APPENDIX

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APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2018-001990

[Filed: June 17, 2020]

In Re: The Estate of James Brown a/k/a James Joseph Brown.	)
	)
Tommie Rae Brown, Respondent,	)
	)
v.	)
	)
David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, Michael Deon Brown and Daryl Brown, Defendants,	)

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

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 27982
Heard October 16, 2019 – Filed June 17, 2020

REVERSED AND REMANDED

Robert C. Byrd and Alyson Smith Podris, both of Parker Poe Adams & Bernstein, LLP, of Charleston, and Marc Toberoff, of Toberoff & Associates, PA, of Malibu, California, for Petitioners.

Robert N. Rosen, of Rosen Law Firm, LLC, of Charleston; S. Alan Medlin, of Columbia; Thomas Heyward Carter Jr., Andrew W. Chandler and M. Jean Lee, all of Evans Carter Kunes & Bennett, PA, of Charleston; David Lawrence Michel, of Michel Law Firm, LLC, of Mount Pleasant; Arnold S. Goodstein, of Goodstein Law Firm, LLC, of Summerville; and Gerald Malloy, of Malloy Law Firm, of Hartsville, for Respondent.

CHIEF JUSTICE BEATTY: Disputes over the estate of entertainer James Brown (Brown) have persisted in the years since his untimely death on December 25, 2006. In this case, the Court considers an action by Tommie Rae Brown (Respondent) to establish that she is the surviving spouse of Brown under the South Carolina Probate Code. The issue arose in the context of Respondent's claims filed in the Aiken

County Probate Court for an elective share or an omitted spouse's share of Brown's estate.[1] Uncertainty as to Respondent's marital status existed because Respondent did not obtain an annulment of her first recorded marriage until after her marriage ceremony with Brown. Respondent's claims were transferred to the circuit court, which granted Respondent's motion for partial summary judgment and denied a similar motion by the Limited Special Administrator and Trustee (LSA). The circuit court found as a matter of law that Respondent was the surviving spouse of Brown. The court of appeals affirmed. *In re Estate of Brown*, 424 S.C. 589, 818 S.E.2d 770 (Ct. App. 2018). This Court granted a petition for a writ of certiorari filed by several of Brown's children (Petitioners)[2] to review the decision of the court of appeals. We reverse and remand.

I. FACTS

In February 1997, Respondent participated in a marriage ceremony in Texas with Javed Ahmed, a native of Pakistan who was living in the United States. Ahmed's and Respondent's signatures appear on the application for a marriage license and affirmed that Ahmed was not currently married. The application

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[1] *See generally* S.C. Code Ann. § 62-2-802 (Supp. 2019) (defining surviving spouse in the current codification of the Probate Code); *id.* § 62-2-201 (elective share); *id.* § 62-2-301 (omitted spouse).

[2] Petitioner Venisha Brown passed away in 2018. Petitioners have advised the Court that an action for the appointment of a personal representative is pending.

contained a warning that false statements could result in imprisonment and a fine.

In December 2001, Respondent participated in a marriage ceremony with Brown in South Carolina, after the birth of a son earlier that year.[3] Respondent signed the 2001 marriage license, affirming this was her first marriage. However, Respondent and Ahmed had not divorced and no formal document purporting to terminate or void Respondent's marriage to Ahmed existed at that time.

A third party informed Brown sometime in 2003 that Respondent had been married to Ahmed and was never divorced. In December 2003, Respondent brought an action in South Carolina to annul her marriage to Ahmed.

In January 2004, Brown filed an action to annul his marriage to Respondent, indicating the parties had recently separated. Brown alleged he was entitled to an annulment because Respondent never divorced her first husband, so their purported marriage was void ab initio. Brown asked that Respondent "be required to permanently vacate the marital residence" and noted the parties had executed a prenuptial agreement that resolved all matters regarding equitable division, alimony, and attorney's fees.

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[3] Prior to her marriage ceremony with Brown, Respondent signed a prenuptial agreement that waived any future claim to an interest in Brown's estate, including the right to an elective share or an omitted spouse's share. No issue is before the Court regarding the prenuptial agreement.

A hearing was held in the family court in Charleston County in April 2004, on Respondent's application for an annulment of her marriage to Ahmed. Ahmed did not appear to litigate the claim. Respondent's attorney conceded Ahmed technically was in default, but stated he was not moving to place Ahmed in default. Respondent briefly testified as the sole witness and stated immediately after the marriage, she went to Ahmed's house with her belongings and Ahmed told her that she could not live with him, he already had three wives in Pakistan, and he just wanted to stay in the United States. It is undisputed that Respondent's testimony as to Ahmed's alleged statements was the only evidence before the family court that Ahmed was married at the time of his marriage ceremony with Respondent.

The same day as the hearing, the family court issued an order granting Respondent's request for an annulment. The family court found Ahmed had been adequately served by publication in Texas (his last known residence) after attempts to locate him were unsuccessful, and that he was given notice of the hearing. Citing Respondent's testimony, the family court found Respondent's marriage to Ahmed was void ab initio because (1) their union was bigamous, as Ahmed had three wives and lacked the capacity to marry; (2) the parties never consummated the marriage; and (3) Ahmed fraudulently induced the marriage to stay in the United States.

In May 2004, Brown amended his complaint against Respondent. In the amended complaint, Brown alleged Respondent did not inform him that she had been

married and was still married to Ahmed at the time of their marriage ceremony in 2001. Brown asserted S.C. Code Ann. § 20-1-80 prohibited Respondent from entering into another marriage while she was still married to Ahmed. Respondent answered and counterclaimed, seeking a divorce from Brown and support. The actions of Respondent and Brown were ultimately withdrawn and dismissed without prejudice in a consent order filed in August 2004, in which Respondent and Brown agreed to seal the court records, and Respondent agreed to "forever waive any claim of a common[-]law marriage to [Brown], both now and in the future." Respondent and Brown had an on-and-off relationship until Brown passed away on December 25, 2006. They did not have another marriage ceremony following the issuance of the 2004 order declaring Respondent's marriage to Ahmed null and void.

After Brown's death, Respondent and Petitioners filed actions in the Aiken County Probate Court to set aside Brown's 2000 will and charitable trust based on fraud and undue influence. Respondent sought an elective share or an omitted spouse's share of Brown's estate, as well as a share for her son with Brown. The probate court transferred the matters to the circuit court in Aiken County. Respondent and Petitioners reached a settlement with Brown's Estate, and the circuit court issued an order approving the settlement. On appeal, this Court affirmed in part, reversed in part, and remanded the matter to the circuit court, finding the settlement was improper. *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013).

In 2014, following the remand, the circuit court took up Respondent's claims for an elective share or an omitted spouse's share of Brown's estate, as well as Respondent's motion for partial summary judgment on the issue of the legal validity of her ceremonial marriage to Brown. The LSA also filed a summary judgment motion, asserting Respondent could not establish that she is Brown's surviving spouse because her marriage to Brown was legally impossible under South Carolina law. The LSA contended Respondent's marriage to Brown in 2001 was invalid because she still had a marriage of record with Ahmed at that time, citing S.C. Code Ann. § 20-1-80 (providing a marriage contracted while a party has a living spouse is void ab initio unless one of several exceptions applies). The LSA also contended that, while the status of Respondent's first marriage is binding on the world (i.e., it is annulled), the underlying factual findings in the family court's 2004 annulment order (such as the finding that Ahmed had three wives in Pakistan in 1997) were not conclusive as to nonparties who had no opportunity to litigate those points. Petitioners submitted memoranda and documents in support of the LSA's motion and opposed Respondent's motion.[4] The parties also submitted a Joint Stipulation of Facts

[4] The documents included a 2014 affidavit from a Georgia attorney and a 2008 affidavit from an attorney in Pakistan, both of whom stated they contacted Ahmed (who was in Pakistan) in 2008, and he informed them that he was not married at the time of his 1997 marriage ceremony with Respondent and that he and Respondent lived together after the wedding. The Georgia attorney stated he spoke to Ahmed by phone in early 2008 and then secured the attorney in Pakistan to follow up with Ahmed in person.

summarizing the facts on which they were able to agree.

The circuit court granted Respondent's motion for partial summary judgment on the issue of Respondent's status and denied the LSA's in a 2015 order, finding as a matter of law that Respondent is the surviving spouse of Brown. The circuit court, relying on the family court's 2004 annulment order (which it found was conclusive of the facts recited therein and binding on Petitioners), ruled Respondent's first marriage to Ahmed was void ab initio due to Ahmed's bigamy, so Respondent had no legal impediment to her marriage with Brown in 2001 and their marriage was valid. The circuit court further found Respondent and Brown had not annulled their 2001 marriage or divorced prior to Brown's death in 2006.

The court of appeals affirmed the circuit court's determination that Respondent was Brown's surviving spouse.[5] *In re Estate of Brown*, 424 S.C. 589, 818 S.E.2d 770 (Ct. App. 2018). The court of appeals reasoned Petitioners lacked standing to challenge the annulment order, just as Brown did not have standing to intervene in the annulment action, and any rights Petitioners have are derivative from Brown. The court noted Brown availed himself of the method he could use to invalidate his marriage to Respondent by bringing his own annulment action, but the parties agreed to

[5] Before the court of appeals issued its opinion, the LSA entered into a settlement agreement with Respondent on behalf of the Estate and was permitted to withdraw from the appeal. Petitioners indicate the validity of this settlement agreement is the subject of a separate action.

dismiss that action, and Brown did not bring another action during his lifetime.[6]

The court of appeals rejected Petitioners' contention that they were not disputing the annulment order's effect on Respondent's *status*, but only the unchallenged factual findings, such as the fact that Ahmed had three wives at the time of his marriage to Respondent. The court held Petitioners were collaterally estopped from disputing those findings because (1) the annulment was actually litigated, as the family court reviewed the evidence presented and found it was sufficient to meet Respondent's burden of proof; (2) the validity of the marriage of Respondent and Ahmed was determined in the annulment action; and (3) the facts were necessary to support the judgment.

The court of appeals agreed with the circuit court that the 2004 annulment order was conclusive of all facts regarding Ahmed's marriage to Respondent and further found the circuit court did not have subject matter jurisdiction to relitigate the annulment order because only the family court has jurisdiction over

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[6] As part of that settlement, Respondent agreed to never claim she was Brown's common-law wife. Petitioners contend Brown did not believe his marriage to Respondent was valid and wanted to preclude the alternative establishment of a common-law marriage. *See Byers v. Mount Vernon Mills, Inc.*, 268 S.C. 68, 71, 231 S.E.2d 699, 700 (1977) (stating removal of an impediment to marriage does not convert a bigamous marriage to a common-law marriage and noting "there must be a new mutual agreement, either by way of civil ceremony or by way of a recognition of the illicit relation and a new agreement to enter into a common[-]law marriage").

annulments.[7] Relying solely on the factual findings in the annulment order, the court of appeals found Ahmed had at least three wives in Pakistan at the time of his marriage ceremony with Respondent in 1997, so Respondent's and Ahmed's marriage was bigamous and void ab initio. Consequently, the court of appeals agreed with the circuit court that Respondent's recorded marriage to Ahmed was not an impediment to Respondent's marriage to Brown, regardless of whether there was an annulment order in place resolving Respondent's first marriage.

The court of appeals acknowledged that in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008), this Court analyzed section 20-1-80 of the South Carolina Code and held an annulment order did not "relate back" to resuscitate a marriage that violated the statute. The court of appeals found Respondent's situation was distinguishable, however, because, unlike in *Lukich*, Respondent's *first* recorded marriage was bigamous (based on the perceived conclusiveness of the findings in the annulment order) and, therefore, void ab initio. As a result, the court of appeals reasoned Respondent's second recorded marriage could not be bigamous because her first recorded marriage was never valid. The court of appeals held the rule announced in *Lukich*—that an annulment order cannot retroactively validate a bigamous marriage—is limited to situations where the first marriage is merely voidable, not void, as voidable marriages are valid until

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[7] We agree with Petitioners that subject matter jurisdiction is not implicated here. Petitioners did not seek to overturn the annulment or the family court's order.

one of the parties elects to end the marriage, but a bigamous marriage is never valid. This Court granted the petition for a writ of certiorari filed by Petitioners.

II. DISCUSSION

Petitioners contend the court of appeals erred in upholding the circuit court's ruling that Respondent is Brown's surviving spouse as a matter of law. We agree and begin our analysis by examining (A) the effect of the annulment order, followed by (B) the application of section 20-1-80 of the South Carolina Code.

A. Effect of In Rem Annulment Order on Nonparties

Petitioners argue the court of appeals erred in holding the findings of fact underlying the 2004 annulment order are binding on them and that they are collaterally estopped from challenging those facts in this estate matter. Petitioners assert the order annulling the marriage of Respondent and Ahmed is an in rem order to establish the parties' status. Petitioners contend, however, that third parties are not bound by the underlying factual findings in the order. Petitioners emphasize that they do not—and concede that they could not—challenge the grant of the annulment to Respondent and its declaration as to Respondent's status, and they state nothing in the current litigation will resurrect Respondent's marriage to Ahmed.

Petitioners maintain the annulment order was effectively obtained by default, as Ahmed did not appear at the hearing, so the facts put forth by Respondent were never litigated by an opposing party. Petitioners assert Respondent has never actually

shown that Ahmed had three wives in Pakistan when she married him in 1997; rather, in seeking the annulment, Respondent merely offered her unchallenged testimony that Ahmed made a statement to this effect after their wedding ceremony. Petitioners point out that no marriage certificates or any other evidence has ever been produced to show Ahmed was previously married. Moreover, Respondent has stipulated that she possesses no documents or other tangible evidence to establish that Ahmed was married to someone else when he married her. Petitioners state that, in the absence of the annulment order being treated as conclusive of the facts recited therein, the court of appeals erred in holding Ahmed had three wives at the time of his marriage ceremony with Respondent, and that Respondent was, therefore, Brown's surviving spouse as a matter of law.[8]

"In rem actions generally are instituted to determine the status of property and the rights of individuals with respect thereto." 1 Am. Jur. 2d *Actions* § 29 (2016). "A proceeding in rem is not confined to determining the status of inanimate things but extends to the status of individuals and their relations to others." *Id.*

Respondent's action for an annulment, in which she served Ahmed with notice by publication, is an action in rem that acts only upon the status of the parties. *See*

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[8] Petitioners also assert there is evidence in the record that Ahmed was not married based on, *inter alia*, his 1997 Texas marriage license with Respondent, in which he affirmed that he was not married, and the affidavits submitted (see *supra* note 4).

Mazzei v. Cantales, 112 A.2d 205, 207 (Conn. 1955) ("Marriage does create a status."); 4 Am. Jur. 2d *Annulment of Marriage* § 1 (2018) (both an annulment and a divorce "relate to the marriage status"); *see also Estate of Walton*, 794 P.2d 131, 133 (Ariz. 1990) (stating "the import of designating a proceeding as *in rem* relates to the effect of the judgment"). "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*, 179 N.Y.S.2d 788, 792 (App. Div. 1958), *aff'd,* 168 N.E.2d 135 (N.Y. 1960).

The Supreme Court of the United States has long recognized, however, that it is misleading to broadly state that an in rem judgment is binding on all the world. The judgment is binding on the world, including nonparties, only as to the decision regarding status, but it is not conclusive or binding on nonparties as to the underlying facts upon which the decision is based, even those facts that are essential to its determination:

> "If a competent court . . . divorces a couple, or establishes a will, . . . the couple is divorced, [and] the will is established as against all the world, whether parties or not, because the sovereign has said that it shall be so. . . . But . . . the judgment, because conclusive on all the world in what we may call its legislative effect, is [not] equally conclusive upon all as an adjudication of the facts upon which it is grounded. On the contrary, those judgments . . . are said to be conclusive evidence of the facts upon which they proceed only against parties

> who were entitled to be heard before they were rendered. . . . We may lay on one side, then, any argument based on the misleading expression that all the world are parties to a proceeding *in rem*. This does not mean that all the world are entitled to be heard; and, *as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or status which the judgment establishes*." We think that this quotation expresses the correct rule and that it is sustained by the decisions of this court.

Tilt v. Kelsey, 207 U.S. 43, 52–53 (1907) (emphasis added) (citation omitted) (last omission in original); *see also Gratiot Cty. State Bank v. Johnson*, 249 U.S. 246, 248–49 (1919) (stating a judgment in rem "is not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto," and observing "[t]he rule finds abundant illustration in cases dealing with decedents' estates and in cases involving the marriage status" (citations omitted)).

"The general rule applicable to proceedings in rem affecting a marital status" is that the judgment is conclusive upon all persons as to existence of the status, but the judgment will not bind anyone personally unless the court has jurisdiction over the individual, and it is not conclusive as to a fact upon which the judgment is based except as between persons who have actually litigated the existence of the fact. *In re Holmes' Estate*, 52 N.E.2d 424, 429 (N.Y. 1943) (quoting Restatement of the Law of Judgments § 74).

We agree with Petitioners that the in rem annulment order simply determined Respondent was *thereafter* free to remarry. The underlying factual findings as to her marriage ceremony with Ahmed and, more specifically, Ahmed's true marital status in 1997, do not bind those who had no opportunity to be heard on the matter. *Cf. Gaines v. Relf*, 53 U.S. 472, 539 (1851) (stating "the naked confession of Desgrange, that he had been guilty of bigamy, . . . is incompetent evidence, and inadmissible against" the executors of Daniel Clark).

To the extent the court of appeals held Petitioners were precluded from contesting any findings in the annulment order because Brown did not pursue his own annulment action against Respondent and Petitioners' rights were derivative from Brown, we find Brown's actions are not determinative of Petitioners' rights. The fact that Brown did not pursue his own annulment action is not determinative of his marital status in this estate proceeding to ascertain if Brown has a surviving spouse, as a void marriage may be challenged at any time, even after the death of a spouse. *See Morris v. Goodwin*, 148 A.3d 63, 70 n.4 (Md. Ct. Spec. App. 2016) ("[C]ourts have ruled that void marriages may be challenged by third parties after the death of one of the married parties."); *In re Estate of Toutant*, 633 N.W.2d 692, 697 (Wis. Ct. App. 2001) ("[A] marriage can be declared null and void after the death of a spouse."); *see also Estate of Randall*, 999 A.2d 51, 52 (D.C. 2010) (stating "a marriage void *ab initio* is subject to collateral attack at any time whereas a marriage merely voidable cannot be annulled after the death of either spouse" (citation omitted)).

As for the finding of the court of appeals that the doctrine of collateral estoppel precluded Petitioners from examining the underlying factual findings in the annulment order, we find the doctrine is not applicable. Petitioners were not parties to the annulment order, were not privies with a party, and the issue was effectively decided by default, so the issues disputed here were not actually litigated.

"Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to *the parties and their privies* in any subsequent action based upon a different claim." *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 495–96, 450 S.E.2d 616, 619 (Ct. App. 1994) (emphasis added). The validity of Brown's and Respondent's purported marriage was not litigated in Respondent's annulment action against Ahmed.

In addition, Ahmed did not appear at the annulment proceeding and did not litigate any issue regarding the annulment. Neither the reluctance of Respondent's counsel to move for an entry of default nor counsel's one-sided presentation of evidence alters the fact that the annulment was uncontested. Collateral estoppel does not apply to default judgments because the factual issues were never actually litigated. *See State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998) ("In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually

have been litigated in the earlier litigation." (citing 50 C.J.S. *Judgments* § 797 (1997))); *Kunst v. Loree*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013) (stating the essential element requiring that the claim was actually litigated is not met where there is a default). Thus, collateral estoppel is not applicable in this case.

Even if the matter had actually been litigated, Petitioners were not parties or in privity with a party. The parties to the annulment action were Respondent and Ahmed. Respondent argues to this Court (1) that Brown paid for all or part of Respondent's legal fees for the annulment, so he was in privity with Respondent, and (2) since Brown is Petitioners' father, Petitioners are in privity with Brown as his relatives, and (3) Petitioners are, by extension, in privity with a party and are bound by the findings in Respondent's annulment order. Respondent's allegation of privity has no merit. Brown's purported financial assistance in obtaining the annulment, without any evidence that Brown directed or controlled the litigation, does not place him in privity with Respondent and does not bind Petitioners.[9] Moreover, Petitioners' relationship with Brown as his children does not place them in privity with a party. *See Roberts*, 316 S.C. at 496, 450 S.E.2d at 619 ("'Privity' as used in the context of collateral estoppel, does not embrace relationships between

[9] The parties stipulated that Brown did not intervene in the annulment action, and he was not a client of Respondent's attorney. *See, e.g.*, *E.I. Du Pont de Nemours & Co. v. Sylvania I. Corp.*, 122 F.2d 400, 405 (4th Cir. 1941) (holding "mere assistance in the defense of a case is insufficient to bind a person not joined as a party," as it is participation in the trial and control of the litigation that will bind one who is not a party of record).

persons or entities, but, rather deals with a person's relationship to the subject matter of the litigation. Privity is not established from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action." (citation omitted)).

Based on the preceding, we conclude Petitioners are not bound by the factual findings in the annulment order and are not collaterally estopped from litigating whether Ahmed had the capacity to marry Respondent.[10] *See id.* at 496, 450 S.E.2d at 619 ("Due process prohibits estopping some litigants who never had a chance to present their evidence and arguments on a claim, despite one or more existing adjudications of the identical issue which stand squarely against their position."); *cf. Scarboro v. Morgan*, 64 S.E.2d 422, 424 (N.C. 1951) (stating "the heirs-at-law of Everette Scarboro, not being parties to the action in Wilson County, are not bound by the annulment judgment"). Since the factual findings underlying the annulment

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[10] The validity of a marriage is usually determined by the jurisdiction where it is contracted and will be recognized in another state unless "such recognition would be contrary to a strong public policy of that State." *Zwerling v. Zwerling*, 270 S.C. 685, 686, 244 S.E.2d 311, 312 (1978) (quoting 52 Am. Jur. 2d *Marriage* § 82). Since Respondent's 1997 marriage to Ahmed occurred in Texas, Texas law could be implicated in determining its validity, but no issue has been raised in this regard. The validity of Brown's South Carolina marriage to Respondent is properly examined under South Carolina law.

order are not conclusive, the grant of summary judgment in favor of Respondent is reversible error.

B. Application of Section 20-1-80

Petitioners further contend the court of appeals erred in finding Respondent was Brown's surviving spouse because Respondent's marriage to Brown violated section 20-1-80 of the South Carolina Code as a matter of law, where Respondent did not resolve her first marriage before contracting marriage with Brown.

The South Carolina General Assembly has established detailed procedures regarding the issuance and recordation of marriage licenses and certificates in this state to maintain the accuracy and accessibility of information affecting the public interest. The General Assembly has deemed it unlawful for any person to contract marriage within this state without first procuring a marriage license. S.C. Code Ann. § 20-1-210 (2014); *see also id.* § 20-1-280 (imposing a penalty for anyone furnishing a false affidavit to procure a license).

