THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

Trial Court Case Nos. 2013-CP-02-02849 and 2013-CP-02-02850
Appellate Case No. 2015-002417 (Court of Appeals)
Appellate Case No. 2018-001990 (Supreme Court)

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

Tommie Rae Brown ..... Respondent,

v.

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

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

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TOMMIE RAE BROWN

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STATEMENT OF ISSUES ON APPEAL

I. Appellants are bound by the final unappealed family court order ruling that Respondent was not married when she married James Brown and cannot relitigate that judgment because there is no subject matter jurisdiction in the circuit court and Appellants lack standing; moreover, family court judgments about status are binding on all third parties.

II. The lower courts' decision is consistent with the summary judgment standard: because all necessary evidence was stipulated, so that no further discovery was proper or necessary.

III. The lower courts' decision is consistent with *Lukich v. Lukich*, all other case precedent, and the applicable statute.

IV. Respondent met her burden of proof.

STATEMENT OF THE CASE

The issue in this appeal of a partial summary judgment is whether Tommie Rae Brown ("Mrs. Brown") is the surviving spouse of James Brown ("Mr. Brown"). The partial summary judgment issue of her status as surviving spouse arose in the context of Mrs. Brown's claims for her elective share and omitted spouse's share,[1] both of which are probate matters, for which she has to be the surviving spouse to qualify. The South Carolina Probate Code defines "surviving spouse" for these purposes. S.C. Code Ann. §62-2-802. The matters were removed from the probate court to the circuit court, which was therefore effectively sitting in probate. The following is based upon stipulations and holdings of both courts below.[2]

Mr. and Mrs. Brown were married in a ceremonial wedding and have a valid marriage certificate issued by the Aiken County Probate Court on December 14, 2001.[3] All parties have stipulated to the validity of the marriage license in a Joint Stipulation. (ROA Vol. I, p. 256 at ¶ 4, pp. 269-70; pp. 293-6.) Mrs. Brown had a putative prior marriage with Javad Ahmed. But, as the family court would hold, at that time Ahmed, a Pakistani, had multiple wives from whom he had

[1] Although not mentioned in the Court of Appeals opinion, the omitted spouse's claim arose because Mr. and Mrs. Brown married *after* he executed a will and trust in 2000.

[2] Appellants' Statement of the Case and Statement of Facts contain factual errors and omissions. (1) Appellants omit that they too filed contests against Mr. Brown's will and trust and that they too were parties to the settlement agreement (the "2009 agreement") rejected by this Court in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). (2) They omit the fact that Mr. Brown made his will before he married Mrs. Brown and before the birth of James Brown II. (3) They omit the fact that Mrs. Brown filed her summary judgment motion initially in 2000. (4) They assert that Mrs. Brown and Javad Ahmed were "legally" married, but they were not. (5) They assert that, to obtain her marriage license, Mrs. Brown "falsely swore" to the Aiken County Probate Court that the marriage to Mr. Brown was her first; rather, her statement was true because the putative marriage to Ahmed was never valid. (6). They omit the fact that Appellant Venisha Brown died on September 23, 2018.

[3] ROA Vol. I, p. 256 at ¶¶ 4-5, pp. 269-70. As discussed *infra*, Mr. and Mrs. Brown signed a purported prenuptial agreement. The South Carolina Probate Code provides the requirements for a waiver of spousal shares. At the appropriate time, Mrs. Brown could challenge the validity of the purported prenuptial agreement, but that opportunity will be obviated because she will dismiss her spousal claims in accordance with the settlement agreement with the Estate, discussed *infra*.

not been divorced. In December 2003, to confirm the invalidity of that putative marriage, Mrs. Brown filed an action in the Charleston County Family Court, seeking to annul it. Mr. Brown paid the attorney's fees that made that action possible and thus supported the action; he was kept aware of the action. (ROA Vol. I, p. 257 at ¶ 13.) After a trial, the family court held in April 2004 that any putative marriage between Mrs. Brown and Ahmed was void *ab initio* on the ground of Ahmed's bigamy. (ROA Vol. I, pp. 293-6.) After a domestic altercation, and aware of the Mrs. Brown-Ahmed family court action that he financed, Mr. Brown filed an action in January 2004 to annul his marriage to Mrs. Brown on the ground of Mrs. Brown's alleged bigamy; after the Charleston County Family Court issued its order in April 2004, Mr. Brown filed an amended complaint in May 2004, to which Respondent responded with an action for divorce and support. But instead of pursuing that action, Mr. Brown dismissed the action and lived with Mrs. Brown as husband and wife until his death. (ROA Vol. I, pp. 349-50.)

The circuit court held that the family court judgment of annulment was binding, that there was never a valid marriage between Mrs. Brown and Ahmed, and that Mrs. Brown is therefore Mr. Brown's surviving spouse because there was no impediment to their marriage.[4]

During the pendency of Appellants' appeal to the Court of Appeals, the Estate of James Brown ("Estate") entered into a settlement agreement with Mrs. Brown and, in accordance with its provisions, the Estate has withdrawn its appeal in this matter and is now supportive of Mrs. Brown's position as the legal wife of James Brown. Under that agreement, Mrs. Brown has dismissed her contests of Mr. Brown's will and charitable trust. The agreement provides a substantial financial benefit to the Estate (and charitable trust), which will receive 65 percent of any proceeds related to Mrs. Brown's federal copyright termination rights. Under federal

[4] ROA Vol. I, pp. 53-98.

copyright law, Mrs. Brown will receive 50 percent of these extremely valuable termination rights, but only if she is determined to be the surviving spouse of James Brown. Were it not for Mrs. Brown's agreement to transfer those proceeds from her termination rights, the Estate and charitable trust would not be entitled to any proceeds from the termination rights, which by federal law belong only to intestate heirs. Thus, the Estate and charitable trust will benefit from those termination rights proceeds only if Mrs. Brown is the surviving spouse and then only because of her settlement agreement with the Estate. Appellants have not entered into any settlement agreement with the Estate, and consequently the Estate will not receive any benefit from Appellants' termination rights — only from Mrs. Brown if she is the surviving spouse.[5]

The settlement agreement also provides that, once the litigation over Mrs. Brown's status as surviving spouse is concluded, Mrs. Brown will then dismiss her elective share and omitted spouse's share claims against the Estate. Although not noted in the Court of Appeals opinion or in Appellants' brief, Appellants and other Brown Children also filed separate will and trust contests. Those Brown Children, with the exception of Terry Brown, settled separately with the Estate.[6] The Estate litigation has been the primary reason that the charitable trust has yet to be funded. Thus, affirming the lower courts in this case would effectively put an end to approximately 12 years of litigation among the beneficiaries of the Estate of James Brown and will provide substantial financial benefit to the Estate and charitable trusts.

[5] The previous 2009 agreement did include a contribution of the termination rights proceeds from six of the Brown Children, including three of the current Appellants, and Mrs. Brown. Without that 2009 agreement the Estate and charitable trust lost the rights to receive any benefit of these valuable rights, and Appellants now are attempting to obtain all these rights for themselves.

[6] Terry Brown appealed that settlement to the Court of Appeals. His counsel's motion to withdraw was granted by the Court of Appeals on October 30, 2018, which gave Terry Brown 30 days to find substitute counsel. He has apparently failed to do so and will presumably act *pro se*, if at all.

Appellants' own separate settlement agreement with the Estate means that they are contesting Mrs. Brown's status as surviving spouse, contrary to their father's intentions, for only one reason: federal termination rights. Regardless of a writer's intentions, federal law provides valuable termination rights to the writer's intestate heirs: half to the surviving spouse and half to the children. By hoping to overturn Mrs. Brown's status as surviving spouse, Appellants hope to double their share of the federal termination rights because Mrs. Brown would not be entitled to any if she is not the surviving spouse. If Mrs. Brown is not the surviving spouse, the charitable trust will receive no termination rights proceeds. Consequently, Appellants are contesting her status with the intended result of depriving the charitable trust of any termination rights proceeds.

The Court of Appeals affirmed the trial court's decision. *In re Estate of Brown*, 424 S.C. 589, 603, 818 S.E.2d 770, 778 (S.C. Ct. App. 2018). The Court of Appeals denied Appellants' petitions for rehearing and suggestions for rehearing *en banc*.

This appeal involves only one issue: whether Mrs. Brown is the surviving spouse of Mr. Brown. As discussed *supra*, Mrs. Brown has already dismissed her will and trust contests, and she has agreed to dismiss her remaining spousal claims against the Estate[7] upon the final determination of her spousal status.[8] Her status as surviving spouse affects such nonprobate

[7] In *Wilson v. Dallas*, *supra* note 2, this Court noted the existence of a putative prenuptial agreement, the validity of which had yet to be determined in the lower court. Appellants also cite this prenuptial agreement in their brief. Appellants' Brief, p. 6. That issue is not before this Court. If its validity were actually tried, Respondent is confident the putative prenuptial agreement would be invalid because it lacks an essential requirement under South Carolina Probate Code Section 62-2-204 (involving the waiver of elective share rights): the record contains no evidence of any disclosure of Mr. Brown's assets at the time the putative waiver was executed, which renders any attempted waiver ineffective. *See, e.g., Geddings v. Geddings* 319 S.C. 213, 460 S.E.2d 376 (S.C. 1995). However, because her agreement with the Estate will result in her dismissal of her spousal claims, the validity of the putative prenuptial agreement will never have to be actually decided.

[8] If this Court upholds the lower courts, that would be the final determination of her spousal status, serving as the trigger under her agreement with the Estate for her to dismiss her spousal claims. If the Court reverses the lower

matters as the termination rights (the proceeds of which pass to the charitable trust only if she is the surviving spouse), social security, health insurance, and the rights of their son James Brown II, including his reputation and arguably his legitimacy. There is no dispute that James II, now age 17, is the son of James Brown. (ROA Vol. I, p. 255 at ¶ 3, p. 268.)

courts on the summary judgment issue, the issue of her spousal status would presumably return to the lower courts for a trial, and likely appeal therefrom. In that latter event, her dismissal of her spousal claims under her agreement with the estate would be substantially delayed and the estate would continue to remain unresolved for years to come.

SUMMARY OF ARGUMENT

Appellants have two basic arguments:

(1) Appellants want to retry in circuit court the final unappealed[9] order of the family court in an annulment action that Mrs. Brown's putative marriage to Ahmed was void *ab initio* for bigamy. They cannot do so, for many well-established reasons under our law. First, only the family court has jurisdiction over an annulment case. Second, they can have no greater standing to contest that family court order than Mr. Brown did, and he had no standing to do so.[10] These two points obviate Appellants' other arguments for allowing them to attack the family court order, but the remaining arguments fail for other reasons as well. Although with knowledge of Mrs. Brown's annulment action, Mr. Brown brought his own annulment action, he dismissed his action and never brought another.[11] He alleged in his Complaint that the Charleston family court findings of fact were binding. Appellants seek to do what he chose not to do during his lifetime,

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[9] The only person who could have possibly appealed the family court order was Ahmed, and it is too late for him to do so. Appellants cite the affidavit of David Bell, at the time an attorney representing Terry Brown in the estate litigation, attaching a purported affidavit of one Taha Aliza (ROA, pp. 515-21), which is inadmissible and irrelevant, claiming that he talked to Ahmed by phone in Pakistan. However, Appellants' citing to that affidavit makes the point that, if true, Ahmed knew no later than 2008 of the annulment, and he has not appealed or appeared in any way.

