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IN THE SUPREME COURT OF IOWA
Supreme Court No. 21-0455

U.S. BANK NATIONAL ASSOCIATION
Plaintiff-Appellee

vs.

JEFFREY S. BITTNER, trustee of the Joan Y. Bittner Marital Trust and Individually,
Defendant-Appellee

Appeal from the Iowa District Court in and for Scott County
The Honorable Tom Reidel Case No. CVCV300445

FINAL BRIEF OF APPELLANT-DEFENDANT JEFF BITTNER

Jeffrey S. Bittner AT0000931
201 West 2nd Street Suite 1000
Davenport, Iowa 52801
Tel. 563-579-7071
Fax 563-328-3352
E-mail jbittner@jbittnerlaw.com

ATTORNEY FOR DEFENDANT-APPELLANT JEFFREY S. BITTNER

PROOF OF SERVICE

The undersigned attorney hereby certifies that on September 8, 2021, I electronically filed the foregoing Defendant-Appellant, Jeffrey Bittner's Final (Original) Brief with the Clerk of the Supreme Court of Iowa using the EDMS system which will send notification of such filing to the following attorneys of recored.

Lynn Hartman
Nicholas Peterson
Simmons Perrrine
115 3rd Street SE Suite 1200
Cedar Rapids, IA 52401

Timothy Krumm
Danica Bird
Meardon, Sueppel & Downer
122 S. Linn St.
Iowa City, IA 52240

CERTIFICATE OF FILING

The undersigned attorney further certifies that the foregoing Defendant-Appellant's Final (Original) Brief was filed with the Supreme Court of Iowa by using the EDMS system on this 8th day of Sept. 2021.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly determined that the decedent's IRA beneficiary designation clearly and unambiguously designates the decedent's spouse as 100% owner of his IRA.

- *Burlington Indus. Inc. v. Dayco Corp.* , 849 F.2d 1418, 1421–22 (Fed. Cir. 1988).

- *Charleston Area Med. Ctr., Inc. v. United States*, 940 F.3d 1362, 1370 (Fed. Cir. 2019).

- *Colwell v. MCNA Ins. Co.* Case No. 20-0545 Decided June 11, 2021 (Iowa 2021) at p. 7.

- *Estate of Pearson v. Interstate Power*, 700 N.W. 2d 333, 343 (Iowa 2005).

- *EEOC v. Gilbarco, Inc*., 615 F.2d 985, 999 & n.23 (4th Cir. 1980).

- *Harvey Construction Co. v. Parmele*, 113 N.W. 2d 760, 765 (Iowa 1962).

- *Iowa Fuel & Minerals v. Bd. of Regents*, 471 NW 2d 859, 863 (Iowa 1991).

- *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1017 (9th Cir. 2017).

- *Kerndt v. Rolling Hills Nat. Bank*, 558 N.W. 2d 410, 416 (Iowa 1997).

- *Low v. Young, Mullarky & Long*, 158 Iowa 15,15 138 N.W. 828, 829 (Iowa 1912).

- *Med. Coll. of Wis. Affiliated Hosps., Inc. v. United States*, 854 F.3d 930, 933 (7th Cir. 2017).

- *Mopper v. Circle Key Life Ins. Co.*, 172 N.W.2d 118, 126 (Iowa 1969).

- *Small v. Ogden*, 259 Iowa 1126, 1131, 147 N.W.2d 18, 21 (Iowa 1966).

- *Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75, 78 (Iowa 1997).

- *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004).

- *Stream v. Grow*, No. 0-094/09-1011 (Iowa App. 4/21/2010) (Iowa App. 2010), 2010 Iowa App. LEXIX 310 *15.

- 17A C.J.S. Contracts § 325.

- 26 CFR 1.409(a)(9)-4 Q & A-5.

2. Whether the District Court correctly determined that decedent's handcrafted addendum to his IRA beneficiary designation was surplusage.

- Issues 1 and 2 are interrelated. The authority supporting Issue 2 is the same authority which supports Issue 1.

3. Whether the District Court correctly excluded the decedent's two previous IRA beneficiary designations and six previous wills as irrelevant to his intent.

- *Anderson v. Aspelmeier, Fish, Power, Warner & Engberg*, 461 N.W.2d 598, 600 (Iowa 1990).