"The form of license and certificate of marriage shall be prescribed and furnished by the State Registrar and shall contain information required by the standard certificate as recommended by the national agency in charge of vital statistics, *all of which are declared necessary for registration, identification, legal, health[,] and research purposes*, with such additions as are necessary to meet requirements imposed by the State." *Id.* § 20-1-310 (emphasis added). For uniformity, the Division of Vital Statistics of the Department of Health and Environmental Control (DHEC) is responsible for

printing and distributing the forms to be used by all probate courts in this state. *Id.* § 20-1-320.

A probate court judge or the clerk of court shall issue a license upon the filing of an application, the lapse of at least twenty-four hours, the payment of the fee provided by law, and "the filing of a statement, under oath or affirmation, to the effect that the persons seeking the contract of matrimony are legally entitled to marry, together with the full names of the persons, their ages, and places of residence." *Id.* § 20-1-230(A).

The probate judge or clerk of court who issued the marriage license must (upon the return of copies by the person who performed the wedding ceremony) "record and index such [marriage] certificate in a book kept for that purpose and send one copy to the Division of Vital Statistics of [DHEC] within fifteen days after the marriage license is returned to his offices." *Id.* § 20-1-340. Thereafter, DHEC must "properly file and index every marriage license and certificate and may provide a certified copy of any license and certificate upon application of proper parties except that upon request the Department of Social Services or its designee must be provided at no charge with a copy or certified copy of a license and certificate for the purpose of establishing paternity or establishing, modifying, or enforcing a child support obligation." *Id.* § 20-1-350.

In section 20-1-80, entitled, "Bigamous marriage shall be void; exceptions," the General Assembly has declared *all* marriages contracted while a party has a

living spouse are void, unless one of three specified circumstances is established:

> *All marriages contracted while* either of the parties has a former wife or husband living shall be void. But this section shall not extend [1] 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, [2] not to any person who shall be divorced[,] or [3] [to any person] *whose first marriage shall be declared void by the sentence of a competent court.*

Id. § 20-1-80 (emphasis added). By the plain reading of this statute, the General Assembly has not declared every bigamous marriage void ab initio; there are exceptions. The first two circumstances, absence for five years and divorce, are not implicated here. Petitioners contend the third exception highlighted in section 20-1-80, the party's first marriage has been declared void by a competent court, required Respondent to obtain a court order declaring her first recorded marriage void *before* entering into a second marriage.

Petitioners argue this Court indicated in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008) that section 20-1-80 focuses on the parties' status *at the time a marriage is undertaken*, so an annulment order cannot retroactively validate a bigamous marriage entered into prior to the issuance of the annulment. Petitioners assert it is undisputed that, at the time of Respondent's marriage ceremony with Brown in 2001, she had not annulled her first marriage to Ahmed. Consequently, pursuant to section 20-1-80 and *Lukich*,

Respondent's 2004 annulment could not retroactively validate Respondent's 2001 marriage to Brown. Petitioners assert the statute applies on its face to "[a]ll marriages," without limitation, and it requires the first marriage to be "*declared void* by the sentence of a competent court" (emphasis added).

Petitioners state vital public policy concerns underlie section 20-1-80, which "simply requires spouses who have previously obtained a marriage license and participated in a marriage ceremony to annul that marriage before attempting to marry again." Petitioners contend "*Lukich* and its strict construction of Section 20-1-80 are entirely dispositive of this appeal as a matter of law . . . ." They note all annulments declare a defective marriage void ab initio, so Respondent's attempt to distinguish between void and voidable marriages is not warranted in the context of section 20-1-80.

Respondent, in turn, argues the rule in *Lukich* is limited to the facts of that case, which involved a voidable first marriage that was terminated based on a spouse's intoxication, not a marriage that was void ab initio for bigamy. Respondent contends bigamous marriages are not legal marriages and are never valid. Respondent maintains her marriage to Ahmed was void ab initio because Ahmed was already married. As a result, Respondent states, there was no legal first marriage that would serve as an impediment to her marriage to Brown.

Respondent contends a voidable marriage is a valid marriage until one party elects to procure an annulment, and an annulment is not needed for a void

marriage. Respondent states this distinction is not at odds with the holding in *Lukich*, which recognized that, although an annulment renders a marriage void ab initio for most purposes, it cannot resurrect a bigamous second marriage because, at the time the second marriage was contracted, the individual had a lawful spouse. Here, however, Respondent asserts she did not have a lawful spouse, as Ahmed did not have the capacity to marry her.

Determining the meaning of a statute is a question of law. *See Town of Summerville v. City of N. Charleston,* 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.").

We first note Respondent's arguments presuppose that Petitioners are conclusively bound by the factual finding in the family court's annulment order that Ahmed had three wives in Pakistan (and that his marriage to Respondent was, therefore, bigamous). For the reasons discussed in the preceding section of this opinion, the annulment order does not bind third parties such as Petitioners to this factual finding, as they had no opportunity to contest this point. Further, Respondent has stipulated that she has no evidence that Ahmed had three wives in Pakistan, other than her own (unchallenged) testimony at the annulment hearing regarding Ahmed's alleged statement to this effect. *Cf. Gaines*, 53 U.S. at 534 ("The great basis of human society throughout the civilized world is founded on marriages and legitimate offspring; and to hold that either of the parties could, by a mere

declaration, establish the fact that a marriage was void, would be an alarming doctrine."). Consequently, we agree with Petitioners that the alleged bigamous nature of Respondent's first marriage was never established in this estate matter.

However, even assuming Respondent's first marriage was, in fact, bigamous, we disagree with Respondent's interpretation of section 20-1-80 and this Court's holding in *Lukich*. *Lukich* presented a bright-line rule based on the plain language of the statute—*all* marriages contracted while a party has a living spouse are invalid unless the party's first marriage has been "declared void" by an order of a competent court (assuming the other statutory exceptions do not apply). We noted that, "[i]n construing a statute, we need not resort to rules of construction where the statute's language is plain." *Lukich*, 379 S.C. at 592, 666 S.E.2d at 907.

As we explained in *Lukich*, the statute looks to only a single point in time, the date of contracting the subsequent marriage, and it does not contemplate either a prospective or retroactive perspective:

> The statute *speaks to the status quo at the time the marriage was contracted*, and does not contemplate either a prospective or a retroactive perspective. Any other construction of § 20–1–80 would lead to uncertainty and chaos.

Id. at 593, 666 S.E.2d at 907 (emphasis added).

Respondent asserts the effect of the statute (i.e., whether it is retroactive) should turn on the basis for the annulment. We rejected this contention by the

appellant in *Lukich*, stating it is the rule set forth in section 20-1-80, not its exceptions, which is paramount. *See id.* at 592 n.2, 666 S.E.2d at 907 n.2. We have previously noted that "[t]his law first appears [in the civil context] in the Revised Statues of 1873 . . . ." *Davis v. Whitlock*, 90 S.C. 233, 237, 73 S.E. 171, 172 (1911). To date, the General Assembly has not carved out any exceptions to the requirement that a party obtain a declaration of voidness from a competent court, and we decline to impose an alternative reading that the General Assembly did not set forth in the plain language of the statute.

We agree with Respondent that most bigamous marriages are void ab initio by law as a matter of public policy. However, also as a matter of public policy, and to protect the state's interest in the accurate recording of marriages, the failure to resolve a prior marriage of record is also undesirable. Section 20-1-80 promotes the state's need for accurate public records by ensuring a marriage entered in the public record is terminated before an individual enters into another marriage of record. As we stated in *Lukich*, it is the status of the parties *at the time of contracting the subsequent union*, without the official resolution of a prior union, that the statute prohibits in order to protect societal interests. *Cf. Carnie v. Carnie*, 252 S.C. 471, 477, 167 S.E.2d 297, 300 (1969) (observing "the well established proposition that the state itself is a silent party to all divorce proceedings and that it is the duty of the court to protect the interest of the state therein").

As noted above, the General Assembly has set forth detailed procedures to be followed in the recording and indexing of marriage certificates, which it has stated are vital "for registration, identification, legal, health[,] and research purposes." *See* S.C. Code Ann. § 20-1-310. At the time Respondent contracted marriage with Brown, public records showed Respondent entered into a marriage in Texas in 1997 and then a purported marriage in South Carolina in 2001. In our view, section 20-1-80 requires that the resolution of the 1997 marriage be placed upon the public record prior to the subsequent marriage so that the records accurately reflect the parties' status as married or unmarried. *See generally* 11 Am. Jur. 2d *Bigamy* § 4 (2019) (stating where a statute specifies exceptions to bigamy that includes a declaration of voidness by a court, the voidness generally must be declared by a competent court *prior* to entering the second marriage).

While we acknowledge there is some authority for the proposition that a marriage that is deemed void ab initio by statute need not be declared so by a court, we believe section 20-1-80, a civil statute,[11] contemplates an orderly procedure for this determination that precludes a party from unilaterally and privately concluding a prior marriage is defective. Without a formal declaration that a marriage is void by a competent court, the public record will continue to show an existing marriage. Moreover, it is possible that a party could falsely claim (or mistakenly believe) that

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[11] Section 20-1-80, a civil statute, is distinguishable from the criminal offense of bigamy, currently found in section 16-15-10 of the South Carolina Code.

a marriage is bigamous, so requiring this point to be established in a formal setting with admissible evidence provides a verifiable method for ascertaining the parties' marital status. *Cf. Perlstein v. Perlstein*, 204 A.2d 909, 911–12 (Conn. 1964) (stating a marriage ceremony gives rise to a presumptively valid status of marriage that persists unless and until it is overthrown by evidence in an appropriate judicial proceeding; the court stated "[n]o mere claim of bigamy, whether made in a pleading or elsewhere, would establish that a marriage was bigamous," and "[t]he state's concern in the marriage status of its domiciliaries imperatively demands that the invalidity of the purported marriage be judicially determined before that invalidity be accepted"); *State v. Crosby*, 420 P.2d 431, 433 (Mont. 1966) (reasoning that, where a statute proclaims the methods to avoid a subsequent marriage from being declared bigamous, one of which being that the marriage has been declared void by a court of competent jurisdiction, "such a determination of voidness cannot be made by the person involved"; rather, it must be made by a court of competent jurisdiction).

Public records have long played an essential role in society. Official records are kept of each individual's birth, marriage, divorce, and death. These vital records provide a confirmation of status that can be determinative of a person's rights in many contexts. *See generally Murray v. Supreme Lodge of New England Order of Prot.*, 52 A. 722, 723 (Conn. 1902) ("From a very early period our law has provided for the record of births, deaths, and marriages in some way by some public official. The first act of this kind seems to

have been passed in 1664 [], and ever since that time our statute book has contained provisions [regarding] the making and preservation of such records.").

This state's abiding interest in the accuracy of its records regarding a party's marital status is underscored by the fact that a panoply of rights, privileges, and responsibilities are legislatively created by a valid marriage. For example, under the South Carolina Code, a spouse has a vested special equity and ownership right in marital property (§ 20-3-610); may consent to medical treatment for the other (§ 44-66-30); has homestead protections (§ 15-41-30); has the right to bring a claim for loss of consortium (§ 15-75-20); is given preference for appointment as the spouse's guardian (§ 62-5-308); is entitled to various tax benefits, such as the two wage-earner credit for married individuals (§ 12-6-3330); has the right to claim an evidentiary privilege for marital communications (§ 19-11-30); has insurance conversion privileges (§ 38-71-170); has rights to alimony (§ 20-3-130), child custody (§ 20-3-160), and the equitable distribution of property in the event of a divorce (§ 20-3-620); is entitled to pursue a claim for wrongful death of a spouse (§ 15-51-20); may receive an award of workers' compensation benefits as the surviving spouse (§ 42-9-290); and is protected from disinheritance via the provisions for an elective share (§ 62-2-201) and for an omitted spouse's share (§ 62-2-301). These rights, privileges, and responsibilities that are incident to a marriage are universally recognized in other jurisdictions. *See Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993), *as clarified on reconsideration* (May 27, 1993) (outlining "a number of

the most salient marital rights and benefits"), and *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Baker v. State*, 744 A.2d 864, 883–84 (Vt. 1999) (discussing "the benefits and protections incident to a marriage license").

The recording of a marriage license creates an obstacle to a subsequent marriage until such time as the obstacle is removed by court order. If individuals do not comply with the proper protocols for entering into and documenting a valid marriage under state law, the public records will not be accurate, and the determinations on which those records are based will likewise be faulty. For this reason, compliance serves not only the interests of the individual parties entering into a marriage, but also the public interest, and it advances a state's public policy of affording notice of its residents' status to all concerned.

In the current appeal, because it is undisputed that, at the time Respondent contracted marriage with Brown in 2001, she had not resolved her first recorded marriage (to Ahmed), her marriage to Brown was void ab initio and "there was nothing to be 'revived' by the annulment order" Respondent obtained in 2004. *See Lukich*, 379 S.C. at 592, 666 S.E.2d at 907 (stating a bigamous married is void ab initio and cannot be revived by the subsequent conduct of the parties); 11 Am. Jur. 2d *Bigamy* § 4 (2019) (stating some authorities hold that "voidness of the former marriage must be declared by a court of competent jurisdiction, and the fact that under a civil statute a prior marriage was void from the beginning because of the fact that at the time of the prior marriage the accused had another

wife does not render subsequent marriages nonbigamous"); *see also Davis*, 90 S.C. at 246, 73 S.E. at 175 ("The tendency of the courts of this country is . . . to hold that, where the relation began as meretricious, it cannot be converted into a marriage by the mere removal of the obstacle to marriage without some subsequent agreement to be husband and wife.").

The uncertainty that arose as to Respondent's marital status in the current case and the lengthy legal process that ensued, to the detriment of all those concerned, is precisely the type of problem section 20-1-80 addresses by requiring the orderly recording of marriages and any terminations to facilitate the accuracy of the public record.[12] While the inability to readily determine Brown's heirs has needlessly diminished Estate assets, we are concerned that it has also had detrimental effects on numerous unknown persons who are not parties to this appeal. Brown's estate planning documents indicated that he intended the bulk of his wealth to be used to support his charitable trust, which he specifically declared was to "be used solely for the tuition, educational expenses, and financial assistance of . . . children, youth, or young adults ([w]ho are both qualified and deserving)" of financial assistance to further their education in South Carolina and Georgia. *Wilson v. Dallas*, 403 S.C. 411, 417, 743 S.E.2d 746, 750 (2013). The ongoing litigation

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[12] Because the preceding issues are dispositive, we need not reach Petitioners' remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (observing an appellate court need not address remaining issues when the determination of another point is dispositive).

since Brown's passing has thwarted his expressed wish that his estate be used for educational purposes, a fact confirmed by the parties in this case, who acknowledged that no scholarships have been paid for students to date, a point we find both extraordinary and lamentable.

III. CONCLUSION

Based on the foregoing, we conclude Respondent is not the surviving spouse of Brown. Consequently, we reverse the decision of the court of appeals and remand the matter to the circuit court for further proceedings. Upon remand, the circuit court shall promptly proceed with the probate of Brown's estate in accordance with his estate plan.

REVERSED AND REMANDED.

KITTREDGE, HEARN and JAMES, JJ., concur. FEW, J., concurring in a separate opinion.

JUSTICE FEW: I completely agree with the majority's well-reasoned analysis of section 20-1-80 of the South Carolina Code (2014) in Section II.B of the majority opinion. I concur in Section II.B and the conclusion the majority sets forth in Section III. Respectfully, I would not reach the issues addressed in Section II.A.

APPENDIX B

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2015-002417

[Filed: July 25, 2018]

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, Terry Brown, Michael Deon Brown and Daryl Brown are the Appellants.

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge
Opinion No. 5578
Heard April 17, 2018 – Filed July 25, 2018

AFFIRMED

Robert C. Byrd and Alyson Smith Podris, both of Parker Poe Adams & Bernstein, LLP, of Charleston; Katon Edwards Dawson, Jr., of Parker Poe Adams & Bernstein, LLP, of Columbia; and Marc Toberoff, of Malibu, CA, all for Appellants Deanna Brown Thomas, Yamma Brown, and Venisha Brown. Matthew Day Bodman, of Matt Bodman, PA, of Columbia, and David B. Bell, of Augusta, GA, both for Appellants Michael Deon Brown and Daryl J. Brown. John Andrew Donsbach, Sr., of Donsbach Law Group, LLC, of Martinez, GA, for Appellant Terry Brown.

Robert N. Rosen, of Rosen Law Firm, LLC, of Charleston; S. Alan Medlin, of Columbia; Thomas Heyward Carter, Jr., Andrew W. Chandler, and M. Jean Lee, all of Evans Carter Kunes & Bennett, PA, of Charleston; David Lawrence Michel, of Michel Law Firm, LLC, of Charleston; and Arnold S. Goodstein, of Goodstein Law Firm, LLC, of Summerville, all for Respondent.

SHORT, J.: In this case involving the estate of James Brown, six of Brown's children appeal from the trial court's grant of Tommie Ray Brown's (Respondent's) motion for summary judgment, arguing the trial court

erred in finding the marriage between Respondent and Brown was not bigamous. We affirm.

FACTS

Respondent married Javed Ahmed on February 17, 1997. Thereafter, she married Brown on December 14, 2001.[1] Respondent brought an action to annul her marriage to Ahmed on December 15, 2003, and in its April 15, 2004 order, the Charleston County Family Court found her marriage to Ahmed was void ab initio.

The court found Ahmed was married at the time of his marriage to Respondent, and therefore, he lacked capacity to marry her.[2]

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[1] On her marriage license to Brown, Respondent stated it was her first marriage. In the parties' joint stipulation of facts filed September 5, 2014, it states, "From the February 17, 1997 marriage ceremony between [Respondent] and [Ahmed] through the December 14, 2001 marriage ceremony between [Respondent] and [Brown], no order of any court or other occurrence of which [Respondent] is aware at this time ended or caused to end any marriage that certain parties assert existed between [Respondent] and [Ahmed]."

[2] Respondent stated she thought she married Ahmed, but after the marriage ceremony, he told her he would not live with her because he was married to three or more women in Pakistan. She claims the marriage was never consummated, and Ahmed only married her to become a United States citizen. In the parties' joint stipulation of facts, it states Respondent had "no documents or other tangible evidence evidencing [Ahmed] was married to another person when [Respondent] and [Ahmed] participated in the February 17, 1997 marriage ceremony" and Respondent could not identify any person "who can testify that [Ahmed] was married to another person when [Respondent] and [Ahmed] participated in the February 17, 1997 marriage ceremony." According to

Brown and Respondent separated after Brown was arrested on January 28, 2004, for criminal domestic violence as a result of an altercation between Brown and Respondent. Brown sought an annulment from Respondent on May 6, 2004, asserting Respondent was legally barred from entering into a marriage to Brown because she was married to Ahmed at the time of their marriage ceremony. Respondent filed a counterclaim, seeking a divorce on the grounds of physical cruelty and adultery. In a consent order of dismissal filed by the Aiken County Family Court on August 16, 2004, the parties informed the court they had reached an agreement, and Respondent agreed to "forever waive any claim of a common law marriage to [Brown], both now and in the future." Respondent states she and Brown reconciled and lived together until his death.

Brown died on December 25, 2006. His will devised his personal effects to six named children: Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown, and Daryl Brown (collectively, Appellants). Brown's will was admitted to probate on January 18, 2007. On January 26, 2007, the Aiken County Probate Court removed the matter to the circuit court, and the probate court continued to remove all matters filed in Brown's Estate to the circuit court. On February 1, 2007, Respondent brought an action to set aside Brown's entire will, which did not name her or their son as beneficiaries, based on alleged

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Respondent, Ahmed was never located, and he did not "appear, answer the complaint or otherwise plead within the time required, participate in or otherwise defend himself in the Ahmed Annulment Action."

undue influence and fraud.[3] She separately claimed an elective share or an omitted spouse's share of the Brown estate.

Appellants and Respondent participated in mediation on August 10, 2008, and reached a settlement agreement. The agreement states "[t]he settling parties intend for the agreement to be a binding private settlement agreement but also are seeking court approval of the settlement." The parties agreed Respondent "was the legal wife of [Brown], during his lifetime and at the time of his death, and qualifies as his surviving spouse." The court approved the settlement agreement on May 26, 2009. However, on May 8, 2013, the South Carolina Supreme Court reversed and remanded the approval of the settlement to the trial court because of a lack of evidence showing a fair and reasonable settlement of a good faith controversy. *See Wilson v. Dallas*, 403 S.C. 411, 450-51, 743 S.E.2d 746, 767-68 (2013). The court stated that "even if [Respondent was] able to establish a claim as Brown's surviving spouse, she executed a prenuptial agreement, in which she indicated that she had the opportunity to consult with counsel of her own choosing and waived all rights to Brown's property or any statutory claims against his estate," and a valid prenuptial agreement would normally preclude any right to an elective share. *Wilson*, 403 S.C. at 440, 743 S.E.2d at 762.

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[3] Brown and Respondent have one son together, James Joseph Brown, II, who was born on June 11, 2001.

In the interim, a hearing was held and several other motions were filed, but what is relevant to this appeal is that on April 28, 2014, Respondent filed a motion for summary judgment, asserting there was no genuine issue of material fact as to her marriage to Brown, and she was entitled to summary judgment on the issue of the validity of her marriage as a matter of law. On June 2, 2014, Appellants joined in on a motion for summary judgment, limited to the sole assertion that Respondent was not Brown's surviving spouse at the time of his death.[4] After a hearing on the motions, the trial court filed its order on January 13, 2015, granting Respondent's motion for summary judgment. The court found Respondent and Ahmed never had a valid marriage because it was a bigamous marriage, and thus, Respondent had no impediment to her valid marriage to Brown. Appellants filed motions to reconsider. In an order filed October 26, 2015, the trial court denied Appellants' motions to reconsider. These appeals followed.[5]

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[4] The Limited Special Administrator (LSA) of the Estate of James Brown filed the motion. In the motion, Appellants attached as an exhibit an affidavit from an attorney who said he spoke with Ahmed, who was in Pakistan. The attorney stated Ahmed told him he was not married to anyone else when he married Respondent, and he and Respondent lived together as husband and wife for a period of time following the 1997 marriage. Appellants also attached the marriage license between Ahmed and Respondent that stated Ahmed was not married at the time of the application.

