THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

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APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

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Case No. 2008-CP-02-1647

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Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Daryl J. Brown, on behalf of his minor children, Lindsey B. and Janise B.; Deanna J. Brown Thomas, on behalf of her minor child, Jason L.; Yamma N. Brown, on behalf of her minor children, Sydney L., Carrington L., and Tonya B.; Vanisha Brown; Larry Brown; Tommie Rae Hynie Brown; and James B., through his Guardian ad Litem, Respondents,

v.

Albert H. Dallas, Alfred A. Bradley, and David G. Cannon, Individually and as (purported) Trustees of the James Brown 2000 Irrevocable Trust; Adele J. Pope and Robert L. Buchanan, Jr., Personal Representatives of The Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust; Terry Brown; Romunzo Brown; Forlando Brown; Cinnamon N.M. Paris; LaRhonda Petitt; Jeanette Mitchell; and Russell L. Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and the James Brown 2000 Irrevocable Trust, Defendants,

of whom Robert L. Buchanan, Jr., and Adele J. Pope, as Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust are, Appellants,

and Albert H. Dallas, Alfred A. Bradley, and David G. Cannon, Individually and as (purported) Trustees of the James Brown 2000 Irrevocable Trust; Terry Brown; Romunzo Brown; Forlando Brown; Cinnamon N.M. Paris; LaRhonda Petitt; Jeanette Mitchell; and Russell L. Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and The James Brown 2000 Irrevocable Trust are, Respondents.

In re: The Estate of James Brown and The James Brown 2000 Irrevocable Trust u/a/d August 1, 2000

Appellate Case No. 2009-142286

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**PETITION FOR REHEARING**

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## Introduction

Respondent Alan Wilson, in his capacity as Attorney General of the State of South Carolina, respectfully requests, pursuant to Rule 221, SCACR, a rehearing of the decision of the Court rendered on February 27, 2013. We emphasize at the outset that we have nothing but the greatest respect for the Court and that the Petition is not intended in any way to detract from that respect. But we must file this Petition, nevertheless, because, based upon the decision as written, we do not believe the Court had the full story concerning the Attorney General's role in the Brown settlement or the Office's part or lack thereof in any administration of the charitable trust.

We had thought that in our Brief and at oral argument we had provided the Court with the information it needed to accurately assess the part the Attorney General played in this settlement. Assuming we did not, however, this Petition is presented to ensure the Court now has all the facts and the applicable law. Specifically, based upon the information presented herein, we seek to have the Court modify its Opinion consistent with what we believe is a more accurate depiction of the role of the Attorney General in this case. Such modification is important because, otherwise, we fear the decision will have a lasting adverse impact upon the credibility of the Office of Attorney General, which this Court has recognized as the executive office designated to protect charitable trusts and defend the public interest. *See*, *State ex rel. Condon v. Hodges*, 349 S.C. 232, 239, 562 S.E.2d 623, 628 (2002) ["(a)s the chief law officer of the State, (the Attorney General) may ... exercise all such power and authority as public interests may from time to time require, and may institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order

and the protection of public rights." *See also, City of Cola. v. Tatum*, 174 S.C. 366, 177 S.E. 541, 546 (1934) ["It is doubtless due to the insistence of the Attorney General that the rights of the public have been so carefully guarded ...."].

**Argument**

The Court is absolutely correct that the Attorney General was substantially involved in the Brown settlement because of his longstanding common law and statutory duty "as the protector, supervisor and enforcer of charitable trusts[.]" 2013 WL 697042, *Op.* at 18. But equally involved were the numerous other parties in this case. This was not a situation where the Attorney General's Office directed anyone or anything. Of course, the Attorney General's legal authority concerns only the charitable beneficiaries, not private parties or interests. *See* S.C. Code Ann. § 1-7-130 (1986). Here, all other Respondents had widely divergent interests and adverse positions to each other. Those positions were each represented vigorously by well-respected counsel. A settlement of such complexity and magnitude cannot be arrived at by Attorney General fiat. Thus, in no sense, did the Attorney General "broker," nor could he have, the terms of the settlement. Nor did he "direct[ ] a compromise which ultimately resulted in the AG obtaining virtual control over Brown's estate," as this Court found. *Op.* at 19.

Instead, consummation of the Settlement was a hard-fought, hotly-contested process and agreed to at arms-length by the parties with the assistance of one of the most highly respected mediators in this State, Tom Wills. Contrary to the Court's implication throughout its decision, the Attorney General is not a dictator, and he did not dictate the terms of this settlement. This settlement arrived at was fair, reasonable, and was approved by a highly regarded circuit judge after seven strenuous, hard fought days of

hearings. And, this was a circuit judge who vowed on the record that he would not be "ramrodded" by anyone, but would reach his own independent determination as to the settlement's merits. *Supplement* at 5. [The Court: "So it (the settlement) won't be ramrodded by any stretch of the imagination. It will only be approved or disapproved by a very thoughtful discussion by everybody and everybody having an opportunity to present to me their pros and cons. So, ramrod – I take issue with that description."] Thus, as this Court correctly recognized, "... it was the circuit court, not the AG which gave final approval to the compromise agreement submitted by the parties." *Op.* at 10. That is what the law requires of a court of equity and that is what occurred in this case.

While we certainly disagree with the Court's conclusion voiding this settlement, a settlement which was carefully thought out and thoroughly reviewed, we fully respect the Court's judgment based upon the applicable legal standard that the settlement must be "just and reasonable." However, to the extent that the Court's opinion is premised upon the Attorney General's having effected a "total takeover of Brown's estate" or his having "highjacked the proceedings here," the Court is mistaken. That is not at all what happened here. Based upon this incorrect premise, and to avoid a future adverse impact which this decision, as written, will inevitably cause to the Office of the Attorney General as the protector and enforcer of charitable trusts, we respectfully seek to have the Court reconsider these portions of its Opinion and to correct its assessment of the Attorney General's role here. In our view, any finding that the settlement is not just and reasonable, although we disagree with such conclusion, can and should stand separate and apart from any opinion of the Court that the Attorney General "commandeered" these proceedings. He did not.