[10] The Court of Appeals confirmed such a lack of standing in *Lukich v. Lukich*, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (S.C. Ct. App. 2006); *aff'd* 379 S.C. 589, 666 S.E.2d 906 (2008). In their brief, p. 14, Appellants attempt to equate the standing granted them by the circuit court to contest Mrs. Brown's spousal claims with the standing to attack the family court order. The circuit court granted them the standing to contest the elective and omitted share petitions, although Respondent believes that Appellants do not have that standing because South Carolina Code Ann. sections 62-2-205 and 62-2-301 provide that only the personal representative would have such standing, given that the personal representative represents the interests of estate beneficiaries. However, the lower courts recognized that Appellants *do not* have standing to contest the family court order, which is their real goal.

[11] Appellants take the illogical position that the dismissal of Mr. Brown's annulment action somehow granted him an annulment. That would be a first: a dismissal of an action would grant the relief requested despite the action being dismissed. They assert that the waiver in that consent dismissal of any common law marriage claim also waived the licensed, ceremonial civil marriage. The waiver of any common law marriage claim in the consent dismissal can no more create an annulment than it created a divorce or an obligation for support — both of which Mrs. Brown asked for in that action. The consent dismissal does what it says: it dismisses his annulment action and her divorce and support counterclaims. They remained married.

which the law does not allow.[12] Appellants argue that they are not collaterally estopped from contesting the family court annulment order. However, they admit that a family court order is binding on the world as to status, but argue that an order's facts and conclusions of law are not binding.[13] The *status* of the invalidity *ab initio* of Mrs. Brown's putative marriage to Ahmed is all that matters for purposes of the summary judgment. As a matter of law, she had no impediment to her marriage to Mr. Brown. Appellants argue that they were deprived of discovery, but the decision was based on stipulated facts. *See* Stipulation of Facts (ROA Vol. I, pp. 254-350). The trial court order reiterated "that it relied only upon the applicable law and facts as agreed upon in the Joint Stipulation of Facts." (ROA Vol. I, p. 104). In their brief, Appellants now contend that they are not really trying to attack the annulment order, but they are merely trying to litigate the issue of whether Mrs. Brown is the surviving spouse of Mr. Brown. Of course, that is a canard: they cannot succeed in their argument that Mrs. Brown is not the surviving spouse without overturning or contradicting the family court order. The family court order ruled, based on bigamy, that Mrs. Brown was not ever married to anyone else — before she married Mr. Brown. As discussed *infra*, a bigamous marriage is never valid, so according to the family court, Mrs. Brown was never married to anyone else. Appellants want to argue in circuit court that Mrs. Brown's putative prior marriage was not bigamous, which directly contradicts the ruling in the family court order. Thus, despite their semantical feint, Appellants

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[12] *Estate of Brown,* 424 S.C. at 602, 818 S.E.2d at 777.

[13] Appellants' position of the binding status of an in rem order has apparently evolved so that in their brief they now admit they are bound by the status created by an order, but now only as of the date of the order (whereas in previous pleadings they admitted they were bound by a status ruling without limitation by date). Appellants' Brief, p. 14. The *status* of Mrs. Brown's putative marriage to Ahmed — void and never valid — is the critical matter. Appellants' contention that an order finding a bigamous marriage is void only from the time of the order continues their erroneous theme that a bigamous marriage is valid unless and until there is an order; this position contradicts the bigamy statute and all case precedent dealing with a bigamous marriage, as discussed *infra*.

clearly want to retry the family court litigation, which they cannot do for numerous reasons discussed *infra*.

(2) Appellants argue that the circuit court and the Court of Appeals misunderstood *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754, (S.C. Ct. App. 2006); *aff'd* 379 S.C. 589, 666 S.E.2d 906 (2008). They argue that *Lukich* requires a finding that Mrs. Brown had an impediment to her marriage to Mr. Brown because the family court annulment order occurred after the marriage ceremony of Mr. and Mrs. Brown. Their argument fails for many reasons. First, this Court held in *Lukich*, as it has in every other case ever decided by this Court, that a bigamous marriage is void *ab initio* — that it was never valid, never a marriage.[14] In doing so, this Court cited numerous South Carolina cases, all holding that a bigamous marriage is never a marriage. Appellants undertake a sleight-of-hand attempt at confusion by trying to focus on the order of the marriages, rather than whether a marriage was bigamous. However, the order of the marriages is not what matters. In *Lukich*, the second "marriage" was bigamous because the first marriage was valid until the order invalidating the first marriage was obtained.[15] Importantly in *Lukich*, the first marriage was valid until the order was obtained because the annulment was based on intoxication, which is a voidable marriage. A voidable marriage — such as one based on intoxication — remains valid until it is annulled.[16] However, in this case, Mrs. Brown's putative first marriage was void for bigamy, not voidable, and thus was never a marriage and never an impediment to her marriage to Mr. Brown.

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[14] *Lukich, supra* note 10, at 592-3, 666 S.E.2d at 907.

[15] *Id.*

[16] In other words, if neither party to the "intoxication marriage" chooses to annul it, it remains a valid marriage.

Second, the decision in every South Carolina case that a bigamous marriage is never valid is required by South Carolina Code Section 20-1-80, which provides that a bigamous marriage is void. Appellants ask this Court to not only overturn every case it has decided about bigamous marriages (that they are never valid), but also to disregard the clear mandate of the legislature.

Third, Appellants argue that this Court in *Lukich* did not recognize the distinction between a void and voidable marriage. That is simply not correct. For example, this Court in *Lukich* cites its prior decision in *Day*: "See e.g., *Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950) ('A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable')."[17]

Fourth, Appellants argue that, although this Court affirmed the Court of Appeals in *Lukich* and cited numerous cases that have held without exception that a bigamous marriage is never valid, somehow this Court, without mentioning it, overturned the footnote in the Court of Appeals' opinion recognizing that, if the first marriage is void *ab initio* for bigamy, there would be no impediment to the second marriage.[18]

Fifth, Appellants argue that Mrs. Brown's bigamous marriage to Ahmed was valid until the family court annulment order, yet the alleged bigamous marriage — according to them — between Mrs. and Mr. Brown was void *ab initio*, without the need to obtain a court order. Appellants want this Court to apply Appellants' erroneous rule — that a bigamous marriage is

[17] *Id.* at 592, 666 S.E.2d at 907. Moreover, the rationale in *Lukich* is based on the distinction between a void and voidable marriage.

[18] Judge Short authored the Court of Appeals opinion in *Lukich* and the opinion in this case below.

valid until a court order is obtained — only to the Brown-Ahmed marriage but not to the Brown-Brown marriage, which they contend is bigamous.

Sixth, Appellants argue that the order of the marriage makes a difference. But this Court has already decided a case with exactly the same order of marriages as in this case, and the decision of this Court in that case is consistent with the Court of Appeals decision in this case. In *State v. Sellars*, 140 S.C. 66, 134 S.E. 873 (1926), this Court held that a man was not guilty of the crime of bigamy because his first "marriage" was void as bigamous so that he had no impediment to his second marriage.[19] There is nothing novel or contradictory as to the order of marriages in this case.

Rather than presenting issues that are novel questions of law or that conflict with previous Supreme Court rulings, Appellants ask this Court to overturn established law. To prevail, Appellants must have this Court: (1) overturn every case addressing bigamous marriages, all of which hold that they are never valid; (2) reject South Carolina Code Section 20-1-80 that mandates that bigamous marriages are void (not voidable); (3) grant subject matter jurisdiction over annulments to the circuit court; (4) allow standing to third parties in an annulment action; (5) allow a decedent's heirs to have greater rights than he had and have standing that he did not have; (6) allow a decedent's heirs to overturn a marriage he wanted; (7) hold that a family court determination about marriage status is not binding on others, so that the issue would have to be continually re-tried; and (8) find that a bigamous marriage is valid unless and until there is a court order of annulment — except in the case of the Brown-Brown marriage.

[19] Similarly, *Hallums v. Hallums*, 74 S.C. 407, 54 S.E. 613 (1906), stands for the proposition that, if the first marriage of a woman was bigamous, there would be no impediment to her valid second marriage. However, in *Hallums*, the court (in the days before there was a family court) concluded that the first marriage was not bigamous because her first husband was not already married to another, which is different from the facts in this case, where Respondent's putative first marriage was bigamous and never valid.

Although Appellants erroneously contend that the Brown-Brown marriage is also bigamous, they argue that it is void *ab initio* without the need of a court order, which was never obtained. Thus, they want their fanciful rule that a bigamous marriage is valid until there is a court order to apply *only* to the Brown-Ahmed marriage, and not to the Brown-Brown marriage.

ARGUMENT

I. The South Carolina Probate Code Applies

The issue before the court is whether Mrs. Brown is the surviving spouse of Mr. Brown. "Surviving spouse" is a defined term under S.C. Code Ann. § 62-2-802(a), which provides that:

> An individual who is *divorced* from the decedent or whose marriage to the decedent has been *annulled* is not a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death. A decree of separate maintenance that does not terminate the status of husband and wife is not a divorce for purposes of this section.
> (Emphasis added.)

Mr. and Mrs. Brown had a valid marriage license and certificate evidencing their ceremonial marriage. Thus, for Mrs. Brown not to be Mr. Brown's surviving spouse under section 62-2-802, it must be determined that Mr. and Mrs. Brown were either divorced or that their marriage was annulled by the time of his death. Mrs. Brown's status as the surviving spouse is determined as of the time of Mr. Brown's death. Mr. and Mrs. Brown were never divorced and their marriage was never annulled. Consequently, she is the surviving spouse as defined in the South Carolina Probate Code.

In order for a divorce or annulment to preclude someone from being the surviving spouse of a decedent, the South Carolina Probate Code requires a *signed order* of divorce *or annulment filed* with the clerk of court. S.C. Code Ann. § 62-2-802(c). Under South Carolina law, that

signed order must be filed with the court before the decedent's death. *Hatchell-Freeman v. Freeman*, 340 S.C. 552, 532 S.E.2d 299 (S.C. Ct. App. 2000); *Bayne v. Bass*, 302 S.C. 208, 394 S.E.2d 726 (S.C. Ct. App. 1990); Roy T. Stuckey, *Marital Litigation in South Carolina* ch. 1E (3d ed. 2006). There is no such thing as a postmortem annulment. *See generally, Id.*

Because Mrs. Brown presented a valid marriage certificate and court records prove that the marriage of Mr. and Mrs. Brown was never terminated by divorce and never annulled, Mrs. Brown qualifies as Mr. Brown's surviving spouse.[20]

II. THE FAMILY COURT DECREE OF ANNULMENT IS BINDING IN THE PRESENT ACTION

Appellants argue that the Family Court judgment of annulment is not binding on them in the present action. The trial court and the Court of Appeals properly held otherwise.

