THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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 REPLY TO PETITIONERS' RETURN TO RESPONDENT'S PETITION FOR REHEARING PURSUANT TO RULE 221(a), SCACR

Respondent Tommie Rae Brown ("Mrs. Brown") replies to a number of issues in Petitioners' Return to Respondent's Petition for Rehearing, Pursuant to Rule 221(a), SCACR ("Return") filed with this Court on July 10, 2020.

I. Petitioners Fail to Address the Court's Failure to Apply Its Record-Clearing Rule to Both Marriages at Issue

Petitioners fail to respond to one of the primary issues in Respondent's Petition for Rehearing. The Court, in its Opinion, failed to apply its record-clearing rule consistently. The Court held that the Brown-Brown marriage was never valid because Mrs. Brown failed to "clear the record" — by obtaining an annulment — *before* she married Mr. Brown. Therefore, according to the Court, Mr. Brown was never married to Mrs. Brown. However, the Court fails to apply its own rule to the Brown-Ahmed marriage. Applying the Court's record-clearing rule, Ahmed failed to clear the record *before* he attempted to marry Mrs. Brown. Thus, according to this Court's own rule, Mrs. Brown was never married to Ahmed. Consequently, she had no impediment to marrying Mr. Brown.

The only way this Court would *not* be applying unequal treatment to the two marriages would be if the Court *overturned* the unappealed binding family court order that Ahmed was married when he attempted to marry Mrs. Brown and thus the Brown-Ahmed marriage was void *ab initio* for bigamy. Yet the Court and Petitioners both assert that they are not attempting to overturn that family court order — because as the Court and Petitioners recognize, they cannot. The Court and Petitioners are mistaken in asserting that Petitioners are not bound by the underlying facts of the family court order — but that is not what matters here. The family court order ruled as to status: Mrs. Brown was never married to Ahmed because the attempted marriage was bigamous. Either this Court is actually overturning the family court's binding unappealed annulment order or it is not. If it is overturning the order, then it is holding that an in rem action is not binding as to status — which creates untold chaos. If it is not overturning the

order, then Mrs. Brown was never married to Ahmed and had no impediment to marrying Mr. Brown, according to the Court's own record-clearing rule.[1] The Court, and Petitioners, cannot have it both ways. Either the Court actually overturned the family court order, despite the Court and Petitioners asserting to the contrary, or the Court did not, which means that Mrs. Brown had no impediment to marrying Mr. Brown.

The discussion about Petitioners being bound by status but not facts is meaningless in this case. The family court order clearly applied to status, ruling in its order that the attempted marriage to Ahmed was void *ab initio* because of his bigamy. If the Court somehow in its Opinion has determined that the underlying facts are different from the unappealed findings of fact by the family court — without benefit of any hearing about facts below *in this case* — so that the Court is implicitly finding that Ahmed was not married when he attempted to marry Mrs. Brown, then the Court is also silently overturning the family court's order itself — that the Ahmed-Brown marriage was void *ab initio* as bigamous. The Court cannot rule that the family court got the facts wrong about Ahmed's bigamy without overruling the order itself as to status.

So, unless this Court is actually overruling the unappealed family court order as to status, then it mistakenly failed to also apply its own record-clearing rule to Ahmed. If it applied its own rule, then Ahmed failed to clear the record by getting an annulment before his attempted marriage to Mrs. Brown, resulting in the attempted Brown-Ahmed marriage never being valid. This is the same rule the Court applied to the Brown-Brown marriage. The Court cannot pick

[1] This is also the result under all case precedent applying the bigamy statute — a bigamous marriage is void *ab initio* and never a marriage — so that the Brown-Brown marriage is valid because Mrs. Brown had no impediment to that marriage. *See* Petition for Rehearing at VIII; Respondent's Brief at IV.

and choose which marriage it wants its record-clearing rule to apply. *See* Petition for Rehearing at I.B., V.