As the Court readily acknowledges, "no one disputes the propriety of the AG's initial intervention [in this case] amidst allegations of fraud by the original trustees ...." *Op.* at 24. And, as the Court correctly observes, in 2011, one of the trustees – Cannon – "entered a plea under *North Carolina v. Alford*, 400 U.S. 25 (1970) to charges of taking money from Brown, for which he was sentenced to house arrest." *Op.* at Footnote 2. Restitution for Cannon's misdeeds is currently being sought; an Order has been issued granting a restitution hearing. That matter is presently pending. This is consistent with the Attorney General's longstanding role concerning charitable trusts.

In other words, in view of the current financial soundness of the estate and trust, we believe that the role of the Attorney General, as "'an overseer of charities representing the public, the ultimate beneficiary of the charitable trust'" and as the officer to "'remedy abuses in the trust management," has now been largely fulfilled. The charitable trust is in the hands of an able circuit judge, exercising his equitable powers, and one who, in the Court's own words, has done "a commendable job in attempting to sort out this difficult situation." *Op.* at 20.

Accordingly, we now advise this Court that, it is our plan that, having completed our function in intervening in this case, the Attorney General will, upon the appointment of a new trustee, assume a posture of monitoring the action, as we typically do in many charitable trust matters. Chief Justice Toal is correct that "the AG's involvement [is] no longer necessary to stave off maladministration of the Charitable Trust." In this monitoring posture, we will be available to assist the court, if required, but any active role by the Attorney General is no longer necessary, now that the Court has directed that the lower court appoint a new trustee. Moreover, in light of this Court's ruling in the separate

action against Ms. Pope and Mr. Buchanan in Richland County, which will be discussed more thoroughly below, we will withdraw from that action completely and leave the new trustee the task of protecting the charitable beneficiaries in that action.

Having said that, we turn to the settlement and the part which the Attorney General's Office played in it, as well as to the Court's incorrect assessment that the Attorney General has enmeshed himself in the day-to-day operations of this charitable trust. We believe we have professionally and capably carried out our legal responsibilities to protect this charity. If we had not, Judge Early, who is an experienced and able trial judge, would not have concluded that in protecting the charitable trust, "the diligent efforts of the Attorney General's Office [have resulted in making] ... the assets to fund the trust ... [now] available." *Record* at 45. This Office stands by Judge Early's assessment.

As the Court readily acknowledges, "'[t]he law generally favors an agreement of compromise among family members to avoid a will contest or to promote the settlement and distribution of an estate.'" *Op.* at 18, citing *Duncan v. Alewine*, 273 S.C. 275, 255 S.E.2d 841 (1979); *Dibble v. Dibble*, 248 S.C. 165, 149 S.E.2d 355 (1966). Moreover, "[a]s a general matter, the more complex, time consuming and expensive the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court." *See*, *McBean v. City of New York*, 233 F.R.D. 377, 385 (S.D.N.Y. 2006). Further, as this Court recognized in its Opinion, "'a court may decline to approve or enforce a settlement agreement which does not settle a 'good faith contest or controversy ... .'" *Op.* at 16. See also, *Cooley v. Tax Comm.*, 204 SC 10, 28 S.E.2d 445, 451 (1943). ["the Attorney General of a state 'may enter into compromises and

settlement of suits in which the state is an interested party, which will be binding on the State, where there is doubt and an honest dispute as to the State's rights, and the compromise or settlement is a bona fide one ...."(quoting 5 Am. Jur. p. 240).]. We thus agree with the Court, based upon our reading of *Cooley*, that "something more than a subjective belief or a mere allegation is necessary to avoid the potential for collusion ...." *Op.* at 12.

Thus, in any evaluation of a settlement, the court must determine that the settlement is not the product of collusion or coercion. *See*, 15A CJS, *Compromise and Settlement*, § 25 ["... a settlement should not be approved ... if it is the product of fraud, or overreaching by, or collusion among the negotiating parties."] In order to make that determination, there must be an evaluation of the negotiation process. As one court has put it, the court must "determine whether the compromise was the result of arms-length bargaining between the parties." *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D.Ga. 2001). Important in such a determination is that the case "has been adversarial, featuring a high level of contention between the parties throughout the litigation, the mediation, and the arbitration and drafting of the Settlement Agreement." *Id.*

All of these elements were met here, but the Court did not examine these. While the Court may disagree with the settlement on its merits, our reasonable, good faith belief that there existed a contest or controversy in this matter, and that a settlement was in the best interest of the charitable trust, cannot be questioned. Nor did the Court examine the settlement negotiations and how settlement came about. Indeed, Appellants' attorney, Mr. Bailey, candidly told the lower court "that Mr. Buchanan and Mrs. Pope aren't opposed to settlement," just the terms of the settlement. *Supplement* at 16-17. Thus,

Appellants themselves appear to have acknowledged that a controversy existed and that they favored settlement. *See*, *Supplement* at 18. [Mr. Bailey in questioning by the court, recognized that a finding that Tommie Rae Brown (hereinafter "Ms. Brown") was Brown's wife would "diminish what goes into the trust."] It is further noted that Wayne Byrd, attorney for former Trustee Dallas, also advised the Court that in his opinion the controversy was genuine but there needed to be an adjustment as to the percentage going to the charitable trust. *Supplement* at 19-20. Ms. Pope told the lower court at the hearings that "nobody wants more than Mr. Buchanan and me to see this case properly settled." *Supplement* at 6. In fact, Appellants proposed their own settlement to the circuit court. *Record* at 2935-2939. Thus, to conclude that a good faith controversy may have been lacking is incorrect. To the contrary, while there was strong disagreement as to what a settlement would entail, there was virtually no dissent that a settlement should be had.