- *C-Thru Container v. Midland Mfg*. 533 N.W.2d 542, 544 (Iowa 1995).

- *Elkader Prod. Credit Ass'n v. Eulberg*, 251 N.W. 2d 234, 237 (Iowa 1977).

- *Elliott v. Hiddleson*, 303 N.W. 2d 140, 142 (Iowa 1981).

- *Estate of Anderson (Matter of)*, 359 N.W.2d 479, 480 (Iowa 1984).

- *Estate of Larsen (In re)*, 256 Iowa 1392, 1395, 131 N.W.2d 503,504-05 (1964).

- *Estate of Pearson v. Interstate Power*, 700 N.W.2d 333, 343 (Iowa 2005).

- *Estate of Rogers (Matter of)*, 473 NW 2d 36, 39 (Iowa 1991).

- *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 796 (Iowa 1999).

- *Iowa Fuel & Minerals v. Bd. of Regents*, 471 N.W. 2d 859, 863 (Iowa 1991).

- *Kerndt v. Rolling Hills Nat. Bank*, 558 N.W. 2d 410, 416 (Iowa 1997).

- *Montgomery Properties v. Economy Forms*, 305 N.W.2d 470, 475-76 (Iowa 1981).

- *Whalen v. Connelly*, 545 N.W.2d 284, 291 (Iowa 1996).

4. Whether the District Court correctly excluded the testimony of decedent's 40 year law partner; 30 year administrative assistant and 35 year law partner and son regarding the decedent's habits and intent.

- Issues 3 and 4 are interrelated. The authority supporting Issue 3 is the same authority which supports Issue 4.

5. Whether U.S. Bank had unclean hands as a consequence of its favoring one set of fiduciary duties to the detriment of conflicting fiduciary duties.

- *Ellwood v. Mid States Commodities, Inc*. 404 N.W.2d 174, 184 (Iowa 1987).

- *Estate of Wiese's (Matter of)*, 257 N.W.2d 1,4 (Iowa 1977).

- *Iowa Health System v. Trinity Health Corp*. 177 F. Supp. 2d 897, 924 (N.D. Iowa 2001).

- *McBurney v. Carson*, 99 US 567, 572, 25 L. Ed. 378 (1879).

- *Marriage of Phillips (In re)*, 493 N.W.2d 872, 878 (Iowa App. 1992).

- *Wilson v. Snow*, 228 U.S. 217; 33 S. Ct. 487, 57 L. Ed. 807 (1913).

- Iowa Code §633.160.

- Iowa Code §633A.4202.

- 90 C.J.S. Trusts §242, 247(b), 263, 270.
- 27 Am Jur 2d *Equity* § 136 p. 667
- 31 Am Jur. 2d Executors and Administrators §414 -416.
- 76 Am Jur 2d Trusts §440.

6. Whether U.S. Bank had standing to serve as Joan Bittner's advocate in the declaratory judgment action.

- *City of Humboldt v. Knight*, 255 Iowa 22, 120 N.W.2d 457, 458 (Iowa 1963).
- *Dickson v. Hubbell Realty Co.*, 567 N.W.2d 427, 430 (Iowa 1997).
- *Green v. City of Mt. Pleasant*, 256 Iowa 1184, 1206 131 N.W.2d 5, 19 (Iowa 1964).
- *Kerndt v. Rolling Hills Nat. Bank*, 558 N.W.2d 410, 416 (Iowa 1997).
- *Outing v. Plum*, 212 Iowa 1169, 235 N.W. 559 (Iowa 1931).
- *Rodman v. State Farm Mut. Auto. Ins. Co.*, 208 N.W.2d 903, 905-06 (Iowa 1973).
- *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639, 645 (Iowa 1979).
- Black's Law Dictionary (Sixth Edition).

ROUTING STATEMENT

This case involves interpretation of an IRA beneficiary designation, an area of the law where legal precedent in Iowa is sparse, if not non-

existent. In addition, the Court's decision may establish important precedent on fiduciary conflict of interest. In this case the same fiduciary simultaneously served as Richard Bittner IRA Trustee on the one hand and a conflicted co-executor and co-trustee of Mr. Bittner's testamentary trusts on the other. Decedent's Will directed the IRA to be placed in trust for the benefit of the surviving spouse with the remainder passing to his children. In filing its petition for declaratory judgment, U.S. Bank, the conflicted fiduciary, chose to serve as advocate for the surviving spouse's outright ownership of the IRA contrary to the directions Richard left in his Will. Accordingly, this case would appear governed by Iowa R. App. Proc. 6.1101(2)(c). Retention by the Supreme Court is appropriate.

