THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2008-CP-02-1647

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

PETITION OF RESPONDENT JAMES B. FOR REHEARING

On February 27, 2013, this Court issued its Opinion reversing and remanding the circuit court order approving an agreement settling litigation concerning the estate of the singer and entertainer James Brown, and affirming the circuit court order removing Appellants as personal representatives and trustees. Wilson v. Dallas, Op. No. 27227 (S.C.Sup.Ct. filed Feb. 27, 2013) (Davis Adv.Sh. No. 10 at 14). Pursuant to Rule 221(a), SCACR, Respondent James B., surviving son of James Brown, by and through his Guardian *ad Litem*, respectfully requests a rehearing of the Court's decision reversing approval of the settlement. James B. respectfully submits that a rehearing is warranted for the following reasons.

1. The Court overlooked or misapprehended the value of the federal copyright termination rights contributed to the settlement by the family members, leaving the trust and estate relatively valueless.

The copyright termination rights constitute the most substantial part of the value of the James Brown assets. Federal copyright law provides that the statutory heirs per stirpes (the "Statutory Heirs") of James Brown own these termination rights.[1] These

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[1] Under the Copyright Act of 1976, 17 U.S.C. § 304(c), the heirs of a deceased author may terminate the pre-1978 grant or transfer of license of copyright, thereby entitling them to ownership of the copyright for the statutory term going forward. The Ninth Circuit has explained that § 304(c)

> allows an author, if he is living, or his widow and children, if he is not, to recapture, for the Extended Renewal Term, the rights that had previously been transferred to third parties. The rights thus revert to the author or his statutory heirs. The termination of transfer right, as applied to the widow and children, is limited to transfers executed before January 1, 1978. See id. § 304(c). The termination of transfer may be effected only during a five year window beginning at the end of what would have been the copyright's original and renewal terms (the end of 56 years from the date the copyright was originally secured), or beginning on January 1, 1978, whichever is later. Id. § 304(c)(3).

Classic Media, Inc. v. Mewborn, 532 F.3d 978, 983 (9th Cir. 2008).

termination rights do not and cannot belong to James Brown's estate or any trust or any other entity, regardless of what he may have wanted. Thus, the only way that any charitable trust can benefit from these termination rights is pursuant to the settlement agreement because the Statutory Heirs contributed their rights and all proceeds therefrom to the settlement entity, which includes the charitable trust. Rather than saving any charitable intention of James Brown, this Court's reversal of the approval of that settlement agreement decimates any charitable intention because, without the settlement agreement, no value from these termination rights can pass to any charitable trust. This Court correctly focused on the charitable trust. But, though the consequence is unintended, the remand will delay and likely destroy the charitable trust.

Under the federal copyright statutes, the termination dates for each of James Brown's hits come due 56 years from the date of publication, and notice of exercising the termination right can be given as much as 10 years before the termination date. As these termination rights come due, the Statutory Heirs will take the royalty stream from these songs away from the estate or trust and own them for themselves until the copyright period expires 95 years after the publication date. See "Superman's Latest Episode," an article submitted by Appellants, which explains the operation of the termination rights process and describes these rights as "immensely valuable." (R. p. 2313).

Because the substantial part of the value of assets relating to James Brown comes from the royalty stream from his songs, the royalty stream will shift, as the termination rights come due, from the estate or trust to the Statutory Heirs. As Mr. Jones observed in the oral argument before this Court, because these termination dates are imminent,[2] any

[2] The termination date for his first big hit—"Please, Please, Please"—has already

assets in any charitable trust will soon be dissipated. When considering the millions of dollars of claims still outstanding, which will be paid first from the royalty stream before any charitable trust, there may be few if any scholarships ever awarded unless the proceeds from the termination rights can pass to that charitable trust, which can happen only if the settlement is upheld.

In its decision, the Court states that there was "no evidence presented as to the potential value of these [termination] rights that could be compared to the potential value the Respondents would obtain by having testamentary plan voided." Davis Adv.Sh. No. 10 at 42. This is an unfair assessment. First, Appellants introduced into evidence an article describing termination rights as "immensely valuable." But more importantly, any lack of evidence as to the value of the termination rights is due to the fact that none of the first three personal representatives/trustees or Appellants satisfied their duty to determine what assets are owned by the estate and their value. (R. p. 1455, 1460-62). Thus, Respondents were, at the time of filing of their appellate brief, deprived of information that would have allowed an exact valuation of these termination rights. The pre-Bauknight fiduciaries provided varying estimates of the estate's value, but all were wild guesses because not one of them ever ascertained the individual royalty rights owned by James Brown or obtained any appraisal. (R. p. 1616-18, 1687, 1690, 1691). It is a sad irony of this case that the prior fiduciaries' failure to obtain a proper inventory and valuation has provided a basis for this Court to overturn approval of the settlement. It is simply sad that Appellants' appeal has overturned a settlement that would have provided a stream of royalty income to the charitable trust for many years.

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arrived.