Moreover, it is worth noting that in its past decisions, this Court has not taken the Attorney General to task for participating in the negotiation of an arm's length settlement based upon a reasonably arrived at, honest, good faith assessment that litigation carries considerable risk and that settlement is in the public interest. Indeed, in *Cooley v. S.C. Tax Comm.*, 204 S.C. 10, 28 S.E.2d 445 (1943), the Court had no issue with a complex inheritance and income tax settlement in which the Attorney General participated on behalf of the State. As here, there was in *Cooley* a vigorous attack upon the settlement. The *Cooley* settlement was questioned by the State Tax Commission, which evidently believed settlement would, in essence, forfeit large sums to the taxpayer. As the Court stated, the settlement was challenged in part, because "the amount to be paid in said

settlement is less by several hundreds of thousands of dollars than the amount of taxes due by said estate if the decedent was in fact domiciled in South Carolina ...." 28 S.E.2d at 449.

But it is important to observe that in approving the *Cooley* settlement, this Court did not find that the Attorney General – because he favored settlement in order to dispose of costly litigation and to protect the public interest – engaged in overreaching or was unnecessarily forfeiting assets, as he carried out his constitutional and statutory duties. As the Court well knows, any settlement must give up something to get something. In the public arena, any settlement less than what was originally sought (like any plea agreement) can be second guessed or subject to criticism as being too little or not nearly enough. However, as the Court stated in *Cooley,* in a passage which could be deemed virtually applicable to the circumstances in this case:

> [l]imiting ourselves to the precise question presented by the peculiar facts of this case, we find the situation to be that the State of South Carolina, acting by counsel for whom provision is made in the Constitution and statutes of the State, ... came to the conclusion that the best interests of the State lay in the settlement of the litigation. Its counsel had before him a settlement proposal which represented substantially more than fifty percent. [[1]] of the amount he deemed to be involved and he was dealing with contentions on the part of the State involving matters of law and fact about which he believed there was serious doubt. Presumably his judgment was affected by the fact that the Commission had dealt with the estate as that of a nonresident in thus acting upon the detailed factual representations of the attorneys for the executors as to the domicile of the testatrix, and that this course of dealing on the part of the Commission had represented its considered judgment based upon full investigation of available sources of information.
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> Nowhere in the record is there the slightest suggestion of fraud on the part of the executors or their attorneys in the course pursued by them, or in the representations made by them; nor under the motion challenging

[1] It is our understanding that the charity will get substantially more than fifty percent here, also. With the renewal and termination rights being a part of the settlement, the revenue stream for scholarships to needy children can continue for at least another 40 years longer than it would have without these rights.

> the settlement in question, and in the petition made in support thereof, is it suggested that any of the factual considerations which the executors presented and the Commission and the Attorney General acted upon are erroneous.
>
> *And finally the record is clear that the Attorney General has not acted otherwise than in good faith, or with any other purpose than to serve the best interests of the State.* (emphasis added).

*Id.*

In other words, the Court in *Cooley* did not characterize the Attorney General's role in participating in the settlement as one of overreaching, commandeering, or abdication even though the settlement was hotly contested, and even though there were those contending that the Attorney General gave up too much in settling the case. For the Attorney General to advocate a position on behalf of the State or on behalf of the charitable beneficiaries that a matter should be settled is not, absent proof thereof in the Record, overstepping our authority or abdicating our responsibility. Importantly, no such proof exists in this case. Here, as in *Cooley*, the Attorney General participated in hard-nosed settlement negotiations and agreed to compromise when faced with a good faith controversy. The fact that it is the Office of Attorney General involved in the settlement negotiations does not *ex proprio vigore* mean that the Office "brokered" the settlement and thus the settlement will be voided. *See also*, *Duncan, supra* [Court disapproved of family settlement, in which Attorney General participated, but Court did not single out role of Attorney General]. If it did, the Court would be tying the hands of the Attorney General in resolving cases for the best interest of the State.

Originally, in this case, the Office of the Attorney General did not favor settlement at all and was prepared to litigate the matter to the fullest. We believed that we could prevail completely, based upon the four corners of the will. *Record*, at 1853.

["Mr. Jones: ... the position of our office is we don't settle .... [W]e're satisfied it is a four corners case."]; *Record* at 1990 [Mr. Jones: ... in the first three or four months it looks like the AG doesn't want to settle or he's not in the mode to settle. [His] ... is a scorched-earth type of situation because [of] how vigorously we were opposing."]. However, as time went on, we became convinced that the trust was losing value rapidly because it was being overwhelmed by lawsuits and family strife. The "cunning, artifice or undue influence" litigation,[2] brought by the Appellants, as well as the continued family strife, thereby insuring lengthy, expensive litigation, thus made settlement more attractive to the Attorney General even though it had not been before. As the Court itself notes, "the parties remained at odds over the handling of Brown's estate matters." *Op.* at 19.

More specifically, in February, 2008, Appellants sued Cannon, Dallas, Bradley, et al., alleging that "[b]eginning on or before January 1, 1999, the Defendants Cannon, Dallas and Bradley entered into a civil conspiracy to defraud James Brown and his related interests and entities which continued up to the date of his death and thereafter." *Record* at 1201, 1237. This "cunning, artifice, or undue influence" lawsuit is markedly different from the claims of "undue influence" which are addressed in this Court's opinion. Our focus turned to the body of evidence that was building in support of James Brown being swindled over a period of time, not the facts and circumstances surrounding the signing of the trust document.

