufort County only in Beaufort County. The Court found further that the affidavits requesting service by publication did not contain any statements regarding the **due diligence** undertaken and, in fact, did not even contain the phrase "due diligence." Id 572.

The Caldwell Court looked to judicial history and said that South Carolina courts have repeatedly required strict compliance with publication statutes. It cited Riker v. Vaughan, 23 S.C. 187, 189 (1885), which involved a publication statute and whether a non-resident minor had properly been made a party to an action. The Riker Court found that the **failure of the plaintiff to procure an order for service by publication**, the only

statutory mode by which a non-resident minor could be made a party defendant to an action, was **a fatal defect rendering service incomplete.** Id. It looked further and said that in 1911, our Supreme Court was asked to determine whether an order for publication that was endorsed on the back by the clerk of court prior to the actual service by publication was void where the clerk signed the order for publication on the front after the service by publication was effectuated. Du Bose v. Du Bose, 90 S.C. 87, 89, 72 S.E. 645, 646 (1911). The Du Bose court noted that the "rule that the statutory **requirements as to constructive service by publication must be strictly carried out**" and held that, despite the clerk's endorsement on the back of the order of publication, the order of publication was invalid because it had not been signed on the front as required by the publication statute. Id.

After looking at other jurisdictions, the Caldwell Court concluded that while not controlling it found those cases persuasive. Based upon that reading it **found that the affidavit for service must include some factual basis upon which the court issuing the order of service by publication can find that the defendant cannot, after due diligence be found within the state.**

In State v Dudley, 354 S.C. 514, 581 S.E.2d 171 (C.A. 2003), the court said, "Jurisdictional limits are tied to the territorial reach of the particular government's power." The court considered two kinds of jurisdiction, (1) Jurisdiction of the subject matter, and (2) jurisdiction of the person. Citing Douglas, 245 S.C. at 87, 138 S.E.2d at 847, the court referred to the common law expression, `Consent cannot confer jurisdiction.' State v Dudley, Id, 531, cited State v. Funderburk, 259 S.C. 256, 261, 191 S.E.2d 520, 522 (1972), which stated "the acts of a court with respect to a matter as to which it has no jurisdiction are void".

The Court in Foster v Nordman, 244 S.C. 485, 137 S.E. 2d 600 (S.C. 1964), stated that a court of competent jurisdiction is one having power and

authority of law at the time of acting to do a particular act; one that has jurisdiction both of the person and of the subject matter; one provided for in the constitution or created by legislature and which has jurisdiction of the subject matter and of the person. It cites 21 C.J.S. Courts § 22, p.35. The Court looked to 20-45 of the South Carolina Code for **providing the method of obtaining service in an action to annul a marriage of a defendant who is a nonresident or who has left the state**. Under the facts in **Foster** the lower court lacked jurisdiction, therefore, all orders were reversed and set aside.

In the case, Rita Roche, as Personal Representative of the Estate of George J. Roche, Petitioner, v. Young Brothers, Inc., of Florence, d/b/a Days Inn East, 456 S.E.2d 897, 898 (S.C. 1995), it held that personal service may also be effected on certain classes of defendants by mail pursuant to SCRCP. Rule 4(d)(8), which allows a corporation to be served by "certified or registered mail, return receipt requested and delivery restricted to the addressee. However, it held that **"Service by mail cannot be the basis for a default judgment unless the return receipt shows "acceptance by the defendant."**

In Wachovia Bank of South Carolina v Player, 334 S.C. 200, 203, 512 S.E.2d 129, (C.A.S.C1999) a default order was entered after the defendant could not be found and was served by publication. In addition, a copy of the summons and complaint was mailed to his attorney. After the Defendant did not respond to the complaint a default was entered against him. **In setting it aside the court found that the service by publication involved a defective affidavit. The Court said, generally, absent fraud or collusion, the decision of the clerk is final. However, the exception to the general rule is when an order of publication is premised upon a facially defective affidavit.** Miles v. Lee, 319 S.C. 271, 274, 460 S.E.2d 423, 425 (Ct.App.1995) ("The affidavit supporting publication was facially

defective because it purported to show due diligence in ascertaining the whereabouts of someone other than the person to be served."). **The court went on to say that issues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on our own motion.** See Johnson v. State, 319 S.C. 62, 64, 459 S.E.2d 840, 841 (1995).

B. IMPROPER NOTICE OF FINAL HEARING FOR ANNULMENT

The Notice of Final Hearing mailed by Rosen's staff was ineffective to give proper Notice to Ahmed of the hearing. First it was not address to the last known address. In addition, the mail came from the attorney for the Plaintiff.

According to Roche, supra Rule 4, SCRCP serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action. The Court said, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings.

Mc Call v CESC, 611 S.E.2d 315, 363 S.C. 646, is an appeal from the denial of relief from default judgment under Rule 60(b), SCRCP. The Appellant in that case raised two exceptions to the default judgment: (1) that the default was in error because the defendant was never properly served with the plaintiff's summons and complaint, and (2) **alternatively, that even if service were proper, it was not notified of the subsequent hearing**. The appellate Court agreed that notice of the damages hearing was insufficient.

The service requirements of Rule 5(a), SCRCP, incorporated into Rule 55(b)(2) involving default judgments mandate that "[e]very

order required by its terms to be served, every pleading subsequent to the original summons and complaint... every written notice, appearance, demand, offer of judgment, designation of record or case and exceptions on appeal, and similar papers **shall be served upon each of the parties ...**" (emphasis added). The Court said, "The need to properly serve each party individually does not arise from an arcane or highly technical application of the rules. Rather, this requirement serves an essential function — **ensuring that notice is properly received by all entitled to it.**" McCall, id 611 S.E.2d 315, 363 S.C. 646

The Action to annul the marriage of Tommie Rae and Ahmed, and the April 15, 2003 Final Judgment annulling the marriage of Hynie and Ahmed disregard certain well established and recognized principles set forth in the U.S. Constitution, Amend. XIV, guaranteeing due process and in South Carolina laws, such as Johnson v. Baldwin, 53 S.E.2d 785 (S.C. 1949), which relate to the proper method of acquiring jurisdiction of a non-resident defendant in an action in personam. **The exercise of personal jurisdiction under statute must comport with due process requirements and must not offend traditional notions of fair play and substantial justice.** Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 611 S.E.2d 505 (2005).

C. THE CIRCUIT COURT HAS JURISDICTION TO DETERMINE ISSUES AFFECTING MARRIAGE CONTRACTS

Foster v Nordman, 244 S. C. 485, 137 S.E. 2d 600 (S.C. l1964) involved a suit brought in common pleas to annul a marriage. The Court found that pursuant to Section 20-41 Code of Laws of South Carolina 1962, the **Court of Common Pleas does have authority to hear and determine any issue affecting the validity of a contract of marriage.** That section goes on to say, "It is evident that the legislature manifested no intention in

this section to set forth the requirements of residence and domicile in an action to annul a marriage contract as it has in actions for divorce." However, where neither party was a resident of South Carolina, the court determined it had no jurisdiction.

That code section has been codified into S.C. Code Ann. 20-1-510, which provides, "The court of common pleas shall have authority to hear and determine any issue affecting the validity of a contract of marriage." (2014).

Rule 55 (c), SCRCP provides that for good cause shown the court may set aside an entry of default and if a judgment by default has been entered , may likewise set it aside in accordance with Rule 60(b).

Rule 60 (b) (4) SCRCP provides that on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding where the judgment is void.

The Court in Thynes v. Lloyd, 294 S.C. 152, 154, 363 S.E. 2d 122,123, (Ct. App. 1967. Held that Rule 55(c) allows the Circuit Court to grant relief from the entry of default. It also held that Rule 60 (b) allows the Circuit Court to grant relief from a final judgment.

In June 19, 2014 Petitioner Tommie Rae Brown's Supplemental Responses to LSA's First Request for Admissions, #2 and Second Request for Production, Request for Admission, (Mitchell Exhibit 24) Question # 19, asked, "In the Ahmed Annulment action Javed Ahmed failed to appear, plead, participate or otherwise defend. Hynie's response was, "Admitted; however **like many defendant's Javed Ahmed was properly served by publication as provided by SC law."** (emphasis added) This response amounts to a legal conclusion and should be stricken and disallowed to determine whether Ahmed was in fact properly served. Furthermore, jurisdiction cannot be stipulated. State v Dudley,

Question 20 (Mitchell Exhibit 20) states, "In the Ahmed Annulment Actions Javed Ahmed was in default when judgment was entered through

the final order. Hynie answered: Denied. However, the transcript of the April 15, 2004 Final Hearing, (Exhibit 13, JSF, pg. 4, lines 7-8), state that Defendant is in default but we are not moving to put him in default.

There was no order of default. However, the facts of Hynie's annulment case clearly appears to be a default where Ahmed was never properly served and where notice of the final hearing was mailed by the lawyer's firm (Mitchell Exhibit 22) to an address other than the last known address and the certified mail receipt was never signed by Ahmed.

II.. LACK OF SERVICE ON AHMED AND LACK OF STANDING DENIED JAMES BROWN DUE PROCESS ALLOWS JAMES BROWN TO COLLATERALLY ATTACK THE ANNULMENT

James Brown had no standing and was not a party to Tommie Rae's annulment action. Furthermore, there was defective service as to Ahmed in the annulment action, Therefore James Brown (and those in privy are being denied due process without an opportunity to be heard if Hynie is allowed entitlement to one-half or one-third of James Brown's estate as a surviving spouse.

Jackson v. Speed, 326 S.C. 289, 303, 486 S.E. 2d 750,757 (1997) provides that Under Rule 60(b) SCRCP, a judgment is void if the court that rendered it lacked jurisdiction over the parties.

"Rule 60(b)(4) provides the court may relieve a party or his legal representative from a final judgment, order, or proceeding if the judgment is void.

"The definition of `void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." Linda MC Company Inc. v Share, 375 SC 432, 653 SE 2d 279 (Ct App 2007); *McDaniel v. U.S. Fid. Guar. Co.,* 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct.App.1996)."

Rule 3 SCRCP provides that a civil action is commenced by filing a summons and complaint with the clerk of court.

The Family court Rules differ slightly. Rule 16, SCFCR provides for continuing jurisdiction, the family court has jurisdiction of the parties and control of all subsequent proceedings from the time of service of the summons and complaint. If the summons and complaint were never served in this case, then the Family Court does not have continuing jurisdiction.

In Carpenter v Carpenter, 244 N.C. 286, 93 S.E. 2d 617 (N.C. 1956), the husband, Stanley sued the wife, Mary for annulment of their marriage by showing that her earlier divorce was invalid. Shaver, the husband in the earlier divorce action was not a party in the subsequent annulment action.

The precise question in Carpenter was whether the plaintiff could attack collaterally the earlier divorce proceedings in which he was not a party and the decree, for the purpose of nullifying such decree insofar as it affected his marriage, by offering evidence tending to show that, contrary to what appeared on the face of the judgment, the Shavers in the earlier divorce had not been separated for the requisite statutory period and that therefore the earlier divorce decree was void as to him, due to perjury in the earlier case. This issue was one of first impression in North Carolina and therefore the majority opinion and dissent went outside of its jurisdiction to thoroughly examine the issue.

The Court acknowledged that if the Plaintiff could attack the divorce decree at all he must do so (collaterally) in an independent action because he was a stranger to that divorce action and could not intervene therein and attack the divorce decree by motion in the cause. Shaver v. Shaver, N.C., 93 S.E.2d 614

Carpenter also considered the decision in Pridgen v. Pridgen, 203 N.C. 533, 166 S.E. 591, which involved an action by a second husband for annulment of his purported marriage based on his wife's alleged incapacity

to contract a valid marriage with him, since she had a living husband. The wife relied upon a divorce decree obtained in Georgia by her first husband when she resided in North Carolina. The jurisdiction of the Georgia court was predicated solely on service of summons by publication. Hence, it appeared on the face of the judgment that the Georgia court had not acquired jurisdiction of the defendant pursuant to the statute.

The Pridgen case was found to be direct authority for the proposition that in such annulment action the purported divorce may be attacked collaterally when it appears on the face of the record that the court granting such decree had no jurisdiction of the person of the defendant.

the Majority Opinion in Carpenter considered the early North Carolina decision in Irby v. Wilson, 21 N.C. 568. Although Irby was not an annulment action, it said that a Tennessee divorce decree, entered under similar circumstances, was subject to collateral attack, it appearing on the face of the record that 'it was not an adjudication between any parties,' since the Tennessee court had no jurisdiction of the person of the person of the defendant. The Majority went on to say, "Unquestionably, when it appears on the face of the record that a court has no jurisdiction, either of the person or of the subject matter, any judgment it attempts to render is a nullity and so may be attacked by any person adversely affected thereby, at any time, collaterally or otherwise." Simmons v. Simmons, 228 N.C. 233, 45 S.E.2d 124;

Examining a litany of cases, the majority in Carpenter found that it appeared on the face of the record that the court had not obtained jurisdiction of the person of the defendant. Id, 623 In Rodriguez v. Rodriguez, 224 N. C. 275, 29 S.E.2d 901 and Fowler v. Fowler, , 190 N.C. 536, 130 S.E. 315 the attempted service by publication was held fatally defective because the affidavit did not comply with statutory requirements.

The Carpenter majority said, unless it is made to appear by affidavit that everything necessary to dispense with personal service has been done, no jurisdiction is acquired over the person of the defendant. Id 623. The Carpenter majority said the same rule applies when the judgment is apparently regular, showing service or appearance when in fact there was none. City of Monroe v. Niven, 221 N.C. 362, 20 S.E.2d 311.

Neither the Plaintiff nor the Defendant in Carpenter questioned the affidavit giving rise to jurisdiction. "On the face of the judgment, it was in all respects regular and appeared that the court had jurisdiction of the parties and the subject matter, no jurisdictional defects were alleged." Therefore the majority in Carter concluded that since there was no allegation that the affidavit on its face did not comply fully with the statute, the Court assumed that the affidavit did comply. However the Court went on to said, "Of course, if the affidavit is insufficient on its face, or if no affidavit was filed, a different question would be presented; for such jurisdictional defect would appear on the face of the record." Carter, Supra, 623.

The Carter dissent said ... If the allegations of his complaint asked to be stricken are true and he cannot have his day in court to prove them, he is put under obligation to support a woman who is not in law his wife, and who had no capacity to contract a marriage with him. He may be required to pay alimony and maintenance to one who has a prior living husband legally undivorced... A court should be vigilant to see that the forms of judicial sanctity are not used as a cloak for fraud and injustice.

Further, the Court in Carpenter said a void marriage is a nullity and may be impeached at any time... and may be inquired of in any Court. For, although, in such case there may be a proceeding in the ecclesiastical Court, it is not to dissolve the marriage, but merely, for the convenience of the parties, to find the fact and declare the marriage thereupon to have been void, ab initio...; and no civil rights can be acquired under such a marriage.

It went on to say, "A void marriage is good for no legal purpose, and its invalidity may be maintained in any proceeding in any court between any parties, whether in the lifetime or after the death of the supposed husband or wife, or both, and whether the question arises directly or collaterally.

Williams v. Williams, 63 Wis. 58, 23 N.W. 110, 115, 53 Am.Rep. 253, held that the plaintiff was not estopped from showing that the marriage was void. The Court said: 'The marriage between the plaintiff and Jones being absolutely void ab initio, it was good for no legal purpose, and its invalidity may be maintained in any proceeding in any court between any parties, whether in the lifetime or after the death of the supposed husband or wife, or both, and whether the question arises directly or collaterally.

James Brown was not a party to the annulment proceeding but is entitled to due process in this matter, as it affects his rights. It is well settled that a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit, and therefore has no res judicata effect as to that party. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 805, 105 S. Ct 2965, 86 L. Ed. 2d 628 (1985). [Although the case involved a class action, the court here held that there is the **fundamental interest in not allowing constitutionally infirm judgments to be enforced**. It would be troublesome to enforce a class action settlement against parties over whom the rendering court did not have personal jurisdiction. It is well established law that a challenge to jurisdiction may be made at any time. Anderson v. Atkinson, 235 N.C. 300, 69 S.E.2d 603.

In Old Colony Trust Co. v. Porter, 324 Mass. 581, 88 N.E.2d 135, 140, 12 A.L.R.2d 706, it was held the executor of a will apparently revoked by a subsequent marriage of the testatrix, may, for the purpose of showing the invalidity of such marriage, collaterally attack a divorce decree previously granted the new spouse without jurisdiction. In its opinion the Court said the weight of authority, which in general support the principle of collateral attack

for want of jurisdiction upon decrees of divorce by persons not parties to the divorce proceedings whose rights would be impaired if effect were given to the decrees as against them.

In Williams v. State of North Carolina, 325 U.S. 226, at page 230, 65 S.Ct. 1092, at page 1095, 89 L.Ed. 1577, at page 1582, 157 A.L.R. 1366, at page 1369, the Court said: 'It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. But those not parties to a litigation ought not to be foreclosed by the interested actions of others *

The Court if Carpenter said, that if Carpenter cannot assail in any way in our Courts this void judgment materially affecting his rights, there will be a denial of his constitutional right of due process of law. In Galpin v. Page, 18 Wall. 350, 368, 369, 21 L.Ed. 959, 963, Mr. Justice Field said for the Court: 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination.' Carter cited, Young v. Young, which held that a party to a divorce decree can obtain relief when there is a false statutory affidavit, which is jurisdictional, by showing the jurisdictional defect by extrinsic evidence.

In Stafford v. Gallops, 123 N.C. 19, 31 S.E. 265, 266, the Court said: 'A void judgment is, in legal effect, no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless.'

GENUINE ISSUES OF MATERIAL FACT

The Court in Carpenter, supra said, in cases involving **collateral attack raising questions of jurisdiction over the person the motion**

raises questions of fact; and the court has the power and the duty to hear evidence and find the facts, subject to review, determinative of its jurisdiction. Carpenter supra.

A. TOMMIE RAE'S TESTIMONY WAS INCONSISTENT, CONTRADICTED, UNRELIABLE, AND BIASED

Hynie alleges that Ahmed committed fraud upon her by marrying her for the purpose of obtaining US citizenship. She further alleges that Ahmed failed to consummate the marriage. Also, Hynie alleges that Ahmed had some prior marriages. However, the Affidavit of Taha Alizai (Mitchell Exhibit 26) directly contradicts this, raising genuine issues of material fact. Furthermore, there was no other testimony presented other than the testimony of Hynie on this issue. Furthermore, Hynie had an interest in the outcome of the annulment litigation, as she does herein, which raises genuine issues of material fact.

Hynie has taken previous inconsistent positions such as signing a Prenuptial Agreement (Exhibit 31 M) agreeing to waive any claim to statutory distributive share plus any claim as an omitted spouse of James Brown. Hynie signed a Prenuptial Agreement wherein Hynie gave up all interest and rights to make any statutory claims against James Brown's estate or copyrights. She also signed a Consent Order waiving all rights as a common law spouse. Now Hynie changes positions to argue there was a valid marriage between Hynie and James Brown, and that the Consent Order and Prenuptial Agreement did not waive her rights under the marriage contract to claim a financial interest. Hynie treats those two documents as though they never existed.

In her Affidavit (Exhibit 20 M, ¶ 12 dated 11-8-2007) Hynie states that she and James lived as husband and wife from Dec 14 2001 until his death in December 2006. However, James Brown's complaint to annul his marriage with Hynie (Exhibit 15 JSF) states that the parties separated on January 28, 2004 and requested that the Court Order Hynie to permanently vacate the

marital residence which was owned by him prior to their marriage. He also stated that prior to entering into the marital contract the parties entered into a Prenuptial Agreement dated November 19, 2001 wherein all matters of equitable division, attorney fees and alimony were resolved. (Exhibit 31 M). Paragraph 19 of that agreement states that the prevailing party shall be entitled to expenses, costs and attorney fees. Also, in his Amended Complaint to annul his marriage from Hynie, James Brown stated in (Exhibit 16 JSF ¶ 13, Plaintiff is informed and believes that Defendant should be responsible for any reasonable and necessary attorneys fees and costs in the bringing of this action.

In light of James Brown's Complaint (Exhibit 15 JSF), Prenuptial Agreement (Exhibit 31 M) and Consent Agreement (Exhibit 19 JSF), Hynie should not be allowed to now make a contradictory statement that James Brown paid her legal fees and that she lived at his residence at the time of his death.

B. TOMMIE RAE'S ARGUMENTS ARE FLAWED

i. JAMES BROWN RECEIVED OBLIGATIONS NOT BENEFITS

Tommie Rae cited Edwards v Edwards, 254 S.C. 466, 471, 176 S.E.2d 123 (SC 1970), where the South Carolina Supreme Court considered what was found to be a void judgment, due to a defective affidavit. It said, 'While such a void judgment as a general rule neither binds nor bars any one, yet a party who procures such a judgment to be entered in his favor may not in good conscience be heard to impeach it. * * * Even where one who did not procure it accepts the benefits of a void judgment, he is estopped to assert its invalidity.' The party had an opportunity to be heard and proposed the agreement then later sought to deny it. Benefits in Edwards included a reduction for the amount of the house payment.

Lack of jurisdiction over Ahmed makes the facts of Edwards distinctly different. The court in Edwards did not address and clearly did not say that failure to properly serve the summons and failure to give proper notice of a hearing could bind a third party based upon some vaguely alleged benefits he allegedly received. What the Court in Edwards did find was that the judgment was void due to a defective affidavit.

The Court in Carpenter said a rule "which, in the absence of elements of estoppel chargeable to him personally, denies to a party the right to attack a divorce decree otherwise subject to attack, solely because he is the second spouse of the divorced party contracting the second marriage, places upon him (or her) the obligations of a valid second marriage, without at the same time entitling him (or her) to its benefits, and places the enjoyment by him (or her) of such benefits at the mercy of third persons." Annotation 120 A.L.R. at page 817. James Brown received obligations not benefits.

ii. COLLATERAL ESTOPPEL DOES NOT BAR JAMES BROWN INSTEAD COLLATERAL ATTACK ALLOWS HIM DUE PROCESS

Since James Brown was not a party to the annulment law suit, had no previous opportunity to litigate it and was barred from intervening in that prior law suit, he is entitled to collaterally attack it in an outside proceeding.

Tommie Rae's application of collateral estoppel is not applicable in the James Brown case because the same parties are not involved here and to deny him an opportunity to be heard would amount to a violation of due process.

In 2014 the South Carolina Supreme Court addressed the issue of collateral estoppel in Holmes v E. Cooper Cmty. Hospt., Inc. (S.C., March 26, 2014), where it stated that under the doctrine of collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid

and final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. Carman v. S.C. Alcoholic Beverage Control Comm'n 317 S.C. 1, 6, 451 S.E. 2d 383, 386 (1994).

Hynie argues collateral estoppel applies. Collateral estoppels only applies where the party against whom it is raised was either a party to the earlier suit or had an opportunity to intervene in that matter to be heard. James Brown was not a party to the prior annulment action between Tommie Rae and Ahmed therefore James Brown is not collaterally stopped from challenging that judgment as void and a violation of due process.

"Collateral estoppel, does not prevent him from re-litigating the issue that was decided in the previous family court action. Carolina Renewal, Inc., V S.C. dept. of Transp.385 S.C. 550, 554, 684 S.E. 2d 779, 782 (Ct. App. 2009). **"The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was actually litigated in the prior action. That court said that traditionally the use of collateral estoppel required mutuality of parties to bar re-litigation, however, modern courts recognize that the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue.** *Id. Id.* at 555, 684 S.E.2d at 782. "Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it." *Id.*

iii. THE COURTS IN THE CASES CITED BY HYNIE HAD JURISDICTION

Tommie Rae cites Edwards v Edwards, 254 S.C. 466, 471, 176 S.E.2d 123 (SC 1970) The appellant in Edwards acknowledged that the court had jurisdiction. The Court said, "While the Juvenile and Domestic Relations Court

of Spartanburg had jurisdiction to grant divorces and alimony, it had no authority to order the transfer of his property to his wife as an incident to such jurisdiction."

Also the facts in the case of Schleicher v. Schleicher, 423 S.E.2d 147, 310 S.C. 275, (C.A. S.C. 1992) are distinguished from James Brown's case because the court in that case had jurisdiction over the person and the subject of divorce.

Likewise, in Scheper v. Scheper, 125 S.C. 89, 118 S.E. 178 (S.C. 1923), the court had already acquired jurisdiction. It clearly stated that by virtue of the Court's jurisdiction of the person and subject matter and full faith and credit of the U.S. Constitution it was able to rule in that case.

In Day v Day, 216 S.C. 334,338, 58 S.E. 2d 83, 85 (1950), cited by Tommie Rae, the court discussed the diligent search required for service by publication were a spouse could not be located. That case involved service by publication where the whereabouts of the defendant had been unknown for seven years, yet, service of process still had to meet the statutory requirements. With regard to the diligent search necessary to obtain service by publication, that court stated. * * * **The inquiry should embrace all reasonably patent sources of information which the circumstances of the case suggest**, including an inquiry made of the persons and at the places where news of him, if living, would most probably be had.

iv. WHEN A BIGAMOUS MARRIAGE IS VOIDED IT DOES NOT GIVE VALIDITY TO THE SUBSEQUENT MARRIAGE CONTRACT

The general rule applicable to this situation is stated in 52 Am. Jur.2d Marriage 57: Apart from statute, a bigamous marriage does not acquire validity when the prior subsisting marriage is legally terminated by divorce or by the death of the first spouse. The same rule is generally followed where the prior subsisting marriage is annulled after the second marriage is

contracted, even though the purpose of an annulment proceeding is to declare that no valid marriage ever took place between the parties or that no valid marriage relation ever existed between the parties. Even where the annulment decree expressly declares the first marriage null and void ab initio, it does not relate back so as to validate the second marriage. In order for the subsequent marriage to be valid, it has been held that there must be a new ceremony following the termination of the earlier marriage. Lukich v. Lukich 627 S.E. 2d 754, 758, 368 S.C. 47 (SC App 2006).

If the annulment was effective, it took away any rights under the 12/10/01 marriage contract between Hynie and James Brown. Termination of that marriage terminated any rights she had, except under common law. And her Consent Agreement terminated any rights under common law. (Exhibit 19 JSF)

Hynie's attempt to annul her marriage to Ahmed was void, However, even if Hynie was successful in annulling her former marriage with Ahmed, then her marriage with James Brown would still require renewing their vows.

Hynie's April 15, 2004 annulment, did **NOT** operate to validate Hynie's 12/10/2001 Marriage Contract" with James Brown. The annulment from Ahmed required Hynie and James Brown to renew their marriage vows to make their Marriage Contract effective. Hynie and James Brown did not remarry. Therefore, they were not married by contract. Furthermore, Hynie's rights under the marriage contract were limited, fixed and waived by the terms of the Prenuptial Agreement signed by Tommie Rae on November 19, 2001. (Exhibit She understood that by signing that Agreement she would receive substantially less than the amount she would otherwise be entitled to receive.

This explains why the Consent Order (Exhibit 19 JSF) states that Hynie would make no claim as a common law spouse. The marriage under the contract was already void. With the marriage contract void and they did not

remarry, then the only claim that Hynie could make in the future would be as a common law spouse. The Consent Order insured that she could not claim as a common law spouse either. James Brown should be entitled to judicial estoppel to prevent Hynie from now making a claim as a spouse under the December 10, 2001 marriage contract where the law required the parties to remarry. Now that James Brown is deceased this legal manipulation should not allow a shift in the law to his detriment.

V. MITCHELL CANNOT BE BOUND TO A SETTLEMENT AGREEMENT SHE NEVER SIGNED AND THAT IS UNJUST AND UNREASONABLE

Jeanette Mitchell was not a signing party to the Settlement Agreement, which Hynie seeks to apply as binding all parties in this case. It would be unjust and prejudicial to bind Mitchell to an Agreement, which Mitchell never signed.

Furthermore, the Supreme Court in Wilson v. Dallas, 403 S.C. 411 (S.C. 2013), did not find that the Compromise Agreement was just and reasonable. It said that a two-part test must be satisfied to warrant approval of a compromise agreement. First, there must be the presence of a good faith controversy between the parties. The effect of the Agreement upon the interest of persons represented by fiduciaries or other representatives must be just and reasonable. Id at 436. In addition, the evidence did not support a just and reasonable compromise. The Court found that the settling parties had signed over their federal copyrights termination right, which could be a significant benefit to the charitable beneficiaries because they might form a substantial portion of the future value of the estate. The Court found no evidence presented as to the potential value of these rights. Id 437.

Hynie's arguments on pages 9 and 10 of her Memorandum of Law are speculative as to the Supreme Court's ruling and should be given no weight,

including, "Had the Supreme Court believed that Mrs. Brown was not Mr. Brown's wife under Lukick it could easily have said so" and "...Apparently the Supreme Court understood that not only does Lukick not invalidate the marriage of Mr. and Mrs. Brown, it confirms the validity of that marriage." What the Supreme Court did say was that Tommie Rae executed a Prenuptial Agreement in which she waived any right to Brown's property and waived any claim for an interest in his estate in the event of his death, including the rights to a statutory share of Brown's estate or to any interest as an omitted spouse. Wilson v. Dallas, supra at 414.

Finally, settlement negotiations are not admissible under Rule 408, SCRE, which provides:

> **Evidence** of (1) furnishing or offering or promising to furnish, or (2) accepting or **offering or promising** to accept, a valuable **consideration** in compromising or attempting **to compromise** a claim which was disputed as to either validity or amount, **is not admissible to prove liability** for or invalidity of the claim or its amount. **Evidence of conduct or statements made in compromise negotiations is likewise not admissible.** This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The Question in Fesmire v. Dign, 683 SE 2d 803, 385, SC 296 (S.C. App 2009), was whether the master erred in admitting into evidence redacted versions of two letters authored by counsel for the purpose of settlement negotiations The Court said, this rule contemplates that the parties need to

Feel free to make certain assumptions for the purpose of settlement negotiations and that those statements are assumed by the author to be true only for the purpose of compromise negotiations. The rule codifies that longstanding principle that evidence of conduct or statements make in compromise negotiations is not admissible. Hunter v. Hyder, 236 S.C. 378, 387, 114 S.E. 2d 493, 497 (1960) ("Compromises are favored and evidence of an offer or attempt to compromise or settle a matter in dispute cannot be given in evidence against the party by whom such offer or attempt was made.").

WHEREFORE, Jeanette Mitchell and Amicus Curiae moves and respectfully request that this court deny Hynie's Motion for Summary Judgment because (1) genuine issues of material fact exist, (2) determine that the annulment between Hynie and Ahmed was invalid for lack of jurisdiction and (3) determine that Hynie has waived her right to make any claim against the Estate of James Brown, and such other relief as this court deems just and proper.

Respectfully submitted,

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
	)	MEMORANDUM IN SUPPORT OF
	)	LIMITED SPECIAL ADMINISTRATOR'S
Tommie Rae Brown,	)	("LSA") MOTION FOR SUMMARY
Petitioner,	)	JUDGMENT AND OPPOSING
v.	)	TOMMIE RAE BROWN'S MOTION
	)	FOR PARTIAL SUMMARY
	)	JUDGMENT ON THE ISSUE OF
	)	SURVIVING SPOUSE AND
David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown	)	SUPPORTING RESPONDENT
	)	TERRY BROWN'S
	)	MEMORANDUM OF LAW IN
	)	OPPOSITION TO PETITIONER'S
	)	MOTION FOR PARTIAL
Respondents,	)	SUMMARY JUDGMENT
	)	
IN RE:	)	
	)	Case Number 2013-CP-02-02849-orig
The Estate of James Brown a/k/a James Joseph Brown	)	Case Number 2013-CP-02-02850-cert copy
	)	

NOW COMES, Larry Brown, Venisha Brown, Deanna Brown-Thomas, Jason Brown Lewis, Yamma Brown (individually and on behalf of her minor children Sydney Lumar and Carrington Lumar), and show this Honorable Court as follows:

Respondents respond to the current motions and fully adopt and incorporate herein Limited Special Administrator David C. Sojourner, Jr.'s Memorandum of Law Supporting Limited Special Administrator's ("LSA") Motion for Summary Judgment and Opposing Tommie Rae Brown's Motion for Partial Summary Judgment on the Issue of Surviving Spouse as if stated fully verbatim herein.

In addition, Respondents fully adopt and incorporate herein Respondent Terry Brown's Memorandum of Law in Opposition to Petitioner's Motion for Partial Summary Judgment and in Support of Respondent Terry Brown's Counterarguments as if stated fully verbatim herein.

WHEREFORE, Respondents respectfully move this Honorable Court to deny Petitioner's motion for partial summary judgment, grant the LSA's motion for summary judgment, and deny Petitioner's omitted spouse and elective share claims.

FILED 10.20.14 9AM
Liz Godard
C.C.C.P.&G.S.
Anita Knoepfle
Deputy Clerk

Respectfully submitted this 15TH day of OCTOBER, 2014.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	Case Nos.: 2013-CP-02-02849 - 019
	)	2013-CP-02-02850 - Cert Copy
	)	
	)	
IN RE THE ESTATE OF	)	
JAMES BROWN A/K/A	)	
JAMES JOSEPH BROWN	)	
	)	

REPLY MEMORANDUM IN SUPPORT OF TOMMIE RAE BROWN'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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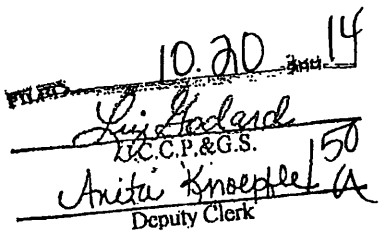

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Petitioner Tommie Rae Brown ("Mrs. Brown") submits this Memorandum of Law in reply to memoranda submitted to the court by the opposing parties: (1) David C. Sojourner Jr., as Limited Special Administrator ("LSA") of the estate of James Brown, (2) Daryl Brown, (3) Terry Brown, and (4) Jeanette Mitchell, [1] and (5) Larry Brown, Venisha Brown, Jason Brown Lewis, Deanna Brown-Thomas, and Yamma Brown (individually and on behalf of her minor children S L and C L).

I. INTRODUCTION.

This memorandum supplements the initial memorandum by Mrs. Brown supporting her motion for partial summary judgment and incorporates that initial memorandum herein.

Although this memorandum addresses hereinbelow a number of issues raised by the opposing parties, the primary argument confirming the validity of Mrs. Brown's marriage to James Brown ("Mr. Brown") is simple and compelling: (1) the family court order holding that the putative marriage between Mrs. Brown and Ahmed is final and binding and (2) consequently, Mrs. Brown had no impediment to her marriage to Mr. Brown, in accordance with the *Lukich* case and all other applicable case and statutory law.

Mr. Brown dismissed his own family court action seeking to annul his marriage to Mrs. Brown. In that action, contrary to the position now taken by those who stand in his shoes, he insisted that the family court order in the Mrs. Brown-Ahmed action be binding in his own Amended Complaint.[1] Mr. Brown never sought thereafter to dispute his marriage to Mrs.

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[1] Without waiving any objection to Mitchell's motion to intervene or the potential motions to intervene of J B L , S L and C L

[1] Mr. Brown sought this relief in this Amended Complaint in the Family Court;

> The Findings of Facts of the Charleston Family Courts are binding on this Court...Pursuant to the [Annulment] Order from the Charleston Family Court, Defendant is collaterally and judicially estopped from denying the allegations in this action [, and] Plaintiff is entitled to an annulment from the Defendant.

Brown.[2] Purely for personal gain, the opposing parties, other than the LSA, seek to do what Mr. Brown did not do: attempt to invalidate his marriage to Mrs. Brown. The LSA, also standing in the shoes of Mr. Brown, now attempts to do the same. Their actions contradict Mr. Brown's own actions in his lifetime.[3]

These are the same people who sought to deny that J. . Bı is the biological child of Mr. Brown. After years of false allegations and name calling, it turns out that Mr. Brown had a son with the woman he married. After dismissing his family court action seeking to annul his marriage to Mrs. Brown, Mr. Brown never sought to dispute his paternity of Jı .[4] Again, purely for personal gain, the opposing parties, other than the LSA, seek to do what Mr. Brown did not do: attempt to dispute his paternity of J [5] The LSA, also standing in the shoes of Mr. Brown, attempted to do the same. Their actions contradict Mr. Brown's own actions during his lifetime.

Consequently, the primary argument raised by the opposing parties is two-fold.

Amended Complaint for Annulment, Joint Stip. Exhibits at 000070, ¶¶ 10-12.

[2] The court can take judicial notice that James never sought thereafter to terminate his marriage to Tommie Rae or question its validity. James held her out publicly as his wife, as evidenced by the autobiography copyrighted and published after the family court actions.

[3] Although Terry Brown was the only named devisee in the 2000 will who did not join in the will and trust contests, Terry and Daryl entered into and supported the settlement agreement, through the appeal to the Supreme Court --- a settlement agreement that gave them far more than they would take under the will and trust.

[4] The court can take judicial notice that Mr. Brown never sought thereafter to question his paternity of Jı . Mr. Brown held him out publicly as his son, as evidenced by the autobiography copyrighted and published after the family court actions.

[5] In his memorandum, Daryl Brown admits that J is the biological son of James Brown, but contends that Jı has the same status as illegitimate children. The latter part of that assertion is not correct: South Carolina law legitimizes J because of the marriage of James and Tommie Rae – regardless of whether that marriage was valid. Jı is a legitimate child and intestate heir of James Brown.

(1) The opposing parties assert that the annulment order in the Mrs. Brown-Ahmed action is not final and binding.[6] The opposing parties thus assert that this Court should do what it cannot do: completely disregard the family court order. The opposing parties would then have this Court do something else it cannot do: retry the issue of the invalidity of the putative marriage of Mrs. Brown to Ahmed. As explained elsewhere in this memorandum,[7] even if the Respondents were somehow allowed to challenge the annulment decree in this Court, they have the burden of proving extrinsic fraud which no one has ever alleged and no one alleges now.

(2) The second part of the opposing parties' argument, given that the annulment order is final and binding, is that, notwithstanding the fact the Ahmed was married when he attempted to marry Mrs. Brown, *Lukich* somehow holds that the bigamous marriage was nevertheless valid and constituted a legal impediment that prevented Mrs. Brown from entering into a subsequent marriage to Mr. Brown. Although this Court has already rejected this bizarre interpretation of *Lukich* in its Order entered on May, 26, 2009, this argument is addressed again by Mrs. Brown in this memorandum and in her initial memorandum.

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[6] They do so despite the opposing parties who entered into the settlement agreement having recognized Tommie Rae as the surviving spouse, and despite that agreement providing, with approved severability in the agreement, that it was a binding private settlement agreement as well, under SCPC section 62-3-912. The Supreme Court in *Wilson v. Dallas* did not consider or rule on the 62-3-912 issue, so that agreement is still binding on those parties. Although Terry argues that the SCRE precludes the assertion of that settlement agreement, Terry misapprehends the rule, which prohibits evidence of the negotiations. That rule does not prevent the assertion of the agreement that was reached, which is what Tommie Rae is asserting.

It is noteworthy that the Internal Revenue Service conducted an audit of the estate and concluded that Tommie Rae was the surviving spouse of James, even though that determination cost the Service substantial tax dollars under the settlement, yet opposing parties contest what they agreed to under that very settlement. Again, the Estate and Mr. Brown are more than happy to accept the benefits of the marriage and annulment when it suits.

[7] *See* pages 8-10, infra.

II. BURDEN OF PROOF.

The parties opposing the validity of the marriage of Mr. And Mrs. Brown bear the burden of proof. *See* Tommie Rae Brown's Initial Memorandum in Support of Motion for Partial Summary Judgment, pp. 14-17; *E.D.M. v. T.A.M.*, 415 S.E.2d 812, 815; *Day v. Secretary of HHS*, 519 F.Supp. 872 (S.C. Dist. 1981). Mrs. Brown satisfied the burden of proof that her putative marriage to Ahmed was void ab initio. Opposing parties are now attacking the marriage of Mrs. Brown to Mr. Brown and have the burden of proof to show that marriage was invalid.[8]

All opposing parties claim that the marriage between Mr. Brown and Mrs. Brown was void ab initio because at the time she married Mr. Brown, Mrs. Brown was still married to Ahmed. The burden of proof, therefore, lies upon those who would attack the validity of the certificate of marriage produced by Mrs. Brown.