A. The Family Court Judgment Of Annulment Cannot Be Attacked In An Action Filed In The Court Of Common Pleas

Appellants cannot attack or relitigate a family court order in the circuit court. As the Court of Appeals recognized, the family court has *exclusive* subject matter jurisdiction over

[20] *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013), did not rule on Mrs. Brown's status as surviving spouse. Instead, in concluding that the trial court lacked evidence to determine that the settlement agreement was just and reasonable, the Supreme Court suggested that there were two principal obstacles in the way of Mrs. Brown's spousal claims, neither of them being the issue now before this Court, which is whether she is the surviving spouse of Mr. Brown. First, as to Mrs. Brown's elective share claim, the Supreme Court stated that Mrs. Brown executed a prenuptial agreement waiving all rights to Mr. Brown's property or any statutory claims against his estate, and observed that "[a] valid prenuptial agreement would normally preclude any right to an elective share." *Id.* at 440, 743 S.E.2d at 762. S.C. Code Ann. § 62-2-204 provides that a valid waiver of the elective share requires a fair written disclosure of the non-waiving party's assets. The validity of the alleged prenuptial agreement for spousal share purposes has not yet been determined. However, this issue is now moot (see *supra* note 7). Second, as to Mrs. Brown's omitted spouse claim, the Supreme Court noted that Brown's testamentary documents state that he was specifically omitting any other beneficiaries or potential beneficiaries, including a future spouse or heirs, based on his desire to leave most of his estate to charity after providing for the education of his grandchildren. *Id.* at 441, 743 S.E.2d at 762. Similarly, his intent on that issue has yet to be determined in the trial court. Unfortunately, the practical result of the *Wilson* decision was to deprive the charitable trust of the extremely valuable contribution of certain federal termination rights by Mrs. Brown and the Brown children, as the agreement had provided for, as well as to continue the extremely expensive estate litigation, at the ultimate expense of the charitable trust.

annulments. S.C. Code Ann. § 63-3-530(A)(6). "[T]he trial court had no subject matter jurisdiction to relitigate the family court order because only the family court has jurisdiction over annulments." *In re Estate of Brown*, 424 S.C. 589, 600, 818 S.E.2d 770, 776 (S.C. Ct. App. 2018).

Because the Court of Common Pleas has no subject matter jurisdiction over annulments, it could not relitigate or overturn the family court's holding that no valid marriage ever existed between Mrs. Brown and Ahmed. The courts below properly held that the family court judgment of annulment was binding in its result: Mrs. Brown and Ahmed never had a valid marriage.

In their brief, Appellants now argue that they "have no interest in 'undoing' Respondent's termination of her marriage to Husband 1 in 2004, nor do Appellants have any ability to do so." Rather, they contend that they are merely "trying to enforce their own due process rights to litigate the validity of Respondent's claim that she is their father's surviving spouse and, in so doing, are not bound by the factual findings of her *in rem* Annulment Order." Their position is incorrect for several reasons:

(1) Appellants contend that the Charleston County Family Court annulment order terminates Respondent's marriage as of 2004. That is clearly wrong. Rather, that order clearly holds that the putative marriage was *never valid.* The order did not terminate a marriage to "Husband 1" (as Appellants style it) as of 2004 because there was never any marriage to terminate. The family court held correctly that a bigamous marriage is never a marriage. Thus, Respondent's putative marriage to Ahmed was void *ab initio* because it was bigamous.[21]

[21] See discussion *infra* at IV. In its opinion, the Court of Appeals quoted language from this Court's opinion in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013), stating that the Charleston County Family Court's order of

(2) Appellants now concede that they have "no ability" to contest or relitigate the family court order. Yet, that is exactly what their brief does under the guise of litigating Respondent's marital status at the time she married Mr. Brown. Her marriage to Mr. Brown is valid, and she is the surviving spouse because their marriage was never annulled or ended in divorce, in accordance with section 62-2-802. But Appellants argue that Respondent's marriage to Mr. Brown was invalid because she was already married. However, the only way Appellants can prevail on their argument is to show that her marriage to Ahmed *was valid* — a direction contradiction to the family court order they profess not to attack. Regardless of their semantic contortions, they want to retry in circuit court — without subject matter jurisdiction over annulments — the issue of the annulment. In so doing, they ask the Court to ignore the ruling of the family court that the marriage was never valid because of bigamy. Relitigating and contesting the family court order is exactly what they want to do, and all they want to do. Imagine the chaos in the legal system if the circuit court — without subject matter jurisdiction over annulments — reached a conclusion about the putative first marriage that contradicted the final unappealed family court order. If a circuit court could reach conclusions about annulments contrary to a family court, what effect would that have on the parties to the family court order,

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annulment was "hastily granted ... during the pendency of [Mr.] Brown's separate annulment action against [Respondent]." Respondent disagrees with this depiction, given that her annulment action in the Charleston County Family Court was filed before Mr. Brown's annulment action in the Aiken County Family Court; moreover, the Charleston County order was issued before Mr. Brown amended his complaint in the Aiken County family court. The inference in the quote from *Wilson v. Dallas* is that either Respondent rushed out to file her annulment action in the Charleston County Family Court *after* Mr. Brown filed his annulment action in Aiken County — which is not accurate — or that the Charleston County Family Court, somehow aware that Mr. Brown had filed his annulment action in Aiken County after Respondent's filing in the Charleston court, was thereby spurred to rush to judgment to beat the issuance of a decision by the Aiken County court. The reality is that the Charleston County Family Court issued its order in due time in an action filed by Respondent *before* Mr. Brown filed his action, in the regular course of court process.

their children, their future spouses, their children from future spouses, and others? The parties to the annulment could never rely on a final family court order.

(3) Appellants' contention that an order finding that a marriage is void for bigamy is effective only from the time of the order continues their erroneous position that a bigamous marriage is valid unless and until there is an order. This position clearly contradicts the bigamy statute and all case precedent dealing with a bigamous marriage as discussed at IV, *infra*.

(4) Appellants contend that it is their due process right to litigate whether Respondent is, as they put it, "their father's surviving spouse." They are wrong for two compelling reasons: First, Mr. Brown did not have the right to contest Respondent's annulment order. Rather, he had a way to exercise his rights, which was to bring his own annulment action against Respondent. That is a route he indeed initially chose, but he then dismissed that action, never again to bring an annulment or divorce action against Respondent. By his own choice, he remained married to Mrs. Brown when he died. His children do not have any due process rights to do what he could not do or what he chose not to do. As his putative heirs, they have no greater rights than he had. Nor do they have any right to undo what he chose. Second, the applicable law does not give them any "due process rights" to contest Respondent's status as surviving spouse for purposes of the statutory elective share and/or the omitted spouse's share. South Carolina Probate Code sections 62-2-205 and 62-2-301 clearly provide that the personal representative is the *only* party to handle elective share and/or omitted spouse's share claims by a surviving spouse. These statutes do not give them to right to contest the elective share and/or omitted spouse share.[22]

[22] Granted, the trial court issued an order allowing Appellants to contest the elective share and omitted spouse's share in this case, which Respondent did not appeal. While Respondent does not believe that order was correct, allowing Appellants to participate in the contest of Respondent's spousal claims does not remotely equate with allowing them to relitigate a final unappealed family court order.

(5) Regardless of the claim by Appellants that they are not really contesting the family court order, the result of allowing them to argue Respondent's status in circuit court would necessarily result in an annulment, if they were to prevail. Their argument is critically flawed for three reasons: (a) Appellants want the circuit court to find that the marriage between Mrs. Brown and Mr. Brown was not valid. The only way to determine that a marriage is not valid is by an annulment. As discussed *infra*, the circuit court has no subject matter jurisdiction over annulments; (b) even if the circuit court could issue such an annulment order, that is not possible: there can be no posthumous annulment[23]; and (c) the circuit court sitting in probate does not even have subject matter jurisdiction to determine the *validity* of marriages.[24]

Thus, Appellants attempt to circumvent the lack of subject matter jurisdiction to attack the family court annulment order by contending that they are not attacking the family court order, but rather only want to attack the validity of the Brown-Brown marriage. But, they are attacking the family court order and judgment nonetheless: the only way they can attempt to invalidate the Brown-Brown marriage is to collaterally attack the family court annulment order. The circuit court lacks subject matter jurisdiction to overturn or contradict the family court annulment order. Regardless of how Appellants try to re-package what they are attempting to do

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[23] In order for a divorce or annulment to preclude someone from being the surviving spouse of a decedent, the South Carolina Probate Code requires a *signed order* of divorce *or annulment filed* with the clerk of court. S.C. Code Ann. § 62-2-802(c). Under South Carolina law, that signed order must be filed with the court before the decedent's death. *Hatchell-Freeman v. Freeman*, 340 S.C. 552, 532 S.E.2d 299 (S.C. Ct. App. 2000); *Bayne v. Bass*, 302 S.C. 208, 394 S.E.2d 726 (Ct. App. 1990); Roy T. Stuckey, *Marital Litigation in South Carolina* ch. 1E (3d ed. 2006). There is no such thing as a postmortem annulment. *See generally, Id.*

[24] S.C. Code Ann. section 62-1-302, the general probate jurisdictional section, does not give the probate court jurisdiction over annulments but in addition does not afford jurisdiction to even determine the *validity* of marriages: That section limits probate jurisdiction to the "*interpretation* of marital agreements." § 62-1-302(c). (Emphasis added.)

so as to avoid their subject matter jurisdiction problem, they are attacking the family court annulment order. As noted above, the Court of Appeals recognized the substance of this veiled attempt to relitigate the family court annulment order in a court without subject matter jurisdiction over annulments and rejected their position: "we find the trial court had no subject matter jurisdiction to relitigate the family court order because only the family court has jurisdiction over annulments. S.C. Code Ann. § 63-3-530(A)(6) (2010)." *Estate of Brown*, 424 S.C. at 600, 818 S.E.2d at 776.

Moreover, and critically, even if Appellants convinced this Court that they are not really relitigating the family court annulment order in circuit court, they cannot do in circuit court what they profess to want to do. Appellants' goal is to invalidate Respondents' marriage to Mr. Brown — contrary to his intent indicated by his dismissal of his own annulment action against her.[25] However, the only way one can invalidate a marriage is through an annulment.[26] Mrs. and Mr. Brown have a valid marriage license, to which Appellants stipulated.[27] Thus, Appellants are seeking to annul that marriage. Yet Appellants have three fatal defects in their attempt to annul the marriage in circuit court: *First, the circuit court does not have subject matter jurisdiction over annulments (only the family court does).*[28] *Second, it is not possible to have a*

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[25] *See* footnote 11, *supra.*

[26] *See* Stuckey, *supra*, at Ch. 3A.