In that regard, what the Court overlooks is the substantial impact which the Appellants' "cunning, artifice, or undue influence" litigation had upon our decision to seek settlement. Appellants' suit asserts that James Brown was being "bilked" by those

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[2] This initial complaint was filed on February 5, 2008. (R at 1194-1229). The Amended Complaint was filed on March 18, 2008. (*Record* at 1230-1271)

closest to him for almost a decade during his life. Appellants' complaint alleges this scheme had "Defendants Cannon, Dallas and Bradley began or continued a scheme under which excessive and exorbitant fees and commissions were charged and collected against income generated by Mr. Brown from the performance of tours and concerts throughout the world[.]" *Record* at 1201-1201, 1237-1238. Appellants further assert that David Cannon funneled more than one million dollars of funds to himself, his entity DGC Associates, and Albert H. Dallas. This lawsuit seeks actual, as well as punitive, damages. *Record* at 1224-1229, 1264-1270. Moreover, the Complaint further alleges that pursuant to the conspiracy, Dallas, Cannon and Bradley undertook to procure Brown's signature by undue influence, fraud or forgery and fraudulently concealed these acts from Brown.[3] *Record* at 1201, 1237.

In other words, once this litigation was filed in February, 2008, we realized that not only did Dallas, Cannon and Bradley seek to defraud James Brown during his lifetime; they also sought to play upon his passion to educate needy children by placing themselves in charge of the charitable trust so that they could bilk Brown after his death.

Appellants' lawsuit, and the allegations contained therein, are discussed extensively in our Brief to this Court at pp. 24-26. There, we noted that "the controversy whether Brown's former handlers and confidants took advantage of and unduly influenced him has a good-faith basis." *Respondents' Brief* at 25-26.

This Court has recognized the doctrine of "cunning, artifice or undue influence" to

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[3] A snapshot of one of these schemes to bilk James Brown is Exhibit G that is attached to the February, 2008, complaint. Exhibit G addresses the payout of a refinancing of the Pullman bond that had an outstanding balance of $20,100,000 for a refinance amount of $25,200,000. That refinance would leave a net proceed of $5,100,000. However, with the payment of fees to Cannon and Dallas, among others, the net result would be James Brown ***owing*** over $1 million in addition to the bond increasing by $5 million. *Supplement* at 22.

void the acts of a person where that person "has not exercised a deliberate judgment, but that he has been imposed upon, circumvented or overcome by cunning, artifice or undue influence." *Gaston v. Bennett*, 30 S.C. 467, 9 S.E. 515 (1889). *See also Dubose v. Kell,* 90 S.C. 196, 71 S.E. 371 (1911) [Court found no undue influence because the deed was not procured or induced by any undue influence, fraud, cunning, duress or artifice].

As we argued in our *Brief* to this Court, "[u]nfortunately, at the end of the day, Cannon, Dallas, and Bradley's undue influence over Mr. Brown appears to have prevailed." *Brief* at 26-27. Thus, the primary witnesses we would use to uphold the charitable trust – Cannon, Bradley and Dallas – stood accused of fraud and Herring was in prison. As Mr. Medlin told the circuit court, "[t]his is exactly what Mrs. Pope and Mr. Buchanan accused those three gentlemen of doing during Mr. Brown's lifetime – that – to be gross about it, that they cheated and tricked him." *Record* at 1967.

The circuit court recognized the importance of the "cunning, artifice, or undue influence" litigation upon the decision to settle. Questioning Mr. Bailey, the court stated that "you will acknowledge there is a serious challenge to those based on undue influence and for no other reason for the fees that were allowed under those documents to be paid to Bradley, Dallas and Buchanan (sic) up to 50% of the gross?" *Record* at 1399. And, in its Order, the circuit clearly focused on this litigation brought by Appellants:

> [o]n behalf of the estate and trust, Ms. Pope and Mr. Buchanan have brought an action against Messrs. Cannon, Dallas and Bradley, alleging inter alia that Messrs. Cannon, Dallas, and Bradley practiced undue influence on Mr. Brown and used various entities controlled by them to syphon off his assets, effectively order the guise of management expenses. Ms. Pope testified that Mr. Cannon told her he could get half of Mr. Brown's estate, if he wanted ....
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> Furthermore, the credibility of four principal witnesses to the validity of the 2000 will and trust is questionable. Mr. Herring is in jail

> for murder. The accuracy and veracity of the testimony in this matter by Messrs. Cannon, Dallas and Bradley is suspect and at times contradictory.... The questionable credibility of the four witnesses most involved with the preparation and execution of the 2000 will and trust certainly supports the good faith basis of the contestants' claims.

*Record* at 24-25.

The Court also had concerns about the impact of the prenuptial agreement. This provides further basis for there to have been a good faith controversy, thereby leading to settlement. From our review of the briefs, the agreement is mentioned only once – in footnote 24 of the Appellant's Final Brief. In our view, there may be a reason for this: The Attorney General also did his due diligence as to this issue. From the information represented to us, the prenuptial document in November 2001 was presented to Mrs. Brown by one of the Trustees without legal representation for Mrs. Brown. Additionally, there was no evidence that we found that Mrs. Brown was provided information, of a general and approximate nature, concerning Mr. Brown's net worth. *See Geddings v. Geddings*, 319 S.C. 213, 460 S.E.2d 376 (1995) ("Fair disclosure contemplates that each spouse should be given information, of a general and approximate nature, concerning the net worth of the other. Each party has a duty to consider and evaluate the information received before signing an agreement."). Mr. Brown could not have informed Ms. Brown of his financial situation, even if he had wanted to, because he did not know it himself. In fact, the value is still in dispute today.