II. Petitioners Fail to Address the Court's Differential Treatment of Mrs. Brown

Similarly, Petitioners fail to respond to the related issue of unequal treatment of its record-clearing rule to Mr. Brown. If it had applied the same rule to Mr. Brown that it applied to Mrs. Brown, then Mr. Brown would be married to Mrs. Brown until he cleared the record by obtaining an annulment, which he clearly failed to do. Moreover, Petitioners fail to address the Court's unequal treatment of its application of Section 20-1-80 only to the Brown-Ahmed marriage and its different treatment of the second marriage in *Lukich* — which was void *ab initio* and never a marriage even though the "second husband" did not obtain an annulment until after that marriage — as compared to the Court's treatment of Mrs. Brown. *See* Petition for Rehearing at VII, VIII.

III. Petitioners Misstate the Applicable Law about Subject Matter Jurisdiction to Invalidate or Annul the Brown-Brown Marriage

Importantly, Petitioners confuse and conflate the subject matter jurisdiction of a court sitting in probate to determine who is a surviving spouse for elective share purposes — which a court sitting in probate can do — with the authority to determine that a marriage was invalid — which a court sitting in probate cannot do — because only a family court has such jurisdiction to determine that a marriage is invalid. Mrs. Brown properly asked the court sitting in probate, for purposes of the elective share, to rule that she is the surviving spouse. Because a court sitting in probate has no subject matter jurisdiction to invalidate a marriage — only the family court has such jurisdiction and this is not an appeal from family court — the court sitting in probate must

follow the statute and merely determine whether the decedent got divorced or had his marriage annulled before his death; if neither, then per the explicit language of the applicable statute[2] the decedent has a surviving spouse for elective share purposes. *See* Petition for Rehearing at III; Respondent's Brief at I., II.A. The applicable probate code statutes grant a court sitting in probate the authority to determine who is a surviving spouse for elective share purposes — which is what Mrs. Brown requested — but does not grant authority for a court sitting in probate to invalidate/annul the decedent's marriage.[3]

IV. Petitioners Misstate the Applicable Law about Standing

Petitioners argue that they have standing because the trial court allowed them to be parties to contest Mrs. Brown's elective share claim, which Mrs. Brown did not appeal and thus became the law of the case.[4] However, Petitioners confuse and conflate standing to argue against Mrs. Brown's elective share — granted by the trial court and unappealed — with standing to attack the family court annulment as well as the Brown-Brown marriage, which they do *not* have. *See* Petition for Rehearing at III; Respondent's Brief at II.B. South Carolina law clearly and

[2] It is not possible to have a postmortem annulment in an elective share matter. *See* Petition for Rehearing at III, IV; Respondent's Brief at I. Petitioners contend that the Court did not annul the Brown-Brown marriage posthumously, but that is exactly what this Court did. The only way to invalidate a marriage is by an annulment. Petitioners can call it whatever they like, but the bottom line is that the Court invalidated the Brown-Brown marriage after Mr. Brown died, despite lacking subject matter jurisdiction and despite the inability to invalidate a marriage postmortem for elective share purposes. Petitioners cite cases that are inapposite and were decided long before the enactment of the South Carolina Probate Code and its jurisdictional provisions.

[3] Even if a probate court had subject matter jurisdiction to determine the validity of a marriage — which it does not — it would have to accept as valid and binding a prior determination from a family court.

[4] Petitioners are correct about one point: Mrs. Brown chose not to appeal that trial court ruling to avoid even more years of delay in this case.

understandably prohibits heirs from attaining greater rights than the decedent through which they claim. Mr. Brown lacked standing to attack the Brown-Ahmed family court annulment order. He understood that his only route was to bring his own annulment action, which he dismissed by consent. Moreover, Mr. Brown adopted the findings of facts from the annulment order in his own annulment action. Because Mr. Brown lacked standing to attack the family court order and because he asserted the findings of fact in his own action, Petitioners lack standing to do what he could not do. There is a difference between being a party to an elective share action versus having standing to do what Mr. Brown could not do. Therefore, Petitioners lack such standing. *See* Petition for Rehearing at III; Respondent's Brief at II.B.