[27] ROA Vol. I, p. 256, ¶¶ 4-5, pp. 269-70.

[28] Appellants have no ability to litigate this issue in the only court with subject matter jurisdiction over annulments — family court. Creating an unprecedented opportunity to do so in this case would set a precedent with monumental problems.

posthumous annulment.[29] *Third, a court sitting in probate has no subject matter jurisdiction to determine the validity of marriages.*[30]

B. The Family Court Judgment of Annulment Is Binding Because Appellants Lack Standing To Question It

Even if the Court of Common Pleas somehow has subject matter jurisdiction over annulments and re-litigating the family court order were otherwise permissible, Appellants lack standing to question the family court order. Mr. Brown had no standing to attack the annulment. The Court of Appeals in *Estate of Brown* directly so held, citing *Lukich v. Lukich*, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (S.C. Ct. App. 2006): "We find Appellants lacked standing to contest the annulment order, just as Brown did not have standing to intervene in the annulment action between Respondent and Ahmed . . . . Any rights Appellants have are derivative from Brown." *Estate of Brown*, 424 S.C. at 601, 818 S.E.2d at 777. Appellants claim to be heirs of James Brown; their claims are through him, and they cannot assert claims that he himself could not. *See Watson v. Watson*, 172 S.C. 362, 369-70, 174 S.E. 33, 36 (1934) ("[A]s it is only the children of Mr. Watson who are contesting this question, they are completely estopped, as was their father, from disputing the validity of the divorce in question."); *Neely v. Thomasson*, 365 S.C. 345, 354, 618 S.E.2d 884, 889 (2005).

Moreover, the stipulated facts show clearly that, with knowledge of Mrs. Brown's family court annulment action, which he himself financed, Mr. Brown, after a domestic altercation, did for a time question the validity of his marriage to Mrs. Brown by bringing an action in the Aiken County family court to have Mr. Brown's marriage to Mrs. Brown annulled. Because Mr.

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[29] *See* footnote 23.

[30] *See* footnote 24.

Brown lacked standing to contest or otherwise be involved in the family court action between Mrs. Brown and Ahmed, this was the remedy available to him to contest the validity of his marriage to Mrs. Brown. He obviously understood that the way to invalidate a marriage is through an annulment action because he brought an annulment action to invalidate his marriage. But Mr. Brown then reconciled with Mrs. Brown and withdrew the claim. (ROA Vol. I, pp. 349-50.) (Aiken County family court stating in Finding 2 that "[t]he parties have resolved their differences and are currently residing together").[31] Mr. and Mrs. Brown remained married until Mr. Brown's death. Appellants lack standing to do what their own decedent ultimately refused to do: question the validity of his marriage to Mrs. Brown.

Appellants make a broad series of policy arguments that heirs should have broad license to question the marriages of their decedents. To the contrary, parties to a marriage have a strong and direct interest in determining whether their marriage is valid. If the decedent accepts the validity of a marriage, as Mr. Brown clearly did here by choosing to dismiss his annulment action and live in matrimony with Mrs. Brown until his death, the marriage should be binding upon his heirs. Appellants disagree with Mr. Brown's decision to dismiss the annulment action and are using this action to overturn his personal judgment. Appellants lack standing to question the validity of a marriage that Mr. Brown himself clearly chose to accept.

[31] Appellants argued that Mrs. Brown concealed her relationship to Ahmed. To the contrary, Mr. Brown was well aware of that relationship, as he paid the attorney's fees for the annulment action and even filed an annulment action of his own. Moreover, Mrs. Brown testified in family court that she thought that marriage was annulled before she married Mr. Brown (ROA Vol. I, p. 307), and since a valid marriage never existed between Mrs. Brown and Ahmed, there was, in any event, no valid prior marriage to disclose.

C. The Family Court Judgment of Annulment Is Binding Because Judgments of Annulment Are Binding On All Third Parties

1. Judgments of Annulment Are Binding Upon Third Parties

Even if the judgment of annulment can be relitigated and attacked in the Court of Common Pleas, and even if Appellants have standing to do so, the annulment judgment is still binding because judgments of annulment are binding on all third parties.

The efficient and orderly tracking of marriages within South Carolina requires that annulments be binding upon third parties. Assume that a wife enters into a bigamous marriage when her husband conceals from her a prior marriage. Within a period of months, she learns the truth, recognizes the error, and has the marriage annulled.

The position of Appellants in this case is that the wife in this example can never rest: Her original judgment of annulment, no matter how clearly she proved her case, binds only the parties named to the annulment action. According to Appellants, every time the validity of her marriage becomes an issue with regard to anyone not a party to the original annulment, she must file a new annulment action against that third party. For example, if she desires to remarry, she must name her prospective husband as the defendant in an action to annul her first marriage; otherwise the husband is not bound by the annulment and the second marriage is bigamous. If her marital status becomes an issue when she purchases real property or applies for government benefits — e.g. Social Security — she must again file an annulment action. These repeated annulment actions, seeking the same relief over and over again against different defendants, would be an impossible burden upon both the wife and the court system and create chaos.[32]

[32] Moreover, Appellants' proposal would unfairly and absurdly affect the rights of the only real parties to the annulment action: the putative husband and wife. If third parties are not bound by an annulment action, but are free to re-try the case every time a third party is interested in doing so, then what if a court with subject matter

South Carolina law is clear. South Carolina Code Section 20-1-80 provides that a bigamous marriage is never a marriage: "All marriages contracted while either of the parties has a former wife or husband living shall be void." This statute means just what it says — a bigamous marriage is void — which every South Carolina appellate court opinion has affirmed. Unless an annulment is binding on third parties, the statute would be rendered meaningless.

There is no question that Mrs. Brown's putative marriage to Ahmed was void on the ground of Ahmed's bigamy because there is a binding family court order. That final order granting the annulment is stipulated to by Appellants. (ROA Vol. I, p. 257, ¶ 11, pp. 293-6.)[33]

The effect of section 20-1-80 is to make annulments binding upon all third parties. This is the strong general rule nationwide. "*[A]nnulment decrees are binding upon non-parties* as well as parties respecting the validity of the marriages involved." Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 3.6 (2d ed. 1987) (emphasis added).[34] *See, e.g., Joye v. Yon*, 345 S.C. 264, 547 S.E.2d 888 (S.C. Ct. App. 2001) (holding that ex-husband of first marriage, who was to pay alimony to ex-wife, was bound by annulment of his ex-wife's second marriage on grounds of her putative second husband's bigamy even though the ex-husband of

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jurisdiction decided that a marriage previously annulled for bigamy was not bigamous and thus not void? The parties to the void marriage would have a family court order saying they were never married but there would be a different court order saying they were. This would create chaos. The status of the parties' marriage is their business, not someone else's.

[33] Although it does not matter in this case because there is a family court order of annulment, the Court of Appeals opinion in this case recognizes that a bigamous marriage is void *ab initio* regardless of an order, and that Mrs. Brown's marriage to Mr. Brown would be valid even without the annulment order. *Estate of Brown*, 424 S.C. at 599, 818 S.E.2d at 776. See, e.g., Roy T. Stuckey, *Marital Litigation in South Carolina*, ch. 3A (4th ed. 2010). *See also*, 52 Am. Jur. 2d *Marriage* §58.

[34] Other states have likewise held that annulments cannot be collaterally attacked by those who are not parties to the action. "In a proceeding in rem with respect to a status the judgment is conclusive upon all persons as to the existence of the status." RESTATEMENT (FIRST) OF JUDGMENTS § 74(1) (1942). "It is ancient law that a judgment *in rem* is *res judicata* as to all the world with regard to the res or status that is determined therein." *Presbrey v. Presbrey*. 6 A.D.2d 477, 480, 179 N.Y.S.2d 788, 792 (1958), *aff'd*, 8 N.Y.2d 797, 168 N.E.2d 135, 201 N.Y.S.2d 807 (1960).

first marriage was not a party to the annulment action: "Since [ex-husband] had no standing to challenge the granting of the annulment, it was not necessary for [ex-wife] to include him as a party to the action [to annul her second marriage]."[35]

The *Restatement (Second) of Judgments* § 31 cmt. *f* (1982) states the general rule that a status determination is ordinarily binding on non-parties. *See also Id.* § 31 cmt. *a* ("Proceedings for the determination of status include divorce and annulment actions.").[36]

Appellants admit that an *in rem* judgment, such as an annulment, is binding on the world. They argue, however, that they are not bound by findings of fact. What matters is the ruling on status. The Charleston County Family Court held that Mrs. Brown's putative marriage to Ahmed

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[35] The Supreme Court reversed the Court of Appeals on whether the void bigamous second marriage affected the ex-husband's alimony obligation, adopting a case-by-case approach on the issue. Importantly, the Supreme Court in *Joye*, while dealing with the issue of a void subsequent marriage on a pre-existing alimony obligation, held, as does every other case, that a bigamous marriage is void *ab initio*. *Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003). Several other cases deal with ancillary issues, but all follow the basic holding in every bigamous marriage case: a bigamous marriage is void *ab initio* and never a marriage. To the extent these cases also deal with ancillary matters, they are inapposite. *See Splawn v. Splawn*, 311 S.C. 423, 429 S.E.2d 805 (1993) (bigamous marriage void *ab initio* but court had to deal with ancillary equitable apportionment of property issues); *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (S.C. Ct. App. 2004) (similar, citing *White v. White*, 283 S.C. 348, 323 S.E.2d 521 (1984)). Moreover, according to this Court in *Lukich*, under South Carolina's current view of bigamy, the family court has jurisdiction to decide all ancillary matters where it annuls a marriage and declares it void *ab initio*. *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (S.C. Ct. App. 2004).

