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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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 (Court of Appeals)
Appellate Case No. 2018-001990 (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, Michael Deon Brown, and Daryl Brown, ... Defendants,

Of whom Deanna Brown-Thomas, Yamma Brown, and Venisha Brown are the ..... Petitioners.

TOMMIE RAE BROWN'S PETITION FOR REHEARING PURSUANT TO RULE 221(a), SCACR

Tommie Rae Brown ("Mrs. Brown") hereby petitions this Court pursuant to Rule 221(a), SCACR, for a rehearing of the matter decided by Opinion No. 27982, issued June 17, 2020.

I. Introduction

A. If this Court does not vacate or revise its opinion, it will cost the beneficiaries of the I Feel Good Trust ("Charitable Trust") a substantial share of tens of millions of dollars.

The dispute before this Court, as a practical matter, is about federal copyright termination rights, believed to be worth tens of millions of dollars. The Court's opinion ("Opinion") means that Petitioners and their siblings will get all of those valuable rights and the James Brown Charitable Trust ("Charitable Trust") will get none of those benefits. Mrs. Brown has agreed to contribute 65 percent of the proceeds of her share of those federal termination rights to the Charitable Trust. If she is the surviving spouse, her share is 50 percent of those rights, with Petitioners (and their siblings) sharing the other 50 percent; if she is not the surviving spouse, Petitioners and their siblings get all these rights and the Charitable Trust beneficiaries receive none. If Mrs. Brown is not the surviving spouse, she has nothing to contribute to the Charitable Trust, which otherwise has no right to federal termination rights. The dispute before this Court has nothing to do with Mrs. Brown taking assets from the Estate or Charitable Trust. She settled several years ago with the Estate and Charitable Trust and has agreed to dismiss all of her contests and spousal claims against the Estate and Charitable Trust.[1] The Estate and Charitable Trust consequently withdrew from the appeal of the summary judgment confirming her status as surviving spouse. Thus, the sole practical result of the Opinion is to transfer the multi-million dollar federal termination rights proceeds from needy children to James Brown's adult children, to whom he left nothing of substance in his will.

As discussed below, the Court failed to apply its new "record-clearing" rule fairly and uniformly to both marriages at issue in this case. Perhaps the Court made this mistake because it

[1] *See* Respondent's Brief at pp. 3-6, explaining the settlement agreement filed in the Court of Appeals on August 4, 2017, along with a copy of the filed settlement agreement in Exhibit A.

believed it was preventing Mrs. Brown from taking assets away from the charitable trust, but its decision has caused the opposite result: valuable assets that would have passed to the charitable trust because of Mrs. Brown's settlement agreement with the estate and trust will now pass to Petitioners instead. By overturning established case law, ignoring legislative intent, dismissing public policy, and failing to apply its reasoning uniformly to both marriages in question in this case, this Court has completed its decimation of the James Brown Charitable Trust ("Charitable Trust"), which began in *Wilson v. Dallas,*[2] by eliminating Mrs. Brown's contribution of valuable federal rights to the charitable trust and doubling Petitioner's share of those rights. This case is not about the probate estate of James Brown ("Mr. Brown"). In her settlement with the Estate and Trust, Mrs. Brown has agreed to dismiss any contest or claim against the Estate and Trust. In compliance with that settlement agreement, Mrs. Brown has already dismissed her will and trust contests; the Estate and Mrs. Brown agreed that she would leave her spousal claims pending as a foundation for a final determination of her status as surviving spouse and that, after such determination, she will formally dismiss her spousal claims as well.

Rather than a dispute over the probate estate and trust assets, this case is simply a dispute over who will be entitled to receive valuable federal copyright termination rights, which by federal law pass to Mr. Brown's intestate heirs. Mr. Brown's federal termination rights are believed to be worth tens of millions of dollars.[3] Accordingly, these federal termination rights are worth many times more than the date of death value of Mr. Brown's estate and trust.[4]

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

[3] *See* settlement agreement, *supra* note 1. See also Affidavit of Peter Afterman, at Exhibit B.

[4] *See,* e.g., Sue Summers, Newberry Observer (May 10, 2018) (indicating that the Estate and the Internal Revenue Service agreed on a date of death music valuation of approximately $4.7 million dollars. Petitioners settled their own separate will and trust contests of the Estate and Charitable Trust, which was finally resolved in 2019. *Estate of Brown,* 427 S.C. 138, 828 S.E.2d 789 (S.C. App. 2019). Petitioners each received $37,500 for dismissing their contests,

Importantly, by federal law, in no event would the estate and trust be entitled to any federal termination rights. The only way the estate and trust would be entitled to any value from these federal termination rights is because Mrs. Brown, in the settlement agreement, effectively contributed to the estate and trust 65 percent of the proceeds from her share of the federal termination rights, which she is entitled to only if she is the surviving spouse. Thus, this Court's ruling that Mrs. Brown is not the surviving spouse means that she is not entitled to any federal termination rights, and thus she has nothing to contribute to the estate and trust, so that the estate and trust are deprived of any value from the federal termination rights. Rather, Petitioners and the other adult children take all of the federal termination rights.

In the initial 2009 settlement agreement among the estate and trust, Mrs. Brown, and the adult children — including Petitioners — had each agreed to effectively contribute 75 percent of their federal termination rights proceeds to the estate and trust. By rejecting that settlement, *Wilson v. Dallas* invalidated that contribution,[5] costing the Charitable Trust and its beneficiaries millions of dollars.

Several years ago, in the current settlement agreement between Mrs. Brown and the estate and trust, Mrs. Brown once again agreed to contribute a substantial portion of her

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demonstrating further that the federal termination rights are perceived to be far more valuable than the estate's date of death value. See also Affidavit of Peter Afterman, at Exhibit B.

[5] A seminal reason for this Court's decision in *Wilson v. Dallas* was the acceptance as valid of a purported prenuptial agreement. The validity of that purported prenuptial agreement had never been tested in the lower court, for good reason: under the clear provisions of South Carolina Probate Code section 62-2-204, a prenuptial agreement is valid for elective share purposes only if the deceased spouse provides a fair disclosure of his assets in writing before execution. There was never any such disclosure by Mr. Brown anywhere in the voluminous record in that case. This Court recognized in this case that any purported prenuptial agreement was not an issue, even though the Opinion failed to note the real reason for that: under the settlement agreement in this case, Mrs. Brown agreed to dismiss her spousal claims, so any prenuptial agreement would be moot.

termination rights proceeds — this time effectively 65 percent. Since the invalidation of the 2009 settlement in *Wilson v. Dallas*, the children have not entered into any such settlement. Thus, *Wilson v. Dallas* ensured that the estate and trust would be deprived of any contribution of federal termination rights proceeds from the adult children. By determining that Mrs. Brown is not the surviving spouse, this Court has ensured that the estate and trust will receive *no* federal termination rights proceeds, thereby completing this Court's decimation of the estate and trust.

This case is actually about Petitioners disputing Mrs. Brown's status as surviving spouse so Petitioners and other children can take all the federal termination rights, thereby depriving the estate and trust of any value from the federal termination rights. Thus, this case is about Petitioners — not Mrs. Brown — attempting to drain assets from the estate and trust. The Court's opinion filed June 17, 2020 (the "Opinion"), allowed the children to do so and has deprived the estate and trust of any value from the federal termination rights, which again are worth far more than the date of death value of the estate and trust's probate assets.

The Court also appears to operate under the incorrect premise that Mrs. Brown is somehow preventing the charitable trust from giving scholarships. Mrs. Brown settled with the estate and trust in 2008, and that settlement was approved by the lower court in 2009, but this Court in *Wilson v. Dallas*, overturned that settlement in 2013 thereby re-igniting all the litigation involving the estate and trust. Mrs. Brown again settled with the estate and trust several years ago, this time contributing 65 percent of her termination rights proceeds. Petitioners and other children had their own separate will and trust contests, which they settled with the estate around the same time, but without contributing any of their termination rights proceeds. However, Petitioners continued to fight Mrs. Brown's status as surviving spouse, thereby depriving the charitable trust of her contribution of termination rights proceeds and extending the litigation.