Petitioners argue that they are not attempting to annul the Brown-Brown marriage, but that is exactly what they are doing. Mr. and Mrs. Brown engaged in a licensed ceremonial marriage. The only way to invalidate a licensed ceremonial marriage is by an annulment. For determination of a surviving spouse status for elective share purposes, which is this case, there is no posthumous annulment possible. *See* Petition for Rehearing at III., IV; Respondent's Brief at I.

V. Petitioners Fail to Address Their Attempt to Deprive the Estate and Trust of Millions

Petitioners contend that Mrs. Brown improperly raises the settlement agreement attached as Exhibit B to the Petition for Rehearing. Petitioners are the ones who raised that agreement in Petitioners' Brief in this case, yet they do not want Mrs. Brown to be able to respond. *See* Petitioners' Brief at 4. Moreover, the Court can take judicial notice of the agreement, which was signed on March 8, 2017 and filed with the Court of Appeals on August 4, 2017. Despite

Petitioners' arguments, the agreement speaks for itself and confirms Mrs. Brown's assertions about it in her Petition for Rehearing: Mrs. Brown agreed to dismiss her will and trust contests — which she has already done — and will ultimately dismiss her remaining spousal share claims; the Estate and Trust, which will receive 65 percent of the proceeds of any of Mrs. Brown's proceeds from federal termination rights, agreed to dismiss its contest of her status as surviving spouse, which is necessary for the Estate and Trust to be able to receive any proceeds contributed by her from the federal termination rights.

What Petitioners continue to fail to address is that by contesting Mrs. Brown's status as surviving spouse, they are effectively taking millions of dollars (likely tens of millions) away from the Estate and Trust, which they get for themselves if Mrs. Brown is not the surviving spouse. Moreover, Petitioners themselves admit that they are in federal court trying to invalidate Mrs. Brown's contribution to the Estate and Trust of 65 percent of her share of the federal termination rights proceeds — again demonstrating their intent to deprive the Estate and Trust.[5]

Nor are Petitioners correct when they accuse Mrs. Brown of improperly explaining the impact of her settlement agreement with the Estate and Trust by trying to sway the Court. Mrs. Brown is addressing the concern expressed by the Court, both at oral argument and in the Opinion, about scholarships through the Trust. Petitioners clearly do not want the Court to understand that Petitioners are trying to deprive the Trust, which otherwise is not entitled to any interest in federal termination rights, of Mrs. Brown's contribution per the settlement agreement,

[5] While complaining that Mrs. Brown explains the settlement agreement which is on file at the Court of Appeals, they talk about the federal case, which is not in the Record on Appeal.

so that Petitioners, not the Trust, will receive these extremely valuable benefits. They do not and cannot dispute that this is the result of a determination that Mrs. Brown is not the surviving spouse.

VI. Petitioners Mistakenly Assert that Mrs. Brown Failed to Previously Raise an Argument about Prospective Application

Petitioners contend that Mrs. Brown failed to raise the vested rights/prospectivity argument until her Petition for Rehearing. That is not correct. *See, e.g.*, Respondents COA Brief at footnote 24.

VII. Petitioners Misstate Application of *Lukich*

Petitioners misstate the ruling in *Lukich* that treated the annulment of a bigamous marriage (the second marriage) as void *ab initio* while treating the annulment of the intoxication marriage (the first marriage) as merely voidable, thus following the bigamy statute and all case precedent. *See* Petition for Rehearing at VIII.; Respondent's Brief at IV. Petitioners misapprehend that *Lukich* treated the bigamous second marriage exactly as the bigamy statute and all precedent have always treated bigamous marriages: void *ab initio* and never a marriage. Petitioners fail to state that the second marriage in *Lukich*, the bigamous marriage, was held to be void *ab initio* and never a marriage even though the "second husband" did not obtain an annulment, or "clear the record," until long after the second marriage. A proper application of *Lukich* and all case precedent leads to the same result as a consistent application of the record-clearing rule: Mrs. Brown had no impediment to her marriage to Mr. Brown, which is valid.[6]