STATEMENT OF THE CASE

U.S. Bank commenced this action with conflicting fiduciary roles. In one role U.S. Bank served as co-executor of the estate of Richard Bittner and co-trustee of his testamentary trusts (Petition para. 1, 38; App. 9, 16-17). Richard's Last Will and Testament directs his IRA to be held in trust for decedent's wife, Joan, for her life. The Will directs the remainder interest in the IRA to pass to decedent's children following Joan's death. (Exhibit 1 p. 9, 14-15 of 24; App. 111, 116-117).

In its conflicted role, U.S. Bank served as Trustee for Richard's IRA Trust. U.S. Bank's Trust Agreement (Ex. USB-2; App. 93-102) deliberately limits its powers as IRA Trustee. (Ex. USB-2 para. 14; App. 100). The Trust Agreement does not confer any power on U.S. Bank to advocate for any claimed beneficiary's ownership. U.S. Bank commenced this action advocating for Joan's outright ownership of the IRA. (Petition, July 29, 2020 para. 37; App. 16). U.S. Bank was invited to re-cast its Petition as an interpleader action. (Ex. JB-26 p. 2 para. 1,3,4; App. 161). U.S. Bank rejected this invitation. It elected to prefer one of its conflicted roles over the other.

Upon U.S. Bank's urging, the District Court concluded that Richard's IRA designation of January 11, 2010 (Ex. JB-2/USB-1; App. 89-92) was the single instrument which deviated from Richard Bittner's 19 year dispositive plan for his IRA established in:

- 2 previous IRA beneficiary designations;
- 3 previous Wills;
- 1 contemporaneous Will, and;
- 2 subsequent Wills.

This appeal challenges the District Court ruling which concluded that

Joan is the 100% owner of the decedent's IRA.

At the center of this appeal is the last paragraph of the decedent's IRA beneficiary designation which reads as follows:

> Upon the death of my wife, my children, Kimberly Montgomery, Jeffrey S. Bittner, Todd R. Bittner and Lynn Von Schneidau, shall become primary beneficiaries and have an equal share...
> (Ex. USB-1/JB-2 p. 4; App. 92).

In order to reach its conclusion that Joan was the 100% owner, the District Court was required to ignore this language as well as the other language in Richard's handcrafted addendum to his IRA beneficiary designation. The District Court's interpretation denies effect to this Court's time-honored rule that no language in a written instrument shall be deemed superfluous unless no other construction is reasonable. The District Court's interpretation denies effect to this Court's rule of law that when handwritten clauses are added to form agreements, the handwritten clauses prevail.

STATEMENT OF RELEVANT FACTS

Richard's handcrafted addendum to his IRA beneficiary designation begins with the following paragraph:

> My wife, Joan Y. Bittner, is and shall be the primary beneficiary under my IRA Account No. xxxxxxxx6300 which is currently administered by U.S. Bank, N.A. Joan Y. Bittner is

> the primary beneficiary under the Joan Y. Bittner Marital Trust under my Last Will & Testament dated January 11, 2010 and she shall be entitled to all annual distributions from my IRA based upon her life expectancy under the then applicable federal income tax rules and regulations. (Exhibit JB-2 p. 3; App. 91).

As noted above, Richard's addendum concludes with the following paragraph:

> Upon the death of my wife, my children, Kimberly Montgomery, Jeffrey S. Bittner, Todd R. Bittner and Lynn Von Schneidau, shall become primary beneficiaries and have an equal share... (Exhibit JB-2 p. 4; App. 92).

Richard's Final Will contains similar language:

> If and in the event there is no federal estate tax in force at the date of my death and in the event JOAN Y. BITTNER survives me, she shall be entitled to all of the required distributions from such IRA during her lifetime and upon her death... then the balance of my IRA shall pass to and be distributed as set forth in the beneficiary designation on file with U.S. Bank....
>
> (Exhibit JB-1 p. 9 of 24; App. 111)[1].