[36] *See, e.g.*, Restatement (First) of Judgments section 74(1), which states a general rule that judgments of status are binding on all third parties. Section 74(2) provides: "[a] judgment in such a proceeding will not *bind anyone personally* unless the court has jurisdiction over him, and it is not conclusive as to a fact upon which the judgment is based except between persons who have actually litigated the question of the existence of the fact." (emphasis added). Coming directly after section 74(1), section 74(2) is therefore a limited exception to a broad general rule. If section 74(2) means that factual findings never bind any third party, then a judgment of status itself never binds any third party and section 74(2) has completely swallowed section 74(1). The trial court held that section 74(2) applies only to factual findings on matters collateral to status. (ROA VOL. I, p. 92.) This is consistent with section 74, which provides that an in rem judgment, such as status, is binding on all third parties, whereas an in rem judgment cannot impose *personal liabilities*, such as alimony, on a non-party. The comment to section 74 makes this distinction clear. *See also, e.g. Presbrey v. Presbrey*, 6 A.D.2d 477, 480, 179 N.Y.S.2d 788, 792 (1958) *(emphasis added), aff'd*, 8 N.Y.2d 797, 168 N.E.2d 135, 201 N.Y.S.2d 807 (1960); *see also Luke v. Hill*, 137 Ga. 159, 73 S.E. 345, 346 (Ga. 1911) ("So far as the adjudication fixes the status of the parties, the judgment concludes both parties and strangers[.]"); *Johnson County Nat'l Bank & Trust Co. v. Bach*, 189 Kan. 291, 369 P.2d 231 (1962) (annulment cannot be questioned by third parties); *Mitchelli v. Mitchelli*, 527 So.2d 359 (La. Ct. App. 1988) (annulment cannot be attacked.)

was never valid because of bigamy. Thus, her status, which Appellants admit they are bound by, was that she was never married and thus had no impediment to her marriage to Mr. Brown.[37]

Appellants make a strange argument that the family court's Findings of Fact in the annulment action are inadmissible hearsay.[38] This argument is without merit. First, *Appellants stipulated to the admissibility of the entire Family Court's final order, which appears as an appendix to a Joint Stipulation.* (ROA, Vol. I, pp. 293-6.) Appellants cannot accuse the trial court of error in considering evidence to which Appellants themselves stipulated. *See, e.g., Butler v. Sea Pines Plantation Co.*, 282 S.C. 113, 317 S.E.2d 464 (S.C. Ct. App. 1984).

Further, factual findings that are binding under the doctrines of res judicata and collateral estoppel are either admissible outside the rules of evidence[39] or do not constitute hearsay at all.[40]

Otherwise, the hearsay rule would completely swallow res judicata and collateral estoppel. The case cited by Appellants, *Nipper v. Snipes*, 7 F.3d 415 (4th Cir. 1993), involved a

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[37] The cases cited by Appellants are inapposite or supportive of Respondent's position: *In re Rowe's Estate* (dealing with paternity, a fact collateral to the status of marriage); *Fairfax Savings, F.S.B. v. Kris Jen Ltd. P'Ship* (involving foreclosure and lender liability; no status was involved); *State v. Phillips* (confirms that judgment in rem is binding as to status, dealing with ownership of land); *Rediker v. Rediker* (in rem judgment binding as to status as to divorce).

[38] This argument is just another red herring. What is critical about the Charleston County Family Court order is the *ruling* that Mrs. Brown's marriage to Ahmed was never valid because of his bigamy. Because she was never married before she married Mr. Brown, her marriage to Mr. Brown is valid. Although the Findings of Fact are not hearsay, they were not necessary for the trial court and the Court of Appeals to rule that Mrs. Brown is Mr. Brown's surviving spouse: all they needed was the family court ruling about the status of Respondent's putative marriage to Ahmed — that it was never valid — and the stipulated evidence (also available from judicial notice) that Mr. and Mrs. Brown were never divorced nor was their marriage annulled. See South Carolina Probate Code section 62-2-802.

[39] *See Mugno v. Casale*, Nos. CIV.A. 96-6228, CIV.A. 96-6229, 1997 WL 152793, at *6 (E.D. Pa. Mar. 28, 1997) ("[I]f the doctrine of collateral estoppel precludes consideration of a factual issue, that issue is not a fact to be determin[ed] at trial and, thus, the rules of evidence do not apply to that issue.").

[40] *See Lincoln Beneficial Life v. Wilson*, No. 4:13CV3210, 2015 WL 4092851, at *8 (D. Neb. July 7, 2015) ("The findings are not hearsay because they are not offered to prove the truth of the matter asserted; rather, they are offered to prove what was decided in the case. *See* Fed. R. Evid. 801(c)(2). If it is determined that collateral estoppel applies, the result of the prior litigation will be admissible in evidence at trial.").

prior decision that was not legally binding.[41] For reasons accepted by both the trial court and the Court of Appeals, the family court decree of annulment in this case is legally binding on all third parties.

2. Appellants' Attempted Distinction Between Findings of Fact and Conclusions of Law Versus Status Does Not Change the Result

Appellants argue that judgments of annulment are binding only on questions of status, and not as to findings of fact or conclusions of law. But as the Court of Appeals held, Mrs. Brown "is only asserting the family court's order as to the status of her marriage to Ahmed." *Estate of Brown*, 424 S.C. at 602, 818 S.E.2d at 777. *Status is the only matter at issue: her status is that she was never married before she married Mr. Brown.*

Moreover, the conclusions of law in any judgment are necessarily based upon the findings of fact. *It is absurd to hold that the judgment is binding as to status but that the factual findings that underlie the judgment are not binding.* To hold that the factual findings are not binding is also to hold that the conclusions of law that are based on those findings are also not binding. Appellants' real argument is that annulments do not bind any third parties — a result that has been repeatedly rejected by both courts and commentators.

Moreover, in his complaint for annulment in Aiken County, Mr. Brown asserted that "[t]he Charleston County Family Court made Findings of Facts," that "the Findings of Facts of the Charleston Family Courts are binding on [the Aiken County Family] Court," and that "[Mrs. Brown] is collaterally and judicially estopped from denying the allegations in this action."[42] Mr.

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[41] *Nipper* applies only when prior judgments are used as evidence, not where they are used for preclusive effect. Otherwise, years of case law under res judicata and collateral estoppel would be overturned.

[42] (ROA VOL. I, p. 334 at ¶¶ 8, 10, 11)

Brown accepted and affirmatively asserted the Charleston Family Court Findings of Fact; his putative children, standing in his shoes, cannot take a contrary legal position.

The cases cited by Appellants involve situations in which a party argued that factual findings on one action were binding in a later action involving a completely different issue.[43] Here, both cases involve the exact same issue. Moreover, and more importantly, the family court has exclusive subject matter jurisdiction over annulments, while the Court of Common Pleas has no jurisdiction over annulments at all. The cases cited by Appellants therefore do not apply.

Because annulment judgments are binding upon all third parties, the courts below properly held that the annulment in this case is binding upon Appellants.

D. The Family Court Judgment of Annulment Is Binding Because Appellants Are Collaterally Estopped From Attacking It

Even if the judgment of annulment can be relitigated or attacked in the Court of Common Pleas, and even if Appellants have standing to do so, and even if annulment does not bind third parties generally, the annulment in this case is binding upon Appellants under the doctrine of collateral estoppel. *See Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (S.C. Ct. App. 2009) (elements of collateral estoppel).

Appellants claim that the annulment action was not actually litigated. The record clearly shows otherwise as there was a trial in the family court. The defendant in the annulment action, Ahmed, was properly served in accordance with South Carolina law.[44] While Ahmed did not appear, the family court found service was proper. (ROA Vol. I, pp. 293-6.) An order of

[43] *See Gratiot County State Bank v. Johnson*, 249 U.S. 246 (1919) (first case was a bankruptcy action and the second was as an action to set aside a transfer to creditors); *Becher v. Contoure Labs.*, 279 U.S. 388 (1929) (the first case was a state court action to a declare a party as trustee of a patent, and the second case was a federal court action for patent infringement).

[44] The family court found that service was proper.

publication cannot be attacked collaterally; only the defendant who was allegedly improperly served can attack service.[45] South Carolina law places upon the court a solemn duty to approach all annulment cases with careful skepticism and to grant an annulment only in the presence of strong supporting evidence. *See, e.g., Fogel v. McDonald*, 159 S.C. 506, 157 S.E. 830 (1931); *Davis v. Davis*, 236 S.C. 277, 284, 113 S.E.2d 819 (1960) (quoting *Holliday v. Holliday*, 235 S.C. 246, 253-54, 111 S.E.2d 205, 210 (1959)).

Appellants state that Ahmed was "never personally served but instead was purportedly served by publication." However, Appellants stipulated that "The Charleston County Family Court found that Javed Ahmed was properly served by publication and notified of the hearing." J. Stipulation #17 (ROA Vol. I, p. 257.) In fact, a licensed private investigator in Texas attempted to locate Ahmed (as it was in Mrs. Brown's interest to do so) and could not locate him (ROA Vol. I p. 274.) The family court considered the affidavits of the investigator and Mrs. Brown and issued an Order of Publication finding that his whereabouts were unknown and, pursuant to S.C. Code Ann. sections 15-9-710 and 15-9-740, that he could be served, as many defendants are, by publication. (ROA Vol I, pp. 281-2.)

Appellants deride and mock the Family Court proceeding and claim "the only purported evidence presented to the Family Court was Respondent's self-serving testimony" or "her uncorroborated self-serving hearsay" testimony.

In fact, on April 15, 2004, the Family Court held a hearing on the merits of an annulment action. (ROA Vol. I, pp. 297-313.) Mrs. Brown testified under oath in detail to the history of her purported marriage to Ahmed. She described the fraud he perpetrated on her in order to

[45] *Howell v. Atl. Coast Line R.R. Co.*, 79 S.C. 493, 60 S.E. 1114 (1908); *Brown v. Wilson*, 45 S.C. 519, 23 S.E. 630 (1896); *Wachovia Bank of S.C. v. Player*, 341 S.C. 424, 428-9, 535 S.E.2d 128, 130 (2000).

obtain American citizenship. She testified that he refused to allow her to move in because she was not a Muslim, that they never had sexual relations, and that he already had three wives. (ROA Vol. I, pp. 305-6.) She testified that she saw a lawyer who promised the marriage would be annulled. (ROA Vol. I, p. 307.) She testified, contrary to the assertions of Appellants, that she believed herself to be unmarried when she married Mr. Brown. She testified that Mr. Brown was aware of the annulment proceeding and had paid for it. (ROA Vol. I, p. 309.) Mrs. Brown testified that Mr. Ahmed told her he was married to another woman or women. (ROA Vol. I, pp. 306, 310.) This is not hearsay. This is an exception to the hearsay rule, an admission against interest. She testified that she hired an investigator to locate Ahmed. (ROA Vol. I, pp. 311-2.)

It is axiomatic that the state has a strong interest in preserving marriages. The effect of *Fogel* is to make the state a third party to every annulment and to charge the judge with a duty to review the evidence carefully. An annulment case is therefore never a default judgment in the normal sense of a judgment entered automatically simply because the defendant fails to respond. The court was required to review the evidence carefully and not simply to assume that the annulment should be granted because no one opposed it. *See Fogel*, 159 S.C. at 512-4, 157 S.E. at 833.

In addition, counsel for Mrs. Brown expressly asked the court not to issue a default judgment but, rather, to comply with its legal duty to examine the sufficiency of the evidence. (Tr. 4-15-04 p. 4, lines 7-12, *reprinted in* ROA Vol. I, pp. 297-313.)

The annulment was, therefore, fully litigated. The court had a duty to examine the sufficiency of the evidence before ruling, and the court did that. The decree annulling the marriage between Mrs. Brown and Ahmed was a determination by the family court on the merits of the case that Mrs. Brown and Ahmed never had a valid marriage.

The judgment of annulment obviously directly determined the validity of the marriage between Mrs. Brown and Ahmed; indeed, resolving that issue was the entire purpose of the annulment action. A finding that no valid marriage ever existed was obviously necessary to support the court's judgment of annulment. All three elements of collateral estoppel are therefore met here.