Second, a view of the document itself reflects facial defects of the prenuptial agreement *Record* at 2641-2647. The first page states the document is an Aiken document, while the signature page indicates it was executed in Georgia. *Record* at 2641, 2647. The handwriting on the first page purports that it was signed on November

19, 2001, while the signature page purports to be signed on November 27 2001. *Record* at 2641, 2647. Further, the two purported witnesses do not include the notary or the witness swearing before the notary, yet the witness swearing before the notary claims that she along with the "other witness" signing above saw the signatures. *Record* at 2647.

These issues – the lawsuit alleging cunning, artifice or undue influence, and the potential invalidity of the prenuptial agreement – together with the other litigation brought by family members, thus caused us to seriously rethink our position of "no settlement." The trust could well end up with "zero," as we saw it. *Supplement* at 9. [Mr. Bauknight (who was then functioning as court advisor): "If the will contests that were being litigated were successful, the Attorney General's Office would see absolutely nothing going into the charitable trust unless ultimately something was found to have already been funded into a trust."] It was in this light that attorneys for other parties in this litigation approached the Office of Attorney General, suggesting mediation and possible settlement. We did not push these settlement talks, but they were proposed to us. The Attorney General, recognizing the obstacles facing us, gave his approval to enter these settlement negotiations. We did not know whether settlement was even possible, but we agreed to give it a try. *Record* at 1992-1993. We suggested Tom Wills, a leading mediator in the State, in an effort to mediate the matter. The site for mediation was agreed by all to be held in Augusta. While the Court found that Appellants did not receive notice of the mediation, we had been advised and believed in good faith that they had received notice. *Supplement* at 9-14.

The atmosphere in Augusta was one of high tension, due to family members being at odds with one another. A draft skeletal outline for settlement had been prepared by an

attorney for one of the other parties. After considerable negotiation, the ratio of 50-25-25 was agreed upon, together with the inclusion of the renewal and termination rights. This proposal seemed more than fair from the standpoint of the trust, particularly given the value of these music rights.

With regard to those music rights, to their credit, the children and Ms. Brown strongly believed that James Brown truly desired needy children to have scholarships and it was they who offered the renewal and termination rights to the trust. This would give the trust a value far beyond where it then stood.

Such renewal and termination rights, provided a very valuable asset to the Trust. Even if the Trust litigated the matters and won on every point, the Trust *would not have this significant asset.*

As Peter Afrasiabi's article explains, using the example of "Superman," authors and their families possess rights under federal copyright law to terminate a previous assignment of a copyright. The article states that "[t]his termination-recapture right that exists for authors and their families is immensely valuable." *Record*, at 2308, 2313.

It was our position that these rights being made a part of the Trust was a huge gain for the Trust, and that the parties at that time recognized that the value of this asset was uncertain. *Record* at 1326. [Mr. Jones: "The renewal and termination rights being included within the settlement was a major factor for us and what we consider[ed] a bonus ..."]. As the contribution agreement states: "The parties hereunder recognize that it may be difficult at this time to value accurately the interests and rights being contributed hereunder to the Legacy Trust. However, the parties are reasonably informed that a large portion of the value of the assets and interests contributed hereunder resides

in the rights granted to heirs under the federal copyright laws. Accordingly, the parties recognize that the beneficial interests received hereunder by Ms. Brown and/or by the Levenson clients *may be of lesser value than the interests they are contributing to the Legacy Trust pursuant to this Agreement*." *Record* at 513. (emphasis added)

Following day-long negotiations in a contentious atmosphere, early that evening, we believed a settlement had been achieved. However, due to internal family strife, the settlement agreement then appeared to collapse. After some considerable effort by the mediator, the family strife was resolved and an agreement to settle in principle was finally reached after 11:00 p.m. that evening. The settlement agreement was signed in August, 2008, about 10 months after the Attorney General had intervened in the action. *Record* at 171-172, 506.

That did not end the matter, however. The other Respondents took the position that no court approval of the settlement agreement was necessary, but that such agreement was a private family settlement. *See* S.C. Code Ann. § 62-3-912 (2009). Notwithstanding this position, the Attorney General insisted as a condition of any settlement that court approval would be necessary and should be sought pursuant to section 62-3-1102. *Record* at 1321 ["Mr. Jones: ... while the Attorney General is the – is the chief legal officer of this state and the protector by statute and common law of charitable trusts, ... this court, the court of equity would also protect the charitable trusts and charitable fiduciaries"; *Record* at 1725 ["Mr. Jones: ... but in the charitable trust the executive branch, the chief legal officer in this state protects the interest of the charitable trust under supervision of a court of equity – not under any supervision of any PR or trustee."]; *Record* at 1725 [Mr. Jones: The Attorney General takes a little different

position. Mr. Medlin and I have gone back and forth about this, but in a trust we feel, your Honor, *that the resolution we have must be presented to you* ....]. (emphasis added). This was consistent with our longstanding policy, that because a charitable trust was involved, court approval is required. *Id. See also*, 14 C.J.S. *Charities*, § 40 ["The ultimate control over [a charitable] ... trust rests in the court."].

Seven days of hearings were held by the circuit court before the settlement was finally approved. As Chief Justice Toal recognized in her separate opinion, "[t]he fact that the AG has agreed to the settlement is of no consequence as the court is the ultimate arbiter of the merits of any settlement agreement devolving from a testator's express intent." *Op.* at 22. We agree with that statement completely. A court of equity is the ultimate protector of a charitable trust. That is why we were insistent that court approval must occur.