Other wills and IRA beneficiary designations executed by Richard Bittner over the last 19 years of his life demonstrate an unbroken dispositive pattern for his IRA: Joan would receive the required annual IRA distributions during her life. Upon Joan's death, the remainder was to pass

[1] There was no federal estate tax due at the death of decedent.

to their children in equal shares. (Ex. JB 59- R. Bittner Will February 6, 1995 pp. 3-4 of 26, App. 238-39; Exhibit JB 56 p. 3, App. 233, R. Bittner IRA Ben. Design. February 8, 1998; Exhibit JB-60 p. 6 of 21, App. 267; October 26, 1999 R. Bittner Will; Exhibit JB-57 p. 1, App. 234; October 26, 1999 R. Bittner IRA Ben. Desig.; Exhibit JB-61 p. 11 of 20, App. 293; September 29, 2006 R. Bittner Will; Exhibit JB-62 p. 12 of 21, App. 314; October 18, 2008 Will; Exhibit JB-25 pp. 6-7 of 20, App. 145-46; January 11, 2010 Will; Exhibit JB-2 January 11, 2010 IRA ben. design. pp. 2-4, App. 90-92; Exhibit JB 63 p. 8 of 23, January 2010 (draft) R. Bittner Will; Exhibit 1- p. 9 of 24, App. 332-22; Exhibit JB-1 January 7, 2014 R. Bittner Final Will, App. 111).

Initially, Sarah Maiers, the U.S. Bank trust officer assigned to Richard Bittner's estate agreed that it was Richard's intent to place his IRA in trust. In an April 25, 2019 memo to file, Ms. Maiers wrote:

> After speaking to Wendy Kelly, she stated the preferred method would be to re-register the asset in Joan's [Mrs. Bittner's] IRA and move it to her IRA and then sell it.
>
> BUT, that is not what the beneficiary designation says-Joan, as an individual is not the beneficiary-the marital trust is the beneficiary.
> (Exhibit JB-32; App. 200-201).

Ms. Maiers was also the lead person for U.S. Bank on the IRA issue. (Tr. 56:16-57:11).

Two weeks after the Richard Bittner's estate was opened, estate attorney Curt Oppel wrote Ms. Maiers asking, "Do we know who the beneficiaries are of Dick's IRA?" Ms. Maiers responded, "Yes. Joan is the primary beneficiary under the Joan Y. Bittner Marital Trust under the Last Will and Testament dated January 11, 2010 and she shall be entitled to all annual distributions from the IRA based upon her life expectancy..." (Exhibit JB-33; App. 202). On May 6, 2019, Ms. Maiers repeated this same position in a memo to Mr. Oppel, "...I believe...the [IRA] beneficiary is the marital trust." (Exhibit JB-34; App. 205).

Then, on May 30, 2019, six employees of U.S. Bank convened a conference call. Included in the meeting was Sarah Maiers who had on three prior occasions stated that the Joan Bittner Marital Trust was the IRA beneficiary. (Exhibits JB 32-34; App. 199-206).

The group came up with three reasons that the (Joan Y. Bittner) Marital Trust would not be the beneficiary. (Exhibit JB-91; App. 365). None of the proffered reasons matched the District Court's conclusion: that the IRA beneficiary designation clearly and unequivocally designates Joan

Bittner, individually, as the sole 100% owner. *Id*.

In forming its opinion on ownership of the IRA, U.S. Bank did not ask to review Richard's prior wills (Tr. 242:19-22). U.S. Bank cannot recall if it asked to review Richard's prior IRA beneficiary designations (Tr. 242:23-243:3). U.S. Bank produced no evidence establishing any effort on its part to contact any person who personally knew Richard about his habits, custom and intent.

In the memo summarizing the May 30, 2019 U.S. Bank conference call, there is no mention of the late Mr. Bittner's intent. (Exhibit JB-91; App. 365). U.S. Bank Trust Officer Phil Hershner conceded that no one at U.S. Bank ever asked a question about Richard Bittner's intent. (Tr. 182:21-183:1).

Jeff Bittner practiced law with his father since 1984. (Tr. 332:20-333:10). Jeff was appointed co-executor along with U.S. Bank. Jeff had a different interpretation of Richard's IRA beneficiary designation. Jeff believed that Richard intended to leave the IRA in trust for the benefit of Joan, Richard's spouse and Jeff's mother, to support her during her lifetime. Upon Joan's death, the remainder would be divided equally among their children. (Tr. 364:6-17; 365:4-367:5).