Courts uniformly impose a very strict burden upon those who argue against the validity of this marriage. The Texas Supreme Court held:

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

[8] Even if Tommie Rae has the burden of proof, she has met this burden by presenting the court with a certificate of marriage, showing that she and James Brown were married on December 14, 2001, at Beech Island, in Aiken County, South Carolina. (Joint Stipulation ¶ 4 & Ex. 4 [Marriage License, dated 12/14/01].)

be valid are collated in annotations in 34 A.L.R. 464, 77 A.L.R. 729, and 14 A.L.R.2d 7.

Tex. Employers' Ins. Ass'n v. Elder, 155 Tex. 27, 30, 282 S.W.2d 371, 373 (1955).

"Where a valid prior marriage is shown, it is presumed to have been dissolved by divorce or death so that *the attacking party has the burden of adducing evidence to the contrary.*" 55 C.J.S. *Marriage* § 55 (Westlaw database updated Sept. 2013) (emphasis added).[9]

Under the above authorities, it is not enough for the opposing parties to produce a marriage certificate showing on its face that Mrs. Brown and Ahmed were married because there is a final and binding family court order showing that the putative marriage between Mrs. Brown and Ahmed was never valid.

Mrs. Brown notes that her argument so far depends upon exactly one assertion of fact—the existence of a marriage certificate between Mr. and Mrs. Brown.[10] This assertion is

[9] Tommie Rae has already satisfied her burden of proof as to the lack of validity of her putative marriage to Ahmed when the family court ruled that marriage void ab initio. The opposing parties attacking the marriage of Tommie Rae and James cannot overcome that issue. Because there was never any marriage between Tommie Rae and Ahmed, the burden of proof issue borne by the opposing parties has nothing to do with showing that the putative marriage between Tommie Rae and Ahmed was terminated by death or divorce before her marriage to James, but even if death or divorce were the issue, Tommie Rae's statement that she was not *aware* of any occurrence that would have terminated the marriage, such as Ahmed's death or divorce, is not a statement that Ahmed has not died or gotten a divorce. Tommie Rae has not seen Ahmed for years, and it is very possible that he died long ago without Tommie Rae's knowledge, or that he got a divorce, perhaps in Pakistan. It is the opposing parties' burden, not Tommie Rae's burden, to disprove the possibility that Ahmed died before James Brown and Tommie Rae Brown were married. To carry the burden that divorce did not occur, for example, the opposing parties would have to show they checked records in all appropriate places, including Pakistan.

[10] In his memorandum, the LSA contends that Tommie Rae has asserted facts that are disputed yet necessary for her to prevail, thus precluding a summary judgment. Tommie Rae has not asserted any relevant facts that are disputed, but her assertion of any facts in no way affects the ability of this Court to issue a summary judgment in her favor. As noted, the ultimate issue, regardless of standing and estoppel affecting the various parties as discussed in her initial memorandum, is that the final and binding order of the family court, which cannot be overturned by this Court, holds that she had no impediment to her marriage to James, under all South Carolina statutes and case precedent related to the effect of a bigamous marriage – that it is never a marriage and is void ab initio. Although the validity of Tommie Rae's marriage to James is thus a matter of law, if the Court nevertheless concluded that disputed facts precluded granting Tommie Rae's motion, the LSA's position about disputed facts precluding a summary judgment would apply to his own motion for summary judgment. The LSA also contends that if Tommie Rae is determined not to be the surviving spouse for spousal share matters, she is also automatically denied standing in the will and trust contest. That, too, is an incorrect position: Tommie Rae could be an interested person for the

established by stipulation. (Joint Stipulation ¶ 4 & Ex. 4 [Marriage License].) The certificate establishes that Mr. Brown's marriage to Mrs. Brown is his *most recent* marriage. Once that fact is established, the burden is then on those who would attack that marriage to prove *both* (1) the existence of a prior marriage, *and* (2) that the prior marriage was not dissolved by divorce or death. The opposing parties have shown the court a prior marriage certificate, but they cannot overcome the family court order that the prior marriage certificate was determined to be void ab initio. Hearsay conversations with strange unknown persons in foreign countries are not admissible evidence.

In the absence of such evidence, the very strong presumption in favor of the most recent marriage has not been rebutted.

III. ALL THIRD PERSONS ARE BOUND BY THE FINAL JUDGMENT ANNULLING THE MARRIAGE BETWEEN MRS. BROWN AND AHMED.

All opposing parties are precluded from arguing that a valid marriage ever existed between Mrs. Brown and Ahmed.[11]

This conclusion is based upon a valid judgment of the South Carolina family court, annulling the marriage between Mrs. Brown and Ahmed. All parties admit the existence of this judgment. (Joint Stipulation ¶ 11 & Ex. 12 [Final Order].) The judgment expressly holds that Ahmed "was married at the time he entered into his marriage with [Mrs. Brown]" and, therefore, the marriage between Mrs. Brown and Ahmed was void ab initio. (Joint Stipulation Ex. 12 [Final Order] at 000031, Finding of Fact No. 4.) Mrs. Brown contends that this finding is binding on all parties in the present action.

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will and trust contests for other reasons.

[11] For an additional discussion, see the initial memorandum, pp. 17-34.

A. Validity Of The Annulment.

Some of the opposing parties argue that Ahmed was not properly served with process in the annulment action. Ahmed was served by publication in the annulment action, as his whereabouts could not be determined. (*See* Joint Stipulation Ex. 12 [Final Order], at 000029-30.) No party to this action has alleged the existence of any admissible evidence that Mrs. Brown actually knew Ahmed's whereabouts. Copies of the Order of Continuance were sent to addresses for Ahmed provided by a licensed private investigator. *See* Joint Stipulation Ex. 9 [Marcia Jones Aff., filed 4/15/04]; Affidavit of Ronald Pannell. Mrs. Brown's counsel attempted to located Ahmed. Hiring a licensed private investigator to locate a party is due diligence.

In addition, if service by publication was not proper, it is too late even for Ahmed to raise the issue. *See Peoples Bank of Beaufort, S.C. v. Exch. Realty, Inc.*, 273 S.C. 537, 540, 257 S.E.2d 733, 734 (1979) (trial court properly refused to vacate order, even though "the method of service was not technically in keeping with" South Carolina law, where attacking party waited almost three years before raising the issue). According to Alizai's sworn affidavit, Ahmed knew no later than early 2008 about the annulment. More than six years since then, and more than 10 years since the annulment, Ahmed has done nothing. Moreover, Alizai swears that Ahmed refused to even swear to an affidavit or be deposed. Ahmed cannot at this late date contest the annulment.

1. Ahmed Is The Only Person Who May Have Had Standing To Challenge The Annulment Decree But He Failed To Do So.

The grounds for setting aside a judgment are set out in Rule 60(b), SCRCP, which states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.

Ahmed had all of these avenues available to him but did not avail himself of any of them, even after at least by 2008 he had learned the marriage was dissolved. The two avenues the opposing parties now wish he had pursued are that the annulment decree was procured by fraud (Rule 60(b)(3)) and that the annulment decree is void (Rule 60(b)(4)). However, not only did Mr. Ahmed never assert either of these claims, the facts alleged by the opposing parties as evidence that he had the grounds to assert such claims do not even constitute valid grounds for such relief.

2. The Opposing Parties Cannot Claim That The Annulment Decree Was Procured By Extrinsic Fraud.

The opposing parties accuse Mrs. Brown of fraud in obtaining the annulment. However, only extrinsic fraud is a ground for invalidating an order based on fraud.

In *Hagy v. Pruitt*, 339 S.C. 425, 529 S.E.2d 714 (2000), the Supreme Court determined that courts have the inherent authority to set aside any judgment on the ground of extrinsic fraud, notwithstanding any statute of limitation barring an action to set aside the judgment.

But the Supreme Court further explained a judgment may be set aside only for extrinsic fraud and not for intrinsic fraud:

> A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.' *Corley v. Centennial Const. Co.*, 247 S.C. 179, 146 S.E.2d 609 (1966). Extrinsic fraud is collateral or external to the trial of the matter. *Mr. G. v. Mrs. G.*, 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995). It is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.' *Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). Intrinsic fraud, on the other hand, is fraud presented and considered in the trial. *Evans v. Gunter*, 366 S.E.2d 44, 294 S.C. 525 (Ct. App. 1988). For example, perjury is intrinsic fraud and will not support an action to set aside the judgment. *Rycroft v. Tanguay*, 279 S.C. 76, 302 S.E.2d 327 (1983).

Id. at 431, 529 S.E.2d at 717.[12]

Mr. Brown never made a claim that Mrs. Brown had procured the annulment decree by extrinsic fraud, nor could he have done so because it is undisputed that he 1) helped her obtain the decree by paying her legal fees, 2) sought to use the annulment findings offensively in his own action, and 3) accepted its benefits. *See, e.g., Smoak v. Smoak*, 269 S.C. 313, 237 S.E.2d 372 (1977), a case where the husband procured a Haitian divorce decree. Smoak later claimed the wife was barred from receiving alimony because she had committed adultery while still married to him, since the Haitian divorce decree was void. The Supreme Court held the husband was estopped to challenge the validity of the Haitian decree. Among many other authorities, the Supreme cited the following with approval:

> Thus, in a proper case, a person may be estopped to attack, impeach, or deny the validity of a foreign divorce decree, as where he or she obtained the decree, participated in the fraud or wrong by which the decree was obtained, financed the proceeding, voluntarily appeared and participated in the foreign

[12] *See also Gainey v. Gainey*, 382 S.C. 414, 426, 675 S.E.2d 792, 798 (Ct. App. 2009); *Ex parte Gov't Emples. Ins. Co. v. Goethe*, 373 S.C. 132, 644 S.E.2d 699 (2007).

action, did some act which in itself recognized the validity of the decree, or accepted the benefits of the decree. . . ."

Id. at 320, 237 S.E.2d at 375.

Even if the opposing parties were somehow allowed to wait until after Mr. Brown's death to bring an action he chose not to bring while he was still living, they would be subject to the same estoppel to which he would have been subject. Moreover, none of the facts alleged by the opposing parties, principally that Mrs. Brown committed perjury in obtaining the annulment decree, even constitute extrinsic fraud. As has been noted in countless cases, perjury is a classic example of intrinsic fraud.

3. Not Only Did Mr. Brown Lack Standing To Contest The Family Court Order, He Was Estopped.

The opposing parties cannot claim that the annulment decree is void for the same reasons they cannot claim it was procured by extrinsic fraud: Mr. Brown paid the legal fees to obtain it. Mr. Brown would have been estopped to claim the decree was void even if he had wanted to, and the facts alleged by the opposing parties, even if proven at a trial, would not constitute grounds for finding that the decree was void in any event. [13]

It has long been settled that a person who accepts the benefits of even a void order is estopped to question its validity. *Edwards v. Edwards*, 254 S.C. 466, 176 S.E.2d 123 (1970) ("Since [husband] proposed the transfer of the property and has accepted the benefits accruing to him therefrom, he is now estopped to assert the invalidity of the judgment."); *Scheper v. Scheper*, 125 S.C. 89, 118 S.E. 178 (1923) ("Even where one who did not procure it accepts the benefits of a void judgment, he is estopped to assert its invalidity.").

[13] See an additional discussion in the initial memorandum, pp.21-28.

As is explained in section III.A.4 of this memorandum, the facts are undisputed that Judge Segars-Andrews determined that Ahmed could not be served in this State, and the efforts made by Mrs. Brown to obtain personal service on Ahmed in Texas went well beyond what was required by the above-referenced statutes to give him notice of the in rem annulment action.[14]

Third parties do not have a greater right to attack the judgment than Ahmed himself. Third parties have no right to attack the judgment in Ahmed's shoes, especially when Ahmed has not raised it himself. "Judgments and decrees of courts having jurisdiction of parties and of the subject-matter cannot be collaterally attacked, however erroneous, unless procured through fraud or collusion." *Piedmont Press Ass'n v. Record Publ'g Co.*, 156 S.C. 43, 152 S.E. 721, 726 (1930). The exception refers only to extrinsic fraud—fraud that denies a party his day in court—and not mere intrinsic fraud, such as perjury. *See, e.g., Gainey v. Gainey*, 382 S.C. 414, 426, 675 S.E.2d 792, 798 (Ct. App. 2009).

The opposing parties claim to have spoken to Javed Ahmed in 2008. David Bell, an attorney of record in this case and now a witness, states that he talked to Ahmed directly. The Taha Alizai affidavit flatly indicates that "until recently Javed Ahmed was unaware that the marriage had been dissolved." According to Alizai's affidavit, Javed Ahmed knew six (6) years ago that his marriage to Mrs. Brown had been annulled. Had Javed Ahmed wanted to contest, he could have tried. He too accepted the benefit of the judgment according to the opposing parties.

The opposing parties have not alleged any admissible evidence that the annulment proceeding resulted from any form of extrinsic fraud upon Mr. Brown. Indeed, the parties have stipulated that Mr. Brown knew of the annulment action (Joint Stipulation ¶ 14) and that he gave

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[14] See the additional discussion of publication issues, pp. 12-17 infra.

Mrs. Brown the funds to pay the legal fees "for the Ahmed Annulment litigation" (Joint Stipulation ¶ 13). Mr. Brown urged the Family Court of Aiken County to adopt the findings of fact contained in the annulment. Clearly he did not seek to enforce a fraudulent judgment, and if he did, he should be equitably estopped from now questioning that judgment. Mr. Brown would obviously not have agreed to finance litigation that was intended to defraud him. There was no fraud perpetrated on Mr. Brown. By paying the fees he clearly caused the annulment to take place. Were it not for his paying the fees, no annulment would have taken place. So clearly he wanted it to happen. This is an inference the court must draw from his actions.

4. Petitioner's Service By Publication Was Proper.

Service on Ahmed was valid and proper. There is nothing improper about service by publication when the defendant in an action legitimately cannot be found. Such service is permitted by section 15-9-710 of the South Carolina Code and is a common occurrence in the legal system. *See generally Hendrix v. Hendrix*, 296 S.C. 200, 203, 371 S.E.2d 528, 530 (1988). Opposing parties act like they have never heard of service by publication, but it is done every day in every court in the United States. Mrs. Brown conducted a thorough search for Ahmed, even going so far as to hire the services of a licensed private investigator to find him. (*See* Joint Stipulation Ex. 9 (listing the measures taken).). The family court entered an order expressly stating that it appeared to the satisfaction of the family court that "the Plaintiff made a diligent effort to locate the Defendant, Javed Ahmed." (Joint Stipulation Ex. 8 [Order of Publ'n, filed 2/4/04], at 000017.) The record supports that determination, and that determination is conclusive in this action.

Contrary to Terry Brown's argument, Ahmed was not served by certified mail in Pakistan, and there was accordingly no need for Mrs. Brown to follow Rule 4(h)(5), SCRCP, or the

provisions of the Hague Convention on Service of Process Abroad, 20 U.S.T. 361, T.I.A.S. No. 6638 (1965). Ahmed lived in Houston, Texas. His last known address was in Houston, Texas. Defendant was served by publication in accordance with § 15-9-740 and was given *notice* of the hearing by mail as required by Rule 17, SCRFC.

Contrary to Jeanette Mitchell's argument, the annulment judgment cannot be set aside for alleged defects in service by publication. Mrs. Brown filed an affidavit with the Family Court stating that Ahmed could not be found. The family court then issued an order finding that "the Plaintiff made a diligent effort to locate the Defendant, Javed Ahmed," and that "it appears to the satisfaction of this Court that the current address and whereabouts of the Defendant are unknown." (Joint Stipulation Ex. 8 [Order of Publ'n], at 000017). Thus, the court expressly authorized service by publication.

South Carolina law does not permit direct or collateral attacks upon an order authorizing service by publication:

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

Wachovia Bank of S.C., N.A. v. Player, 341 S.C. 424, 428-29, 535 S.E.2d 128, 130 (2000) (emphasis added). The opposing parties allege no admissible evidence of fraud or collusion. The order authorizing service by publication therefore cannot be attacked.

Notice was properly sent to Ahmed's last known residence. That residence was 14403 Ella Boulevard #314 in Houston, Texas, as used consistently on almost all documents from the annulment. An apartment number of #1314 appears in Mrs. Brown's affidavit (Joint Stipulation

Ex. 7 [Tommie Rae Brown Aff., filed 2/4/04]), and the Jeanette Mitchell Return makes much of this statement: "Hynie's affidavit dated February 2, 2004 states that the last known address...was # 1314." Jeanette Mitchell's Return, at 10. However, that is not what Mrs. Brown's affidavit says. It says the last known address she had was 14403 Ella Boulevard #1314, "but in an effort to locate the Defendant in order to personally serve him...I hired a licensed private investigator in the state of Texas, Ronald Pannell, who located a subsequent address, also in Houston, Texas, where the Defendant had apparently resided since the time I knew of his whereabouts." (Stip. Ex 000016). An affidavit by the licensed private investigator states that he found an apartment number of #314 after "conduct[ing] several searches in numerous national databases." (Joint Stipulation Ex. 6 [Aff. of Attempted Service, filed 2/4/04]). The correct address was clearly #314, and that is where notice was sent.

The Jeanette Mitchell Return contends that somehow, a typographical error invalidates an annulment proceeding. *See* Jeanette Mitchell's Return at 10, 12. The reference to December 30, 2003 on the process server's affidavit is clearly a typographical error. The correct reference was to December 30, 2002, which makes sense since the affidavit was sworn on January 12, 2003. Failing to change the year on a date is a very common error in the first few weeks of a new year. *See* Joint Stipulation Ex. 000010-11). Otherwise, the process server would have been projecting into the future.

The process server's statement that he "conducted several searches in numerous national databases" (Joint Stipulation Ex. 6 [Aff. of Attempted Service]), finding only two addresses in Texas, is sufficient to show that Ahmed could not be found within South Carolina and clearly satisfies the requirements of S.C. Code § 15-9-710. Indeed, there is not the slightest evidence in this case that Ahmed ever resided in South Carolina. This argument is a red herring, albeit a

minor one. Ahmed was living in Texas, not South Carolina. That fact distinguishes *Caldwell v. Wiquist*, 402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013), where the defendant's last known address was in South Carolina. The law does not require a search of South Carolina when Ahmed never lived in South Carolina beyond the search done by the licensed private investigator.

Note also that *Caldwell* distinguished *Wachovia Bank* and several other cases on grounds that "those cases involved affidavits that "'included at least some facts concerning efforts to locate the defendant.'" *Id.* at 570, 741 S.E.2d at 586. The *Caldwell* Court found that the standard in South Carolina is as follows:

> The affidavit must include some factual basis upon which the court issuing the order of service by publication can find that the defendant cannot, after due diligence, be found within the state. It is the existence of this factual basis that our appellate courts have found make the order for service by publication unreviewable, absent fraud or collusion.

Id. at 574. Mrs. Brown's affidavit alleges considerable efforts to locate Ahmed, including the retention of a licensed private investigator to conduct a nationwide search, which satisfies due diligence. (Joint Stipulation Ex. 6 [Aff. of Attempted Service].) This case is therefore distinguishable from *Caldwell* on the same basis as *Wachovia Bank*.

The fact that the notice published stated a hearing date of March 26 is not a defect. The hearing was set for March 26, but was continued. The order continuing the hearing is found at Joint Stipulation Exhibit 9 [Marcia Jones Aff.], page 000021, and the following page shows that notice was properly sent to Ahmed. It is not necessary to serve again a defendant who was properly served by publication, merely because the trial was continued. Notice of a hearing in Family Court is governed by Rule 17, SCRFC. Both Terry Brown and Jeanette Mitchell allege that service was invalid under Rule 4(d)(8), SCRCP. Jeanette Mitchell cites *Roche v. Young Brothers*, 318 S.C. 207, 456 S.E.2d 897 (1995) for this proposition. However, that case is

distinguishable as it involved acceptance of service by mail by a corporation and did not involve service by publication. The Court of Appeals has made it clear that Rule 17 clearly governs in this case:

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

Schleicher v. Schleicher, 310 S.C. 275, 277,423 S.E.2d 147, 148-149 (Ct. App.1992). The Court of Appeals thus clearly dispensed with any application of Rule 4(d)(8) suggested by Mitchell and Terry Brown. In the present case, the Notice was mailed to Ahmed's last known address by certified mail, return receipt requested. Moreover, the private investigator determined that Ahmed's last known address was in Texas, which shows he was not in South Carolina, thus establishing literal compliance with the statute.

Any error on service of process could have been raised only by Ahmed, and cannot be raised even by him over 10 years after the event. *Peoples Bank of Beaufort*, 273 S.C. 537, 257 S.E.2d 733. Further, the Respondents' lengthy discussion of North Carolina case law is obviously of no consequence as this case is in South Carolina.[15]

5. Venue Was Proper.

Some of the opposing parties object that the annulment action should have been filed in Aiken County, not Charleston County. This is a mere matter of venue, which has no effect on the validity of the judgment. "The failure to bring the proceedings within the proper venue, when such is determined by the place of residence, does not render them void, the error being in practice and not jurisdictional." *In re Lemack's Estate*, 207 S.C. 137, 144, 35 S.E.2d 34, 37 (1945) (quoting 32 C.J. 633). "A court sitting where venue is improper may nevertheless render judgment provided the party who possesses the venue right consents, either expressly or impliedly." *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994). Venue is clearly not jurisdictional, and it is therefore not a sufficient basis for attacking a final judgment.

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[15] Terry Brown also cites a South Carolina case which involved a question of North Carolina law. Both Terry Brown and Jeanette Mitchell cite cases which are factually distinct from and have no bearing on these matters. Further, in *Roche v. Young Brothers* (cited by Jeanette Mitchell), the Supreme Court of South Carolina said:

> We have never required exacting compliance with the rules to effect service of process. *See Foster v. Crawford*, 57 S.C. 551, 36 S.E. 5 (1900)(when officer's return defective as to time and place of service, it can be amended to state facts); *Saunders v. Bobo*, 2 Bailey 492 (1831) (sheriff's incomplete return that was not sworn to may be amended); *Miller v. Hall*, 1 Speers 1 (1842). Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings.

Roche v. Young Bros., 318 S.C. 207, 209-210,456 S.E.2d 897, 899 (1995). Certainly, at the very least, Mrs. Brown sufficiently complied with the service rules. Mitchell also cites *Graham v. Lloyd's*, 296 S.C. 249, 371 S.E.2d 801 (Ct. App. 1988) for the proposition that a court may consider affidavits and other evidence outside of a complaint when a motion to dismiss questions jurisdiction. *Graham* is distinguishable though because the motion to dismiss in *Graham* was filed by a party to the suit, whereas third parties are now attacking Mrs. Brown's annulment Order. Further, *Graham* involved service effected on an insurance business and did not involve service by publication.

This ad hominem attack on Mrs. Brown and her counsel are unworthy of a judicial proceeding. Terry Brown's Memorandum, for example, states: "Mr. Ahmed conveniently was neither personally served nor present to defend himself against the fraudulent and criminal allegations. Interestingly, the annulment proceeding...took place in Charleston, S.C. where neither Ms. Hynie, nor Mr. Ahmed lived." Terry Brown's Memorandum in Opposition at 2. (emphasis added).

As this Court is well aware, the family court has statewide jurisdiction. Ms. Brown lived in Aiken County but her counsel's office was in Charleston County. As venue was not important, and as it was far less expensive for the matter to be brought in the county where Mr. Rosen practiced, this was done to keep down unnecessary expense. It has no legal significance or implication of some sinister motive.

Many of the assertions in various parties' memoranda border on the ludicrous. For example, Terry Brown's Memorandum engages in extensive name-calling about fraud and then proceeds to represent to this Court that "Mr. Brown and Ms. Hynie entered into a Consent Order ('Brown-Hynie Consent Order') wherein Ms. Hynie agreed and stipulated that she was not Mr. Brown's spouse..." Terry Brown's Memorandum in Opposition at 1. This is a rather remarkable misrepresentation to a court which has been hearing this issue for over seven years and, at a minimum, illustrates the unreliability of the opposing parties' arguments.

Finally, Mrs. Brown asks the Court to place itself in her position at the time when the annulment was obtained. Doubt had been expressed as to the validity of Mrs. Brown's marriage to Ahmed and therefore her marriage to Mr. Brown. Mrs. Brown was certainly entitled to have this doubt authoritatively resolved by a court of South Carolina. Ahmed was out of the state and possibly out of the country, and could not be found. Mrs. Brown submits that in this situation,

any resident of South Carolina would have done what she did: filed an action to resolve the dispute, and served Ahmed by publication. Mrs. Brown was not required to live the rest of her life in uncertainty regarding her marital status and continue to be attacked by others who were not parties to her marriage to Mr. Brown.

In sum, no admissible evidence has been presented to suggest that the Final Order annulling the marriage of Mrs. Brown and Ahmed is invalid in any way. But even if it had been, it would not matter. The family court order has resolved all those issues and is final and binding.

B. Effect Of The Annulment.

1. The Annulment Binds Ahmed.

A valid annulment is unquestionably binding upon the named parties. Ahmed was a named party. Thus, the annulment is binding upon Ahmed. In the Bell and Alizai affidavits, the man claiming to be Ahmed makes statements inconsistent with the judgment. Accepting for the sake of argument that the man to whom Bell and Alizai spoke was actually Ahmed, the statements made are impermissible collateral attacks upon the Final Order in the annulment action, which unquestionably binds Ahmed. This is the primary reason why the Bell and Alizai affidavits cannot be given any weight whatsoever. Ahmed should not be heard to contradict the facts set forth in the Final Order in the annulment case because he did not appear and attack that Final Order directly. According to Bell's sworn statement, Ahmed has known about the annulment since at least early 2008.

2. The Annulment Was Not A Default Judgment But It Would Not Matter If It Were.

The question then becomes, what effect does the annulment have upon third parties? *See* Tommie Rae Brown's initial memorandum pp. 17-34. Some opposing parties argue that the

annulment does not bind third parties because it was a default judgment. This is factually wrong. At the annulment hearing, Mrs. Brown's attorney expressly told the court that Mrs. Brown was *not* requesting a default judgment:

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

(4/15/04 Tr. 4:7-12, *reprinted in* Joint Stipulation Ex. 13 (emphasis added).) Mrs. Brown therefore expressly refused to ask the court to find Ahmed in default and, instead, asked the court to hear the evidence and determine whether the evidence was credible.

In addition, a default judgment is a judgment rendered without opposition. A judgment of annulment is never entered without opposition because the trial court has a solemn duty to approach all annulment cases with careful skepticism, and to grant an annulment only in the presence of strong supporting evidence:

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

Fogel v. McDonald, 170 S.C. 506, 157 S.E. 830, 833 (1931) (emphasis added).

> In a controversy relating to marriage the Court is concerned not only with the rights of the individuals involved but also with the public interest. A duty rests upon the Court to encourage the parties to live together, to see that the marriage status is not disturbed except under circumstances and for causes fully sanctioned by law, and to prevent fraudulent and collusive divorces.

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

To similar effect is Rule 55(e):

> No judgment by default shall be entered against . . . parties to a suit for divorce or annulment of marriage or against a party upon whom service of summons was made by publication . . . *unless the claimant establishes his claim to relief by evidence satisfactory to the Court.*

Rule 55(e), SCRCP (emphasis added).

It is axiomatic that the state has a strong interest in preserving marriages. The effect of *Fogel* and Rule 55(e) is to make the state a third party to every annulment, and to charge the judge with a duty to review the evidence carefully. An annulment case is therefore never a default judgment, in the normal sense of a judgment entered routinely and automatically simply because the defendant fails to respond. The court was required to review the evidence carefully, and not simply to assume that the annulment should be granted because no one opposed it.

The same response applies to the opposing parties' argument that the annulment was not actually litigated. The annulment *was* actually litigated because the law required Mrs. Brown to convince the trial court that valid grounds for annulment were present. Unlike most civil cases, an annulment case cannot be resolved in favor of the plaintiff simply because the defendant fails to appear. *The plaintiff must still convince the trial court that grounds for annulment are present*, and the trial judge is required to "exercise[] a jealous and exclusive dominion," *Fogel*, 170 S.C. 506, 157 S.E. at 833, to ensure that no annulments are granted without cause.

In short, to protect the powerful state interest in not granting annulments without cause, the trial court was required to assume a stance of reasonable opposition even if no defendant appeared. Because Mrs. Brown had to overcome that oppositional stance, the annulment at issue

in this case *was* actually litigated. The court did not simply rule in Mrs. Brown's favor because Ahmed did not show up; the court fully considered the merits of Mrs. Brown's position and found that position to be correct. The annulment was therefore not any form of default judgment.

Even if the family court order were a default judgment, the case directly on point is *Neely*, cited by the illegitimate children opposing parties as their primary argument to be determined heirs. The husband in *Neely*, which is most directly applicable to this situation, involving the requirement that a probate court accept the earlier judgment of family status by a family court, "never answered the complaint and was found in default."

3. The Annulment Of A Void Marriage Is Binding Upon Third Parties.

The opposing parties argue that annulments are not binding upon third parties. To the contrary, a final judgment of annulment of a void marriage is legally binding on all persons, even those who are not parties to the action.[16]

Mrs. Brown relies initially upon section 20-1-80 of the South Carolina Code. That statute provides:

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

S.C. Code Ann. § 20-1-80.

The position of the South Carolina courts and statutes is expressly advocated in the nation's leading nationwide family law treatise. "*[A]nnulment decrees are binding upon non-*

[16] For an additional discussion, see initial memorandum, pp.17-35

parties as well as parties respecting the validity of the marriages involved." 1 Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 3.6 (2d ed. 1987) (emphasis added).

Professor Clark recognizes that this issue highlights the tension between the opportunity to be heard, on the one side, and the need for finality on the other. Although he recognizes that the rights of third persons may be affected by whether or not a marriage exists, he concludes:

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

Id.

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

The court of appeals resolved the main issue in the case by holding that a bigamous remarriage, which is void ab initio, does not terminate a prior spousal support obligation. The husband then argued in the alternative that the wife's remarriage could not be treated as bigamous *against him*, as he was not a party to the annulment action in which the remarriage was declared void. This is the same argument that the opposing parties make in the present case.

The court of appeals rejected the argument, holding directly that the annulment was binding upon the first husband even though he was not a party to the action:

> Yon also argues the court erred in reinstating his alimony obligation because he was not a party to Joye's annulment action. He asserts that he should have been made a party to the annulment action because its outcome directly affected him. We disagree.
>
> Generally, a person must be joined as a party to an action if his absence precludes complete relief among those already parties or his interest in the subject matter is so intertwined that he would not receive complete relief or resolution without his participation. Rule 19(a), SCRCP; *see First Citizens Bank & Trust Co. v. Strable*, 292 S.C. 146, 148, 355 S.E.2d 278, 279 (Ct.App.1987).
>
> *Since Yon had no standing to challenge the granting of the annulment, it was not necessary for Joye to include him as a party to the action.* Moreover, Yon suffered no prejudice by not being made a party to the action. Under South Carolina law, Joye's marriage to Vance was void *ab initio* and Yon's presence as a party to the action could not have altered the decision to grant the annulment.

Id. at 276, 547 S.E.2d at 894 (emphasis added). For exactly the same reasons, the opposing parties here have no standing to question the annulment of Mrs. Brown's previous marriage. Just as the first husband in *Joye* was bound by the annulment of the marriage between the wife and her second husband, so is Mr. Brown and the estate of James Brown bound by the annulment of Mrs. Brown's previous marriage.

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

But the supreme court necessarily agreed with the court of appeals regarding the husband's standing to attack the annulment. The supreme court's opinion ordered the trial court upon remand to apply the case-by-case approach. The court therefore must have accepted that a valid annulment had occurred; otherwise, there would be no annulled remarriage to which the case-by-case approach could be applied. By accepting the existence of an annulment, the supreme court agreed with the court of appeals that the annulment was binding upon the first husband, even though he was not a party to the annulment proceedings. The court of appeals was reversed as to the *effect* of the annulment upon the *prior* support obligation, and not as to the *existence* or *validity* of the annulment. Had the supreme court intended to hold that the husband was not bound by the annulment of the wife's remarriage, the court would have held that alimony absolutely terminated; there would have been no need to remand the case for application of a rule (the case-by-case approach), which applies only in the presence of a valid annulment.

The result reached in *Joye* is also consistent with section 20-1-520 of the South Carolina Code, which provides that third parties are generally bound by a court's determination that a marriage is valid:

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

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

marriage to Mr. Brown. Under section 20-1-520, such an affirmation is binding upon third parties.

Other states have held more directly that annulments cannot be collaterally attacked by those who are not parties to the action. In *Johnson County National Bank & Trust Co. v. Bach*, 189 Kan. 291, 369 P.2d 231 (1962), a Kansas divorce settlement agreement required the husband to establish a trust. The trust provided that the wife would receive the income from the trust during her lifetime, until her remarriage. The wife subsequently remarried a second husband under the law of Wyoming. Soon after, she discovered that the second husband had not been divorced from a previous wife, and an Arizona court annulled the marriage for bigamy. Disagreement then arose among the trust beneficiaries regarding the wife's rights, and the trustee, a Kansas bank, asked a Kansas court to determine whether the wife remained an income beneficiary of the trust.

The trial court held that the wife's remarriage terminated her rights even though the remarriage had been annulled for bigamy. The wife appealed, arguing that the Arizona annulment decree conclusively established that her remarriage was void ab initio, so that she had legally never had a valid remarriage. The other beneficiaries made the exact same argument that the estate of James Brown makes here—that the annulment is not binding on third parties. The Kansas Supreme Court agreed with the wife that the Arizona annulment was dispositive, and that it could not be questioned by third parties:

> The appellees [the other beneficiaries of the trust] argue that whatever the effect of the Arizona decree annulling the appellant's remarriage may have been as against the parties thereto, it cannot affect the rights of third parties whose rights had previously vested upon the occurrence of the vesting condition; that is, the appellant's remarriage.

> The argument of the appellees throughout their brief fails to distinguish between a marriage which is voidable, such as a marriage induced by fraud where one of the parties has an option to continue the marriage or to set it aside, and a marriage which is absolutely void, such as here a bigamous marriage. No decree is necessary to declare a bigamous marriage void. Under the law applicable to this case it was impossible for the appellant to marry Emerson. There being no marriage, other than the inefficacious marriage ceremony in Wyoming, the condition precedent to the vesting of rights in third persons did not occur. Under these circumstances the rights of third persons could not have been affected by the Arizona decree of annulment.

Id. at 298-99, 369 P.2d at 236. Thus, the court held that the Arizona decree could not have affected the rights of third parties, because third parties had no such rights. Their rights were entirely contingent upon the wife's remarriage, but no remarriage had occurred, as a bigamous marriage ceremony simply did not create a marriage. The wife therefore remained as income beneficiary of the trust.

Just as the Arizona decree in *Bach* was conclusive on the validity of the alleged marriage in that case, so is the annulment in this case likewise dispositive. The annulment can be attacked only in a prior direct attack filed by the parties to the action—Mrs. Brown and Ahmed.

A New York court stated the fundamental principle of law that underlies South Carolina's position:

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

Presbrey v. Presbrey, 6 A.D.2d 477, 480, 179 N.Y.S.2d 788, 792 (1958) (emphasis added), *aff'd*, 8 N.Y.2d 797, 168 N.E.2d 135, 201 N.Y.S.2d 807 (1960); *see also Luke v. Hill*, 137 Ga. 159, 73

S.E. 345, 346 (1911) ("So far as the adjudication fixes the status of the parties, the judgment concludes both parties and strangers[.]").

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

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

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

The Oregon case cited by the LSA, *In re Rowe's Estate*, 172 Or. 293, 141 P.2d 832 (1943), is distinguishable on several grounds. To begin with, the case involved a decree of divorce, not a decree of annulment. A decree annulling a bigamous marriage has a much broader preclusive effect, because it determines that no marriage ever existed. A divorce decree, by contrast, merely terminates a marriage.

More importantly, the issue in *Rowe's Estate* was whether a finding of desertion in the divorce decree conclusively established lack of access for purposes of paternity. The fact at issue was therefore not the status of marriage itself but, rather, a fact collateral to status. Here, the issue is purely one of status—if the decree annulled Mrs. Brown's marriage to Ahmed, then her marriage to Mr. Brown was not bigamous.[17] The *Rowe's Estate* court expressly held that the divorce was binding on issues of status. "[T]he decree in a divorce suit as a decree in rem binds

[17] The LSA apparently admits that an in rem action affecting status is binding, but then twists the family court order so that it would have only future effect. That is an illogical position since the family court order ruled on the status of the bigamous marriage of Ahmed. Under the LSA's theory, actions to quiet title, foreclosures, and other in rem actions would have only future effect and would thus not resolve the very title issues they are intended to resolve.

the whole world as to the status of the parties, to the extent that their status is the res adjudicated[.]" *Id.* at 302, 141 P.2d at 836. The status of Mrs. Brown's marriage to Ahmed is exactly the matter adjudicated by the present decree of annulment.

The same argument applies to the cases cited by David Bell, *Westbury v. Bauer*, 293 S.C. 224, 359 S.E.2d 515 (Ct. App. 1987), and *Jordan v. Jordan*, 284 S.C. 342, 326 S.E.2d 416 (1985). These cases both involved divorces, not annulments, and they both involved collateral factual issues, not the central core issue of status itself. On the key issue of whether Mrs. Brown and Ahmed had a valid marriage, the Final Order of annulment binds all third parties.

Mrs. Brown recognizes the presence of some cases from other jurisdictions allowing certain kinds of third-party attacks on annulments. Much of this authority is based upon specific statutes, enacted in California and several other states, providing that annulments are binding only upon the parties and those claiming under them. *E.g.*, *Redmann v. Redmann*, 376 N.W.2d 803, 805 (N.D. 1985); *Cottam v. City of Los Angeles*, 184 Cal. App. 2d 523, 7 Cal. Rptr. 734 (1960). But no such statute exists in South Carolina. On the contrary, a judgment affirming a marriage is binding against "all persons concerned." S.C. Code Ann. § 20-1-520. There is no reason why the scope of persons bound should be less merely because the court ultimately determines that a questioned marriage is void for bigamy.

The South Carolina legislature has acted wisely in refusing to adopt the California statute. Assume for the sake of argument that a woman has one purported marriage annulled for bigamy and then marries and divorces in succession three different husbands. If the position advocated by the opposing parties in this case is correct, *this woman must prove the merits of her annulment repeatedly each time she is divorced.* None of her three husbands was a party to the annulment, so none of them would be bound by it. This is an absurd result. Once this woman convinces a

skeptical trial judge to annul her first purported marriage, that judgment should be binding upon all third parties for all purposes. The effect of the California statute is to prevent annulments from ever being final, and to permit relitigation of the merits every time the validity of the annulment becomes a contested issue. This result violates the fundamental policy of the finality of judgments.

Treating annulment decrees as final judgments is not unfair to third parties. As noted above, the state is a third party to every annulment case, and the court is required to adopt a skeptical attitude toward the evidence. Since the interest of the state and the trial judge in preventing annulments without proper proof is as strong as the interest of any third party, the interests of third parties are essentially already fully represented in every annulment action. If third parties were not bound by the result, annulments would have to be proven all over again every time the validity of the marriage arose with regard to another third party—*a result that would burden the courts with an endless series of collateral attacks on annulments.*

Stability of marital status judgments—divorces and annulments—is greatly in the public interest:

> [O]nce the marriage relationship has been severed by a judgment of divorce which has become final, it then is in the public interest to maintain the stability of the new status established by a final judgment of divorce. Indeed, divorced persons may lawfully enter into other relationships which would be jeopardized if final judgments of divorce could be set aside readily; a converse public policy would make it possible, under the guise of law, to inflict injury and suffering upon innocent persons entitled to every protection the law can afford.
>
> Reasons of public policy make it desirable that judgments affecting the marital status, whether [] nullity, dissolution or separation, have a high degree of stability. Such judgments affect so many collateral rights and interests of third persons that uncertainty and fluctuation respecting them would be greatly detrimental to the public interest.

Reville v. Reville, 370 A.2d 249, 253 (Me. 1977).

The position taken by the opposing parties here would greatly facilitate collateral attacks upon annulments, thereby creating dangerous uncertainty as to the validity of many happy and successful second marriages. Under opposing parties' approach, *there would be no such creature as a final judgment of annulment.* On the contrary, annulments would be subject to collateral attack every time they affect the rights of a different third party. As a result, parties to annulments would be left unable to remarry for fear of committing bigamy should their annulment be attacked and their former marriage reinstated at the hands of a third party many years in the future.