[5] Michael Deon Brown and Daryl Brown adopted the briefs of the LSA. The LSA notified this court that it reached a settlement with Respondent and sought to withdraw its appeal. On September 19, 2017, this court granted the LSA's request to withdraw its appeal and stated the briefs submitted by the LSA were to be made a part

STANDARD OF REVIEW

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment." *Pallares v. Seinar*, 407 S.C. 359, 365, 756 S.E.2d 128, 131 (2014). "An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment." *Spence v. Wingate*, 395 S.C. 148, 156, 716 S.E.2d 920, 925 (2011). "Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial." *Id.*

LAW/ANALYSIS

I. Bigamous Marriage

Appellants Deanna Brown-Thomas, Yamma Brown, and Venisha Brown argue the trial court erred in not finding Respondent's attempted marriage to Brown was bigamous as a matter of law due to her failure to

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of the record as the briefs of Michael Deon Brown and Daryl Brown.

terminate her first marriage prior to her second marriage.[6] We disagree.

Section 20-1-80 of the South Carolina Code (2014) provides:

> 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.

Appellants argue the trial court erred in applying the 2004 annulment order to validate Respondent's 2001 marriage to Brown, which they assert was bigamous under section 20-1-80. They maintain a subsequent order declaring a first marriage void ab initio does not relate back so as to validate a second bigamous marriage. Appellants also argue the trial court erred in making a distinction between later-annulled marriages that were "void" and those that were "voidable." They state it does not matter whether Respondent's 1997 marriage to Ahmed was "void" or "voidable" because Respondent's first marriage must be declared void by a competent court before she can remarry.

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[6] Appellants Terry Brown, Michael Deon Brown, and Daryl Brown also make essentially this same argument in their briefs; therefore, we combine the arguments for this issue.

The trial court in this case stated, "A void marriage is treated differently from a voidable marriage. A voidable marriage is valid unless and until a court rules that such a marriage is invalid, but a void marriage is never valid for any purpose." The court further stated, "South Carolina law precludes this Court from giving any effect whatsoever to a bigamous marriage. Because the Court cannot give any effect to a bigamous marriage, it is required to hold that the bigamous marriage was never a marriage." Therefore, the court held Respondent and Ahmed never had a valid marriage at any point in time, and Respondent had no impediment to her valid marriage to Brown.

The South Carolina Supreme Court in *Lukich v. Lukich* found that under the terms of section 20-1-80, the wife's "'marriage' to [h]usband # 2 was 'void' from the inception since at the time of that marriage she had a living spouse and that marriage had not been 'declared void.'" 379 S.C. 589, 592, 666 S.E.2d 906, 907 (2008) (quoting S.C. Code Ann. § 20-1-80). "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." *Day v. Day*, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950); *see also Howell v. Littlefield*, 211 S.C. 462, 466, 46 S.E.2d 47, 48 (1947) ("[Husband's] existing marriage . . . incapacitated him . . . to contract another marriage. . . ."); *Johns v. Johns*, 309 S.C. 199, 201, 420 S.E.2d 856, 858 (Ct. App. 1992) ("At the time the parties began residing together in September 1983, and throughout their cohabitation, the respondent was legally married to another woman. Thus, any marriage between the parties while [the] respondent had a

subsisting marriage was void as a matter of public policy. . . . It was void from its inception, not merely voidable, and, therefore, cannot be ratified or confirmed and thereby made valid.").

> While an annulment order relates back in most senses, it does not have the ability to validate the bigamous second "marriage." Since there was no marriage under the plain terms of the statute when the ceremony between Wife and Husband # 2 was performed in 1985, there was nothing to be "revived" by the annulment order in 2003.

Lukich, 379 S.C. at 592, 666 S.E.2d at 907.

In *Wilson v. Dallas*, 403 S.C. at 434 n.16, 743 S.E.2d at 759 n.16, our supreme court stated in a footnote:

> [Respondent]'s request for an annulment from Ahmed was hastily granted by the family court in Charleston County during the pendency of Brown's separate annulment action against her. The circuit court noted the decision of the Court of Appeals in *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006), in which the Court of Appeals held that an annulment declaring a spouse's first marriage void could not retroactively validate the spouse's second marriage. The circuit court distinguished Brown's situation, opining that the rule in *Lukich* did not apply where the first marriage was never valid because one of the parties was already married. This Court has since affirmed *Lukich*, in *Lukich v. Lukich*, 379 S.C. 589, 666

> S.E.2d 906 (2008). We express no opinion, however, on the circuit court's interpretation here.

In *Lukich*, there was no impediment to the first marriage; thus, the wife had to have the first marriage annulled for the second marriage to be valid. Here, Respondent's first marriage to Ahmed was invalid or void from the beginning because he was already married to someone else at the time of the marriage. As a result, had Respondent's marriage to Ahmed not been annulled, the second marriage to Brown would still have been valid. Respondent was married to Brown in a valid ceremonial marriage, as evidenced by a marriage license and certificate. Her marriage to Ahmed was properly held bigamous in a final unappealed judgment by the family court, which provides she had no impediment to her marriage to Brown. Therefore, we find the trial court did not err in finding Respondent was married to Brown.

II. Summary Judgment

Appellants Deanna Brown-Thomas, Yamma Brown, and Venisha Brown argue the trial court erred in not granting their motion for summary judgment because Respondent failed to present any admissible evidence that her marriage to Ahmed was invalid.[7]

Appellants argue the trial court granted Respondent's motion for summary judgment on the purported ground that Respondent's marriage to Ahmed was bigamous

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[7] Appellant Terry Brown makes essentially this same argument in his brief; therefore, we combine the arguments for this issue.

without any evidentiary support for its finding. They also assert the trial court erred in relying on the annulment order for the truth of the matter asserted in its findings because it was inadmissible hearsay not subject to an exception. Appellants assert the evidence presented to the trial court established that Ahmed was not married when he married Respondent in 1997. Specifically, that Ahmed stated he was not presently married on their Texas marriage license. They assert, in contrast, that the only evidence that Ahmed was married at the time is the annulment order, which was based solely on Respondent's testimony.

The denial of a motion for summary judgment is not directly appealable. *Ballenger v. Bowen*, 313 S.C. 476, 476, 443 S.E.2d 379, 380 (1994). Therefore, we decline to address this issue. However, to the extent Appellants also argue the trial court erred in granting Respondent's motion for summary judgment, 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) ("The family court has exclusive jurisdiction . . . to hear and determine actions for the annulment of marriage."). As a result, the trial court did not err in granting Respondent's motion for summary judgment because the annulment order was conclusive as to Respondent's marriage to Ahmed.

III. Collateral Estoppel

Appellants Deanna Brown-Thomas, Yamma Brown, and Venisha Brown argue the trial court erred in holding the findings of fact and conclusions of law in

the annulment order were preclusive as to Appellants.[8] We disagree.

"Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.*

Appellants argue the annulment order binds "all the world" as to the marital status of Respondent and Ahmed as of April 15, 2004, the date the order was filed. However, they assert the annulment order's findings of fact and conclusions of law are not binding on those who were not parties to that proceeding, such as Brown and Appellants.

Appellants also argue the trial court erred in finding they are collaterally estopped from contesting the findings of fact and conclusions of law in the annulment order. They assert the first element of collateral estoppel is not met because the order was essentially granted by default and the issue of Ahmed's alleged bigamy was never actually litigated. Appellants also assert Ahmed was not properly served with

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[8] Appellants Terry Brown, Michael Deon Brown, and Daryl Brown all make essentially this same argument in their briefs; therefore, we combine the arguments for this issue.

Respondent's summons and complaint because the publication was buried in the Houston Chronicle on page two of the classified section and the process server did not state he searched United States immigration databases or looked for Ahmed in Pakistan. Appellants further argue collateral estoppel only applies to parties to the prior action and their privies, and the only named parties in the annulment action were Respondent and Ahmed. They assert Brown was not in privity with Respondent due to his alleged interest in the outcome, and Brown's and Appellants' interests are neither identical to nor closely aligned with Respondent or Ahmed. Appellants assert merely paying Respondent's legal fees for the annulment action did not place him in privity with Respondent and did not give him control over the litigation. Finally, Appellants argue that even if the elements of collateral estoppel were present, application of the doctrine is discretionary and should not be applied to this case because it would be inequitable to bar Appellants from challenging the hasty findings of a prior action in which Brown was not a named party, had no right to intervene, did not control the proceedings, and his interests were not heard or adjudicated.

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. *See Lukich*, 368 S.C. at 51, 627 S.E.2d at 756 (denying the husband's motion to intervene in the wife's annulment proceeding and finding he did not have standing because he was not a party to the marriage). Any rights Appellants have are derivative from Brown. *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. If they cannot dispute the validity of the divorce, then there is no question of the validity of the marriage to the demandant which they can make, and hence there is no question of her right of dower in the real estate which he owned during coverture."); *Neely v. Thomasson*, 365 S.C. 345, 354, 618 S.E.2d 884, 889 (2005) ("Because the issue of paternity was raised and ruled upon in a prior action, Decedent, if alive, would have been barred from challenging paternity at a later date. As a result, Decedent's heirs are likewise barred from asserting claims that Decedent himself would have been barred from asserting. Moreover, we find that it would be unjust to allow Decedent's siblings to assert a claim that Decedent himself never chose to assert during his lifetime." (citations omitted)). During his life, Brown availed himself of the method available to him by bringing his own annulment action against Respondent to invalidate his marriage to her. However, Brown and Respondent agreed to dismiss the action, and Brown did not bring another action prior to his death.

Appellants also argue that while the annulment order binds them as to the marital status of Respondent and Ahmed as of April 15, 2004, the annulment order's findings of fact and conclusions of law are not binding on those who were not parties to that proceeding. However, Respondent is only asserting the family court's order as to the status of her marriage to Ahmed. As for Appellants' collateral estoppel argument, (1) the

annulment was actually litigated as the court reviewed the evidence presented and found it was sufficient to meet Respondent's burden of proof; (2) the validity of the marriage between Respondent and Ahmed was determined in the annulment action as it was the entire purpose of the action; and (3) the issue was necessary to support the prior judgment. Therefore, we find the trial court did not err in holding the findings of fact and conclusions of law in the annulment order were preclusive as to Appellants.

IV. Discovery Stay

Appellants Deanna Brown-Thomas, Yamma Brown, and Venisha Brown argue the trial court erred in staying discovery and granting Respondent's motion for summary judgment despite genuine issues of material fact. We disagree.

Appellants argue the court erred in not allowing the parties to conduct any discovery pending its ruling on Respondent's motion, yet allowed her to file two self-serving affidavits in support of her motion, and the court sealed her handwritten diaries. They assert this prevented them from using potentially relevant evidence that may have been adverse to Respondent.

The parties all agreed to the stipulation of facts in this case, which resolves the material factual issues in the action. The reason Appellants seek additional discovery is to relitigate the annulment order. We already determined Appellants are bound by the annulment order. Therefore, we find the trial court did not err in staying discovery pending the decision on Respondent's

motion for summary judgment as to the status of her marriage to Brown.

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.

THOMAS and HILL, JJ., concur.

APPENDIX C

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
Case Nos.: 2013-CP-02-02849
2013-CP-02-02850

[Filed: October 26, 2015]

IN RE THE ESTATE OF	)
JAMES BROWN A/K/A	)
JAMES JOSEPH BROWN	)
	)

ORDER RE RESPONDENT'S AND AMICI CURIAE'S MOTIONS TO ALTER, AMEND OR RECONSIDER ORDER RE PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND THE LIMITED SPECIAL ADMINISTRATOR'S MOTION FOR SUMMARY JUDGMENT

This matter came before the court on June 30, 2015 on the following motions: the Limited Special Administrator's Motion to Alter, Amend and Reconsider filed January 26, 2015; Larry Brown, Venisha Brown, Deanna Brown-Thomas, and Yamma Brown's Motion to Alter or Amend Judgment and/or for Reconsideration dated January 26, 2015; Jeanette Mitchell, Sarah LaTonya Brown Fegan, Ciara Petitt, Cheriquarius Williams and LaRhonda Petitt's Motion

to Reconsider Alter Amend January 13, 2015 Order; Daryl Brown's Motion to Alter, Amend and Reconsider filed January 28, 2015; Michael Deon Brown's Motion to Alter, Amend and Reconsider dated February 2, 2015; and Terry Brown's Motion to Alter, Amend and Reconsider filed February 2, 2015. Petitioner filed a Return in Opposition to Respondents' Motions to Alter, Amend or Reconsider on July 6, 2015.

The following counsel appeared at the hearing: (1) Robert N. Rosen, S. Alan Medlin, Arnold S. Goodstein, and Corey T. L. Smith, counsel for Tommie Rae Brown; (2) John F. Beach and Lyndey Zwing, counsel for the Limited Special Administrator David C. Sojourner; (3) A. Peter Shahid, Jr., counsel for Guardian ad Litem Stephen M. Slotchiver; (4) Stephen M. Slotchiver, Guardian ad Litem for James Joseph Brown, II; (5) Matthew D. Bodman, counsel for Daryl Brown and Michael Deon Brown; (6) John A. Donsbach and Scott Keniley, counsel for Terry Brown; (7) William Barr and Ittriss J. Jenkins, counsel for Jeanette Mitchell and Amici Curiae LaRhonda Petitt, Ciara Petitt, Cheriquarius Williams, and Sarah LaTonya Brown Fegan; and (8) J. David Black; counsel for Russell Bauknight, Personal Representative of the James Brown Estate and Trustee of the James Brown 2000 Irrevocable Trust Agreement.

I. ISSUES BEFORE THE COURT.

This Court had an extensive hearing on the Respondent's respective Motions on June 30, 2015. All points raised in these Motions have already been considered and denied in this Court's Order filed January 13, 2015 granting Petitioner's Motion for

Summary Judgment. In granting Petitioner's Motion for Summary Judgment, this Court relied only upon the applicable law as well as the stipulated facts and took judicial notice of the pleadings and other documents in this case.[1] The only real issue in controversy at the June 30, 2015 hearing was the interpretation of *Lukich v. Lukich,* 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006), *aff'd,* 379 S.C. 589, 666 S.E.2d 906 (2008). This Court reiterates that it relied only upon the applicable law and facts as agreed upon in the Joint Stipulation of Facts in granting Petitioner's Motion for Summary Judgment.

At the hearing on Respondents' Motions to Alter, Amend or Reconsider held on June 30, 2015, Respondents argued that *Lukich* was dispositive of this matter and agreed that this Court's determination of the impact of *Lukich* on this case would be determinative. Consequently, this Order focuses specifically on the impact of *Lukich.* Respondents contend that *Lukich* changes prior law by holding that a bigamous marriage is voidable, and Petitioner contends that *Lukich* is consistent with the bigamy statute and all case precedent by holding that a

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[1] *See* Joint Stipulation of Facts filed September 5, 2014 at p. 5, ¶ 10 which states:

> The parties could not reach an agreement as to other facts but agree this Court can take judicial notice, as it deems appropriate, of the files, pleadings, transcripts of hearings, briefs and oral arguments in this Court, the Court of Appeals and the Supreme Court along with the Record on Appeal from the Court of Appeals and Supreme Court, in all cases concerning or related to Petitioner's elective share and omitted spouse claims.

bigamous marriage is void and thus never a marriage. For the reasons stated in the previous order and discussed hereinbelow, this Court agrees with Petitioner's position. Determining the impact of *Lukich* on South Carolina jurisprudence first requires an examination of South Carolina law prior to *Lukich*.

A. The Bigamy Statute.

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.[2] 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

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[2] 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. Sellers,* 140 S.C. 66,134 S.E. 873 (S.C. 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.

Lukich confirms the difference between a void marriage – void ab initio because of bigamy – and a merely voidable marriage – valid unless and until a court invalidates it, such as for intoxication. *Lukich* annulled two marriages: a bigamous marriage, held void ab initio, and a marriage annulled for intoxication, held voidable. Unlike bigamous marriages, which are against public policy and necessarily void, "intoxication" marriages are not against public policy and understandably are voidable.

> 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.

S.C. Code Ann. § 20-1-80. A void marriage is treated differently from a voidable marriage. A voidable marriage can be valid unless and until a court rules that such a marriage is invalid, but a void marriage is never valid for any purpose.

The South Carolina General Assembly understands the difference between void and voidable. For example, S.C. Code Ann. § 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, *Marital Litigation in South Carolina,* Ch. 3.A. A bigamous marriage is void.[3]

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.

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[3] In fact, "a void [bigamous] marriage technically needs no judicial action to declare that it is void." *Id.*

B. Case Precedent: A Bigamous Marriage Is Void Ab Initio And Never A Marriage.

The annulment order in this case was granted on the most serious and substantial of all grounds for rendering a marriage void: bigamy. It is against public policy and a crime to commit bigamy. A long line of South Carolina cases; including *Lukich,* holds that a bigamous marriage is not a marriage at all, at any point in time. In fact, every South Carolina case considering the issue has concluded that a bigamous marriage is void ab initio, and thus never a marriage:

> At the time the patties began residing together in September 1983, and throughout their cohabitation, the respondent was legally married to another woman. Thus, any marriage between the parties while respondent had a subsisting marriage was void as a matter of public policy. S.C. Code Ann. § 20- 1-80 (1985) ("All marriages contracted while either of the parties has a former wife or husband living shall be void"). It was void from its inception, not merely voidable, and, therefore, *cannot be ratified or confirmed and thereby made valid.*

Johns v. Johns, 309 S.C. at 201, 420 S.E.2d at 858 (emphasis added).

> 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.

Day v. Day, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) (emphasis added).

> There could not have been a valid marriage between the appellant, Maggie (Craft) Blizzard, and William Blizzard, as William Blizzard had a lawful living wife at the time of the claimed marriage.

Ex parte Blizzard, 185 S.C. 131, 193 S.E. 633, 634 (1937).

> When, however, there is an impediment to marriage, such as one party's existing marriage to a third person, *no common-law marriage may be formed,* regardless whether mutual assent is present.

Callen v. Callen, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005) (emphasis added). *See also Splawn v. Splawn,* 311 S.C. 423, 425, 429 S.E.2d 805, 806 (1993); 52 Am. Jur. 2d, supra, § 57 ("A marriage that occurs while one party is still legally married to another is void from its inception and cannot be retroactively validated by estoppel, by mutual agreement, or by the parties' conduct in holding themselves out as husband and wife.").[4] This is hardly surprising as the courts are

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[4] 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

required to follow the mandate from the legislature that bigamous marriages are void ab initio.

C. *Lukich v. Lukich.*

Both the Court of Appeals and Supreme Court decisions in *Lukich*[5] are in accord with § 20-1-80, case precedent, and Mrs. Brown's position. *Lukich* held that a *bigamous* marriage is void ab initio. *Lukich* also held that a marriage, annulled for *intoxication rather than bigamy,* could be treated as voidable.

Lukich annulled two marriages: one void ab initio for bigamy and another voidable for intoxication.[6] In

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had no impediment to their marriage because she had never been married before. Respondents cite several 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 (S.C. 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. App. 2004) (similar, citing *White v. White,* 283 S.C. 348, 323 S.E.2d 521 (S.C. 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).

[5] 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006); 379 S.C. 589, 666 S.E.2d 906 (2008).

[6] It is highly significant, however, that the annulment of the wife's first marriage 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*

Lukich, the wife sought alimony during a divorce from her second husband (Marriage 2). During the divorce proceeding, 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. During the divorce case, which was pending in one county, the wife quickly obtained an annulment for Marriage 1, without her husband's knowledge and in another venue, on the ground of intoxication.[7] Both appellate courts concluded that Marriage 1 was voidable and refused to apply the annulment of Marriage 1 retroactively so that her status would allow her to enter Marriage 2. Marriage 1 in *Lukich* was properly voidable, rather than void, because the annulment was based on intoxication

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Barber v. People, 203 Ill. 543, 546, 68 N.E. 93, 94 (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 (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.

A bigamous marriage, by contrast, is one of the least valid relationships possible. It 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.

[7] "[S]he and Havron were married during a night of heavy drinking, [and] had never lived together as husband and wife[.]". *Lukich,* 368 S.C. at 51, 627 S.E.2d at 756.

rather than bigamy. One consequence of the *Lukich* court treating Marriage 2, the bigamous marriage, as void ab initio, is that the husband in Marriage 2 owed no alimony because Marriage 2 was "never a marriage." If *Lukich* had not treated Marriage 2 as void ab initio because it was bigamous, as required by statute and precedent, the Court would have had to conclude that the husband of Marriage 2 would have owed alimony from the time of Marriage 2 until the annulment of Marriage 2.[8]

In short, a marriage entered into by intoxicated persons is not invalid until the parties decide to attack the marriage and not to waive the defect. Therefore, it is logical, as the *Lukich* Court held, that a voidable marriage was invalid only prospectively from the date of the annulment.

A void marriage, however, is different. A void marriage is never a valid marriage. The parties are not permitted to waive the defect; the marriage is automatically invalid. Both *Lukich* appellate courts concluded that Marriage 2 was void ab initio because it was bigamous. Consequently, Marriage 2 was never a

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[8] The holding in *Lukich* as to Marriage 1 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. The annulment of Marriage 1 in *Lukich* was granted on the ground of intoxication. Intoxication is one of the classic grounds that render a marriage voidable, but not void. *See* 52 Am. Jur. 2d Marriage § 23 (Westlaw database updated Nov. 2014); *Abel v. Waters,* 373 So. 2d 1125, 1128 (Ala. Civ. App.), *writ denied,* 373 So. 2d 1129 (Ala. 1979); *Barber v. People,* 203 Ill. 543, 546, 68 N.E. 93, 94 (1903).

marriage so that the divorce was unnecessary and the second husband could not owe alimony.

In contrast to Mrs. Brown's situation, Mrs. Lukich's *first* husband was *not* already married when he married Mrs. Lukich, and consequently there was no impediment under the bigamy statute for this first husband to enter a marriage with Mrs. Lukich. Therefore it was Mrs. Lukich 's *second* marriage, to Mr. Lukich, that was void unless this second marriage fit under one of the three exceptions in the bigamy statute.

The Court of Appeals in its *Lukich* decision expressly stated that its holding as to the intoxication annulment was limited to the facts of the marriage and would not apply to bigamous marriages such as this very case, where *Mrs. Brown's first marriage was void and not merely voidable:*

> 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, S.C. Code Ann. § 20-1-80 (Supp. 2004); (2) same sex marriages, S.C. Code Ann. § 20-1-15 (Supp. 2004); and (3) marriages of minors under the age of 16, S.C. Code Ann. § 20-1-100 (Supp. 2004).

Lukich v. Lukich, 368 S.C. 47, 55, 627 S.E.2d 754,758 n. 2 (Ct. App. 2006).

The Supreme Court in its *Lukich* opinion did not overturn the obvious rule recognized by the Court of Appeals in its *Lukich* opinion. In fact, the Supreme Court opinion confirms that bigamous marriages are void ab initio and are never a marriage at all: *"The [bigamy] statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or retroactive perspective. Any other question of § 20-1-80 would lead to uncertainty and chaos."* 379 S.C. at 593; 666 S.E.2d at 907 (emphasis added). The Supreme Court opinion in *Lukich* also cites precedential authority for the same principle:

> *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.'); *Howell v. Littlefield,* 211 S.C. 462, 46 S.E.2d 47 (1947) ('[Husband's] existing marriage. . .incapacitated him. . .to contract another marriage. . . .').