So it has been Petitioners, not Mrs. Brown, who have continued the litigation for years and prevented the giving of scholarships. By prevailing, Petitioners have taken Mrs. Brown's share of the termination rights proceeds for themselves and deprived the Estate and Charitable Trust of 65 percent of tens of millions of dollars.[6]

B. The Court failed to apply its new record-clearing rule to both marriages in this case.

A significant mistake in the Opinion is its failure to apply its new record-clearing rule to both marriages in question. The Court held that Mrs. Brown failed to obtain an annulment from her prior bigamous marriage before she married Mr. Brown so that she was considered married at the time she married Mr. Brown; consequently, the Brown-Brown marriage was never valid because it was bigamous. However, the Court failed to apply that same rationale to Mrs. Brown's prior attempted marriage to Javed Ahmed ("Ahmed"). Had it applied the same rule to the Brown-Ahmed marriage, the Court would have reached the conclusion that, because Ahmed had not obtained an annulment before he attempted to marry Mrs. Brown, the Brown-Ahmed marriage was never valid because it was bigamous, in which event Mrs. Brown was not married at the same time she married Mr. Brown. Put another way, the Court found the Brown-Brown marriage bigamous and never valid because Mrs. Brown did not obtain an annulment before that marriage, yet it failed to apply the same rule and find the Brown-Ahmed marriage bigamous and

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[6] *See* Afterman affidavit, Exhibit B, indicating the lack of funds to provide scholarships caused by Mrs. Brown's inability to contribute proceeds from termination rights to the Charitable Trust. The Opinion misapprehends another cause of the failure to so far provide scholarships from the charitable trust. In *Pope v. Estate of Brown*, pending in the Court of Appeals (No. 2019-000362), a former personal representative and trustee is claiming millions in fees for approximately 18 months service as personal representative and trustee. That exorbitant claim precludes the trust from distributing meaningful scholarships until it is resolved. Thus, the Opinion is mistaken when it indicates that its decision now allows the Charitable Trust to commence distributing scholarships to any meaningful degree.

never valid because Ahmed did not obtain an annulment before that marriage. If the Court had applied its record-clearing rule to both marriages, Mrs. Brown was free to marry Mr. Brown at the time of their marriage. The Court has to agree that Ahmed was married when he married Mrs. Brown because the Opinion upholds the annulment order as valid and binding as to status. The Court states that the annulment order is valid as to status, yet also states that the "alleged bigamous marriage of Respondent's first marriage was never established in this estate matter." This is a completely contradictory statement: By finding that the annulment order — which found that as a conclusion of law the Brown-Ahmed marriage was invalid for bigamy and ordered that the marriage was void *ab initio* [7] — is not valid for the "estate matter," this Court has invalidated the order issued by the family court judge who actually heard the case. The precedent set is chaotic — presumably any attack on a status in rem order will occur in "another matter," so no in rem order is safe as to status. The decision deprives Mrs. Brown of her statutory rights, Mrs. and Mr. Brown of their constitutional right to marry, and Mrs. Brown (and ultimately the Charitable Trust) of her federal copyright interests.

C The Court Fails to Honor Mr. Brown's Intentions.

As discussed below in Part XIII (Conclusion), James Brown died knowing that he was married to Mrs. Brown. We know this because of what he did and what he did not do. He knew about Mrs. Brown's putative marriage to Ahmed and even brought an action to annul his marriage to Mrs. Brown (after he paid for her annulment action in the Brown-Ahmed matter), but he dismissed his annulment action by consent. He could not have thought that the annulment action was unnecessary to terminate his marriage to Mrs. Brown because the law at that time — before *Lukich* and this Court's record-clearing rule — would not have invalidated their marriage;

[7] ROA pp. 295-96.

in any event, if he wanted to invalidate their marriage, why not pursue the annulment to conclusion, and if the law invalidated their marriage without an annulment, then why bring the action in the first place? After all the family court actions, he made numerous public pronouncements, such as the publication of his autobiography, confirming that Mrs. Brown was his wife. After the family court actions, he never brought another annulment action.

Not one piece of evidence in the record or cited by this Court indicates or even implies that he did not think he was married to Mrs. Brown when he died. The Opinion decimates the Charitable Trust that this Court recognized he wanted when he died and diverts extremely valuable federal termination rights proceeds from that Charitable Trust to Petitioners, who were beneficiaries of only some personal property in his will. Although the federal termination rights operate by federal law, his treatment of his children in his will — executed before his marriage to Mrs. Brown — indicates that he did not want them to benefit significantly, and certainly evidences that he did not want them becoming even wealthier at the expense of needy children who would take under the Charitable Trust.

Overriding what Mr. Brown understood and wanted when he died — that he was married to Mrs. Brown and that his Charitable Trust would flourish — this Court has done the opposite of honoring James Brown and his legacy. To do so, it ignored its lack of subject matter jurisdiction; it ignored the lack of Petitioners' standing; it reversed all case precedent holding that a bigamous marriage is never valid (the Brown-Ahmed marriage was never valid); it reversed the order of a family court not properly before it on appeal; it rejected the public policy that a bigamous marriage is never valid; it ignored the plain language of a statute; it created a new rule that allows a bigamous marriage to be valid; it opened the door for third parties to contest in rem status rulings about marriages, divorce, and annulments, creating a precedent for

chaos and uncertainty for marital status; and it applied its new rule selectively and disparately to invalidate the Brown-Brown marriage but not to invalidate the earlier Brown-Ahmed marriage (which would be invalid under the existing law as well as under a uniform application of the Court's new rule). It would not be proper for a court to do all of that even to honor a decedent's wishes; it is certainly not proper for a court to do all of that to override a decedent's wishes.

II. This Court Lacks Subject Matter Jurisdiction to Invalidate the Brown-Brown Marriage

This Court misapprehends and is mistaken about subject matter jurisdiction. This Court lacks subject matter jurisdiction and has thus violated Mrs. Brown's right to due process. This Court mistakenly accepts Petitioners' assertion "that subject matter jurisdiction is not implicated [because] Petitioners did not seek to overturn the annulment or the family court's order."[8] Contrary to Petitioner's assertion, Petitioners are seeking to overturn the ceremonial marriage of James Brown to Mrs. Brown, for which this Court does not have subject matter jurisdiction. The Opinion holds that the Brown-Brown marriage is invalid, effecting a postmortem annulment (which this Court recognizes it is doing by discussing that it is appropriate to annul a marriage postmortem).[9] This Court does not have subject matter jurisdiction to do so in this case.

This case is a probate matter because it arises out of Mrs. Brown's assertion of her elective share. Because Petitioners disputed Mrs. Brown's right to an elective share, Mrs. Brown sought a partial summary judgment confirming her status as surviving spouse in the probate matter. Because this case is therefore a probate case, it was initiated in probate court and removed to the circuit court, thereby sitting in probate. The South Carolina Probate Code applies

[8] The assertion that Petitioners do not seek to overturn the family court order of annulment is questionable in itself given this Court's acceptance of Petitioners' premise that they accept the family court order as to status but not as to facts, which creates a non-sequitur as discussed below at Part XI.

[9] This Court is also mistaken about that, as is discussed below at Parts III, IV.

because this case involves an elective share claim.