Contrary to Appellants' arguments, Mr. Brown was in privity with Mrs. Brown in the annulment action. A person is in privity with a party if the person provides essential support for an action which that party files. *See Tillman v. Tillman*, 93 S.C. 281, 76 S.E. 559 (1912). Mr. Brown clearly provided substantial support for Mrs. Brown's annulment action; indeed, it is undisputed that he paid the fees for Mrs. Brown's attorney and that his counsel was kept informed (ROA Vol. I, p. 257 at ¶ 13.) A person who pays the attorney's fees for a party has provided essential support for the action and is in privity with that party for purposes of collateral estoppel. *See Piney Oil & Gas Co. v. Scott*, 258 Ky. 51, 79 S.W.2d 394, 396 (Ky. 1934). Thus, Mr. Brown was in privity with Mrs. Brown.

There is no question that Appellants are in privity with Mr. Brown, as heirs are generally in privity with their ancestors. *See Thompson v. Hudgens*, 161 S.C. 450, 159 S.E. 807 (1931).

Mr. Brown also benefited from the annulment judgment during his lifetime, as the annulment resolved uncertainty in the validity of his marriage. Indeed, in his own annulment action, Mr. Brown expressly argued that Mrs. Brown "is collaterally and judicially estopped from denying" the holding in her own annulment action. (ROA Vol. I, p. 334.) Having argued expressly that the annulment judgment was binding, and having benefited from the judgment, Mr. Brown could not have changed course 180 degrees and argued that the annulment was not binding. *See Salley v. McCoy*, 186 S.C. 1, 195 S.E. 132, 135 (1937) (citing the "elementary

principle that counsel will not be permitted to take inconsistent positions at successive stages of a cause"). Nor, after dismissing his own annulment action, did Mr. Brown ever contend that the annulment was not binding. Appellants have no greater rights than Mr. Brown.

The Court of Appeals therefore correctly held that Appellants are estopped to attack the validity of the annulment. *Estate of Brown*, 424 S.C. at 602, 818 S.E.2d at 776.

III. THE DECISIONS BELOW ARE CONSISTENT WITH THE SUMMARY JUDGMENT STANDARD

Appellants make much of the summary judgment standard. However, the decisions below are fully consistent with this standard.

Both the circuit court and the Court of Appeals held that Appellants are not permitted to attack the judgment of annulment. Appellants asked the Court of Common Pleas to effectively overturn a family court judgment of annulment, an act outside the Court of Common Pleas' jurisdiction. Appellants lack standing to attack the annulment, and they are collaterally estopped from doing so. In any event, under South Carolina law, annulments are binding upon third parties in general, and upon Appellants in particular.

None of the lower courts' rulings turn upon any genuine issue of material fact. Indeed, all material facts regarding the annulment have been stipulated to by the parties. There is no question that the judgment of annulment exists. The exclusive nature of the family court's jurisdiction over annulments is clear from the face of section 63-3-530(A)(6). As the Court of Appeals recognized in *Lukich*, 368 S.C. at 51, 627 S.E.2d at 756, the fact that James Brown himself could not have attacked the annulment is clear. Appellants are heirs of James Brown and claim through him. They can have no greater rights than he had.

While a genuine issue of material fact prevents entry of summary judgment, "it is not sufficient that one create an issue of fact that is not genuine." *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). Dispute as to an immaterial fact does not preclude entry of summary judgment. *See, Id.*

The question of whether annulments bind third parties is a question of law. The prior annulment is a matter of record; the status of Appellants as James Brown's heirs is not disputed. All *material* facts are contained within the Joint Stipulation, and the trial judge relied on only the stipulated facts and applicable law. (ROA Vol. I, p. 104). Where there is no material factual dispute, a question of law is properly resolved upon summary judgment. *See Lewis v. Coleman*, 257 F. Supp. 38, 40 (S.D. W. Va. 1966); *see also, Taylor v. Cardiology Clinic, Inc.*, 195 F. Supp. 3d 865, 869 (W.D. Va. 2016) ("[S]ummary judgment is appropriate '[w]here the unresolved issues are primarily legal rather than factual.'") (quoting *Koehn v. Indian Hills Cmty. Coll.*, 371 F.3d 394, 396 (8th Cir.2004)); *Doyle v. Milton*, 73 F. Supp. 281, 284 (S.D.N.Y. 1947) ("[W]here the issue is one of law only, summary judgment is an appropriate remedy for the disposition of the issues.").

Here, as in *Lewis*, resolution of the legal issue will not be rendered easier by trying immaterial issues of fact. The Court of Appeals properly held that the Court of Common Pleas lacks jurisdiction over annulments, that Appellants lack standing to attack a judgment that their decedent never attacked, that Appellants are collaterally estopped from attacking the annulment, and that annulments are binding upon all third parties. None of these points depends on any material factual dispute. Summary judgment was therefore properly granted.[46]

[46] Any of Appellants' concerns about summary judgment being an inappropriate remedy is countered by the fact that they too filed a motion for summary judgment on the same record, which was denied.

In the same vein, Appellants argue that they were deprived of discovery, but the decision was based only on stipulated facts and applicable law. *See* Stipulation of Facts (ROA Vol. I, pp. 254-350).

IV. THE OPINION OF THE COURT OF APPEALS IS CONSISTENT WITH *LUKICH*

A. Every South Carolina Appellate Case, Including *Lukich*, Has Held That a Bigamous Marriage Is Void *Ab Initio* and Never a Marriage

Appellants argue that the Court of Appeals misconstrued this Court's decision in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008). To the contrary, in *Estate of Brown* the Court of Appeals' construction of *Lukich* is entirely correct. To begin with, *Lukich* involved an appeal from family court, not an appeal from the Court of Common Pleas. The limited jurisdiction of the Court of Common Pleas over annulment actions was therefore not involved in *Lukich.* Here, unlike *Lukich,* the court below lacked jurisdiction to question the annulment decision.

Both the Court of Appeals and Supreme Court decisions in *Lukich*[47] are in accord with S.C. Code Ann. section 20-1-80, all case precedent, and Mrs. Brown's position. *Lukich* held that a *bigamous* marriage is void *ab initio*. *Lukich* also held that another marriage, annulled for *intoxication rather than bigamy*, could be treated as voidable. *Lukich* involved the annulment of two marriages: one void *ab initio* for bigamy and another voidable for intoxication.[48]

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[47] 368 S.C. 47, 627 S.E.2d 754 (S.C. Ct. App. 2006); *aff'd* 379 S.C. 589, 666 S.E.2d 906 (2008).

[48] It is critically significant, however, that the annulment of the wife's first marriage in *Lukich* was based upon intoxication. A ceremony performed while the parties are intoxicated is not completely ineffective to create a marriage. The marriage is only voidable, not void. *See Barber v. People*, 203 Ill. 543, 546, 68 N.E. 93, 94 (Ill. 1903) ("Intoxication at the time of entering into the marriage contract will not render the marriage void, but only voidable."); *Henley v. Foster*, 220 Ala. 420, 422, 125 So. 662, 664 (Ala. 1930) ("A nullity decree may be and is properly granted . . . upon a voidable marriage, one subject to ratification, but not ratified, as in the case of drunkenness[.]"). Once the parties return to sobriety, they are free to waive the defect and have a legally recognized marriage. Heavily intoxicated people have the right to seek an annulment of their marriage, but they are not required to exercise that right.

In addition, *Lukich* holds that when a *voidable* marriage is annulled, the annulment takes effect only prospectively from the date of the annulment decree forward. That holding makes perfect sense, as a voidable marriage is invalid only if it is attacked. The parties to a voidable marriage always have the option of waiving the defect and ratifying the marriage. One marriage in *Lukich* was annulled for intoxication, which is a ground for a voidable marriage. The other marriage in *Lukich* was held to be void *ab initio* based on bigamy, which requires that a marriage be treated as never valid. Unlike a voidable marriage based on intoxication, a bigamous marriage is *void.*

A void marriage is fundamentally different from a voidable marriage. A void marriage is never a valid marriage. The parties are not permitted to waive the defect; the marriage is automatically invalid. *See Johns v. Johns*, 309 S.C. 199, 201, 420 S.E.2d 856, 858 (S.C. Ct. App. 1992) (bigamous marriage "was void from its inception, not merely voidable, and, therefore, cannot be ratified or confirmed and thereby made valid"). The annulment in this case was granted on the ground of bigamy, which is the most serious and substantial of all grounds for rendering a marriage void. Every South Carolina case dealing with a bigamous marriage has held that a bigamous marriage is never a marriage at all. *See, e.g.*, *Day v. Day*, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950)[49]; *Splawn v. Splawn*, 311 S.C. 423, 429 S.E.2d 805 (1993); *Ex parte Blizzard,* 185 S.C. 131, 193 S.E. 633 (1937); *Callen v. Callen*, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005).

A bigamous marriage, by contrast, is not a marriage at all, for any purpose known to the law. The defect cannot be waived or ratified; the law positively forbids the recognition of any form of marriage where one party to the marriage ceremony is already married to someone else.

[49] Cited by this Court in *Lukich*: ("A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable").

By asking the Court to hold that the bigamous marriage between Mrs. Brown and Ahmed was valid until the order of annulment, Appellants invite this Court to become the first appellate court in South Carolina history to give any legal effect to a bigamous marriage. The Court should decline that invitation. South Carolina law prohibits giving any effect whatsoever to a bigamous marriage, either presently, prospectively, or retrospectively. There was never, at any point in time, a valid marriage between Mrs. Brown and Ahmed.

The Court of Appeals' opinion in *Lukich* expressly notes that the result would have been different if the first marriage in that case had been void *ab initio* for bigamy rather than being merely voidable for intoxication:

> We note that our holding is limited to the facts of the case at bar, e.g. the situation where the annulled marriage would be valid but for an annulment decree declaring the marriage *ab initio. Our holding is not meant to affect a party who enters into one of the three types of marriages that never have legal validity in South Carolina, namely marriages that are void ab initio by operation of statute: (1) bigamous marriages*, . . . ; (2) same sex marriages, . . . ; and (3) marriages of minors under the age of 16[.]

368 S.C. at 55 n.2, 627 S.E.2d at 758 n.2 (emphasis added).

There is nothing in this Court's opinion in *Lukich* inconsistent with this footnote. On the contrary, the result of this Court's opinion confirms that bigamous marriages are void from their inception. In *Lukich*, a woman sought alimony during a divorce from her second husband (Marriage 2). During the divorce, the second husband learned that the woman had previously been married (Marriage 1) and had never obtained a divorce or an annulment from the first husband. She quickly obtained an annulment in another venue, without her husband's knowledge, for Marriage 1, on the grounds of intoxication. Both appellate courts concluded that the annulment of Marriage 1 was voidable.