Even in California, where annulment decrees have limited finality by statute, the courts do not in practice permit unlimited third-party attacks upon the fact underlying an annulment decree. Such decrees are not conclusive, but in practice they are given very substantial weight.

> It thus appears that the trial court permitted appellants to 'go behind' the annulment judgment and try to prove that there was insufficient factual basis for an annulment, and that Mrs. Clark obtained the annulment in bad faith and by fraud. As above shown, the trial court found in effect that no valid marriage existed between Mrs. Clark and Peterson; that she obtained the annulment in good faith and without any fraud; that the appellants (city and board) were not prejudiced by the purported marriage or by the reinstatement of the pension benefits. *The annulment judgment is presumed to be valid.* 'One of the disputable presumptions of law is that a judicial record when not conclusive does still correctly determine or set forth the rights of the parties.' Argabrite v. Argabrite, 56 Cal.App. 650, 652, 206 P. 81, 82. Appellants herein were given an opportunity to try to rebut that presumption of validity of the annulment judgment. It is implicit in the findings that the court found that appellants did not overcome that presumption.

Clark v. City of Los Angeles, 187 Cal. App. 2d 792, 800-01, 9 Cal. Rptr. 913, 919 (1960) (emphasis added). Even the California courts are not eager to accept the sort of collateral attack made here, in which the attacking party simply seeks to relitigate the facts and reach a different

result. Allowing that sort of attack will functionally prevent annulments from ever being final, and do great harm to the stability of marriage.

In sum, the position of the opposing parties in this case is that no annulment judgment is ever final. Every time the judgment has an effect on the rights of a different third party, that third party is permitted to relitigate the merits of the annulment all over again. The inevitable result would be to allow an endless series of collateral attacks upon annulments by different third parties, and to wreak havoc upon the important public policy of the stability of marriage.

By contrast, the public policy of sections 20-1-80, section 20-1-520, and *Joye*, 345 S.C. 264, 547 S.E.2d 888 (Ct. App. 2001), as supported by Professor Clark and the *Restatement (Second)*, is that there should be such a thing as a final judgment of annulment. Once a spouse convinces a skeptical trial judge that a marriage should be annulled, the spouse need not prove that result over and over again every time the annulment affects the rights of a different third party. Instead, the result is binding upon all third parties. This result ensures the stability of marriage, without doing any harm to the interests of third parties, who are fully protected by the strong public policy against granting annulments without clear supporting evidence.

4. Actions In Rem Bind Third Parties.

The LSA cites case law holding that annulment is an action in rem, and then cites law on the conclusive effect of judgments in rem. Much of this law involves in rem actions other than annulments. The conclusive effect of actions to invalidate (annul) or to affirm a marriage is set forth expressly in §§ 20-1-80 and 20-1-520. If this is not the law, then the merits of an annulment must be relitigated over and over again every time the rights of a new third party are affected.

Moreover, the case law cited by the LSA supports Mrs. Brown's position. On page 21 of his brief, the LSA points the court to the following quotation:

> Judgments in rem are considered binding on third persons, as are judgments or decrees determining the status or relations of individuals, as, for instance, decrees of divorce[.]

(LSA's Br. 21 (quoting *Fitchette v. Sumter Hardwood Co.*, 145 S.C. 53, 142 S.E. 828, 833 (1928).). If "[j]udgments in rem are considered binding on third persons," then the annulment here, as an in rem action, is binding on third persons.

If "judgments in rem are not binding against third parties beyond the *status* adjudicated therein," as the LSA argues on page 22 of his brief, this again supports Mrs. Brown's position, as the whole issue here is whether Mrs. Brown had the status of a married person when she married Mr. Brown. Again, if annulments do not bind third parties, then parties who obtain annulments will be forced to constantly relitigate the merits of their annulments every time they are questioned by a new party. This would throw the stability of marriages into chaos.

The LSA cites and quotes the comments to section 73 of the Restatement (First) of Judgments ("Restatement (First)"). (LSA's Br. 21.). The section is entitled "Proceedings with Respect to Property," and as the name implies, it deals only with the effect of in rem *property* judgments. However, the law on in rem *status* judgments is set forth in Restatement (First) section 74, which is titled "Proceedings with Respect to Status." The section provides that "[i]n a proceeding in rem with respect to a status the judgment is conclusive upon all persons as to the existence of the status." Restatement (First) § 74(1). This is essentially the same rule set forth in Restatement (Second) § 31, which is quoted above at p. 28. Both Restatements recognize the conclusive effect of annulments, and do not require persons obtaining annulments to prove their case all over again every time a new third party attacks the judgment.

Eve if the *Restatement (First)* requires that the issue actually be litigated, the issue here actually was litigated, for the reasons set forth above. The state is a third party to every annulment action, and the judge was not permitted to grant an annulment unless fully convinced that proper grounds were present.[18] Because Mrs. Brown faced a serious and heavy burden of proof, the validity of her marriage to Ahmed was fully litigated in the annulment action.

In sum, the vital public policy of the stability of marriage requires that annulments be binding upon all third persons. Otherwise, there will be no such thing as a final judgment of annulment. Parties who obtain such judgments can never be secure that their prior marriage is invalid and that they can safely remarry, as the merits of the annulment action would be subject to complete relitigation every time a new third party objects. Public policy demands that when a party carries the heavy burden of convincing a trial judge to annul a marriage, that annulment is conclusive against all third parties.

5. A Contrary Result Is Not Required by *Lukich*.

The opposing parties argue that even if the annulment binds third parties, it does not operate retroactively under the holding in *Lukich v. Lukich*, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (Ct. App. 2006), *aff'd*, 379 S.C. 589, 666 S.E.2d 906 (2008). Contrary to these contentions, *Lukich* is very distinguishable from the present action.

The wife in *Lukich* married her first husband in 1973, "during a night of heavy drinking." *Id.* They never lived together as husband and wife, and shortly after the marriage, the first husband moved to Illinois. In 1985, the wife married her second husband, and the couple lived together for more than 17 years. Upon their separation, the second husband filed an action to annul the second marriage for bigamy. After that complaint was filed, the wife filed an action to

[18] *See Fogel v. McDonald* and *Davis v. Davis*, discussed above.

annul her marriage to her first husband on the ground of intoxication. The court granted the requested annulment. The wife then filed to dismiss the second husband's annulment action, arguing that the second marriage could not be bigamous since the first marriage had been annulled.

The trial court held that the annulment of the first marriage did not cure the bigamous nature of the second marriage. The court of appeals affirmed:

> Based on our strong public policy against recognizing bigamous marriages and our reading of relevant authority, we find an annulment that declares a pre-existing marriage void *ab initio* does not relate back so as to give validity to a marriage that was bigamous before the annulment was granted. Here, Wife had a living spouse at the time she contracted for marriage with Husband. Because Wife's annulment was not granted until after she contracted for marriage with Husband, the annulment does not validate her marriage with Husband. Therefore, we hold the trial court did not abuse its discretion in barring Wife from using her annulment decree as a defense to Husband's bigamy action.

Id. at 55, 627 S.E.2d at 758 (footnote omitted). [19]

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

[19] In his memorandum, Terry contends that Tommie Rae takes the same position as Judge Anderson in his dissent. Terry is wrong. Judge Anderson opined that the *Lukich* annulment was retroactive (the first marriage was void ab initio), even though it was not based on bigamy. Tommie Rae's annulment was based on bigamy, which case and statutory law clearly treat as void ab initio. In his memorandum, Terry also (incorrectly) summarizes his version of Tommie Rae's statements in her diary, despite the existing diary orders.

recognized marriage. Heavily intoxicated people have the right to seek an annulment of their marriage, but they are not required to exercise that right.

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

The first marriage in *Lukich* was only *voidable*, while Mrs. Brown marriage to Ahmed was bigamous and void ab initio. The court of appeals' opinion in *Lukich* expressly recognizes this fact, stating in a footnote that the case would have been decided differently if the wife's first marriage had been annulled for bigamy, rather than for intoxication:

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

368 S.C. at 55 n.2, 627 S.E.2d at 758 n.2 (emphasis added) (citations omitted).

This case presents the first of the three numbered types of marriage set forth in the above footnote. Mrs. Brown's purported marriage to Ahmed was not annulled due to intoxication. Rather, Mrs. Brown's purported marriage to Ahmed was set aside because it was a bigamous marriage—"one of the three types of marriages that never have legal validity in South Carolina." *Id.* The court of appeals' opinion in *Lukich* expressly states that *Lukich would have been decided differently* if the first marriage in that case had been bigamous. *Lukich* anticipated the exact fact pattern that has arisen in this case, and it stated expressly that its holding would not apply.

The LSA makes the remarkable argument that the *Lukich* footnote was overruled. The supreme court in *Lukich* was not at all hesitant to criticize the result reached by the court of appeals. When the supreme court disagreed with the court of appeals, it said so. Given the forthrightness of the supreme court's *Lukich* opinion, there is no basis for assuming that the court secretly disagreed with footnote 2 and was too polite to say so in its opinion. Somehow, according to the LSA, the supreme court, *while affirming the court of appeals*, silently and secretly overruled the court of appeals' cited exceptions noting that bigamous marriages are void ab initio, while at the same time silently and secretly overruling all the prior cases standing for that rule[20] and while silently and secretly overturning the statute that clearly provides that a bigamous marriage is void ab initio. The LSA's position is especially remarkable because the supreme court must have silently and secretly overruled the very cases it cited in the opinion for the proposition that bigamous marriages are void ab initio.

Moreover, nothing in the supreme court's *Lukich* opinion suggested that the supreme court had any intention of overruling longstanding South Carolina case law on a point not even at issue in the case. South Carolina law is clear that a bigamous marriage is never a marriage at all. It is not valid in law for any purpose:

> A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, *is not a marriage at all.* Such a marriage is absolutely void, and not merely voidable.

Day v. Day, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) (emphasis added).

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

[20] And that would mean *all* cases because no prior South Carolina case held that bigamous marriages are not void ab initio --- understandably, because to hold otherwise would to contravene the plain language of the statute.

Ex parte Blizzard, 185 S.C. 131, 193 S.E. 633, 634 (1937).

If *Lukich* applies where the first marriage was void for bigamy, as the opposing parties would have this Court believe, then it is no longer true that a bigamous marriage is no marriage at all. *Day* and *Blizzard* would be effectively overruled. Section 20-1-80 of the South Carolina Code would be judicially modified to say that bigamous marriages are only voidable, not void. A bigamous marriage would now be valid, until such time as an annulment action is filed. When an annulment is granted, the marriage will then be invalid prospectively, but would remain valid retroactively.

Such a holding would be a landmark change in South Carolina law. Bigamous marriages would no longer be completely invalid; in fact, in many situations they would be valid retroactively. The supreme court in *Lukich* did not intend to make such a far-reaching change. The supreme court opinion, like the court of appeals opinion, applies only where the first marriage was annulled on voidable marriage grounds, such as intoxication. It does not apply when the first marriage is void ab initio, like the bigamous marriage in the present case. Nothing in the supreme court's opinion concludes otherwise.

If the supreme court had overruled the exceptions in *Lukich*, as asserted by the LSA, then it would have relied on *Lukich* as the simplest and most obvious argument supporting its decision to overturn this Court's approval of the settlement agreement in *Wilson v. Dallas*. Raising questions about the prenuptial agreement would have been completely unnecessary if the LSA's remarkable assertion about *Lukich II* is correct: the supreme court would simply have said that *Lukich* meant that Mrs. Brown was not the surviving spouse because her putative marriage to Ahmed was not void ab initio.

The opposing parties essentially argue under *Lukich* that when a marriage is annulled for bigamy, the marriage is retroactively recognized as existing from the date of marriage until the date of annulment, and that it is invalid only prospectively from the date of annulment forward. This argument is correct when the first marriage was voidable, as the first marriage in *Lukich* was.

But the opposing parties' argument is not correct when the marriage is void ab initio, such as a bigamous marriage or (currently) a same-sex marriage. Such a marriage is no marriage at all, and no act of court can make it a marriage. It would not have been marriage even if there had been no decree of annulment. It does not retroactively become a marriage simply because its invalidity is recognized at a later point in time. *A bigamous marriage simply does not exist for any purpose.*

This argument is fully consistent with the *Lukich* court's citation to *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004). *Rodman* relied completely upon the supreme court holding in *Splawn v. Splawn,* 311 S.C. 423, 425, 429 S.E.2d 805, 806 (1993), which held that equitable distribution can be awarded after an annulment. But this result is required by section 20-3-620(A) of the South Carolina Code, which allows division of property in "other marital litigation between the parties." S.C. Code Ann. § 20-3-620(A). An annulment is certainly litigation involving the presence or absence of a marriage.

But *Splawn* did not question, and indeed strongly reaffirmed, the basic point that a bigamous marriage is no marriage at all. *Splawn* cited *Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950), which directly held that "[a] mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all." *Day*, 216 S.C. at 338,

58 S.E.2d at 85. *Splawn*, *Rodman*, and *Lukich* intended to preserve and not overturn this long-standing rule of South Carolina law.

The General Assembly is perfectly free to enact legislation permitting equitable distribution after a relationship that is not a marriage, but that superficially resembles one. Indeed, several states permit equitable distribution after long-standing cohabitation relationships in which the parties were never married. *See Ellis v. Berry*, 19 Kan. App. 2d 105, 106, 867 P.2d 1063, 1065 (1993) ("[A] trial court may divide assets jointly obtained by an unmarried cohabiting couple."); *Foster v. Thilges*, 61 Wash. App. 880, 885, 812 P.2d 523, 526 (1991) ("[B]ecause there was continuous cohabitation for over 10 years during which the parties conducted themselves like a married couple and pooled their resources . . . , there was no error in . . . applying [Washington state's property division statute] to divide the property acquired during the parties' relationship."). A decision to allow equitable distribution after a relationship does not necessarily mean that the relationship was a valid marriage.

Splawn did state that "[t]here is no legal distinction between a marriage which is annulled and one terminated by reason of bigamy, [as] they are both void *ab initio*, 'from the inception.'" 311 S.C. at 425, 429 S.E.2d at 806. The LSA apparently construes this passage to overrule the long-standing distinction between void and voidable marriages. It does nothing of the sort. The passage merely notes that *once an annulment is granted*, an annulled voidable marriage is no different from an annulled void marriage. But *before an annulment is granted*, void and voidable marriages are very different. Voidable marriages exist until the annulment is granted; void marriages never exist for any purpose.

If the above distinction is not valid, then *Lukich* overruled *Day*. But a later decision cites both *Day* and *Lukich in the same sentence*, without any suggestion that the latter overrules the former:

> We decline to adopt the putative spouse doctrine, as it is contrary to South Carolina's statutory law and marital jurisprudence. *See* S.C.Code Ann. § 20-1-80 (Supp.2012) ("All marriages contracted while either of the parties has a former wife or husband living shall be void."); *Lukich v. Lukich,* 368 S.C. 47, 56, 627 S.E.2d 754, 758 (Ct.App.2006) ("Even if Wife was acting under a good faith belief, South Carolina will not recognize her bigamous second marriage because to do so would violate public policy."); *Day v. Day,* 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) ("A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable."); *Howell v. Littlefield,* 211 S.C. 462, 466, 46 S.E.2d 47, 48 (1947) ("[Husband's] existing marriage in North Carolina incapacitated him . . . to contract another marriage. . . .").

Hill v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 405 S.C. 423, 426, 747 S.E.2d 791, 792-93 (2013).[21] *Lukich* did not intend to overrule the long-standing distinction between void and voidable marriages, and to overrule years of South Carolina case law holding that a bigamous marriage is not a marriage for any purpose.

The opposing parties would have this Court become the first court ever in the history of South Carolina to hold that any form of validity attaches to a bigamous marriage. The Court should decline that invitation. *Regardless of whether it annulled sooner, annulled later, or even not annulled at all, a bigamous marriage is not a marriage for any purpose known to the law.* The holding in *Lukich*, which held that a voidable marriage is valid between the date of marriage and the date of annulment, cannot possibly be applied to bigamous marriages, which are void ab initio.

[21] Tommie Rae's argument in this action is that she is an actual spouse. She is not claiming as a putative spouse.

6. A Contrary Result Is Not Required by *Hallums.*

The LSA argues that his position finds support in *Hallums v. Hallums*, 74 S.C. 407, 54 S.E. 613 (1906). *Hallums* is plainly distinguishable from this case.

In *Hallums*, the plaintiff had married Bill Williams in 1895. In 1899, the plaintiff engaged in a marriage ceremony with Nero Hallums, who by the time of the trial was deceased. At trial, the plaintiff claimed that as the widow of Hallums, she was entitled to a portion of his estate. The plaintiff's claim was opposed by the defendants, who argued that the plaintiff's alleged marriage to Hallums was bigamous and void.

The plaintiff countered this argument by alleging that at the time of her marriage to Bill Williams in 1895, he was married to another, and that her marriage to Williams was therefore void.

The *Hallums* court found the evidence of the prior marriage between Williams and another woman to be insufficient to annul and make void his actual marriage to the plaintiff; the court also found the evidence insufficient to show that Williams was dead at the time of the ceremony in 1899 between the plaintiff and Hallums. The court then considered the plaintiff's claim that "his honor should have held that the presumption of law is in favor of the validity of the last marriage between the plaintiff and Nero Hallums, and is against the validity of any prior marriage." *Id.*, 54 S.E. at 613. The court recognized that "the authorities affirming this doctrine are numerous, as has already been shown, and it may be considered as settled that such a presumption, in a proper case, may be indulged." *Id.*, 54 S.E. at 614. The court then concluded that in the case before it, the evidence of the plaintiff's marriage to Williams was sufficient, and there was no need to apply the presumption. The plaintiff was denied a share of Hallums' estate.

In the present case, unlike *Hallums*, the Court is not deciding as a matter of first instance whether Mrs. Brown's purported ceremonial marriage to Ahmed was void for bigamy. That issue has already been decided; there is a final judgment holding that no valid marriage ever existed. For the reasons stated above, that annulment absolutely must bind all third parties; otherwise, the court system will be faced with endless actions to rule upon the validity of a marriage every time its validity is at issue as against a different third party. The bigamous nature of Mrs. Brown's first purported marriage is established in binding fashion by a final family court judgment.

In other words, *Hallums* is distinguishable because the court was adjudicating the validity of both marriages. Here, the Court is not adjudicating the validity of both marriages, because a court has already ruled that the marriage between Mrs. Brown and Ahmed is void for bigamy. There was no such prior ruling in *Hallums*.

IV. THE ANNULMENT BINDS MR. BROWN, HIS ESTATE, AND ALL PERSONS WHO CLAIM THROUGH HIM.

Annulments are binding upon all third parties. If this is not the law, then annulments will never be final, and it will be impossible for any person who receives an annulment to ever be confident of his or her marital status. At any point, a new third party could show up and force the merits of annulment to be relitigated.

Even if the Court finds that annulments do not bind third parties generally, however, the Court should still find that the annulment in this case binds all of the parties who are now attempting to attack it.

A. The Judgment Of Annulment Was Binding Upon Mr. Brown.

Not only did Mr. Brown lack standing to attack the annulment, but he was estopped to contest the annulment.[22]

The elements of collateral estoppel are as follows:

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

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

For the reasons argued above, the validity of the marriage was actually litigated because the state is functionally a third party to every annulment action. The trial court had a very strict duty to test the sufficiency of the evidence before granting the decree. The process of satisfying the trial court as to the sufficiency of the evidence constitutes actual litigation of the issue.

Mr. Brown was obviously not a party to the annulment action. But the preclusive effect of a judgment is not limited to named parties. It also applies to persons who provide essential support for the litigation:

> [I]t does not follow that the decree is invalid as to all the parties to the action. It was *sought, consented to, or acquiesced in by all of them* except the named

[22] For an additional discussion, see the Petitioner's initial memorandum, pp 21-35.

> appellants herein. They objected to it, and they alone have appealed from it. They are not bound by it; *all the others are, and as to them it is res adjudicata.*

Carolina Baking Co. v. Geilfuss, 169 S.C. 348, 168 S.E. 849, 852 (1933) (emphasis added). Thus, *Carolina Baking* held that a judgment is binding upon nonparties who "sought, consented to, or acquiesced in" the judgment. *Id.* Mr. Brown "sought" the annulment by paying Mrs. Brown's legal fees. He "consented" and "acquiesced" in the order by insisting in his family court action that it was binding.

To similar effect is *Tillman v. Tillman*, 93 S.C. 281, 76 S.E. 559 (1912). There, a father executed a deed giving custody of his children to his parents. A custody action then followed between the father's parents and the mother, in which the mother prevailed. The court held that the father was bound by the judgment:

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

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

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

H.G. Hall Constr. Co. v. J.E.P. Enters., 283 S.C. 196, 204, 321 S.E.2d 267, 271 (Ct. App. 1984).

Courts in other states have identified at least three types of privity:

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

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

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

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

In the present case, it is stipulated that Mr. Brown paid Mrs. Brown's attorney's fees in the annulment action. (Joint Stipulation ¶ 13.) It is further stipulated that Mr. Brown was informed separately of the results of the action. (Joint Stipulation ¶ 14.) But Mr. Brown went much further. He actively sought to use the annulment findings in his own case.[23] His amended complaint insisted that the annulment order was binding.[24] Clearly, Mr. Brown sought, consented to, and acquiesced in the findings and in the judgment.

These facts establish, at a minimum, that Mr. Brown supported the annulment action to at least the same extent that the father supported his parents' action in *Tillman*. He did not assert a claim of his own; he supported Mrs. Brown's claim by paying the attorney's fees necessary for her to make it.

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[23] *See* Joint Stipulation at 000070.

[24] *Id.* at ¶ 10.

In addition, paying a party's attorney's fees constitutes, as a matter of both law and common sense, supporting an action in the sense that that term was used in *Carolina Baking*. Mr. Brown evidently agreed that his interests in the annulment action were represented by Mrs. Brown, as he retained no attorney of his own, filed no claim of his own, and *paid Mrs. Brown's attorney*.

Courts in other states have held that a party who pays another party's attorney's fees is bound by the result of the litigation. In *Piney Oil & Gas Co. v. Scott*, 258 Ky. 51, 79 S.W.2d 394, 396 (1934), the Kentucky Supreme Court held that paying part of another party's attorney's fees is sufficient to establish privity.

Piney Oil holds that a nonparty is bound by a judgment if the nonparty even *contributed* to a party's attorney's fees. Here, Mr. Brown did not pay only part of Mrs. Brown's attorney's fees; he paid her *entire* attorney's fees.

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

The result reached by the *Tillman*, *Carolina Baking*, and *Piney Oil* courts is good public policy. The preclusive effect of litigation should not be strictly limited to those who are named as parties. When a person supports litigation, encourages litigation, insists upon litigation, and most importantly pays for litigation, the person should be bound by the result of the litigation he

or she has fostered. To do otherwise would allow persons of means to litigate through an endless series of agents, gathering the fruits of all victories, and avoiding all losses on the ground that only the actual named parties are bound by the judgment.

It is a reasonable inference from the facts alleged by affidavit that Mrs. Brown represented Mr. Brown's interests in her annulment litigation against Ahmed. That is fundamentally why Mr. Brown paid her attorney's fees. Because she represented Mr. Brown's interests, he was bound by the result of the annulment litigation.

Per *Carolina Baking*, Mr. Brown also acquiesced in the annulment order: he brought an action to annul his marriage, in which action he insisted that the annulment order was binding, and then he dismissed his action, never again to question the annulment order.

B. Mr. Brown Was Estopped To Question The Validity Of The Annulment During His Lifetime.

It is important to note that in addition to paying Mrs. Brown's attorney's fees, Mr. Brown also accepted substantial benefits of the judgment during this lifetime. The acceptance of these benefits estopped him from later attacking the judgment.

The opposing parties, as demonstrated primarily in the LSA memorandum, conflate (1) offensive *collateral* estoppel (issue preclusion against parties who were not parties to the original action) with (2) the acceptance of the benefits doctrine, which is a form of *equitable* estoppel. The most obvious difference between the two is that *collateral* estoppel requires a *valid* former judgment whereas *equitable estoppel* can bind people to *void* judgments that they have participated in, *or* accepted the benefits from, or have otherwise done something in connection with that void judgment that bars them from flip-flopping and claiming that the same judgment is both right and wrong. *See, e.g., Smoak v. Smoak*, 269 S.C. 313, 320, 237 S.E.2d 372, 375

(1977)(The doctrine of estoppel is "essentially flexible" and "in a proper case, a person may be estopped to attack, impeach, or deny the validity of a foreign divorce decree, as where he or she obtained the decree, participated in the fraud or wrong by which the decree was obtained, financed the proceeding, voluntarily appeared and participated in the foreign action, did some act which in itself recognized the validity of the decree, or accepted the benefits of the decree. . . ."); *Scheper v. Scheper*, 125 S.C. 89, 105, 118 S.E. 178, 184 (1923)("Even where one who did not procure it accepts the benefit of a void judgment, he is estopped to assert its invalidity."); *Edwards v. Edwards*,254 S.C. 466, 471, 176 S.E.2d. 123, 125 (1970) (same quote).

C. Mr. Brown Was Bound By The Annulment Judgment, And His Estate And Heirs Are Likewise Bound.

Mr. Brown was bound by the result of the annulment action, and all persons claiming through him are likewise bound. When a decedent is bound by a judgment, his estate and heirs are likewise bound.[25]

The court so held in *Neely v. Thomasson*, 365 S.C. 345, 618 S.E.2d 884 (2005). The decedent in that case was divorced from his wife during his lifetime, and the divorce decree ruled that a daughter was born during the marriage. After the decedent's death, the decedent's heirs argued that they were not parties to the divorce case, that they were not bound by the court's decision, and that the daughter was actually not the child of the decedent. The South Carolina Supreme Court held that the decedent was bound by the judgment, and that the heirs were likewise bound:

> Because the issue of paternity was raised and ruled upon in a prior action, Decedent, if alive, would have been barred from challenging paternity at a later date. *See Eichman,* 285 S.C. at 380, 329 S.E.2d at 766. As a result, *Decedent's heirs are likewise barred from asserting claims that Decedent himself would have*

[25] For an additional discussion, see initial memorandum, pp. 29-31

> *been barred from asserting. See Watson,* 172 S.C. at 370-71, 174 S.E. at 36. Moreover, we find that it would be unjust to allow Decedent's siblings to assert a claim that Decedent himself never chose to assert during his lifetime. In fact, there is no evidence in the record that Decedent took any steps whatsoever during his lifetime to disclaim Nancy as his daughter. To the contrary, Decedent acknowledged, on more than one occasion, that Nancy was his child. Therefore, we hold that Decedent's siblings should not have been permitted to challenge the prior paternity determination.

Id. at 354-55, 618 S.E.2d at 889 (emphasis added); *see also Newberry v. Walker*, 162 S.C. 478, 161 S.E. 100 (1931).

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

In this case, Mr. Brown's active participation in the annulment action shows that he was bound by the result during his lifetime. Mr. Brown obviously agreed, as he repeatedly referred to Mrs. Brown as his wife, sometimes in very public settings. Subsequent to Mr. Brown's death, his estate and heirs cannot raise a claim that Mr. Brown himself was barred from asserting.

The LSA contends that the Estate is not bound despite Bauknight's acquiescence in the settlement agreement and appointment as Personal Representative, pursuant to which he served for approximately four years during the appeal of *Wilson v. Dallas*, and despite his involvement in that appeal, in which his counsel argued that *Lukich* supported the validity of Mrs. Brown's marriage to Mr. Brown. The LSA contends that, instead, Pope and Buchanan represented the Estate in the *Wilson v. Dallas* appeal. The LSA bases his contention on his misstatement of the Supreme Court's holding in *Wilson v. Dallas*. Citing that opinion, the LSA represents that the "Supreme Court concluded Pope and Buchanan had standing to appeal `based on their fiduciary capacities' as *Personal Representatives* and Trustees" (emphasis added). However, that opinion

does not state that Pope and Buchanan had standing as Personal Representatives (representing the Estate) but only as trustees.

> Assuming, *arguendo,* that the circuit court impliedly ruled on the issue, we conclude Appellants have standing. Appellants were properly made parties to the action and were allowed to set forth specific challenges to the proposed compromise agreement for the circuit court's consideration under S.C.Code Ann. § 62–3–1102 (2009). We agree with Appellants that they have standing based on the explicit terms of the trust agreement, which conferred upon the trustees the authority to handle claims for or against the trust estate (including the authority to mediate or compromise claims), and based on their official fiduciary capacities pursuant to state law.[5] *See* S.C.Code Ann. § 62–7–405(c) (2009) ("The settlor of a charitable trust, the trustee, and the Attorney General, among others may maintain a proceeding to enforce the trust."); P.H. Vartanian, Annotation, *Right of Trustee of Express Trust to Appeal from Order or Decree Not Affecting His Own Personal Interest,* 6 A.L.R.2d 147, 152 (1949 & Later Case Service 1997) (stating where an order threatens the existence of a trust, prevents a trustee from performing his duties, or depletes the trust fund with unreasonable claims, the trustee may, in his fiduciary or representative capacity, appeal therefrom as an aggrieved party); *see also Columbia Union Nat'l Bank & Trust Co. v. Bundschu,* 641 S.W.2d 864, 879 n. 10 (Mo.Ct.App.1982) (stating "where a trustee is affected by a judgment in his official capacity, he is aggrieved and may appeal"); *In Re Estate of Birch,* 50 A.D.2d 475, 378 N.Y.S.2d 792, 797 (1976) (holding "that the Attorney General and the trustee had standing" because "[t]he trustee has a legal obligation to defend the trust ... [and] [t]he Attorney General, likewise, has a duty to represent the beneficiaries where there are dispositions for religious and charitable purposes"); *in rE crawford'S estate,* 340 pa. 187, 16 A.2d 521 (1940) (involving an appeal from an order removing the appellant as a co-trustee).

Wilson v. Dallas, 403 S.C. 411, 423-424, 2013 S.C. LEXIS 240, *16-18 (2013).

Moreover, in the language cited by the LSA the Supreme Court merely addressed standing, not representation.

Even under the LSA's strained construction of *Wilson v. Dallas*, someone had to be representing the Estate, and that someone was Bauknight. The Supreme Court confirmed this Court's removal of Pope and Buchanan in this Court's order. This Court appointed Bauknight as Personal Representative. Bauknight not only acted under this appointment during the pendency of the appeal, but he fought successfully to replace Pope and Bauknight as the representative of

the estate in other pending appellate matters. At Bauknight's request, he was also appointed as Special Administrator and as Special Trustee, an appointment which lasted through the appeal and arguably was not overturned by the *Wilson v. Dallas* court. Is the LSA contending that Bauknight did not represent the Estate at all during that period? If so, then what of the contracts and other actions, including the settlement of lawsuits, that he appeared to take on behalf of the Estate? Or, is the LSA contending that Bauknight represented the Estate (and continues to do so) for all matters except, conveniently, the appeal? If so, what follows from that position is that the Estate is not responsible for the presumably substantial fees and costs incurred by Bauknight and his counsel and other agents during the appeal. And if Bauknight was not representing the Estate in the appeal, then does his position in the appeal (against the Estate, inferentially from the LSA's contention) not create a conflict of interest with his duty to represent the Estate? The LSA's contention about the appeal, while convenient for his argument about Bauknight's actions supposedly not binding the Estate for the purpose of the validity of the marriage issue, sets off a chain reaction of serious problems, as exemplified in this paragraph.

To be clear, Mrs. Brown's position is that Bauknight was authorized to represent and did represent the Estate during the appeal. Mrs. Brown's position is that, consequently, Bauknight was empowered to bind and did bind the Estate during the appeal. Mrs. Brown's position is that, by representing the Estate, Bauknight did not suffer from a conflict of interest for the argument he made through counsel during the appellate process. Mrs. Brown's position is that Bauknight and his counsel and other agents would be entitled to appropriate payment for fees and costs from the Estate. Unfortunately for Bauknight, the LSA's position that Bauknight did not represent the Estate during the appeal would lead to the opposite conclusion about these issues.

V. THE MARRIAGE APPLICATION FILED BY AHMED IN TEXAS DOES NOT CHANGE THE RESULT.

The LSA draws the Court's attention to a statement made by Ahmed in applying for a Texas marriage license, denying any prior marriages. That statement is inadmissible to begin with, and even if true, it is not relevant to the issues contested here.

A. The Application Is Inadmissible Hearsay.

To begin with, the marriage application is still another out-of-court statement made by Ahmed, which is being used for the truth of the matter asserted. It is therefore inadmissible hearsay.

The application does not fall within the scope of the hearsay exception for public record and reports. Rule 803(8), SCRE. The application is an application, not a public record. It does not reflect any official action; it is simply a request for official action. The application applies only to "(A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report." Rule 803(8)(A)-(B), SCRE. The application certainly is not a report of the actions taken by any agency, and the opposing parties do not cite to law that requires any public official to observe Ahmed's statement in the application. Hearsay does not cease to be hearsay merely because it is reported to the government.

There is nothing at all trustworthy about the statement made by Ahmed on the marriage application. Mrs. Brown testified (4/15/04 Tr. 8-9, *reprinted in* Joint Stipulation Ex. 13), and the family court held (Joint Stipulation Ex. 12 [Final Order], Conclusion of Law No. 5, at 000031) that Ahmed married Mrs. Brown in order to obtain a more favorable immigration status. Given that the entire marriage was fraudulent from its inception, any statements made by Ahmed in

applying for the marriage license are inherently suspect. Ahmed desired a more favorable immigration status and was willing to lie to obtain it.

If hearsay ceases to be hearsay when reported to the government, a considerable volume of hearsay evidence will suddenly become admissible. Hearsay statements, made to police officers and repeated in their reports, will be admissible in civil cases. A party desiring to have hearsay evidence admitted need only attach a copy of the statement to a document filed with a public official, and suddenly the statement would become official. Tolerating this sort of practice is not the purpose of the public records exception. The exception should be limited to statements made by public officials, and it certainly should not apply when there is evidence that the record in question was filed as part of a conspiracy to commit fraud upon the U.S. government.

B. The Application Is Irrelevant.

In any event, the application is irrelevant because the family court has already ruled.

The opposing parties are precluded from attacking the Final Order declaring that Mrs. Brown's marriage to Ahmed was void for bigamy. The Texas marriage license has no bearing on the preclusion issue. Rather, the application is simply one piece of evidence being used in the collateral attack on the Final Order, which attack the opposing parties are all precluded from making.[26]

Ahmed's false statement on the application regarding his prior marriage is not itself a sufficient basis to overturn the marriage. *Williams v. White*, 263 S.W.2d 666, 667 (Tex. Civ. App.

[26] Ahmed's statement on the application is hardly remarkable. Presumably, that statement is on every marriage license application in the United States, or otherwise a court would not issue a license if an applicant were already married. Presumably, therefore, every case in the history of jurisprudence that invalidated a marriage for bigamy has done so despite such a statement on the application.

1953). As a final comment, the opposing parties to this case are bound and determined to relitigate the merits of the annulment case. If they are permitted to do this, then no spouse who has ever received an annulment can ever be assured that the annulled marriage is actually invalid. At any point in time, a new third party could file a motion to attack the annulment, cite the present case as precedent, and overturn any and all future marriages into which the spouse may enter.

The stability of marriages requires that there be such a thing as a final judgment in an annulment case. A way must exist for a spouse, uncertain of his or her marital status, to obtain an authoritative determination of that status that binds all third parties. Otherwise, the stability of marriages will be thrown in chaos.

The Final Order annulling the marriage between Mrs. Brown and Ahmed is a final judgment binding on all third parties. It precludes any collateral attack, including the collateral attack the opposing parties make with the Texas marriage certificate application.

VI. THE ALIZAI AND BELL AFFIDAVITS ARE INADMISSIBLE HEARSAY AND DO NOT CREATE A GENUINE ISSUE OF MATERIAL FACT.

The opposing parties make reference to an affidavit filed by Taha Alizai, allegedly a Pakistani man, who claims to have spoken with a man claiming to be Ahmed. The statements made by this second man are out-of-court statements, being used to prove the truth of the matter asserted. They are therefore inadmissible hearsay. Rules 801(c), 802, SCRE.

The Alizai affidavit is also not a new fact. The affidavit was first filed in 2008, and it was considered by the court when making prior rulings. The affidavit has not improved with age. All of the statements made by the man claiming to be Ahmed are hearsay and, therefore, inadmissible. Mrs. Brown acknowledges that one single conclusory sentence in the Alizai

affidavit quotes the man claiming to be Ahmed as saying that he never divorced Mrs. Brown. (Alizai Aff. ¶ 7.) Like the entire Alizai affidavit, this statement is inadmissible hearsay. It is an out-of-court statement, which the opposing parties seek to use for the truth of the matter asserted. It was also made under circumstances that can charitably be called extremely suspicious.

More importantly, the statements made in the Alizai affidavit are contradictory to findings made in the South Carolina family court order annulling the marriage between Mrs. Brown and Ahmed. The existence and content of that order have been stipulated. (Joint Stipulation ¶ 11 & Ex. 12 [Final Order, filed 4/15/04]). That order binds the persons named as parties, Mrs. Brown and Ahmed. Any contention by Ahmed that he ever had a valid marriage to Mrs. Brown is an impermissible collateral attack upon the validity of a final family court judgment.

Some of the opposing parties further refer to an affidavit filed by David Bell, recounting an alleged conversation with a man who claimed to be Ahmed. This affidavit is not anything new in substance. Bell is the attorney who claims he retained Alizai (Bell Aff. ¶ 6), and his affidavit is not entitled to any greater weight than Alizai's.[27] Like Alizai, Bell relates only out-of-court statements with a man claiming to be Ahmed, and seeks to have those statements considered as proof of the matters asserted. Bell did not even see the man in person; he only spoke with him on the phone. The man's true name and face are completely unknown. All of the man's statements constitute inadmissible hearsay.

[27] Bell's affidavit asserts that Ahmed confirmed to Bell he had married Mrs. Brown on February 12, 1997. In fact, Bell's Affidavit lists February 12, 1997 as the date of marriage three times. *See* Affidavit of David B. Bell at p. 2. However, the marriage ceremony took place on February 17, 1997, which is clearly indicated on the marriage license itself. *See* Joint Stipulation at 000001.

Mrs. Brown particularly notes that there is absolutely no evidence that either Bell or Alizai actually spoke to Ahmed. At most, they claim to have spoken to a man claiming to be Ahmed. Mrs. Brown further notes that Bell is not a disinterested witness but, rather, an attorney involved as an advocate in this case. The statements in his affidavit are therefore not only hearsay, but a particular unreliable form of hearsay.

Daryl Brown argues that the Alizai and Bell affidavits are admissible under Rule 804(b)(4), SCRE, as statements of family history.[28] But the hearsay exceptions stated in Rule 804(b)(4) apply only if the declarant is unavailable and the statement of personal or family history is made by the declarant about his own marriage or divorce (Rule 804(b)(4)(A)) or the statement concerning the marriage or death is made by another person "if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate." (Rule 804(b)(4)(B)).[29] Rule 804(b)(4), SCRE.

The burden of showing unavailability of the declarant is on the proponent of the hearsay evidence. *Dodd v. Berlinsky*, 543 S.E.2d 237, 344 S.C. 172, 177 (Ct. App., 2001); *Garcia-Martinez v. City and County of Denver*, 392 F.3d 1187, 1192 (10th Cir. 2004); *United States v. Fuentes-Galindo*, 929 F.2d 1507, 1510 (10th Cir. 1991). There are five criteria for being unavailable under Rule 804(a): the declarant (1) is exempted by ruling of the court because a

[28] "Rule 803 which is based on the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant rule [804(b)] proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if the statement meets a specified standard. . . The term 'unavailable' is defined in subdivision (a)." Advisory Committee's Note 56 Fed.R.Evid.183,328 Subdivision (b). (emphasis added).

[29] "[S]tatement[s] concerning [facts]" listed in Rule 804(b)(4) does not extend to evidence as to motive or purpose for entering into a marriage. *U.S. v. Carvalho*, 742 F.2d 146, 151 (4th Cir. 1984). *See* Alizai Aff. ¶8.

privilege applies; (2) refuses to testify despite a court order to do so; (3) does not remember; (4) cannot be present because of death or an existing infirmity; or (5) "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means." Rule 804(a), SCRE.