Id. at 592-93, 666 S.E.2d at 907.

Contrary to Respondents' contention, *Lukich* does not change, but is instead consistent with, S.C. Code Ann. § 20-1-80 and all South Carolina case precedent: a bigamous marriage (Marriage 2 in *Lukich*) is void ab initio and never a marriage.

In their summary judgment arguments, Respondents, in particular Terry Brown, cited the

following language from the Supreme Court opinion in *Lukich* as somehow changing the treatment of bigamous marriages in this state:

> Under the statute's terms, Wife's 'marriage' to Husband # 2 was 'void' from the inception since at the time of that marriage she had a living spouse *and that* marriage had not been 'declared void.' § 20-1-80.

Lukich, 373 S.C. at 592, 666 S.E.2d at 907 (Emphasis added).

Respondents contend that *Lukich* creates new law with respect to bigamous marriages. Respondents claim *Lukich* disregards the clear requirement of the bigamy statute and ignores or reverses all case precedent that bigamous marriages are void ab initio. At the summary judgment hearing, Respondents based their contention on the words "and that" emphasized in the above quote. These words, Respondents argue, indicate that regardless of whether a marriage is void or voidable, one has an impediment to marriage and must obtain an annulment before remarriage. Contrary to Respondents' contention, however, the words "and that" do not refer to the bigamous marriage (Marriage 2 in *Lukich*); the words "and that" clearly refer to the intoxication marriage (Marriage 1 in *Lukich*). Thus, *Lukich* cannot be read to change a substantive statutory rule of law: *Lukich* does not hold that a bigamous marriage is void only from the date of the annulment order. This would render a bigamous marriage voidable rather than void. *Lukich* does no such thing. Rather, *Lukich* confirms that a bigamous marriage is void ab initio and never a marriage because

it treated Marriage 2 (the bigamous marriage in *Lukich*) as never having been a marriage, so that the second husband did not need a divorce and did not owe alimony to a wife he never married.

Similarly, at the hearing on the motions to reconsider, Respondents, especially Terry Brown, continue to misplace and misstate the order of marriages in *Lukich* and argue that the order of marriages in this case is parallel, but it is not.[9] Terry Brown tries to shoehorn the first marriage in *Lukich* into Mr. Brown and Mrs. Brown's marriage situation, but that shoe does not fit. The *Lukich* court clearly distinguish a marriage void for bigamy --- the second marriage in *Lukich* --- from a marriage voidable for intoxication --- the first marriage in *Lukich*. Terry Brown attempts to equate the putative first marriage of Mrs. Brown to Ahmed with the first marriage in *Lukich*, based simply on the order of marriages. But it is the type of annulment that creates the critical distinction between *Lukich* and this case, not the order of marriages. A bigamous marriage --- the first putative marriage in this case and the second marriage in *Lukich* --- is always void ab initio and never a marriage.

Respondents' misreading of *Lukich* would necessarily include both the Court of Appeals and the Supreme Court favorably citing the statute requiring and the cases holding that bigamous marriages are void and thus never valid, yet according to Respondents somehow overturning and contravening them without

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[9] *See* Transcript, June 30, 2015, pp. 83-84.

expressly saying so. For example, the *Lukich* Court of Appeals cited the following cases:

> Section 20-1-80 of the South Carolina Code Annotated sets forth the principle that "[a]ll marriages contracted while either of the parties has a former wife or husband living shall be void." This statute codifies the overriding public policy of this state against bigamy. *Johns v. Johns,* 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct.App.1992) (holding the public policy of not recognizing bigamous marriages overrides the public policy supporting the finality of judgments). A person who is married cannot enter into a valid marriage by participating in a marriage ceremony with a new person. *Day v. Day,* 216 S.C. 334, 338, 58 S.E.2d 83, 85 (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.").

The Supreme Court opinion in *Lukich* quoted the following cases:

> While an annulment order relates back in most senses, it does not have the ability to validate the *bigamous second 'marriage.'* Since there was no marriage under the plain terms of the statute when the ceremony between Wife and Husband # 2 was performed in 1985, there was nothing to be 'revived' by the annulment order in 2003. *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")[2]; *Howell v. Littlefield,* 211 S.C. 462, 46 S.E.2d 47 (1947) ("[Husband's] existing marriage ... incapacitated him ... to contract another marriage...."). The statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective. Any other construction of § 20-1-80 would lead to uncertainty and chaos.

379 S.C. at 592-93, 666 S.E.2d at 907 (emphasis added).[10]

Respondents argue that the *Lukich* courts, without expressly saying so, overruled the very cases they cited favorably for the proposition that bigamous marriages are void ab initio and contravened the bigamy statute that the *Lukich* courts cited. Of course, the *Lukich* courts did no such thing, but instead ruled consistently with the bigamy statute and all South Carolina

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[10] The italicized language clearly refers to the bigamous marriage as the second marriage in *Lukich,* The first marriage, annulled for intoxication, was voidable and, because voidable marriage annulments may be prospective only, did not alter the wife's status as already being married when she attempted to enter into a bigamous marriage with her putative second husband. Unlike Mrs. Lukich, it was Mrs. Brown's first putative marriage that was void ab initio for bigamy, so that she had a status of "not married" when she entered into her valid marriage with Mr. Brown because she had no impediment.

precedent by holding that a bigamous marriage is never a marriage.[11]

If Respondents were correct that *Lukich* created a new rule, then the *Lukich* court would instead have held that the second husband owed alimony until an annulment order for Marriage 2 was obtained. The clear meaning of *Lukich* is that, as required by § 20-1-80 and all precedent, bigamous marriages are void ab initio and never a marriage.

Moreover, even if Respondents were correct in their position about *Lukich,* i.e., that even a bigamous marriage is valid unless and until an annulment order is obtained, they could still not prevail. Under their theory, *Lukich* changed the law about bigamous marriages so that a bigamous marriage remains valid unless and until an order of annulment is obtained. If that were correct, then under their theory Mrs. Brown had an impediment to marrying Mr. Brown and that marriage was therefore bigamous. But under Respondents' position, Mr. Brown's bigamous marriage to Mrs. Brown would be valid unless and until Mr. Brown obtained an order annulling their marriage, which he did not obtain during his lifetime. It is now too late for Mr. Brown to obtain an annulment.[12] So, even under Respondents' theory, the marriage between

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[11] In fact, a later 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/Pele Rozelle NFL Player Ret. Plan,* 405 S.C. 423, 426, 747 S.E.2d 791, 792-93 (2013).

[12] *See* the discussion in the January 13, 2015 Order at IV.C.

Mrs. Brown and Mr. Brown was valid at his death and cannot be invalidated because it is too late.

In this case, unlike *Lukich,* it is the first marriage (Marriage 1), rather than Marriage 2 in *Lukich,* that is bigamous and thus void. Consequently, Mrs. Brown's attempted marriage to Ahmed (Marriage 1) was void ab initio and never a marriage. Therefore Mrs. Brown had no impediment to her marriage to Mr. Brown, and that marriage (Marriage 2) is valid.

Despite the contentions of Respondents, *Lukich* is consistent with the bigamy statute and all precedent involving bigamous marriages: bigamous marriages are void ab initio and never have any effect --- they are "never a marriage." The only difference with respect to bigamous marriages between *Lukich* and this case is that, in *Lukich,* the bigamous marriage was the second marriage, while in this case, the bigamous marriage is the first marriage. That difference has no impact on the treatment of bigamous marriages. The bigamous second marriage in *Lukich* was void ab initio and never had effect. The bigamous first marriage in this case was void ab initio and never had effect, so that Mrs. Brown had no impediment to her marriage to Mr. Brown.

Were this Court to give only prospective effect to the annulment in this case, it would be holding that a bigamous marriage was not invalid from its inception. Rather, it would be holding that a bigamous marriage was valid from the date of its inception until the date of the annulment.

This Court is unwilling to hold that a bigamous marriage, as determined by a family court of this state, was ever legal. There is no precedent for such a holding. South Carolina law precludes this Court from giving any effect whatsoever to a bigamous marriage. Because the Court cannot give any effect to a bigamous marriage, it is required to hold that the bigamous marriage was never a marriage.

Mrs. Brown and Ahmed never had a valid marriage at any point in time, and Mrs. Brown had no impediment to her valid marriage to Mr. Brown.

Lukich is consistent with *Hallums v. Hallums,* 74 S.C. 407, 54 S.E. 613 (1906), which held that bigamous marriages are void ab initio, in accord with all other cases considering the issue. The LSA argued that *Hallums* was exactly on point and reached a different result. The LSA misses a critical factual distinction between *Hallums* and the current case: in *Hallums,* there was never a court determination that the first marriage (Marriage 1) was bigamous and, in fact, the court found that the Marriage 1 was not bigamous. By contrast, in the current case, there is a valid annulment order finding that the first marriage was bigamous.

The Hallums paradigm actually supports Mrs. Brown's position. If the *Hallums* court had determined that Marriage 1 was bigamous, then the *Hallums* opinion indicates that the second marriage (Marriage 2) would have been valid because there would have been no impediment to the wife entering into the second marriage (Marriage 2) with the decedent.

More specifically, in *Hallums,* a woman attempted to get a distributive share from the decedent's estate, claiming to be his surviving spouse. However, the estate contended that she was already married when she attempted to marry the decedent, and thus had an impediment to the attempted marriage to the decedent. The woman then contended that her attempted first marriage was invalid because her putative first husband was already married when they attempted to get married. So far, the LSA is correct: absent the critical distinction missed by the LSA's analysis, the *Hallums* paradigm is the same as the paradigm in the current case because in *Hallums,* the woman argues that she had no impediment to marrying the decedent (Marriage 2) because she was never married to her first husband (Marriage 1) as the first husband himself was already married.

In the current case, Mrs. Brown argues that she had no impediment to marrying the decedent (Marriage 2) because she was never married to her first husband (Marriage 1) as the first husband himself was already married. The *critical* difference between the two cases is that in *Hallums,* the woman *did not* have a separate annulment order invalidating Marriage 1 void ab initio and did not get one because the court concluded her first marriage was not bigamous. In the current case, Mrs. Brown *does* have an annulment order invalidating Marriage 1. In *Hallums,* the court was asked to consider the validity of both Marriage 1 and Marriage 2 at the same time. The *Hallums* court determined that Marriage 1 was valid because there was insufficient evidence that the husband in Marriage 1 was already married: consequently, Marriage 1 in *Hallums was not*

bigamous and therefore was valid. Thus, the woman in *Hallums* had an impediment to Marriage 2. That is the critical factual difference between the facts in *Hallums* and the current case. In the current case, Marriage 1 was determined by a court to be bigamous and thus never valid. In the current case, Mrs. Brown thus had no impediment to Marriage 2 (her valid marriage to Mr. Brown).

Hallums supports Mrs. Brown's position. *Hallums* stands for the proposition that, *if* Marriage 1 had been bigamous and thus void ab initio, Marriage 2 to the decedent would have been valid and the woman would have been entitled to her distributive share from the decedent's estate. That is exactly Mrs. Brown's position. Because she has an order confirming that Marriage 1 was void ab initio as bigamous, Marriage 2 is valid and she qualifies as a surviving spouse.[13]

D. All Bigamous Marriages Are Void, Under *Lukich* And All Other Applicable Law.

Every bigamous marriage is void ab initio. A bigamous marriage is never valid – "never a marriage." In S.C. Code Ann. § 20-1-80, the bigamy statute, the South Carolina General Assembly requires that a

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[13] Unlike this case, the court in *Hallums* looked at the first marriage after the decedent's death because: (1) there was no pre-existing annulment order from a court with exclusive jurisdiction over annulments, as there is today; (2) this was prior to the family court having exclusive jurisdiction over annulments – in fact, this was prior to the existence of family courts in South Carolina; (3) this was prior to § 62-2-802 defining surviving spouse for estate purposes and case law precluding postmortem annulments. *See* the January 13, 2015 Order at IV.C.

bigamous marriage is void ab initio. In accordance with this legislative mandate, every South Carolina case dealing with bigamous marriages, including *Lukich* and *Hallums,* holds that a bigamous marriage is void ab initio and never has effect. Although Respondents contend that *Lukich* somehow changes that rule and instead provides that a bigamous marriage is valid until an annulment order is obtained, that is not the holding in *Lukich* as to bigamous marriages. *In Lukich, it is the second marriage that is bigamous* and both appellate courts treat that second marriage as void ab initio, in accordance with the bigamy statute and all case precedent. *In Mrs. Brown's case, it is the first marriage that is bigamous,* and that first marriage is therefore void ab initio, meaning that Mrs. Brown had no impediment to her marriage to Mr. Brown.

Despite the contention of the LSA, *Hallums is in accord with the bigamy statute, Lukich, and* all other case precedent in treating bigamous marriages as void ab initio. Unlike Mrs. Brown's first marriage, which was *found to be bigamous and void,* the first marriage in *Hallums* was *found not to be bigamous and was therefore valid.* However, if the first marriage in *Hallums* had been found to be bigamous and void, the opinion indicates that the second marriage would have consequently been valid because the wife would have had no impediment to her second marriage and thus could inherit. That is exactly Mrs. Brown's case: her first marriage has been found to be bigamous and void, so that she had no impediment to her marriage to Mr. Brown: their marriage is valid and she is his surviving spouse.

II. CONCLUSION.

Respondents would have this Court become the first court ever in the history of South Carolina to hold that any form of validity attaches to a bigamous marriage. The Court declines that invitation. Regardless of whether it is annulled sooner, annulled later, or even not annulled at all, a bigamous marriage is not a marriage for any purpose known to the law. The holding in *Lukich*, which also held that a voidable marriage based on intoxication is valid between the date of marriage and the date of annulment, confirms the statutory and case precedent rule that all bigamous marriages are void and never a marriage.

Therefore, it is hereby ORDERED, DECREED and ADJUDGED that the Respondents' and Amici Curiae's Motions to Alter, Amend and Reconsider are denied.

AND IT IS SO ORDERED.

This 20 day of Oct., 2015, at ____, South Carolina.

/s/ Doyet A. Early
DOYET A. EARLY, III
JUDGE, SECOND JUDICIAL CIRCUIT

APPENDIX D

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
Case Nos.: 2013-CP-02-02849
2013-CP-02-02850

[Filed: January 13, 2015]

IN RE THE ESTATE OF	)
JAMES BROWN A/K/A	)
JAMES JOSEPH BROWN	)
	)

ORDER RE PETITIONER TOMMIE RAE BROWN'S MOTION FOR SUMMARY JUDGMENT AND THE LIMITED SPECIAL ADMINISTRATOR'S MOTION FOR SUMMARY JUDGMENT

This matter came before the court on November 24, 2014 on Petitioner Tommie Rae Brown's Motions for Summary Judgment filed October 30, 2007, November 26, 2007, and April 28, 2014, and the Limited Special Administrator's (LSA's) Motion for Summary Judgment dated May 29, 2014. Each of these Motions requests summary judgment determining whether Mrs. Brown is the surviving spouse of James Joseph Brown. All parties have submitted detailed memoranda in support of their respective positions as well as responsive

memoranda, and all parties have consented to a Joint Stipulation of Facts filed September 5, 2014.

The following counsel appeared at the hearing: (1) Robert N. Rosen, S. Alan Medlin, M. Jean Lee, David L. Michel, and Corey T. L. Smith, counsel for Tommie Rae Brown; (2) John F. Beach, counsel for the LSA David C. Sojourner; (3) A. Peter Shahid, Jr., counsel for Guardian ad Litem Stephen M. Slotchiver; (4) Stephen M. Slotchiver, Guardian ad Litem for James Joseph Brown, II; (5) David B. Bell and Matthew D. Bodman, counsel for Daryl Brown; (6) John A. Donsbach and Scott Keniley, counsel for Terry Brown; (7) Louis Levenson, counsel for Deanna Brown Thomas, Yamma N. Brown, Venisha Brown, and Lany Brown; and (8) William Barr and Vera Gilford, counsel for amicus curiae Jeanette Mitchell.

I. SUMMARY JUDGMENT STANDARD.

The standard for granting summary judgment is clear:

> Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the

> party opposing summary judgment. *Brockbankv. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000).

Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 42, 747 S.E.2d 178, 181-82 (2013).

II. HISTORY OF THE CASE AND STATEMENT OF FACTS.

A. These Proceedings.

Mrs. Brown filed a petition for Elective Share or Omitted Spouse's share on February 1, 2007, asserting she is the surviving spouse of Mr. Brown. She filed a Motion for Summary Judgment on October 30, 2007 on the issue of her ceremonial marriage to Mr. Brown and the legality of said marriage. Mrs. Brown filed the same motion along with the Affidavit of Tommie Rae Brown in Support of Her Motion for Summary Judgment on November 26, 2007.

On December 20, 2007, Mrs. Brown filed Petitions to Set Aside the Will and Trust. Similarly, on December 26, 2007, five of the six Devisees from the 2000 will filed Petitions to Set Aside the Will and Trust. Before these Petitions were heard, Mrs. Brown and other parties to the estate litigation participated in mediation which resulted in a private settlement agreement. In the settlement agreement, Mrs. Brown was recognized by all parties thereto as the surviving spouse of Mr. Brown. 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. 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.

On May 26, 2009, this Court issued an Order that, inter alia, approved the settlement agreement and found that the contest or controversy was in good faith and that the effect of the agreement on interested parties was just and reasonable in satisfaction with S.C. Code Ann. § 62-3-1102(3). This Court issued another Order which removed the then Personal Representatives and Trustees (Pope and Buchanan), and at the request of the settling parties, this Court appointed Russell Bauknight as Personal Representative and Trustee.

Pope and Buchanan appealed the order approving the settlement agreement and the order removing them from their fiduciary positions to the Court of Appeals, and at the request of the Court of Appeals the consolidated appeals were certified to the Supreme Court pursuant to Rule 204(b), SCACR. In reviewing this Court's finding that there was a good faith controversy under S.C. Code Ann. § 62-3-1102, the Supreme Court determined that the settlement failed the second element of the S.C. Code Ann. § 62-3-1102 test, *i.e.*, that the effect of the agreement on interested parties is just and reasonable. *Wilson v. Dallas,* 403 S.C. 411, 447, 2013 S.C. LEXIS 240, *64 (2013). The Supreme Court upheld the removal of the prior fiduciaries, finding that they had irreconcilable differences with the estate and trust beneficiaries, but reversed and remanded the approval of the settlement because of a lack of evidence showing a fair and

reasonable settlement of a good faith controversy. The Supreme Court also vacated Mr. Bauknight's appointments and remanded the case to this Court.

This Court held a status conference on May 29, 2013 concerning the Supreme Court Opinion and issued an Order on June 13, 2013 requiring all interested persons to submit applications to serve as fiduciaries of the Estate and Trust by July 29, 2013. Mr. Bauknight was ordered to continue serving in a fiduciary capacity as Special Administrator and Special Trustee in the interim. This Court conducted a hearing to receive testimony from all applicants on September 4 and 11, 2013. This Court then issued its October 1, 2013 Order appointing Mr. Bauknight as the Personal Representative of the Estate and Trustee of the Trust and David C. Sojourner as Limited Special Trustee of the Trust. The Probate Court of Aiken County appointed Mr. Sojourner as the Limited Special Administrator (LSA) of the Estate by its Order filed October 10, 2013.

On March 10, 2014 the LSA served a Motion to Modify Protective Orders Related to Diaries of Tommie Rae Hynie Brown asking this Court to lift the Court's protective orders and to require Mrs. Brown to produce her diaries. Mrs. Brown filed a Return to Motion to Modify Protective Orders Related to Diaries of Tommie Rae Brown and Motion for Protective Order or Order of Confidentiality along with her supporting Affidavit on March 27, 2014, and a hearing was held on March 31, 2014. This Court determined that the LSA's Motion to Modify Protective Orders and all discovery would be held in abeyance pending resolution of Mrs. Brown's

Motion for Summary Judgment and later indicated the parties should negotiate a scheduling order.

Mrs. Brown filed another Motion for Summary Judgment and supporting Affidavit on April 28, 2014. She filed a Motion for Protective Order and the Affidavit of Robert N. Rosen on May 12, 2014 requesting that, other than answering the LSA's First Requests to Admit, all discovery be stayed pending resolution of her Motion for Summary Judgment. Petitioner and the LSA subsequently entered an Agreement Resolving Petitioner's Motion for Protective Order dated May 16, 2014, and this Court issued a Scheduling Order filed June 10, 2014 staying all discovery (other than the LSA's April 23, 2014 1st Requests for Admission, 2nd Interrogatories, and 2nd Requests for Production) pending resolution of Mrs. Brown's April 24, 2014 Motion for Summary Judgment. The LSA subsequently served his own Motion for Summary Judgment on May 29, 2014.

The parties have served memoranda in support of their respective positions and responsive memoranda in accordance with the Scheduling Order, and a hearing was held on the aforementioned Motions for Summary Judgment at the Bamberg County Courthouse on November 24, 2014.

B. Stipulated Facts.

Petitioner Tommie Rae Brown ("Mrs. Brown") and James Joseph Brown ("Mr. Brown") were married by ceremonial marriage on December 14, 2001 at Beech

Island in Aiken County, South Carolina.[1] Prior to their marriage, Mrs. Brown gave birth to Mr. Brown's biological son; James Brown, II on June 11, 2001.[2] Following their marriage, Mr. Brown learned that Mrs. Brown had participated in a putative marriage ceremony with another man, Javed Ahmed ("Ahmed") in February of 1997 in Texas, where both Mrs. Brown and Ahmed resided at the time. In December 2003, with Mr. Brown paying her attorney's fees, Mrs. Brown filed an action against Ahmed in the Family Court of South Carolina for an annulment on the grounds of bigamy, among other grounds.[3]

Mrs. Brown's counsel hired a licensed private investigator, Mr. Ronald Pannell, to locate Ahmed, and he was unable to do so. Mr. Pannell submitted an Affidavit of Attempted Service, filed in the Family Court on February 4, 2004, stating he conducted numerous searches in national databases in an attempt

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[1] *See* Joint Stipulation of Facts, p. 3, ¶¶ 4-5 and Exhibit 4 at 000005-6 (License and Certificate for Marriage).

[2] *See* Joint Stipulation of Facts, p. 2, ¶ 3 along with Exhibit 2 (birth certificate) at 000003 and Exhibit 3 (LabCorp DNA Test Results) at 000004.