Once Bauknight took office, he did what his predecessors did not do and determined the royalty rights of James Brown, including the termination dates. Unlike his predecessors, he obtained a professional appraisal by a nationally renowned appraiser, which was reviewed during an estate tax return audit by the IRS royalties experts and confirmed. Respondents attempted to present this information to the Court via a Motion to Supplement the Record under Rule 212, SCACR, filed May 6, 2011, but the Court denied it. This information was also included as Exhibit O to Respondent's Motion to Dismiss or Stay Appeal, or for Extension of Time to File Respondents' Initial Brief, which pertains to Appellant Pope's appeal of the lower court's denial of her motion to lift certain protective orders, and which was filed with the Court of Appeals September 13, 2012, and later transferred to the Supreme Court. Despite the denial of the Rule 212 motion, it appears the Court availed itself of that information because the opinion refers to it in footnote 29. The IRS conducted an extensive audit and confirmed the professional appraiser's valuation. Despite Appellants' claims that Bauknight and all the settling parties, including the Attorney General, conspired to egregiously undervalue the estate so that Terry Brown, through his right of first refusal, could run off with the estate,[3] the truth is in the IRS' confirmation: The IRS would have effectively given away tens of millions of dollars in taxes by accepting the professional appraiser's valuation if the estate value were indeed $86 million as Appellants represented when they filed the federal estate tax return. (R. p. 1616).

[3] That conspiracy theory fails to focus on the fact that Terry Brown has only a right of first refusal, (R. p. 2106-07), and not an option to purchase the estate, nor does it explain why the settling parties, including the Attorney General on behalf of the charitable interest, would willingly give away tens of millions of dollars to Terry Brown.

Effectively, the appraisal confirmed by the IRS on audit, which is for the date of death value, shows the royalty stream belonging to the estate worth approximately $4.7 million, which is the fair market value of the royalty stream less outstanding associated debt of approximately $19 million arising from bonds secured by the royalty stream. Thus, without the bond debt, the date of death value of the royalty stream to the estate would be approximately $24 million, a valuation derived from taking the royalty stream up to the termination dates and discounted back to date of death for present value purposes. Seen in this light, the $4.7 million date of death valuation for the royalty stream, as confirmed by the IRS, does not seem as counterintuitive as it otherwise might to a layman guessing what the value of the estate might be. Moreover, neither Appellants nor their expert witness on estate tax issues understood that the royalty stream following the termination rights dates, until the end of the copyright period, belongs to the Statutory Heirs, not the estate or any trust. (R. p. 1444-46, 1449-53, 1915-16). Appellant Pope wrongly testified that the termination rights belonged to the estate. (R. p. 1449-53). If one added the value of the royalty stream belonging to the statutory heirs after the termination dates to the value of the royalty stream belonging to the estate or any trust before the termination dates, the overall value of the entire royalty stream would be much greater than the date of death value of the estate's interest.

Respondent James B. asserts that the value of the termination rights is a critical factor in the determination of whether any charitable intent by James Brown will be recognized. As noted above, the settling parties did not have, and could not have obtained, this information because all of the pre-Bauknight fiduciaries failed to obtain the necessary information at the time of the filing of the appellate briefs. Footnote 29 of the

opinion demonstrates that the Court may have been willing to consider some of the valuation evidence obtained after the filing of the appellate briefs. However, to the extent necessary, Respondent James B. asks this Court to take judicial notice of the fact that most of James Brown's biggest royalty-producing hits occurred no later than the 1960s. Based on that information, one can extrapolate from an understanding of the operation of the federal copyright termination rights that the substantial value of the royalty stream will imminently pass to the statutory heirs and would not be available to any charitable interest if the settlement is overturned. The net result of the Court ignoring the reality of the value of the termination rights based on a procedural deficiency is that the charitable trust will be effectively annihilated.

In sum, the termination rights pass by federal law—the Copyright Act—to James Brown's Statutory Heirs. These rights and the value of these rights are not part of the probate estate or any trust created by James Brown, but were assigned for the benefit of the charitable interests by the family members as part of the settlement. Without the contribution by the family members to the settlement entity through which the charity is funded, the charity will never receive any value from the termination rights. To be clear, even if the will and trust are upheld, and even if the spousal and pretermitted child's claims are defeated, the charity will still not receive any value from the termination rights. Without the settlement, any charitable trust would be short-lived.

2. The Supreme Court overlooked or misapprehended the appropriate standard of review.

According to this Court's Opinion, the appropriate standard of review in determining whether the circuit court abused its discretion in approving the compromise is as follows: "An abuse of discretion occurs when a court's order is controlled by an

error of law or there is no evidentiary support for the court's factual conclusions." Davis Adv.Sh. No. 10 at 6 (emphasis added). The Opinion, which will be widely quoted and cited in the future, appears radically to alter this standard. The Opinion cites no error of law controlling Judge Early's decision, and fails to determine that "there is no evidentiary support" for Judge Early's factual conclusions. Rather than applying this standard of review, the Court substitutes its judgment of the facts for that of the trial court when it concludes: "We see no reasonable or substantial basis to support a good faith finding here," id. at 38, and, "In our view, the evidence does not support the finding that the compromise was just and reasonable," id. at 42. This Court bases its opinion on its determination about whether the evidence supported the existence of a good faith controversy or that the compromise was just and reasonable, rather than appropriately basing its opinion on whether there was "no evidence" supporting Judge Early's conclusion. Judge Early made his determination of fact based on the entire record before him and his intimate knowledge of the entire case. This real-time experience of a trial judge is the basis for the "no evidence" standard of review, which this Court did not follow. Instead the Court appears to have applied a standard more akin to de novo review.