[6] *See, State v. Sellers*, 140 S.C. 66, 134 S.E. 873 (1926) (which supports Mrs. Brown's position because it involved exactly the same order of marriages, and the husband was not guilty of

VIII. Petitioners Make Assertions Not in the Record that Are Not True

Despite Petitioners' complaints about asserting matters not in the Record on Appeal, Petitioners proceed to do just that, such as their attempted explanation of federal termination rights, in an attempt to obfuscate the basic fact that they are trying to take away Mrs. Brown's termination rights for themselves, costing the Estate and Trust her contribution of those proceeds.[7] They state that at Mr. Brown's death, he and Mrs. Brown "were already living apart in opposite ends of the country." That is simply not true.[8] They argue that, "as a result Respondent is excluded from Mr. Brown's will." Again, that is not true. The 2000 will was executed before they were married. Petitioners continue to assert that Mrs. Brown stipulated that she had "no evidence" of Ahmed's bigamy, which is patently misleading. Mrs. Brown

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bigamy in his "second" marriage because his "first" marriage was void *ab initio*); *see* Petition for Rehearing at VIII.; Respondent's Brief at IV.

[7] While continuing to hide the basic truth that they are attempting to take millions of dollars away from the Trust by depriving the Trust of Mrs. Brown's contributed proceeds from federal termination rights, Petitioners in their brief make insignificant arguments in an apparent attempt to deal with a secondary issue raised by the affidavit (Petition for Rehearing, Exhibit B) of the Estate's music manager, Peter Afterman, that as Petitioners exercise the termination rights, not only is the Trust deprived of the millions of dollars of proceeds contributed by Mrs. Brown, the Trust will be additionally diminished by the reduction of the royalty stream. Petitioners are incorrect about their statements of facts and law as to this secondary issue. The major income producing hits were copyrighted as follows: Please Please Please 1956; Try Me 1960; Papas Got a Brand New Bag 1965; I Got You I Feel Good 1965; It's A Mans Mans Mans World 1966; Cold Sweat 1966; Say It Loud I'm Black and I'm Proud 1968; I Got the Feelin 1968; Mother Popcorn 1969; It's Too Funky in Here 1970; Superbad 1970; Sex Machine 1970; Get on the Good Foot 1970. Moreover, Petitioners attempt to confuse by discussing the derivative works exception in regard to the recordings; however, the recordings cannot be licensed without the publishing rights, which will have gone to Petitioners with the termination rights.

[8] At the time of Mr. Brown's unexpected and sudden death, Mrs. Brown was receiving short-term medical treatment in California, paid for and approved by Mr. Brown. They were not living apart, any more than if a decedent died while a spouse was away on a business trip.

testified before the family court, which judged the reliability of her evidence and ruled in her favor.[9] Petitioners assert that they "were wholly unaware that any settlement negotiations were taking place" before they received notice of the settlement. That is untrue and misleading. Petitioners' South Carolina counsel had been involved in settlement negotiations, which included Mrs. Brown. But even if they did not find out about any settlement until notice was filed in the Court of Appeals, they have not attempted to contribute any termination rights proceeds to the Trust. Moreover, Petitioners were involved in settlement negotiations with the Estate and Trust in their own will and trust contests, which they settled without contributing any proceeds from their federal termination rights.

The bottom line is, despite their weak and patently false statements and excuses, Petitioners are attempting to deprive the Trust of valuable termination rights proceeds so that they can have them all to themselves.

Conclusion

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 in Mrs. Brown's Petition for Rehearing.

Respectfully Submitted,

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[9] Mrs. Brown stipulated that she had *no other* evidence except for the evidence she presented in her testimony. Despite Petitioners' contention that there was no admissible evidence, her testimony before the family court was clearly admissible.

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