This difference of opinion began a chain of events that ultimately led to irreconcilable differences between the two co-executors.

U.S. Bank did not discuss the reasons for its conclusions or share any of its communications on this issue with Jeff, (an Iowa attorney with 35 years experience) or with estate attorney, Curt Oppel, (an Iowa attorney with 25 years experience). In a memo sent to nine other U.S. Bank employees, Sarah Maiers wrote:

> I have already told [co-executor] Jeff [Bittner] (who is a trial attorney) that it is IRA (IRS) laws but he doesn't want to accept that. He really wants to talk to someone like Wendy and Barbara since he thinks he can talk them into thinking his way.[2] I have already told him NO and US Bank will be doing the right thing and this really has NOTHING to do with the estate-it is IRA law. I told him there is no way we will budge on this but he wants to 'go over my head', so I need you all to back me up. (Capitalization original).

(Exhibit JB-112; App. 393).

When asked, Wendy Kelly, U.S. Bank's internal IRA expert, refused to communicate with Jeff about the IRA issue. (Exhibit JB-104; App. 386).

Richard Bittner Estate attorney Curt Oppel testified, "...(W)e never really did get a response on our request to talk to somebody or to get written

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[2] Jeff Bittner's way of thinking was also the memo's author's (Sarah Maiers') original way of thinking (Exhibits JB 32-34; App. 199-206).

information from U.S. Bank on how they came to their conclusion regarding the [IRA] designated beneficiary form." (Tr. 298:15-18).

Instead, U.S. Bank hired outside counsel tasked with the mission of convincing Jeff that his interpretation of his late father's intentions was mistaken. (Ex.'s JB-36, App. 208-14; JB-94, App. 369-76; JB-105, App. 387-88; Tr. 179:18-23, 188:17-20). This was done without Jeff's knowledge or consent. (Tr. 353:4-10).

In a meeting held on December 17, 2019, U.S. Bank acknowledged for the the second time[3], that it had a conflict of interest between its roles as IRA trustee and co-executor of Richard Bittner's estate, (Exhibit JB-89 p. 2

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[3] "After much deliberation and thought, we feel it best if U.S Bank resigns as co-trustee of the R. Bittner Estate. First and foremost, as you know, we have a conflict of interest as far as Mr. Bittner's IRA beneficiary designation is concerned because we are at odds with our co-executor". (Exhibit JB-39).

"Further, that if Jeff pursues his claim that his father intended for the IRA to be controlled via a QTIP election...the bank would be forced to resign. This was due to a conflict where the bank as trustee of the IRA would be in a position of defending the clear language of the IRA Beneficiary Designation and on the other hand pursuing a position contrary to that as Co-Executor of the estate. (Exhibit JB-89 p. 2 under caption "Meeting Summary").

On June 18, 2020 U.S. Bank also acknowledged its conflict on the day Jeff received the legal opinion it had sought without its co-executor's knowledge or consent. "It seems the only way forward with regard to the IRA is to go to court for an opinion. That would bring up the conflict we have being both Co-Executor and Trustee of the IRA." (Exhibit JB-110).

para. 1., App. 359; Tr. 354:3-20). Jeff observed that given U.S. Bank's conflict, it was required to maintain a position of neutrality (Tr. 353:3-353:22). Jeff proposed that he would file a declaratory judgment petition advocating for the trusts created under his father's Will. *Id.* He would name MidWestOne Bank, his mother's conservator, as opposing party. *Id.* In this manner, U.S. Bank would be allowed to maintain a position of neutrality due to its conflicting roles. *Id*. No one from U.S. Bank objected to this proposal. (Tr. 354:23-354:2). Jeff was confident that the conflict between the co-executors was, thus, resolved. (Tr. 354:6-10).

On June 18, 2020, estate attorney Curt Oppel and Jeff were surprised when they received a legal opinion regarding the IRA beneficiary designation solicited by U.S. Bank from the Simmons' law firm.[4] (Tr. 312:19-313:2; 355:11-357:14).