The record is replete with evidence supporting Judge Early's decision, even those facts cited by this Court in its opinion. In many instances, the evidence would pass the "no evidence" test if Judge Early had indeed found that the underlying claims—e.g., undue influence—were valid, but that is not necessary. All that is necessary are findings that "the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and

reasonable." S.C.Code Ann. § 62-3-1102(3). Only if "no evidence" exists to support such findings should Judge Early's approval of the settlement be overturned. Some examples of evidence supporting the approval of the settlement—any one of which satisfy the "no evidence" standard—are as follows:

A. The evidence of undue influence supports a finding of a good faith controversy and of a just and reasonable settlement.

The Court's opinion dismisses the significance of the provisions hidden away in the will and trust documents that would give James Brown's original advisors/managers/personal representatives/trustees (Dallas, Cannon and Bradley, hereafter the "Original Fiduciaries") the right to take up to 50% of the gross income from the trust on an annual basis. The Court's opinion describes this as "generous" and opines that any concern with it could be resolved by reformation.

This rationale misses the point. If reformation could resolve any documentary evidence of undue influence, then undue influence would never effectively exist. Anyone wanting to practice undue influence would thus give it a shot, knowing the worst result would be that a court would later reform the document and eliminate the provision—if someone catches it. The issue of the 50% gross income to the Original Fiduciaries shows the existence of undue influence at the time the documents were executed, which is, obviously, the pertinent time for determining whether a purported testamentary document is the product of undue influence and, if so, whether it is valid. This outrageous provision in which the Original Fiduciaries would annually receive 50% of the gross income provides strong evidence of undue influence, and is overwhelming evidence that there was a good faith controversy supporting the settlement and that the settlement was just and reasonable.

It is clear from the record that James Brown was subjected to undue influence. Despite this Court's conclusion that James Brown was of a strong mind, that does not eliminate undue influence by those with great power over his life. (The issue of mental capacity, which is separate from undue influence, was not alleged in any of the contests). The files of H. Dewain Herring, the attorney who drafted James Brown's purported will and trust, were in evidence. The Herring File contains voluminous correspondence about the estate planning discussion between Herring and the Original Fiduciaries, but not with James Brown. Rather, a letter from Herring indicates that he had met only twice with James Brown over a period of years, during which this Court concludes that James Brown meticulously prepared his estate plan. (R. p. 2054). The evidence shows that the Original Fiduciaries, not James Brown, meticulously planned James Brown's estate with Herring. Thus, either (a) James Brown was tricked into signing a document that gave the alleged influencers (the Original Fiduciaries) 50% of his estate (the value of his estate is in the stream of income, against which the outrageous 50% fee could be charged annually against gross), or (b) if he understood the document, he knew that he was giving more than 50% (gross, not net) of his annual estate income stream, constituting the substantial part of the value of his estate, to the Original Fiduciaries. Either possibility demonstrates undue influence. If James Brown were tricked into signing the document without knowing of the 50% provision, that is classic undue influence. If he knew of the provision but signed it anyway, that is evidence of classic undue influence (coercion). Why else would a man whom this Court states wanted to give the bulk of his estate to charity instead give 50% of the annual gross income to the Original Fiduciaries? See Cumbee v. Cumbee (In re Estate of Cumbee), 333 S.C. 664, 673, 511 SE.2d 390, 394

(Ct.App.1999) (finding undue influence based on evidence that the disposition of the testator's estate "did not comport with her expressed intentions").

Further, the Original Fiduciaries were in a position to assert undue influence and were predisposed to unduly influencing James Brown. Judge Early had a great deal of evidence of this before him as well. The Original Fiduciaries managed James Brown's financial affairs while he was alive. One (Cannon) was accused of pillaging millions of dollars from him while he was alive, and he took an Alford plea to that charge. Another (Dallas) admitted under oath to lying to the court to attempt to protect his position as fiduciary and to fabricating evidence—a Trust Schedule B that Dallas created after James Brown's death. (R. p. 2046-48). These factors are important. If those in a fiduciary position were in a position to steal from him while he was alive, the only way they could continue to steal from him after his death was to place themselves in fiduciary positions after his death and create documents giving them outrageous management fees in perpetuity. They had to realize that, if they coerced James Brown into signing estate planning documents naming them—who were neither relatives nor charities—as beneficiaries, that would be a glaring red flag showing undue influence.[4] Instead, their plan had to be more subtle. Rather than naming themselves directly as beneficiaries, they named themselves as managers with the right to outrageous and unconscionable fees.

Moreover, Pope and Buchanan, after respected lawyers engaged by them to represent the estate and trust against the Original Fiduciaries (among others) performed due diligence, authorized those lawyers to sue the Original Fiduciaries for undue

[4] Appellant Pope did, however, testify that Cannon told her he could get 50% of the estate from James Brown if he had wanted (R. p. 1785, 2006), which is further evidence of James Brown's susceptibility to undue influence.

influence exerted by them during James Brown's lifetime. (R. p. 1667, 1681-82).