Ahmed is not unavailable. Indeed, Terry Brown expressly admits that "[s]ince Mr. Brown's death, Mr. Ahmed was easily found by attorneys involved with this action." (Terry Brown's Memo. in Opp. to Petitioner's Mot. for Partial Summary Judgment at 11). If Ahmed is "easily found," then he is not an unavailable declarant. There has been no proof presented that Alizai is unavailable, and Terry Brown has expressly admitted otherwise.

For subsection 804(a)(2) to apply, an actual order of the court directing the witness to testify is required. *United States v Zappola*, 646 F.2d 48, 54 (2nd Cir. 1981), *cert. denied*, 459 U.S. 866, 103 S.Ct. 145 (1982). There is no order directing Ahmed to testify. Therefore, subsection 804(a)(2) does not apply even if Ahmed is refusing to provide testimony in this case.

Rule 804(a)(5) requires that the proponent show an inability to obtain the testimony, such as by deposition, as well as the attendance of the declarant. *Campbell v. Coleman Co., Inc.*, 786 F.2d 892, 895-96, 1986 U.S. App. LEXIS 23448 at *8 (8th Cir. 1986). Furthermore, "other reasonable means" does not encompass practical unavailability. *Gibson v. County of Riverside*, 181 F. Supp. 2d 1057, 1067, 2002 U.S. Dist. LEXIS 5173 at *22-23 (C.D. Cal. 2002) ("'Unavailability in practical terms,'...is not one of the enumerated categories set forth in Rule 804(a) which defines what it means to be unavailable as a witness for purposes of the 804(b) exceptions." The County was not allowed to avail itself of the "'statement of personal or family history'" exception.). There has been no attempt to serve or depose Alizai. *See S.E.C. v. Kramer*,

778 F. Supp.2d 1320, 1322-24, 2011 U.S. Dist. LEXIS 38968 at *3-9 (M.D. Fla. 2011) (The Commission neither attempted to serve nor to depose Baker abroad nor to procure the assistance of local authorities.); *Dodd v. Berlinsky*, 344 S.C. 172, 176-178, 543 S.E.2d 237, 239-40 (Ct. App. 2001) (It was error to allow affidavit when Dodd failed to meet the burden of establishing Kerrison [affiant] was unavailable; there was no attempt to obtain her presence by process and insufficient evidence to show she could not be located).

Also, Rule 804(b)(4) applies only to statements of the declarant's own family history. To rely upon Rule 804(b)(4), therefore, the opposing parties must present admissible evidence that the man who spoke to Bell and Alizai was actually Ahmed. Mrs. Brown contends that if the conversations described even took place to begin with, the man who spoke is not actually Ahmed. To the extent that the man claimed to be Ahmed, that statement was also hearsay, and Rule 804(b)(4) does not apply to statements of identity. There is simply no proof that the man spoken to by Bell and Alizai was actually Ahmed.

If the declarant is not providing an affidavit or deposition testimony about his own family history, the declarant must be related to the person by blood, adoption, or marriage or be so intimately associated with the person's family that the declarant's information is likely to be accurate. Rule 804(b)(4)(B). Clearly, neither of the affiants (Mr. Bell and Mr. Alizai) is related to Mr. Ahmed, nor are they intimately associated with Mr. Ahmed's family history.

Mrs. Brown is not asking the Court to rule on the credibility of the Alizai and Bell affidavits. Rather, Mrs. Brown's position is that all statements pertaining to Ahmed in the Alizai and Bell affidavits are *inadmissible* as hearsay. "[M]aterials used to support or refute a motion for summary judgment must be those which would be admissible in evidence." *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002). "This statement is clearly hearsay and

does not fall under any of the hearsay exceptions enumerated in the Rules of Evidence. Therefore, it would be inadmissible evidence at trial and is inadmissible to refute a motion for summary judgment." *Id.* at 175-76, 561 S.E.2d at 657; *see also Smith v. Hastie*, 367 S.C. 410, 416, 626 S.E.2d 13, 16 (Ct. App. 2005) (affidavit "did not create an issue of fact for the purpose of defeating summary judgment" where the affidavit "contained hearsay").

Further, Terry Brown's memorandum gets so overheated that he claims that "Ms. Hynie's unsupported, uncorroborated, self-serving hearsay testimony, which was laced with allegations of behavior that is fraudulent and criminal in nature against Mr. Ahmed, and his attorney...." (Terry Brown's Memo. in Opp. to Petitioner's Mot. for Summary Judgment at 3). Actually, Mrs. Brown's testimony was clear, concise and credible, and the judge who heard her had the opportunity to evaluate her credibility.

It is elementary that Mrs. Brown's testimony relating to what Javed Ahmed said was not hearsay. One need go no further than the South Carolina Rules of Evidence.[30] In addition, obviously, the testimony came in without objection and was allowed by the trial court which had the discretion to allow it. *Willis v. Tozer*, 44 S.C. 1, 21 S.E. 617 (1895). It appears the LSA agrees, or pretends to agree, with Terry Brown.[31] Surely the LSA is aware that his representation to the Court that Mrs. Brown's sworn testimony in the Family Court is not, as he contends, "inadmissible hearsay under Rule 801, SCRE." *Id.*

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[30] *See* SCRE 801(d)(2)(A) which reads as follows: "A Statement is not hearsay if...(2) Admission by Party-Opponent. The statement is offered against a party and is...the party's own statement in either an individual or a representative capacity..." *See generally Gunnels v. Roach*, 243 S.C. 248, 251, 133 S.E.2d 757, 759 (1963); *Bunch v. Cobb*, 273 S.C. 445, 452, 257 S.E.2d 225, 228 (1979); *State v. Needs*, 333 S.C. 134, 150, 508 S.E.2d 857, 865 (1998).

[31] *See* Memo. of Law Supp. the LSA's Mot. for Summary Judgment and Opposing Petitioner's Mot. for Partial Summary Judgment at 30. This lends no credibility to the LSA's argument.

Stated differently, the opposing parties cannot create a contested material issue of fact merely by claiming that one exists. "[T]he non-moving party may not rely on mere allegations to resist summary judgment but must present some evidence in the form of affidavits or otherwise in support of its proposition." *Fairfield County. Sch. Dist. Bd. of Trs. v. State*, 409 S.C. 119, 126, 761 S.E.2d 241, 245 (2014). Statements made in a brief are not equivalent to statements made in an affidavit, and they are not a sufficient basis for denying a motion for summary judgment. *See Taylor v. Small*, 350 F.3d 1286, 1294-95 (D.C. Cir. 2003) (motion for summary judgment "cannot 'be defeated by factual assertions in a brief by the party opposing it'" (quoting 10A Charles A. Wright et al., *Federal Practice and Procedure* 2721, at 366)).

The first portion of the LSA's brief in particular seems to take the position that an issue is contested simply because the LSA's brief says so. But again, a contested material issue of fact cannot be created by an assertion in a brief. It can be created only by submitting to the court an affidavit, signed under oath, alleging *admissible evidence* that creates a factual conflict. If one party submits an affidavit alleging admissible evidence on an issue, and the other party does nothing more than refuse to concede the issue in a brief, there is no contested material issue of fact, and summary judgment can be granted. The Court must look to the opposing parties' affidavits, not to their briefs, to determine whether a contested material issue of fact is present.

VII. CONCLUSION.

The putative Mrs. Brown-Ahmed marriage was void from its inception. A Final Order from the South Carolina family court expressly so states. That Order was not a default judgment, because the trial judge was charged with the duty of protecting the very strong state interest in not annulling marriages lightly. Mrs. Brown could not be given an annulment simply because Ahmed did not appear; she had to present evidence to support her position, and the trial court

was required by South Carolina law to view that evidence very skeptically. Because Mrs. Brown faced a substantial burden of proof, the annulment was not a default judgment.

South Carolina law is clear that annulments are binding on all third parties. If this is not so, then there is no such thing as a final judgment in an annulment case. Annulments would be susceptible to collateral attack, and the spouse who obtained the annulment would have to prove his or her case on the merits all over again, every time a new third party challenged the decree. Such a result would reduce the policy of stability of marriage to chaos, and would burden the courts with an endless series of annulment cases raising the exact same issues. Judgments regarding status, including annulments, are binding on all third parties.

Even if judgments regarding status are not binding on third parties generally, the annulment here is binding on Mr. Brown, who supported it, consented to it, asked a court of law to adopt its findings, paid the attorney's fees that made the action possible, acquiesced to it, and accepted its benefits. The annulment binds Mr. Brown, and it necessarily binds the opposing parties in this case, essentially the estate and the heirs of Mr. Brown. South Carolina law, both case and statute, clearly provide that a bigamous marriage is void ab initio, so the annulment confirms that Mrs. Brown had no impediment to her marriage to Mr. Brown.

For the reasons stated above, Mrs. Brown respectfully requests that the Court grant her motion for summary judgment.

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ATTORNEYS FOR PETITIONER
TOMMIE RAE BROWN

October 17, 2014
Charleston, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
		Civil Action No. 2013-CP-02-02849 - original
Tommie Rae Brown,	)	Civil Action No. 2013-CP-02-02850 - cvr/copy
	)	
Petitioner,	)	
v.	)	**REPLY MEMORANDUM SUPPORTING LSA'S MOTION FOR SUMMARY JUDGMENT AND OPPOSING TOMMIE RAE BROWN'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF SURVIVING SPOUSE**
David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown and Daryl Brown,	)	
Respondents,	)	
IN RE:	)	
THE ESTATE OF JAMES BROWN A/K/A JAMES JOSEPH BROWN	)	

FILED 11. 3 2014
C.C.P.&G.S.
Anita Knoepfle
Deputy Clerk

TO: ROBERT N. ROSEN, ESQ., AND S. ALAN MEDLIN, ESQ., ATTORNEYS FOR PETITIONER TOMMIE RAE BROWN; LOUIS LEVENSON, ESQ., ATTORNEY FOR DEANNA BROWN THOMAS, YAMMA BROWN, AND VENISHA BROWN, JOHN DONSBACH, ATTORNEY FOR TERRY BROWN; AND DAVID B. BELL, ESQ., AND MATTHEW D. BODMAN, ESQ., ATTORNEYS FOR LARRY BROWN AND DARYL BROWN:

David C. Sojourner, Jr. (the "LSA"), as Limited Special Administrator for the Estate of James Brown and Limited Special Trustee of the James Brown August 1, 2000 Irrevocable Trust Agreement (collectively, the "Estate") submits this Reply Memorandum responding to Petitioner Tommie Rae Brown's ("Petitioner" or "Tommie Rae") Reply Memorandum in Support of Petitioner's Motion for Partial Summary Judgment, filed October 17, 2014 ("Petitioner's Reply Memorandum"). The sole issue before the Court is whether Petitioner is James Brown's ("Decedent") "surviving spouse."

INTRODUCTION[1]

Petitioner is not entitled to a judgment recognizing her as James Brown's "surviving spouse" because the Ahmed Annulment Order does not reach back to make valid her bigamous marriage to James Brown and there exists no other evidence upon which the Court could find her 1997 marriage to Javed Ahmed was invalid.

As seen through her Motion and subsequent memoranda, Petitioner repeatedly makes the same essential argument on every point:

> "X" (some disputed fact Petitioner asserts in her affidavits, in the Court's Order Approving Settlement Agreement, in Bauknight's Appellate Court arguments, in the Compromise Agreement, etc.) requires the Court to recognize Petitioner as Decedent's surviving spouse. Due to some procedural mechanism (collateral estoppel, judicial estoppel, res judicata, law of the case, etc.) the Court and all parties are powerless to now challenge "X" through discovery or otherwise. Petitioner is therefore entitled to a partial summary judgment ruling she is Decedent's surviving spouse.

Petitioner *must* take this approach because, if the Parties are allowed to test her positions through depositions and discovery, all of Petitioner's arguments will collapse.

For the reasons set forth herein and in the LSA's Initial Memorandum, the Court should deny Petitioner's motion for partial summary judgment and grant the LSA's motion for summary judgment.

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[1] This memorandum supplements the LSA's initial memorandum submitted on October 3, 2014 (October 3, 2014 Memorandum of Law Supporting LSA's Motion for Summary Judgment and Opposing Tommie Rae Brown's Motion for Partial Summary Judgment on the Issue of Surviving Spouse ("LSA's Initial Memorandum")). The LSA is striving to avoid repeating matters explained in his Initial Memorandum, but, instead, address and clarify matters asserted by Petitioner in Petitioner's Reply Memorandum.

ARGUMENTS

I. PETITIONER CANNOT RELY ON THE LSA'S "LACK OF EVIDENCE IN OPPOSITION" TO WIN SUMMARY JUDGMENT BECAUSE PETITIONER PREVIOUSLY CAUSED THE COURT TO STAY ALL DISCOVERY.

On March 31, 2014, Petitioner asked the Court to stay discovery and protect the Petitioner from being deposed, answering written discovery, or producing her diaries. To support this request, Petitioner argued to the Court:

> [Petitioner] is either married to James Brown or she isn't. And that's a decision for you to make and maybe ultimately for the Supreme Court to make. Whether she's married or not really depends on the law and not the facts. It doesn't really matter what anybody says.... And if the marriage is legal, *we don't need any discovery at all*....
>
> I'm going to move for a protective order that the discovery not be had at least until the summary judgment motion is heard, because we can take depositions from now till Doomsday, spending $250,000, fly all over the country, and there's really nothing – there's no point in it, because either the annulment is a valid annulment and the marriage to James Brown is a valid marriage or it isn't. And I think that's a legal matter for the Court, ultimately.[2]

Based upon this unequivocal representation that discovery was unnecessary, the Court barred the parties from conducting any discovery pending its ruling on Petitioner's present motion. In accordance with the Court's order, the parties have not pursued written discovery, taken depositions, or gathered affidavits from parties or other potential witnesses since March 31, 2014.

Now, six months later, Petitioner supports her motion for partial summary judgment with two self-serving affidavits and presents to the Court a myriad of (alleged, but hotly disputed) non-stipulated facts to support her motion.[3] Instead of maintaining her assertion there are no disputed factual issues before the Court, Petitioner now argues that the Court must rule she is

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[2] March 31, 2014 Hearing Transcript, pp. 54-56 (emphasis added).

[3] *See generally*, Petitioner's Initial Memorandum; LSA's Initial Memorandum, pp. 11-16.

James Brown's "surviving spouse" because the non-moving parties have failed to offer any evidence to show a genuine issue of material fact. She asserts, in relevant part:

> [T]he opposing parties cannot create a contested material issue of fact merely by claiming that one exists. "[T]he non-moving party may not rely on mere allegations to resist summary judgment but *must present some evidence* in the form of affidavits or otherwise in support of its proposition." *Fairfield County Sch Dist. Bd of Trs. v. State*, 409 S.C. 119, 126, 761 S.E.2d 241, 245 (2014)....
>
> The first portion of the LSA's brief in particular seems to take the position that an issue is contested simply because the LSA's brief says so. But again, a contested material issue of fact cannot be created by an assertion in a brief. ***It can be created only by submitting to the court an affidavit, signed under oath, alleging admissible evidence that creates a factual conflict. If one party submits an affidavit alleging admissible evidence on an issue, and the other parties does nothing more than refuse to concede the issue in a brief, there is no contested material issue of fact, and summary judgment can be granted.***[4]

When a trial court entertains a motion for summary judgment before material discovery has occurred, the court should not grant that motion if the moving party could adduce contrary evidence through depositions or answers to written discovery. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *BPS, Inc. v. Worthy*, 362 S.C. 319, 325, 608 S.E.2d 155, 159 (Ct. App. 2005) (citations omitted). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Id.* (citations omitted). "Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a 'full and fair opportunity to complete discovery.'" *Schmidt v. Courtney*, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003) (quotation omitted).

Despite Petitioner's clear representations to the Court on March 31, 2014 that no factual issues existed regarding the question of her status as Decedent's "surviving spouse," Petitioner

[4] Petitioner's Reply Memorandum, p. 61. (emphasis added).

now bases her claim for summary judgment on her own affidavits and upon many alleged facts *which the opposing Parties have already refused to stipulate and, in fact, directly dispute.*

Petitioner asserts she has met her burden of proving she was married to Decedent by presenting evidence of the marriage license between herself and Decedent.[5] She claims that the burden of proving the invalidity of her marriage to Decedent is now on the parties opposing it.[6]

Petitioner argues "it is not enough for the opposing parties to produce a marriage certificate showing on its face that Mrs. Brown and Ahmed were married[7]. . . the burden is [now] on those who would attack the marriage to prove *both* (1) the existence of a prior marriage, *and* (2) that the prior marriage was not dissolved by divorce or death."[8] Petitioner concludes her argument by asserting: "In the absence of such evidence, the very strong presumption in favor of the most recent marriage has not been rebutted."[9]

Petitioner makes these arguments after having tied the Parties hands from conducting the discovery that would be necessary to produce opposing evidence. The importance of this point cannot be overstated: Petitioner should not win summary judgment on the basis that the non-moving parties have failed to offer opposing evidence when it is Petitioner who caused all discovery to be stayed.

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[5] *See* Petitioner's Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment, filed September 12, 2014 ("Petitioner's Initial Memorandum") at p. 14.

[6] *Id.* at pp. 14-17; *see also* Petitioner's Reply Memorandum at pp. 4-6.

[7] *See* Petitioner's Reply Memorandum at p. 5.

[8] *Id.* at p. 6 (emphasis in original).

[9] *Id.*

II. THE SUPREME COURT'S DECISION IN *JOYE V. YON* ESTABLISHES THE LSA'S POSITION AND GOVERNS THE COURT'S RULING HERE.

Petitioner tries to support her motion for partial summary judgment by citing language from the Court of Appeals decision in *Joye v. Yon.*[10] While the Court of Appeals' language Petitioner quotes does not support her position, it is unnecessary to explain why, because the Court of Appeals decision was reversed by the Supreme Court.[11] More significant, the Supreme Court's decision in *Joye* also holds a family court order annulling a wife's marriage as bigamous *does not relate back to the date of the bigamous marriage.*[12] The Supreme Court holding in *Joye* therefore directly governs the Court's decision here.

In *Joye*, Husband and Wife were married in 1970. After being married for 26 years, the couple divorced in 1996 and Husband was ordered to pay Wife monthly alimony. In March 1999 Wife remarried to Vance, but soon discovered Vance had never divorced his former spouse and filed for an annulment. In September 1999, the family court granted Wife an annulment on the grounds of bigamy, ruling her March 1999 marriage to Vance was void *ab initio*.

Following Wife's remarriage to Vance, her first Husband had ceased paying alimony because in South Carolina a payor spouse's alimony obligation terminates upon the payee spouse's remarriage.[13] Following her annulment, Wife filed a contempt action against Husband for his failure to pay alimony, arguing because her marriage to Vance was void *ab initio* her

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[10] Petitioner's Reply Memorandum at p. 23-24. *Joye v. Yon*, 345 S.C. 264, 547 S.E.2d 888 (Ct. App. 2001).

[11] *Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003).

[12] *Id.*, 355 S.C. at 457, 586 S.E.2d at 134.

[13] *Id.*, 355 S.C. at 454, 586 S.E.2d at 133, citing S.C. Code Ann. § 20-3-130(B)(1) (Supp. 2002).

former Husband's alimony obligation never terminated.[14] The family court agreed and ordered Husband to make the alimony payments "both retroactively and prospectively."[15]

The Court of Appeals affirmed the family court's order, ruling the Husband's obligation to pay alimony never terminated because "a second bigamous marriage is void from its inception and is perceived as never having existed."[16] The Court of Appeals ruled the annulment order applied retroactively against the Husband, even though he was not a party to the annulment action. Both Court of Appeals holdings precisely reflect Petitioner's position here.

Upon granting certiorari, however, the Supreme Court reversed the Court of Appeals ruling and held an order annulling a marriage as bigamous does not automatically terminate a previous alimony obligation, but, rather, the court should determine whether it does or doesn't based upon the facts of each case.[17]

The following portion of the Supreme Court's holding directly rejects Petitioner's position and governs this Court's ruling:

> We also hold that regardless of whether the family court determines to reinstate periodic alimony payments or not, Husband has *no obligation to pay retroactive alimony to Wife for the time period that Wife was married to her bigamous husband*.[18]

In other words, Husband would owe no alimony for the 6 months between when Wife and Vance married and their marriage was annulled, even though the order of annulment contained a ruling the marriage was bigamous and, therefore, void *ab initio*. The ruling therefore

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[14] *Id.*

[15] *Id.*

[16] *Id.* (citing 345 S.C. 264, 547 S.E.2d 888 (Ct. App. 2001)).

[17] *Id.* 355 S.C. at 457, 586 S.E.2d at 134.

[18] *Id.* (emphasis added).

establishes that the family court decree voiding *ab initio* a bigamous marriage *does not apply retroactively*. This holding directly rejects Petitioner's position here. Instead, it establishes that the 2004 Ahmed Annulment Order does not apply retroactively to Petitioner's 1997 marriage, and would not validate Petitioner's 2001 bigamous marriage to James Brown.

III. THE AHMED ANNULMENT ORDER CANNOT BE USED IN THIS CASE TO PROVE PETITIONER'S MARRIAGE TO AHMED WAS BIGAMOUS.

A. To the extent the Ahmed Annulment Order is enforceable at all, it is an *in rem* order and, as to the world, only establishes the status between the parties going forward.

Petitioner cannot rely on the Ahmed Annulment Order as affirmative evidence her marriage to Ahmed was bigamous. To the extent such order is enforceable at all,[19] it is an *in rem* order and only establishes the status between the parties from the date of the order forward.[20] Because the LSA concedes that the *decree* or *judgment* of annulment[21] is binding on the parties and the world, it is unnecessary to relitigate annulments over and over, as expressed by Petitioner.[22] The LSA agrees that *decrees* of annulment, i.e., the portion of an annulment order

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[19] *See* Respondent Terry Brown's Memorandum of Law in Opposition to Petitioner's Motion for Partial Summary Judgment and in Support of Respondent Terry Brown's Counterarguments, filed October 3, 2014, at pp. 10-18; *see also* Jeanette Mitchell and Amicus Curiae Return to Motion for Summary Judgment of Tommie Rae Hynie Brown, served October 3, 2014, at pp. 19-25.

[20] *See Fitchette v. Sumter Hardwood Co.*, 145 S.C. 53, 142 S.E. 828, 833 (1928) ("Judgments in rem are considered binding on third persons, as are judgments or *decrees determining the status* or relations of individuals, as, for instance, decrees of divorce and adjudications as to the mental condition of persons, judgments of a public nature, and, for the purpose of proving title, judgments under which a sale of land has taken place.").

[21] *See* S.C. Code Ann. § 20-1-520 (providing "upon due proof of the validity thereof, it shall be decreed to be valid and *such decree* shall be conclusive upon all persons concerned") (emphasis added).

[22] Petitioner's Reply Memorandum at pp. 29-32 (misconstruing the LSA's argument as follows: "In sum, the position of the opposing parties in this case is that no annulment judgment is ever final. Every time the judgment has an effect on the rights of a different third party, that third party is permitted to relitigate the merits of the annulment all over again.").

declaring that the parties are no longer married, are binding on parties, non-parties, and "all persons in the world."[23] The distinction between the LSA position and Petitioner's, however, is the LSA strongly asserts no facts or conclusions of law in an annulment order are binding on third parties.

The California Supreme Court decision in *Rediker v. Rediker*, 221 P.2d 1 (Cal. 1950) (en banc) is instructive. Alice Rediker (wife) brought an action against Abraham Rediker (husband) for separate support and maintenance. *Id.* at 3. Husband was personally served and cross-complained for an annulment of their marriage because at the time of their purported marriage, plaintiff was still the wife of another man, Reinhold Graf. *Id.* The trial court found plaintiff was divorced from Graf six years before her marriage to defendant. *Id.* The court also found, however, that at the time of wife's marriage to husband, husband was still married to another woman, Bessie Rediker, and that therefore the marriage between wife and husband was bigamous and void. *Id.* Husband's previous marriage was held to be conclusively established upon evidence of a Florida divorce decree entered in 1944, five years after wife's purported marriage to husband in 1939. *Id.* at 2-3.

The dispute in *Rediker* concerned the effect of the Florida divorce decree entered in 1944 purporting to end the marriage between husband and Bessie. Wife argued the only effect of that decree was to adjudicate the "lack of marital relationship to each other from then on." *Id.* at 800. Husband argued the effect of the decree was to "establish[] that he and Bessie were lawfully married until the entry of the decree dissolved their marriage." *Id.* at 799. He asserted that "an existing valid marriage is a condition precedent to the entry of a divorce decree under Florida law" and therefore the ruling his previous marriage was valid up until the issuance of the decree

[23] *See* Restatement (First) of Judgments § 73 (1942), note a.

was binding against wife. *Id.* at 3. The trial court agreed with husband, stating that "I am not in a position to ignore [the findings of fact in the divorce decree]. I have to accept it and as I pointed out in my notice of decision that judgment carried the absolute necessary implication that up to the time it was rendered [husband] and Bessie were married and that at the time [husband] was married to Alicia he was married to Bessie." *Id.* Wife appealed. *Id.*

The California Supreme Court, en banc, however, agreed with wife and reversed the trial court's ruling regarding the enforceability of findings of fact in the previous annulment order. *Id.* at 3-4. The Supreme Court held that husband's "contention [the ruling that his previous marriage was valid up until the issuance of the decree was binding against wife]. . . is opposed to the prevailing rule in most jurisdictions of the United States . . . ." *Id.* at 4.

> It is an oversimplification to state that a divorce proceeding is a proceeding in rem, and to proceed from that statement to the assumption that a decree entered therein is res judicata in an action between a party and a stranger thereto, not only as to the subsequent status of the parties with relation to each other, but also as to all issues decided or that might have been decided in the proceeding.
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> The weight of authority holds that *a decree of divorce is a judgment in rem only to the extent that it adjudicates the future status of the parties in relation to each other*.... As between parties or privies, the decree is res judicata not only of their status with relation to each other but also of all issues that were litigated or that could have been litigated therein.... As between strangers or strangers and parties, however, the decree is res judicata only in that it conclusively determines that the parties are thereafter free to remarry so far as any relation to each other is concerned. It does not establish the previous validity of their marriage against third persons who were not and had no right to be heard thereon....
>
> We may lay on one side, then, any argument based on the misleading expression that all the world are parties to a proceeding in rem. This does not mean that all the world are entitled to be heard; and, as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or status which the judgment establishes.

Id. (citations and quotation omitted) (emphasis added). The Court recognized that "[t]he rights of an innocent second spouse or the children of a second marriage are not diminished by the

findings of fact in a proceeding to which they were not parties and in which they had no right to be heard. Such a holding would not only be unreasonable but constitutionally objectionable" as it would deny the third party of property without due process of the law. *Id.* at 5.

The fatal flaw in Petitioner's argument is her misinterpretation of the definition of a "judgment" or "decree" of an annulment order. Like the husband in *Rediker*, she unpersuasively argues that, in addition to the judgment or decree itself, the findings of fact and conclusions of law in the Ahmed Annulment Order should also be binding on non-parties. The law does not support Petitioner's position.

Section 20-1-520 of the South Carolina Code affirmatively states that only a "decree [of annulment] shall be conclusive upon all persons concerned."[24] Such statutory provision does not compel an order from this Court that the facts and legal conclusions implicated by such decree are likewise binding on third-parties.

Petitioner's citation to 1 Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 3.6 (2d ed. 1987),[25] supports the LSA's position. Professor Clark states: "Annulment decrees are binding upon non-parties as well as parties respecting the validity of the marriages involved." *Id.* (emphasis added). The LSA agrees with this legal proposition. Petitioner's interpretation of the word "decree" is simply over-inclusive. Cases in other jurisdictions cited by Petitioner in her Reply Memorandum also support the LSA's position.[26]

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[24] S.C. Code Ann. § 20-1-520 (emphasis added).

[25] Petitioner's Reply Memorandum at pp. 22-23.

[26] *See* Petitioner's Reply Memorandum at pp. 27-28 (*citing Presbrey v. Presbrey*, 6 A.D.2d 477, 480, 179 N.Y.S.2d 788, 792 (1958) ("An essential issue is, therefore, one of status—or, put another way, there is a marital res subject to in rem jurisdiction. As a consequence, ... a judgment determining marital status is binding on the whole world, and is not confined in effect to the immediate parties to the action in which the judgment determining status was rendered.)) (emphasis added); *Luke v. Hill*, 73 S.E. 345, 346 (Ga.

The LSA agrees that the Charleston County Family Court order annulling Ahmed and Petitioner's marriage is binding on non-parties, but only so far as it conclusively determines the relationship between Ahmed and Petitioner *going forward.* The LSA does not contest that as of the date of the Ahmed Annulment Order, both Petitioner and Ahmed were not married and that such finding was binding on all non-parties in the world.[27]

The Petitioner misunderstands that the binding nature of annulment orders, decrees or judgments are *limited* to the *decree itself* and does not incorporate any other findings of facts or conclusions of law, even those necessarily implicated by the judgment itself. *See Gratiot County State Bank v. Johnson*, 249 U.S. 246, 39 S.Ct. 263, 63 L.Ed. 587 (1919) ("judgments in rem [are] not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto") (citations omitted)(emphasis added).

The LSA's explanation of the meaning of "decree of annulment" agrees with case law in other jurisdictions. In *Becher v. Contoure Labs.*, 279 U.S. 388, 49 S.Ct. 356, 73 L.Ed. 752 (1929), the U.S. Supreme Court held: "Establishing a fact and giving a specific effect to it by judgment are quite distinct. A judgment in rem binds all the world, but the facts on which it necessarily proceeds are not established against all the world . . . ." 279 U.S. at 391, 49 S.Ct. at 357 (citation omitted). "[I]t has long been settled that . . . judgments *in rem* are conclusive only

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1911) ("So far as the adjudication fixes the status of the parties, the judgment concludes both parties and strangers[.]").

[27] *See* Clark, supra at § 3.6 (noting the "well established rule that a decree of divorce is conclusive on third parties with respect to the termination of the marriage" and suggesting that a decree of annulment should have the same effect). That Petitioner cites Professor Clark for the holding that annulment orders should be treated identically to divorce decrees undermines her later attempt to distinguish case law from the LSA's memorandum on the basis that "[t]hese cases involve divorces, not annulments." *See* Petitioner's Reply Memorandum at p. 29 (discussing *Westbury v. Bauer*, 293 S.C. 224, 359 S.E.2d 515 (Ct. App. 1987) and *Jordan v. Jordan*, 284 S.C. 342, 326 S.E.2d 416 (1985).

as to the property involved, and may be controverted as to all the grounds and incidental facts on which they profess to be founded." *Durant v. Abendroth*, 52 Sickels 132, 97 N.Y. 132 (N.Y. 1884) ("even if the bankruptcy proceedings are treated as proceedings *in rem*, the decree was not conclusive as to any fact, in a subsequent personal controversy").

Instead of responding to the LSA's position on its merits, Petitioner attempts to distinguish cases cited by the LSA on the ground that they deal with in rem judgments determining the status of real property instead of the status of parties' marital relationships.[28] Petitioner, first, fails to give any legal support for her argument these two types of in rem judgments are somehow distinguishable. South Carolina law does not recognize such a distinction. *See* 4 S.C. Jur. *Action* § 5 (describing an "in rem" judgment as one which operates only upon a specific property or status). *See also Fitchette v. Sumter Hardwood Co.*, 145 S.C. 53, 142 S.E. 828, 833 (1928). Regardless of the type of res—real property or a marital status—an *in rem* judgment does not bind third persons regarding underlying facts and conclusions of law. Both types of judgments bind third-parties as to the status or ownership of the *res*. Petitioner cannot find any foundation in law or equity for a cognizable distinction between these types of orders and therefore her "distinction" is unavailing.

B. Petitioner is wrong in asserting "the Court was an opposing party" and therefore the Ahmed Annulment Order is not a default judgment.

Petitioner asserts the court is effectively an unnamed "opposing party" to annulment proceedings and, therefore, a court's judgment in such a proceeding can never be a default judgment.[29] Petitioner cites no law for this proposition and based on the LSA's independent research, no such authority exists. Petitioner's position also contravenes existing law. The

[28] Petitioner's Reply Memorandum at p. 32.

[29] *Id.* at pp. 19-22.

United States Court of Appeals for the Fourth Circuit has cautioned that courts should determine "with particular care" whether a matter has been "actually litigated" in a prior action for purposes of collateral estoppel. *In re Raynor*, 922 F.2d 1146, 1148 (4th Cir. 1991) (*quoting Combs v. Richardson*, 838 F.2d 112, 113 (4th Cir. 1988)). *See also Matter of Garland*, 401 F.Supp. 608, 610 n.3 (E.D. Pa. 1975) ("The better practice for the collateral estoppel effect of default judgments is to limit it severely. Generally, a default judgment has no collateral estoppel effect in later suits involving different matters....") (citations omitted).

"Default judgment" is defined as "[a] judgment entered against a defendant who has failed to plead or otherwise defend against the plaintiff's claim."[30] Petitioner attempts to claim Ahmed was not in "default" simply because counsel for Petitioner did not move to put him into default,[31] but such argument is unpersuasive. The entry of default is a mere "official recognition" of a defendant's "failure to appear or otherwise defend." *See Beckham v. Durant*, 300 S.C. 329, 387 S.E.2d 701 (Ct. App. 1989). Where a plaintiff fails to move to put a defendant in default, the resulting trial is on the merits; however, such failure to move does not mean the defendant is still not "in default" for the purposes of an estoppel analysis. *See RRR, Inc. v. Toggas*, 378 S.C. 174, 662 S.E.2d 438 (Ct. App. 2008).

Courts in other jurisdictions agree that judgments obtained against a party in default are not binding on the defaulting party under principles of collateral estoppel. In *In re Kalita*, 202 B.R. 889, 914 (Bankr. W.D. Mich. 1996), the Western District of Michigan explained: "In analyzing whether an issue was 'actually litigated' in the prior proceeding, the Court must look

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[30] BLACK'S LAW DICTIONARY 480 (9th ed. 2009); *see also* Rule 55, SCRCP (indicating default occurs "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend").

[31] Petitioner's Reply Memorandum at p. 20.

at more than what has been plead and argued. We must also consider whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue." *Id.* at 903 (quotation omitted). The Court held "unless a proper answer is filed which identifies facts necessarily in issue, a subsequent judgment is not entitled to collateral estoppel effect because the factual issues were not contested and hence not actually litigated." *Id.* 202 B.R. at 914 (citation omitted).

The parties have stipulated that Ahmed did not appear, plead, or otherwise participate in the Ahmed Annulment Action.[32] Such proof legally qualifies the Ahmed Annulment Order as one obtained against a defendant in default under Rule 55, SCRCP. By failing to respond to the initial pleading and/or appear for the final hearing, Ahmed did not contest the evidence submitted by Petitioner and/or present any contrary proof. In sum, Ahmed did not have a "full and fair opportunity to litigate the issue."[33] Whether or not Ahmed had "notice" is irrelevant whether he was in default. To hold the findings of fact and conclusions of law against him when the judgment was rendered by default would contravene time-honored public policies that default judgments are not binding against third parties.[34]

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[32] Stipulation of Facts at ¶ 17 ("Javed Ahmed failed to appear, answer the complaint or otherwise plead within the time required, participate in or otherwise defend himself in the Ahmed Annulment Action.").

[33] In *In re Kalita*, 202 B.R. 889, 914 (Bankr. W.D. Mich. 1996)

[34] South Carolina family courts do not need to have personal jurisdiction over a non-resident defendant to order a divorce or annulment. *See* S.C. Code Ann. § 20-3-30 (1976). All that is required is the Court to have jurisdiction over one of the parties, oftentimes the plaintiff. *Id.* Jurisdiction to grant a decree of divorce or annulment can be done even though there is no personal jurisdiction over the non-resident defendant, such as where the court has "constructive jurisdiction" over such person. *See* 24 Am. Jur. 2d *Divorce and Separation* § 256. *See also Carnie v. Carnie*, 252 S.C. 471, 167 S.E.2d 297 (1969) ("a decree awarding simply a divorce, dissolving the martial status of the parties, is a judgment in rem, and for such purpose the jurisdiction of a nonresident may be obtained by constructive service"). Judgments obtained against non-resident defendants should not be binding on such defendants as to the underlying findings of fact and conclusions of law because technically speaking the court lacks personal jurisdiction over them. *See Carnie*, 252 S.C. at 475, 167 S.E.2d at 299 ("On the other hand, a divorce decree which grants, in addition to the divorce, alimony, child support and attorney's fees against a nonresident

C. Petitioner misconstrues Decedent's use of the Ahmed Annulment Order in Decedent's own annulment action against Petitioner.

Petitioner misrepresents Decedent's use of the Ahmed Annulment Order in Decedent's Amended Complaint for annulment against Tommie Rae. She asserts with no factual evidence:

> Mr. Brown urged the Family Court of Aiken County to adopt the findings of fact contained in the annulment. Clearly he did not seek to enforce a fraudulent judgment, and if he did, he should be equitably estopped from now questioning that judgment. Mr. Brown would obviously not have agreed to finance litigation that was intended to defraud him. There was no fraud perpetrated on Mr. Brown. By paying the fees he clearly caused the annulment to take place. Were it not for his paying the fees, no annulment would have taken place.[35] So clearly he wanted it to happen. This is an inference the court must draw from his actions.[36]

To advance such a circular argument belittles both Petitioner and the Court.

Petitioner relies on Decedent's Amended Complaint in the *James Joe Brown, Jr. v. Tommie Rae Hyne Ahmed Brown*, 2004-DR-02-157. In his Amended Complaint, Decedent took the position the findings of fact and conclusions of law in the Ahmed Annulment Order were binding upon Petitioner.[37] Decedent asserted that because Petitioner was a party to the Ahmed Annulment Action, she was (and the LSA would contend, still is) collaterally and judicially estopped by findings contained in the Ahmed Annulment Order. Such an argument is not in

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defendant personally is, to that extent, a judgment in personam, which may not be rendered without jurisdiction of the person of the defendant.")

[35] There is absolutely no factual foundation in the record for Petitioner's assertion that without Decedent's "paying the legal fees, no annulment would have taken place." While this statement should be given absolutely no legal effect, it should be noted as another example of Petitioner's reliance upon facts her opponents directly dispute.

[36] Petitioner's Reply Memorandum at p. 12.

[37] Stipulation of Facts at ¶ 19 and Stip. Exhibit No. 16 (emphasis added). The Decedent did not, as Petitioner asserts, "urge[] the Family Court of Aiken County to adopt the findings of fact contained in the annulment." *See* Petitioner's Reply Memorandum at p. 12.

conflict with LSA's position regarding the subject motion.[38] The fact that Decedent previously argued Petitioner is bound by the findings of fact and conclusions of law in the Ahmed Annulment Action because she was a named party, does not cause Decedent, who was not a named party, to be bound by such findings. To do so would mean any party who uses the doctrine of offensive non-mutual collateral estoppel would likewise be bound by such proceedings, which is not the law.

IV. THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT APPLY SO AS TO BIND DECEDENT, AND BY EXTENSION THE LSA, TO THE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE AHMED ANNULMENT ACTION.

A. Petitioner misstates the holding in *Carolina Baking Co. v. Geilfuss* and asserts it supports her position when that holding actually supports the LSA.

Petitioner asserts although James Brown "was obviously not a party to the [Ahmed] annulment action,"[39] because James Brown "sought, consented to, and acquiesced in" the Ahmed Annulment Order, *Carolina Baking v. Geilfuss*[40] holds he is bound by the finding of that order. Petitioner asserts: "Thus, *Carolina Baking* held that a judgment *is binding upon nonparties* who 'sought, consented to, or acquiesced in' the judgment."[41] Petitioner directly misstates the

[38] Whereas non-parties, including Decedent, and by extension the LSA, are not bound by the findings of fact and conclusions of law contained in the Ahmed Annulment Order (*see supra* at § III(A)), Petitioner is bound by the findings of fact and conclusions of law because she was a named party to that action.

[39] Petitioners Reply Memorandum, p. 44. Petitioner's admission is consistent with Joint Stipulation of Facts ¶¶ 12, 15.

[40] *Carolina Baking v. Geilfuss*, 169 S.C. 348, 168 S.E. 849 (1933).

[41] Petitioner's Reply Memorandum, p. 45.