At the March 25, 2009 settlement hearing, we were asked bluntly by the circuit court whether we "have ... diligently examined all the possible outcomes? Have you examined all the documents and pleadings and affidavits and court orders and case law and statutes? And having done that, are you of the opinion that the settlement agreement is in the best interest of these needy children?" Our response, by Mr. Jones, was: "without a doubt, your Honor. The Attorney General, as I have mentioned to you earlier on, has not restricted me on any resources in my office that are necessary at my beck and call to do the work we needed to do." *Record* at 1726-1727.

In short, the Court is in error in concluding that the Attorney General "brokered" this settlement. What we did was prudently and reasonably weigh in good faith the pros and cons of the settlement versus that of litigation and to make a reasoned judgment that

settlement was in the best interest of the "ultimate, unspecified, and indefinite charitable beneficiaries mentioned in the decedent's will[.]" *Op.* at 9, citing with approval *In re Estate of Smith*, 75 Misc.2d 895, 349 N.Y.S.2d 281 (Surrog. Ct. 1973). That is what this Court's decision in *Cooley* requires.

We negotiated on behalf of our client, the charitable beneficiaries, in good faith and at arms-length with the other Respondents, who represented different interests. By any objective measure, our belief that there was a good faith controversy here was entirely reasonable. *Record* at 1326. [Mr. Jones: ... based upon the arguments and the hurdles we had to overcome including what witnesses we would have had to have called to present our case and the credibility of those witnesses that it was appropriate, reasonable, and at the part of doing our due diligence to enter into this settlement agreement and that it's reasonable and fair."]. Together, with the assistance of an able mediator, involved in the negotiation process every step of the way, we ultimately all reached a compromise, and the Attorney General insisted upon circuit court review thereof. Intensive review by the circuit court occurred and the settlement was ultimately approved by it. In our judgment, this was proper and in accordance with the law. We understand and respect fully that this Court does not agree with the settlement which was reached. But we strongly disagree that we overstepped our authority or our bounds with respect to the settlement.

We also take considerable issue with the Court's conclusion that "[t]he settlement provisions allowing the AG to select the trustee and his continued influence over the trust overreaches his statutory authority, as there is no provision allowing an AG to become involved in the day-to-day operations of a trust." We never have sought such a role

involving us in day-to-day operations, there is no evidence to that effect, and it would be inappropriate to involve ourselves therein. The Attorney General fully accepts and understands his role as protector of charitable trusts. The Court's conclusion, moreover, is legally erroneous because it overlooks the fundamental point that it is not the Attorney General who makes the ultimate decision in this regard, but the circuit court functioning as a court of equity. We repeatedly emphasized that point to the circuit judge.

It is first important to point out that in the settlement negotiations, the other Respondents came to us with the proposal that the Attorney General – as the neutral protector of charitable trusts – should possess the authority to appoint the trustee. The Court should know that the Attorney General did not seek out this authority, but that it was agreed by the other Respondents as a neutral and detached entity, acting in a quasi-judicial capacity, that we assume that responsibility.

Secondly, contrary to the Court's finding, statutory law authorizes the Attorney General to play a significant role in the appointment of a trustee for a charitable trust. Section 62-7-704(d)(2) states the order of priority for filling a vacancy in a trusteeship of a charitable trust, providing that the vacancy may be filled by (2) ... a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust *[if the attorney general] concurs in the selection* ...." (emphasis added) The Comments to Subsection (d) provide that "a successor trustee may be selected by the charitable organizations expressly designated to receive distributions in the terms of the trust but only if the Attorney General concurs in the selection." However, if the Attorney General does not concur, or if the trust does not designate a charitable organization to receive distributions [as this one did not], "the vacancy may be filled only by the court."

With these provisions in mind, and particularly the fact that there was no "charitable organization" involved here, authority is not lacking for the Attorney General to have been given the authority to select the trustee as part of the settlement. But even so, the Attorney General took the position that this provision of the settlement, like all others, must be approved by the circuit court.

Third, as a provision of the settlement agreement, such provision regarding the Attorney General's appointment of the trustee was reviewed by the circuit court and approved. The circuit court is the ultimate authority in this regard and at the point that provision of the settlement was presented for approval, we viewed the provision as a means for the Attorney General to recommend a trustee to be considered and approved by the circuit court. Such provision could have been altogether rejected by the circuit court or even revised, but it was not. Further, as we advised the circuit court, if a conflict developed with Mr. Bauknight, "we can appoint somebody else to handle that issue." Of course, any new trustee would ultimately be approved by the circuit court. *Record* at 1998.

Fourth, even after approval of the settlement containing that provision, the circuit court as a court of equity stands as the ultimate protector of the charitable trust with respect to any abuses by the Attorney General or by the trustee. As this Court recognized in *S.C. Dept. of Mental Health v. McMaster*, 372 S.C. 175, 642 S.E.2d 552, 556 (2007), "supervision of charitable trusts is an inherent judicial function." The "ultimate control over the trust rests in the court." 14 C.J.S. *Charities*, § 40. As the United States Supreme Court has noted:

> When a charitable trust has been fully constituted, and the funds have been passed out of the hands and control of donors, and into the hands of the

> proper institution or organization, intended for its administration the Court of Chancery, or some analogous jurisdiction, becomes its legal guardian and protector, and will take care that the objects of the trust are duly pursued and the funds rightfully appropriated.

*American Printing House v. Trustees*, 104 U.S. 711, 727 (1881). Furthermore, the "jurisdiction of courts of equity over charitable trusts is a continuing jurisdiction over the safeguarding, supervision and control of such trusts." 15 Am.Jur.2d, *Charities* § 123.