In response, Jeff requested U.S. Bank produce all e-mails and other communications related to the IRA issue. (Exhibit JB-5 para. 2, App. 129; Tr. 357:2-20). U.S. Bank refused to share the requested information with its co-executor. (Exhibit JB-17 p. 1 para. 5; App. 136).

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[4] Neither Curt Oppel nor Jeff were surprised that the legal opinion supported the interpretation urged by U.S. Bank, the party which paid for that opinion.

Jeff gave U.S. Bank the option of resigning as co-executor or being removed under Article XVI of the Will. (Exhibit JB-1 p. 21 of 24; App. 123; JB-18, App. 138; 358:9-14). On July 9, 2020, U.S. Bank promised to resign. (Exhibit JB-19; App. 139).

On July 27, 2020, U.S. Bank reversed course refusing to resign as co-executor. (Answer Case No. ESPR 078709; App. 59). Two days later, on July 29, 2020, while still co-executor of the Estate of Richard Bittner and nominated co-trustee of Mr. Bittner's testamentary trusts, U.S. Bank, filed the declaratory judgment petition in this suit advocating for Joan Bittner's 100% ownership of the IRA. (Petition July 29, 2021 para. 37; App. 58).

On August 19, 2020, Jeff, through counsel, asked U.S. Bank to maintain a neutral position by re-casting its Petition as an interpleader. (Ex. JB-26 p. 2 para. 4; App. 161). U.S. Bank refused and proceeded to prosecute the declaratory judgment action advocating for Joan's sole ownership of the IRA.

On November 10, 2020, Jeff formally petitioned the Court to remove U.S. Bank as co-executor.

The District Court fast-tracked both U.S. Bank's petition for declaratory judgment and Jeff's motion/petition to remove U.S. Bank as co-

executor. Trial on the merits took place through a virtual bench trial held on January 26-27, 2021.

On March 17, 2021, in its first ruling, the District Court declared Joan Bittner to be the sole owner of the Richard Bittner IRA (App. 78-86). In the second ruling, the District Court granted Jeff's request to remove U.S. Bank as co-executor (App. 67-77). Scott Co. Case ESPR 078709 Order Removing U.S. Bank March 17, 2021. This appeal only involves the Court's first ruling (on the petition for declaratory judgment).

BRIEF AND ARGUMENT

A. THE DISTRICT COURT'S INTERPRETATION OF THE IRA BENEFICIARY DESIGNATION ERRONEOUSLY RENDERS RICHARD'S HANDCRAFTED ADDENDUM SUPERFLUOUS

This is an issue of law and the most substantive issue tried to the court. Error was preserved through Jeff's Answer 12/16/20 para. 13-24, 32-39, 41, Prayer for Relief and Jeff's pretrial brief 01/12/20, App. 24-27 .

The standard of review on this issue is for errors at law. *Colwell v. MCNA Ins. Co.* Case No. 20-0545 Decided June 11, 2021 (Iowa 2021) at p. 3; *Krause v. Krause*, 589 N.W.2d 721, 724 (Iowa 1999); *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011) *Fashion Fabrics of Iowa, Inc. v. Retail Invs. Corp.*, 266 N.W.2d 22, 25 (Iowa 1978)).

At the outset, it is important to emphasize the term "primary beneficiary" is *not* a defined term under U.S. Bank's IRA form agreement (Exhibit USB-2, App. 93-102). More specifically, "primary beneficiary" is *not* defined as "100% owner". Professor Kurtz at the University of Iowa College of law teaches that the lifetime beneficiary of a trust is considered the primary beneficiary of the trust because, the lifetime beneficiary receives his/her share of the trust asset before the remaindermen, by definition.

Of equal importance, this case is not about what U.S. Bank meant when it used the word "primary beneficiary" in its form. Rather, this case is about what Richard Bittner meant when he used the term "primary beneficiary" in *his* IRA beneficiary designation.

In this regard, Jeff testified, as follows:

> Q. Did your father ever indicate to you just verbally how he had disposed of his property in testamentary documents?
>
> A. Yes. He said that he left it in trust for Mom and that she was the primary beneficiary, and that he had made a power of invasion for her benefit if she didn't have enough to live on, and that the remainder went to his children.
>
> (Tr. 366:7-14).