Carolina Baking holding, which *expressly* held the order in question was binding upon *"parties to the action."*[42]

The *Carolina Baking* holding shows, even without a review of that opinion's underlying facts, the Court applied collateral estoppel only to "parties to the action":

> [It] does not follow that the decree is invalid *as to all the parties to the action.* It was sought, consented to, or acquiesced in *by all of them* except the named appellant herein. They object to it, and they alone have appealed from it. They are not bound by it; *all the others are, and as to them* it is res adjudicata.[43]

Carolina Baking ruled that certain creditors, *who were parties to the circuit court action*, were bound by the circuit court's order distributing proceeds from the sale of a baking business, because *those creditor parties* had "sought, consented to, or acquiesced in" the circuit court order and had not appealed the order.[44]

Petitioner's representation to the Court that "*Carolina Baking* held a judgment is binding on *nonparties*"[45] is careless, as *Carolina Baking* actually supports the LSA's position that only parties to an action are collaterally estopped by the provisions of an order issued in that action.

B. The doctrine of collateral estoppel only binds parties and their privies; James Brown was not a party or in privity with any party to the Ahmed Annulment Action.

Under the doctrine of collateral estoppel, relitigation of issues "actually and necessarily litigated and determined in [a prior] suit" is barred in a second action based upon a different claim. *Carrigg v. Cannon*, 347 S.C. 75, 79-80, 552 S.E.2d 767, 770 (Ct. App. 2001) (citations omitted). "Only a party to a prior action or one in privity with a party to a prior action can be

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[42] *Carolina Baking*, 169 S.C. 348, 168 S.E. 849, 852.

[43] *Id.* (emphasis added).

[44] *Id.*

[45] Petitioner's Reply Memorandum, p. 45.

precluded from relitigating an issue on the basis of offensive collateral estoppel." *Id.* at 80, 552 S.E.2d at 770. Decedent was not a named party to the Ahmed Annulment Action, nor could he have intervened to become one.[46]

Decedent was not in privity with Tommie Rae during the Ahmed Annulment Action due to his alleged "interest" in the proceedings. None of the legal matters decided in the annulment proceeding affected Decedent directly.

South Carolina courts take a strict position on determining whether a party is "in privity." In *Palm v. General Painting Co., Inc.*, 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988), the South Carolina Court of Appeals affirmed the trial court's ruling that a purported child of a decedent was not estopped from relitigating her parentage despite two previous orders finding her illegitimate and changing her last name to the name of a different father. *Id.* at 44, 370 S.E.2d at 465. The Court held that even though two previous orders determined the child's paternity, because she was neither a party to the actions nor a privity of a party of her parents, she was not estopped from challenging paternity in this third action. *Id.* (*citing Prather v. Tupper*, 267 S.C. 636, 230 S.E.2d 712 (1976) (a determination that a child was illegitimate must be set aside where the child was not represented by a guardian *ad litem* in the action; a defendant is not bound by an adjudication where he was not a party to the action)).

Similarly to the child in *Palm*, Decedent was not presented with the opportunity in the Ahmed Annulment Action to present his own evidence and arguments. He therefore should not

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[46] *See* 4 Am. Jur. 2d *Annulment of Marriage* § 59 ("The right to annul a voidable marriage is a personal right and the action for annulment of such a marriage can be maintained only by a party to the marriage contract. ... Therefore, a third person cannot, as a general rule, maintain an action to annul a marriage which is merely voidable.") (citations omitted); *Ex parte GEICO*, 373 S.C. 132, 644 S.E.2d 699 (2007) (holding third party with an indirect interest in the validity of a marriage does not have standing to intervene in a family court action) and *Powell ex rel. Kelley v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008) (same).

be estopped as "a privy" of Tommie Rae. Like *Richburg v. Baughman* and *Palm v. General Painting Co.*, the Court should determine the Estate is not bound by the findings of fact or conclusions of law in the Ahmed Annulment Order. James Brown's legal interests were not represented or litigated during the annulment action, therefore, he cannot be said to be in privity with any of the parties to that action, despite his indirect interest in the outcome of those proceedings. *See Carrigg v. Cannon*, 347 S.C. at 82, 552 S.E.2d at 771. At the time of the proceedings in the Ahmed Annulment Action, Decedent had his own annulment action against Petitioner pending in the Aiken County Family Court. His concurrent adverse action against Petitioner precludes any inference or finding he was a "privy" of Petitioner's in her independent annulment action.

C. James Brown did not exercise substantial control or actually participate in the Ahmed Annulment Action.

Petitioner attempts to bootstrap her way into showing James Brown was in "privity" with her in the Ahmed Annulment Action by citing cases from Texas, Oklahoma, and Ohio holding a nonparty may establish privity by "controlling" the action in which he or she is not a party.[47] Petitioner fails to provide any law explaining what constitutes such "control" other than the Supreme Court's "sought, consented to, and acquiesced" language in *Carolina Baking* which, as explained above, is irrelevant because it only served to bind *parties* to that action.[48]

South Carolina only applies collateral estoppel against actual parties and has not extended the concept to apply to nonparties to an action who controlled that action. Even jurisdictions applying collateral estoppel against non-parties would not find James Brown to be bound by the

[47] Petitioner's Reply Memorandum, pp. 46-48.

[48] *See* pp. 17 - 18, *supra*. Because Petitioner has misstated the holding in *Carolina Baking*, Petitioner's references to *Carolina Baking* offer no support for her attempt to establish privity through "control."

Ahmed Annulment Order. In those jurisdictions, to be bound, "[t]he nonparty must have had adequate control of the litigation, and must have had a sufficient 'interest' in the result." 18A Fed. Prac. & Proced. Juris § 4451 (2d ed.) (emphasis added). Other courts emphasized the degree of control must be "extensive" and "exceed[ing] mere influence," instead requiring that the evidence show the non-party funded, argued, and formulated the legal theory of the case. *See Henry E. and Nancy Horton Bartels Trust ex rel. Cornell University v. U.S.*, 88 Fed. Cl. 105 (Fed. Cl. 2009) (citations omitted).

In *Montana,* 440 U.S. 147, 154–55, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979), the U.S. Supreme Court held that control-type nonparty preclusion appropriate where the nonparty: (1) caused the earlier lawsuit to be filed; (2) reviewed and approved the complaint; (3) paid the attorneys' fees and costs; (4) directed the appeal to the Montana Supreme Court; (5) appeared and submitted a brief as *amicus* therein; (6) directed the filing of an appeal to the Supreme Court; and (7) on the advice of the Solicitor General, caused the captioned party to abandon that appeal).

None of these factors are present in the instant case and there is no evidence in the record to show that Decedent had any effective choice as to the legal theories and proofs to be advanced on behalf of Petitioner in the Ahmed Annulment Action. The evidence in the record also discloses that Petitioner's counsel in the Ahmed Annulment Action did not provide a filed copy of the summons and complaint to Decedent's counsel until almost two months after it was filed.[49] Petitioner has offered no evidence to suggest her counsel conferred with Decedent or Decedent's counsel regarding the legal positions to be taken in the pleadings against Mr. Ahmed.

[49] *See* Joint Stipulation of Facts at ¶14; Stip. Exhibit 14.

Similarly, the only evidence in the record indicates Decedent's attorney was not informed regarding the final hearing on Petitioner's marital status until a day after the final order was filed.[50] Knowledge of filings after they are filed cannot, even given all reasonable inferences, compel a finding Decedent "controlled," i.e., made "effective choice as to the legal theories and proofs to be advanced" on behalf of Petitioner. *See Virginia Hosp. Ass'n v. Baliles, 830 F.2d 1308, 1313 (4th Cir. 1987) (citing Restatement (Second) of Judgments* § 39 comment c, at 384 (1982)).

Because James Brown directly opposed Petitioner in the Aiken Annulment Action, it would likely have violated South Carolina's Professional Rules of Conduct for Petitioner's attorney in the Ahmed Annulment Action to allow James Brown to exercise control over the Ahmed Annulment Action. Rule 1.7 of the South Carolina Professional Rules of Conduct prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest. *See* Rule 407, SCACR, Rules of Prof. Conduct, Rule 1.7. The notes to Rule 1.7 of the Rules of Professional Conduct discuss a potential conflict of interest if a non-party pays for the attorney's legal fees. The notes state: "A lawyer may be paid from a source other than the client . . . if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client." Here, Petitioner's attorney in the Ahmed Annulment Action could not have been "controlled" by Decedent because to do so would violate his duty of loyalty or independent judgment to his client, Petitioner.

Petitioner has presented no evidence that James Brown exercised *actual* control over the Ahmed Annulment Action. Her only assertion is that Decedent's mere provision of legal fees

[50] *Id.*

makes is somehow equitable that Decedent, a non-party to the Ahmed Annulment Action, be bound by the Ahmed Annulment Order based on principles of collateral estoppel.

"To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain [appellate] review. . . . It is not sufficient, however, that the person merely contributed funds or advice in support of the party, supplied counsel to the party, or appeared as *amicus curiae.*" *Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308, 1313 (4th Cir. 1987) (*citing Restatement (Second) of Judgments* § 39 comment c, at 384 (1982)) (emphasis added). "Moreover, a nonparty is not deemed to have control over litigation simply because he procures witnesses or evidence for a party to the suit." *Id.* (*citing* 1B *Moore's Federal Practice* ¶ 0.411[6], at 457).

The Stipulated Facts do not establish Decedent's "control," as the Joint Stipulation merely provides that "James Brown gave Tommie Rae Brown the funds to pay the legal fees for the Ahmed Annulment litigation" and "James Brown was aware of the Ahmed Annulment litigation as his attorney received" copies of the filed pleadings and final order.[51] To the extent Petitioner relies on such evidence alone, her position is unpersuasive.

C. Even if the elements for collateral estoppel were present, application of the doctrine is discretionary and should only be applied where equitable.

"Even where all the elements for collateral estoppel are met, it will not be rigidly or mechanically applied, and the application of the doctrine may be precluded where unfairness or injustice results, or public policy requires it." *Carrigg*, 347 S.C. at 81, 552 S.E.2d at 770 (*citing State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998)). Collateral estoppel should be applied "*sparingly*, with clear regard for the facts of the particular case." *Cothran*, 357 S.C. at

[51] Joint Stipulation of Facts at ¶¶ 13-14.

216, 592 S.E.2d at 632 (emphasis added). "The application of ... estoppel must be determined on a case-by-case basis, and must not be applied to impede the truth-seeking function of the court." *Id.*

Here, it would be unfair to hold a third party (James Brown and the Estate) to be estopped from challenging a previous action in which Decedent was not a named party, had no right to intervene, did not control the proceedings, and whose interests were not heard or adjudicated. This case should stand as a clear example of a case where a non-party was not afforded a fair and full opportunity to litigate his own interests such that estoppel should not apply. For these reasons, Decedent, and by extension, the LSA are not bound by the findings of fact or conclusions of law in the Ahmed Annulment Order.

V. JUDICIAL ESTOPPEL IS AN EQUITABLE DOCTRINE THAT SHOULD NOT BE APPLIED GIVEN THE FACTS IN THIS CASE.

Judicial estoppel based on Bauknight's arguments in the *Wilson v. Dallas* appeal should not be applied so as to bind the LSA in this action. The LSA is not asserting Bauknight was not acting for the Estate or that he was not entitled to be paid for his services in the appeal as Petitioner contends.[52] Rather, the LSA is asserting that, because there were *two* parties colorably representing the Estate in the Appeal—Adele Pope and Robert Buchanan on one hand and Russell Bauknight on the other—both of which took diametrically opposing positions on the issue of surviving spouse, it would be inequitable for the Court to choose Bauknight over the former Personal Representatives and apply judicial estoppel accordingly.

The doctrine of estoppel should be applied "sparingly, with clear regard for the facts of the particular case." *Cothran*, 357 S.C. at 216, 592 S.E.2d at 632. "The application of ...

[52] Petitioner's Reply Memorandum at pp. 50-52.

estoppel must be determined on a case-by-case basis, and must not be applied to impede the truth-seeking function of the court." *Id.* Here, it would be unfair to hold a third party (James Brown and the Estate) to be estopped from challenging a the legal positions taken by Bauknight in the *Wilson v. Dallas* appeal where the Estate was purportedly represented by two groups of personal representatives and trustees that were both supposedly acting in the best interests of the Estate. Judicial estoppel should not apply where there is no evidence of any "intentional effort to mislead the court." *Cothran*, 357 S.C. at 216, 592 S.E.2d at 632. Here, there is no such evidence and judicial estoppel should not be applied.

VI. THE SUPREME COURT'S OPINION IN *LUKICH* ESTABLISHES THAT THE ANNULMENT OF AN EARLIER BIGAMOUS MARRIAGE SHALL NOT APPLY RETROACTIVELY SO AS TO VALIDATE A MORE RECENT BIGAMOUS MARRIAGE.

Petitioner asserts because the Ahmed Annulment Order declared Petitioner's marriage to Ahmed void, she fits into the exception expressed by § 20-1-80[53] providing a bigamous marriage is void *except* as to those persons "whose first marriage shall be declared void by a competent court."

The plaintiff in *Lukich v Lukich*[54] advanced this same argument and the Court of Appeals and Supreme Court both rejected it. Petitioner attempts to distinguish her case by asserting the *Lukich* holding only applies where the first marriage was annulled because the parties "had never

[53] S.C. Code Ann., § 20-1-80 (2007).

[54] The Supreme Court in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008), held an annulment order declaring a wife's first marriage void *ab initio* did not "relate back" so as to validate the wife's bigamous purported second marriage which occurred between the time of her first marriage and the annulment order.

lived together as husband and wife,"[55] and not where the first marriage is annulled as bigamous. Petitioner supports her assertion with the *dicta* in Footnote 2 of the Court of Appeals decision.[56]

The Supreme Court opinion removes the potential limitation expressed by the Court of Appeals and directly forecloses Petitioner's argument in two ways.[57]

First, the plain language of the *Lukich* holding establishes the Court's intent for its ruling to encompass orders annulling a first marriage as bigamous. The wife in *Lukich*, as here, relied primarily on S.C. Code Ann. § 20-1-80 (Supp. 2007) titled "Bigamous Marriages shall be void: Exceptions." That statute provides in relevant part:

> All marriages contracted while either of the parties has a former wife or husband living shall be void. But this section shall not extend to a person . . . *whose first marriage shall be declared void by the sentence of a competent court.*

Id. (emphasis added).

Like Petitioner, the plaintiff in *Lukich* contended § 20-1-80 created an exception to its provision her otherwise bigamous second marriage was void because her first marriage had been "declared void by a competent court" (both here and in *Lukich* the declaration was an order issued by Charleston Family Court Judge Frances Segars-Andrews). The *Lukich* court foreclosed the plaintiff's (and therefore Petitioner's) argument with the following holding:

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[55] *Lukich v. Lukich*, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (Ct. App. 2006)), *aff'd as modified* 379 S.C. 589, 666 S.E.2d 906 (2008).

[56] Footnote 2 of the South Carolina Court of Appeals decision provides in *dicta*:

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

[57] The LSA limits his discussion here to two points. For additional discussion, *see LSA's Initial Memorandum*, pp. 39-42.

> Under the statute's terms, Wife's "marriage" to Husband #2 was "void" from the inception since *at the time of that marriage* she had a living spouse and [Wife's first] marriage *had not been* *"declared void."*[58]

In so ruling, the *Lukich* court reads § 20-1-80 to require the order declaring the first marriage void to have been issued *"at the time of [the second] marriage."*[59] Because Judge Segars-Andrews' order declaring *Lukich* Wife's first marriage void "had not been" issued "at the time of" her second marriage, the Court held the exception in § 20-1-80 did not apply. Likewise, because Judge Segars-Andrews order declaring Petitioner's marriage to Ahmed void "had not been" issued "at the time of" Petitioner's marriage ceremony with James Brown, the exception in § 20-1-80 does not apply here.

Second, *Lukich* strongly suggests its holding extends to prohibit the "retroactive" application of orders annulling bigamous marriages through the last paragraph of the Supreme Court's decision:

> [U]nder South Carolina's current view of bigamy, the Family Court has jurisdiction to decide all ancillary matters where it annuls a marriage and declares it void *ab initio*. *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004). It would be inconsistent at best to hold that a marriage declared void *ab initio* never existed for bigamy purposes, yet can serve as the foundation for a family court's division of property, alimony, and/or child support.[60]

Rodman, expressly followed *White v. White*[61] and *Splawn v. Splawn*[62], both of which held the family court has jurisdiction to equitably distribute the marital property of a couple whose

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[58] *Lukich v. Lukich*, 379 S.C. at 592, 666 S.E.2d at 907 (2008) (*citing* S.C. Code Ann. § 20-1-80) (emphasis added).

[59] *Id.* (emphasis added).

[60] *Id.* at 593, 666 S.E.2d at 907.

[61] 283 S.C. 348, 323 S.E.2d 521 (1984).

[62] 311 S.C. 423, 429 S.E.2d 805, (1993).

marriage it has declared void as bigamous. The South Carolina Court of Appeals in *Rodman* held:

> There is no legal distinction between a marriage which is annulled and one terminated by reason of bigamy, as they are both void *ab initio*, or "from the inception." *Splawn v. Splawn*, 311 S.C. 423, 425, 429 S.E.2d 805, 806 (1993). In fact, the South Carolina Supreme Court has specifically held the family court has subject matter jurisdiction to equitably distribute property in a bigamous marriage. *Id.*, 311 S.C. at 424, 429 S.E.2d at 806.[63]

The Supreme Court's reference in *Lukich* to the family court's subject matter jurisdiction is profoundly important. Section 63-3-530 entitled "Jurisdiction in Domestic Matters" defines the family court's original jurisdiction in domestic matters, and includes the jurisdiction "to hear and determine . . . marital litigation between the parties and for settlement of all legal and equitable rights of the parties in the actions and to the real and personal property of the marriage and attorney's fees . . . ."[64] Subject matter jurisdiction refers to the court's "power to hear and determine cases of the general class to which the proceedings in question belong."[65] Subject matter jurisdiction in the family court is especially important because the family court is a court of limited jurisdiction.[66] As a statutory court, its jurisdiction is limited to that expressly or by necessary implication conferred by statute.[67]

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[63] *Rodman*, 604 S.C. at 296, 604 S.E.2d at 402.

[64] S.C. Code Ann. § 63-3-530(A)(2).

[65] *Watson v. Watson*, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995) (*quoting Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237, 442 S.E.2d 598, 600 (1994)).

[66] *See Sims v. Sims*, 290 S.C. 190, 348 S.E.2d 835 (1986).

[67] *S.C. Dep't of Mental Health v. State*, 301 S.C. 75, 390 S.E.2d 185 (1990).

If a court does not have subject matter jurisdiction, it cannot obtain it. Lack of subject matter jurisdiction cannot be waived, even by consent or stipulation of the parties.[68] Moreover, "[l]ack of subject matter jurisdiction may be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court."[69] If the action is not dismissed, any action by a court that lacks subject matter jurisdiction is void.[70]

Although the foregoing review of subject matter jurisdiction is obvious to the Court and all parties to this action, the importance of the Supreme Court reference in *Lukich* to the family court's subject matter jurisdiction cannot be overemphasized. The holdings in *Rodman, Splawn,* and *Lukich* revolve around the appellate courts' recognition that subject matter jurisdiction in the family court could become chaotic if annulment orders on the basis of bigamy applied retroactively.

Through S.C. Code Ann. § 63-3-530(A)(6) (2009), the legislature granted the family court exclusive jurisdiction over annulment proceedings.[71] As Petitioner points out,[72] because the annulment of a marriage is "other marital litigation between the parties," in annulment actions "the family court *shall* make a final equitable apportionment between the parties of the

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[68] *See Badeaux v. Davis*, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999); *Austelle v. Austelle*, 294 S.C. 19, 21, 362 S.E.2d 181, 183 (1987) (stating that "[o]f course, it is axiomatic that subject matter jurisdiction cannot be waived.").

[69] *Harden v. S.C. State Highway Dep't*, 266 S.C. 119, 124, 221 S.E.2d 851, 853 (1976) (*quoting Lake v. Reeder Const. Co.*, 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998)).

[70] *Peake v. Peake*, 284 S.C. 591, 327 S.E.2d 375 (Ct. App. 1985); *State v. Funderburke*, 259 S.C. 256, 191 S.E.2d 520 (1972).

[71] *Rodman v. Rodman*, 361 S.C. 291, 296, 604 S.E.2d 399, 401 (Ct. App. 2004), citing *White, supra.*

[72] Petitioner's Reply Memorandum, p. 39

parties' *marital property* upon request by either party in the pleadings"[73] by applying the factors set forth in S.C. Code Ann. § 20-3-620 (B).

> Marital property is all the property accumulated during the marriage as the result of the parties' marital efforts and endeavors.[74]

Regarding the family court's equitable distribution of marital property,

> Equitable distribution is based on a recognition that marriage is, among other things, an economic partnership. Upon dissolution of the marriage, property accumulated during the marriage should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of which spouse holds legal title.[75]

Where the family court annuls a marriage because it was bigamous and one party requests equitable distribution of the property, the Court must then equitably distribute the "property accumulated during the marriage." In doing so, the Court must consider "what the material contributions of the parties have been to the acquisition of the marital property"[76] from the marriage ceremony through the annulment order. The Court must then divide and distribute the marital property "in a manner which fairly reflects each spouse's contribution to its acquisition,"[77] again, *from the marriage ceremony through the annulment order.*

Our legislature has made it equally clear that "[t]he [family] court *does not* have jurisdiction or authority to apportion nonmarital property."[78] The Supreme Court illustrated this in *Tipton*, where divorced Husband filed an action against his former Wife seeking an interest in

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[73] S.C. Code Ann. § 20-3-620 (A) (2009) (emphasis added); *Splawn*, 311 S.C. at 425, 429 S.E.2d at 807.

[74] *Voelker v. Hillock*, 288 S.C. 622, 628, 344 S.E.2d 177, 181 (Ct. App. 1986).

[75] *Walker v. Walker*, 295 S.C. 286, 288, 368 S.E. 2d 89, 90 (Ct. App. 1988) (citations omitted).

[76] *Voelker*, 288 S.C. at 627, 344 S.E.2d at 181.

[77] *Walker*, 295 S.C. at 288, 368 S.E. 2d at 90.

[78] S.C. Code Ann. § 20-3-630 (B) (formerly § 20-7-473); *Tipton v. Tipton*, 351 S.C. 456, 458, 570 S.E.2d 195, 196 (Ct. App. 2002) (emphasis added).

the former marital home because Husband had contributed to the mortgage following the couple's divorce.[79] The family court held that while the former married couple had resumed cohabitation two months after the divorce and lived together for almost four years, the parties were not (re)married by common law.[80] The family court determined it therefore lacked jurisdiction to award Husband an equitable interest in the former marital home and Husband appealed.[81]

The Court of Appeals affirmed the family court's decision, finding

> Once the parties were divorced, there no longer existed any "marital property" over which the family court could assume jurisdiction unless jurisdiction was reserved in the [divorce] decree...'The [family] court lacks jurisdiction or authority to apportion nonmarital property.'[82]

Likewise in *Hallums v. Bowens*,[83] Respondent Theresa Hallums brought action alleging a common-law marriage to Appellant Thomas Bowens.[84] The family court ruled, based upon the parties' stipulation, there was no common-law marriage, but, nevertheless, equitably distributed properties accumulated by the couple while they lived together.[85] Bowens appealed.[86] The Court of Appeals reversed, holding the family court had no subject matter jurisdiction over the property division:

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[79] *Tipton v. Tipton*, 351 S.C. 456, 457, 570 S.E.2d 195, 195-96 (Ct. App. 2002)

[80] *Id.* at 458, 570 S.E.2d at 196.

[81] *Id.*

[82] *Id.*

[83] *Hallums v. Bowens*, 318 S.C. 1, 428 S.E.2d 894 (Ct. App. 1993).

[84] *Id.* at 2, 428 S.E.2d at 894.

[85] *Id.* at 2-3, 428 S.E.2d at 894-95.

[86] *Id.* at 2, 428 S.E.2d at 894.

> It patently appears that the family court did not have jurisdiction to allocate properties of this unmarried couple. When it became apparent that no marriage was involved, there could be no marital property as contemplated by our law. Accordingly, the court had no jurisdiction of the subject matter...The family courts of this state have jurisdiction to deal with family problems. It has no jurisdiction to settle property disputes between unmarried people.[87]

The application of this concept to the present facts is obvious. Petitioner contends the Ahmed Annulment Order established for all the world "there was never any marriage between Tommie Rae and Ahmed."[88] But *Lukich* makes clear an order annulling a bigamous marriage *does not do that.* Otherwise, the couple whose marriage is annulled as bigamous would be just like the couples in *Tipton* and *Hallums v. Bowens* – an "unmarried couple [with] no marital property as contemplated by our law."[89] If such an annulment order applied retroactively, then the family court would not have jurisdiction to apportion the bigamous couple's property because "[t]he [family] court *does not* have jurisdiction or authority to apportion nonmarital property."[90] Lack of subject matter jurisdiction cannot be waived, even by consent or stipulation of the parties.[91] An order rendered by a court without subject matter jurisdiction is void.[92]

The Supreme Court penned *Lukich* as a concise, one-page opinion. It, nevertheless, chose to express the connection of its ruling with the *Rodman* decision and in light of the family

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[87] *Id.*, at 3, 428 S.E.2d at 895.

[88] Petitioner's Reply Memorandum, p. 5, footnote 9.

[89] *Hallums v. Bowens*, 318 S.C. 1, 3, 428 S.E.2d 894, 895 (Ct. App. 1993).

[90] S.C. Code Ann. § 20-3-630 (B) (formerly § 20-7-473); *Tipton v. Tipton*, 351 S.C. 456, 458, 570 S.E.2d 195, 196 (Ct. App. 2002) (emphasis added).

[91] *See Badeaux v. Davis*, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999); *Austelle v. Austelle*, 294 S.C. 19, 21, 362 S.E.2d 181, 183 (1987) (stating that "[o]f course, it is axiomatic that subject matter jurisdiction cannot be waived.").

[92] *Peake v. Peake*, 284 S.C. 591, 327 S.E.2d 375 (Ct. App. 1985); *State v. Funderburke*, 259 S.C. 256, 191 S.E.2d 520 (1972).

court jurisdiction to equitably distribute marital property discussed above. The legal concept represented by this connection strongly suggests the Court would hold that an annulment order declaring a wife's first marriage void as bigamous would not relate back so as to validate her otherwise bigamous second marriage.

CONCLUSION

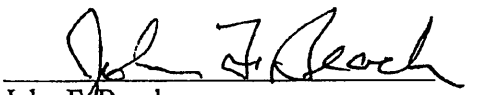
Petitioner cannot succeed on the merits of her claims because Petitioner cannot meet her burden of proving Petitioner and James Brown were lawfully married to each other at the time of Decedent's death and, accordingly, that Petitioner is Decedent's "surviving spouse."

The LSA is therefore entitled to an order finding: (1) when Petitioner participated in the December 14, 2001 marriage ceremony with Decedent, Petitioner was still lawfully married to Javed Ahmed; (2) it was legally impossible for Petitioner to marry Decedent in December 14, 2001 because of South Carolina's law against bigamous marriages; (3) Petitioner cannot use the Ahmed Annulment Order to retroactively validate her bigamous December 14, 2001 marriage to Decedent; (4) Petitioner was not lawfully married to Decedent when he died on December 25, 2006; and (5) Petitioner is not Decedent's surviving spouse.

Based on these findings, the Court should deny Petitioner's motion for partial summary judgment, grant the LSA's motion for summary judgment, and deny Petitioner's omitted spouse and elective share claims.

Respectfully submitted,

ADAMS AND REESE LLP



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October 31, 2014.

STATE OF SOUTH CAROLINA COUNTY OF AIKEN Tommie Rae Brown, Petitioner, v. David C. Sojourner, Jr., in his Capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown Thomas, Yamma Brown, Vanisha Brown, Larry Brown, Terry Brown and Daryl Brown Respondents. IN RE: The Estate of James Brown a/k/a James Joseph Brown	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT Case No. 2013-CP-02-2849-original (Omitted Spouse Claim) Case No. 2013-CP-02-2850- cert/copy (Elective Share Claim) **REPLY MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF RESPONDENT TERRY BROWN'S COUNTERARGUMENTS**

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I. INTRODUCTION AND STATEMENT OF FACTS

Truth is the foundation upon which the justice that is dispensed by the American legal system rests. Truth is like a deep seeded splinter, it always finds a way to the surface.

Ms. Hynie's entire argument in support of her Motion for Partial Summary Judgment may be summed up in one simple phrase which is "because I said so." Without supplying any proof other than her own statements based on clearly inadmissible hearsay, she proclaims that she should be Mr. Brown's wife because she told a South Carolina Court, in a matter that Mr. Brown was not a party, that Mr. Ahmed was married to other women because he told her it was so and now she is telling this Honorable Court it is so. [1] This is what Ms. Hynie presents to this Honorable Court as the complete foundation of her argument. No other evidence of Mr. Ahmed's alleged marriages have surfaced anywhere in Petitioner's hundreds of pages of briefing and affidavits.[2] Her only evidence is because she says so.

Tommie Rae Hynie ("Ms. Hynie") attempts to hide facts and truth under a shroud of irrelevant technical arguments in an attempt to confuse this Honorable Court. Such irrelevant

[1] Joint Stipulation of Facts, Exhibits 7 and 13.
[2] See. Petitioner's Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment and attached Exhibits and Reply Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment and attached Exhibits.

technical arguments are just a part of the smoke and mirrors and red herring arguments that Ms. Hynie attempts. When viewed in their simplest terms, this Honorable Court can reach but one conclusion on the evidence as applied to the law at hand. Ms. Hynie is a bigamist. She was never married to Mr. Brown. Further, she has, at a minimum, known this to be true since the conclusion of Mr. Brown's annulment action ("Brown-Hynie Annulment") by entering into a consent order ("Brown-Hynie Consent Order") wherein Ms. Hynie agreed she was not Mr. Brown's spouse.[3] This statement is nothing remarkable as Petitioner suggests in her response brief, but just an incontestable fact.[4]

It is an indisputable fact that Ms. Hynie married Javed Ahmed ("Mr. Ahmed") on February 17, 1997 ("Hynie-Ahmed Marriage").[5] Ms. Hynie conveniently asserts and testified under oath that Mr. Ahmed was married at the time she married him.[6] However, in the 17 years since her marriage to Mr. Ahmed, 13 years since her marriage to Mr. Brown, 11 years since filing her annulment action against Mr. Ahmed ("Hynie-Ahmed Annulment"), and 8 years since filing the matter sub judice, Ms. Hynie has never provided proof of Mr. Ahmed's prior marriage(s) to anyone, much less Mr. Brown or any court, including this Honorable Court. To the contrary, the only admissible evidence this Honorable Court has been provided, regarding whether Mr. Ahmed was in fact married when he married Ms. Hynie, is in the form of sworn statement by Mr. Ahmed that he was not married prior to marrying Ms. Hynie.[7]

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[3] Joint Stipulation of Facts, Exhibit 19.
[4] See. Petitioner's Reply Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment, Page 18.
[5] Joint Stipulation of Facts, Exhibit 1.
[6] Id. at Exhibit 13
[7] Respondents Memorandum of Law in Opposition to Petitioner's Motion for Partial Summary Judgment and in Support of Respondent Terry Brown's Counterarguments, Affidavit of Scott Keniley with attached Ahmed-Hynie Marriage License Application Exhibit.

Mr. Brown filed the Brown-Hynie Annulment on January 29, 2004 in Aiken County, South Carolina asserting Ms. Hynie's bigamy, merely 46 days after Ms. Hynie filed for annulment against Mr. Ahmed ("Hynie-Ahmed Annulment").[8] On May 4, 2004, 19 days after the Hynie-Ahmed Annulment concluded ("Hynie-Ahmed Order"), Mr. Brown amended the Brown-Hynie Annulment re-asserting Ms. Hynie's bigamy stating:

> At the time of the marriage ceremony on December 14, 2001 in Aiken County, South Carolina, Defendant was still legally married to Javed Ahmed and by way of such legal impediment was legally barred from entering into a marriage to Plaintiff . . .[9]

Even as late as July 6, 2004, Mr. Brown continued to take the position that Ms. Hynie was a bigamist in his Reply to Counterclaim responding to Ms. Hynie's counterclaim for divorce to the Brown-Hynie Annulment re-alleging and stating: "Defendant remained married to this man at the time she entered into the marriage to Plaintiff."[10]

Mr. Brown, throughout the Hynie-Ahmed Annulment and the Brown-Hynie Annulment, continued to support his position that Ms. Hynie was a bigamist. The Brown-Hynie Annulment was concluded by negotiated settlement and memorialized in the Brown-Hynie Consent Order.[11] In that negotiated settlement and Brown-Hynie Consent Order, Ms. Hynie agreed she was not Mr. Brown's spouse.[12] Specifically, the Brown-Hynie Consent Order provides: "Defendant agrees to and does hereby forever waive any claim of a common law marriage to the Plaintiff, both now and in the future."[13] The Brown-Hynie Consent Order was the last judicial declaration regarding the parties' status. [14] The Brown-Hynie Consent Order unequivocally reflects Mr.

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[8] Joint Stipulation of Facts, Exhibits 5 and 15.
[9] Id. at Exhibit 16.
[10] Id. at Exhibit 18.
[11] Id. at Exhibit 19.
[12] Id.
[13] Id. at paragraph 3 of Exhibit 19.
[14] Id. at Exhibit 19.

Brown's state of mind and that the parties reached a contractually valid meeting of the minds that Ms. Hynie was not married to Mr. Brown.[15] It appears the parties did not want a very public and ugly litigation over Ms. Hynie's bigamy as the Brown-Hynie Consent Order also provided for a the sealing of the Court's file.[16] If Ms. Hynie's argument were even remotely correct regarding that Orders of other Court's bind this Court as to its factual determination, then this Court would have no choice but to view the Brown-Hynie Consent Order as the final adjudication of the facts on this matter. It was the last Order entered of record, clearly reflects that the parties were never married, and actually involved both Mr. Brown and Ms. Hynie as the litigating parties.[17] Ms. Hynie's disingenuous argument asks this Court to declare that the one court order that rests upon facts in her favor trumps the more recent Order resting upon facts that prove she is a bigamist.

Ms. Hynie's smoke and mirrors tactic takes the position, to the contrary, that because some court ordered an annulment that magically her bigamist marriage and the negotiated Brown-Hynie Consent Order and settlement never occurred. A court pronouncement cannot change a fact or facts. The court can issue an annulment, but not change facts, especially a court that is not presented any facts or admissible evidence on which to base its decision. Interestingly, Ms. Hynie further asserts that even if she did lie to the Charleston County Family Court ("CCFC") in order to secure an annulment that it does not matter because it is not extrinsic fraud, but merely intrinsic fraud.[18]

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[15] Id.
[16] Id.
[17] Id.
[18] See. Petitioner's Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment, Page 10.

The only admissible facts this Honorable Court has before it are: 1) Ms. Hynie married Mr. Ahmed[19]; 2) After marrying Mr. Ahmed, and within five years, Ms. Hynie married Mr. Brown[20]; 3) Ms. Hynie's marriage to Mr. Ahmed had not terminated[21]; 4) Mr. Brown filed the Brown-Hynie Annulment[22]; and 5) Ms. Hynie agreed in the Brown-Hynie Consent Order which indicated she was not Mr. Brown's spouse[23].

This Honorable Court deserves facts so that it can opine on truth and thereby deliver justice. This Honorable Court has all the information it needs to not only dismiss Ms. Hynie's motion for summary judgment, but also to grant the Limited Special Administrator's ("LSA") motion for summary judgment. The following removes the smoke and mirrors and red herrings and identifies the relevant and material facts.

II. PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT MUST BE DENIED.

A. Scintilla of proof

Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Schmidt v. Courtney, 357 S.C. 310, 592 S.E. 2d 326 (Ct. App. 2003). "Summary judgment is appropriate when there is no remaining genuine issue of material fact such that the moving party must prevail as a matter of law." Rule 56(c), SCRCP, Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002). In determining whether any triable issues of fact exist, the evidence and all inferences which can be

[19] Joint Stipulation of Facts, Exhibit 1.
[20] Id. at Exhibit 4 and 7.
[21] Ms. Hynie attempts to confuse the Court in her response brief when she states that Respondents failed to prove that Mr. Ahmed was still alive or had not divorced Ms. Hynie. Respondents would suggest that the simple fact that Ms. Hynie filed an annulment action is enough to get over this hurdle such action would be unnecessary if Mr. Ahmed was deceased or they were divorced. Clearly, the filing of such action by Ms. Hynie is enough to prove that she was still married to Mr. Ahmed and that they were not divorced and he was not deceased.
[22] Joint Stipulation of Facts, Exhibit 15 and 16.
[23] Id. at Exhibit 19.

reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). "To withstand a motion for summary judgment 'in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

i. The Ahmed-Hynie marriage license is more than a scintilla of proof and admissible.

Petitioner once again tries to confuse this Honorable Court and obfuscate the real legal arguments in her Reply Memorandum when she states that the Ahmed-Hynie marriage license is inadmissible hearsay under Rule 803(8) of the South Carolina Rules of Evidence.[24] This Honorable Court need only be directed to South Carolina Rule of Evidence 803(9) which proves the fallacy of this argument:

> "Records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office pursuant to the requirements of law."

Section 1.03 of the Texas Family Code of 1995(which was the statue in effect at the time that Mr. Ahmed and Ms. Hynie were married) provided:

> § 1.03. Application Form
>
> (a) The county clerk shall furnish the application form as prescribed by the Bureau of Vital Statistics of the State Department of Health.
>
> (b) The application form shall contain:
>
> (1) a heading entitled "Application for Marriage License, County, Texas";
>
> (2) spaces for each applicant's full name (including the woman's maiden

[24] Petitioner's Reply Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment, Pages 53-54.

surname), address, social security number, if any, date of birth, and place of birth (including city, county, and state);

(3) a space for indicating the document tendered by each applicant as proof of identity and age;

(4) spaces for indicating whether each applicant has been divorced within the last 30 days;

(5) printed boxes for the applicant to check "true" or "false" in response to the following statement: "I am not presently married.";

(6) printed boxes for each applicant to check "true" or "false" in response to the following statement: "The other applicant is not related to me as:

(A) an ancestor or descendant, by blood or adoption;

(B) a brother or sister, of the whole or half blood or by adoption;

(C) a parent's brother or sister of the whole or half blood; or

(D) a son or daughter of a brother or sister of the whole or half blood or by adoption.";

(7) a printed oath reading: "I SOLEMNLY SWEAR (OR AFFIRM) THAT THE INFORMATION I HAVE GIVEN IN THIS APPLICATION IS CORRECT.";

(8) spaces immediately below the printed oath for the applicants' signatures;

(9) a certificate of the county clerk that the applicants made the oath and the date and place that it was made (or that the applicant did not appear personally but the prerequisites for the license have been fulfilled as prescribed by Section 1.05 of this code);

(10) spaces for indicating the date of the marriage and the county in which it is performed; and

(11) a space for the address to which the applicants desire the executed license to be mailed.

As specifically noted under Texas law, the marriage license application form under Texas law was reported to the Bureau of Vital Statistics of the State Department of Health. As such, the marriage license clearly falls within the hearsay exception under South Carolina Rules of

Evidence 803(9). Even more importantly, the Texas form required **BOTH** parties to swear under oath that "I am not presently married." To obtain a marriage license in Texas both parties swore before the County Clerk of Harris County, Texas that they were not married. This evidence is absolutely admissible and irrefutable. Finally, this piece of evidence by itself is enough to deny Petitioner's Motion for Partial Summary Judgment when taken in light most favorable to the Respondents as it is more than a scintilla of evidence. However, it goes one step further, it is the only admissible evidence that has been presented in this matter that Mr. Ahmed was not married at the time he married Ms. Hynie.[25]

ii. Respondents present numerous other items of evidence that provide more than a scintilla of evidence of bigamy and lack of marriage to Mr. Brown.

Respondents have presented the following additional evidence that proves that Ms. Hynie is a Bigamist and not married to Mr. Brown:

1. Ms. Hynie agreed in the Brown-Hynie Consent Order that she was not Mr. Brown's spouse;[26]
2. Ms. Hynie has never proposed that she and Mr. Ahmed divorced, but she instead filed for an annulment which very clearly denotes that the parties were still married;[27]
3. Ms. Hynie has not shown a death certificate of Mr. Ahmed, which would have made an annulment action moot;[28]
4. Ms. Hynie's marriage to Mr. Brown was less than 5 years after the marriage to Mr. Ahmed thereby demonstrating that Mr. Ahmed was not missing for more than 5 years;[29]
5. The fact under consideration as to whether Mr. Ahmed was married to three women in Pakistan has never been proven; and
6. The 17 years since her marriage to Mr. Ahmed, 13 years since her marriage to Mr. Brown, 11 years since filing her annulment action against Mr. Ahmed ("Hynie-

[25] See. Respondent's Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment and attached Exhibit.
[26] Joint Stipulation of Facts, Exhibit 19.
[27] Id. at Exhibit 5.
[28] Id. at Exhibits 5 through 12.
[29] Id.