The Opinion invalidates or annuls the marriage between James Brown and Mrs. Brown, who had a ceremonial marriage. *However, a court sitting in probate does not have subject matter jurisdiction to determine the validity of marriage.* The Probate Court is a court of limited jurisdiction. South Carolina Code section 62-1-302(c) does not grant a court sitting in probate the subject matter jurisdiction to determine the validity of a marriage.[10] An annulment determines that a marriage is invalid.[11] Only a family court in South Carolina has subject matter jurisdiction over annulments. S.C. Code Ann. § 63-3-530(A)(6). This has been the law in South Carolina for a very long time. *See, e.g., White v. White*, 283 S.C. 348, 323 S.E.2d 521 (1984); *Splawn v. Splawn*, 311 S.C. 423, 429 S.E.2d 805 (1993); *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004).[12] Nor does a circuit court have subject matter jurisdiction to determine the validity of a marriage.

Courts without jurisdiction affecting fundamental rights such as marriage deny a litigant due process of law under the state and federal constitutions.

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[10] Section 62-1-302(c) does grant a court sitting in probate the jurisdiction to "interpret a marital agreement," meaning that a court sitting in probate could interpret the meaning of, for example, a prenuptial agreement. But interpreting a marital agreement is not the same as determining the validity of a marriage, which is reserved only for family courts. Section 63-3-530(B) similarly provides that "Notwithstanding another provision of law, the family court and the probate court have concurrent jurisdiction to hear and determine matters relating to paternity, common-law marriage, and interpretation of marital agreements; except that the concurrent jurisdiction of the probate court extends only to matters dealing with the estate, trust, and guardianship and conservatorship actions before the probate court." Section 63-3-530(A)(6) provides exclusive jurisdiction to the family court over annulments. The probate court does not have any jurisdiction over annulments.

[11] *See* Roy T. Stuckey, *Marital Litigation in South Carolina* § 3.A (3d ed. 2006).

[12] For some reason, in *Neely v. Thomasson*, 365 S.C. 345, 618 S.E.2d 884 (S.C. 2005) (note 1), the Court, anticipating statutory amendments, mistakenly states that the amendment would provide concurrent jurisdiction to the family and probate courts to determine the validity of marriages. However, the legislature has never granted a court sitting in probate the jurisdiction to determine the validity of a marriage, nor was such an amendment anticipated by the *Neely* Court enacted as to such a determination of the validity of marriages.

Section 62-2-201 provides an elective share to a surviving spouse and refers to Section 62-2-802 for a definition of surviving spouse. Section 62-2-802 defines surviving spouse as one who has not obtained a divorce from the decedent or an annulment of a marriage to the decedent. Thus, reading Sections 62-1-302, 63-3-530(A)(6), 62-2-201, and 62-2-802 together and consistently, a probate court determining status as a surviving spouse can consider only whether the decedent was divorced or had an annulled marriage while alive, but does not have jurisdiction to determine the validity of a marriage, which is reserved to the family court. Mr. Brown did not divorce Mrs. Brown or have their marriage annulled. The probate court, therefore, did not have authority to determine whether that marriage was valid. Under the rules created by the legislature, Mrs. Brown is the surviving spouse.

This appeal was from the probate court, not the family court. Thus, this Court does not have subject matter jurisdiction to determine that Mr. and Mr. Brown did not have a valid marriage, effectively annulling their marriage. By mistakenly assuming subject matter jurisdiction, this Court deprived Mrs. Brown of her statutory rights, deprived Mrs. Brown and Mr. Brown of their constitutional right to marry, deprived Mrs. Brown of due process of law and deprived Mrs. Brown — and ultimately the Charitable Trust — of her federal copyright termination rights, rights protected by the United States Constitution.

III. Petitioners Lack Standing

Not only does this Court lack subject matter jurisdiction, but Petitioners lack standing. Thus, the two basic foundational elements for a court to decide a matter are missing in this case. This Court has not only allowed Petitioners to, without subject matter jurisdiction and standing, effectively take valuable termination rights proceeds from Mrs. Brown and the charitable trust, but allowing them to do so creates chaos for future attacks on marital status. Unless vacated or

revised, the Opinion will serve as precedent for any child to contest a parent's marital status after the parent dies. Even if the deceased parent went to his or her grave believing that he or she was married — or divorced or annulled — any child can now attack that status.[13] A divorce and an annulment both determine marital status.

The Court mistakenly granted standing to Petitioners. Although the Opinion does not address standing directly, the Court states that Mr. Brown's failure to pursue his own annulment action is not determinative of Petitioners' rights to contest the validity of his marriage in his estate or to contest the annulment order.[14] The Opinion disregards established South Carolina case law precedent on the standing of heirs. It is black letter law — and South Carolina law — that the heirs of a decedent can acquire no greater rights than the decedent.[15] Thus, the heirs cannot question the validity of the ruling or findings of fact in the annulment action because Mr. Brown could not do so. *See 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); *Joye v. Yon,* 345 S.C. 264, 547 S.E.2d 888 (S.C. App. 2001). The Opinion conspicuously and mistakenly avoids noting the Court's own precedent to the contrary that an heir has no greater rights than the decedent and that, standing in the shoes of a decedent, heirs cannot do what the decedent could not do. *See Thompson v. Hudgens*, 159 S.E. 807, 812 (S.C. 1931) (heirs are generally in privity with their ancestors); *Watson v. Watson*, 174 S.E. 33, 36 (1934) (decedent barred from attacking divorce; those in privity with him, such as his children, were likewise barred); *Neely v. Thomasson*, 365 S.C. 345, 618 S.E.2d 884 (2005)

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[13] The Opinion also serves as precedent for any child to attack the underlying "facts" of an in rem family court order as to status, which according to this Court, is not binding on such a child. In effect, the Court also creates precedent for any child to attack the status determination in an in rem order.

[14] Petitioners' "rights" to contest the validity of the marriage and the order is in fact "standing," which Petitioners do not have under South Carolina law.

[15] An heir can no more inherit any greater standing than the decedent had than they can inherit greater title or more property than the decedent had in estate property.

(similar). The Opinion wreaks havoc on the law of probate and standing in South Carolina.

Nor do Petitioners have standing to attempt to annul the Brown-Brown marriage. The only method for invalidating a marriage, such as the ceremonial marriage between Mr. and Mrs. Brown, is by an annulment proceeding.[16] Mr. Brown was obviously aware of that because he brought an annulment proceeding in 2004, which was dismissed by consent.[17] Mr. Brown died believing he was married to Mrs. Brown because he never annulled their marriage — the only way to determine that his marriage to her was invalid — and other evidence proves this, such as his autobiography published after the dismissal of his annulment action.[18] Petitioners cannot choose to undo what Mr. Brown chose to do: go to his death knowing that he was married to Mrs. Brown.

Moreover, Petitioners, having no greater rights than Mr. Brown, have to accept the facts of the annulment order *because by his actions he actually did accept those facts.* After the Brown-Ahmed annulment, Mr. Brown filed an annulment action in Aiken County against Mrs. Brown and asserted that "the Findings of Facts of the Charleston Family Courts are binding on [the Aiken County Family] Court" (ROA VOL. I, p. 258 at ¶ 19, p. 334) and that "[Mrs. Brown] is collaterally and judicially estopped from denying the allegations in this action." (ROA VOL. I, p. 334 at ¶ 11). Thus, Mr. Brown accepted and judicially asserted the findings of fact of the annulment order, so even if the Opinion were correct — which it is not — about the ability of

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[16] *See* Roy T. Stuckey, *Marital Litigation in South Carolina* § 3.A (3d ed. 2006).

[17] In addition to the plain language of the consent order of dismissal, which does not grant an annulment but dismisses the petition asking for an annulment, Mr. Brown could not have assumed at that time that he did not have a valid marriage. At that time, there was no *Lukich* decision (which in any event would not have invalidated his marriage under a proper analysis) nor this Court's newly-minted "record-clearing" rule in this case, which would not have invalidated his marriage under a proper analysis. *See* the discussion below at Part V.