Having established these facts, by definition, there is nothing of Richard's IRA left to be distributed to his children "upon the death of my wife" if his wife is the sole owner of the IRA as the District Court ruled and as U.S. Bank urged.

In its ruling, the District Court provided no explanation for the last paragraph of Richard's IRA beneficiary designation, Exhibit JB-2/USB-1, (App. 89-92) (which leaves the remainder of the IRA to his children upon the death of his spouse, Joan). U.S. Bank has no explanation for this paragraph, either. It is their Achilles Heel and the proverbial "Elephant In The Room". U.S. Bank's Vice-President, Phil Hershner conceded this point in his testimony.

> "Q.... If Richard Bittner intentionally put [the last paragraph of his IRA beneficiary designation] in the.... IRA beneficiary designation and did not want to give Joan Bittner the power to change beneficiaries, that's pretty much the end of the declaratory judgment action, because we don't have any remainder interest if Joan Bittner is the 100 per cent beneficiary, correct?
>
> A. I guess that would be correct...."
>
> (Tr. 161:6-13).

The District Court ignored the last paragraph of the beneficiary designation and Mr. Hershner's admission as it was required to do in order

to reach its ultimate conclusion.

Even the legal opinion author hired by U.S. Bank struggled to explain how this paragraph of Mr. Bittner's IRA beneficiary designation could be reconciled with Joan's 100% ownership of the IRA. In a draft legal opinion its author noted, "The text is all accurate, provided that Joan Y. Bittner does not change the beneficiary on this account. But, as Primary Beneficiary[5], she has the power to change the beneficiaries or liquidate the IRA at any time."(Exhibit JB-94 pp. USB 220-221; App. 374-75) .

Sharon Chin, the other U.S. Bank Vice-President who testified, was equally unsuccessful in explaining this paragraph. According to Ms. Chin, the last paragraph of Richard's IRA beneficiary designation was not superfluous provided Richard survived Joan. (Tr. 85:15-19). Ms. Chin's reasoning is backwards. U.S. Bank's form provides that Contingent Beneficiaries (Richard's children) only take if the primary beneficiary (Joan) has predeceased the owner (Richard). (Ex. JB-2/USB-1 p. 2; App. 90) So, if the last paragraph only applies if Joan predeceased Richard as Ms. Chin opined, then it says the exact same thing as the paragraph

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[5] The fatal flaw to Mr. Morf's opinion is that he assumes (without contractual support) that "primary beneficiary" and "100% owner" are synonymous terms.

immediately preceding which discusses contingent beneficiaries. This interpretation makes Richard's last paragraph "superfluous", by definition.

The last paragraph of Richard Bittner's IRA handcrafted beneficiary designation cannot be reconciled with Joan Bittner's sole ownership of that asset. By definition, Richard Bittner could not leave himself the power to direct the distribution of the remainder interest "upon the death of my wife" if he devised the entire IRA to his wife. In Professor Kurtz's terms, a person becomes the sole owner when both lifetime and remainder interests vest in that same individual.

The only way that the District Court's conclusion that Joan Bittner is the sole owner of the IRA can be upheld is if the last paragraph Richard Bittner's handcrafted IRA beneficiary addendum is judicially deleted from that agreement. This Court has repeatedly stressed its disapproval of this approach to contract interpretation.

"We assume no part of the contract is superfluous or of no effect and a construction giving meaning to all its clauses is preferred." *Estate of Pearson v. Interstate Power*, 700 N.W. 2d 333, 343 (Iowa 2005). *Colwell v. MCNA Ins. Co.* Case No. 20-0545 Decided June 11, 2021 (Iowa 2021) at p. 7. [Supreme Court attempts to interpret every word and every provision of a

contract to give it effect, if possible]. *Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75, 78 (Iowa 1997)[A contract is to be interpreted as a whole, and it is assumed in the first instance that no part is superfluous]. *Kerndt v. Rolling Hills Nat. Bank*, 558 N.W. 2d 410, 416 (Iowa 1997)[An interpretation which gives a reasonable meaning to all terms is preferred to one which renders a term superfluous or of no effect]. *Iowa Fuel & Minerals v. Bd. of Regents*, 471 NW 2d 859, 863 (Iowa 1991)[Because a contract is to be interpreted as a whole, it is assumed in the first instance that no part of it is superfluous; an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect]. *Harvey Construction Co. v. Parmele*, 113 N.W. 2d 760, 765 (Iowa 1962)[Each word in a statute, or contract, must, if possible, be given some meaning. It must be considered that the words were used advisedly, and for a definite purpose in expressing the intent of the parties].