Thus, whether the question is one of approval of the provision bestowing upon the Attorney General the power to appoint and/or replace the trustee or the implementation of this settlement provision over the course of time, the answer is the same: the circuit court, as a court of equity, is the ultimate protector of charitable trusts and its powers clearly trump the authority of the Attorney General in this regard. That is what we told this Court in the *McMaster* case, and it is likewise why we insisted upon taking this settlement in the Brown case to the court for its review. As we stated to the circuit court, "in a trust, we feel, your Honor, that the resolution that we have must be presented to you[.]" *Supplement* at 2.

Case law vividly illustrates this important principle regarding the supervisory power of the Court. In *McMaster*, *supra*, this Court concluded that "[p]roperty subject to a charitable trust may not be terminated or altered by the General Assembly, but rather, must be approved by the Court .... As a court of equity, the court possesses the authority to carry out the intent of the donor of a charitable trust." 372 S.C. at 183-184, 642 S.E.2d at 556.

And, in *In re Wilson*, 361 N.E.2d 1281 (Mass. 1977), the Court stated that while it "is true that the Attorney General is charged with representing the interest of the public in the administration of charitable trusts," still, the Court maintains its traditional discretion

with respect to such trusts, including the appointment of a trustee. Likewise, it was said in *In the Matter of the Trusts Under the Will of Crabtree*, 795 N.E.2d 1157, 1169 (Mass. 2003), that "[a] judge is not bound by a settlement reached between acting trustees and the Attorney General ... or obligated to appoint a nominee proposed by the Attorney General." (citing *Matter of Trust Under Will of Fuller*, 636 N.E.2d 1333 (Mass. 1994); *In re Wilson, supra*).

Moreover, the Michigan Supreme Court's decision in *In the Matter of Reeder*, 158 N.W.2d 451 (Mich. 1968) is instructive. There, the Court concluded that the court of chancery is the ultimate authority with respect to a charitable trust. In the Court's judgment, the Attorney General was entitled to appear on behalf of the beneficiaries and to assert that a settlement is not in the best interest of the beneficiaries, but in no sense could the Attorney General "forbid the judgment of the chancellor ...." *Id.* at 456. As the Court emphasized:

> [t]he attorney general, standing before the court in this case as an appointed legal representative of the people and of that class of charitable beneficiaries contemplated by the various statutory provisions upon which he relies, is no less amenable to the judgment of equity than are other appointed legal representatives of persons unknown or indefinite, or under legal disability or otherwise requiring representation.

*Id.*

Nor was Mr. Bauknight under the direction and control of the Attorney General as the Court's opinion implies. Mr. Bauknight is a well-respected professional fiduciary. Further, the circuit court utilized him as the court's advisor before he was appointed trustee. To suggest he is under the control of the Attorney General, further suggests that the circuit court did not consider his qualifications or credentials objectively either as its own advisor or as trustee. We call to the Court's attention the conclusion of the Court of

Appeals in its Order granting the Motion to Substitute Mr. Bauknight:

> It is, however, unquestionable that Bauknight, as the court-appointed PR/Trustee, does have an interest in ensuring the proper management of the Estate and Trust. At the same time the circuit court relieved Pope and Buchanan of their duties, it also placed upon Bauknight the fiduciary duty to manage and control the Estate and Trust. Thus, Bauknight should be substituted because the liability for mismanagement of the Estate or the Trust now falls on him.

*Record* at 76-77.

In summary, the Court, in rejecting the settlement on the grounds that the Attorney General placed himself in control of the trust, through the authority to appoint and remove the trustee, overlooks the fact that it is the court of equity which ultimately approved that provision, as it did the remainder of the settlement. Again, it was the insistence of the Attorney General which resulted in court review. And, it is the circuit court which possesses a continuing jurisdiction over the trust to supervise it and look after its welfare and best interests regardless of the role of the Attorney General to protect the trust. The circuit court made its own decision to appoint Mr. Bauknight independently of the Attorney General.

Finally, we take issue with the Court's statement in footnote 29 of its Opinion which reads as follows:

> [f]urther, the AG, with Bauknight's knowledge and cooperation, allegedly entered into contingency-fee agreements with outside counsel, Kenneth Wingate, for Wingate to sue Appellant Pope on behalf of the State, Bauknight, and others while also representing private plaintiffs in the suit. The suit sought damages to Brown's estate allegedly arising during Pope's appointment. Despite FOIA requests, the AG has refused to publicly release all of the documents pertaining to this purported arrangement. These matters should be considered by the circuit court in the first instance and any fees found to be inappropriately incurred should be disgorged and returned to the trust in light of our finding that the compromise is void and the AG has exceeded his authority by, among other things, effectively controlling the charitable trust through the appointment of Bauknight, who

serves at the AG's pleasure.

This recount of what happened is incorrect.

First of all, the Attorney General has not "refused to publicly release all of the documents pertaining to this purported arrangement." The Attorney General is a strong believer in FOIA and routinely advises public officials that "when in doubt, disclose." In this instance, we have released everything in our possession which we legally can release. One document is the subject of a Motion for a Protective Order, pending before Judge Manning. We certainly have no objection to the release of that document and have so advised the Court that we stand ready and willing to turn that document over once the Court so rules. We hope to have resolution of this issue in the near future.

With respect to the lawsuit brought against Appellants for breach of their fiduciary duty, we advise the Court candidly that the Attorney General did not want to have that suit brought because he is opposed philosophically to suing fellow attorneys.

In this instance, the Attorney General was particularly hesitant to sue because Appellants Pope and Buchanan enjoy a superb reputation throughout the legal community. Appellant Buchanan serves as a part-time federal magistrate and is a long time member of the South Carolina Bar. He is an experienced trial attorney with a diverse practice and is highly regarded. Appellant Pope has, for more than thirty years in South Carolina, been an outstanding attorney in the field of trust and estate matters. She is considered by the legal community to be an exceptional attorney.