Lukich also dealt with the validity of Marriage 2, and both appellate courts concluded that Marriage 2 was void *ab initio* because it was bigamous. Consequently, Marriage 2 was never a marriage, so the divorce was unnecessary and the second husband could not owe alimony. *Lukich* does not change, but is, instead, consistent with Section 20-1-80 and all South Carolina case precedent. A bigamous marriage (Marriage 2 in *Lukich*) is void from its inception and never a valid marriage at any point in time. *Lukich* therefore held that a voidable marriage is invalid prospectively, but *Lukich* also held that a bigamous marriage is void and never a marriage. When a marriage is void *ab initio*, such as a bigamous one, it is invalid from its inception. It *never* existed. Mrs. Brown's putative marriage to Ahmed was bigamous and void; it was never a marriage, and she had no impediment to marrying Mr. Brown.

Both Lukich appellate courts thus ruled that Marriage #2 was void ab initio – never valid – because of bigamy. Thus, *Lukich* was just the latest in the seamless line of cases holding that bigamous marriages are void and never valid.[50]

Either through misunderstanding or misstatement, Appellants refuse to recognize that this Court and the Supreme Court held in *Lukich* that the bigamous marriage – in that case, Marriage #2 – was void *ab initio*, and they refuse to recognize that the order of marriages in *Lukich* was different than the order of marriages in this case. In *Lukich*, it was Marriage #2 that was bigamous and void because the annulment of Marriage #1 was merely voidable. In this case,

[50] As noted, *Lukich* is consistent with every appellate opinion in South Carolina jurisprudence involving a bigamous marriage: it is void and never a marriage. In fact, a post-*Lukich* decision cites both *Day* and *Lukich* in the same sentence for the proposition that bigamous marriages are void *ab initio*, without any suggestion that the latter overrules the former. *See Hill v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 405 S.C. 423, 426, 747 S.E.2d 791, 792-93 (2013). More recently, the Court of Appeals, in *Gary v. Lowcountry Med. Transp., Inc.*, 424 S.C. 18, 817 S.E.2d 291 (S.C. Ct.Ap0p. 2018) confirmed yet again that a bigamous marriage is void *ab initio*: void from its inception. Moreover, *Gary* recognized the very strong public policy that bigamous marriages are never valid at any point in time. According to the Court of Appeals, this policy is so strong that it overcomes the policy of estoppel by pleading and even the policy of finality of judgment.

however, it is putative Marriage #1 (Brown-Ahmed) that was bigamous and thus void – never a marriage. Because putative Marriage #1 was never a marriage, it was not an impediment to Marriage #2 (Brown-Brown). It is the type of annulment — bigamous and void versus intoxication and voidable — that creates the critical distinction.

Appellants argue against following the bigamy statute and all precedent.[51] They want this Court to create a new rule that a bigamous marriage is effective until a court order finds it invalid. Their proposed new rule would result in chaos for relationships and related rights and certainly violate the strong public policy against bigamy. Even if the Court would adopt their theory and create new law, the new rule could not apply to the marriage of Mr. and Mrs. Brown, but would have to be applied prospectively only. *See Boan v. Watson*, 281 S.C. 516, 316 S.E.2d 401 (1984); *Wilson v. Jones*, 281 S.C. 230, 314 S.E.2d 341 (1984).

Importantly, the order of marriages in this case is not novel to South Carolina law. In *State v. Sellars*, 140 S.C. 66, 134 S.E. 873 (1926), this Court held that a man was not guilty of the crime of bigamy because his first "marriage" was void as bigamous so that he had no impediment to his second marriage.[52] There is nothing novel or contradictory as to the order of marriages in this case.

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[51] Appellants argue that the Court of Appeals in *Lukich* intended to hold that an annulment cannot retroactively invalidate a marriage, and therefore must prospectively validate the marriage, based upon material in a quotation from *American Jurisprudence 2d.* It would be remarkable if the Court of Appeals intended that language to be controlling, as that court expressly stated in footnote 2 that its holding did not apply to marriages that were void *ab initio.* Moreover, *American Jurisprudence 2d* expressly adopts Mrs. Brown's position: "A person who has entered into a marriage that is void, as distinguished from one that is merely voidable, may thereafter legally enter into another marriage *without taking any steps to have the first marriage dissolved.* However, where a prior marriage is voidable, a second marriage generally cannot be entered into until the prior marriage has been legally dissolved." 52 Am. Jur. 2d Marriage, § 58 (emphasis added). This language reaches the exact same result as footnote 2 in the Court of Appeals opinion in *Lukich.* The earlier marriage is never valid if the marriage is void *ab initio*, but is invalid only prospectively if the marriage is only voidable. A bigamous marriage, of course, is void *ab initio.*

[52] Similarly, *Hallums v. Hallums*, 74 S.C. 407, 54 S.E. 613 (1906), also stands for the proposition that, if the first marriage of a woman was bigamous, there would be no impediment to her valid second marriage. However, in

B. The South Carolina Bigamy Statute Requires That a Bigamous Marriage Is Void *Ab Initio* and Never a Marriage

There is a reason that every appellate court decision has held that a bigamous marriage is void *ab initio* and never valid: The South Carolina General Assembly has clearly spoken through S.C. Code Ann. § 20-1-80 that a bigamous marriage is "void" — i.e., never a marriage and never valid from the beginning.[53] This section reads as follows:

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

The South Carolina General Assembly understands the difference between void and voidable. For example, S.C. Code Ann. section 62-3-713, governing self-dealing transactions by a personal representative, provides that such a transaction is "voidable" and can be invalidated at the request of an interested person.

"An annulment declares that a marriage never occurred because of some defect. Defective marriages may be either void or voidable. In a void marriage, the circumstances are such that the marriage could never have come into being. A voidable marriage is recognized under the law as a valid marriage until an action is brought to prove it invalid." Stuckey, *supra*,

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Hallums, the court (in the days before there was a family court) concluded that the first marriage was not bigamous because her first husband was not already married to another, which is different from the facts in this case, where Respondent putative first marriage was bigamous and never valid.

[53] For more than a century, that statute has provided that bigamous marriages are void. This is consistent with the public policy against bigamous marriages. For example, entering into a bigamous marriage is a crime. Note, however, that *State v. Sellars*, 140 S.C. 66,134 S.E. 873 (1926), recognizes, as do all the other bigamy cases, that a bigamous marriage is void *ab initio*, so that a void first marriage is not an impediment to a valid second marriage, and thus the second marriage is not bigamous and not a crime. This is the Brown-Brown marriage situation.

at ch. 3A. A bigamous marriage is void.[54] *Id.*

Consequently, when the General Assembly uses the term "void" in the bigamy statute, the meaning is clear: a bigamous marriage is void *ab initio* and never valid.55

C. Appellants Lose Under Their Own Mistaken Theory of Bigamous Marriages: If a Bigamous Marriage Is Valid Until an Annulment Order Is Obtained, then the Brown-Brown Marriage — Bigamous According to Appellants — Nevertheless Remained Valid at His Death Because He Never Obtained an Annulment Order; And There Can Be No Postmortem Annulment

Problematically for Appellants, even if Appellants' incorrect construction of *Lukich* were correct, they still lose. If *Lukich* holds that bigamous marriages are valid until they are annulled, then Mrs. Brown's marriage to Ahmed was valid at the time she married Mr. Brown, and her marriage to Mr. Brown was bigamous. But Mr. Brown's marriage to Mrs. Brown was not annulled for bigamy during Mr. Brown's lifetime, and it cannot be annulled after his death.[56] If Mrs. Brown's marriage to Ahmed is valid — even though bigamous — until the court order was obtained, and then only prospectively, then by the exact same reasoning Mrs. Brown's marriage

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[54] In fact, "a void [bigamous] marriage technically needs no judicial action to declare that it is void." *Estate of Brown,* 424 S.C. at 599, 818 S.E.2d at 776. *See also* footnote 33, *supra.* Because the bigamy statute and all case precedent hold that a bigamous marriage is never valid, there is no need for the Appellants' "race to the courthouse" because no race is needed.

[55] The result is not any different merely because South Carolina law permits division of property after a bigamous marriage. *E.g., White v. White,* 283 S.C. 348, 323 S.E.2d 521 (1984). South Carolina law has been clear for generations that a bigamous marriage "is not a marriage at all" for any purpose, at any point in time. *Day,* 216 S.C. at 338, 58 S.E.2d at 85. The mere fact that the General Assembly chose to permit division of property in an annulment action does not overturn years of South Carolina case law holding that bigamous marriages are entirely void. The General Assembly has simply chosen to allow division of property acquired in a relationship which was not a marriage. See S.C. Code Ann. § 20-3-620(A), allowing property division in "other marital litigation" which would certainly include annulments. The fact that a legislature chooses to allow equitable distribution after a relationship therefore does not necessarily mean that the relationship is a marriage. Equitable distribution is available upon annulment in South Carolina, but that does not mean that the General Assembly intended to disavow long-standing South Carolina case law holding that a bigamous marriage is void from its inception, nor did it repeal the bigamy statute.

[56] *See* footnote 23, *supra.*

to Mr. Brown is valid even if bigamous, and Mrs. Brown is still Mr. Brown's surviving spouse. (*See* Tr. Ct. Op. p. 16 (expressly accepting this argument).) Appellants prevail only if their construction of *Lukich* applies to one marriage (between Mrs. Brown and Ahmed) but not to another marriage (between Mrs. Brown and Mr. Brown). There is no reason to apply different constructions of *Lukich* to different marriages.[57] Moreover, under Appellants' incorrect analysis of the treatment of bigamous marriages, even if a posthumous annulment order were obtained (even thought that is not possible), such an order would be prospective only from the date it was obtained, so that Mr. Brown would nevertheless be married to Mrs. Brown on his death, the date when his surviving spouse is determined.[58] Appellants thus get hoisted by their own petards.

South Carolina law on this issue is simple: A bigamous marriage does not exist for any purpose, at any time, either presently, prospectively, or retrospectively.[59] There are a few cases that deal with ancillary matters, but all of these cases follow the required rule about status: someone having entered into a bigamous marriage was never married. To the extent these cases also deal with ancillary matters, they are inapposite. *See Splawn v. Splawn*, 311 S.C. 423, 429 S.E.2d 805 (1993) (bigamous marriage void *ab initio* but court had to deal with ancillary equitable apportionment of property issues); *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399

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[57] This also demonstrates just one of countless examples that following Appellants' tortured and incorrect construct of the treatment of bigamous marriages would create the chaos warned about in *Lukich*. Following the statutory requirement and the holdings of every appellate decision in South Carolina jurisprudence, bigamous marriages are void *ab initio*. But if Appellants' construct were correct — that bigamous marriages are valid until a court order and then only prospectively — a person could be married to two or more people at a time. Again, Appellants want their construct to apply only to the Brown-Ahmed marriage and not to the Brown-Brown marriage.

[58] S.C. Code Ann. § 62-2-802.

[59] Every South Carolina case, as required by § 20-1-80, has concluded that the status of someone entering into a bigamous marriage is that of never having been married. It is Mrs. Brown's status that is critical here. At the time she married Mr. Brown, she had no impediment to their marriage because she had never been married before.