[18] *See, e.g.,* ROA pp. 150-154. Not only does the Court allow the postmortem annulment of Mr. Brown's marriage when he chose not to annul it, but it disregards his expressed intentions in his own autobiography.

third parties to attack findings of fact in an in rem status order, Petitioners cannot attack the findings of fact because Mr. Brown would have been estopped from doing so. Again, Petitioners lack standing to do what the decedent could not do.[19]

Nor would Mr. Brown of course be able to invalidate his marriage to Mrs. Brown after his death. Nor do the children have such standing as his heirs. In order for a divorce or annulment to preclude someone from being the surviving spouse of a decedent for probate purposes, Section 62-2-802(c) requires a signed order of divorce or annulment filed with the clerk of court. Under South Carolina law, that signed order must be filed with the court before the decedent's death. *Hatchell-Freeman v. Freeman*, 340 S.C. 552, 532 S.E.2d 299 (Ct. App. 2000); *Bayne v. Bass*, 302 S.C. 208, 394 S.E.2d 726 (Ct. App. 1990); Roy T. Stuckey, *Marital Litigation in South Carolina* § 1.E (3d ed. 2006). There is no such thing as a postmortem annulment for elective shares in South Carolina. *See generally id.* Moreover, Section 62-2-802(c) excludes from the definition of a surviving spouse one who has gotten a divorce or an annulment from the decedent "unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death." Thus, the statute requires the determination of marital status as of the time of death.

Mr. and Mrs. Brown had a ceremonial licensed marriage. They did not get divorced nor was the marriage annulled while he was alive, even though Mr. Brown brought an annulment action that was dismissed. Mr. Brown never brought another annulment action. He died knowing that he was married to Mrs. Brown. Petitioners want to contradict his wishes to take away Mrs. Brown's — and ultimately the charity's — federal termination rights. Petitioners lack

[19] Mr. Brown clearly accepted the benefits of the Charleston County Family Court Order when he utilized the Order to advance his own position in the Aiken County action. This is the essence of estoppel.

standing to do so.

In its Opinion, the Court mistakenly affords standing to Petitioners, as Mr. Brown's heirs, to: (1) attack the family court annulment action between Mrs. Brown and Mr. Ahmed, and (2) obtain a post-mortem annulment. This Court has mistakenly allowed the children to undo what Mr. Brown wanted: to be married to Mrs. Brown at the time of his death. He also died knowing he had intentionally limited his devises at his death to his adult children.

IV. The Status of Surviving Spouse for Elective Share Purposes Is Determined as of the Date of Death

The Court mistakenly states that a postmortem annulment is possible. The Opinion ignores or misconstrues South Carolina law to the contrary. In South Carolina, the rights in a decedent's estate are determined as of the date of death. See Part XII below. The elective share statute, Section 62-2-201, provides that a surviving spouse is determined in accordance with Section 62-2-802. Section 62-2-802 defines surviving spouse as one who has not obtained a divorce or an annulment. In order for a divorce or annulment to preclude someone from being the surviving spouse of a decedent for probate purposes, Section 62-2-802(c) requires a signed order of divorce or annulment filed with the clerk of court. Under South Carolina law, that signed order must be filed with the court before the decedent's death. *Hatchell-Freeman v. Freeman*, 340 S.C. 552, 532 S.E.2d 299 (Ct. App. 2000); *Bayne v. Bass*, 302 S.C. 208, 394 S.E.2d 726 (Ct. App. 1990); Roy T. Stuckey, *Marital Litigation in South Carolina* § 1.E (3d ed. 2006). There is no such thing as a postmortem annulment for elective share purposes. *See generally id.*

Moreover, Section 62-2-802(c) excludes from the definition of a surviving spouse one who has gotten a divorce or an annulment from the decedent "unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death." Obviously, one cannot

enter into a subsequent postmortem marriage. Thus, the statute requires the determination of marital status as of the time of death.

V. The Court Discriminates Against Mrs. Brown by Applying Its Newly-Minted "Record-Clearing" Bigamous Marriage Analysis Only to the Brown-Brown Marriage

Although the Court misapprehends case precedent and legislative intent in its "record-clearing" analysis of bigamous marriages, as well as the chaos its new rule will create, the Court mistakenly applies its analysis only to the Brown-Brown marriage and not to the Brown-Ahmed marriage. In Part IIB of the Opinion, the Court reasons that the Brown-Brown marriage is invalid because Mrs. Brown was previously married to Ahmed and did not get an annulment — "clear the record" — from Ahmed until after her marriage to Mr. Brown. Thus, according to the Court, Mrs. Brown's attempted marriage to Mr. Brown was never valid.

The Court mistakenly, however, fails to apply its own new rule to the Brown-Ahmed marriage. Applying the Court's own rule to the Brown-Ahmed marriage would mean that Mrs. Brown was never married to Ahmed because Ahmed failed to obtain any annulment — clear the record — before the attempted marriage to Mrs. Brown, meaning — again according to the Court's own new rule — that there was never a valid marriage between Mrs. Brown and Ahmed. Consequently, applying the Court's new rule to the Brown-Ahmed marriage, Mrs. Brown was never married to Ahmed and never had an impediment to her marriage to Mr. Brown. The Court's mistaken application of this new rule to only the Brown-Brown marriage constitutes a denial of Equal Protection to Mrs. Brown and her constitutional right to marry.

If the Court is going to apply a new "record-clearing" rule, it must be applied to every attempted marriage in which one person was already married without having "cleared the record." The Court mistakenly failed to do so for the Brown-Ahmed marriage and thus

discriminated against Mrs. Brown (as well as Mr. Brown who intended to be married to Mrs. Brown). The Court cannot pick and choose which marriage to apply the new record-clearing rule; the rule must apply uniformly, not disparately just to obtain a certain result in a certain case.

VI. The Court Denied Equal Protection and Due Process to Mrs. Brown by Applying Its Newly-Minted "Record-Clearing" Bigamous Marriage Analysis Only to Her and Not Mr. Brown

As a corollary to the discussion in Part V. above, the Court mistakenly applied its new record-clearing rule analysis to Mrs. Brown and not Mr. Brown. In effect, the Court ruled that Mrs. Brown was married to Ahmed until she obtained an annulment — "cleared the record" — even though she was innocently entering into a marriage with someone (Ahmed) already married. However, the Court mistakenly failed to apply that same rule to Mr. Brown. If it had applied the same analysis to him, Mr. Brown would be married to Mrs. Brown — who according to the Court was already married — until he obtained an annulment and cleared the record. He never obtained an annulment,[20] so according to the Court's own analysis, Mr. Brown was married to Mrs. Brown at the time of his death.

VII. The Court Discriminates Against Mrs. Brown by Applying Its Newly-Minted Construction of Section 20-1-80 Only to the Brown-Ahmed Marriage

Although the Court misapprehends case precedent and legislative intent in its new construction of the language of Section 20-1-80, as well as the chaos its new construction will create, the Court mistakenly applied its analysis of Section 20-1-80 only to the Brown-Brown marriage and not to the Brown-Ahmed marriage. The Opinion mistakenly treats language in the second sentence of Section 20-1-80 — "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

[20] Nor, as discussed above at Part III, could his children obtain after his death an annulment he chose not to obtain while he was alive.