[3] *Id.* at 3, ¶ 7 and Exhibit 5 at 000007-9 (Summons and Complaint for Annulment). James Brown paid for Mrs. Brown's annulment, and Mrs. Brown's attorney kept Mr. Brown's attorney informed of the proceedings. *See id.* at 4, ¶¶ 13-14 and Exhibit 14 at 000050-64; Personal Representatives' Responses to Petitioner Tommie Rae Brown's Second Request for Admission, dated January 11, 2008, pp. 3-4, Request and Response Nos. 9 and 10.

to locate Ahmed, and he found two addresses.[4] One address was 14403 Ella Blvd., #314, Houston, Texas, 77014. Mr. Pannell stated in his affidavit that Ahmed no longer resided at that address. The other address was 14365 Cornerstone Drive, #617, Houston, Texas, 77014, which Mr. Pannell stated in his affidavit was the address on Mr. Ahmed's driver's license issued in 1999. As a result, this address (14365 Cornerstone Drive, #617, Houston Texas, 77014) was Ahmed's last known address. Mr. Pannell stated in his affidavit that Ahmed no longer resided at that address either.

Mrs. Brown filed an Affidavit in the Family Court on February 4, 2004, with Mr. Pannell's Affidavit of Attempted Service, requesting an Order of Publication.[5] In her affidavit, Mrs. Brown stated that Mr. Pannell conducted a full skip trace report and was unable to locate Ahmed. She also said Mr. Pannell found an address where Ahmed apparently had resided since she last knew of his whereabouts. Judge Jocelyn B. Cate of the Family Court issued an Order of Publication on February 3, 2004 finding that Mrs. Brown had made a diligent effort to locate Ahmed and that it appeared to the satisfaction of the Family Court that Ahmed's current address and whereabouts were unknown.[6] The Order of Publication scheduled a Final Hearing for March 26, 2004 at 9:30 A.M. Mrs. Brown

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[4] Joint Stipulation of Facts at 000010 (Affidavit of Ronald Pannell)

[5] *Id*. at 000016 (Affidavit of Tommie Rae Hynie, a/k/a Tommie Rae Brown).

[6] *Id*. at 000017 (Order of Publication).

properly published the Summons and notice of the hearing in the Houston Chronicle, a newspaper of general circulation in the area, and filed an Affidavit of Publication as directed by the Order of Publication.[7] Ahmed was served by publication.

An Order of Continuance was filed by the Family Court on March 24, 2004, rescheduling the Final Hearing to April 15, 2004 at 9:00 A.M.[8] Mrs. Brown's counsel sent Ahmed notice of the rescheduled hearing by regular mail *and* certified mail, return receipt requested, to both of the addresses found by Mr. Pannell, which included Ahmed's last known address at 14365 Cornerstone Drive, #617, Houston, Texas, 77014, the address he had given to the Texas Department of Motor Vehicles.[9] Mrs. Brown's counsel therefore properly gave written notice of the rescheduled hearing pursuant to Rule 17, SCRFC as determined by Judge Segars-Andrews' April 15, 2004 Order.

At the trial in Family Court, Mrs. Brown testified that Ahmed told her he was married to several other women at the time of their purported marriage ceremony and that none of those marriages had been

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[7] *Id.* at 000026-27 (Affidavit of Publication); *see also id.* at 000017-18 (Order of Publication).

[8] *Id.* at 000028 (Order of Continuance).

[9] *Id.* at 000019-25 (Affidavit of Marcia F. Jones); 000010 (Affidavit of Ronald Pannell).

dissolved.[10] A final judgment was entered on April 15, 2014 annulling the purported marriage between Mrs. Brown and Ahmed ("the annulment order").[11] Judge Segars-Andrews found that Ahmed was already married at the time of his putative marriage ceremony to Mrs. Brown, that Ahmed lacked capacity to marry Mrs. Brown, and that the purported marriage between Mrs. Brown and Ahmed was "wholly null and void *ab initio*."[12]

The stipulated facts show that Mr. Brown was aware of the litigation between Mrs. Brown and Ahmed because (1) Mr. Brown paid Mrs. Brown's legal fees, (2) Mrs. Brown's counsel sent Mr. Brown's attorney a copy of the Summons and Complaint in February, 2004, and (3) Mrs. Brown's counsel sent Mr. Brown's attorney the Final Order in April, 2004.[13]

Mr. Brown filed an annulment action of his own against Mrs. Brown on January 29, 2004 in the Family Court of Aiken County.[14] Just weeks after the April 15, 2004 Final Order was filed, Mr. Brown filed an Amended Complaint for Annulment in the Family

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[10] *Id.* at 000040, lines 16-20; 00004, lines 13-15 (April 15, 2004 Transcript of Record).

[11] *Id.* at 000029-32 (April 15, 2004 Final Order).

[12] *Id.* at 000030-32 (April 15, 2004 Final Order).

[13] *Id.* at 4, ¶¶ 13-14 and Exhibit 14 at 000050-64 (Correspondence with James B. Huff, Esquire).

[14] *Id.* at 000065-67 (Mr. Brown's Summons and Complaint for Annulment).

Court requesting the Court to issue a judgment that the "Findings of Facts of the Charleston Family Courts are binding on [the Aiken County Family Court]..." and that "[p]ursuant to the Order of the Charleston Family Court, Defendant is collaterally and judicially estopped from denying the allegations in [Mr. Brown's annulment action]."[15] Mrs. Brown counterclaimed for a divorce and other relief.[16] Mr. and Mrs. Brown reconciled in July 2004 and signed a Consent Order on August 16, 2014 dismissing Mr. Brown's action.[17]

Mr. Brown died on December 25, 2006, and his will, dated August 1, 2000 was filed with the Aiken County Probate Court on January 18, 2007.

C. The Annulment Action.

Mrs. Brown properly brought the annulment action in South Carolina, properly served Ahmed, and properly notified him of the date of rehearing. The Family Court concluded that Ahmed "was married at the time he entered into his marriage with [Mrs. Brown] and therefore he lacked the capacity to marry [Mrs. Brown]."[18]

The Respondents have argued that the annulment order was improper because the summons and

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[15] *Id*. at 000070, ¶¶ 10-11 (Mr. Brown's Amended Complaint for Annulment).

[16] *Id*. at 5, ¶ 19 and Exhibit 17 at 000072-82.

[17] *Id*. at 000085-86 (Consent Order of Dismissal).

[18] *Id*. at 000031, ¶ 4 (April 15, 2004 Final Order).

complaint were not properly served and notice of the final hearing was not given. The Court has already found that service and notice were proper. Mrs. Brown's counsel hired a licensed private investigator to locate the Defendant. That investigator's affidavit was found to be sufficient by the Family Court.

South Carolina law does not permit direct or collateral attacks upon an order authorizing service by publication:

> An order for service by publication may be issued pursuant to S.C. Code Ann. § 15-9-710 (Supp.1999) when an affidavit, satisfactory to the issuing officer, is made stating that the defendant, a resident of the state, cannot, after the exercise of due diligence, be found, and that a cause of action exists against him. § 15-9-710(3). *When the issuing officer is satisfied by the affidavit, his decision to order service by publication is final absent fraud or collusion.*

Wachovia Bank of S.C., N.A. v. *Player*, 341 S.C. 424, 428-29, 535 S.E.2d 128, 130 (2000) (emphasis added); see also Hendrix v. Hendrix, 296 S.C. 200, 203, 371 S.E.2d 528, 530 (1988). The Respondents do not contend there was fraud in the procurement of the annulment. The order authorizing service by publication therefore cannot be attacked. *See also Schleicher v. Schleicher*, 310 S.C. 275, 277, 423 S.E.2d 147, 148-49 (Ct. App. 1992) (holding that service of the notice of the time and date for a merits hearing is effective upon mailing when sent by certified mail, return receipt requested and that Rule 5(b)(1); SCRCP,

rather than Rule 4(d)(8), SCRCP, is the applicable rule).

Some of the Respondents object that the annulment action should have been filed in Aiken County, not Charleston County. This is a mere matter of venue, which has no effect on the validity of the judgment. In *Lillard v. Searson*, 170 S.C. 304, 170 S.E. 449 (1933), the court held that a defect in venue cannot be used to attack a final judgment:

> Since it clearly appears that the defendant named in the case was not a resident of Richland county, at the time the action was instituted against him, but was a resident of Allendale county, the action was instituted in the wrong county, and the proper course to have pursued was for the defendant to have moved to have the case transferred to Allendale county. . . . However, the defendant did not do this, and waited until judgment had been rendered in the cause before taking any steps in the matter. *Therefore the defendant waived the jurisdictional question, and, in effect, gave to the court of Richland County authority to hear the said case on its merits*, and judgment was thereafter rendered in said court against the defendant as in any other default case.

170 S.E. at 450-51 (1933) (emphasis added). Note that the judgment in *Lillard*, like the annulment in this case, was entered without entry of an appearance by the defendant.

"The failure to bring the proceedings within the proper venue, when such is determined by the place of residence, does not render them void, the error being in practice and not jurisdictional." *In re Lemack's Estate*, 207 S.C. 137, 144, 35 S.E.2d 34, 37 (1945) (quoting 32 C.J. 633). "The irregularity [in venue] complained of is not jurisdictional." *State v. Richardson*, 149 S.C. 121, 124, 146 S.E. 676, 677 (1928).

Under the above authority, venue is clearly not jurisdictional, and it is therefore not a sufficient basis for attacking a final judgment. The Family Court has statewide jurisdiction. *See* S.C. Code Ann. § 14-2-10 (establishing "the statewide family court system").

III. BECAUSE MRS. BROWN HAD NO IMPEDIMENT, HER MARRIAGE TO MR. BROWN IS VALID.

A. The Bigamy Statute.

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.[19] This section reads as follows:

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[19] 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. Sellers*, 140 S.C. 66,134 S.E. 873 (S.C. 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.

> 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.

S.C. Code Ann. § 20-1-80. A void marriage is treated differently from a voidable marriage. A voidable marriage is valid unless and until a court rules that such a marriage is invalid, but a void marriage is never valid for any purpose. *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006), *aff'd*, 379 S.C. 589, 666 S.E.2d 906 (2008), confirms the difference between a void marriage – void ab initio because of bigamy – and a merely voidable marriage – valid unless and until a court invalidates it, such as for intoxication. *Lukich* annulled two marriages: a bigamous marriage, held void ab initio, and a marriage annulled for intoxication, held voidable.

The South Carolina General Assembly demonstrates that it understands the difference between void and voidable. For example, S.C. Code Ann. § 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.

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.

B. Case Precedent.

1. A Bigamous Marriage Is Void Ab Initio And Never A Marriage.

The annulment order in this case was granted on the most serious and substantial of all grounds for rendering a marriage void: bigamy. It is against public policy and a crime to commit bigamy. A long line of South Carolina cases, including *Lukich,* holds that a bigamous marriage is not a marriage at all, at any point in time. In fact, every South Carolina case considering the issue has concluded that a bigamous marriage is void ab initio, and thus never a marriage:

> At the time the parties began residing together in September 1983, and throughout their cohabitation, the respondent was legally married to another woman. Thus, any marriage between the parties while respondent had a subsisting marriage was void as a matter of public policy. S.C. Code Ann. § 20-1-80 (1985) ("All marriages contracted while either of the parties has a former wife or husband living shall be void"). It was void from its inception, not merely voidable, and, therefore, *cannot be ratified or confirmed and thereby made valid*.

Johns, 309 S.C. at 201, 420 S.E.2d at 858 (emphasis added).

> 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.

Day v. Day, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) (emphasis added).

> There could not have been a valid marriage between the appellant, Maggie (Craft) Blizzard, and William Blizzard, as William Blizzard had a lawful living wife at the time of the claimed marriage.

Ex parte Blizzard, 185 S.C. 131, 193 S.E. 633, 634 (1937).

> When, however, there is an impediment to marriage, such as one party's existing marriage to a third person, *no common-law marriage may be formed*, regardless whether mutual assent is present.

Callen v. Callen, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005) (emphasis added). *See also Splawn v. Splawn,* 311 S.C. 423, 425, 429 S.E.2d 805, 806 (1993); 52 Am. Jur. 2d, supra, § 57 ("A marriage that occurs while one patty is still legally married to another is void from its inception and cannot be retroactively validated by estoppel, by mutual agreement, or by the parties' conduct in holding themselves out as husband and wife.").[20] This is hardly surprising as the courts are

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[20] 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

required to follow the mandate from the legislature that bigamous marriages are void ab initio.

2. *Lukich v. Lukich*.

Both the Court of Appeals and Supreme Court decisions in *Lukich v. Lukich*[21] are in accord with § 20-1-80, case precedent, and Mrs. Brown's position. *Lukich* held that a *bigamous* marriage is void ab initio. *Lukich* also held that a marriage, annulled for *intoxication rather than bigamy*, could be treated as voidable.[22]

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had no impediment to their marriage because she had never been married before. Respondents cite several 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 (S.C. 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. App. 2004) (similar, citing *White v. White*, 283 S.C. 348, 323 S.E.2d 521 (S.C. 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).

[21] 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006); 379 S.C. 589, 666 S.E.2d 906 (2008).

[22] "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, *Marital Litigation in South Carolina,* Ch. 3.A. A bigamous marriage is void. In fact, "a void

Lukich annulled two marriages: one void ab initio for bigamy and another voidable for intoxication. In *Lukich,* the wife sought alimony during a divorce from her second husband (Marriage 2). During the divorce proceeding, 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. During the divorce case, the wife quickly obtained an annulment for Marriage 1, without her husband's knowledge and in another venue, on the ground of intoxication.[23] Both appellate courts concluded that Marriage 1 was voidable and refused to apply the annulment of Marriage 1 retroactively so that her status would allow her to enter Marriage 2. Marriage 1 in *Lukich* was properly voidable, rather than void, because the annulment was based on intoxication rather than bigamy. One consequence of the *Lukich* court treating Marriage 2, the bigamous marriage, as void ab initio, is that the husband in Marriage 2 owed no alimony because Marriage 2 was "never a marriage." If *Lukich* had not treated Marriage 2 as void ab initio because it was bigamous, as required by statute and precedent, the Court would have had to conclude that the husband of Marriage 2 would have

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[bigamous] marriage technically needs no judicial action to declare that it is void." *Id.*

[23] The annulment at issue in *Lukich* was granted on the ground of intoxication. *Lukich*, 368 S.C. at 51, 627 S.E.2d at 756 ("[S]he and Havron were married during a night of heavy drinking, [and] had never lived together as husband and wife[.]").

owed alimony from the time of Marriage 2 until the annulment of Marriage 2.[24]

In short, a marriage entered into by intoxicated persons is not invalid until the parties decide to attack the marriage and not to waive the defect. Therefore, it is logical, as the *Lukich* Court held, that a voidable marriage is invalid only prospectively from the date of the annulment.

A void marriage, however, is different. A void marriage is never a valid marriage. The parties are not permitted to waive the defect; the marriage is automatically invalid. Both *Lukich* appellate courts concluded that Marriage 2 was void ab initio because it was bigamous. Consequently, Marriage 2 was never a marriage so that the divorce was unnecessary and the second husband could not owe alimony.

Lukich does not change, but is instead consistent with, S.C. Code Ann. § 20-1-80 and all South Carolina case precedent: a bigamous marriage (Marriage 2 in *Lukich)* is void ab initio and never a marriage. Respondents, in particular Terry Brown, cite the following language from the Supreme Court opinion in

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[24] The holding in *Lukich* as to Marriage 1 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. The annulment of Marriage 1 in *Lukich* was granted on the ground of intoxication. Intoxication is one of the classic grounds that render a marriage voidable, but not void. See 52 Am. Jur. 2d Marriage § 23 (Westlaw database updated Nov. 2014); *Abel v. Waters,* 373 So. 2d 1125, 1128 (Ala. Civ. App.), writ denied, 373 So. 2d 1129 (Ala. 1979); *Barber v. People,* 203 Ill. 543, 546, 68 N.E. 93, 94 (1903).

Lukich as somehow changing the treatment of bigamous marriages in this state:

> Under the statute's terms, Wife's 'marriage' to Husband # 2 was 'void' from the inception since at the time of that marriage she had a living spouse *and that* marriage had not been 'declared void.' § 20-1-80.

Lukich, 373. S.C. at 592, 666 S.E.2d at 907 (Emphasis added).

Respondents contend that *Lukich* creates new law with respect to bigamous marriages. Respondents claim *Lukich* disregards the clear requirement of the bigamy statute and ignores or reverses all case precedent that bigamous marriages are void ab initio. Respondents base their contention on the words "and that" emphasized in the above quote. These words, Respondents argue; indicate that regardless of whether a marriage is void or voidable, one has an impediment to marriage and must obtain an annulment before remarriage. Contrary to Respondents' contention, however, the words "and that" do not refer to the bigamous marriage (Marriage 2 in *Lukich*); the words "and that" clearly refer to the intoxication marriage (Marriage 1 in *Lukich*). Thus, *Lukich* cannot be read to change a substantive rule of law, namely that a bigamous marriage is void only from the date of the annulment order. This would render a bigamous a marriage voidable rather than void. *Lukich* does no such thing. Rather, *Lukich* confirms that a bigamous marriage is void ab initio and never a marriage because it treated Marriage 2 (the bigamous marriage in *Lukich)* as never having been a marriage, so that the

second husband did not need a divorce and did not owe alimony to a wife he never married.

If Respondents were correct that *Lukich* created a new rule, then the *Lukich* court would instead have held that the second husband owed alimony until an annulment order for Marriage 2 was obtained. Moreover, if Respondents are correct, then the *Lukich* appellate courts favorably cite cases holding that bigamous marriages are void ab initio while somehow overturning those cases and ignoring § 20-1-80. The clear meaning of *Lukich* is that, as required by § 20-1-80 and all case precedent, bigamous marriages are void ab initio and never a marriage.

Moreover, even if Respondents were correct in their position about *Lukich,* i.e., that even a bigamous marriage is valid unless and until an annulment order is obtained, they could still not prevail. Under their theory, *Lukich* changed the law about bigamous marriages so that a bigamous marriage remains valid unless and until an order of annulment is obtained. If that were correct, then under their theory Mrs. Brown had an impediment to marrying Mr. Brown and that marriage was therefore bigamous. But under Respondents' position, Mr. Brown's bigamous marriage to Mrs. Brown would be valid unless and until Mr. Brown obtained an order annulling their marriage, which he did not obtain during his lifetime. It is now too late for Mr. Brown to obtain an annulment.[25] So, even under Respondents' theory, the marriage between

[25] See the discussion at IV.C. below.

Mrs. Brown and Mr. Brown was valid at his death and cannot be invalidated because it is too late.

In this case, unlike *Lukich*, it is the first marriage (Marriage 1), rather than Marriage 2 in *Lukich*, that is bigamous and thus void. Consequently, Mrs. Brown's attempted marriage to Ahmed (Marriage 1) was void ab initio and never a marriage. Therefore Mrs. Brown had no impediment to her marriage to Mr. Brown, and that marriage (Marriage 2) is valid.

Despite the contentions of Respondents, *Lukich* is consistent with the bigamy statute and all precedent involving bigamous marriages: bigamous marriages are void ab initio and never have any effect --- they are "never a marriage." The only difference with respect to bigamous marriages between *Lukich* and this case is that, in *Lukich*, the bigamous marri

age was the second marriage, while in this case, the bigamous marriage is the first marriage. That difference has no impact on the treatment of bigamous marriages. The bigamous second marriage in *Lukich* was void ab initio and never had effect. The bigamous first marriage in this case was void ab initio and never had effect, so that Mrs. Brown had no impediment to her marriage to Mr. Brown.

Were this Court to give only prospective effect to the annulment in this case, it would be holding that a bigamous marriage was not invalid from its inception. Rather, it would be holding that a bigamous marriage was valid from the date of its inception until the date of the annulment.

This Court is unwilling to hold that a bigamous marriage, as determined by a family court of this state, was ever legal. There is no precedent for such a holding. South Carolina law precludes this Court from giving any effect whatsoever to a bigamous marriage. Because the Court cannot give any effect to a bigamous marriage, it is required to hold that the bigamous marriage was never a marriage.

Mrs. Brown and Ahmed never had a valid marriage at any point in time, and Mrs. Brown had no impediment to her valid marriage to Mr. Brown.

3. *Hallums v. Hallums.*

The LSA argued that *Hallums v. Hallums,* 74 S.C. 407, 54 S.E. 613 (S.C. 1906), was exactly on point and reached a different result. The LSA misses a critical factual distinction between *Hallums* and the current case: in *Hallums,* there was never a court determination that the first marriage (Marriage 1) was bigamous and, in fact, the court found that the Marriage 1 was not bigamous. By contrast, in the current case, there is a valid annulment order finding that the first marriage was bigamous.

The Hallums paradigm actually supports Mrs. Brown's position. If the *Hallums* court had determined that Marriage 1 was bigamous, then the *Hallums* opinion indicates that the second marriage (Marriage 2) would have been valid because there would have been no impediment to the wife entering into the second marriage (Marriage 2) with the decedent.

More specifically, in *Hallums,* a woman attempted to get a distributive share from the decedent's estate,

claiming to be his surviving spouse. However, the estate contended that she was already married when she attempted to marry the decedent, and thus had an impediment to the attempted marriage to the decedent. The woman then contended that her attempted first marriage was invalid because her putative first husband was already married when they attempted to get married. So far, the LSA is correct: absent the critical distinction missed by the LSA's analysis, the *Hallums* paradigm is the same as the paradigm in the current case because in *Hallums,* the woman argues that she had no impediment to marrying the decedent (Marriage 2) because she was never married to her first husband (Marriage 1) as the first husband himself was already married.

In the current case, Mrs. Brown argues that she had no impediment to marrying the decedent (Marriage 2) because she was never married to her first husband (Marriage 1) as the first husband himself was already married. The *critical* difference between the two cases is that in *Hallums*, the woman *did not* have a separate annulment order invalidating Marriage 1 void ab initio and did not get one because the court concluded her first marriage was not bigamous. In the current case, Mrs. Brown *does* have an annulment order invalidating Marriage 1. In *Hallums*, the court was asked to consider the validity of both Marriage 1 and Marriage 2 at the same time. The *Hallums* court determined that Marriage 1 was valid because there was insufficient evidence that the husband in Marriage 1 was already married: consequently, Marriage 1 in *Hallums was not bigamous* and therefore was valid. Thus, the woman in *Hallums* had an impediment to Marriage 2. That is the

critical factual difference between the facts in *Hallums* and the current case. In the current case, Marriage 1 was determined by a court to be bigamous and thus never valid. In the current case, Mrs. Brown thus had no impediment to Marriage 2 (her valid marriage to Mr. Brown).