It is a logical nexus to assume that the Original Fiduciaries who unduly influenced James Brown during his lifetime and who were being sued by Appellants for doing so, would have had to, either by deception or coercion, unduly influence a man, who supposedly had such serious charitable intentions, to instead sign documents giving them, rather than charity, more than 50% of his estate.

The 50% provision alone, thought through, constitutes substantial evidence of undue influence, well beyond the "no evidence standard" applicable to this appeal. The existence of this evidence shows that the Original Fiduciaries unduly influenced James Brown and provides factual support that a good faith controversy exists and the settlement is just and reasonable.

The original blank deed purportedly signed by James Brown, which was discovered in the Herring file (R. p. 2728), is another example of evidence showing undue influence. Why would any lawyer have a client sign a blank deed? Although Pope testified that she had seen many blank signed deeds (R. p. 1499), Respondent James B. cannot envision one single proper and ethical reason to have a client sign a blank form. Rather, this is further evidence that the Original Fiduciaries, who were the ones communicating with Herring, deceived and/or coerced James Brown into doing what they wanted, not what he would have wanted. To assign no evidentiary value to this unsigned deed, particularly in light of the other evidence before Judge Early, misses the point of a good faith controversy about undue influence.

Nevertheless, much of the Court's opinion assumes that the 2000 will and trust documents were valid. That was not the issue before Judge Early. According to this

Court's statement about its standard of review, the issue for this Court is whether there was any evidence to support his approval of a settlement agreement that included the dismissal of will and trust contests based on reliable evidence of undue influence. Similarly, although the circuit court specifically avoided ruling on the validity of the marriage, the prenuptial agreement, and the DNA test results validity, this Court's Opinion seems to assume the validity of the prenuptial agreement and the invalidity of the DNA test. The Court appears to give appellants the benefit of a summary judgment standard of review—considering all facts in the light most favorable to Appellants—rather than the "no evidence" standard of review.

Separate from the "no evidence" standard of review issue, the will and trust proponents failed to overcome the presumption of undue influence. This Court observes that, once a fiduciary relationship is established, a presumption of undue influence arises, even though the ultimate burden of persuasion rests with the contestants. See Davis Adv.Sh. No. 10 at 36. The evidence clearly shows that Dallas, Cannon and Bradley served as fiduciaries during James Brown's lifetime by managing his finances, participating in the drafting of his purported testamentary documents, etc. This creates a presumption of undue influence. Cumbee v. Cumbee (In re Estate of Cumbee), 333 S.C. 664, 672-73, 511 S.E.2d 390, 394 (Ct.App.1999). Although this Court's standard of review should be whether there is no evidence to support Judge Early's finding of a good faith controversy, the evidence before Judge Early overwhelmingly showed the existence of undue influence. The presumption of undue influence arose upon the showing of a confidential relationship, and the presumption was not overcome. The only evidence contrary to a finding of undue influence came either from (a) testimony of the Original

Fiduciaries (the undue influencers themselves), or (b) from testimony of Appellant Pope. This testimony is refuted by (i) Appellants allowing the estate's attorneys to sue the Original Fiduciaries for undue influence, (ii) Appellant Pope's own testimony that Cannon told her he could have made James Brown give him 50% of the estate (R. p. 1785, 2006), and (iii) Appellants' filing numerous affidavits and pleadings, accusing the Original Fiduciaries of being untrustworthy, dishonest, and of stealing and conspiring to bilk the estate. (R. p. 1666-67, 1681).

This self-serving testimony in no way overcomes the presumption that undue influence occurred, and in many ways (such as Dallas's admission that he lied and fabricated evidence and Cannon's admission that he disregarded court orders and his Alford plea), further shows their propensity to commit undue influence.

There is also evidence that another will existed that did provide for James B. and his mother. There is a document in the Herring file showing an unexecuted copy of a will prepared by another of James Brown's attorneys, Jay Ross of Chicago, faxed to Dallas one month after James Brown's death. See Appendix of James B. pages 1-5 (attached to Motion to Supplement the Record Pursuant to Rule 212(b), SCACR, filed March 14, 2013). (Jay Ross was a longtime attorney and confidant of James Brown (R. p. 2358)). That copy shows a will form, drafted by Ross after James Brown's marriage to Tommie Rae and James B.'s birth, leaving 17% of his estate to Tommie Rae and 5% to James B. Of course, if an executed original existed, and the Original Fiduciaries were involved in undue influence, they could have destroyed the original. It is undisputed that they alone had access to the house after James Brown's death, and that they excluded James B. and his mother from the house from the time of James Brown's death. Certainly, it is not

beyond belief that fiduciaries (one of whom has admitted lying under oath and fabricating evidence, and another who has taken an Alford plea to the charge of stealing millions of dollars from James Brown) would destroy a will that would disrupt their nefarious scheme. In light of this evidence, the notion that the presumption of undue influence was overcome is absurd.

Thus, even if Judge Early had ruled that undue influence existed, rather than ruling that there was a good faith controversy because evidence of undue influence existed, he would have been correct because the proponents would have failed to overcome the presumption of undue influence.

To remand the issue involving undue influence for further evidence would force family members to introduce additional evidence that would disparage the memory and legacy of James Brown.