After much deliberation, the Attorney General was advised that the statute of limitations was about to expire and that it would be a breach of the Attorney General's own fiduciary duty in protecting charitable trusts if an action was not brought on behalf

of the charity. The Attorney General's intent not to bring the action on behalf of the Attorney General's Office is fully demonstrated clearly by a letter, dated May 18, 2010, to Mr. Bauknight in which he stated that it was the Attorney General's "understanding that *you* (Mr. Bauknight) will be retaining Mr. Wingate and Mr. Kendall to file this action on behalf of the beneficiaries of the James Brown Estate and Trust, including the charitable interests." *Supplement* at 37. (emphasis added). The letter from the Attorney General to Mr. Bauknight further confirmed that with respect to "the charitable trust portion of this matter," Bauknight had "agreed to use the terms and conditions in the attached 'Agreement for Legal Services' which references and incorporates the Attorney General's Standard Litigation Retention Agreement." Thus, the contingent fee agreement was between Mr. Bauknight and Mr. Wingate, not with the Attorney General's Office.

Accordingly, the Attorney General's Office was particularly reluctant to have this action brought on behalf of the charity against Appellants by Mr. Bauknight, but in light of the one-year statute of limitations' imminent expiration and the duty of the Office vis-à-vis charitable trusts, did not object to the Trustee's doing so. The action on behalf of the charitable beneficiaries was thus filed on the very last day possible. *See* S.C. Code Ann. § 62-7-1005(a) (2009).[4] The accounting in question was filed on May 20, 2009. *Supplement* at 23-36. The lawsuit was filed on May 19, 2010, at 1:11 p.m., almost the last instant possible. From the standpoint of the Attorney General, in light of this Court's

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[4] 62-7-1005(a)-(b) states as follows:
(a) Unless previously barred by adjudication, consent, or limitation, a **beneficiary may not commence a proceeding against a trustee for breach of trust more than one year** after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust.
(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.
(emphasis added)

ruling, we now see no need to pursue this action further. We advise this Court, therefore, that we will shortly move to have the Attorney General removed as a party in this action and any further action in this case to protect the charitable beneficiaries may be pursued by the new trustee.

## Conclusion

In summary, we would submit to this Court that we have diligently pursued the protection of the charitable trust in this case. The Court may disagree with the terms of the settlement which was reached, and we fully respect the Court's ruling. However, in light of the challenges facing us to uphold the trust, particularly the credibility of those we would need to call as witnesses in that regard, we thought settlement was the most prudent course. These were the very individuals who stood accused of fraud and with the promotion of a scheme of cunning and artifice, by Appellants' lawsuit. Clearly, as the circuit court found, there was a good faith controversy and we believed the terms of the settlement were fair and reasonable. 81 A.L.R. 124 (citing *State v. Southern R. Co.*, 82 S.C. 12, 62 S.E. 116 (1908) [court possesses discretion to refuse Attorney General's motion to discontinue]. We still believe that today. We respectfully request that the Court modify its Opinion accurately to reflect the Attorney General's role in the settlement, consistent with the facts and arguments set forth above.

Respectfully submitted,

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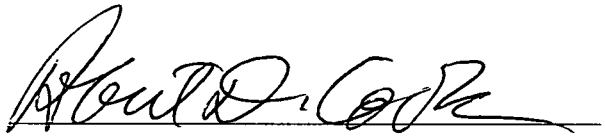
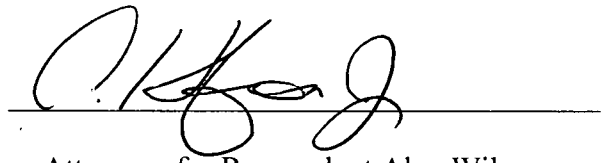
By: 

By: 

Attorneys for Respondent Alan Wilson.

March 14, 2013.

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

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Case No. 2008-CP-02-1647

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Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Daryl J. Brown, on behalf of his minor children, Lindsey B. and Janise B.; Deanna J. Brown Thomas, on behalf of her minor child, Jason L.; Yamma N. Brown, on behalf of her minor children, Sydney L., Carrington L., and Tonya B.; Vanisha Brown; Larry Brown; Tommie Rae Hynie Brown; and James B., through his Guardian ad Litem, Respondents,

v.

Albert H. Dallas, Alfred A. Bradley, and David G. Cannon, Individually and as (purported) Trustees of the James Brown 2000 Irrevocable Trust; Adele J. Pope and Robert L. Buchanan, Jr., Personal Representatives of The Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust; Terry Brown; Romunzo Brown; Forlando Brown; Cinnamon N.M. Paris; LaRhonda Petitt; Jeanette Mitchell; and Russell L. Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and the James Brown 2000 Irrevocable Trust, Defendants,

of whom Robert L. Buchanan, Jr., and Adele J. Pope, as Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust are, Appellants,

and Albert H. Dallas, Alfred A. Bradley, and David G. Cannon, Individually and as (purported) Trustees of the James Brown 2000 Irrevocable Trust; Terry Brown; Romunzo Brown; Forlando Brown; Cinnamon N.M. Paris; LaRhonda Petitt; Jeanette Mitchell; and Russell L. Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and The James Brown 2000 Irrevocable Trust are, Respondents.

In re: The Estate of James Brown and The James Brown 2000 Irrevocable Trust u/a/d August 1, 2000

Appellate Case No. 2009-142286

## Certificate of Service

I hereby certify that this 14th day of March, 2013, I served a copy of the within **Petition for Hearing** and **Motion to Supplement the Record Pursuant to Rule 212(b), SCACR, or in the Alternative, to Take Judicial Notice of Transcripts and Records** on all counsel of record by depositing a copy in the U.S. Mail and addressed as follows:

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