> Ahmed Annulment"), and 8 years since filing the matter sub judice, Ms. Hynie has never provided proof of Mr. Ahmed's prior marriage(s), or death, to anyone, including this Honorable Court.[30]

Ms. Hynie, on the other hand, has provided no admissible evidence, much less a scintilla (e.g. an Ahmed prior marriage license or death certificate), that she was not married to Mr. Ahmed except self-serving inadmissible hearsay in a court where Mr. Ahmed was not present.[31] As previously noted in Respondent's brief, Ms. Hynie bears the burden of proving her alleged marriage to Mr. Brown.[32] The only evidence, in the broadest meaning of the legal term, she provides is her own hearsay laced testimony that proclaims that Mr. Ahmed told her that he had three wives in Pakistan and that the she and Mr. Ahmed did not consummate their marriage.[33]

iii. The Brown-Hynie Consent Order is sufficient evidence to support the LSA's Motion for Partial Summary Judgment and deny Ms. Hynie's Motion for Partial Summary Judgment.

In the Brown-Hynie Consent Order, Ms. Hynie clearly agrees that she will not seek to be Mr. Brown's common law spouse.[34] The only reason for inclusion of such language in the Order is because **BOTH** parties did not consider themselves married at that time. Mr. Brown's actions in his annulment action, which include amendments that denote that Ms. Hynie was previously married as well as continuing such action to a final Consent Order resolution, indicate the parties understood that they were not married.[35] Finally, the Brown-Hynie Consent Order was the most recent Order entered in any court that actually involved both Mr. Brown and Ms. Hynie where

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[30] Id. at Exhibits 1 through 19.
[31] Id. at Exhibit 13.
[32] See. Petitioner's Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment, Page 9.
[33] Joint Stipulation of Facts, Exhibit 13.
[34] Id. at Exhibit 19.
[35] Id. at Exhibits 15, 16 & 18.

the parties denote their understanding of their marital relationship, which was that they were not married.[36]

iv. This Honorable Court indicated on March 31, 2014 that should factual issues arise in the presentation of Petitioner's Motion for Partial Summary Judgment that such Motion would be denied.

As noted in the transcript[37] of the March 31, 2014 hearing:

Mr. Beach: Now, Judge, there are –that simple questions could be legal questions. On the other hand, if Mr. Rosen asserts that the - - if Mr. Rosen asserts that James Brown is estopped by that order, then Mr. Rosen is probably going to have to assert some facts to support that estoppel argument...

The Court: Well, if he does that – if he does that, then I think the summary judgment goes out the window.

Clearly several facts have been raised which would preclude summary judgment for Petitioner such as:

1) the supportive effects of Brown-Hynie Consent Order and annulment dismissal which clearly is challenged by Petitioner and used by Respondents in support of their briefs;[38]

2) the corroborating needs of the Hynie Diary[39] as it relates to the Brown-Hynie Consent Order as well as the statements against interest made in such document;

3) the communications between Ms. Hynie's attorney and Mr. Brown's attorney during the Brown Annulment action;

4) the estoppel arguments raised suggesting that because Mr. Brown financed the Hynie-Ahmed Annulment that Mr. Brown desired the annulment of the Ahmed-Hynie relationship

[36] Id. at Exhibit 19.
[37] See March 31, 2014 transcript of hearing Page 60, Line 19.
[38] See. Respondent's Memorandum of Law in Opposition to Petitioner's Motion for Partial Summary Judgment and in Support of Respondent Terry Brown's Counterarguments.
[39] It is Respondents understanding that the use of this piece of evidence is currently being held in abeyance. At a minimum, the parties should be allowed to have an in camera discussion with the Court over the parts of this diary that may be used as admissible evidence.

which calls into question the correspondence between Mr. Brown's attorney (Jim Huff) and Ms. Hynie's attorney(Robert Rosen);[40]

5) the alleged autobiography statements that Mr. Brown acknowledged Ms. Hynie as his wife without support as to when the manuscript was submitted or when the book was sent to print (possibly prior to information related to Ms. Hynie's bigamy);[41]

6) whether Mr. Brown benefitted from the annulment, as stated by Petitioner as part of their collateral estoppel argument and defacto party argument, but which is never supported by any factual evidence of benefit (this once again calls into question the correspondence that might exist in Mr. Jim Huff's and Robert Rosen's file between the parties during this 2004 time period); [42]

7) the Hynie-Ahmed Marriage license where Mr. Ahmed swore under oath he was not married that has not been refuted by any other evidence other than Ms. Hynie's inadmissible hearsay testimony; [43]

8) Ms. Hynie's knowledge of Mr. Ahmed's whereabouts as it pertains to service of process;

9) private investigator Pannell's full report and search efforts to locate Mr. Ahmed;

11) Mr. Ahmed's immigration status and related paperwork; and

12) evidence from Mr. Brown's attorney regarding the Brown-Hynie Consent Order and the understanding of the status of the parties relationship.

Interestingly enough, however, none of these items would preclude summary judgment being granted to Respondents. As has been noted, Petitioner has no admissible evidence that she and Mr. Ahmed did not enter into a legal marriage and that she is not a bigamist. As such, Respondents should be granted summary judgment.

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[40] See. Petitioner's Reply Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment, Pages 44-45.
[41] Id. at Page 2.
[42] Id. at Page 10.
[43] See. Respondent's Memorandum of Law in Opposition to Petitioner's Motion for Partial Summary Judgment and in Support of Respondent Terry Brown's Counterarguments and attached Exhibit.

v. Ms. Hynie has failed to present any admissible evidence that Mr. Ahmed was married prior to their marriage.

It should certainly be assumed that Ms. Hynie's qualified and capable legal team would have considered seeking, and certainly sought, Mr. Ahmed's marital records in Pakistan in order to prove their case and they obviously failed to locate and/or collect one shred of evidence linking Mr. Ahmed to any prior marriages. If they had such proof, they would have provided it to the Court, the press and whoever would listen so as to conclude this matter as quickly as possible.

Pakistan is a modern nuclear country with modern data collection capabilities. Ms. Hynie and her legal team easily could have acquired a marriage license, or otherwise known as a Nikah Nama, from the Pakistani National Data and Registration Authority (NADRA) and/or the Karachi Union Councils. A Nikah Nama (marriage contract) is a legal document certifying the solemnization of marriage between a husband and wife. Under the Muslim Family Law Ordinance of 1961, it is mandatory that the Nikah Nama is registered with the local Union Council, where an original copy of Nikah Nama is kept as public record and two other copies to be served to the bride and groom. The Nikah Nama, is registered with a Nikah Registrar, who is appointed by the municipality, Panchayat committee, cantonment board or union council. Ms. Hynie, and/or by and through her attorneys could have, and it is expected they did, seek such documents and failed. They could have done so by going directly to the source, i.e. (NADRA) and/or the Karachi Union Councils, hiring Pakistani attorneys to search and locate such documents or utilize services such as:

http://inp.org.pk/nikkah-nama-registration

http://birthcertificatespakistan.com/how-to-get-pakistani-marriage-registration-certificate/

http://mamooinpakistan.com/services/marriage-certificate/

https://www.facebook.com/jalwastyle/posts/3945661577099

http://birthcertificatekarachi.com/nadra-marriage-registration-certificate/

Based on the foregoing, only one conclusion can be reached. Ms. Hynie, and or her legal team, looked and found nothing. As such Ms. Hynie is unable to provide any actual admissible evidence to any court and most importantly, this Honorable Court of her self-serving claims that Mr. Ahmed was married at the time of her marriage to him. As such, she is a bigamist.

vi. Ms. Hynie has made admissions against her interest that must be considered as evidence and cause the denial of Petitioner's Motion for Partial Summary Judgment.

Ms. Hynie kept a handwritten diary ("Hynie Diary") that was presented to several attorneys involved in this matter and others. This Honorable Court has sealed the Hynie Diary and it remains that way temporarily as indicated by this Honorable Court allowing Ms. Hynie the opportunity to prove she is Mr. Brown's widow without the need for discovery.[44] The fact the Hynie Diary exists is no secret and Counsel does not violate this Honorable Court's gag order referencing the sealed Hynie Diary as the Diary itself is not a secret and the diary has been the subject of pleading, Appellate Briefs, FOIA Requests by third parties in other courts, Hynie public interviews and various media outlets. The contents of the Hynie Diary are sealed. However, in light of the Brown-Hynie Consent Order and likely communications that exist between Mr. Brown's and Ms. Hynie's attorney from 2004, Ms. Hynie's recorded present impressions and admissions against her interest are critically important evidence. Respondents believe that such evidence will lead to a party admission supporting the fact that she knew she was not Mr. Brown's spouse. That she agreed in the Brown-Hynie Consent Order that she was

[44] See. March 31, 2014 transcript of hearing Pages 61-62.

not Mr. Brown's spouse. Respondents also believe the Hynie Diary will show the parties intent was to clear up the legal issues surrounding the invalidity of the marriage and possibly attempt to reconcile and be married legally. Most importantly, it is believed that the document will prove that the parties did not marry after the Brown-Hynie Consent Order. Respondents have a right to pursue this evidence in discovery if the court is not inclined to grant Respondents' Motion for Partial Summary Judgment. The contents of the Hynie Diary very likely will corroborate the Brown-Hynie Consent Order and likely correspondence between attorneys for the parties. Finally, This Honorable Court addressed this issue:

> The Court: And depending on how I rule on that, if need be, we'll come back and revisit the production of the Tommie Rae Brown's diary. But my thoughts on that would probably be if there's factual issues involved, that it would be something that would be discoverable, it would be subject to a very strict protective order, and probably would want some type of in camera review so I will not have read all that stuff that may not be germane to this. That's sort of going through my mind.
>
> Mr. Beach: Well, that is sort of going through our mind too, Your Honor. So we're thinking along the same lines.
>
> Mr. Rosen: That sounds very reasonable, Judge.[45]

The Hynie Diary alone precludes summary judgment for Petitioner. However, as previously noted, Respondents deserve to have their Motion for Partial Summary Judgment granted as their is not one scintilla of evidence in support of Ms. Hynie's position relative to her being a bigamist.

B. THE BROWN-HYNIE CONSENT ORDER IS INCONTESTABLE.

Ms. Hynie in her reply brief responds to the Terry Brown's position that Mr. Brown and Ms. Hynie entered into a Consent Order ("Brown-Hynie Consent Order") wherein Ms. Hynie agreed

[45] Id., Line 20.

and stipulated that she was not Mr. Brown's spouse as: "a remarkable misrepresentation to a court which has been hearing this issue for over seven years and, at a minimum, illustrates the unreliability of the opposing parties' arguments."[46] It does not matter how long this matter has been litigated before someone points out the obvious. It is remarkable how Ms. Hynie can attempt to twist the language of the Brown-Hynie Consent Order to suggest it says anything otherwise. The Brown-Hynie Consent Order in essence outlined to the court the settlement of the Brown-Hynie Annulment. The Brown-Hynie Consent Order provides: "Defendant agrees to and does hereby forever waive any claim of a common law marriage to the Plaintiff, both now and in the future.[47] Why would an actual and legal current spouse agree to never make a claim for common law marriage? The only possible answer is that the parties were not married. This Honorable Court should consider, and it is important to note, that the Brown-Hynie Consent Order was negotiated and entered into as a result of, and to bring to a conclusion, Mr. Brown's complaint for annulment and Ms. Hynie's complaint for divorce. Both parties were seeking to conclude and finally define the relationship. Both parties had very ugly and embarrassing allegations against the other. It was in everyone's best interest that their actions were concluded as privately and expeditiously as possible. All available evidence indicates Mr. Brown wanted an annulment. Ms. Hynie, unimpressively and unconvincingly, argues that Mr. Brown, by financing the Hynie-Ahmed Annulment, really wanted her marriage to Mr. Ahmed to be void *ab initio* and benefitted by allowing them to continue as husband and wife. This position is a tenuous argument at best in the face of substantial evidence to the contrary.

[46] Petitioner's Reply Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment, Page 18.
[47] Brown-Hynie Consent Order, Paragraph 3.

Mr. Brown filed the Brown-Hynie Annulment on January 29, 2004 in Aiken County, South Carolina asserting Ms. Hynie's bigamy, merely 46 days after Ms. Hynie filed for annulment against Mr. Ahmed ("Hynie-Ahmed Annulment").[48] As stated in Mr. Brown's Complaint for Annulment: "Defendant was never legally divorced from her previous husband prior to entering into marital contract with the Plaintiff. As such, this marriage is void *ab initio*."[49] On May 4, 2004, 19 days after the Hynie-Ahmed Annulment concluded ("Hynie-Ahmed Order"), Mr. Brown amended the Brown-Hynie Annulment re-asserting Ms. Hynie's bigamy stating: "At the time of the marriage ceremony on December 14, 2001 in Aiken County, South Carolina, Defendant was still legally married to Javed Ahmed and by way of such legal impediment was legally barred from entering into a marriage to Plaintiff . . ." [50] On July 6, 2004, Mr. Brown's Reply to Counterclaim responding to Ms. Hynie's counterclaim for divorce ("Hynie Divorce Counterclaim") to the Brown-Hynie Annulment re-alleging and stating: "Defendant remained married to this man at the time she entered into the marriage to Plaintiff."[51]

Further, at the conclusion of the Hynie-Ahmed Annulment, there would be no need for Mr. Brown to actually continue his annulment action if he was in favor of being married (as Ms. Hynie's contention would be that the parties were in fact married) and he supported the Hynie-Ahmed action as alleged. Based on Ms. Hynie's flawed logic, Mr. Brown should have simply dismissed his annulment action with no stipulations or conditions, but that is not what happened.[52] Instead, the parties continued to litigate and negotiate a final resolution to the matter with the Brown-Hynie Consent Order.[53] When it comes to the validity of all the marriages in

[48] Joint Stipulation of Facts, Exhibit 15.
[49] Id., at Brown Complaint for Annulment Paragraph 3.
[50] Id. at Brown Amended Complaint, Paragraph 5.
[51] Joint Stipulation of Facts, Exhibit 18.
[52] Id. at Exhibit 19.
[53] Id.

question, i.e. Brown-Hynie, Hynie-Ahmed, Ahmed and three other wives, the one absolute and indisputable fact is that Mr. Brown and Ms. Hynie were not legally married at any time as a result of Ms. Hynie's bigamy.

C. **Should the Court determine, that the mountain of evidence and incontestable Brown-Hynie Consent Order are not enough, Respondents still have the right to make Ms. Hynie prove that she and Mr. Ahmed were not previously married thereby proving Ms. Hynie was not a bigamist.**

i. Res Judicata And Collateral Estoppel May not be invoked in this matter.

"The Supreme Court of the United States cautioned that [b]ecause res judicata may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry." Brown v. Felson, 442 U.S. 127, 132 99 S. Ct 2205 (1979). To establish res judicata, the defendant must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986); Rogers, 336 S.C. at 537, 520 S.E.2d at 817; Owenby v. Owens Corning Fiberglas, 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993). Even though Petitioner attempts to assert Mr. Brown was a de facto party to the initial action, South Carolina law does not create such a requirement. Mr. Brown actually had to be a party. Petitioner blatantly admits that he was not a party when she states, "Mr. Brown was obviously not a party to the annulment action." [54] As such, Petitioner fails the first prong of the test for res judicata in that Mr. Brown was not a party to the original action. Additionally, the other two prongs of the test are not meet either. The same subject matter was

[54] Petitioner's Reply Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment, Page 44.

not litigated (i.e. whether the Brown-Hynie marriage was legal) and the issue has not been adjudicated. Res judicata cannot apply.

The court must determine whether the issue was actually litigated "with particular care." Combs v. Richardson 838 F.2d 112, 113 (1988). As articulately stated in People v. Plevy, 52 N.Y.2d 58, 64, 436 N.Y.S.2d 224, 417 N.E.2d 518, 521 (1980) (citation omitted), "[P]reclusive doctrines are 'not to be rigidly or mechanically applied and must on occasion, yield to more fundamental concerns.' More precisely, the application of res judicata and collateral estoppel 'may be precluded where unfairness or injustice results, or public policy requires it." Nelson v. QHG, 354 S.C. 290, 315, 580 S.E.2d 171, 184 (Ct. App. 2003) *rev'd in part,* 362 S.C. 421, 608 S.E.2d 855 (2005) citing State v. Bacote, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998); Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001).

The factors to consider in determining whether the defense of collateral estoppel exists and whether the issues were actually litigated in the first suit include: whether privity exists, whether the doctrine is used offensively or defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). The South Carolina Courts, in Pye v. Aycock, 325 S.C. 426, 437-38, 480 S.E.2d 455, 460-61 (Ct. App. 1997), adopted the Restatement (Second) of Judgments § 28 (1982), which states in pertinent part:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, re-litigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because

> it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.
>
> The mere presence of the various exceptions, many of which are founded in equity principles, warrants affording the parties the opportunity to develop the record. As noted in the Restatement provision adopted in Pye, the adverse impact upon the interests of persons not parties to the original litigation may also be considered.

Obviously, substantial portions of Pye apply to the case sub judice. First, Mr. Brown was neither a party nor had an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. It was neither his annulment action nor was Mr. Rosen his attorney or working at his direction. The result certainly was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, i.e. his own estate litigation. Most importantly, the order of the CCFC, if it was intended as Ms. Hynie currently uses as a weapon, would create absolute chaos and vividly provide the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action. Public policy considerations must be addressed and considered by this Court.

"Even when the elements of res judicata and collateral estoppel have been met, they will not be rigidly or mechanically applied, and the application of the doctrines may be precluded where unfairness or injustice results, or public policy requires it." Id.; Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001). "Thus application of res judicata will not be applied where it will contravene other important public policies; the courts must weigh the competing public policies." Johns v. Johns, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992). The following illustrates some of but a few of the scenarios of complete chaos and opportunities for the wicked that the Petitioner's application of the doctrines would allow:

1. Could Mr. Ahmed be charged and convicted of bigamy under the criminal statues regardless of the actual facts proving he was not married just because the CCFC in its order proclaimed he was a bigamist and thereby deny his constitutional right to defend? No!

2. In the James Brown action for annulment, could Ms. Hynie have defended by stating she didn't have to prove she was not a bigamist merely by pointing to the family court order? No. Under direct and cross examination, she would have to present admissible evidence such as a valid marriage certificate demonstrating Mr. Ahmed was in fact married when he married Ms. Hynie. Or better yet, if Ms. Hynie failed to respond or appear for trial in the Brown Annulment Action, could we have competing annulments, one saying Mr. Ahmed is a bigamist and the other saying Ms. Hynie is a bigamist? Complete chaos.

3. Consider a situation where a person is accused by a spouse of bigamy, has verifiable proof of bigamy and threatens to go to the police. Could that spouse avoid criminal charges by finding some court in South Carolina to hold an annulment hearing without the first spouse present, receive an annulment void ab initio and use the order as an absolute defense for the crime of bigamy?

4. Consider wife with daughter marries husband, husband engages in incestuous sexual relations with the step daughter who is barely of age of consent, thereafter husband receives an annulment void ab initio for wife's factual bigamy. Does the annulment void ab initio for bigamy provide an absolute defense against the incest with the step daughter?

5. Could a Personal Representatives obtain an annulment, as Petitioner would argue can happen because the order would allow the annulment to be void ab initio, which would allow an Estate to claim someone was not even a spouse at the time of death because the annulment made the marriage void ab initio? If Petitioner's argument as to an action being void ab initio is to be believed, this creates instant disinheritance and no standing to pursue a will challenge or claim on the estate because one was not a spouse. Further, the witness was unavailable to testify so the only testimony the Court could receive would be that of the survivor. The fact that the "spouse" was deceased does not make the action moot because it is "ab initio" as the Petitioner argues.

6. Do the state and federal government have the right to reclaim taxes for improperly filing married filing jointly? The ruling would be "void ab initio" and as Petitioner argues binding on third parties.

7. Insurance companies can seek additional premiums for payments that were made on policies because the rates were lower for a married family unit because the ruling is "void ab intitio."

8. Insurance policies could cancel all life insurance policies that spouses took out because an insurable interest did not exist.

9. Any benefit or advantage that is received relative to a marriage would have to be refunded or have a right to be reclaimed if Petitioner's argument were correct.

The relation back in time effect Ms. Hynie claims is the exact chaos Lukich describes if everything after the bigamist marriage is washed away as if it never occurred. Ms. Hynie's position will open flood gates and create chaos for all bigamist to avoid prosecution or gain economic advantages by running to some obscure court in South Carolina, claim residency, conveniently fail to serve the first spouse, provide self-serving damming hearsay testimony, receive an annulment *ab initio* and claim they are immune from prosecution and entitled to certain economic benefits and advantages because the marriage never occurred. Further, the chaos that ensues on benefits related to government, retirement, health and insurance would be utter chaos if Petitioner's view of the doctrines where correct. Fortunately, Lukich is not read this way.

D. Even if Petitioner is correct and Respondents are barred by res judicata and collateral estoppel, Respondent's Motion for Summary Judgment must be granted as a result of Lukich because no other facts are necessary to prove Ms. Hynie is a bigamist.

Petitioner's analysis of Lukich is simply wrong. In her opening brief, she argues that Lukich applies to the matter at hand and that it supports Ms. Hynie's claim that she is Mr. Brown's spouse.[55] After reading the responses from Respondents, which all strongly cited Lukich in support of Respondents position, Petitioner did an about face. In her reply brief Petitioner attempts to distinguish Lukich and argues that it does not apply trying to obfuscate the actual legal holdings of Lukich. Further, Petitioner focuses most of her time and quotes from the South Carolina Court of Appeals decision in Lukich. The Supreme Court of South Carolina affirmed the Court of Appeals ruling in Lukich , but wrote its own opinion to clarify the analysis

[55] Memorandum in Support of Tommie Rae Brown's Motion for Partial Summary Judgment, Pages 35-40.

used in its decision. The analysis supports granting Respondents' Motion for Partial Summary Judgment, not Petitioner's.

Lukich makes it clear that Petitioner's alleged marriage to Mr. Brown was bigamy *ab initio*. Any other facts that are discovered in this matter will not change this result. The South Carolina Supreme Court makes analysis for bigamous relationships clear when it states:

> "Under the statute's terms, Wife's 'marriage' to Husband #2 was 'void' from the inception since at the time of that marriage she had a living spouse and that marriage had not been 'declared void.'...The statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective. Any other construction of §20-1-80 would lead to uncertainty and chaos. ... It would be inconsistent at best to hold that a marriage declared void *ab initio* never existed for bigamy purposes, yet can serve as the foundation for a family court's division of property, alimony, and/or child support."

The South Carolina Supreme Court in its Lukich opinion, by making such unambiguous statements clearly supports the South Carolina Court of Appeals. The South Carolina Court of Appeals emphasized such Court's position in its opinion in Lukich when it specifically referenced the general rule applicable in 52 Am.Jur. 2d Marriage §57:

> [A]part from statute, bigamous marriage does not acquire validity when the prior subsisting marriage is legally terminated by divorce or by the death of the first spouse. The same rule is generally followed where the prior subsisting marriage is annulled after the second marriage is contracted, even though the purpose of an annulment proceeding is to declare that no valid marriage ever took place between the parties or that no valid marriage relation ever existed between the parties. Even where the annulment decree expressly declares the first marriage null and void ab initio, it does not relate back so as to validate the second marriage. In order for the subsequent marriage to be valid, it has been held that there must be a new ceremony following the termination of the earlier marriage. (Emphasis added). Lukich v. Lukich, 368 S.C. 47, 55, 627 S.E.2d 754, 758 (Ct. App. 2006).

The South Carolina Supreme Court has determined that the public policy of attempting to prevent bigamy has overridden all other considerations. The South Carolina Supreme Court's

language when broken down into an analytical framework works for every situation on the continuum of multiple marriages if analyzed from each individual's perspective in the relationship. The South Carolina Supreme Court has determined that a person's capacity to marry a subsequent spouse will be determined by that individual's capacity and status at that time. In other words, the power to free one's own capacity to marry another individual rests solely in the hands of the person seeking to marry another individual. It is the recognition of autonomous power of an individual seeking a marriage.

If a person is married and wants to have the ability to marry someone else, they must have one of three things occur: 1) the first marriage annulled; 2) the first spouse divorced; or 3) the first spouse dies. The power lies in the spouse seeking to be married again.[56] The only person that can truly know if they are married is the person who is seeking to be married a second time. That is why this individual seeking the subsequent marriage faces the harshest penalty (i.e. being declared a bigamist) under the South Carolina Supreme Court analysis. The unwitting subsequent spouse who is unaware of a possible bigamous relationship must be protected by the law. This analysis works in both relationships (i.e the Ahmed-Hynie and Hynie-Brown) with a consistent application of protection to the unwitting subsequent spouse. As such, the analysis and results must be correct because the equitable result is the same for both Ms. Hynie in her relationship with Mr. Ahmed and Mr. Brown in his relationship with Ms. Hynie.

It is irrelevant, for purposes of this case, whether Mr. Ahmed was married at the time he married Ms. Hynie. If Mr. Ahmed was married prior to his marriage to Ms. Hynie, the analysis grants Ms. Hynie the right to annul her marriage and remove her incapacity to marry a subsequent individual as soon as the annulment is granted. Further, her marriage to Mr. Ahmed

[56] Obviously, death is somewhat out of the control of an individual. Albeit pre-mediated causes are an option.

would be void as to any rights or obligations that Mr. Ahmed could attempt to enforce upon her *ab initio* as it was his actions that created the problem (i.e. the previous marriage of which he had knowledge). Ms. Hynie would have the right to marry another individual once a court declared the marriage void. This is the only way the analysis can work as it fully protects the spouse upon whom bigamy is perpetrated. The bigamist is unable to enforce any rights upon the unwitting spouse *ab initio* and the unwitting spouse has the sole right to clear the incapacity.

As a result, it matters not whether Mr. Ahmed was married under the South Carolina Supreme Court analysis. What matters is whether Ms. Hynie has rectified the restrictions on her capacity to marry when she attempts to marry a subsequent individual. Ms. Hynie was not a bigamist at the time she married Mr. Ahmed because she was allegedly unaware of his alleged prior marriages. As such, she is protected and would have the right to seek an annulment to restore her capacity to marry. Under this analysis, Mr. Ahmed would be a bigamist and she would have her right and capacity to marry restored upon the grant of her annulment. Mr. Ahmed could not enforce the marriage or any rights or obligations *ab initio* as he was allegedly a bigamist. Ms. Hynie could annul the marriage because of the bigamy to regain her capacity to marry, which she did in 2004.[57]

Ms. Hynie's role reversed under the South Carolina Supreme Court analysis, however, when she attempted to marry Mr. Brown. At the time of her attempted marriage to Mr. Brown in 2001,[58] she was married to Mr. Ahmed and was the only one who could remove her incapacity in order to marry Mr. Brown. Mr. Brown was unaware of the incapacity at the time of marriage.[59]

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[57] Joint Stipulation of Facts, Exhibits 5 through 12.
[58] Joint Stipulation of Facts, Exhibit 4.
[59] It would not matter if Mr. Brown was aware of the prior marriages under this analysis because the spouse who entered into the prior relationships is the one upon whom the burden is placed not to enter into a bigamous relationship.

As such, Mr. Brown receives the protection as the unwitting subsequent spouse in the analysis. Ms. Hynie becomes a bigamist when she marries Mr. Brown and the purported marriage was a nullity *ab initio* as to Ms. Hynie's right to enforce the marriage. Mr. Brown could regain his capacity to marry another party by seeking an annulment (which he did).[60] Even if Ms. Hynie were to argue that the Brown-Hynie Consent Order was not an annulment, it would not matter. Ms. Hynie could not enforce any rights of the marriage *ab initio* due to her incapacity to marry at the time of the ceremony with Mr. Brown. The only person who would have an issue with the fact that an annulment may or may not have occurred would be a subsequent spouse that Mr. Brown attempted to marry, which he did not do. As can be seen from this analysis, the continuum is intact and the analysis produces the same result in every situation, which is to protect the unwitting subsequent spouse upon whom bigamy is perpetrated.

Since according to the Supreme Court of South Carolina, the statute does not contemplate a retroactive or prospective analysis, the determination of bigamy can only be analyzed on an individual basis from a particular point in time. As a result, the South Carolina Supreme Court grants the spouse with the knowledge of his or her own marital status the sole and autonomous right to avoid bigamy. This can be the only way the analysis works. The relationship as to the spouse who is aware of the impediment to marry has the marriage voided *ab initio*. The spouse who unwittingly enters into the relationship has the sole power to correct the incapacity by seeking an annulment. The equity that is provided to all parties, including third parties to the relationship, involved with the application of this analysis is sublime.

In the instant matter, Ms. Hynie's capacity to marry on December 14, 2001 was entirely in her control. Ms. Hynie knew or should have known that she was still married. The only way

[60] Joint Stipulation of Facts, Exhibits 15, 16 & 18.

she could restore her capacity to marry was the death of Mr. Ahmed, to divorce Mr. Ahmed, or annul her marriage to Mr. Ahmed. She chose to annul the marriage.[61] Interestingly enough, the analysis also makes the reason for annulment irrelevant. Additionally, whether Mr. Ahmed committed bigamy on Ms. Hynie under the analysis becomes irrelevant as well. Mr. Ahmed could not enforce any rights or obligations on Ms. Hynie if he was found to be a bigamist. Further, Ms. Hynie had complete knowledge that she married Mr. Ahmed which created a capacity issue relevant to her marriage to Mr. Brown. Ms. Hynie, under Lukich, had the full power in her control to assure that she did not enter into a bigamous relationship by ensuring that her prior relationship with Mr. Ahmed was terminated in an appropriate manner prior to her marriage to Mr. Brown. This obviously did not occur.[62] Under the Lukich analysis, she failed to exercise the sole autonomous power granted to her thereby insuring her capacity to marry Mr. Brown. As in an equity case, the person with unclean hands may not now seek to have equity performed.

The brilliance of the South Carolina Supreme Court decision is the simplicity in its application. It works in every situation involving a possible bigamous relationship when applied in this manner. A third party action will never change the outcome that any party is entitled to under Lukich. It creates a certainty in the simplicity of it application.

In other words, it does not matter whether Mr. Ahmed was married prior to his marriage to Ms. Hynie as it relates to Mr. Brown. The Lukich decision only allows for the determination of Mr. Hynie's marital status as of December 14, 2001. The facts that unequivocally existed and are stipulated to by all parties as of that moment in time were that Ms. Hynie was still married to

[61] Joint Stipulation of Facts, Exhibit 5.
[62] Joint Stipulation of Facts, Exhibits 1 through 19.

Mr. Ahmed and that relationship had not been declared void by Ms. Hynie's exercise of her power to void the marriage.[63] At the time of her purported marriage to Mr. Brown, Ms. Hynie was married to another man, and Mr. Brown was not. It would be inconsistent to declare Ms. Hynie's marriage void *ab initio* for bigamy purposes.

Based on the foregoing, Ms. Hynie did not have the capacity to marry Mr. Brown. Ms. Hynie's capacity to marry was restored on April 15, 2004.[64] At that time, she was free to marry anyone she chose. Ms. Hynie attempted to marry Mr. Brown on December 14, 2001 with full knowledge that she had another relationship that tainted her capacity to marry Mr. Brown. As such, Ms. Hynie became a bigamist on December 14, 2001 by her own control and election. No additional facts need be discovered in this case to make this determination as a matter of law. Further, based on this analysis, Ms. Hynie's annulment action in 2004 and any facts contained in its ruling is also irrelevant and has no bearing on the analysis in this matter. As such, Mr. Brown is unequivocally entitled to be granted summary judgment determining that he was never legally married to Ms. Hynie based upon Lukich. Ms. Hynie is a bigamist.

E. CONCLUSION

Respondents have provided more than a scintilla of evidence with regard to the facts and law in this matter which allows this Honorable Court to deny Petitioner's Motion for Summary Judgment. Specifically to name a few, Respondents provide the Ahmed-Hynie marriage license, the marriage license application, the existence of a marriage to Mr. Ahmed at the time of Ms. Hynie's marriage to Mr. Brown, the Brown-Hynie Consent Order, and the Hynie Diary which all prove that Ms. Hynie is a bigamist. Further, even if the Honorable Court disagrees that enough

[63] Joint Stipulation of Facts, Exhibit 5.
[64] Id. at Exhibit 12.

evidence has not been provided, discovery should still be available to provide further evidence for Respondents, especially since the Petitioner provided facts in support of her arguments. This Honorable Court stated:

> Mr. Beach: Now, Judge, there are –that simple questions could be legal questions. On the other hand, if Mr. Rosen asserts that the - - if Mr. Rosen asserts that James Brown is estopped by that order, then Mr. Rosen is probably going to have to assert some facts to support that estoppel argument...
>
> The Court: Well, if he does that – if he does that, then I think the summary judgment goes out the window.

Respondents have a right to challenge the facts as presented in the Hynie Annulment action as they related to Mr. Brown's own marital status as res judicata and collateral estoppel do not apply.

The Brown-Hynie Consent Order alone provides the foundation that Mr. Brown and Ms. Hynie were not married. Ms. Hynie agreed in the Brown-Hynie Consent Order that she is not Mr. Brown's spouse. The Brown-Hynie Consent Order stated: "Defendant agrees to and does hereby forever waive any claim of a common law marriage to the Plaintiff, both now and in the future." No actual or presumed legal spouse would need to negotiate and agree to such a statement. Making such a statement, when combined with the fact that the Brown-Hynie Consent Order was a settlement of a very ugly annulment accusation by Mr. Brown and equally ugly divorce accusation by Ms. Hynie indicates that both parties were seeking to conclude the marriage. Additionally, it should be noted that Mr. Brown always maintained his bigamy assertions. He claimed bigamy in the Brown-Hynie Annulment action merely 46 days after Ms. Hynie filed the Hynie-Ahmed Annulment, claimed bigamy in his Amended Complaint for Annulment 19 days after Ms. Hynie received her annulment, and as late as July 6, 2004 in Mr. Brown's Reply to Counterclaim for divorce (62 days after the Hynie Annulment Order), Mr.

Brown continues his accusations of bigamy stating: "Defendant remained married to this man at the time she entered into the marriage to Plaintiff." If Mr. Brown desired the Hynie-Ahmed Annulment so that he would be benefit by a free, clear and legal marriage to Ms. Hynie after the Hynie Annulment ordering the Hynie-Ahmed Marriage void *ab initio* (April 15, 2004), then why did Mr. Brown continue filing pleadings in May of 2004 and July of 2004 asserting bigamy and seeking his own annulment?

Equally as important to note for summary judgment as the Brown-Hynie Consent Order, and, most importantly for the purpose of supporting an immediate order granting immediate summary judgment for the Respondents, is the analysis made with regard to Lukich. This Honorable Court has at its disposal the ability to dispose of this entire action in one swift stroke. All of the arguments made by the parties regarding evidence, annulment, service, extrinsic and intrinsic evidence, collateral estoppel, res judicata and every other argument made by any party in this matter need not be addressed because the entire matter may be disposed of as a matter of law. The South Carolina Supreme Court in Lukich provides that vessel clearly and convincingly when it states:

> Under the statute's terms, Wife's 'marriage' to Husband #2 was 'void' from the inception since at the time of that marriage she had a living spouse and that marriage had not been 'declared void.'...The statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective. Any other construction of §20-1-80 would lead to uncertainty and chaos. ... It would be inconsistent at best to hold that a marriage declared void ab initio never existed for bigamy purposes, yet can serve as the foundation for a family court's division of property, alimony, and/or child support.

The parties jointly stipulated to the facts that Ms. Hynie was married to Mr. Ahmed at the time she allegedly married Mr. Brown on December 14, 2001. She did not annul her relationship with Mr. Ahmed until April 15, 2004. Ms. Hynie never had another marriage ceremony of any

type with Mr. Brown after the first one of December 14, 2001. There can be no other facts that can be obtained through discovery that will change or alter these facts. The parties have stipulated to them. As noted in the above analysis of Lukich and its application to these facts, this Honorable Court can reach but one conclusion, Ms. Hynie is a bigamist. Therefore, based on such result, Respondents' Motion for Partial Summary Judgment must be granted as matter of law.

This 31st day of October, 2014.

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STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Tommie Rae Brown,

Petitioner,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown and Daryl Brown,

Respondents.

IN RE:
THE ESTATE OF JAMES BROWN A/K/A JAMES JOSEPH BROWN

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

C/A No. 2013-CP-02-02849
C/A No. 2013-CP-02-02850

LIMITED SPECIAL ADMINISTRATOR'S MOTION TO ALTER, AMEND AND RECONSIDER

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this 16 day of Dec 2015

C.C.C.P. & G. S., Aiken County, S.C.

Deputy Clerk

TO: ROBERT N. ROSEN, ESQ., AND S. ALAN MEDLIN, ESQ., ATTORNEYS FOR PETITIONER TOMMIE RAE BROWN; LOUIS LEVENSON, ESQ., ATTORNEY FOR DEANNA BROWN THOMAS, YAMMA BROWN, VENISHA BROWN AND LARRY BROWN; DAVID B. BELL, ESQ., AND MATTHEW D. BODMAN, ESQ., ATTORNEYS FOR TERRY BROWN, AND DARYL BROWN; JOHN A. DONSBACH, ATTORNEY FOR TERRY BROWN; AND WILLIAM J. BARR AND VERA E. GILFORD, ATTORNEYS FOR JEANETTE MITCHELL:

YOU WILL PLEASE TAKE NOTICE that ten days after service hereof, or as soon thereafter as he may be heard, David C. Sojourner, Jr., (the "LSA"), as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown (the "Estate") and as Limited Special Trustee of the James Brown August 1, 2000 Irrevocable Trust Agreement (the "Trust"), will move before the Court, pursuant to Rule 59(a)(b) and (e) and 60(a)(b) of the *South Carolina Rules of Civil Procedure*, for an order altering, amending, and/or reconsidering the Order Re Petitioner Tommie Rae Brown's Motion for Summary Judgment and the Limited Special Administrator's Motion for Summary Judgment, dated January 13, 2015 (the "Summary Judgment Order").

The LSA received notice of entry of the Summary Judgment Order from the Aiken County Clerk of Court via electronic mail on January 23, 2015 and has not yet received written notice of entry of the Summary Judgment Order. The Summary Judgment Order is attached hereto as **Exhibit A**.

This Motion is based upon any memoranda of law, stipulated facts, and/or affidavits that may be submitted in support of this motion, along with all applicable common and statutory law, and such other evidence and authority as this Court may consider[1].

ARGUMENT

The Court should reconsider, alter, and/or amend its ruling for the following reasons:

1. The Summary Judgment Order is based upon "facts" that have not been stipulated by the parties or otherwise established, including but not limited to the following:

a. That Ahmed was given proper notice of the Charleston County Family Court rescheduled hearing in the Ahmed Annulment Action[2]. *See* Summary Judgment Order at pp. 7-8.

b. That Decedent requested the Aiken County Family Court be bound by the Findings of Fact in the Charleston County Family Court Order. *See id.* at p. 8.

c. That Decedent and Petitioner "reconciled" after Decedent filed an annulment action in Aiken County. *See id.*

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[1] The LSA hereby incorporates Memorandum of Law Supporting LSA's Motion for Summary Judgment and Opposing Tommie Rae Brown's Motion for Partial Summary Judgment on the Issue of Surviving Spouse, filed October 6, 2014 ("LSA's Initial Memorandum"), the Reply Memorandum Supporting LSA's Motion for Summary Judgment and Opposing Tommie Rae Brown's Motion for Partial Summary Judgment on the Issue of Surviving Spouse, dated October 31, 2014 ("LSA's Reply Memorandum"), and all arguments made before the Court on November 24, 2014.

[2] On December 14, 2003, Petitioner filed a family court action in Charleston County South Carolina seeking an annulment of her marriage to Javed Ahmed (*Tommy Rae Hynie, a/k/a Tommie Rae Brown v. Javed Ahmed*, 2003-DR-10-4609.) (hereinafter, the "Ahmed Annulment Action.")

d. That Decedent "supported the annulment litigation" by paying Petitioner's legal fees. *See id.* at pp. 33-34.