Hallums actually supports Mrs. Brown's position. *Hallums* stands for the proposition that, *if* Marriage 1 had been bigamous and thus void ab initio, Marriage 2 to the decedent would have been valid and the woman would be entitled to her distributive share from the decedent's estate. That is exactly Mrs. Brown's position. Because she has an order confirming that Marriage 1 was void ab initio as bigamous, Marriage 2 is valid and she qualifes as a surviving spouse.[26]

4. All Bigamous Marriages Are Void.

Every bigamous marriage is void ab initio. A bigamous marriage is never valid – "never a marriage." In S.C. Code Ann. § 20-1-80, the bigamy statute, the South Carolina General Assembly requires that a bigamous marriage is void ab initio. In accordance with this legislative mandate, every South Carolina case dealing with bigamous marriages, including *Lukich*

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[26] Unlike this case, the court in *Hallums* looked at the first marriage after the decedent's death because: (1) there was no pre-existing annulment order from a court with exclusive jurisdiction over annulments, as there is today; (2) this was prior to the family court having exclusive jurisdiction over annulments – in fact, this was prior to the existence of family courts in South Carolina; (3) this was prior to § 62-2-802 defining surviving spouse for estate purposes and case law precluding postmortem annulments. See IV.C below.

and *Hallums*, holds that a bigamous marriage is void ab initio and never has effect. Although Respondents contend that *Lukich* somehow changes that rule and instead provides that a bigamous marriage is valid until an annulment order is obtained, that is not the holding in *Lukich* as to bigamous marriages. *In Lukich, it is the second marriage that is bigamous* and both appellate courts treat that second marriage as void ab initio, in accordance with the bigamy statute and all case precedent. *In Mrs. Brown's case, it is the first marriage that is bigamous*, and that first marriage is therefore void ab initio, meaning that Mrs. Brown had no impediment to her marriage to Mr. Brown.

Despite the contention of the LSA, *Hallums* is in accord with the bigamy statute, *Lukich*, and all other case precedent in treating bigamous marriages as void ab initio. Unlike Mrs. Brown's first marriage, which was *found to be bigamous and void,* the first marriage in *Hallums* was *found not to be bigamous and was therefore valid.* However, if the first marriage in *Hallums* had been found to be bigamous and void, the opinion indicates that the second marriage would have consequently been valid because the wife would have had no impediment to her second marriage and thus could inherit. That is exactly Mrs. Brown's case: her first marriage has been found to be bigamous and void, so that she had no impediment to her marriage to Mr. Brown: their marriage is valid and she is his surviving spouse.

IV. THE ANNULMENT ORDER IS FINAL AND BINDING.

A. Introduction.

Because the bigamy statute and case law, including *Lukich*, hold that a bigamous marriage is void ab initio, the annulment order confirms that Mrs. Brown had no impediment to her marriage to Mr. Brown.

Respondents contend that the annulment order is not valid and that this Court should refuse to recognize the annulment order or alternatively disregard the findings of fact of the annulment order. For a number of reasons, this Court concludes that the annulment order is final and binding. Nor will this Court re-open or re-litigate the underlying findings of fact of the annulment order, which in this case would have the same effect as disregarding the annulment order. All of these reasons are explained in greater detail below at IV.B-G, but generally the reasons are as follows:

First, only the family court has jurisdiction over annulments. This Court does not have jurisdiction over annulments. If this Court failed to recognize the annulment order as valid, then the result would be to re-litigate the annulment in this Court. If this Court does not have jurisdiction to hear an annulment action, it does not have jurisdiction to re-litigate an annulment action. Nor can this Court re-open or review the findings of fact underlying the annulment order. Even if this court had jurisdiction to do so, doing so would lead to only two possible results: (1) this Court's determination that the family court was correct or (2) that the family court reached an incorrect

conclusion. This, presumably, would mean that the annulment order, which was not appealed, is rendered invalid by this Court. This Court simply does not have such jurisdiction.

Second, even if this Court had jurisdiction to not recognize or to re-litigate the annulment order, the appropriate parties would not be available. Mrs. Brown and Ahmed would be the necessary parties, and Ahmed is not a party to this action nor should he be. If this Court allowed Ahmed to participate as a party in the re-litigation of the order, this would allow him to collaterally attack a family court order he cannot now directly attack. The only way to invalidate a marriage in South Carolina is to bring an annulment action. Mr. Brown obviously knew that because he brought an annulment action, which he eventually dismissed. Annulment actions cannot be brought postmortem. Nor can Respondents do so. Any right they may have is derived from Mr. Brown, and they cannot have greater rights than he did.

Third, a court has to have a reason to refuse to recognize an order, and the only reason is the failure of due process, either by failure to obtain personal jurisdiction or a lack of subject matter jurisdiction. Even if this Court had jurisdiction concerning the annulment order, it finds that there is no defect in personal jurisdiction –i.e., the service was proper – and the family court had subject matter jurisdiction. There is no failure of due process and so there is no reason to refuse to recognize the order.

Fourth, even if this Court had jurisdiction, the issue of the finality of the annulment order – i.e., whether it

is binding on those not parties to the action – in this case applies only to Mr. Brown because, as noted, Respondents at best stand in his shoes. The Respondents concede that an annulment is an in rem action, and in rem actions are binding on non-parties as to status. Even if Mr. Brown was not precluded by the reasons stated above, and for other reasons, he would be bound by the status determination of an in rem action. The status determination of the annulment order was that Mrs. Brown was never married to Ahmed and thus her status at the time of her marriage to Mr. Brown was that she had no impediment to that marriage. Mrs. Brown's status is the only relevant issue here.

Finally, to disregard or relitigate the annulment order would create a chaotic precedent. No marital determination of status – validation of marriage, invalidation of marriage (annulment) or termination of marriage (divorce) – would ever be final and binding. Families are critically affected by the status of family court actions and their status determinations must be sacrosanct. To allow any third party to attack a status determination would permit endless litigation over family matters and continuing uncertainty over such critical relationship matters as paternity and legitimacy, as well as a person's ability to enter into valid marriages. Some examples of unacceptable problems which would result in this case are as follows:

1. Mr. Brown brought and dismissed an annulment action attacking his marriage to Mrs. Brown. This Court takes judicial notice that Mr. Brown did not thereafter attempt to

file an action in court to invalidate their marriage, which he obviously knew how to do if he wished. Mr. Brown did not annul his marriage to Mrs. Brown before his death, but Respondents now wish to do so.

2. The annulment order legitimizes James Brown II. Because the annulment action confirmed that Mrs. Brown had no impediment to her marriage to Mr. Brown, their marriage makes James II, born before the marriage, legitimate. Effectively overturing the annulment order would render James II illegitimate, affecting critical rights of his.

3. If Ahmed is not a party to relitigation of the annulment order, an overturning or disregard of that order could impact his family status. According to the sworn affidavit of Daryl Brown's attorney in this matter, David Bell, Ahmed has known for at least six years that his marriage to Mrs. Brown was annulled. This Court takes judicial notice that Mr. Ahmed has taken no judicial action to attack the annulment order. Relying on the validity of the annulment order, Ahmed may have married subsequently and had children: if the annulment order is overturned, then his marriage would be invalidated and his children rendered illegitimate.

B. This Court Lacks Subject Matter Jurisdiction To Relitigate Or Disregard The Annulment Order.

Respondents would have this Court relitigate or disregard the annulment order issued by the family court. However, this Court does not have jurisdiction over annulments. *Only* the family court has jurisdiction over actions for annulments. S.C. Code Ann. § 63-3-530(A)(6)[27] provides that the family court has *exclusive* jurisdiction over annulments.

The only way for Mr. Brown to have invalidated his marriage to Mrs. Brown would have been through an annulment of their ceremonial marriage. "Annulments are actions to establish the invalidity of marriages." See Stuckey, *Marital Litigation,* Ch. 3.A. Mr. Brown obviously understood that an annulment action is the method to seek an invalidation of a marriage because he brought an action to annul his marriage to Mrs. Brown. As discussed above, Mr. Brown dismissed that action through a consent order. It is now too late for Mr. Brown, or anyone acting for or through him, to bring an annulment action to invalidate his marriage to Mrs. Brown. See the discussion at IV.C below.

Consequently, if this Court lacks subject matter jurisdiction over annulments, it cannot relitigate or disregard the family court annulment order. Redetermining the underlying facts of the annulment order would be engaging in an annulment action, which this Court lacks jurisdiction to do.

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[27] Formerly S.C. Code § 20-7-140.

Having this Court relitigate or disregard an existing valid family court order would create a precedent resulting in chaos.[28] If a third party is allowed to attack an order of annulment or divorce obtained during a decedent's lifetime, relationships relied on by the decedent during his lifetime and taken to his grave could be undone, and great damage would be done to the public policy of stability of marriage.

S.C. Code Ann. § 63-3-530(A)(6) grants the family court exclusive jurisdiction over annulments. To allow the Respondents to challenge Mrs. Brown's annulment from Ahmed in this Comt would subvert the exclusive authority granted to the family court by the South Carolina General Assembly.[29] According to the plain language of the statute, the General Assembly granted exclusive jurisdiction over annulments to the family court.[30] In so doing, the General Assembly prohibited all other courts from going behind the family court's annulment orders.

Lukich fits this statutory scheme because it involved an appeal from the family court, which had jurisdiction over annulments. *Lukich* did not allow an

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[28] *See, e.g., Neely*, discussed below.

[29] "The canon of construction '*expressio unius est exclusio alterius*' or *'inclusio unius est exclusio alterius'* holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' Black's Law Dictionary 602 (7th ed. 1999)." Hodges v. Rainey, 533 S.E.2d 578, 582, 341 S.C. 79, 86 (2000).

[30] In S.C. Code § 63-3-530(A)(6), the Legislature says that "[t]he Family Court has exclusive jurisdiction...to hear and determine actions for annulment of marriage".

annulment order to be challenged in a court outside of the family court. Unlike Mr. Lukich, Mr. Brown withdrew his family court action for annulment during his lifetime. The legislative scheme did not give Mr. Brown the ability to challenge the annulment order outside of the family court during his lifetime, and his heirs likewise cannot go behind a family court order in this Court.

C. Even If This Court Had Jurisdiction, A Postmortem Annulment Action Is Not Possible.

The issue before this Court on summary judgment is whether Mrs. Brown is the surviving spouse of Mr. Brown. South Carolina Probate Code § 62-2-802 is the statute governing the determination of surviving spouse qualification. Section 62-2-802 specifically addresses annulment in this context. It provides that a surviving spouse is someone from whom the decedent did not get a divorce or an annulment:

> **Section 62-2-802. Effect of divorce, annulment, decree of separate maintenance, or order terminating marital property rights.**
> (a) 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.

Section 62-2-802(c) requires that any divorce decree or annulment be signed by the court and filed in the office of the clerk of court. It is too late for Mr. Brown, or those acting for or through him, to bring such an annulment action. In *Hatchell-Freeman v. Freeman,* 340 S.C. 552, 532 S.E.2d 299 (Ct. App. 2000), the Court of Appeals, addressing S.C. Code § 62-2-802, held that a divorce decree was invalid when it was filed three days after the husband's death, although his death occurred more than a week after the final divorce hearing. In *Bayne v. Bass,* 302 S.C. 208, 394 S.E.2d 726 (Ct App. 1990), the wife committed suicide after the trial judge orally granted her request for divorce but before he signed a divorce decree. The judge signed the decree two days after she died but vacated it on motion by the husband's counsel. The Court of Appeals held that the order granting the divorce was void and that the court properly vacated its own order. Mr. Brown neither divorced nor had his marriage to Mrs. Brown annulled during his lifetime. Therefore, under the Probate Code Mrs. Brown was still his wife at the time of Mr. Brown's death, and she is his surviving spouse.

Respondents – in privity with Mr. Brown and deriving any rights they have through him – are attempting to do after his death what he chose not to do in life. The exclusive method to invalidate a marriage is to bring an annulment action in the Family Court. Mr. Brown obviously knew that because he brought an annulment action in the Family Court,

which he dismissed.[31] Again, this Court has no jurisdiction over annulment actions, but even if it did, it is too late for Mr. Brown to collaterally attack an annulment order. Annulment actions cannot be brought postmortem. Nor can Respondents do so.

D. Even If This Court Had Jurisdiction Over Annulments And Did Not Lack Necessary Parties; There Is No Reason To Disregard The Annulment Order.

A court has to have a reason to refuse to recognize an order, and the only reason is the failure of due process, either by failure to obtain personal jurisdiction or a lack of subject matter jurisdiction. *Yarbrough v. Collins,* 293 S.C. 290, 360 S.E.2d 300 (S.C. 1987) ("A judgment may be collaterally attacked if the court lacked jurisdiction and the lack of jurisdiction appears on the face of the record. *Turner v. Malone,* 24 S.C. 398 (1886)."); *Miles v. Lee,* 319 S.C. 271, 460 S.E.2d 423 (S.C. App. 1995) (similar); *Henry v. Cottingham,* 253 S.C. 286, 170 S.E.2d 387 (S.C. 1969) ("The decree of a Probate Court admitting a will to probate is final and conclusive if not reversed by the appellate court, or set aside and revoked by direct proceeding, and cannot be questioned collaterally. *Weinberg v. Weinberg,* 208 S.C. 157, 37 S.E.2d 507; *Reed v. Lemacks,* 204 S.C. 26, S.E.2d 441; Davis v. Davis, 204 S.C. 26, 28 S.E.2d 441." . . . . "*In Wilkinson v. Wilkinson,* 178 S.C. 194, 182. S.E. 640, this court said: 'As a proceeding to probate a will

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[31] Notably, even in Mr. Brown's short-lived annulment action, he did not attack the annulment order but rather insisted that it was binding on Mrs. Brown.

is a judicial one, a judgment or decree admitting a will to probate stands on the same footing as a judgment of any other Court of competent jurisdiction; and while it is not conclusive in the sense that a person having a requisite interest may not attack it by a direct proceeding within the period of time allowed by statute, without a statute conferring the right to contest, the order admitting the will to probate would be final on all parties.'") *McCampbell v. Warrich Corporation,* 109 F.2d 115 (7th Cir. 1940) (a collateral attack "is not permissible if the court had jurisdiction over the parties and the subject matter."); *Burlington Data Processing, Inc. v. Automated Medical Systems, Inc., Clinical Management Systems, Inc., and William Carlson,* 492 F.Supp. 821 (D. Vermont 1980) ("A final, valid judgment, though erroneous, is not subject to collateral attack unless it can be shown that the court rendering it was without jurisdiction. *See Midissa Television Co. v. Motion Pictures for Televisions, Inc.,* 290 F.2d 203 (5th Cir. 1961), *cert. denied* 368 U.S. 827, 82 S.Ct. 47, 7 L.Ed.2d 30 (1961). *Anderson v. Tucker,* 68 F.R.D. 461 (D.Conn.1975). *1B J. Moore, Federal Practice,* s .407."); *Popp Telcom v. Americal Sharecom, Inc.,* 210 F.3d 928 (8th Cir. 2000) ("When a judgment is alleged to be simply erroneous or attacked on the basis of anomalies unrelated to the court's jurisdiction, collateral attack is not an option."). *See also* Fouche v. Royal Indemnity Company, 217 S.C. 147, 60 S.E.2d 73 (S.C. 1950) ("The probate court of Orangeburg County which rendered the judgment in this case is a court of record, and had full jurisdiction over the administration proceedings. It has been held in many cases in this state that a judgment is not open to successful collateral attack unless void on its face, or

upon an inspection of the judgment roll. This principle seems to be self evident, and the authority of adjudged cases support it."...."As heretofore stated, the record in the probate court of Orangeburg County does not affirmatively disclose that the court was without jurisdiction of these appellants, hence their collateral attack on the judgment cannot succeed, and the order of discharge is binding upon them.")

Even if this Court had jurisdiction concerning the annulment order, it finds that there is no defect in personal jurisdiction –i.e., the service was proper – and the family court had subject matter jurisdiction. There is no failure of due process and so there is no reason to refuse to recognize the order.

E. The Annulment Order Is Binding On All Parties.

The annulment order is binding on all parties. South Carolina provides:

> 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 [sic] to any person who shall be divorced or whose first marriage shall be declared void by the sentence of a competent court.

S.C. Code Ann. § 20-1-80.

The validity of the attempted marriage between Mrs. Brown and Ahmed has already been addressed by

the South Carolina court with jurisdiction. That court issued a final judgment invalidating the attempted marriage between Mrs. Brown and Ahmed, on the ground of bigamy. This annulment order is binding on Mr. Brown, and consequently is binding on Respondents.

In addition to *Lukich v. Lukich,* other South Carolina case law confirms this rule. In *Joye v. Yon,* 345 S.C. 264, 547 S.E.2d 888 (Ct. App. 2001), a husband and wife were divorced, and the husband was ordered to pay alimony. Some years later, the wife remarried. Six months later, her remarriage was annulled for bigamy, as the second husband had never divorced his prior wife. The first husband refused to resume paying alimony after the annulment, and the wife filed a contempt action to enforce the original decree. The husband then argued that the wife's remarriage, bigamous though it may have been, still terminated his ability to pay support.

The court of appeals resolved the main issue in the case by holding that a bigamous remarriage, which is void ab initio, does not terminate a prior spousal support obligation. The husband then argued in the alternative that the wife's remarriage could not be treated as bigamous *against him,* as he was not a party to the annulment action in which the remarriage was declared void. This is the same argument that Respondents make in the present case. But the court of appeals rejected this argument. It held directly that the annulment was binding upon the first husband even though he was not a party to the action:

> Yon also argues the court erred in reinstating his alimony obligation because he was not a party to Joye's annulment action. He asserts that he should have been made a party to the annulment action because its outcome directly affected him. We disagree.
>
> Generally, a person must be joined as a party to an action if his absence precludes complete relief among those already parties or his interest in the subject matter is so intertwined that he would not receive complete relief or resolution without his participation. Rule 19(a), SCRCP; see *First Citizens Bank & Trust Co. v. Strable,* 292 S.C. 146, 148,355 S.E.2d 278,279 (Ct. App.1987).
>
> Since Yon had no standing to challenge the granting of the annulment, it was not necessary for Joye to include him as a party to the action. Moreover, Yon suffered no prejudice by not being made a party to the action. Under South Carolina law, Joye's marriage to Vance was void ab initio and Yon's presence as a party to the action could not have altered the decision to grant the annulment.

Id. at 276, 547 S.E.2d at 894 (emphasis added). For exactly the same reasons, Respondents have no standing to question the invalidation of Mrs. Brown's previous attempted marriage to Ahmed because of Ahmed's bigamy.[32] That order can be questioned only

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[32] A leading authority on family law supports this South Carolina rule. "[A]nnulment decrees are binding upon nonparties as well as

in a direct attack by those who were party to it, and only if that direct attack was timely and properly brought. Just as the first husband in *Joye* was bound by the annulment of the marriage between the wife and her second husband, so is the estate of Mr. Brown bound by the order invalidating ab initio the attempted marriage between Mrs. Brown and Ahmed.

In *Joye v. Yon,* 355 S.C. 452, 586 S.E.2d 131 (2003), the Supreme Court necessarily agreed with the court of appeals regarding the husband's standing to attack the annulment. The Court of Appeals was reversed as to the *effect* of the annulment upon the prior support obligation, and not as to the *existence* or *validity* of the annulment.[33]

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parties respecting the validity of the marriages involved." 1 Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 3.6 (2d ed. 1987). Professor Clark recognizes that this issue highlights the tension between the opportunity to be heard, on the one side, and the need for finality on the other. Although he recognizes that the rights of third persons may be affected by whether or not a marriage exists, he concludes: "No matter how clearly these [third-party] rights may depend on the existence of a marriage, they are not of the same degree of importance, seriousness or consequence as the interests of the spouses themselves in the marriage. It is perhaps this factor that has led to the well-established rule that a decree of divorce is conclusive on third parties with respect to the termination of the marriage. It is the writer's view that a decree of annulment should have the same effect."

[33] The effect of the final and binding Family Court order invalidating the attempted marriage between Mrs. Brown and Ahmed is that the Brown-Brown marriage is valid, per the *Lukich* case, as discussed below.

The result reached in *Joye* is further consistent with S.C. Code § 20-1-520, which provides that third parties were generally bound by a court's determination that a marriage is valid:

> When the validity of a marriage shall be denied or doubted by either of the parties, the other may institute a suit for affirming the marriage and, upon due proof of the validity thereof, it shall be decreed to be valid and *such decree shall be conclusive upon all persons concerned.*

S.C. Code Ann. § 20-1-520 (emphasis added).[34]

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[34] If third parties were able to contest family court orders, the order would never be final and chaos in family relations would ensue. *See Neely v. Thomasson,* 365 S.C. 345, 618 S.E.2d 884 (2005). As to precedent regarding finality, the Court of Appeals in *Neely* cited cases as follows:

> Adickes v. Allison & Bratton, 21 S.C. 245, 259 (1884) (alteration and emphasis added) (quoting Freeman Judgments § 12), cited with approval in *Mid-State Distribs., Inc. v. Cenlwy Importers, Inc.,* 310 S.C 330, 335, 426 S.E.2d 777, 780 (1993). A decree of divorce is generally a final judgment of the court. Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996); cf. Corbin v. Kohler Co., 351 S.C. 613. 621, 571 S.E.2d 92, 97 (Ct. App. 2002) ("The final written order contains the binding instructions which are to be followed by the parties.")... See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238; 241, 489 S.E.2d 470, 472 (1997) *(holding an unappealed ruling is the law of the case and cannot be later challenged).*

Neely v. Thomasson, 355 S.C. 521, 536, 586 S.E.2d 141, 144 (Ct. App. 2003) (emphasis added).

An annulment action and an action to validate a marriage, as described in § 20-1-520, are symmetrical: one brings an action to validate a marriage to confirm a marriage's validity while one brings an annulment action to conform a marriage's invalidity. See Stuckey, *Marital Litigation in South Carolina,* Ch. 3-A. Thus, because "all persons concerned" are bound by a court determination that a marriage is valid, "all persons concerned" are likewise bound by a court's finding that a marriage is invalid. If third parties were able to contest final family court orders, the order would never be final and chaos in family relations would ensue.

Other states have held that annulments cannot be collaterally attacked by those who are not parties to the action. See, e.g., *Johnson County National Bank & Trust Co. v. Bach,* 189 Kan. 291, 369 P.2d 231 (1962) (certain beneficiaries made exactly the same argument that Respondents make–that the annulment was not binding on third parties – and the Kansas Supreme Court agreed with the wife that the annulment was dispositive and that it could not be questioned by third parties).

Just as the annulment decree in *Bach* was conclusive on the validity of the alleged marriage in that case, so is the annulment in this case likewise dispositive. The annulment can be attacked only in a prior direct attack filed by the parties to the action–Mrs. Brown and Ahmed.