Ironically, the Court cites Cumbee v. Cumbee (In re Estate of Cumbee), as its primary authority on the law of undue influence. In Cumbee, the Court of Appeals upheld a finding of undue influence in the face of contrary evidence based on the standard of review: whether there was no evidence to support the finding. The appellant in Cumbee argued that "the circuit court erred in disregarding the testimony of the subscribing witnesses to the will and the legal secretary who spoke to Mrs. Cumbee two weeks before the will was executed." 333 S.C. at 673-674, 511 S.E.2d at 394. Like the Court of Appeals in Cumbee, which held that "the record presents sufficient evidence to support the lower court's finding of undue influence" notwithstanding the contrary evidence, id., 511 S.E.2d at 394 (emphasis added), this Court should properly apply the "no evidence" standard and affirm Judge Early's order approving the settlement because it is supported

by evidence.

B. The litigation risk properly assessed by the Attorney General supports a finding that there was a good faith controversy and that the settlement was just and reasonable.

If the will and trust contests were successful, the entire probate estate and any assets purportedly in any trust would instead pass by intestacy to the family members. In that case, not only would there be no royalties from termination rights passing to any charitable trust, as discussed above, there would be no charitable trust—period. In assessing the reasonableness of the settlement, the Attorney General had to take into account the risk that there would be nothing passing to any charity.

Even if the will and the trust were upheld as valid, the Attorney General had to take into account that the spousal and pretermitted child's shares claims might be upheld, which depending on which statutory rights were upheld, could have cost any charity anywhere from 14% to 57% of the probate estate. (Again, in no event would the charity receive any benefit from the termination rights, as discussed above.)

The no-contest clauses could affect only assets passing under any will or any trust. A no-contest clause cannot eliminate any statutory spousal or child's right, any intestate right, and most importantly, any federal copyright termination rights.

The Court discounts litigation costs as a significant factor in determining whether the settlement was reasonable. The Court overlooks that Pope and Buchanan have presented a claim against the estate for approximately $5 million in fees, based on hourly calculations, for seventeen months of service, mostly allocated to litigation fighting the settlement agreement. (R. p. 2879-82). Even if the estate prevails against all contests and claims and everything goes to charity, Appellants want $5 million for fees, which will come from the charity. Other litigation costs will similarly come from the charity,

even if the estate were to prevail against all claims. If the individual cases settled by the settlement agreement had to proceed through trial, and then appeal, the litigation costs would be exponentially greater than the $5 million already claimed.

In supporting the settlement agreement, the Attorney General had to assume that the charity could end up with nothing from the probate estate and/or trust and, even if successful, may see any charitable corpus exhausted by litigation costs. And, once again, in no event would any charity receive any benefit from termination right royalties. The avoidance of litigation did ensure any intent of James Brown to fund a charitable trust.

C. The family members' contribution of their termination rights to the settlement entity supports a finding of a just and reasonable compromise.

Under the settlement, the charity will receive a substantial portion of the termination rights that it would not otherwise have received. Although due to the failure of Bauknight's predecessors to ascertain the value of the estate or the termination rights, the settling parties were unable to present to Judge Early the actual value of the termination rights, the record indicates that Judge Early had evidence before him indicating that termination rights were extremely valuable: (a) Pope and Buchanan submitted into evidence the Superman article stating that termination rights are "immensely valuable"; (b) although Judge Early could have taken judicial notice of the federal copyright law in any event, evidence was presented at the hearing showing that federal law gives the termination rights only to the family heirs and not the charity (R. 1444-46, 1449-53, 1497); and (c) Judge Early could take judicial notice of the time at which the most valuable songs for royalty purposes were written, thus starting the termination clock, from which he could conclude that the termination right dates for these songs were imminent, thereby eliminating substantial value from any charitable trust

even if upheld.

D. The avoidance of continuing litigation costs supports a finding of a just and reasonable compromise.

There is evidence that litigation costs would have exhausted whatever assets may have gone into the trust, even if all of the contests were unsuccessful (and recognizing in no event would the trust have any termination rights). Pope and Buchanan filed a claim for $5 million, for seventeen months of service, and their claim was based on hourly service mostly dedicated to litigation, and mostly to fighting the settlement. Judge Early asked each of the counsel, some of the most experienced lawyers in South Carolina, whether the litigation would be complex. Each replied with essentially the same answer: no one had been involved in litigation this complex. (R. p. 1842-76). The complexity of the litigation is confirmed by this Court's opinion, which is over 40 pages in length and deals only with issues related to a settlement. Judge Early had evidence before him showing that, if the litigation were not resolved by settlement, the litigation costs to the estate and any trust, and thus to any charitable interest, would be even more astronomical than already incurred merely to approve a settlement. The central concern of the Court as reflected in its opinion is to ensure that the disposition of the decedent's assets were distributed in conformity with his intent. The settlement attempted to ensure sufficient assets for a charitable trust. The settlement avoided a protracted litigation process which undoubtedly would have exhausted the limited capital of this estate and damaged the marketability of James Brown's name and image. The avoidance of litigation therefore does reach a result consistent with any charitable intent of James Brown.

E. The avoidance of further litigation concerning which assets were in the estate or any trust supports a finding of a just and reasonable compromise.