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" — as a predicate to construing the first sentence of that section — "All marriages contracted while either of the parties has a former wife or husband living shall be void." — in finding that one must have an annulment before a bigamous marriage is void as a bigamous marriage.[21] Even if that construction were not mistaken, however, the Court applies the rule only to the Brown-Ahmed marriage and not to the Brown-Brown marriage. The Court construes the language of Section 20-1-80 to require an annulment before the first sentence of that section becomes operative and invalidates a bigamous marriage. Consistent with the discussion at Parts V and VI above, the Court mistakenly applies this construction of the statute to the Brown-Ahmed marriage but not the Brown-Brown marriage. If the Court applied the same construction to the Brown-Brown marriage, it would mean that Mr. Brown — who never obtained an annulment — did not trigger the predicate language in the second sentence of the section to render the Brown-Brown marriage bigamous and void under the first sentence of the section. The Court mistakenly applied its own new construction only to the Brown-Ahmed marriage, which constitutes an unequal treatment of Mrs. Brown and her constitutional right to marry.

VIII. The Court Discriminates Against Mrs. Brown by Applying Its Newly-Minted Construction of *Lukich* Differently to Mrs. Brown

In its explanation of its decision in *Lukich*, the Court mistakenly ignores and fails to incorporate into its analysis its treatment of the bigamous second marriage in *Lukich*, which it found void *ab initio* even though the husband in the bigamous second marriage did not obtain an

[21] As noted below, this contradicts this Court's own statement in *Lukich* that the first sentence overrides the exceptions: "Wife would distinguish *Day* since it involves the first exception to the bigamy statute rather than the third. *What is important about Day is not the exception, but rather the rule: the bigamous marriage is not a marriage at all.*" (emphasis added).

annulment until many years after the marriage ceremony. This Court in *Lukich* did not rule that the second marriage was bigamous only from the time of the annulment; rather, this Court ruled that the second marriage was void *ab initio*.[22] Thus, this Court's new treatment of bigamous marriages for Mrs. Brown — that she is married until she obtains an annulment — is different from its treatment of a bigamous marriage in *Lukich* — that the bigamous marriage was void *ab initio* even though the second husband did not "clear the record" for 18 years — as well as different from this Court's treatment of every bigamous marriage in every other case it has decided.[23]

IX. This Court has Violated Respondent's Right to Due Process of Law and Equal Protection of the Law by Adopting and Applying New Rules to Her Marriage Instead of Adopting New Rules Prospectively, Depriving Mrs. Brown of her Constitutional Rights Despite the Court's Lack of Subject Matter Jurisdiction.

It is undisputed that Mrs. Brown obtained an annulment from Ahmed with Mr. Brown's financial assistance and with his actual knowledge. (Joint Stipulation, ROA p. 257). The order declared her bigamous marriage void *ab initio*. Overturning all precedent and ignoring legislative intent and public policy that bigamous marriages are void *ab initio*, this Court has now adopted new rules which allow bigamous marriages in South Carolina and has invalidated Mrs. Brown's marriage without subject matter jurisdiction. The Court also adopted new requirements to the annulment process by requiring that state laws about marriage certificates be strictly observed, even though those requirements have nothing to do with the application of the bigamy statute. These new rules impinge on Respondent's federal constitutional rights.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the United States Supreme Court declared:

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[22] "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 [from Husband #1] in 2003."

[23] *See* Respondent's Brief pp. 32-37.

> It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 1824, 18 L. Ed. 2d 1010 (1967). *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992).
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> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), and to abortion, *Casey*, *supra.*

Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

The South Carolina appellate courts have not had occasion to consider whether a similar liberty interest exists under the South Carolina State constitution. But language essentially identical to the Fourteenth Amendment is contained in S.C. Const. art. I, Sec. 3. The only South Carolina case to cite *Lawrence* expressly recognized a constitutional right to freedom of choice in sexual matters:

> [I]n terms of due process and equal protection the "right to privacy" has come to mean a right to engage in certain highly personal activities. More specifically, it currently relates to certain rights of freedom of choice in marital, *sexual*, and reproductive matters . . . . Ronald D. Rotunda & John E. Nowak, 3 Treatise on Constitutional Law: Substance and Procedure § 18.26 (3d ed.) (1999); *see also, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (recognizing a "right of

> privacy" in marriage stemming from the "zone of privacy created by several fundamental constitutional guarantees"); *Roe v. Wade*, 410 U.S. 113, 153, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (holding that right of privacy in matters concerning procreation and family "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (invalidating ordinance that barred certain family living arrangements); *Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (holding that a statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the "right of privacy" guaranteed by the Due Process Clause of the Fourteenth Amendment).*

Burton v. York County Sheriff's Dep't, 358 S.C. 339, 594 S.E.2d 888, 896 (Ct. App. 2004) (emphasis added).

The precise standard for determining when state pursuit of a legitimate interest inflicts unnecessary collateral harm upon a liberty interest depends upon whether the liberty interest is fundamental. When a fundamental interest is involved, such as Mrs. Brown's right to marry and remain married, state action must be narrowly tailored to inflict the smallest harm possible upon the liberty interest. Where a fundamental interest is not involved, there must still be a "reasonable fit" between the state action and the means chosen to advance that purpose. *See, e.g., Reno v. Flores*, 507 U.S. 292, 305 (1993).

Here, Mrs. Brown and her husband Mr. Brown by a ceremonial marriage agreed to formally confirm that their marriage was legal by way of an annulment of her prior invalid marriage, which Mr. Brown paid for and was kept apprised of. Mr. Brown never obtained an annulment of his marriage to Mrs. Brown. Mrs. Brown had the right to rely on her due process right to have a court declare the status of her marriage for all

purposes. That fundamental constitutional right was taken from her by the Court's opinion. The State has no compelling interest in depriving Mrs. Brown of Due Process by adopting rules retroactively which substantially impact her and the beneficiaries of her husband's Charitable Trust.

As this Court pointed out in *Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 750 (1992), "the legislature cannot create a statute which applies retroactively to divest vested rights." 310 S.C. at 205 n.5, 422 S.E.2d at 753. Neither can this Court do so. In *Stone v. Thompson*, 428 S.C. 79, 833 S.E.2d 266 (S.C. 2019), this Court changed the law on common law marriage, but wisely and fairly applied that change prospectively and not retroactively.

This Court stated in *Stone*:

> The Pennsylvania Commonwealth Court . . . also elected to apply its decision purely prospectively. . . . The court weighed the purpose of its new rule, the level of reliance on the old rule, and the impact on judicial function by retroactive application. *Id.* at 1238. The Pennsylvania court noted the benefits of the new rule should not undermine relationships which were validly entered into at the time, and upending formerly-correct decisions of law served the interests of no one. The court also concluded the old rule had been in effect for such a length of time that citizens undoubtedly relied upon it, including the parties before the court."

Id. at 87, 833 S.E.2d at 270.

The Court in *Stone* likewise declined to exercise its prerogative to apply its ruling retroactively. Accordingly, the Court applied its ruling prospectively only. *Stone v. Thompson*, 428 S.C. 79, 833 S.E.2d 266 (S.C. 2019).

To avoid divesting Mrs. Brown of vested rights and impinging on her constitutional rights, this Court should apply any new rule and its ruling prospectively only, and hold that Mrs. Brown is the surviving spouse. See Part XII.

X. The Court Mistakenly Creates a New "Record Clearing Rule" for Bigamous Marriages, Contradicting *Lukich* and All Other Case Precedent, Public Policy, and Legislative Intent

The Court misapprehends all case precedent, including *Lukich*, as well as legislative intent and public policy, by creating a new rule that a bigamous marriage is valid until the parties to that bigamous marriage obtain an annulment and "clear the record." In doing so, the Court is mistaken or misapprehends the law in numerous ways:

A. The Court Misapprehends that there is Actually a Record to Clear

The Opinion cites certain ministerial and reporting statutes requiring, for example, the reporting of marriages to the South Carolina Bureau of Vital Statistics (BVS) in an apparent attempt to justify its contention that there is a record to clear — that is, that an annulment must be obtained before a bigamous marriage is not invalid. That is a non sequitur: the bigamy statute has been around far longer and is based on a public policy so important that it outweighs even the public policy of finality of judgments.[24] Moreover, as discussed below, there is no record to clear despite the ministerial and reporting statutes. Every case decided by this Court holds to the contrary: a bigamous marriage is never a marriage and is void *ab initio*. See, for example, this Court in *Lukich* and all cases cited therein. (Repondent's Brief app. 32-37).