A New York court stated the fundamental principle of law that underlies South Carolina's position:

> It is ancient law that a judgment in rem is res judicata to all the world with regard to the res or status that is determined therein. In a matrimonial action the condition of marriage or non-marriage is involved. An essential issue is, therefore, one of status–or, put another way, there is a marital res subject to in rem jurisdiction. As a consequence, in ordinary circumstances *a judgment determining marital status is binding on the whole world, and it is not confined in effect to the immediate parties to the action in which the judgment determining status was rendered.*

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 (1911) ("So far as the adjudication fixes the status of the parties, the judgment concludes both parties and strangers[.]").

The *Restatement (Second) of Judgments* states the rule as follows:

> *A status determination is ordinarily binding on non-parties* because it effects a transformation of the legal status of the person involved which others have no legal authority to challenge. In this respect it is similar to status changes that parties are free to make without adjudicative proceedings, such as entry into marriage,

> renunciation of citizenship, or voluntary surrender of one's property to a conservator or trustee.

Restatement (Second) § 31 cmt. *f* (emphasis added); *see also id.* § 31 cmt. *a* ("Proceedings for the determination of status include divorce and annulment actions[.]").

The annulment order involves Mrs. Brown's status, and this status cannot be collaterally attacked by any third party. Because Mrs. Brown's putative marriage to Ahmed was void ab initio for bigamy, Mrs. Brown's status at the time of her marriage to Mr. Brown was that she had no impediment to that marriage.

Therefore, the Respondents have no legal authority to challenge the Family Court Order of annulment.

F. The Family Court Order Is Binding On Respondents Who Are in Privity with Mr. Brown.

Respondents are bound by the Family Court order. Heirs are in privity with their ancestors. *Thompson v. Hudgens,* 161 S.C. 450, 463, 159 S.E. 807, 812 (1931). Consequently, heirs are barred from asserting claims that their ancestors would have been barred from asserting. *Watson v. Watson,* 172 S.C. 362,369-71, 174 S.E. 33, 36 (1934). In *Watson,* the decedent was barred from attacking a divorce; the Court held that those in privity with him, such as his children, were likewise barred. These rulings are obvious because heirs and devisees of a decedent cannot acquire any greater rights through the decedent than the decedent had himself. Similarly, a personal representative's relationship with the decedent exemplifies the classic

case of privity with the decedent. It would be illogical for a personal representative, representing the decedent, or Respondents, claiming through the decedent, to have greater rights than the decedent had himself.

More generally, "[t]he term 'privity' when applied to a judgment or decree; means one so identified in interest with another that he represents the same legal right." *H.G. Hall Constr. Co. v. J.E.P. Enters.,* 283 S.C. 196, 204, 321 S.E.2d 267, 271 (Ct. App. 1984). *Carolina Baking Co. v. Geilfuss,* 169 S.C. 348, 168 S.E. 849, 852 (1933), held that a judgment is binding upon nonparties who "sought, consented to, or acquiesced in" the judgment. *Id.* To similar effect is *Tillman v. Tillman,* 93 S.C. 281, 76 S.E. 559 (1912). There, a father executed a deed giving custody of his children to his parents. A custody action then followed between the father's parents and the mother, in which the mother prevailed. The court held that the father was bound by the judgment:

> It is true that [the father] was not a formal party to that proceeding, but he submitted an affidavit therein making no claim on his own behalf, but insisting on the claim of his father and mother, to whom he had solemnly conveyed all his rights of custody. *It is clear that by this action he became bound by the decree rendered in the former proceeding.*

Id. (emphasis added). By supporting his parents in the custody case, therefore, the father became bound by the result.

In *Neely v. Thomasson,* 365 S.C. 345, 618 S.E.2d 884 (2005), the decedent was divorced from his wife during his lifetime, and the divorce decree held that a daughter was born during the marriage. After the decedent's death, the decedent's heirs argued that they were not parties to the divorce case, that they were not bound by the court's decision, and that the daughter was actually not the child of the decedent. The South Carolina Supreme Court held that the decedent was bound by the judgment, and that the heirs were likewise bound:

> Because the issue of paternity was raised and ruled upon in a prior action, Decedent, if alive, would have been barred from challenging paternity at a later date. *See Eichman,* 285 S.C. at 380, 329 S.E.2d at 766. As a result, Decedent's heirs are likewise barred from asserting claims that Decedent himself would have been barred from asserting. *See Watson,* 172 S.C. at 370-71, 174 S.E. at 36. Moreover, we find that it would be unjust to allow Decedent's siblings to assert a claim that Decedent himself never chose to assert during his lifetime. In fact, there is no evidence in the record that Decedent took any steps whatsoever during his lifetime to disclaim Nancy as his daughter. To the contrary, Decedent acknowledged, on more than one occasion, that Nancy was his child. Therefore, we hold that Decedent's siblings should not have

> been permitted to challenge the prior paternity determination.

Id at 354-55, 618 S.E.2d at 889 (emphasis added). The stipulated facts show that Mr. Brown supported the annulment litigation by paying Mrs. Brown's legal fees. After signing the Consent Order of Dismissal concerning his own annulment action, Mr. Brown never again sought to annul his marriage to Mrs. Brown. As such, the Respondents, in privity with Mr. Brown, are bound by the Family Court's order.

G. Binding Effect Of In Rem Judgments.

1. General Rule.

The LSA and other Respondents argue that this Court is not bound by the factual findings set forth in the judgment annulling Mrs. Brown's marriage to Ahmed. The Court respectfully disagrees.

The LSA expressly cites section 73 of the Restatement (First) of Judgments. That section applies on its face only to "Proceedings with Respect to Property." This case is governed by section 74, which applies to "Proceedings with Respect to Status." The validity of the marriage between Mrs. Brown and Ahmed is a matter of status, not a matter of property. There is no question that a judgment annulling a marriage is a judgment in rem.

Section 74 of the Restatement provides:

> (1) In a proceeding in rem with respect to a status the judgment is conclusive upon all persons as to the existence of the status.

> (2) 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.

Restatement § 74.

2. Section 74(1).

The above language states two competing rules. The first rule provides that an in rem judgment is binding upon "all persons" when the issue is the existence of the status. The drafters elaborate:

> *Effect of judgment on the status.* Where in a proceeding for the creation or termination or judicial determination of a status a competent court has after proper notice given a valid and final judgment, the judgment is binding on all persons in the world as to the existence of the status. The judgment is not subject to collateral attack by anyone. . . .*As far as the status is concerned, the judgment is binding not only on persons who were subject to the jurisdiction of the court which rendered the judgment, but also on persons not personally subject to the jurisdiction of the court.*

Restatement§ 74 cmt. *a.* As regards the existence of the status itself, therefore, a judgment of annulment binds everyone, including persons not parties to the action or otherwise not subject to personal jurisdiction.

Mrs. Brown provides compelling authority in support of section 74(1). "*[A]nnulment decrees are binding upon non-parties* as well as parties respecting the validity of the marriages involved." 1 Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 3.6 (2d ed. 1987) (emphasis added). Professor Clark continues:

> No matter how clearly these [third-party] rights may depend on the existence of a marriage, they are not of the same degree of importance, seriousness or consequence as the interests of the spouses themselves in the marriage. It is perhaps this factor that has led to the well-established rule that a decree of divorce is conclusive on third parties with respect to the termination of the marriage. It is the writer's view that a decree of annulment should have the same effect.

Id.

Clark's rule has been followed in South Carolina. *See Joye v. Yon,* discussed above.

The holding of a New York decision is squarely on point:

> 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. In a matrimonial action the condition of marriage or non-marriage is involved. An essential issue is, therefore, one of status–or, put another way, there is a marital res subject to in rem jurisdiction. As a consequence, in ordinary

> circumstances *a judgment determining marital status is binding on the whole world,* and it is not confined in effect to the immediate parties to the action in which the judgment determining status was rendered.

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).

In *Johnson County Nat. Bank & Trust Co. v. Bach,* 189 Kan. 291, 369 P.2d 231 (1962) and *Michelli v. Michelli,* 527 So.2d 359, 361 (La. Ct. App. 1988), courts directly held that annulments were binding upon third parties. These decisions did not draw any distinction between the facts and the law. They held, consistently with § 74(1) of the first Restatement, that in rem judgments of status bind all parties on the issue of status itself.

Another similar case is *Headen v. Pope & Talbot, Inc.,* 252 F.2d 739, 744 (3d Cir. 1958), where the court, dealing with South Carolina facts, expressly acknowledged the exception of § 74(2), but held that the case was controlled by the general rule of § 74(1). An in rem judgment of status binds the world on the question of status itself. Third parties are not bound only as to questions collateral to status. As to status, and necessarily the facts determining status, all parties are bound. *See also Bair v. Bair,* 91 Idaho 30, 31, 415 P.2d 673, 674 (1966) (denying decedent's heirs' attempt to attack a divorce decree obtained by decedent's widow and stating that the heirs "as strangers to the divorce decree, have no right to attack its validity. To hold otherwise could cause chaos and uncertainty in the

lives of thousands of persons" and that "[o]nce a divorce decree is final, it should not be disturbed by strangers who had no preexisting rights or interests adversely affected by such judgment); *Brown v. United States*, 196 F.2d 777, 777-78 (D.C. Cir. 1952) ("Appellant was a stranger to the divorce proceedings. She had no interest in the same; no right or standing to qualify as a party to the proceedings and oppose a divorce").

The rule was applied to an annulment in *Deyette v. Deyette,* 92 Vt. 305, 104 A. 232 (1918). That case was a Vermont divorce action. The wife had been previously married, but the marriage had been annulled in New York on grounds that the parties were underage. The husband attempted to collaterally attack the judgment on grounds that the wife and her first husband were not actually underage, but the court held that he lacked standing. 104 A. at 234.

The Court further finds that the rule of section 74(1) is good policy. If annulment judgments are not binding upon third parties, then there would be no such thing as a final judgment of annulment. Persons whose marriages are annulled would never have any security, because the judgment would always be subject to collateral attack by persons not parties to the original action. For example, if a woman's first marriage is dissolved by annulment, and she then marries again, the facts of the annulment would not be binding on third parties. She would be required to prove the merits of her annulment every time the validity of her second marriage becomes a contested issue. That would happen not only in her divorce action after the second marriage, but also when she takes title to property

with her second husband or files a joint federal or state income tax return. The LSA's argument boils down to an assertion that a decree of annulment is itself a nullity if the facts are contested.

There are strong reasons why annulments should be binding upon all third parties on issues of status–that is, as to the invalidity of the marriage annulled. The Court finds that on the issue of status, the judgment annulling Mrs. Brown's marriage to Ahmed is binding on all third persons, regardless of whether they were parties to the proceedings. Specifically, on the issue of status, the judgment is binding on Mr. Brown and his heirs.

3. Section 74(2).

The LSA recognizes the rule of section 74(1), but argues that this case is controlled by another rule. The LSA at points cites section 73 for this rule, but section 73 applies only to property judgments and not to status judgments. But the LSA also cites section 74(2), and as noted above, that section clearly does apply to status judgments.

The LSA argues under section 74(2) that the annulment does not bind James Brown on issues of fact. The LSA misconstrues section 74(2). That subsection again 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.

Restatement § 74(2) (emphasis added). The LSA construes this section to hold that an in rem judgment does not bind anyone on questions of fact. This position sweeps too broadly.

The Restatement provides, in section 74(1), that judgments of annulment are binding on all third parties *as to the existence of the status itself*. But if a judgment is binding on the issue of status, both its findings and its conclusions are necessarily binding. Indeed the LSA and Respondents claim that they are not disputing Mrs. Brown's status. It is nonsensical to say that a person is bound only by a court's conclusions, and not by the factual findings that lead inevitably to those conclusions. If the factual findings are not binding, then the court in a future action is free to find different facts and reach a different result, and nothing is binding at all.

The LSA's position uses section 74(2) to functionally destroy section 74(1). The Court rejects that position. The Court holds that where the issue is the existence (or necessarily, the nonexistence) of a status itself, an in rem judgment regarding status binds all third parties. It is binding not only as to its conclusions, but also as to its factual findings.

This result is completely consistent with section 74(2). The key phrase in that section is highlighted in the quotation above. A judgment does not "bind anyone personally" unless the court has jurisdiction over him. That is, a judgment in rem cannot have the binding

effect of a judgment in personam unless the court has personal jurisdiction over the defendant. But a judgment that cannot be binding in personam can still be binding in rem. The status change itself is clearly an in rem action, so as regards the issue of status itself, the judgment binds anyone. But as to issues *other than status,* which may require in personam jurisdiction, the judgment is not binding.

Comment *b* to section 74 sheds considerable light upon the relationship between section 74(1) and (2). That comment states:

> *Personal liabilities.* Although a valid judgment in rem is binding on all the world as to the existence of a status which is the subject of the action, it will not bind anyone personally over whom the court does not have jurisdiction. The court cannot impose a personal liability upon a person who is not subject to the power of the court. *The question of the power of the court to impose a personal liability in a proceeding in rem to affect a status arises most frequently in a suit for divorce with respect to a judgment for alimony.*

Id. § 74 cmt. *b* (emphasis added).

The emphasized last sentence gives a direct example of the distinction between section 74(1) and (2). The drafters had in mind the well-known rule that a divorce binds everyone as to the validity of the divorce itself (and necessarily the grounds of the divorce). But when the issue is not the existence of a status, but rather personal liability for alimony, the

judgment does not even bind the named defendant unless the court had personal jurisdiction over him. *See Estin v. Estin,* 334 U.S. 541, 548-49 (1948); *Kreiger v. Kreiger,* 334 U.S. 555 (1948) (companion case to *Estin* reaching the same result); *Vanderbilt v. Vanderbilt,* 354 U.S. 416 (1957).

Section 74(2), therefore, is aimed only at issues other than the status change itself. Section 74(2) says that on issues collateral to status, the judgment is binding only on persons who appear, and over whom the court has jurisdiction. Likewise, factual findings in a status change judgment cannot be binding on issues other than status, because those issues require personal jurisdiction and not merely in rem jurisdiction.

This rule makes perfect sense. In rem jurisdiction allows the court to adjudicate only the question of status. The status here is Mrs. Brown's marital or non-marital status when she married Mr. Brown. If the order is binding, her status was unmarried. It cannot be used as a jurisdictional piggyback to allow the court to decide issues other than the question of status, which are not properly a basis for in rem jurisdiction. The effect of section 74(2) is that in rem judgments bind third parties only as to issues that are proper subjects for in rem jurisdiction, such as status. An in rem judgment cannot be used to bind third parties on an issue that is not subject to personal jurisdiction.

But the LSA seeks to give a broader effect to section 74(2). The LSA argues under section 74(2) that the factual findings in an in rem judgment do not bind third parties on the central issue of the status change

itself. That is going too far. If the factual findings do not bind third parties on issues of status, the third parties are necessarily not bound by the entire judgment, and section 74(1) is pointless. If section 74(1) is to have any effect at all, an in rem judgment must be functionally binding on all issues regarding the status change itself. The judgment is not functionally binding unless both its factual findings and its conclusions are binding. To say that the latter is binding, but the former is not, is to reject the entire premise of section 74(1).

The Court therefore holds that the annulment order in this case binds all third parties on the question of status itself. Third parties are bound on status issues by both the judgment's factual findings and its conclusion. On issues other than the status change itself, however, the annulment does not bind third parties unless they were subject to the personal jurisdiction of the court.

The cases cited by the LSA are consistent with this discussion. For example, in *Gratiot County State Bank v. Johnson,* 249 U.S. 246 (1919), the Supreme Court held:

> The [bankruptcy] adjudication is, for the purpose of administering the debtor's property, that is, in its legislative effect, conclusive upon all the world. Compare *Shawham v. Wherritt,* 7 How. 627, 643, 12 L. Ed. 847. So far as is [sic] declares the status of the debtor, even strangers to the decree may not attack it collaterally. *Michaels v. Post,* 21 Wall. 398, 428, 22 L. Ed. 520; *New Lamp Chimney Co. v. Ansonia Brass & Copper*

> *Co.,* 91 U. S. 656, 661, 662, 23 L. Ed. 336. Compare *Hebert v. Crawford,* 228 U. S. 204, 208, 209, 33 Sup. Ct. 484, 57 L. Ed. 800. But an adjudication in bankruptcy, like other judgments in rem, is not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto.

Id. at 248.

The LSA cites the last sentence and argues that the Court held that the factual findings in the bankruptcy case were not binding anywhere. But the Supreme Court expressly held, in the first two sentences, that the bankruptcy judgment was "conclusive upon all the world," *id.,* as regards the issue of status. If the factual findings in the bankruptcy judgment were not likewise binding against the world, *on the issue of status,* then the Court's third sentence completely destroyed its first two sentences. That was not the Court's intent. *Gratiot County* recognizes the same two competing rules as section 74(1) and (2). It simply held on the facts that the issue in the later action was not one of status.

In *Hunter v. Hunter,* 111 Cal. 261, 43 P. 756 (1896), the issue was the effect of a divorce judgment. The court held that the judgment "was conclusive against all the world that the plaintiff in that suit was no longer the wife of Joseph Milam, and it was an adjudication of nothing else." *Id.* at 265, 43 P. at 757. Likewise, the present annulment is conclusive against all the world that Mrs. Brown was never validly married to Ahmed.

In *Becher v. Contoure Laboratories,* 279 U.S. 388 (1929), the first case was a state court action to declare a party trustee of a patent, while the second case was a federal court action for patent infringement. The Supreme Court very emphatically pointed out that these were different cases, presenting different issues. Whether the patent was placed in a trust said nothing about whether the patent was infringed. *Becher* therefore involved a collateral right, not a direct question of status.

In *Hendrick v. Biggar,* 209 N. Y. 440, 442, 103 N.E. 763, 764 (1913), the issue was whether a judgment in a divorce case finding that a spouse committed adultery was binding in a later action for alienation of affections. The issue in the alienation of affections case was not the validity of the divorce; it was whether the defendant had alienated the affections of a spouse. The second action was therefore a question collateral to status, on which personal jurisdiction was required.

Fromm v. Glueck, 161 Misc. 502, 293 N.Y.S. 530 (Sup. Ct. 1937), involved an in rem judgment from another state. The case involved jurisdictional issues not present here, where both the former and present actions arise in South Carolina. The court also recognized that the judgment was binding on direct questions of status. "[I]t must be conceded that, even though personal jurisdiction of the defendant had not been obtained, the Court of Chancery had the full power to decree the foreclosure of the mortgage and the sale of the property." *Id.* at 504, 293 N.Y.S. at 533.

Finally, *In re Rowe's Estate,* 172 Or. 293, 141 P.2d 832 (1943), is distinguishable on several grounds. To

begin with, the case involved a decree of divorce, not a decree of annulment. The issue was whether a finding of desertion in the divorce decree conclusively established lack of access for the purpose of paternity. The fact at issue was therefore again not the status of marriage itself, but rather a fact collateral to status. The court expressly held that the divorce was binding on issues of status. "[T]he decree in a divorce suit as a decree in rem binds the whole world as to the status of the parties, to the extent that their status is the res adjudicated[.]" *Id*. at 302, 141 P.2d at 836.

In short, all of the cases cited by the LSA recognize the same basic two rules stated in section 74(1) and (2). An in rem judgment binds the world on the direct question of status. It does not bind any nonparty on collateral issues, which are not subject to in rem jurisdiction, and which require that the court have personal jurisdiction over the defendant. The textbook example, cited expressly in the *Restatement* comments, is alimony in a divorce case.

Having stated the competing rules of section 74(1) and (2), the Court must now decide which of those two competing rules applies here. The issue presented here is whether Mrs. Brown is Mr. Brown's surviving spouse. Mrs. Brown has presented a valid marriage certificate, placing upon the Respondents the burden of proving that her most recent marriage is invalid. They seek to defeat Mrs. Brown's claim by proving that her marriage to Mr. Brown was bigamous. But it is bigamous only if Mrs. Brown had a valid marriage to someone else at the time she married Mr. Brown. To prove that Mrs. Brown's marriage to Mr. Brown was

bigamous, the Respondents must prove that Mrs. Brown's marriage to Ahmed was valid.

The issue here is therefore directly one of status: Was Mrs. Brown's marriage to Ahmed valid? The judgment of annulment held that it was not. The Respondents argue that the judgment of annulment was wrong. If the judgment of annulment was wrong, it would obviously affect Mrs. Brown's status. The entire issue turns upon whether the annulment judgment correctly held that Mrs. Brown's status had been that of a single person all along, because her marriage to Ahmed was void from its inception.

Because the central issue in this case is the effect of the annulment judgment upon Mrs. Brown's status, this case falls squarely under section 74(1). Section 74(2) states that the factual findings in an in rem judgment are not binding, but only on issues other than the status change itself, which turn upon jurisdiction in personam and not upon jurisdiction in rem. *Section 74(2) cannot be used to attack the factual findings of an in rem judgment on the question of status itself.* To permit that is to allow section 74(2) to completely destroy section 74(1). Regarding the issue of status itself, the judgment annulling Mrs. Brown's marriage to Ahmed is binding upon all third parties, including Mr. Brown and his heirs.

The LSA and most, if not all, of the Respondents agreed in their arguments before the Court that Mrs. Brown's marriage to Ahmed was legally annulled. They stated that they were not questioning her status. They agreed that the annulment order is binding "on all the world." Their disagreement is on the facts underlying

the annulment. However, this Court cannot separate the judgment from the facts. If Mrs. Brown's marriage to Ahmed was annulled, it was annulled on the grounds set forth in the Order. It could not be annulled for no reason. The factual findings are binding on direct questions of status, although, arguably, factual findings on collateral matters are not binding.

To that end, the Respondents have cited no case holding that the factual findings of an annulment or divorce are not binding when the issue being raised in the second action is the direct question of status itself, and not a collateral issue. For the foregoing reasons, the Family Court Order of annulment is binding on the Respondents.

V. CONCLUSION.

This Court finds that the conclusion it has reached is not unfair or inequitable to Mr. Brown or the estate. Mr. Brown was well aware of Mrs. Brown's annulment action. He paid Mrs. Brown's legal fees. He was copied on pleadings. He sought to have the findings of fact set forth in the annulment order adopted in his own later annulment case. It has long been settled that a person who accepts the benefits of even a void order is estopped to question its validity. *Edwards v. Edwards,* 254 S.C. 466; 176 S.E.2d 123 (1970) ("Since [husband] proposed the transfer of the property and has accepted the benefits accruing to him therefrom, he is now estopped to assert the invalidity of the judgment."); *Scheper v. Scheper,* 125 S.C. 89, 118 S.E. 178 (1923) ("Even where one who did not procure it accepts the benefits of a void judgment, he is estopped to assert its invalidity.").