It was error for such facts to form the basis of the Summary Judgment Order as neither the LSA nor any other party had the opportunity to refute or challenge such facts through discovery, including without limitation, deposing parties and other witnesses, reviewing the Hynie Diaries, and conducing written discovery. *See* LSA's Initial Memorandum at p. 11-16; *see also* LSA's Reply Memorandum at pp. 3-5.

The LSA and all parties were prohibited from conducting such review and discovery by the Court's March 31, 2014 order staying discovery and holding in abeyance the LSA's motion to amend the protective orders prohibiting the Parties from possessing or using the Hynie Diaries. *See* LSA's Initial Memorandum at p. 15; *See also* LSA's Reply Memorandum at p. 3.

2. The Court failed to consider that the Petitioner has the burden of proving she is Decedent's surviving spouse. *See* LSA's Initial Memorandum at pp. 16-17, 20.

3. The Court failed to consider that the facts establish a presumption Petitioner's purported marriage to James Brown ("Decedent") was bigamous and Petitioner can only overcome that presumption by proving, through the presentation of admissible evidence in this proceeding, that Petitioner's marriage to Javed Ahmed was bigamous. *See* LSA's Initial Memorandum at pp. 16, 20 (*citing Hallums v. Hallums*, 74 S.C. 407, 54 S.E. 613 (1906)).

4. The Court failed to consider that, in accordance with extant case law[3], Petitioner is required to present admissible evidence in this proceeding proving Javed Ahmed ("Ahmed") was already married when he and Petitioner married in Texas on February 17, 1997 in order to

[3] *Yarbrough v. Yarbrough*, 280 S.C. 546, 314 S.E.2d 16 (Ct. App. 1984); *Hallums*, 74 S.C. 407, 54 S.E. 613.

overcome the presumption in favor of the validity of Petitioner's marriage to Ahmed. *See* LSA's Initial Memorandum at pp. 16-20, 30.

5. The Court failed to consider that the Petitioner cannot, through the April 15, 2004 Final Order issued in the Ahmed Annulment Action (the "Ahmed Annulment Order"), lawfully establish in this proceeding that her marriage to Ahmed was bigamous. *See* LSA's Initial Memorandum at pp. 21-30; LSA's Reply Memorandum at p. 8-17.

6. The Court failed to consider that, because the Ahmed Annulment Order is a judgment *in rem*, it is only binding on non-parties to that action as to the marital status of Petitioner and Ahmed from the date of the Ahmed Annulment Order; i.e., only establishes the annulment of Petitioner's marriage to Ahmed from the date of the Ahmed Annulment Order forward. The Court failed to consider that the findings of fact and conclusions of law upon which the judgment annulling Petitioner's marriage to Ahmed was based are not binding on non-parties to that action. *See* LSA's Initial Memorandum at pp. 21-24, 40; *see also* LSA's Reply Memorandum at pp. 8-13.

The Court failed to distinguish cases cited by the LSA holding that judgments in rem are not binding against third parties beyond the status adjudicated therein. *See* LSA's Reply Memorandum at p. 13.

7. The Court failed to consider that the LSA is not collaterally estopped by the Ahmed Annulment Order's findings of fact or conclusions of law because the Decedent was not a party to the Ahmed Annulment Action and not in privity with any party to the Ahmed Annulment Action. *See* LSA's Initial Memorandum at p. 24-29; LSA's Reply Memorandum at pp. 18-23.

13. The Court failed to consider that collateral and equitable estoppel are equitable doctrines and even where all of the elements are met, these doctrines should be used "sparingly" and only in cases where it would be equitable. See LSA's Reply Memorandum at pp. 23-24 (*citing Cothran v. Brown*, 357 S.C. 210, 216, 592 S.E.2d 629, 632 (2004)). The Court failed to consider that it would be inequitable to apply the underlying facts and conclusions of the Ahmed Annulment Order through doctrines of collateral or equitable estoppel to the present proceeding. LSA's Reply Memorandum at pp. 2, 23-24.

14. The Court failed to consider evidence submitted in opposition to Petitioner's Motion for Summary Judgment establishing that Ahmed was not married to another person when he married Petitioner. *See* LSA's Initial Memorandum at pp. 30-31. Such evidence creates a genuine issue of material fact that defeats Petitioner's Motion for Partial Summary Judgment. In granting Petitioner's motion, the Court erred in not accepting such evidence but, instead, accepting Petitioner's self-serving hearsay testimony, or inferences to be drawn therefrom, as referenced in the Ahmed Annulment Order and Petitioner's affidavits.

15. The Court erred in holding that the Compromise Agreement establishes Petitioner is Decedent's surviving spouse as a matter of law and is binding on the LSA. The Court failed to consider that neither the Estate nor the Trust were parties to the Compromise Agreement, the personal representatives of the Estate and trustees of the Trust actively opposed and contested the Compromise Agreement, and the South Carolina Supreme Court effectively held the settlement was not binding by "invalidating" it on appeal. *See* LSA's Initial Memorandum at pp. 31-32 (*citing Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013)).

16. The Court failed to consider that judicial estoppel is inapplicable in this case because not all of the requisite elements have been proven and it would be inequitable to apply judicial

estoppel in this action. *See* LSA's Initial Memorandum at pp. 33-35; LSA's Reply Memorandum at pp. 24-25.

17. The Court erred in finding that Petitioner establishes through the briefs and oral arguments presented in the *Wilson v. Dallas*, *supra*, appeal that Petitioner is Decedent's surviving spouse. The Court also erred in holding judicial estoppel binds the Estate or Court to the Settling Parties' alleged application of *Lukich* in the *Wilson v. Dallas* appeal. *See* LSA's Initial Memorandum at pp. 33-35; LSA's Reply Memorandum at pp. 24-25.

18. The Court erred in finding that Petitioner establishes through the lower court's Order Approving Settlement Agreement that Petitioner is Decedent's surviving spouse. The Court also erred in holding the Court and the Estate are bound to the Settling Parties' alleged interpretation of *Lukich* relating to that Order.[5] *See* LSA's Initial Memorandum at pp. 35-37. Such holding is in error where the South Carolina Supreme Court held on appeal that the settlement was "invalidated," remanding the case for further discovery on Petitioner's "surviving spouse" status. *See* LSA's Initial Memorandum at pp. 31 (*citing Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013)).

19. The Court erred in allowing Petitioner to use the Ahmed Annulment Order issued by the Charleston County Family Court in 2004 to retroactively validate Petitioner's and Decedent's bigamous marriage in 2001. *See* LSA's Initial Memorandum at pp. 39-40.

20. The Court failed to consider that the clear and unambiguous holding in *Lukich*, supra, based on S.C. Code Ann. § 20-1-80, bars Petitioner and the Court from retroactively applying the Ahmed Annulment Order to validate Petitioner's bigamous marriage to Decedent. *See* LSA's Initial Memorandum at pp. 39-40; LSA's Reply Memorandum at pp. 25-33.

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[5] *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006), aff'd 379 S.C. 589, 666 S.E.2d 906 (2008).

21. The Court failed to consider the final paragraph in *Lukich*, as well as the holdings in *Rodman v. Rodman*[6], *White v. White*[7], and *Splawn v. Splawn*[8], bar Petitioner and the Court from retroactively applying the Ahmed Annulment Order to validate Petitioner's bigamous marriage to Decedent based. *See* LSA's Reply Memorandum at pp. 27-33.

22. The Court failed to consider that *Joye v. Yon*[9] bars Petitioner and the Court from retroactively applying the Ahmed Annulment Order to validate Petitioner's bigamous marriage to Decedent. *See* LSA's Reply Memorandum at pp. 6-8.

For at least the foregoing reasons, the LSA respectfully requests that this Court grant the LSA's Motion for Reconsideration, deny Petitioner's motion for partial summary judgment, and grant the LSA's motion for summary judgment.

Under Rule 11, SCRCP, the undersigned affirms consultation with opposing counsel would serve no useful purpose.

Respectfully submitted,

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[6] 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004)

[7] 283 S.C. 348, 323 S.E.2d 521 (1984)

[8] 311 S.C. 423, 429 S.E.2d 805, (1993)

[9] 355 S.C. 452, 568 S.E.2d 131 (2003)

Attorneys for David C. Sojourner, Jr., as Limited Special Representative of the Estate of James Brown and Limited Special Trustee of the James Brown August 1, 2000 Irrevocable Trust Agreement

January 26, 2015.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	Case Nos.: 2013-CP-02-02849
	)	2013-CP-02-02850 cert. copy
	)	
	)	**ORDER RE PETITIONER TOMMIE RAE BROWN'S MOTION FOR SUMMARY JUDGMENT AND THE LIMITED SPECIAL ADMINISTRATOR'S MOTION FOR SUMMARY JUDGMENT**
IN RE THE ESTATE OF	)	
JAMES BROWN A/K/A	)	
JAMES JOSEPH BROWN	)	
	)	

This matter came before the court on November 24, 2014 on Petitioner Tommie Rae Brown's Motions for Summary Judgment filed October 30, 2007, November 26, 2007, and April 28, 2014, and the Limited Special Administrator's (LSA's) Motion for Summary Judgment dated May 29, 2014. Each of these Motions requests summary judgment determining whether Mrs. Brown is the surviving spouse of James Joseph Brown. All parties have submitted detailed memoranda in support of their respective positions as well as responsive memoranda, and all parties have consented to a Joint Stipulation of Facts filed September 5, 2014.

The following counsel appeared at the hearing: (1) Robert N. Rosen, S. Alan Medlin, M. Jean Lee, David L. Michel, and Corey T. L. Smith, counsel for Tommie Rae Brown; (2) John F. Beach, counsel for the LSA David C. Sojourner; (3) A. Peter Shahid, Jr., counsel for Guardian ad Litem Stephen M. Slotchiver; (4) Stephen M. Slotchiver, Guardian ad Litem for J: B ; (5) David B. Bell and Matthew D. Bodman, counsel for Daryl Brown; (6) John A. Donsbach and Scott Keniley, counsel for Terry Brown; (7) Louis Levenson, counsel for Deanna Brown Thomas, Yamma N. Brown, Venisha Brown, and Larry Brown; and (8) William Barr and Vera Gilford, counsel for amicus curiae Jeanette Mitchell.

FILED
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C.C.P.&G.S.
Deputy Clerk

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EXHIBIT
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I. SUMMARY JUDGMENT STANDARD.

The standard for granting summary judgment is clear:

> Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment. *Brockbankv. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000).

Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 42, 747 S.E.2d 178, 181-82 (2013).

II. HISTORY OF THE CASE AND STATEMENT OF FACTS.

A. These Proceedings.

Mrs. Brown filed a petition for Elective Share or Omitted Spouse's share on February 1, 2007, asserting she is the surviving spouse of Mr. Brown. She filed a Motion for Summary Judgment on October 30, 2007 on the issue of her ceremonial marriage to Mr. Brown and the legality of said marriage. Mrs. Brown filed the same motion along with the Affidavit of Tommie Rae Brown in Support of Her Motion for Summary Judgment on November 26, 2007.

On December 20, 2007, Mrs. Brown filed Petitions to Set Aside the Will and Trust. Similarly, on December 26, 2007, five of the six Devisees from the 2000 will filed Petitions to Set Aside the Will and Trust. Before these Petitions were heard, Mrs. Brown and other parties to the estate litigation participated in mediation which resulted in a private settlement agreement. In the settlement agreement, Mrs. Brown was recognized by all parties thereto as the surviving spouse of Mr. Brown. The settlement agreement provided that it was a binding private agreement, regardless of court approval, and provided that it bound personal representatives and trustees, as allowed by law. The settlement agreement expressly provided that the provision

recognizing Mrs. Brown as the surviving spouse survived regardless of whether the agreement was approved by a court.

On May 26, 2009, this Court issued an Order that, inter alia, approved the settlement agreement and found that the contest or controversy was in good faith and that the effect of the agreement on interested parties was just and reasonable in satisfaction with S.C. Code Ann. § 62-3-1102(3). This Court issued another Order which removed the then Personal Representatives and Trustees (Pope and Buchanan), and at the request of the settling parties, this Court appointed Russell Bauknight as Personal Representative and Trustee.

Pope and Buchanan appealed the order approving the settlement agreement and the order removing them from their fiduciary positions to the Court of Appeals, and at the request of the Court of Appeals the consolidated appeals were certified to the Supreme Court pursuant to Rule 204(b), SCACR. In reviewing this Court's finding that there was a good faith controversy under S.C. Code Ann. § 62-3-1102, the Supreme Court determined that the settlement failed the second element of the S.C. Code Ann. § 62-3-1102 test, *i.e.*, that the effect of the agreement on interested parties is just and reasonable. *Wilson v. Dallas*, 403 S.C. 411, 447, 2013 S.C. LEXIS 240, *64 (2013). The Supreme Court upheld the removal of the prior fiduciaries, finding that they had irreconcilable differences with the estate and trust beneficiaries, but reversed and remanded the approval of the settlement because of a lack of evidence showing a fair and reasonable settlement of a good faith controversy. The Supreme Court also vacated Mr. Bauknight's appointments and remanded the case to this Court.

This Court held a status conference on May 29, 2013 concerning the Supreme Court Opinion and issued an Order on June 13, 2013 requiring all interested persons to submit applications to serve as fiduciaries of the Estate and Trust by July 29, 2013. Mr. Bauknight was

ordered to continue serving in a fiduciary capacity as Special Administrator and Special Trustee in the interim. This Court conducted a hearing to receive testimony from all applicants on September 4 and 11, 2013. This Court then issued its October 1, 2013 Order appointing Mr. Bauknight as the Personal Representative of the Estate and Trustee of the Trust and David C. Sojourner as Limited Special Trustee of the Trust. The Probate Court of Aiken County appointed Mr. Sojourner as the Limited Special Administrator (LSA) of the Estate by its Order filed October 10, 2013.

On March 10, 2014 the LSA served a Motion to Modify Protective Orders Related to Diaries of Tommie Rae Hynie Brown asking this Court to lift the Court's protective orders and to require Mrs. Brown to produce her diaries. Mrs. Brown filed a Return to Motion to Modify Protective Orders Related to Diaries of Tommie Rae Brown and Motion for Protective Order or Order of Confidentiality along with her supporting Affidavit on March 27, 2014, and a hearing was held on March 31, 2014. This Court determined that the LSA's Motion to Modify Protective Orders and all discovery would be held in abeyance pending resolution of Mrs. Brown's Motion for Summary Judgment and later indicated the parties should negotiate a scheduling order.

Mrs. Brown filed another Motion for Summary Judgment and supporting Affidavit on April 28, 2014. She filed a Motion for Protective Order and the Affidavit of Robert N. Rosen on May 12, 2014 requesting that, other than answering the LSA's First Requests to Admit, all discovery be stayed pending resolution of her Motion for Summary Judgment. Petitioner and the LSA subsequently entered an Agreement Resolving Petitioner's Motion for Protective Order dated May 16, 2014, and this Court issued a Scheduling Order filed June 10, 2014 staying all discovery (other than the LSA's April 23, 2014 1st Requests for Admission, 2nd Interrogatories,

and 2nd Requests for Production) pending resolution of Mrs. Brown's April 24, 2014 Motion for Summary Judgment. The LSA subsequently served his own Motion for Summary Judgment on May 29, 2014.

The parties have served memoranda in support of their respective positions and responsive memoranda in accordance with the Scheduling Order, and a hearing was held on the aforementioned Motions for Summary Judgment at the Bamberg County Courthouse on November 24, 2014.

B. Stipulated Facts.

Petitioner Tommie Rae Brown ("Mrs. Brown") and James Joseph Brown ("Mr. Brown") were married by ceremonial marriage on December 14, 2001 at Beech Island in Aiken County, South Carolina.[1] Prior to their marriage, Mrs. Brown gave birth to Mr. Brown's biological son, J. B. on 2001.[2] Following their marriage, Mr. Brown learned that Mrs. Brown had participated in a putative marriage ceremony with another man, Javed Ahmed ("Ahmed") in February of 1997 in Texas, where both Mrs. Brown and Ahmed resided at the time. In December 2003, with Mr. Brown paying her attorney's fees, Mrs. Brown filed an action against Ahmed in the Family Court of South Carolina for an annulment on the grounds of bigamy, among other grounds.[3]

Mrs. Brown's counsel hired a licensed private investigator, Mr. Ronald Pannell, to locate Ahmed, and he was unable to do so. Mr. Pannell submitted an Affidavit of Attempted Service,

[1] *See* Joint Stipulation of Facts, p. 3, ¶¶ 4-5 and Exhibit 4 at 000005-6 (License and Certificate for Marriage).

[2] *See* Joint Stipulation of Facts, p. 2, ¶ 3 along with Exhibit 2 (birth certificate) at 000003 and Exhibit 3 (LabCorp DNA Test Results) at 000004.

[3] *Id.* at 3, ¶ 7 and Exhibit 5 at 000007-9 (Summons and Complaint for Annulment). James Brown paid for Mrs. Brown's annulment, and Mrs. Brown's attorney kept Mr. Brown's attorney informed of the proceedings. *See id.* at 4, ¶¶ 13-14 and Exhibit 14 at 000050-64; Personal Representatives' Responses to Petitioner Tommie Rae Brown's Second Request for Admission, dated January 11, 2008, pp. 3-4, Request and Response Nos. 9 and 10.

filed in the Family Court on February 4, 2004, stating he conducted numerous searches in national databases in an attempt to locate Ahmed, and he found two addresses.[4] One address was Houston, Texas, . Mr. Pannell stated in his affidavit that Ahmed no longer resided at that address. The other address was Houston, Texas, which Mr. Pannell stated in his affidavit was the address on Mr. Ahmed's driver's license issued in 1999. As a result, this address (Houston Texas,) was Ahmed's last known address. Mr. Pannell stated in his affidavit that Ahmed no longer resided at that address either.

Mrs. Brown filed an Affidavit in the Family Court on February 4, 2004, with Mr. Pannell's Affidavit of Attempted Service, requesting an Order of Publication.[5] In her affidavit, Mrs. Brown stated that Mr. Pannell conducted a full skip trace report and was unable to locate Ahmed. She also said Mr. Pannell found an address where Ahmed apparently had resided since she last knew of his whereabouts. Judge Jocelyn B. Cate of the Family Court issued an Order of Publication on February 3, 2004 finding that Mrs. Brown had made a diligent effort to locate Ahmed and that it appeared to the satisfaction of the Family Court that Ahmed's current address and whereabouts were unknown.[6] The Order of Publication scheduled a Final Hearing for March 26, 2004 at 9:30 A.M. Mrs. Brown properly published the Summons and notice of the hearing in the Houston Chronicle, a newspaper of general circulation in the area, and filed an Affidavit of Publication as directed by the Order of Publication.[7] Ahmed was served by publication.

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[4] Joint Stipulation of Facts at 000010 (Affidavit of Ronald Pannell).

[5] *Id.* at 000016 (Affidavit of Tommie Rae Hynie, a/k/a Tommie Rae Brown).

[6] *Id.* at 000017 (Order of Publication).

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An Order of Continuance was filed by the Family Court on March 24, 2004, rescheduling the Final Hearing to April 15, 2004 at 9:00 A.M.[8] Mrs. Brown's counsel sent Ahmed notice of the rescheduled hearing by regular mail *and* certified mail, return receipt requested, to both of the addresses found by Mr. Pannell, which included Ahmed's last known address at Houston, Texas, the address he had given to the Texas Department of Motor Vehicles.[9] Mrs. Brown's counsel therefore properly gave written notice of the rescheduled hearing pursuant to Rule 17, SCRFC as determined by Judge Segars-Andrews' April 15, 2004 Order.

At the trial in Family Court, Mrs. Brown testified that Ahmed told her he was married to several other women at the time of their purported marriage ceremony and that none of those marriages had been dissolved.[10] A final judgment was entered on April 15, 2014 annulling the purported marriage between Mrs. Brown and Ahmed ("the annulment order").[11] Judge Segars-Andrews found that Ahmed was already married at the time of his putative marriage ceremony to Mrs. Brown, that Ahmed lacked capacity to marry Mrs. Brown, and that the purported marriage between Mrs. Brown and Ahmed was "wholly null and void *ab initio*."[12]

The stipulated facts show that Mr. Brown was aware of the litigation between Mrs. Brown and Ahmed because (1) Mr. Brown paid Mrs. Brown's legal fees, (2) Mrs. Brown's

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[7] *Id.* at 000026-27 (Affidavit of Publication); *see also id.* at 000017-18 (Order of Publication).

[8] *Id.* at 000028 (Order of Continuance).

[9] *Id.* at 000019-25 (Affidavit of Marcia F. Jones); 000010 (Affidavit of Ronald Pannell).

[10] *Id.* at 000040, lines 16-20; 00004, lines 13-15 (April 15, 2004 Transcript of Record).

[11] *Id.* at 000029-32 (April 15, 2004 Final Order).

[12] *Id.* at 000030-32 (April 15, 2004 Final Order).

counsel sent Mr. Brown's attorney a copy of the Summons and Complaint in February, 2004, and (3) Mrs. Brown's counsel sent Mr. Brown's attorney the Final Order in April, 2004.[13]

Mr. Brown filed an annulment action of his own against Mrs. Brown on January 29, 2004 in the Family Court of Aiken County.[14] Just weeks after the April 15, 2004 Final Order was filed, Mr. Brown filed an Amended Complaint for Annulment in the Family Court requesting the Court to issue a judgment that the "Findings of Facts of the Charleston Family Courts are binding on [the Aiken County Family Court]..." and that "[p]ursuant to the Order of the Charleston Family Court, Defendant is collaterally and judicially estopped from denying the allegations in [Mr. Brown's annulment action]."[15] Mrs. Brown counterclaimed for a divorce and other relief.[16] Mr. and Mrs. Brown reconciled in July 2004 and signed a Consent Order on August 16, 2014 dismissing Mr. Brown's action.[17]

Mr. Brown died on December 25, 2006, and his will, dated August 1, 2000 was filed with the Aiken County Probate Court on January 18, 2007.

C. The Annulment Action.

Mrs. Brown properly brought the annulment action in South Carolina, properly served Ahmed, and properly notified him of the date of rehearing. The Family Court concluded that Ahmed "was married at the time he entered into his marriage with [Mrs. Brown] and therefore he lacked the capacity to marry [Mrs. Brown]."[18]

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[13] *Id.* at 4, ¶¶ 13-14 and Exhibit 14 at 000050-64 (Correspondence with James B. Huff, Esquire).

[14] *Id.* at 000065-67 (Mr. Brown's Summons and Complaint for Annulment).

[15] *Id.* at 000070, ¶¶ 10-11 (Mr. Brown's Amended Complaint for Annulment).

[16] *Id.* at 5, ¶ 19 and Exhibit 17 at 000072-82.

[17] *Id.* at 000085-86 (Consent Order of Dismissal).

[18] *Id.* at 000031, ¶ 4 (April 15, 2004 Final Order).

The Respondents have argued that the annulment order was improper because the summons and complaint were not properly served and notice of the final hearing was not given. The Court has already found that service and notice were proper. Mrs. Brown's counsel hired a licensed private investigator to locate the Defendant. That investigator's affidavit was found to be sufficient by the Family Court.

South Carolina law does not permit direct or collateral attacks upon an order authorizing service by publication:

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

Wachovia Bank of S.C., N.A. v. *Player*, 341 S.C. 424, 428-29, 535 S.E.2d 128, 130 (2000) (emphasis added); *see also Hendrix v. Hendrix*, 296 S.C. 200, 203, 371 S.E.2d 528, 530 (1988). The Respondents do not contend there was fraud in the procurement of the annulment. The order authorizing service by publication therefore cannot be attacked. *See also Schleicher v. Schleicher*, 310 S.C. 275, 277, 423 S.E.2d 147, 148-49 (Ct. App. 1992) (holding that service of the notice of the time and date for a merits hearing is effective upon mailing when sent by certified mail, return receipt requested and that Rule 5(b)(1), SCRCP, rather than Rule 4(d)(8), SCRCP, is the applicable rule).

Some of the Respondents object that the annulment action should have been filed in Aiken County, not Charleston County. This is a mere matter of venue, which has no effect on the validity of the judgment. In *Lillard v. Searson*, 170 S.C. 304, 170 S.E. 449 (1933), the court held that a defect in venue cannot be used to attack a final judgment:

> Since it clearly appears that the defendant named in the case was not a resident of Richland county, at the time the action was instituted against him, but was a resident of Allendale county, the action was instituted in the wrong county, and the proper course to have pursued was for the defendant to have moved to have the case transferred to Allendale county. . . . However, the defendant did not do this, and waited until judgment had been rendered in the cause before taking any steps in the matter. *Therefore the defendant waived the jurisdictional question, and, in effect, gave to the court of Richland County authority to hear the said case on its merits*, and judgment was thereafter rendered in said court against the defendant as in any other default case.

170 S.E. at 450-51 (1933) (emphasis added). Note that the judgment in *Lillard*, like the annulment in this case, was entered without entry of an appearance by the defendant.

"The failure to bring the proceedings within the proper venue, when such is determined by the place of residence, does not render them void, the error being in practice and not jurisdictional." *In re Lemack's Estate*, 207 S.C. 137, 144, 35 S.E.2d 34, 37 (1945) (quoting 32 C.J. 633). "The irregularity [in venue] complained of is not jurisdictional." *State v. Richardson*, 149 S.C. 121, 124, 146 S.E. 676, 677 (1928).

Under the above authority, venue is clearly not jurisdictional, and it is therefore not a sufficient basis for attacking a final judgment. The Family Court has statewide jurisdiction. *See* S.C. Code Ann. § 14-2-10 (establishing "the statewide family court system").

III. BECAUSE MRS. BROWN HAD NO IMPEDIMENT, HER MARRIAGE TO MR. BROWN IS VALID.

A. The Bigamy Statute.

The South Carolina General Assembly has clearly spoken through S.C. Code Ann. § 20-1-80 that a bigamous marriage is "void" — i.e., never a marriage and never valid from the beginning.[19] This section reads as follows:

[19] For more than a century, that statute has provided that bigamous marriages are void. This is consistent with the public policy against bigamous marriages. For example, entering into a bigamous marriage is a crime. Note, however, that *State v. Sellers*, 140 S.C. 66,134 S.E. 873 (S.C. 1926), recognizes, as do all the other bigamy cases,

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

S.C. Code Ann. § 20-1-80. A void marriage is treated differently from a voidable marriage. A voidable marriage is valid unless and until a court rules that such a marriage is invalid, but a void marriage is never valid for any purpose. *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006), *aff'd*, 379 S.C. 589, 666 S.E.2d 906 (2008), confirms the difference between a void marriage — void ab initio because of bigamy — and a merely voidable marriage — valid unless and until a court invalidates it, such as for intoxication. *Lukich* annulled two marriages: a bigamous marriage, held void ab initio, and a marriage annulled for intoxication, held voidable.

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

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

B. Case Precedent.

1. A Bigamous Marriage Is Void Ab Initio And Never A Marriage.

The annulment order in this case was granted on the most serious and substantial of all grounds for rendering a marriage void: bigamy. It is against public policy and a crime to commit bigamy. A long line of South Carolina cases, including *Lukich*, holds that a bigamous marriage is not a marriage at all, at any point in time. In

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that a bigamous marriage is void ab initio, so that a void first marriage is not an impediment to a valid second marriage, and thus the second marriage is not bigamous and not a crime.

fact, every South Carolina case considering the issue has concluded that a bigamous marriage is void ab initio, and thus never a marriage:

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

Johns, 309 S.C. at 201, 420 S.E.2d at 858 (emphasis added).

> A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, *is not a marriage at all.* Such a marriage is absolutely void, and not merely voidable.

Day v. Day, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) (emphasis added).

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

Ex parte Blizzard, 185 S.C. 131, 193 S.E. 633, 634 (1937).

> When, however, there is an impediment to marriage, such as one party's existing marriage to a third person, *no common-law marriage may be formed*, regardless whether mutual assent is present.

Callen v. Callen, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005) (emphasis added). *See also Splawn v. Splawn*, 311 S.C. 423, 425, 429 S.E.2d 805, 806 (1993); 52 Am. Jur. 2d, supra, § 57 ("A marriage that occurs while one party is still legally married to another is void from its inception and cannot be retroactively validated by estoppel, by mutual agreement, or by the parties' conduct in holding themselves out as husband and wife.").[20] This is hardly surprising as

[20] Every South Carolina case, as required by § 20-1-80, has concluded that the status of someone entering into a bigamous marriage is that of never having been married. It is Mrs. Brown's status that is critical here. At the time she married Mr. Brown, she had no impediment to their marriage because she had never been married before. Respondents cite several cases that deal with ancillary matters, but all of these cases follow the required rule about status: someone having entered into a bigamous marriage was never married. To the extent these cases also deal

the courts are required to follow the mandate from the legislature that bigamous marriages are void ab initio.

2. *Lukich v. Lukich.*

Both the Court of Appeals and Supreme Court decisions in *Lukich v. Lukich*[21] are in accord with § 20-1-80, case precedent, and Mrs. Brown's position. *Lukich* held that a *bigamous* marriage is void ab initio. *Lukich* also held that a marriage, annulled for *intoxication rather than bigamy*, could be treated as voidable.[22]

Lukich annulled two marriages: one void ab initio for bigamy and another voidable for intoxication. In *Lukich*, the wife sought alimony during a divorce from her second husband (Marriage 2). During the divorce proceeding, the second husband learned that the woman had previously been married (Marriage 1) and had never obtained a divorce or an annulment from the first husband. During the divorce case, the wife quickly obtained an annulment for Marriage 1, without her husband's knowledge and in another venue, on the ground of intoxication.[23] Both appellate courts concluded that Marriage 1 was voidable and refused to apply the annulment of Marriage 1 retroactively so that her status would allow her to enter Marriage 2. Marriage 1 in *Lukich* was properly voidable, rather than void, because the annulment was based on intoxication

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with ancillary matters, they are inapposite. See *Splawn v. Splawn*, 311 S.C. 423, 429 S.E.2d 805 (S.C. 1993) (bigamous marriage void ab initio but court had to deal with ancillary equitable apportionment of property issues); *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (S.C. App. 2004) (similar, citing *White v. White*, 283 S.C. 348, 323 S.E.2d 521 (S.C. 1984); *Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003) (second marriage bigamous and void ab initio — court had to decide impact on first husband's obligation to pay alimony, which had ostensibly ended if second marriage was valid, which it was not).

[21] 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006); 379 S.C. 589, 666 S.E.2d 906 (2008).

[22] "An annulment declares that a marriage never occurred because of some defect. Defective marriages may be either void or voidable. In a void marriage, the circumstances are such that the marriage could never have come into being. A voidable marriage is recognized under the law as a valid marriage until an action is brought to prove it invalid." Stuckey, *Marital Litigation in South Carolina*, Ch. 3.A. A bigamous marriage is void. In fact, "a void [bigamous] marriage technically needs no judicial action to declare that it is void." *Id.*

[23] The annulment at issue in *Lukich* was granted on the ground of intoxication. *Lukich*, 368 S.C. at 51, 627 S.E.2d at 756 ("[S]he and Havron were married during a night of heavy drinking, [and] had never lived together as husband and wife[.]").

rather than bigamy. One consequence of the *Lukich* court treating Marriage 2, the bigamous marriage, as void ab initio, is that the husband in Marriage 2 owed no alimony because Marriage 2 was "never a marriage." If *Lukich* had not treated Marriage 2 as void ab initio because it was bigamous, as required by statute and precedent, the Court would have had to conclude that the husband of Marriage 2 would have owed alimony from the time of Marriage 2 until the annulment of Marriage 2. [24]

In short, a marriage entered into by intoxicated persons is not invalid until the parties decide to attack the marriage and not to waive the defect. Therefore, it is logical, as the *Lukich* Court held, that a voidable marriage is invalid only prospectively from the date of the annulment.

A void marriage, however, is different. A void marriage is never a valid marriage. The parties are not permitted to waive the defect; the marriage is automatically invalid. Both *Lukich* appellate courts concluded that Marriage 2 was void ab initio because it was bigamous. Consequently, Marriage 2 was never a marriage so that the divorce was unnecessary and the second husband could not owe alimony.

Lukich does not change, but is instead consistent with, S.C. Code Ann. § 20-1-80 and all South Carolina case precedent: a bigamous marriage (Marriage 2 in *Lukich*) is void ab initio and never a marriage. Respondents, in particular Terry Brown, cite the following language from the Supreme Court opinion in *Lukich* as somehow changing the treatment of bigamous marriages in this state:

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[24] The holding in *Lukich* as to Marriage 1 makes perfect sense, as a voidable marriage is invalid only if it is attacked. The parties to a voidable marriage always have the option of waiving the defect and ratifying the marriage. The annulment of Marriage 1 in *Lukich* was granted on the ground of intoxication. Intoxication is one of the classic grounds that render a marriage voidable, but not void. See 52 Am. Jur. 2d Marriage § 23 (Westlaw database updated Nov. 2014); *Abel v. Waters*, 373 So. 2d 1125, 1128 (Ala. Civ. App.), writ denied, 373 So. 2d 1129 (Ala. 1979); *Barber v. People*, 203 Ill. 543, 546, 68 N.E. 93, 94 (1903).

> Under the statute's terms, Wife's 'marriage' to Husband # 2 was 'void' from the inception since at the time of that marriage she had a living spouse *and that* marriage had not been 'declared void.' § 20–1–80.

Lukich, 373 S.C. at 592, 666 S.E.2d at 907 (Emphasis added).

Respondents contend that *Lukich* creates new law with respect to bigamous marriages. Respondents claim *Lukich* disregards the clear requirement of the bigamy statute and ignores or reverses all case precedent that bigamous marriages are void ab initio. Respondents base their contention on the words "and that" emphasized in the above quote. These words, Respondents argue, indicate that regardless of whether a marriage is void or voidable, one has an impediment to marriage and must obtain an annulment before remarriage. Contrary to Respondents' contention, however, the words "and that" do not refer to the bigamous marriage (Marriage 2 in *Lukich*); the words "and that" clearly refer to the intoxication marriage (Marriage 1 in *Lukich*). Thus, *Lukich* cannot be read to change a substantive rule of law, namely that a bigamous marriage is void only from the date of the annulment order. This would render a bigamous marriage voidable rather than void. *Lukich* does no such thing. Rather, *Lukich* confirms that a bigamous marriage is void ab initio and never a marriage because it treated Marriage 2 (the bigamous marriage in *Lukich*) as never having been a marriage, so that the second husband did not need a divorce and did not owe alimony to a wife he never married.

If Respondents were correct that *Lukich* created a new rule, then the *Lukich* court would instead have held that the second husband owed alimony until an annulment order for Marriage 2 was obtained. Moreover, if Respondents are correct, then the *Lukich* appellate courts favorably cite cases holding that bigamous marriages are void ab initio while somehow overturning those cases and ignoring § 20-1-80. The clear meaning of *Lukich* is that, as required by § 20-1-80 and all case precedent, bigamous marriages are void ab initio and never a marriage.

Moreover, even if Respondents were correct in their position about *Lukich*, i.e., that even a bigamous marriage is valid unless and until an annulment order is obtained, they could still not prevail. Under their theory, *Lukich* changed the law about bigamous marriages so that a bigamous marriage remains valid unless and until an order of annulment is obtained. If that were correct, then under their theory Mrs. Brown had an impediment to marrying Mr. Brown and that marriage was therefore bigamous. But under Respondents' position, Mr. Brown's bigamous marriage to Mrs. Brown would be valid unless and until Mr. Brown obtained an order annulling their marriage, which he did not obtain during his lifetime. It is now too late for Mr. Brown to obtain an annulment.[25] So, even under Respondents' theory, the marriage between Mrs. Brown and Mr. Brown was valid at his death and cannot be invalidated because it is too late.

In this case, unlike *Lukich*, it is the first marriage (Marriage 1), rather than Marriage 2 in *Lukich*, that is bigamous and thus void. Consequently, Mrs. Brown's attempted marriage to Ahmed (Marriage 1) was void ab initio and never a marriage. Therefore Mrs. Brown had no impediment to her marriage to Mr. Brown, and that marriage (Marriage 2) is valid.

Despite the contentions of Respondents, *Lukich* is consistent with the bigamy statute and all precedent involving bigamous marriages: bigamous marriages are void ab initio and never have any effect --- they are "never a marriage." The only difference with respect to bigamous marriages between *Lukich* and this case is that, in *Lukich*, the bigamous marriage was the second marriage, while in this case, the bigamous marriage is the first marriage. That difference has no impact on the treatment of bigamous marriages. The bigamous second marriage in *Lukich* was void ab initio and never had effect. The bigamous first marriage in this case was void ab initio and never had effect, so that Mrs. Brown had no impediment to her marriage to Mr. Brown.

Were this Court to give only prospective effect to the annulment in this case, it

[25] See the discussion at IV.C. below.

would be holding that a bigamous marriage was not invalid from its inception. Rather, it would be holding that a bigamous marriage was valid from the date of its inception until the date of the annulment.

This Court is unwilling to hold that a bigamous marriage, as determined by a family court of this state, was ever legal. There is no precedent for such a holding. South Carolina law precludes this Court from giving any effect whatsoever to a bigamous marriage. Because the Court cannot give any effect to a bigamous marriage, it is required to hold that the bigamous marriage was never a marriage.

Mrs. Brown and Ahmed never had a valid marriage at any point in time, and Mrs. Brown had no impediment to her valid marriage to Mr. Brown.

3. ***Hallums v. Hallums.***

The LSA argued that *Hallums v. Hallums*, 74 S.C. 407, 54 S.E. 613 (S.C. 1906), was exactly on point and reached a different result. The LSA misses a critical factual distinction between *Hallums* and the current case: in *Hallums*, there was never a court determination that the first marriage (Marriage 1) was bigamous and, in fact, the court found that the Marriage 1 was not bigamous. By contrast, in the current case, there is a valid annulment order finding that the first marriage was bigamous.

The Hallums paradigm actually supports Mrs. Brown's position. If the *Hallums* court had determined that Marriage 1 was bigamous, then the *Hallums* opinion indicates that the second marriage (Marriage 2) would have been valid because there would have been no impediment to the wife entering into the second marriage (Marriage 2) with the decedent.

More specifically, in *Hallums*, a woman attempted to get a distributive share from

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

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

Brown).

Hallums actually supports Mrs. Brown's position. *Hallums* stands for the proposition that, *if* Marriage 1 had been bigamous and thus void ab initio, Marriage 2 to the decedent would have been valid and the woman would be entitled to her distributive share from the decedent's estate. That is exactly Mrs. Brown's position. Because she has an order confirming that Marriage 1 was void ab initio as bigamous, Marriage 2 is valid and she qualifies as a surviving spouse.[26]

4. All Bigamous Marriages Are Void.

Every bigamous marriage is void ab initio. A bigamous marriage is never valid — "never a marriage." In S.C. Code Ann. § 20-1-80, the bigamy statute, the South Carolina General Assembly requires that a bigamous marriage is void ab initio. In accordance with this legislative mandate, every South Carolina case dealing with bigamous marriages, including *Lukich* and *Hallums*, holds that a bigamous marriage is void ab initio and never has effect. Although Respondents contend that *Lukich* somehow changes that rule and instead provides that a bigamous marriage is valid until an annulment order is obtained, that is not the holding in *Lukich* as to bigamous marriages. *In Lukich, it is the second marriage that is bigamous* and both appellate courts treat that second marriage as void ab initio, in accordance with the bigamy statute and all case precedent. *In Mrs. Brown's case, it is the first marriage that is bigamous*, and that first marriage is therefore void ab initio, meaning that Mrs. Brown had no impediment to her marriage to Mr. Brown.

Despite the contention of the LSA, *Hallums* is in accord with the bigamy statute,

[26] Unlike this case, the court in *Hallums* looked at the first marriage after the decedent's death because: (1) there was no pre-existing annulment order from a court with exclusive jurisdiction over annulments, as there is today; (2) this was prior to the family court having exclusive jurisdiction over annulments – in fact, this was prior to the existence of family courts in South Carolina; (3) this was prior to § 62-2-802 defining surviving spouse for estate purposes and case law precluding postmortem annulments. See IV.C below.