There is no record to clear. Unlike real estate title records, which are recorded in the county where the real property is located so that one can perform a title search to determine ownership of real property, there is no central location where one can search the existence of a marriage, or a divorce, or an annulment. Even though the regulations require marriage licenses to be forwarded to the BVS, one cannot determine the existence or non-existence of a marriage

[24] *See Gary v. Lowcountry Med Transp., Inc.*, 424 S.C. 18, 817 S.E.2d 291 (Ct. App. 2018). This Court denied certiorari on January 10, 2019.

by examining those records. People can get married in other states or even other countries.[25] They can get divorced in different states or different countries from where they were married. A marriage can be annulled in other states or other countries. Unlike real estate records, it is not possible to examine a central storehouse of records to determine if someone is already married before issuing a marriage license. Similarly, it is not possible to examine a central storehouse of records to determine if someone with a prior South Carolina marriage license has been divorced or has had that marriage annulled in another state or country. There is no universal storehouse of information that a probate judge, or any one else, can examine before issuing a marriage license.[26]

If it were possible to determine the validity of a marriage from an examination of all the records around the world, similar to a real estate title search in a county where the real estate is located, then the Opinion is mistaken about an annulment order being necessary to "clear the record." Rather, the record would already be clear. For example, Ahmed signed a marriage license application that he was not married. A search of the records, presumably from Pakistan, would have shown that he was indeed married. Consequently, the record would show that he lied on his application and that the marriage to Mrs. Brown was therefore bigamous and invalid — again with no need for an annulment. And the record would show that Mrs. Brown told the truth on her marriage license application with Mr. Brown because of Ahmed's bigamy.[27] Thus,

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[25] The Opinion cites the 1851 United States Supreme Court case of *Gaines v. Relf*, 53 U.S. 472 (1851), which is inapposite, but that case does stand for the proposition that foreign marriages are valid in this country.

[26] For example, if a probate judge embarked on the fruitless exercise of examining the BVS records to determine that an applicant had been previously married, the BVS records would not indicate whether the marriage had been terminated, whether in some state in this country or in another country. Nor would the BVS records tell a probate judge embarking on a fruitless search that an applicant had been married in another state or country.

[27] Mrs. Brown did tell the truth on the application for her marriage to Mr. Brown because (1) her

if there were a binding record to search, Mrs. Brown would have no impediment to marrying Mr. Brown. Unfortunately, there is no such record, but this example also shows the Court is mistaken about there being a record to clear as a reason to overturn every prior bigamy holding.

Consequently, it is a non sequitur to posit that, merely because the ministerial and reporting statutes require reporting marriage licenses to the BVS, the legislature intended for Section 20-1-80's clear language that a bigamous marriage is void *ab initio* to really mean that a bigamous marriage is valid unless and until an annulment — clearing the "record" — is obtained. If that were the legislature's true intent, then this case is the first time in South Carolina jurisprudential history that a Supreme Court discovered and recognized this hidden legislative intent because every previous case decided by the South Carolina Supreme Court has held that a bigamous marriage is void *ab initio*, and never a marriage, without finding, or even mentioning, any type of record-clearing.

In fact, without citing any contrary South Carolina authority (because none exists), the Opinion recognizes that authority exists for the rule that a bigamous marriage is void *ab initio* even without an annulment by a court.[28] That authority exists because the bigamy statute, and public policy, require that a bigamous marriage is never considered valid.[29] Thus, the Opinion in this case also mistakenly overturns the existing rule that a bigamous marriage is never valid even without an annulment and creates the opposite rule, which contradicts all prior South Carolina cases involving bigamous marriages and the clear language of the bigamy statute.

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marriage to Ahmed was never valid and (2) she thought it had been annulled long before in Texas. *See* ROA pp. 304-308.

[28] *See, e.g., State v. Sellars*, 140 S.C. 66, 134 S.E. 873 (1926); *Estate of Brown*, 424 S.C. 589, at 599, 818 S.E.2d 770, at 776 ("As a result, had Respondent's marriage to Ahmed not been annulled, the second marriage to Brown would still have been valid.").

[29] *See, Lukich* and cases cited therein; Repondent's Brief pp. 32-37.

B. No Prior Case Decided by This Court Mentions Any Record-Clearing Rule

Every bigamy case previously decided by this Court finds that a bigamous marriage is void *ab initio* and never a marriage. No case holds that a bigamous marriage is valid unless and until an annulment is obtained. The Court misapprehends precedent or mistakenly overturns it.[30] Thus, the Court is implementing a new rule, which should be applied prospectively only so as not to divest Mrs. Brown of the rights she acquired as of the date of death.

C. The Plain and Unambiguous Language of the Bigamy Statute Requires a Finding that a Bigamous Marriage Is Never Valid

The first sentence of Section 20-1-80 provides that "All marriages contracted while either of the parties has a former wife or husband living shall be void." This language is clear: a bigamous marriage is void — not merely voidable.[31] The second sentence of Section 20-1-80 provides so-called exceptions: "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."[32]

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[30] Even if a new rule was appropriate, a court cannot overturn vested rights and the new rule should have prospective application. The status of surviving spouse is determined under the law as it existed as of Mr. Brown's death, and Mrs. Brown's rights were vested at that time. *See* Part XII below.

[31] The South Carolina legislature knows the difference between void and voidable. *See, e.g.,* S.C. Code Ann. Section 62-3-713: "Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is *voidable* by any person . . . ." (Emphasis added). The statute recognizes the concept of voidable to mean that a transaction is valid unless someone exercises a right to invalidate it; void transactions are never valid.

[32] The Opinion notes that the bigamy statute (Section 20-1-180) is civil, as compared to the criminal bigamy statute (Section 16-15-10). Both are based on the strong public policy against bigamous marriages. In *State v. Sellars*, *supra* note 28, this Court, as it has always done for the civil bigamy statute, recognized that bigamous marriages are never a marriage — never valid — for purposes of the crime of bigamy. Importantly, *State v. Sellars* involved the same template as

This Court mistakenly applies the exceptions in the second sentence of the statute as predicates to the foundational rule in the first sentence that a bigamous marriage is void only if an annulment is obtained. No prior South Carolina Supreme Court decision construes the statute to mean that a bigamous marriage is valid until an annulment is obtained. By doing so, this Court allows for a legal bigamous marriage in South Carolina, making South Carolina the only state sanctioning bigamy. For example, this Court's pronouncement in *Lukich* states: "Wife would distinguish *Day* since it involves the first exception to the bigamy statute rather than the third. *What is important about Day is not the exception, but rather the rule: the bigamous marriage is not a marriage at all.*" (emphasis added).

In any event, the Court mistakenly fails to uniformly apply its own construction of the bigamy statute to the Brown-Ahmed marriage. Ahmed failed to obtain a divorce or an annulment of his prior marriages before his attempted marriage to Mrs. Brown. Consequently, even under this Court's construction of the bigamy statute, the Brown-Ahmed marriage was void — never a marriage — because Ahmed failed to satisfy the exception in the second sentence of obtaining a divorce or annulment before entering into his marriage with Mrs. Brown.