(S.C. Ct. App. 2004) (similar, citing *White v. White*, 283 S.C. 348, 323 S.E.2d 521 (1984)); *Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003) (second marriage bigamous and void *ab initio* — court had to decide impact on first husband's obligation to pay alimony, which had ostensibly ended if second marriage was valid, which it was not).

Mrs. Brown therefore never had a marriage to Ahmed. Because Mrs. Brown never had a marriage to Ahmed, her marriage to Mr. Brown was simply not bigamous. She is therefore Mr. Brown's surviving spouse. This is the exact result reached in the *Lukich* case with regard to Marriage 2, which was the bigamous marriage in that case.

V. THE COURT OF APPEALS CORRECTLY HELD THAT MRS. BROWN MET HER BURDEN OF PROOF IN THIS ACTION

Appellants argue that Mrs. Brown had a burden to prove that her marriage to James Brown was not bigamous. This point is not directly relevant because both the circuit court and the Court of Appeals properly held that the Court of Common Pleas lacks jurisdiction to question the family court's decree of annulment, that the Appellants lack standing to question that decree, that the Appellants are estopped from attacking the decree, and that, in any event, the decree binds all third parties.

Mrs. Brown bears one burden of proof in this action: the burden of proving a prima facie marriage to Mr. Brown. She met this burden by producing a valid certificate of marriage between herself and Mr. Brown, which all parties stipulate is authentic. (ROA Vol. I, p. 256 at ¶ 4, pp. 269-70.) "The party attacking the validity of a marriage bears the burden of proof." *E.D.M. v. T.A.M.*, 307 S.C. 471, 475, 415 S.E.2d 812, 815 (1992). The Court of Appeals held that "the parties all agreed to the Stipulation of Facts in this case, which resolves the material factual issues in the action." *Estate of Brown*, 424 S.C. at 603, 818 S.E.2d at 778.

Regardless of whether Mrs. Brown has the burden of proof, she has met it.

VI. AS AN ADDITIONAL GROUND TO AFFIRM UNDER RULE 220(c), APPELLANTS ARE BOUND BY THEIR PRIOR AGREEMENT THAT MRS. BROWN IS THE SURVIVING SPOUSE

Although the trial court order mentioned the private settlement agreement, this argument was not specifically ruled upon by the trial court, which accepted other arguments in Mrs. Brown's favor. Mrs. Brown is permitted to raise alternate grounds for sustaining the trial court's decision. *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 490, 593 S.E.2d 480, 483 (S.C. Ct. App. 2003); *City of Aiken v. Cole*, 289 S.C. 239, 242-43, 345 S.E.2d 760, 762 (S.C. Ct. App. 1986).[60]

Appellants were among the parties who agreed to and accepted a settlement agreement in 2009 that expressly provided that Mrs. Brown is the surviving spouse regardless of whether the agreement was approved by a court. The settlement agreement provided that it was a binding private agreement, regardless of court approval, and provided that it bound personal representatives and trustees, as allowed by law.[61] The settlement agreement expressly provided that the provision recognizing Mrs. Brown as the surviving spouse survived regardless of whether the agreement was approved by a court.[62] (*See* ROA VOL. VII, p. 2734-7, pp. 2742, 2748-49.) Appellants cannot now take a contrary position.

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[60] This argument was expressly raised in the trial court. (*See* ROA VOL. I, p. 54-5.)

[61] S.C. Code Ann. section 62-3-912 allows successors to enter into a binding private settlement agreement that binds the parties thereto, as well as personal representatives (except to the extent a nonparty's interest could be affected), even without court approval.

[62] The settlement agreement includes a severability provision that continues the binding effect on those provisions not found invalid. (ROA VOL. VII, p. 2748) Although the Supreme Court ruled that the trial court's approval of the settlement agreement needed additional evidence that the settlement was just and reasonable, that opinion did not address the binding private settlement agreement issue, nor did it address the issue of the parties' recognition of the validity of family status, including Mrs. Brown's status as surviving spouse. Consequently, under both the binding private settlement agreement analysis and the severability clause, the provision confirming Mrs. Brown's status as

Appellants' counsel signed the Respondents'[63] brief to the Supreme Court in *Wilson v. Dallas*. *The Respondents' brief asserted that the court's order that approved the settlement agreement was correct.* Both the Respondents' brief and the trial court order that approved the settlement agreement stated that Mrs. Brown was the surviving spouse and that the *Lukich* case, discussed above, supported that conclusion.[64] At oral argument before the Supreme Court, counsel representing Respondents presented the settling parties' position to uphold the court's order which approved the settlement agreement.[65] Thus, Appellants contended in the Supreme Court, in *Wilson v. Dallas,* that the *Lukich* case supported and asserted the position that Mrs. Brown had *no* impediment to her marriage to Mr. Brown.

CONCLUSION

Appellants lack standing to contest the Browns' marriage. They lack subject matter jurisdiction and standing to relitigate the Brown-Ahmed annulment. Nor can they have the circuit court annul the Brown-Brown marriage because the circuit court lacks subject matter jurisdiction over annulments and, in any event, one cannot obtain a posthumous annulment. Mr. Brown knew that he could seek an annulment of the Brown-Brown marriage because he tried but dismissed his action. Appellants lack standing to do what he chose not to do. Because Appellants are in privity with Mr. Brown, they cannot assert claims that he could not assert

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Mr. Brown's surviving spouse remains binding. Michael Deon Brown, *pro se*, appears to have attempted to serve a brief on 3/4/19. But that is untimely, and no record of filing is on the Supreme Court website.

[63] "Respondent" here refers to the posture of the caption in *Wilson v. Dallas*. Appellants in this case were among the Respondents in *Wilson v. Dallas*.

[64] (*See* ROA VOL. I, p. 196-7)

[65] *See* Oral Argument at 42:40, Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (No. 27227) (disc filed seperately with Record on Appeal), where Respondents' counsel argued that *Lukich* confirmed Mrs. Brown's status as surviving spouse.

during his lifetime. Mr. Brown could not attack the validity of the family court order invalidating as void *ab initio* the putative marriage between Mrs. Brown and Ahmed because of Ahmed's bigamy. Therefore, Appellants cannot do what Mr. Brown could not do — and did not do — and cannot attack that order.

Appellants are also estopped from contesting Mrs. Brown's marital status, (1) having agreed to a settlement agreement with a term recognizing the marriage as valid, regardless of whether a court approved that settlement agreement; (2) having asserted the validity of that marriage to the Supreme Court; and (3) Mr. Brown having sought affirmative relief in his own family court action asking the Aiken Family Court to adopt the findings of the Charleston Family Court, paying the attorney's fees for the Brown-Ahmed annulment, and reaping the benefits of that action.

Even if Appellants do have standing and are not estopped, the order of the family court finding the putative marriage of Mrs. Brown and Ahmed void *ab initio* because of Ahmed's bigamy is final and the law of the case. A probate or circuit court cannot override that family court order. Thus, it is the law of the case that Mrs. Brown had no impediment to her marriage to Mr. Brown. The burden of proof is on Appellants, and cannot overcome that burden. Even if the burden were on Mrs. Brown, she meets it.

All relevant precedent, including *Lukich*, supports the indisputable conclusion that Mrs. and Mr. Brown's marriage was valid because she had no impediment to that marriage.

Even if Appellants were correct in their mistaken reading of *Lukich*, the "logic" of their attempt to apply it to the Browns' situation is critically flawed because, under their theory, Mr. and Mrs. Brown's marriage, even if bigamous, is valid until an annulment order is obtained, and

the circuit court has no subject matter jurisdiction; moreover, it is too late to do so because one cannot obtain a postmortem annulment.

For Appellants to prevail, this Court would have to conclude all of the following:

1. That Appellants have standing to attack the Brown-Ahmed final family court order, even though Mr. Brown did not have standing under applicable law and even though Mr. Brown himself in his amended complaint, in his own action, asserted that the order was final and binding;

2. That the circuit court has subject matter jurisdiction to annul the Brown-Brown marriage;

3. That the Brown-Brown marriage can be annulled posthumously;

4. That a court in a probate matter has authority to overturn a final binding family court order, despite the chaos such a precedent would create, and despite the state statute and all South Carolina precedent to the contrary, and even though Mr. Brown himself in his complaint asserted that the family court order was final and binding;

5. That *Lukich* and all other relevant South Carolina precedent about bigamous marriages being void *ab initio* hold for the opposite result that these cases actually hold;

6. That a bigamous marriage is valid unless and until a court finds that the marriage is bigamous — i.e., that the policy of this state, despite its bigamy statute, is to allow valid bigamous marriages unless and until someone complains in court and gets a court order;

7. That the incorrect view of the *Lukich* holding held by Appellants applies only when they want it to — i.e., they want their mistaken view to apply to the putative Brown-Ahmed marriage but not to the Browns' marriage;

8. That the family court's findings of fact and conclusions of law that Mrs. Brown is the surviving spouse is not the law of the case;

9. That Appellants are not bound by their own agreement that Mrs. Brown is the surviving spouse of Mr. Brown; and

10. That Appellants are not bound by their own prior assertion to the Supreme Court that Mrs. Brown is the surviving spouse of Mr. Brown.

Mrs. Brown asserts that none of these ten assertions by Appellants is correct under the law, let alone all ten that would have to apply for Appellants to prevail.

The courts below correctly held that Mrs. Brown never had a valid marriage to Ahmed because Ahmed was guilty of bigamy. This fact is established by the holding in the judgment of annulment, which the Court of Common Pleas had no jurisdiction to question. That judgment was binding upon Mr. Brown, who was in privity with Mrs. Brown, and it is binding upon these Appellants. The *Lukich* decisions confirm what every other South Carolina case dealing with bigamous marriages, as well as the applicable bigamy statute, conclude: a bigamous marriage is never a marriage. Thus, there was no impediment to Mrs. Brown's marriage to Mr. Brown, and she is his surviving spouse.

For the reasons stated throughout this Brief, Mrs. Brown respectfully requests that the decision of the lower courts be affirmed.

Respectfully submitted,

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March 27, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Trial Court Case Nos. 2013-CP-02-02849 and 2013-CP-02-02850
Appellate Case No. 2015-002417 (Court of Appeals)
Appellate Case No. 2018-001990 (Supreme Court)

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

Tommie Rae Brown.....Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000, Deana Brown Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown,

of whom Deana Brown Thomas, Yamma Brown and Venisha Brown are the.....Appellant.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCACR

I certify that the Final Brief of Respondent complies with Rule 211(b) of the South Carolina Rules of Appellate Court.

Robert N. Rosen

March 27, 2019

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of whom Deana Brown Thomas, Yamma Brown and Venisha Brown are the.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the **RESPONDENT'S BRIEF** has been served on all counsel of record by depositing a copy of same in the United States Mail, postage prepaid on March 28, 2019, and addressed as follows:

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