Judge Early had evidence before him showing the difficult, if not impossible task,

of determining what assets might belong to the estate or to any trust. Lack of adequate records, which can be blamed on the Original Fiduciaries, were at the root of this problem. Of course, in no event would the asset ownership by either the estate or trust include any termination rights. This issue is not resolved merely by assuming that, if the will and trust were valid, any assets belonging to the estate would pour-over into the trust. The determination of which assets were owned by the estate would be crucial in dealing with such issues as: (a) what assets might be subject to any statutory claim; (b) what assets might be subject to the claims of estate creditors (there are, of course, millions of dollars of such claims still outstanding); and (c) what assets of the estate could be considered in the calculation of any fiduciary fee.

3. The Supreme Court misapprehended the impact of the status of James B. on the approval of the settlement.

James B. obtained a DNA test from a reliable laboratory confirming that he is the son of James Brown. This Court seems to discount that test, as if the only viable way to prove paternity is through a DNA test established by the Original Fiduciaries. James B. can hardly be penalized for refusing to have faith in the reliability of a test that would be controlled by dishonest fiduciaries, in the case of two of the Original Fiduciaries, and by Appellants vehemently opposed to him and his mother. This Court in discounting the test results hinged its decision on a belief that the samples were not taken in accordance with established protocol. In essence this Court submitted its factual finding in lieu of the trial judge's ruling, again in contradiction of the limited, abuse of discretion standard of review. Judge Early was in a position to evaluate the weight of that evidence, as he was aware of the caveat of the method the samples were collected at the settlement hearing. This Court should have concerned itself only with the existence of evidence, not the

weight of this evidence.

Additional evidence, more than sufficient to satisfy the appropriate standard for Judge Early and the standard of review applicable here, demonstrates that James B. was James Brown's son. James Brown, in his autobiography, published after the family court proceedings referenced by the Court, states that James B. is his son. (R. p. 2903-07A). James Brown also filed documents with the Social Security Administration and the Screen Actor's Guild, claiming that James B. was his son, resulting in social security and health benefits payments during James Brown's lifetime. See Exhibits C and H to Motion to Dismiss or Stay Appeal, or for Extension of Time to File Respondent's Initial Brief, filed September 13, 2012; (R. p. 1558-61). There is a picture in evidence on which James Brown inscribes: "To Little Man Daddy love The Little Man." See Appendix of James B. page 6 (attached to Motion to Supplement the Record Pursuant to Rule 212(b), SCACR, filed March 14, 2013). Either James Brown was a liar and defrauded the Social Security Administration and the Screen Actor's Guild, which James B. fervently denies, or he thought James B. was his son and acknowledged him accordingly. Implying that James B. was not the son of James Brown is to impugn James Brown's integrity.

Nor do the provisions in the 2000 will and trust documents indicate that James Brown intended that the pretermitted child statute would not apply. James B. was born after the purported execution of those documents and would qualify for an intestate share under S.C.Code Ann. § 62-2-302. Any statements in those documents would be common for celebrities who constantly faced paternity claims while alive, to protect against those claims. They are not intended to exclude actually afterborn children. Moreover, as discussed above, there is the copy of a will prepared by Jay Ross of Chicago. That copy

shows a will form, drafted by Ross after James Brown's marriage to Tommie Rae and James B.'s birth, leaving 17% of his estate to Tommie Rae and 5% to James B. Of course, if an original existed, and the Original Fiduciaries were involved in undue influence, they could have destroyed the original. It is undisputed that they alone had access to the house after James Brown's death, and that they excluded James B. and his mother from the house from the time of James Brown's death. Certainly, it is not beyond belief that fiduciaries (one of whom has admitted lying under oath and another who has taken an Alford plea to the charge of stealing millions of dollars from James Brown) would destroy a will that would disrupt their nefarious scheme. Any notion that James Brown intended for his admitted son and namesake, five years old at the time of James Brown's death, to receive nothing is another demeaning statement about James Brown and his legacy.

The Court misapprehends the importance of James B.'s claim in the settlement agreement approval process. Even assuming arguendo that his mother—James Brown's wife—was not entitled to a spousal claim (which James B. believes she is), he would have a compelling argument under § 62-2-302 to take 14% of the probate estate. More importantly, even assuming arguendo James Brown meant to exclude his namesake from a § 62-2-302 share (which James B. denies), that could not prevent James B. from taking his federal copyright termination rights. Assuming arguendo that his mother—James Brown's wife—did not take any federal copyright termination rights, James B. would have a right to 14% of the termination royalty proceeds—an asset the charity could not receive in any event without the settlement, as discussed above. Under the settlement, James B.'s 14% rights to the probate estate and to the termination rights are subsumed

within his mother's 23.75% share of the settlement entity. The Attorney General would have considered this in its calculus, and despite the Court's statement, this is a compelling enough reason for the Attorney General to support the settlement agreement, and reason for the circuit court to approve the settlement. This fact alone satisfies the "no evidence" standard of review.

4. The Supreme Court misapprehended the Attorney General's involvement in the settlement proceedings.

The Court states that the Attorney General "has effectively obtained control over the bulk of Brown's assets and has given his office unprecedented authority to oversee the affairs of the parties that has heretofor not been recognized in our jurisprudence." Davis Adv.Sh No. 10 at 44. This is a misapprehension of the applicable law and the actual involvement of the Attorney General in this matter.