Mr. Brown knew he could pursue an annulment from Mrs. Brown as he initiated such an action himself. If he wanted to annul his marriage, he could have proceeded with the action he commenced. But he decided not to proceed with it. As he never obtained an annulment during his lifetime, his marriage was never annulled and he was married to Mrs. Brown at the time of his death, certainly for the purposes of surviving spouse pursuant to S.C. Code Ann. § 62-2-802, which required him to take action. Further, in this case, Mr. Brown affirmatively sought to benefit specifically from the Findings of Fact in the annulment order. These are the very Findings of Fact the LSA now wants this Court to ignore. He alleged in his own short-lived annulment action that the "Findings of Facts of the Charleston Family Courts" were binding.[35]

Therefore, it is hereby ORDERED, DECREED and ADJUDGED that Tommie Rae Brown is the surviving spouse of James Joseph Brown. The Family Court's April 15, 2004 Final Order is binding on James Joseph Brown and his heirs and must be respected by this Court.

It is further ORDERED, DECREED and ADJUDGED that the Petitioner Tommie Rae Brown's Motion for Summary Judgment on her status as James Joseph Brown's wife and surviving spouse is granted, and the Limited Special Administrator's Motion for Summary Judgment is denied.

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[35] Joint Stipulation of Facts at 000070, ¶ 10 (Mr. Brown's Amended Complaint for Annulment).

It is further ORDERED, DECREED and ADJUDGED that all other issues, including the validity of the prenuptial agreement between Tommie Rae Brown and James Joseph Brown are reserved for a future determination.

This 13 day of January 2015, at Aiken, South Carolina.

/s/ Doyet A. Early, III
DOYET A. EARLY, III
JUDGE, SECOND JUDICIAL CIRCUIT

APPENDIX E

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE FAMILY COURT
SECOND JUDICIAL CIRCUIT

CASE NUMBER: 04-DR-02-157

[Filed: August 16, 2004]

JAMES JOE BROWN, JR., Plaintiff	)
vs.	)
TOMMIE RAE HYNE AHMED BROWN, Defendant.	)

CONSENT ORDER OF DISMISSAL

HEARING DATE:	July 22, 2004
PRESIDING JUDGE:	Peter R. Nuessle
ATTORNEY FOR PLAINTIFF:	James B. Huff
ATTORNEY FOR DEFENDANT:	Robert N. Rosen
COURT REPORTER:	Lisa Hicklin

This matter was scheduled to come before the Court for a Temporary Hearing on the above listed date. Prior to the hearing the parties informed the Court that they

had reached an Agreement in this matter. The Agreement is as follows:

1. The parties hereby dismiss their respective pleadings without prejudice to either party.

2. Plaintiff will pay the sum of $12,000.00 to Defendant for her attorney fees and costs in this matter. This will be paid within 10 days of the filing of this order.

3. Defendant agrees to and does hereby forever waive any claim of a common law marriage to the Plaintiff, both now and in the future.

4. The parties agree to seal the courts file in this matter.

Based upon the review of the court's file I make the following Findings of Fact:

1. The Agreement is fair and reasonable to both parties and should be approved by the Court.

2. The Court has considered the factors enunciated in SCRCP 41.1. I find that sealing the Courts file in this matter is proper. Both parties are entertainers. The parties have mutually consented to having the case dismissed without being litigated. The parties have resolved their differences and are currently residing together. As such, the parties are entitled to retain their privacy as to the documents that have been filed with the Court. The parties mutual request and consent to seal the Courts file is in the best interest of both parties, will avoid disclosure of the parties private financial matters, avoid harm to any minor child

involved with this case and causes no prejudice to either party or to any public interest with this case.

Based upon these Findings of Fact, I make the following Conclusions of Law:

1. That the parties and subject matter are properly before and subject to the jurisdiction of this Court.

Based upon the Findings of Fact and Conclusions of Law, it is hereby ORDERED:

a. That the agreement of the parties is approved by this Court.

b. The Courts' file shall be sealed and not opened to anyone without further court order of this court allowing such disclosure.

AND IT IS SO ORDERED:

/s/ Peter Nuessle
Honorable Peter R. Nuessle
Family Court Judge
Second Judicial Circuit

Aiken, South Carolina

This 14 day of Aug., 2004

I SO CONSENT:

/s/ James Huff
James B. Huff, Esq.
Attorney for Plaintiff

I SO CONSENT:

/s/ Robert Rosen
Robert N. Rosen, Esq.
Attorney for Defendant

APPENDIX F

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE FAMILY COURT
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 03-DR-10-4609

[Filed: April 15, 2004]

TOMMIE RAE HYNIE, a/k/a TOMMIE RAE BROWN,	)
Plaintiff,	)
-vs-	)
JAVED AHMED,	)
Defendant.	)

FINAL ORDER

HEARING DATE: **April 15, 2004**

JUDGE: **Honorable F. P. Segars-Andrews**

ATTORNEY FOR PLAINTIFF: **Robert N. Rosen, Esquire**
Donald B. Clark, Esquire

ATTORNEY FOR DEFENDANT: **N/A**

COURT REPORTER:

This matter comes before the Court for a final hearing on April 15, 2004.

Present before the Court were the Plaintiff, Tommie Rae Brown, and her counsel Robert N. Rosen, Esquire, of the Rosen Law Firm, and Donald B. Clark, Esquire, of the Donald B. Clark Law Firm.

This matter was commenced by the filing of a Summons and Complaint by the Plaintiff to annul her marriage to the Defendant, Javed Ahmed.

The Plaintiff is a citizen and resident of the State of South Carolina and has resided in South Carolina for more than one year prior to the commencement of this action.

The Defendant, at the time of the marriage of the parties, was a resident of the State of Texas, and his last known address was in Houston, Texas. After the filing of the Summons and Complaint, the Defendant could not be located. The Plaintiff retained the services of a private investigator who attempted to locate the Defendant at his last known address. The Plaintiff testified that the last known address she had for the Defendant was 14403 Ella Boulevard, #314 in Houston, Texas. The private investigator found that the

Defendant's Texas driver's license listed his address as 14365 Cornerstone Drive, #617, Houston, Texas.

This Court issued an Order of Publication on February 3, 2004. This Court found that the Plaintiff made a diligent effort to locate the Defendant, and it appeared to the satisfaction of the Court that the current address or whereabouts of the Defendant were unknown although his last known address was in Houston, Texas. The Court therefore ordered service could be had by publication pursuant to §15-9-710 and §15-9-740, SC Code Ann., and that the Summons would be published once a week for a total of three weeks in the *Houston Chronicle,* a newspaper of general circulation in the area of Houston, Texas.

An Affidavit of Publication signed by the Supervisor/Accounts Receivable of the *Houston Chronicle* was filed with this Court. The Court finds that the Defendant has been properly served by publication pursuant to South Carolina law.

This matter was originally set to be heard on March 26, 2004, but the case was continued by Order of the Court. The Defendant was given written notice of the hearing by regular mail and by certified mail, return receipt requested as appears from the affidavit of Marcia F. Jones. The Defendant was therefore properly notified of the final hearing pursuant to Rule 17 of the South Carolina Rules of Family Court.

FINDINGS OF FACT

The Court finds as follows:

1. Plaintiff is a citizen and resident of the State of South Carolina and has resided in the State of South Carolina for a period in excess of one year prior to the commencement of this action.

2. Plaintiff married Defendant, Javed Ahmed, on February 17, 1997 in Harris County, Texas. Thereafter Defendant refused to live with Plaintiff. Plaintiff never saw nor heard from Defendant again. Plaintiff never lived with the Defendant. The parties never lived together as husband and wife. The parties never engaged in sexual intercourse, sexual conduct or sexual activity of any kind and, therefore, failed to consummate their marriage.

3. No children were born of this marriage between the parties.

4. Plaintiff testified that she later learned that Defendant, a Pakistani immigrant, wanted to marry Plaintiff so that he could become a United States citizen. Plaintiff also later learned that Defendant had three or more wives to whom he was married under Pakistani law when the parties married on February 17, 1997.

5. The Court finds there has been no contact between the parties since shortly after February 17, 1997, and therefore there is no collusion between these parties.

6. The marriage between the Plaintiff and the Defendant was contracted by Plaintiff in good faith and without any knowledge of the Defendant's previous marriages or fraudulent intentions.

7. The Court finds that the Plaintiff is entitled to an annulment for the following reasons: (1) Defendant was already married to another woman or other women and therefore did not have the capacity to marry the Plaintiff; (2) Defendant perpetrated a fraud upon the Plaintiff in that she intended in good faith to marry Defendant but Defendant had no intention of marrying her and consummating a marriage; and (3) the parties did not consummate their marriage nor did they live together as husband and wife.

8. This Court finds that the Plaintiff is therefore entitled to an annulment of her marriage to Defendant, Javed Ahmed.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to hear and determine actions to determine the validity of marriages and to hear and determine actions for the annulment of marriage. §20-7-420(5) and (6), SC Code Ann.

2. This Court has jurisdiction to grant an annulment to the Plaintiff as she is domiciled in this state. Foster v. Nordman, 137 S.E.2d 600 (1964).

3. The Court concludes that the uncontradicted testimony shows that Plaintiff never cohabitated with the Defendant and never engaged in sexual intercourse with him and therefore, the marriage can be annulled as it was never consummated.

4. The Court concludes that Defendant was married at the time he entered into his marriage with Plaintiff and therefore he lacked the capacity to marry Plaintiff.

5. The Court concludes that Defendant represented to Plaintiff that he wished to marry her, but in fact he married her for a fraudulent purpose in an effort to obtain United States citizenship. A marriage which is procured by fraudulent means may be annulled in this state. Jaker v. Jaker, 102 S. E. 337 (1919).

6. The Court concludes that it has jurisdiction of the subject matter and of the parties.

7. The Court concludes that it has jurisdiction of the Defendant for the purposes of this proceeding and that the Defendant had been properly served and notified of this hearing. It is therefore,

ORDERED, ADJUDGED AND DECREED that the Plaintiff is entitled to an order and judgment annulling the marriage between the Plaintiff and the Defendant solemnized on February 17, 1997. It is further

ORDERED, ADJUDGED AND DECREED that the marriage between Tommy Rae Hynie a/k/a Tommie Rae Brown and Javed Ahmed is annulled. It is further,

ORDERED, ADJUDGED AND DECREED that the marriage between Plaintiff and Defendant be, and is hereby, declared to be wholly null and void ab initio, and the parties are, and each of them is, freed from the obligations of such marriage.

AND IT IS SO ORDERED!

/s/ Segars Andrews
F.P. SEGARS-ANDREWS

JUDGE OF THE FAMILY COURT
NINTH JUDICIAL CIRCUIT

Charleston, South Carolina
April 15, 2004

APPENDIX G

The Supreme Court of South Carolina

Appellate Case No. 2018-001990

[Filed: August 24, 2020]

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, Defendants,	)

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

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked

or disregarded. Accordingly, the petition for rehearing is denied.

/s/_____ C.J.

/s/_____ J.

/s/_____ J.

/s/_____ J.

Few, J., not participating

Columbia, South Carolina
August 24, 2020

cc: Robert N. Rosen, Esquire
S. Alan Medlin, Esquire
Thomas Heyward Carter, Jr., Esquire
Andrew W. Chandler, Esquire
M. Jean Lee, Esquire
David Lawrence Michel, Esquire
Arnold S. Goodstein, Esquire
Robert C. Byrd, Esquire
Marc Toberoff, Esquire
Alyson Smith Podris, Esquire
Katon Edwards Dawson, Jr., Esquire
Gerald Malloy, Esquire
Daryl J. Brown
Michael Deon Brown
Terry Brown

APPENDIX H

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)

[Filed: July 1, 2020]

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

Tommie Rae Brown,
Respondent,

v.

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

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

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

* * * * *

[pp. 16]

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

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

The Court mistakenly, however, fails to apply its own new rule to the Brown-Ahmed marriage. Applying the Court's own rule to the Brown-Ahmed marriage would mean that Mrs. Brown was never married to

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

If the Court is going to apply a new "record-clearing" rule, it must be applied to every attempted marriage in which one person was already married without having "cleared the record." The Court mistakenly failed to do so for the Brown-Ahmed marriage and thus discriminated against Mrs. Brown (as well as Mr. Brown who intended to be married to Mrs. Brown). The Court cannot pick and choose which marriage to apply the new record-clearing rule; the rule must apply uniformly, not disparately just to obtain a certain result in a certain case.

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

As a corollary to the discussion in Part V. above, the Court mistakenly applied its new record-clearing rule analysis to Mrs. Brown and not Mr. Brown. In effect, the Court ruled that Mrs. Brown was married to

Ahmed until she obtained an annulment – "cleared the record" – even though she was innocently entering into a marriage with someone (Ahmed) already married. However, the Court mistakenly failed to apply that same rule to Mr. Brown. If it had applied the same analysis to him, Mr. Brown would be married to Mrs. Brown – who according to the Court was already married – until he obtained an annulment and cleared the record. He never obtained an annulment,[20] so according to the Court's own analysis, Mr. Brown was married to Mrs. Brown at the time of his death.

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

Although the Court misapprehends case precedent and legislative intent in its new construction of the language of Section 20-1-80, as well as the chaos its new construction will create, the Court mistakenly applied its analysis of Section 20-1-80 only to the Brown-Brown marriage and not to the Brown-Ahmed marriage. The Opinion mistakenly treats language in the second sentence of Section 20-1-80 – "But this section shall not extend to a person whose husband or wife shall be absent for the space of five years, the one not knowing the other to be living during that time, not [sic] to any person who shall be divorced or whose first marriage shall be declared void by the sentence of a

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

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

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

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

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

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[22] "Since there was no marriage under the plain terms of the statute when the ceremony between Wife and Husband #2 was performed in 1985, there was nothing to be "revived" by the annulment order [from Husband #1] in 2003."

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

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

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

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

> It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial

> marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia,* 388 U.S. 1, 12, 87 S. Ct. 1817, 1824, 18 L. Ed. 2d 1010 (1967). *Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833, 847-48 (1992).
>
> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia,* 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska,* 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); to use contraception, *ibid.; Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); to bodily integrity, *Rochin v. California,* 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), and to abortion, *Casey, supra.*

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

The South Carolina appellate Courts have not had occasion to consider whether a similar liberty interest exists under the South Carolina State constitution. But

language essentially identical to the Fourteenth Amendment is contained in S.C. Const. art. I, Sec. 3. The only South Carolina case to cite *Lawrence* expressly recognized a constitutional right to freedom of choice in sexual matters:

> [I]n terms of due process and equal protection the "right to privacy" has come to mean a right to engage in certain highly personal activities. More specifically, it currently relates to certain rights of freedom of choice in marital, *sexual,* and reproductive matters . . . . Ronald D. Rotunda & John E. Nowak, 3 Treatise on Constitutional Law: Substance and Procedure § 18.26 (3d ed.) (1999); *see also, e.g., Griswold v. Connecticut,* 381 U.S. 479, 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (recognizing a "right of privacy" in marriage stemming from the "zone of privacy created by several fundamental constitutional guarantees"); *Roe v. Wade,* 410 U.S. 113, 153, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (holding that right of privacy in matters concerning procreation and family "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (invalidating ordinance that barred certain family living arrangements); *Lawrence v. Texas, 539 U.S. 558, 123* S. *Ct. 2472, 156 L. Ed. 2d 508 (2003) (holding that a statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the "right of*

> *privacy" guaranteed by the Due Process Clause of the Fourteenth Amendment).*

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

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

Here, Mrs. Brown and her husband Mr. Brown by a ceremonial marriage agreed to formally confirm that their marriage was legal by way of an annulment of her prior invalid marriage, which Mr. Brown paid for and was kept apprised of. Mr. Brown never obtained an annulment of his marriage to Mrs. Brown. Mrs. Brown had the right to rely on her due process right to have a court declare the status of her marriage for all purposes. That fundamental constitutional right was taken from her by the Court's opinion. The State has no compelling interest in depriving Mrs. Brown of Due Process by adopting rules retroactively which substantially impact her and the beneficiaries of her husband's Charitable Trust.

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

This Court stated in *Stone*:

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

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

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

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

* * * * *

[pp. 29]

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

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

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

The majority's discussion of in rem judgments and collateral estoppel, which the concurrence presumably believes is unnecessary given the Court's creation of the record-clearing rule for bigamous marriages, is internally inconsistent. The in rem judgment/collateral estoppel discussion is unnecessary, but for a different reason: Petitioners do not have standing under South Carolina law to attack the annulment action, as discussed in Part III above, regardless of general issues of in rem judgments and collateral estoppel. Moreover, in his annulment action, Mr. Brown adopted and

accepted the findings of fact from the Brown-Ahmed annulment order. Standing at best in his shoes, Petitioners cannot be allowed to take an action contrary to Mr. Brown: he accepted the facts that the majority now allows Petitioners to attack.[35]

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

The majority distinguishes the effect of an in rem judgment as to status – which it recognizes is binding on the world – and as to underlying facts, which the majority concludes is fair game for anyone not a party to the in rem judgment to attack. In so doing, the majority mistakenly fails to recognize that, as to the issue of the validity of a marriage and its impact on the validity of future marriages, the status of the parties to the in rem judgment is all that matters.[36] In Mrs. Brown's case, her status as to whether she was married or not before she married Mr. Brown is what matters, and all that matters. Despite Petitioners' lack of standing,[37] the Court allows Petitioners to attack the underlying facts, but, as this Court and Petitioners readily agree, status is not subject to attack. Thus, regardless of how Petitioners might attack the underlying facts, it is the status – which is not subject to attack – that is all that matters in this case: was Mrs. Brown married or not at the time she married Mr.

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

[36] *See* Respondent's brief pp. 21-30.

[37] *See* Part III above.

Brown? The family court in this case determined, and ordered, that her status was unmarried due to bigamy on Ahmed's behalf.[38] Again, most people are divorced in South Carolina in uncontested or default proceedings, yet their decrees are valid as against all the world. When a litigant divorces on the ground of adultery or physical cruelty that decree and factual basis cannot be attacked later. This opinion opens the floodgates of litigation.

Another significant problem with the Court allowing Petitioners to attack the underlying facts of an annulment action, to which their father could not be a party[39] (or anyone other than Mrs. Brown and Ahmed for that matter), is that Mrs. Brown or any future party to an annulment action cannot with confidence ever marry again. For example, assume Mrs. Brown marries next month. Ten years later, she and her new husband decide to divorce, but the new husband does not want to pay alimony, so he contests the validity of the Ahmed annulment which, after all, he can do because he was not a party to the annulment action. The result of the Opinion is that Mrs. Brown cannot now enter into a legally binding marriage with certainty – a decision which clearly results in a denial of her Due Process rights under the United States Constitution. The same would apply to Mr. Brown if he had obtained his annulment from Mrs. Brown and then decided to marry someone else. The record-clearing rule would thus punish innocent parties to a bigamous marriage:

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[38] ROA pp. 295-296.

[39] *See* discussion at Part III above.

Mrs. Brown in the Ahmed-Brown marriage, and in the resulting situation from the Opinion, Mr. Brown in the Brown-Brown marriage, had he survived.

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

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

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

of facts[41] that appear to be designed to undermine Mrs. Brown's testimony in the family court, yet this Court does not – and does not have the subject matter jurisdiction to – invalidate the family court order as to status. Nor are those facts properly before the Court.[42] The summary judgment for Mrs. Brown in the trial

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

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

court and affirmed by the Court of Appeals, holding that she is the surviving spouse, was based on the law and stipulated facts; the stipulated facts do not include the facts referred to in footnote 41 herein. The Opinion of this Court does not expressly override findings of fact. Nor does this Court have the subject matter jurisdiction to override those findings of fact.[43] So the Opinion's discussion of these facts appears to prejudice Mrs. Brown, but has no substantive impact on the decision. The Court fails to mention facts in the record that support Mrs. Brown, such as Mr. Brown's autobiography – published after the consent dismissal of his annulment action – and Mrs. Brown's belief that she had gotten the Brown-Ahmed marriage annulled before she married Mr. Brown,[44] not to mention Mr. Brown's own allegations in the Aiken County Family Court in his later-filed annulment action in Aiken County against Mrs. Brown and said that "the Findings of Facts of the Charleston Family Courts are binding on [the Aiken County Family] Court" (ROA VOL. I, p. 258 at ¶ 19, p. 334) and that "[Mrs. Brown] is collaterally and judicially estopped from denying the allegations in this action." (ROA VOL. I, p. 334 at ¶ 11). Mr. Brown clearly accepted the benefits of the Charleston County Family Court Order when he utilized the Order to advance his own position in the Aiken County action. This is the essence of estoppel.

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

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

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

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

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

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

S.E.2d 341 (1984); *Stone v. Thompson,* 428 S.C. 79, 833 S.E.2d 266 (S.C. 2019).

XIII. Conclusion

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

Not one piece of evidence in the record or cited by this Court indicates or even implies that he did not think he was married to Mrs. Brown when he died. The Opinion decimates the Charitable Trust that this Court recognized he wanted when he died and diverts extremely valuable federal termination rights proceeds from that Charitable Trust to Petitioners, who were beneficiaries of only some personal property in his will.

Although the federal termination rights operate by federal law, his treatment of his children in his will – executed before his marriage to Mrs. Brown – indicates that he did not want them to benefit significantly, and certainly evidences that he did not want them becoming even wealthier at the expense of needy children who would take under the Charitable Trust.

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

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

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APPENDIX I

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)

[Filed: March 28, 2019]

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.)
)

RESPONDENT'S BRIEF

* * * * *

[pp. 26]

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.

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[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).

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[pp. 36]

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).

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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.*

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[pp. 39]

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.

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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.

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[pp. 45]

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March 27, 2019

APPENDIX J

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)

[Filed: March 4, 2019]

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)
Petitioners)
_____)

PETITIONERS' BRIEF

* * * * *

[pp. 15]

There is no dispute that South Carolina recognizes annulment orders as *in rem* orders. *Carnie v. Carnie,* 252 S.C. 471, 475, 167 S.E.2d 297, 299 (1969); 4 S.C. Jur. *Action§* 5. The U.S. Supreme Court has made clear that while the ultimate disposition of the res subject to an *in rem* order is binding on all the world, the factual findings and legal conclusions contained in an *in rem* order are not: "Establishing a fact and giving a specific effect to it by judgment are quite distinct. A judgment *in rem* binds all the world, but the facts on which it necessarily proceeds are not established against all the world". *Becher v. Contoure Labs,* 279 U.S. 388, 391, 49 S.Ct. 356, 357, 73 L. Ed. 752 (1929); *see also Gratiot County State Bank v. Johnson,* 249 U.S. 246, 39 S.Ct. 263, 63 L.Ed. 587 (1919) ("[J]udgments in rem [are] not res judicata as to the facts or [] the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto.").

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[pp. 23]

Appellants were strangers to Respondent's limited family court action and never had any opportunity to contest Respondent's unsupported claim that her Marriage 1 was supposedly bigamous. The erroneous application of the collateral estoppel doctrine below must be reversed as it deprived Appellants of their fundamental right to due process.

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[pp. 47]

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