Lukich, and all other case precedent in treating bigamous marriages as void ab initio. Unlike Mrs. Brown's first marriage, which was *found to be bigamous and void*, the first marriage in *Hallums* was *found not to be bigamous and was therefore valid*. However, if the first marriage in *Hallums* had been found to be bigamous and void, the opinion indicates that the second marriage would have consequently been valid because the wife would have had no impediment to her second marriage and thus could inherit. That is exactly Mrs. Brown's case: her first marriage has been found to be bigamous and void, so that she had no impediment to her marriage to Mr. Brown: their marriage is valid and she is his surviving spouse.

IV. THE ANNULMENT ORDER IS FINAL AND BINDING.

A. Introduction.

Because the bigamy statute and case law, including *Lukich*, hold that a bigamous marriage is void ab initio, the annulment order confirms that Mrs. Brown had no impediment to her marriage to Mr. Brown.

Respondents contend that the annulment order is not valid and that this Court should refuse to recognize the annulment order or alternatively disregard the findings of fact of the annulment order. For a number of reasons, this Court concludes that the annulment order is final and binding. Nor will this Court re-open or re-litigate the underlying findings of fact of the annulment order, which in this case would have the same effect as disregarding the annulment order. All of these reasons are explained in greater detail below at IV.B-G, but generally the reasons are as follows:

First, only the family court has jurisdiction over annulments. This Court does not have jurisdiction over annulments. If this Court failed to recognize the annulment order as valid, then

the result would be to re-litigate the annulment in this Court. If this Court does not have jurisdiction to hear an annulment action, it does not have jurisdiction to re-litigate an annulment action. Nor can this Court re-open or review the findings of fact underlying the annulment order. Even if this court had jurisdiction to do so, doing so would lead to only two possible results: (1) this Court's determination that the family court was correct or (2) that the family court reached an incorrect conclusion. This, presumably, would mean that the annulment order, which was not appealed, is rendered invalid by this Court. This Court simply does not have such jurisdiction.

Second, even if this Court had jurisdiction to not recognize or to re-litigate the annulment order, the appropriate parties would not be available. Mrs. Brown and Ahmed would be the necessary parties, and Ahmed is not a party to this action nor should he be. If this Court allowed Ahmed to participate as a party in the re-litigation of the order, this would allow him to collaterally attack a family court order he cannot now directly attack. The only way to invalidate a marriage in South Carolina is to bring an annulment action. Mr. Brown obviously knew that because he brought an annulment action, which he eventually dismissed. Annulment actions cannot be brought postmortem. Nor can Respondents do so. Any right they may have is derived from Mr. Brown, and they cannot have greater rights than he did.

Third, a court has to have a reason to refuse to recognize an order, and the only reason is the failure of due process, either by failure to obtain personal jurisdiction or a lack of subject matter jurisdiction. Even if this Court had jurisdiction concerning the annulment order, it finds that there is no defect in personal jurisdiction —i.e., the service was proper — and the family court had subject matter jurisdiction. There is no failure of due process and so there is no reason to refuse to recognize the order.

Fourth, even if this Court had jurisdiction, the issue of the finality of the annulment order — i.e., whether it is binding on those not parties to the action — in this case applies only to Mr. Brown because, as noted, Respondents at best stand in his shoes. The Respondents concede that an annulment is an in rem action, and in rem actions are binding on non-parties as to status. Even if Mr. Brown was not precluded by the reasons stated above, and for other reasons, he would be bound by the status determination of an in rem action. The status determination of the annulment order was that Mrs. Brown was never married to Ahmed and thus her status at the time of her marriage to Mr. Brown was that she had no impediment to that marriage. Mrs. Brown's status is the only relevant issue here.

Finally, to disregard or relitigate the annulment order would create a chaotic precedent. No marital determination of status – validation of marriage, invalidation of marriage (annulment) or termination of marriage (divorce) — would ever be final and binding. Families are critically affected by the status of family court actions and their status determinations must be sacrosanct. To allow any third party to attack a status determination would permit endless litigation over family matters and continuing uncertainty over such critical relationship matters as paternity and legitimacy, as well as a person's ability to enter into valid marriages. Some examples of unacceptable problems which would result in this case are as follows:

1. Mr. Brown brought and dismissed an annulment action attacking his marriage to Mrs. Brown. This Court takes judicial notice that Mr. Brown did not thereafter attempt to file an action in court to invalidate their marriage, which he obviously knew how to do if he wished. Mr. Brown did not annul his marriage to Mrs. Brown before his death, but Respondents now wish to do so.

2. The annulment order legitimizes J B . Because the annulment action confirmed that Mrs. Brown had no impediment to her marriage to Mr. Brown, their marriage makes J , born before the marriage, legitimate. Effectively overturning the annulment order would render J illegitimate, affecting critical rights of his.

3. If Ahmed is not a party to relitigation of the annulment order, an overturning or disregard of that order could impact his family status. According to the sworn affidavit of Daryl Brown's attorney in this matter, David Bell, Ahmed has known for at least six years that his marriage to Mrs. Brown was annulled. This Court takes judicial notice that Mr. Ahmed has taken no judicial action to attack the annulment order. Relying on the validity of the annulment order, Ahmed may have married subsequently and had children: if the annulment order is overturned, then his marriage would be invalidated and his children rendered illegitimate.

B. This Court Lacks Subject Matter Jurisdiction To Relitigate Or Disregard The Annulment Order.

Respondents would have this Court relitigate or disregard the annulment order issued by the family court. However, this Court does not have jurisdiction over annulments. *Only* the family court has jurisdiction over actions for annulments. S.C. Code Ann. § 63-3-530(A)(6)[27] provides that the family court has *exclusive* jurisdiction over annulments.

The only way for Mr. Brown to have invalidated his marriage to Mrs. Brown would have been through an annulment of their ceremonial marriage. "Annulments are actions to establish the invalidity of marriages." See Stuckey, *Marital Litigation*, Ch. 3.A. Mr. Brown obviously understood that an annulment action is the method to seek an invalidation of a marriage because he brought an action to annul his marriage to Mrs. Brown. As discussed above, Mr. Brown dismissed that action through a consent order. It is now too late for Mr. Brown, or anyone acting for or through him, to bring an annulment action to invalidate his marriage to Mrs. Brown. See the discussion at IV.C below.

Consequently, if this Court lacks subject matter jurisdiction over annulments, it cannot relitigate or disregard the family court annulment order. Redetermining the underlying facts of

[27] Formerly S.C. Code § 20-7-140.

the annulment order would be engaging in an annulment action, which this Court lacks jurisdiction to do.

Having this Court relitigate or disregard an existing valid family court order would create a precedent resulting in chaos.[28] If a third party is allowed to attack an order of annulment or divorce obtained during a decedent's lifetime, relationships relied on by the decedent during his lifetime and taken to his grave could be undone, and great damage would be done to the public policy of stability of marriage.

S.C. Code Ann. § 63-3-530(A)(6) grants the family court exclusive jurisdiction over annulments. To allow the Respondents to challenge Mrs. Brown's annulment from Ahmed in this Court would subvert the exclusive authority granted to the family court by the South Carolina General Assembly.[29] According to the plain language of the statute, the General Assembly granted exclusive jurisdiction over annulments to the family court.[30] In so doing, the General Assembly prohibited all other courts from going behind the family court's annulment orders.

Lukich fits this statutory scheme because it involved an appeal from the family court, which had jurisdiction over annulments. *Lukich* did not allow an annulment order to be challenged in a court outside of the family court. Unlike Mr. Lukich, Mr. Brown withdrew his family court action for annulment during his lifetime. The legislative scheme did not give Mr.

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[28] *See, e.g., Neely*, discussed below.

[29] "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' Black's Law Dictionary 602 (7th ed. 1999)." Hodges v. Rainey, 533 S.E.2d 578, 582, 341 S.C. 79, 86 (2000).

[30] In S.C. Code § 63-3-530(A)(6), the Legislature says that "[t]he Family Court has exclusive jurisdiction...to hear and determine actions for annulment of marriage".

Brown the ability to challenge the annulment order outside of the family court during his lifetime, and his heirs likewise cannot go behind a family court order in this Court.

C. Even If This Court Had Jurisdiction, A Postmortem Annulment Action Is Not Possible.

The issue before this Court on summary judgment is whether Mrs. Brown is the surviving spouse of Mr. Brown. South Carolina Probate Code § 62-2-802 is the statute governing the determination of surviving spouse qualification. Section 62-2-802 specifically addresses annulment in this context. It provides that a surviving spouse is someone from whom the decedent did not get a divorce or an annulment:

> **Section 62-2-802. Effect of divorce, annulment, decree of separate maintenance, or order terminating marital property rights.**
> (a) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death. A decree of separate maintenance that does not terminate the status of husband and wife is not a divorce for purposes of this section.

Section 62-2-802(c) requires that any divorce decree or annulment be signed by the court and filed in the office of the clerk of court. It is too late for Mr. Brown, or those acting for or through him, to bring such an annulment action. In *Hatchell-Freeman v. Freeman*, 340 S.C. 552, 532 S.E.2d 299 (Ct. App. 2000), the Court of Appeals, addressing S.C. Code § 62-2-802, held that a divorce decree was invalid when it was filed three days after the husband's death, although his death occurred more than a week after the final divorce hearing. In *Bayne v. Bass*, 302 S.C. 208, 394 S.E.2d 726 (Ct. App. 1990), the wife committed suicide after the trial judge orally granted her request for divorce but before he signed a divorce decree. The judge signed the decree two days after she died but vacated it on motion by the husband's counsel. The Court of Appeals held that the order granting the divorce was void and that the court properly vacated its own order. Mr. Brown neither divorced nor had his marriage to Mrs. Brown annulled during his

lifetime. Therefore, under the Probate Code Mrs. Brown was still his wife at the time of Mr. Brown's death, and she is his surviving spouse.

Respondents – in privity with Mr. Brown and deriving any rights they have through him – are attempting to do after his death what he chose not to do in life. The exclusive method to invalidate a marriage is to bring an annulment action in the Family Court. Mr. Brown obviously knew that because he brought an annulment action in the Family Court, which he dismissed.[31] Again, this Court has no jurisdiction over annulment actions, but even if it did, it is too late for Mr. Brown to collaterally attack an annulment order. Annulment actions cannot be brought postmortem. Nor can Respondents do so.

D. Even If This Court Had Jurisdiction Over Annulments And Did Not Lack Necessary Parties, There Is No Reason To Disregard The Annulment Order.

A court has to have a reason to refuse to recognize an order, and the only reason is the failure of due process, either by failure to obtain personal jurisdiction or a lack of subject matter jurisdiction. *Yarbrough v. Collins*, 293 S.C. 290, 360 S.E.2d 300 (S.C. 1987) ("A judgment may be collaterally attacked if the court lacked jurisdiction and the lack of jurisdiction appears on the face of the record. *Turner v. Malone*, 24 S.C. 398 (1886)."); *Miles v. Lee*, 319 S.C. 271, 460 S.E.2d 423 (S.C. App. 1995) (similar); *Henry v. Cottingham*, 253 S.C. 286, 170 S.E.2d 387 (S.C. 1969) ("The decree of a Probate Court admitting a will to probate is final and conclusive if not reversed by the appellate court, or set aside and revoked by direct proceeding, and cannot be questioned collaterally. *Weinberg v. Weinberg*, 208 S.C. 157, 37 S.E.2d 507; *Reed v. Lemacks*, 204 S.C. 26, S.E.2d 441; Davis v. Davis, 204 S.C. 26, 28 S.E.2d 441." . . . . "*In Wilkinson v. Wilkinson*, 178 S.C. 194, 182 S.E. 640, this court said: 'As a proceeding to probate a will is a

[31] Notably, even in Mr. Brown's short-lived annulment action, he did not attack the annulment order but rather insisted that it was binding on Mrs. Brown.

judicial one, a judgment or decree admitting a will to probate stands on the same footing as a judgment of any other Court of competent jurisdiction; and while it is not conclusive in the sense that a person having a requisite interest may not attack it by a direct proceeding within the period of time allowed by statute, without a statute conferring the right to contest, the order admitting the will to probate would be final on all parties.'") *McCampbell v. Warrich Corporation*, 109 F.2d 115 (7th Cir. 1940) (a collateral attack "is not permissible if the court had jurisdiction over the parties and the subject matter."); *Burlington Data Processing, Inc. v. Automated Medical Systems, Inc., Clinical Management Systems, Inc., and William Carlson*, 492 F.Supp. 821 (D. Vermont 1980) ("A final, valid judgment, though erroneous, is not subject to collateral attack unless it can be shown that the court rendering it was without jurisdiction. *See Midissa Television Co. v. Motion Pictures for Televisions, Inc.*, 290 F.2d 203 (5th Cir. 1961), *cert. denied* 368 U.S. 827, 82 S.Ct. 47, 7 L.Ed.2d 30 (1961). *Anderson v. Tucker*, 68 F.R.D. 461 (D.Conn.1975). *1B J. Moore, Federal Practice*, s .407."); *Popp Telcom v. American Sharecom, Inc.*, 210 F.3d 928 (8th Cir. 2000) ("When a judgment is alleged to be simply erroneous or attacked on the basis of anomalies unrelated to the court's jurisdiction, collateral attack is not an option."). *See also* Fouche v. Royal Indemnity Company, 217 S.C. 147, 60 S.E.2d 73 (S.C. 1950) ("The probate court of Orangeburg County which rendered the judgment in this case is a court of record, and had full jurisdiction over the administration proceedings. It has been held in many cases in this state that a judgment is not open to successful collateral attack unless void on its face, or upon an inspection of the judgment roll. This principle seems to be self evident, and the authority of adjudged cases support it."...."As heretofore stated, the record in the probate court of Orangeburg County does not affirmatively disclose that the court was without jurisdiction of these appellants, hence their collateral attack on the judgment cannot succeed, and the order of

discharge is binding upon them.")

Even if this Court had jurisdiction concerning the annulment order, it finds that there is no defect in personal jurisdiction —i.e., the service was proper — and the family court had subject matter jurisdiction. There is no failure of due process and so there is no reason to refuse to recognize the order.

E. The Annulment Order Is Binding On All Parties.

The annulment order is binding on all parties. South Carolina provides:

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

S.C. Code Ann. § 20-1-80.

The validity of the attempted marriage between Mrs. Brown and Ahmed has already been addressed by the South Carolina court with jurisdiction. That court issued a final judgment invalidating the attempted marriage between Mrs. Brown and Ahmed, on the ground of bigamy. This annulment order is binding on Mr. Brown, and consequently is binding on Respondents.

In addition to *Lukich v. Lukich*, other South Carolina case law confirms this rule. In *Joye v. Yon*, 345 S.C. 264, 547 S.E.2d 888 (Ct. App. 2001), a husband and wife were divorced, and the husband was ordered to pay alimony. Some years later, the wife remarried. Six months later, her remarriage was annulled for bigamy, as the second husband had never divorced his prior wife. The first husband refused to resume paying alimony after the annulment, and the wife filed a contempt action to enforce the original decree. The husband then argued that the wife's remarriage, bigamous though it may have been, still terminated his ability to pay support.

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

> Yon also argues the court erred in reinstating his alimony obligation because he was not a party to Joye's annulment action. He asserts that he should have been made a party to the annulment action because its outcome directly affected him. We disagree.
>
> Generally, a person must be joined as a party to an action if his absence precludes complete relief among those already parties or his interest in the subject matter is so intertwined that he would not receive complete relief or resolution without his participation. Rule 19(a), SCRCP; see *First Citizens Bank & Trust Co.* v. *Strable*, 292 S.C. 146, 148,355 S.E.2d 278,279 (Ct. App.1987).
>
> Since Yon had no standing to challenge the granting of the annulment, it was not necessary for Joye to include him as a party to the action. Moreover, Yon suffered no prejudice by not being made a party to the action. Under South Carolina law, Joye's marriage to Vance was void ab initio and Yon's presence as a party to the action could not have altered the decision to grant the annulment.

Id. at 276, 547 S.E.2d at 894 (emphasis added). For exactly the same reasons, Respondents have no standing to question the invalidation of Mrs. Brown's previous attempted marriage to Ahmed because of Ahmed's bigamy.[32] That order can be questioned only in a direct attack by those who

[32] A leading authority on family law supports this South Carolina rule. "[A]nnulment decrees are binding upon nonparties as well as parties respecting the validity of the marriages involved." 1 Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 3.6 (2d ed. 1987). Professor Clark recognizes that this issue highlights the tension between the opportunity to be heard, on the one side, and the need for finality on the other. Although he recognizes that the rights of third persons may be affected by whether or not a marriage exists, he concludes: "No matter how clearly these [third-party] rights may depend on the existence of a marriage, they are not of the same degree of importance, seriousness or consequence as the interests of the spouses themselves in the marriage. It is perhaps this factor that has led to the well-established rule that a decree of divorce is conclusive on third parties with respect to the termination of the marriage. It is the writer's view that a decree of annulment should have the same effect."

were party to it, and only if that direct attack was timely and properly brought. Just as the first husband in *Joye* was bound by the annulment of the marriage between the wife and her second husband, so is the estate of Mr. Brown bound by the order invalidating ab initio the attempted marriage between Mrs. Brown and Ahmed.

In *Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003), the Supreme Court necessarily agreed with the court of appeals regarding the husband's standing to attack the annulment. The Court of Appeals was reversed as to the *effect* of the annulment upon the prior support obligation, and not as to the *existence* or *validity* of the annulment.[33]

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

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

S.C. Code Ann. § 20-1-520 (emphasis added).[34]

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[33] The effect of the final and binding Family Court order invalidating the attempted marriage between Mrs. Brown and Ahmed is that the Brown-Brown marriage is valid, per the *Lukich* case, as discussed below.

[34] If third parties were able to contest family court orders, the order would never be final and chaos in family relations would ensue. *See Neely v. Thomasson*, 365 S.C. 345, 618 S.E.2d 884 (2005). As to precedent regarding finality, the Court of Appeals in *Neely* cited cases as follows:

> Adickes v. Allison & Bratton, 21 S.C. 245, 259 (1884) (alteration and emphasis added) (quoting Freeman Judgments § 12), cited with approval in *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993). A decree of divorce is generally a final judgment of the court. Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996); cf. Corbin v. Kohler Co., 351 S.C. 613, 621, 571 S.E.2d 92, 97 (Ct. App. 2002) ("The final written order contains the binding instructions which are to be followed by the parties.")...See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) *(holding an unappealed ruling is the law of the case and cannot be later challenged).*

Neely v. Thomasson, 355 S.C. 521, 536, 586 S.E.2d 141, 144 (Ct. App. 2003) (emphasis added).

An annulment action and an action to validate a marriage, as described in § 20-1-520, are symmetrical: one brings an action to validate a marriage to confirm a marriage's validity while one brings an annulment action to confirm a marriage's invalidity. See Stuckey, *Marital Litigation in South Carolina*, Ch. 3-A. Thus, because "all persons concerned" are bound by a court determination that a marriage is valid, "all persons concerned" are likewise bound by a court's finding that a marriage is invalid. If third parties were able to contest final family court orders, the order would never be final and chaos in family relations would ensue.

Other states have held that annulments cannot be collaterally attacked by those who are not parties to the action. See, e.g., *Johnson County National Bank & Trust Co. v. Bach*, 189 Kan. 291, 369 P.2d 231 (1962) (certain beneficiaries made exactly the same argument that Respondents make—that the annulment was not binding on third parties – and the Kansas Supreme Court agreed with the wife that the annulment was dispositive and that it could not be questioned by third parties).

Just as the annulment decree in *Bach* was conclusive on the validity of the alleged marriage in that case, so is the annulment in this case likewise dispositive. The annulment can be attacked only in a prior direct attack filed by the parties to the action—Mrs. Brown and Ahmed.

A New York court stated the fundamental principle of law that underlies South Carolina's position:

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

judgment determining status was rendered.

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

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

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

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

The annulment order involves Mrs. Brown's status, and this status cannot be collaterally attacked by any third party. Because Mrs. Brown's putative marriage to Ahmed was void ab initio for bigamy, Mrs. Brown's status at the time of her marriage to Mr. Brown was that she had no impediment to that marriage.

Therefore, the Respondents have no legal authority to challenge the Family Court Order of annulment.

F. The Family Court Order Is Binding On Respondents Who Are in Privity with Mr. Brown.

Respondents are bound by the Family Court order. Heirs are in privity with their ancestors. *Thompson v. Hudgens*, 161 S.C. 450, 463, 159 S.E. 807, 812 (1931). Consequently, heirs are barred from asserting claims that their ancestors would have been barred from asserting. *Watson v. Watson*, 172 S.C. 362,369-71, 174 S.E. 33, 36 (1934). In *Watson*, the decedent was

barred from attacking a divorce; the Court held that those in privity with him, such as his children, were likewise barred. These rulings are obvious because heirs and devisees of a decedent cannot acquire any greater rights through the decedent than the decedent had himself. Similarly, a personal representative's relationship with the decedent exemplifies the classic case of privity with the decedent. It would be illogical for a personal representative, representing the decedent, or Respondents, claiming through the decedent, to have greater rights than the decedent had himself.

More generally, "[t]he term 'privity' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." *H.G. Hall Constr. Co. v. J.E.P. Enters.*, 283 S.C. 196, 204, 321 S.E.2d 267, 271 (Ct. App. 1984). *Carolina Baking Co. v. Geilfuss*, 169 S.C. 348, 168 S.E. 849, 852 (1933), held that a judgment is binding upon nonparties who "sought, consented to, or acquiesced in" the judgment. *Id.* To similar effect is *Tillman v. Tillman*, 93 S.C. 281, 76 S.E. 559 (1912). There, a father executed a deed giving custody of his children to his parents. A custody action then followed between the father's parents and the mother, in which the mother prevailed. The court held that the father was bound by the judgment:

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

Id. (emphasis added). By supporting his parents in the custody case, therefore, the father became bound by the result.

In *Neely v. Thomasson*, 365 S.C. 345, 618 S.E.2d 884 (2005), the decedent was divorced from his wife during his lifetime, and the divorce decree held that a daughter was born during the

marriage. After the decedent's death, the decedent's heirs argued that they were not parties to the divorce case, that they were not bound by the court's decision, and that the daughter was actually not the child of the decedent. The South Carolina Supreme Court held that the decedent was bound by the judgment, and that the heirs were likewise bound:

> Because the issue of paternity was raised and ruled upon in a prior action, Decedent, if alive, would have been barred from challenging paternity at a later date. *See Eichman,* 285 S.C. at 380, 329 S.E.2d at 766. As a result, Decedent's heirs are likewise barred from asserting claims that Decedent himself would have been barred from asserting. *See Watson,* 172 S.C. at 370-71, 174 S.E. at 36. Moreover, we find that it would be unjust to allow Decedent's siblings to assert a claim that Decedent himself never chose to assert during his lifetime. In fact, there is no evidence in the record that Decedent took any steps whatsoever during his lifetime to disclaim Nancy as his daughter. To the contrary, Decedent acknowledged, on more than one occasion, that Nancy was his child. Therefore, we hold that Decedent's siblings should not have been permitted to challenge the prior paternity determination.

Id. at 354-55, 618 S.E.2d at 889 (emphasis added). The stipulated facts show that Mr. Brown supported the annulment litigation by paying Mrs. Brown's legal fees. After signing the Consent Order of Dismissal concerning his own annulment action, Mr. Brown never again sought to annul his marriage to Mrs. Brown. As such, the Respondents, in privity with Mr. Brown, are bound by the Family Court's order.

G. Binding Effect Of In Rem Judgments.

1. General Rule.

The LSA and other Respondents argue that this Court is not bound by the factual findings set forth in the judgment annulling Mrs. Brown's marriage to Ahmed. The Court respectfully disagrees.

The LSA expressly cites section 73 of the Restatement (First) of Judgments. That section applies on its face only to "Proceedings with Respect to Property." This case is governed by section 74, which applies to "Proceedings with Respect to Status." The validity

of the marriage between Mrs. Brown and Ahmed is a matter of status, not a matter of property. There is no question that a judgment annulling a marriage is a judgment in rem.

Section 74 of the Restatement provides:

> (1) In a proceeding in rem with respect to a status the judgment is conclusive upon all persons as to the existence of the status.
>
> (2) A judgment in such a proceeding will not bind anyone personally unless the court has jurisdiction over him, and it is not conclusive as to a fact upon which the judgment is based except between persons who have actually litigated the question of the existence of the fact.

Restatement § 74.

2. Section 74(1).

The above language states two competing rules. The first rule provides that an in rem judgment is binding upon "all persons" when the issue is the existence of the status. The drafters elaborate:

> *Effect of judgment on the status.* Where in a proceeding for the creation or termination or judicial determination of a status a competent court has after proper notice given a valid and final judgment, the judgment is binding on all persons in the world as to the existence of the status. The judgment is not subject to collateral attack by anyone. . . . *As far as the status is concerned, the judgment is binding not only on persons who were subject to the jurisdiction of the court which rendered the judgment, but also on persons not personally subject to the jurisdiction of the court.*

Restatement § 74 cmt. *a*. As regards the existence of the status itself, therefore, a judgment of annulment binds everyone, including persons not parties to the action or otherwise not subject to personal jurisdiction.

Mrs. Brown provides compelling authority in support of section 74(1). "*[A]nnulment decrees are binding upon non-parties* as well as parties respecting the validity of the marriages involved." 1 Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 3.6 (2d ed. 1987) (emphasis added). Professor Clark

continues:

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

Id.

Clark's rule has been followed in South Carolina. *See Joye v. Yon*, discussed above.

The holding of a New York decision is squarely on point:

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

Presbrey v. Presbrey, 6 A.D.2d 477, 480, 179 N.Y.S.2d 788, 792 (1958) (emphasis added), *aff'd*, 8 N.Y.2d 797, 168 N.E.2d 135, 201 N.Y.S.2d 807 (1960).

In *Johnson County Nat. Bank & Trust Co. v. Bach*, 189 Kan. 291, 369 P.2d 231 (1962) and *Michelli v. Michelli*, 527 So.2d 359, 361 (La. Ct. App. 1988), courts directly held that annulments were binding upon third parties. These decisions did not draw any distinction between the facts and the law. They held, consistently with § 74(1) of the first Restatement, that in rem judgments of status bind all parties on the issue of status itself.

Another similar case is *Headen v. Pope & Talbot, Inc.*, 252 F.2d 739, 744 (3d Cir. 1958), where the court, dealing with South Carolina facts, expressly acknowledged the exception of § 74(2), but held that the case was controlled by the general rule of § 74(1). An in rem judgment of status binds the world on the question of status itself. Third parties are not bound only as to

questions collateral to status. As to status, and necessarily the facts determining status, all parties are bound. *See also Bair v. Bair*, 91 Idaho 30, 31, 415 P.2d 673, 674 (1966) (denying decedent's heirs' attempt to attack a divorce decree obtained by decedent's widow and stating that the heirs "as strangers to the divorce decree, have no right to attack its validity. To hold otherwise could cause chaos and uncertainty in the lives of thousands of persons" and that "[o]nce a divorce decree is final, it should not be disturbed by strangers who had no preexisting rights or interests adversely affected by such judgment); *Brown v. United States*, 196 F.2d 777, 777-78 (D.C. Cir. 1952) ("Appellant was a stranger to the divorce proceedings. She had no interest in the same; no right or standing to qualify as a party to the proceedings and oppose a divorce").

The rule was applied to an annulment in *Deyette v. Deyette*, 92 Vt. 305, 104 A. 232 (1918). That case was a Vermont divorce action. The wife had been previously married, but the marriage had been annulled in New York on grounds that the parties were underage. The husband attempted to collaterally attack the judgment on grounds that the wife and her first husband were not actually underage, but the court held that he lacked standing. 104 A. at 234.

The Court further finds that the rule of section 74(1) is good policy. If annulment judgments are not binding upon third parties, then there would be no such thing as a final judgment of annulment. Persons whose marriages are annulled would never have any security, because the judgment would always be subject to collateral attack by persons not parties to the original action. For example, if a woman's first marriage is dissolved by annulment, and she then marries again, the facts of the annulment would not be binding on third parties. She would be required to prove the merits of her annulment every time the validity of her second marriage becomes a contested issue. That would happen not only in her divorce action after the second marriage, but also when she takes title to property with

her second husband or files a joint federal or state income tax return. The LSA's argument boils down to an assertion that a decree of annulment is itself a nullity if the facts are contested.

There are strong reasons why annulments should be binding upon all third parties on issues of status—that is, as to the invalidity of the marriage annulled. The Court finds that on the issue of status, the judgment annulling Mrs. Brown's marriage to Ahmed is binding on all third persons, regardless of whether they were parties to the proceedings. Specifically, on the issue of status, the judgment is binding on Mr. Brown and his heirs.

3. Section 74(2).

The LSA recognizes the rule of section 74(1), but argues that this case is controlled by another rule. The LSA at points cites section 73 for this rule, but section 73 applies only to property judgments and not to status judgments. But the LSA also cites section 74(2), and as noted above, that section clearly does apply to status judgments.

The LSA argues under section 74(2) that the annulment does not bind James Brown on issues of fact. The LSA misconstrues section 74(2). That subsection again provides:

> A judgment in such a proceeding will not *bind anyone personally* unless the court has jurisdiction over him, and it is not conclusive as to a fact upon which the judgment is based except between persons who have actually litigated the question of the existence of the fact.

Restatement § 74(2) (emphasis added). The LSA construes this section to hold that an in rem judgment does not bind anyone on questions of fact. This position sweeps too broadly.

The Restatement provides, in section 74(1), that judgments of annulment are binding on all third parties *as to the existence of the status itself.* But if a judgment is binding on the issue of status, both its findings and its conclusions are necessarily binding. Indeed the

LSA and Respondents claim that they are not disputing Mrs. Brown's status. It is nonsensical to say that a person is bound only by a court's conclusions, and not by the factual findings that lead inevitably to those conclusions. If the factual findings are not binding, then the court in a future action is free to find different facts and reach a different result, and nothing is binding at all.

The LSA's position uses section 74(2) to functionally destroy section 74(1). The Court rejects that position. The Court holds that where the issue is the existence (or necessarily, the nonexistence) of a status itself, an in rem judgment regarding status binds all third parties. It is binding not only as to its conclusions, but also as to its factual findings.

This result is completely consistent with section 74(2). The key phrase in that section is highlighted in the quotation above. A judgment does not "bind anyone personally" unless the court has jurisdiction over him. That is, a judgment in rem cannot have the binding effect of a judgment in personam unless the court has personal jurisdiction over the defendant. But a judgment that cannot be binding in personam can still be binding in rem. The status change itself is clearly an in rem action, so as regards the issue of status itself, the judgment binds anyone. But as to issues *other than status*, which may require in personam jurisdiction, the judgment is not binding.

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

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

Id. § 74 cmt. *b* (emphasis added).

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

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

This rule makes perfect sense. In rem jurisdiction allows the court to adjudicate only the question of status. The status here is Mrs. Brown's marital or non-marital status when she married Mr. Brown. If the order is binding, her status was unmarried. It cannot be used as a jurisdictional piggyback to allow the court to decide issues other than the question of status, which are not properly a basis for in rem jurisdiction. The effect of section 74(2) is that in rem judgments bind third parties only as to issues that are proper subjects for in rem jurisdiction, such as status. An in rem judgment cannot be used to bind third parties on an issue that is not subject to personal jurisdiction.

But the LSA seeks to give a broader effect to section 74(2). The LSA argues under

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

The Court therefore holds that the annulment order in this case binds all third parties on the question of status itself. Third parties are bound on status issues by both the judgment's factual findings and its conclusion. On issues other than the status change itself, however, the annulment does not bind third parties unless they were subject to the personal jurisdiction of the court.

The cases cited by the LSA are consistent with this discussion. For example, in *Gratiot County State Bank v. Johnson*, 249 U.S. 246 (1919), the Supreme Court held:

> The [bankruptcy] adjudication is, for the purpose of administering the debtor's property, that is, in its legislative effect, conclusive upon all the world. Compare *Shawham v. Wherritt*, 7 How. 627, 643, 12 L. Ed. 847. So far as is [sic] declares the status of the debtor, even strangers to the decree may not attack it collaterally. *Michaels v. Post*, 21 Wall. 398, 428, 22 L. Ed. 520; *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S. 656, 661, 662, 23 L. Ed. 336. Compare *Hebert v. Crawford*, 228 U. S. 204, 208, 209, 33 Sup. Ct. 484, 57 L. Ed. 800. But an adjudication in bankruptcy, like other judgments in rem, is not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto.

Id. at 248.

The LSA cites the last sentence and argues that the Court held that the factual findings

in the bankruptcy case were not binding anywhere. But the Supreme Court expressly held, in the first two sentences, that the bankruptcy judgment was "conclusive upon all the world," *id.*, as regards the issue of status. If the factual findings in the bankruptcy judgment were not likewise binding against the world, *on the issue of status*, then the Court's third sentence completely destroyed its first two sentences. That was not the Court's intent. *Gratiot County* recognizes the same two competing rules as section 74(1) and (2). It simply held on the facts that the issue in the later action was not one of status.

In *Hunter v. Hunter*, 111 Cal. 261, 43 P. 756 (1896), the issue was the effect of a divorce judgment. The court held that the judgment "was conclusive against all the world that the plaintiff in that suit was no longer the wife of Joseph Milam, and it was an adjudication of nothing else." *Id.* at 265, 43 P. at 757. Likewise, the present annulment is conclusive against all the world that Mrs. Brown was never validly married to Ahmed.

In *Becher v. Contoure Laboratories*, 279 U.S. 388 (1929), the first case was a state court action to declare a party trustee of a patent, while the second case was a federal court action for patent infringement. The Supreme Court very emphatically pointed out that these were different cases, presenting different issues. Whether the patent was placed in a trust said nothing about whether the patent was infringed. *Becher* therefore involved a collateral right, not a direct question of status.

In *Hendrick v. Biggar*, 209 N.Y. 440, 442, 103 N.E. 763, 764 (1913), the issue was whether a judgment in a divorce case finding that a spouse committed adultery was binding in a later action for alienation of affections. The issue in the alienation of affections case was not the validity of the divorce; it was whether the defendant had alienated the affections of a spouse. The second action was therefore a question collateral to status, on which personal

jurisdiction was required.

Fromm v. Glueck, 161 Misc. 502, 293 N.Y.S. 530 (Sup. Ct. 1937), involved an in rem judgment from another state. The case involved jurisdictional issues not present here, where both the former and present actions arise in South Carolina. The court also recognized that the judgment was binding on direct questions of status. "[I]t must be conceded that, even though personal jurisdiction of the defendant had not been obtained, the Court of Chancery had the full power to decree the foreclosure of the mortgage and the sale of the property." *Id.* at 504, 293 N.Y.S. at 533.

Finally, *In re Rowe's Estate*, 172 Or. 293, 141 P.2d 832 (1943), is distinguishable on several grounds. To begin with, the case involved a decree of divorce, not a decree of annulment. The issue was whether a finding of desertion in the divorce decree conclusively established lack of access for the purpose of paternity. The fact at issue was therefore again not the status of marriage itself, but rather a fact collateral to status. The court expressly held that the divorce was binding on issues of status. "[T]he decree in a divorce suit as a decree in rem binds the whole world as to the status of the parties, to the extent that their status is the res adjudicated[.]" *Id.* at 302, 141 P.2d at 836.

In short, all of the cases cited by the LSA recognize the same basic two rules stated in section 74(1) and (2). An in rem judgment binds the world on the direct question of status. It does not bind any nonparty on collateral issues, which are not subject to in rem jurisdiction, and which require that the court have personal jurisdiction over the defendant. The textbook example, cited expressly in the *Restatement* comments, is alimony in a divorce case.

Having stated the competing rules of section 74(1) and (2), the Court must now decide which of those two competing rules applies here. The issue presented here is whether Mrs.

Brown is Mr. Brown's surviving spouse. Mrs. Brown has presented a valid marriage certificate, placing upon the Respondents the burden of proving that her most recent marriage is invalid. They seek to defeat Mrs. Brown's claim by proving that her marriage to Mr. Brown was bigamous. But it is bigamous only if Mrs. Brown had a valid marriage to someone else at the time she married Mr. Brown. To prove that Mrs. Brown's marriage to Mr. Brown was bigamous, the Respondents must prove that Mrs. Brown's marriage to Ahmed was valid.

The issue here is therefore directly one of status: Was Mrs. Brown's marriage to Ahmed valid? The judgment of annulment held that it was not. The Respondents argue that the judgment of annulment was wrong. If the judgment of annulment was wrong, it would obviously affect Mrs. Brown's status. The entire issue turns upon whether the annulment judgment correctly held that Mrs. Brown's status had been that of a single person all along, because her marriage to Ahmed was void from its inception.

Because the central issue in this case is the effect of the annulment judgment upon Mrs. Brown's status, this case falls squarely under section 74(1). Section 74(2) states that the factual findings in an in rem judgment are not binding, but only on issues other than the status change itself, which turn upon jurisdiction in personam and not upon jurisdiction in rem. *Section 74(2) cannot be used to attack the factual findings of an in-rem judgment on the question of status itself.* To permit that is to allow section 74(2) to completely destroy section 74(1). Regarding the issue of status itself, the judgment annulling Mrs. Brown's marriage to Ahmed is binding upon all third parties, including Mr. Brown and his heirs.

The LSA and most, if not all, of the Respondents agreed in their arguments before

the Court that Mrs. Brown's marriage to Ahmed was legally annulled. They stated that they were not questioning her status. They agreed that the annulment order is binding "on all the world." Their disagreement is on the facts underlying the annulment. However, this Court cannot separate the judgment from the facts. If Mrs. Brown's marriage to Ahmed was annulled, it was annulled on the grounds set forth in the Order. It could not be annulled for no reason. The factual findings are binding on direct questions of status, although, arguably, factual findings on collateral matters are not binding.

To that end, the Respondents have cited no case holding that the factual findings of an annulment or divorce are not binding when the issue being raised in the second action is the direct question of status itself, and not a collateral issue. For the foregoing reasons, the Family Court Order of annulment is binding on the Respondents.

V. CONCLUSION.

This Court finds that the conclusion it has reached is not unfair or inequitable to Mr. Brown or the estate. Mr. Brown was well aware of Mrs. Brown's annulment action. He paid Mrs. Brown's legal fees. He was copied on pleadings. He sought to have the findings of fact set forth in the annulment order adopted in his own later annulment case. It has long been settled that a person who accepts the benefits of even a void order is estopped to question its validity. *Edwards v. Edwards*, 254 S.C. 466, 176 S.E.2d 123 (1970) ("Since [husband] proposed the transfer of the property and has accepted the benefits accruing to him therefrom, he is now estopped to assert the invalidity of the judgment."); *Scheper v. Scheper*, 125 S.C. 89, 118 S.E. 178 (1923) ("Even where one who did not procure it accepts the benefits of a void judgment, he is estopped to assert its invalidity.").

Mr. Brown knew he could pursue an annulment from Mrs. Brown as he initiated such an action himself. If he wanted to annul his marriage, he could have proceeded with the action he commenced. But he decided not to proceed with it. As he never obtained an annulment during his lifetime, his marriage was never annulled and he was married to Mrs. Brown at the time of his death, certainly for the purposes of surviving spouse pursuant to S.C. Code Ann. § 62-2-802, which required him to take action. Further, in this case, Mr. Brown affirmatively sought to benefit specifically from the Findings of Fact in the annulment order. These are the very Findings of Fact the LSA now wants this Court to ignore. He alleged in his own short-lived annulment action that the "Findings of Facts of the Charleston Family Courts" were binding.[35]

Therefore, it is hereby ORDERED, DECREED and ADJUDGED that Tommie Rae Brown is the surviving spouse of James Joseph Brown. The Family Court's April 15, 2004 Final Order is binding on James Joseph Brown and his heirs and must be respected by this Court.

It is further ORDERED, DECREED and ADJUDGED that the Petitioner Tommie Rae Brown's Motion for Summary Judgment on her status as James Joseph Brown's wife and surviving spouse is granted, and the Limited Special Administrator's Motion for Summary Judgment is denied.

It is further ORDERED, DECREED and ADJUDGED that all other issues, including the validity of the prenuptial agreement between Tommie Rae Brown and James Joseph Brown are reserved for a future determination.

This 13 day of January 2015, at Aiken, South Carolina.

DOYET A. EARLY, III
JUDGE, SECOND JUDICIAL CIRCUIT

[35] Joint Stipulation of Facts at 000070, ¶ 10 (Mr. Brown's Amended Complaint for Annulment).