The effect of the Court's ruling is to treat Mrs. Brown's bigamous marriage to Ahmed as valid until she obtained an annulment. According to this Court, if she had not obtained an annulment, that marriage would still be valid. To say that the Brown-Ahmed bigamous marriage was void *ab initio* except for the requirement that Mrs. Brown could not marry without obtaining an annulment is a non-sequitur: if she is not free to marry until she gets an annulment, then the Brown-Ahmed bigamous marriage is valid — at least for that purpose — until she gets an

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this case: the innocent party in a first bigamous marriage is not married for purposes of entering into a valid second marriage, even without an annulment of the first bigamous marriage. The criminal bigamy statute contains the same exception about annulments as the civil statute.

annulment. When all case precedent and the statute say that a bigamous marriage is never valid, then the record-clearing rule creates an exception to that universal treatment and considers a bigamous marriage valid, at least for some purpose.

D. The Court's Treatment of a Bigamous Marriage as Valid Until the Record is Cleared Violates Public Policy

This Court has previously recognized that treating a bigamous marriage as valid violates public policy, obviously without exception.[33] The Court in this case mistakenly creates a rule that violates public policy.

E. The New Record-Clearing Rule Condones Bigamy

This Opinion provides that a party to a bigamous marriage is effectively married until that party clears the record by obtaining an annulment. The effect of this rule is to treat the marriage as valid until the annulment is obtained. Under the Court's new rule and application of Section 20-1-80, a person who is already married and who then marries another is in two valid marriages until the innocent person in the second (bigamous) marriage obtains an annulment, which only then triggers the bigamy statute to void the second (bigamous) marriage. The Opinion thus condones bigamy unlike any other state in the union. Yet bigamy so violates public policy that a recent case held that the public policy against bigamy outweighed the public policy of finality of judgments.[34]

If the Court had followed the rule of all case precedent, legislative intent, and public policy, it would have held that a bigamous marriage is void *ab initio* — as has always been the law heretofore in South Carolina and every state in the union. That is the real "record-clearing" solution: if a first marriage is bigamous, then the innocent party to that bigamous marriage is free

[33] *See Gary, supra* note 24.
[34] *Id.*

to marry, so that a second bigamous marriage — and another innocent party to a bigamous marriage — is not the result when that innocent party marries another. Rather than protecting marriage, the record-clearing rule would allow two bigamous marriage to be valid at the same time, if neither innocent party to the bigamous marriages obtained an annulment.

F. Even If the New Record-Clearing Rule Is Correct, the Court Fails to Apply its New Rule to the Brown-Ahmed Marriage

Even if the new record-clearing rule is not the result of mistake and misapprehension, the Court fails to apply its rule to the Brown-Ahmed marriage. Ahmed failed to clear the record of his marriages before he attempted to enter into the bigamous marriage with Mrs. Brown. Because he failed to clear the record, he was not "clear" to marry Mrs. Brown and that attempted marriage was never valid.

XI. The Court Is Mistaken About In Rem Judgments and Collateral Estoppel

The majority's discussion of in rem judgments and collateral estoppel, which the concurrence presumably believes is unnecessary given the Court's creation of the record-clearing rule for bigamous marriages, is internally inconsistent. The in rem judgment/collateral estoppel discussion is unnecessary, but for a different reason: Petitioners do not have standing under South Carolina law to attack the annulment action, as discussed in Part III above, regardless of general issues of in rem judgments and collateral estoppel. Moreover, in his annulment action, Mr. Brown adopted and accepted the findings of fact from the Brown-Ahmed annulment order. Standing at best in his shoes, Petitioners cannot be allowed to take an action contrary to Mr. Brown: he accepted the facts that the majority now allows Petitioners to attack.[35]

Nevertheless, the majority's mistaken approach to in rem judgments further harms Mrs. Brown and creates further general chaos.

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[35] *See* the discussion at Part III.

The majority distinguishes the effect of an in rem judgment as to status — which it recognizes is binding on the world — and as to underlying facts, which the majority concludes is fair game for anyone not a party to the in rem judgment to attack. In so doing, the majority mistakenly fails to recognize that, as to the issue of the validity of a marriage and its impact on the validity of future marriages, the status of the parties to the in rem judgment is all that matters.[36] In Mrs. Brown's case, her status as to whether she was married or not before she married Mr. Brown is what matters, and all that matters. Despite Petitioners' lack of standing,[37] the Court allows Petitioners to attack the underlying facts, but, as this Court and Petitioners readily agree, status is not subject to attack. Thus, regardless of how Petitioners might attack the underlying facts, it is the status — which is not subject to attack — that is all that matters in this case: was Mrs. Brown married or not at the time she married Mr. Brown? The family court in this case determined, and ordered, that her status was unmarried due to bigamy on Ahmed's behalf.[38] Again, most people are divorced in South Carolina in uncontested or default proceedings, yet their decrees are valid as against all the world. When a litigant divorces on the ground of adultery or physical cruelty that decree and factual basis cannot be attacked later. This opinion opens the floodgates of litigation.

Another significant problem with the Court allowing Petitioners to attack the underlying facts of an annulment action, to which their father could not be a party[39] (or anyone other than Mrs. Brown and Ahmed for that matter), is that Mrs. Brown or any future party to an annulment action cannot with confidence ever marry again. For example, assume Mrs. Brown marries next month. Ten years later, she and her new husband decide to divorce, but the new husband does

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[36] *See* Respondent's brief pp. 21-30.
[37] *See* Part III above.
[38] ROA pp. 295-296.
[39] *See* discussion at Part III above.

not want to pay alimony, so he contests the validity of the Ahmed annulment which, after all, he can do because he was not a party to the annulment action. The result of the Opinion is that Mrs. Brown cannot now enter into a legally binding marriage with certainty — a decision which clearly results in a denial of her Due Process rights under the United States Constitution. The same would apply to Mr. Brown if he had obtained his annulment from Mrs. Brown and then decided to marry someone else. The record-clearing rule would thus punish innocent parties to a bigamous marriage: Mrs. Brown in the Ahmed-Brown marriage, and in the resulting situation from the Opinion, Mr. Brown in the Brown-Brown marriage, had he survived.

This disastrous precedent could apply to anyone who has been through an annulment or, for that matter, a divorce, which is also an in rem action determining status. Using the Court's in rem analysis as precedent, any third party marrying someone who has gotten a divorce or annulment can later decide to attack the divorce or annulment — at least as to underlying facts — because this Court now allows someone not a party to the divorce or annulment to attack it. Presumably, family courts in the future will be asked to decide many such cases. The Opinion of this Court fails to recognize that, under applicable law and relevant commentary, an in rem judgment as to divorce and annulment binds the world as to status and precludes any type of attack by someone not a party to the in rem judgment as to status, except in narrow circumstances not applicable to this case.[40]

The Court and Petitioners recognize that the family court annulment order itself is not subject to collateral attack. This is all that is needed to know that the Brown-Ahmed marriage was bigamous because that was the family court's conclusion of law and its order as to status: Mrs. Brown was in a bigamous marriage which was void *ab initio*. The Opinion offers a number

[40] *See* Respondent's Brief, p. 23. note 36.

of facts[41] that appear to be designed to undermine Mrs. Brown's testimony in the family court, yet this Court does not — and does not have the subject matter jurisdiction to — invalidate the family court order as to status. Nor are those facts properly before the Court.[42] The summary judgment for Mrs. Brown in the trial court and affirmed by the Court of Appeals, holding that she is the surviving spouse, was based on the law and stipulated facts; the stipulated facts do not include the facts referred to in footnote 41 herein. The Opinion of this Court does not expressly override findings of fact. Nor does this Court have the subject matter jurisdiction to override those findings of fact.[43] So the Opinion's discussion of these facts appears to prejudice Mrs. Brown, but has no substantive impact on the decision. The Court fails to mention facts in the record that support Mrs. Brown, such as Mr. Brown's autobiography — published after the consent dismissal of his annulment action — and Mrs. Brown's belief that she had gotten the

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[41] The Court does so even though the summary judgment was based on a joint stipulation of facts. ROA pp. 255. The Court nevertheless cites such "facts" as an affidavit by an attorney in the case who claimed to have talked with Ahmed in Pakistan but who, according to another unrelated person's affidavit, refused to give an affidavit or be deposed. These affidavits obviously are inadmissible, although if they were true, it tells us that Ahmed was aware of the annulment action for many years yet has not bothered to appeal it. The Court's Opinion fails to consider the impact on Ahmed, who may have been relying on the annulment and may have married afterwards. See Respondent's Brief p. 7. This is just another example of the chaotic precedent the Court has created. Yet the Court refuses to give weight to evidence, such as his autobiography, of Mr. Brown's expressed understanding that he was married to Mrs. Brown and happy about it. The Court also notes that the consent dismissal of the annulment action contains language in which Mrs. Brown purportedly prospectively waives her right to a common law marriage. That has no bearing on this case, which involves a licensed marriage. Moreover, one cannot prospectively waive a constitutional right to marry.