The central issue is whether any charitable intent of James Brown was served. This Court, assuming that the 2000 will and trust documents were free from undue influence, as discussed above, relied on those documents as valid and thus expressing the intention of James Brown. If the Court were correct in this analysis, the intended beneficiaries of James Brown, as stated in those documents, would be in ascending order of importance as determined by the value of the purported gifts to them: (a) The grandchildren, who could have their education paid for from the family educational trust; (b) the six named children, who would receive personal property; (c) an amorphous charity for any child, youth, or young adult in the world to have his or her education paid for at any educational institution, from pre-school to graduate school, including but not limited to cosmetology school or truck drivers' school or pet grooming school, etc.,[5] with

[5] Even if the will and trust were valid, it is problematic whether a charitable trust would

no limit on amount or purpose of the scholarship; and (d) the Original Fiduciaries, who would take, in addition to their trustees' and PR fees, a continuing annual 50% of the gross income of the estate—more than even the charitable interest.

Assuming arguendo that James Brown had a charitable intent as described in the documents, as set forth above, the Attorney General did not assume control over James Brown's assets nor did it exercise inappropriate authority in the matter.

Taking into account the litigation costs, litigation risk, and the benefit of adding the value of the termination rights to the charitable interest, the Attorney General did not "distort" or "destroy" or "subvert" James Brown's intent. Rather, he increased the value available for charity, even without considering the litigation risks and costs discussed above. The Attorney General destroyed the plan by the Original Fiduciaries to pillage James Brown's estate.

Nor were the estate and trust necessarily protected, as the concurring opinion states, once Appellants were appointed: "the Attorney General's involvement was no longer necessary to stave off maladministration of the Charitable Trust." This would create a dangerous precedent unheard of in charitable trust law. According to that statement, once successor trustees of a charitable trust are appointed upon allegations of

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be validly created. A charitable trust must be for a charitable purpose and not impossible or impracticable to administer. To the contrary, based on the language in the trust document, any poor or needy (not defined) child, youth, or young adult (not defined by age) both qualified and deserving (no definition) anywhere on earth (not limited by location) could get a scholarship (not defined as to amount or purpose) to any school (broadly defined to include essentially any type or level) as long as it is in South Carolina or Georgia. Such a trust would be impossible to administer. The shoddiness of the expression of any charitable intention in the document is further evidence that Herring was merely following the directions of undue influencers, who did not care about the slapdash expression of charitable intent but were merely concerned about continuing to take massive management fees after James Brown's death.

fraud by original trustees, the successor trustees' appointment obviates the need for continued involvement by the Attorney General, even if the successor trustees are headed on a course of maladministration themselves and take risks that threaten the very existence of charitable trust assets, while seeking exorbitant and unconscionable fees (which, even if the charitable trust survives litigation, get paid from the charitable trust). This conflict is recognized by the UPC Reporter's Comment to 3-1102. If the successor trustees have such a conflict, who else but the Attorney General can represent the charitable interest?

Nor did the Attorney General take control of the case with Judge Early merely rubber-stamping the "Attorney General's settlement." Judge Early conducted seven days worth of hearings and reviewed a voluminous record before deciding to uphold the proposed settlement. The record indicates that, throughout the proceedings, the Attorney General recognized that it was the court, not the Attorney General, with the ultimate authority to approve the settlement. The Attorney General was merely doing its statutory duty—now placed in jeopardy by this opinion—to protect the charitable interests.

Nor is it over-reaching for the Attorney General, to protect the charitable interests, to have the power to remove a trustee and appoint its replacement in this case. The charitable interests, seen as paramount by this Court, are represented by the Attorney General in a settlement entity with minority interests held by family members. Certainly, it is beneficial to the charitable interests for the Attorney General, in its authority to protect the charity, to have greater control over the trustee than the noncharitable beneficiaries. What is the Court's concern here: That the Attorney General, as part of protecting the charitable interest, has too much power over the noncharitable

beneficiaries?

Moreover, the South Carolina legislature already recognizes such a power in the Attorney General. Section 62-7-706 provides that the charitable beneficiaries of a charitable trust have the power to replace a trustee, without the necessity of seeking court approval, if the Attorney General concurs. Only if the Attorney General does not concur does the court have to get involved under § 62-7-706. Even though there is such legislative recognition of the Attorney General's authority, the Attorney General nevertheless deferred to the circuit court in this matter.

Nor did the Attorney General fail to make "a cursory evaluation of the claims rather than directing a compromise . . . ." The record indicates that the Attorney General performed considerable due diligence before deciding to support the settlement agreement. The Attorney General's due diligence included using the resources of its office without limitation and communicating with investigators to examine the validity of claims.[6] (R. p. 1326, 1726-27).

Nor does the document's boilerplate power, also confirmed by statute, of a trustee's power to compromise claims, in any way preclude the Attorney General from having the power and the duty to protect charitable interests if the court-appointed fiduciaries refuse to compromise a claim, even at the risk of destroying the charity and in any event being able to add to exorbitant fees already claimed.