[42] Given that this case is before the Court on summary judgment, there was never any hearing or other determination of facts in this case, other than those stipulated for summary judgment. The relevant facts were determined in the family court, which result is not on appeal in this case. Nor, for family law in rem status binding the world, should it matter whether there is a default judgment. If so, a spouse who for example gets a default divorce based on abuse/cruelty would have to re-open those painful issues when a third party is allowed to collaterally attack the validity of the divorce.

[43] *See* discussion at Part II above.

Brown-Ahmed marriage annulled before she married Mr. Brown,[44] not to mention Mr. Brown's own allegations in the Aiken County Family Court in his later-filed annulment action in Aiken County against Mrs. Brown and said that "the Findings of Facts of the Charleston Family Courts are binding on [the Aiken County Family] Court" (ROA VOL. I, p. 258 at ¶ 19, p. 334) and that "[Mrs. Brown] is collaterally and judicially estopped from denying the allegations in this action." (ROA VOL. I, p. 334 at ¶ 11). Mr. Brown clearly accepted the benefits of the Charleston County Family Court Order when he utilized the Order to advance his own position in the Aiken County action. This is the essence of estoppel.

This Court has invalidated the order issued by the family court judge who actually heard the case.

Problematically, the Court and Petitioners recognize that in rem judgments as to status cannot be attacked by third parties and are binding on the world, yet the Court actually allows the status to be attacked: "alleged bigamous marriage of Respondent's first marriage was never established in this estate matter." Despite recognizing the law is to the contrary, the Court invalidates the in rem annulment order as to status for this "estate matter." The precedent set will allow courts in the future to invalidate in rem status order, such as divorce, for any other "matter." The decision deprives Mrs. Brown of her statutory rights, Mrs. and Mr. Brown of their constitutional right to marry, and Mrs. Brown (and ultimately the Charitable Trust) of her federal copyright interests.

XII. Mrs. Brown's Rights Vested at Mr. Brown's Death in Accordance with the Law in Effect at the Time of His Death; the New Record-Clearing Rule Should Only Apply Prospectively

The Court mistakenly applies its new rule retroactively to Mr. Brown's date of death.

[44] *See* ROA pp. 304 – 308; 150-154.

However, Mrs. Brown's rights vested according to the law in effect at the date of Mr. Brown's death, when no case or statute imposed a record-clearing rule. The Court's new rule cannot apply to the marriage of Mr. and Mrs. Brown, but would have to be applied prospectively only. Otherwise, the Court is divesting vested rights. *See* S.C. Code Ann. § 62-1-100(b)(4) (substantive right in a decedent's estate accrues in accordance with the law at date of death); *Boan v. Watson*, 281 S.C. 516, 316 S.E.2d 401 (1984); *Wilson v. Jones*, 281 S.C. 230, 314 S.E.2d 341 (1984); *Stone v. Thompson*, 428 S.C. 79, 833 S.E.2d 266 (S.C. 2019).

XIII. Conclusion

Again, James Brown died knowing that he was married to Mrs. Brown. We know this because of what he did and what he did not do. He knew about Mrs. Brown's putative marriage to Ahmed and even brought an action to annul his marriage to Mrs. Brown (after he paid for her annulment action in the Brown-Ahmed matter), but he dismissed his annulment action by consent. He could not have thought that the annulment action was unnecessary to terminate his marriage to Mrs. Brown because the law at that time — before Lukich and this Court's record-clearing rule — would not have invalidated their marriage; in any event, if he wanted to invalidate their marriage, why not pursue the annulment to conclusion, and if the law invalidated their marriage without an annulment, then why bring the action in the first place? After all the family court actions, he made numerous public pronouncements, such as the publication of his autobiography, confirming that Mrs. Brown was his wife. After the family court actions, he never brought another annulment action.

Not one piece of evidence in the record or cited by this Court indicates or even implies that he did not think he was married to Mrs. Brown when he died. The Opinion decimates the Charitable Trust that this Court recognized he wanted when he died and diverts extremely

valuable federal termination rights proceeds from that Charitable Trust to Petitioners, who were beneficiaries of only some personal property in his will. Although the federal termination rights operate by federal law, his treatment of his children in his will — executed before his marriage to Mrs. Brown — indicates that he did not want them to benefit significantly, and certainly evidences that he did not want them becoming even wealthier at the expense of needy children who would take under the Charitable Trust.

Overriding what Mr. Brown understood and wanted when he died — that he was married to Mrs. Brown and that his Charitable Trust would flourish — this Court has done the opposite of honoring James Brown and his legacy. To do so, it ignored its lack of subject matter jurisdiction; it ignored the lack of Petitioners' standing; it reversed all case precedent holding that a bigamous marriage is never valid (the Brown-Ahmed marriage was never valid); it reversed the order of a family court not properly before it on appeal; it rejected the public policy that a bigamous marriage is never valid; it ignored the plain language of a statute; it created a new rule that allows a bigamous marriage to be valid; it opened the door for third parties to contest in rem status rulings about marriages, divorce, and annulments, creating a precedent for chaos and uncertainty for marital status; and it applied its new rule selectively and disparately to invalidate the Brown-Brown marriage but not to invalidate the earlier Brown-Ahmed marriage (which would be invalid under the existing law as well as under a uniform application of the Court's new rule). It would not be proper for a court to do all of that even to honor a decedent's wishes; it is certainly not proper for a court to do all of that to override a decedent's wishes.

Mrs. Brown hereby respectfully requests that this Court reverse Opinion No. 27982 issued June 17, 2020, and re-issue an Opinion consistent with the requests set forth above.

Respectfully Submitted,

/s S. Alan Medlin

S. Alan Medlin (Bar No. 3924)
1713 Phelps Street
Columbia, SC 29205
803-920-1181
amedlin@sc.rr.com

Robert N. Rosen (Bar No. 4918)
Rosen Law Firm, LLC
18 Broad Street, Suite 201
Charleston, SC 29401
(843) 377-1700
rnrosen@rosen-lawfirm.com

Gerald Malloy (Bar No. 12033)
Malloy Law Firm
P.O. Box 1200
Hartsville, South Carolina 29551
843-339-3000

T. Heyward Carter, Jr. (Bar No. 001156)
Andrew W. Chandler (Bar No. 69388)
M. Jean Lee (Bar No. 11209)
Evans, Carter, Kunes & Bennett
115 Church Street
P.O. Box 369
Charleston, SC 29402

David L. Michel (Bar No. 13578)
Michel Law Firm, LLC
751 Johnnie Dodds Blvd., Suite 200
Mt. Pleasant, SC 29464

Arnold S. Goodstein (Bar No. 2212)
Goodstein Law Firm, LLC
P.O. Box 2350
Summerville, SC 29484-2350

ATTORNEYS FOR PETITIONER
TOMMIE RAE BROWN