Apparently Appellants, through their actions, understood that the Attorney

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[6] Granted, the Attorney General indicated in oral argument that it did not examine the witnesses to the will, with respect to the issue of mental capacity. There would be little reason to examine witnesses to the will's execution, who would likely either be unaware of the undue influence or parties to it, as opposed to what the Attorney General's office diligently did: examine the circumstances underlying the claims of undue influence.

General had to represent the charitable interest in any settlement. Appellants did not object to the Attorney General's intervention to protect the charitable interest. Appellants always included the Attorney General as a party to their pleadings. For example, Appellants included the Attorney General as a necessary party to Appellants' Rule 68 offer of compromise, made towards the end of the settlement hearings (in which Appellants offered a settlement proposal despite testifying during the settlement hearings that not enough evidence had been obtained to settle) (R. p. 1950-51, 2008-09); Appellants included the Attorney General as the only party to the proposed Corbis settlement. (R. p. 1272-74). If the charitable trust were properly represented by Appellants, what role did Appellants think the Attorney General had if they included the Attorney General as a necessary party? Appellants' actions confirm that, because of their conflict of interest (as noted in § 62-3-1102), someone else had to represent the charitable interests in any settlement. Who else could that be but the Attorney General?

This Court's determination that the Attorney General "subverted" James Brown's estate plan is bootstrapped from its conclusion that James Brown's estate plan was valid and not the result of undue influence. If James Brown's estate plan was the result of undue influence—e.g., he did not intend to give 50% of his estate to the Original Fiduciaries—then the Attorney General did not subvert his estate plan. The Court's presumption that the Attorney General subverted James Brown's estate plan is contrary to the presumption stated elsewhere in the opinion by the Court, recognizing that when a confidential relationship exists with the undue influencers, the presumption is that undue influence occurred. Thus, rather than concluding that the Attorney General subverted James Brown's estate plan, the Court should have seen that the Attorney General was

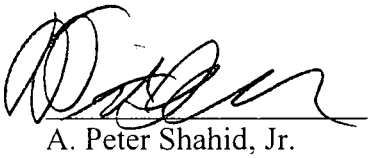
protecting the integrity of the plan. Moreover, the Attorney General obtained the contribution of the termination rights for the benefit of the charitable interest.

Rather than encouraging charitable giving, the Court's decision chills charitable giving. Before this opinion, a charitably minded testator or settlor was unlikely to mind that the Attorney General, protecting any charitable interest, is involved in disputes concerning the validity of the testator's will or settlor's trust. Instead, the opinion creates the potential for fear in potential charitable donors: If a fiduciary is appointed who breaches his duty, including but not limited to one who converts charitable assets to his own use, a donor would want the Attorney General to step in, protect the charitable interest, and stop the fiduciary malfeasance. Thus, the concurring opinion's statement in footnote 35 questioning whether the Attorney General has any role in a will contest creates a chilling prospect. Suppose, similar to what was alleged in this case, that undue influencers coerce a testator into creating a testamentary charitable trust that, rather than mainly benefitting charity, instead mainly benefits the undue influencers through the payment of obscene management fees (say, for example, 50% of gross annual income). Or, suppose a testator executes a will creating a testamentary charitable trust. An undue influencer then coerces the testator into changing his will, leaving all probate assets to the undue influencer and naming the undue influencer as personal representative. According to footnote 35, the Attorney General should not be involved in any will contest. If so, who represents the charitable interests: the very people accused of undue influence whose undue influence including ensconcing themselves in a fiduciary and/or beneficiary position? This creates a classic case of the fox guarding the henhouse. The opinion creates a roadmap for undue influencers who are not natural objects of the testator's

bounty: coerce the testator into creating an apparent charitable trust that includes the mechanism for the undue influencer to pillage from the trust. Someone has to represent the charitable interests in such a case. That has to be the Attorney General.[7]

The opinion eviscerates the historical power of the Attorney General to protect charities. If the Attorney General can intervene in a case to protect the charitable interests, when the fiduciaries are not protecting the charitable interests, then the Attorney General has to have the power to settle that dispute. Otherwise, the Attorney General would be in the absurd position of having to take a case all the way through the appellate process even when a settlement would benefit the charity and going through trial and the appellate process would bankrupt the estate, as may be the case here.

Respectfully submitted,



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March 14, 2013
Charleston, South Carolina

[7] Nor does the boilerplate power to compromise in the document (and under applicable SCPC statutes) obviate the need for the Attorney General to represent charitable interests. This power to compromise is for the fiduciary to deal with creditors' claims, and is not intended as a shield to protect the fiduciaries from claims of undue influence and malfeasance when there is a charitable interest. Once again, this would create a fox guarding the henhouse situation.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2008-CP-02-1647

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

CERTIFICATE OF SERVICE

I, A. Peter Shahid, attorney for Stephen M. Slotchiver, Guardian *ad Litem* for Respondent James B., do hereby certify that on March 14, 2013, I caused a copy of the Petition of Respondent James B. for Rehearing to be served upon counsel for the parties listed below by depositing a copy of same in the United States Mail, postage pre-paid, addressed to the following:

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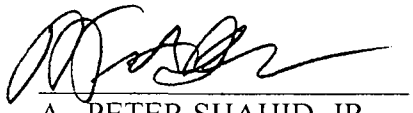

A. PETER SHAHID, JR.