The thrust of the District Court's entire ruling (App. 78-85) is that all of Richard Bittner's handcrafted addendum is surplusage. According to the District Court (and U.S. Bank), Richard Bittner merely kept repeating that Joan Bittner was the sole owner of the IRA in different ways, over and over,

again.

On page 6 of its ruling (App. 83), the District Court stated that Richard Bittner "doubled down" that Joan was the 100% owner in the first sentence of his handcrafted addendum. The Court's use of the term "doubled down" is synonymous with, "In the first sentence of his handcrafted addendum, Richard Bittner, simply repeated what he had already declared: Joan is the sole owner of the IRA".

The District Court rejected the alternative urged by Jeff which was also noted by the Simmons attorney in his draft legal opinion. This alternate approach would give meaning to *all* of Richard Bittner's handcrafted addendum.

Specifically both the Simmons' legal opinion author and Jeff noted Richard used different articles of the English language in the first two sentences of his handcrafted addendum. In the first sentence, Richard stated, "...Joan Y. Bittner is...**a** primary beneficiary *under my IRA*..." In the second sentence, Richard stated that Joan is **the** primary beneficiary *under the Joan Y. Bittner Marital Trust*. (App. 91).

The terms of the Joan Y. Bittner Marital Trust, clearly provide that Joan is the *lifetime beneficiary* of that trust. "Lifetime beneficiary" is what

Richard meant in the second sentence when he stated, "Joan...is **the**...primary beneficiary of the marital trust." When a court is interpreting statutory or contractual language, it presumes that different words mean different things, *Med. Coll. of Wis. Affiliated Hosps., Inc. v. United States*, 854 F.3d 930, 933 (7th Cir. 2017); *Charleston Area Med. Ctr., Inc. v. United States*, 940 F.3d 1362, 1370 (Fed. Cir. 2019); *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1017 (9th Cir. 2017); See also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). [Congress may occasionally engage in "elegant variation"-adopting different language to mean the same thing, perhaps to stave off its own boredom-but we have a presumption against elegant variation]. *EEOC v. Gilbarco, Inc.*, 615 F.2d 985, 999 & n.23 (4th Cir. 1980) [Congress determined in closely related circumstances to use two different terms. It is, therefore, more likely than not that the use of different language indicated a legislative intention to mean different things.]; *Burlington Indus. Inc. v. Dayco Corp.* , 849 F.2d 1418, 1421–22 (Fed. Cir. 1988) [Discussing the risks of elegant variation in legal documents].

In this case, the District Court violated this rule of construction when it concluded that Richard's term "**a** primary beneficiary" [of the IRA] was

the same as his reference as "**<u>the</u>** primary beneficiary" of the marital trust. Again, the sentence that emphasizes Richard used different articles to mean different things is the first in the last paragraph of his beneficiary designation, "*Upon the death of my wife, my children, shall become primary beneficiaries* [of the IRA]". (Exhibit JB-2/USB-1 p. 4; App. 92). Richard could not designate his children to be "primary beneficiaries" of his IRA following Joan's death if he had already declared Joan to be the "sole owner" of his IRA (which is how the District Court and U.S. Bank defined "primary beneficiary").

Richard's beneficiary designation further provides, "[A]nd she [Joan] shall be entitled to all *annual distributions from my IRA based upon her life expectancy*" (App. 91). As noted by the District Court, U.S. Bank and U.S. Bank's hired opinion author, this language is also entirely unnecessary (and, thus, "contractual surplusage") if Richard Bittner had already unequivocally expressed that Joan is already the 100% owner.

As 100% owner Joan would be entitled to all annual distributions, by definition. Moreover, not only would Joan as 100% owner be entitled to all distributions "based upon her life expectancy", she would be entitled to all distributions (and all undistributed portions) of both income and principal,

period.

Rather than urging an interpretation of this language which is merely a repetition of what Richard had said before, Jeff offered an alternative which gives meaning to all of the language in his father's handcrafted addendum: Richard Bittner wanted Joan to receive the required annual distributions *for her life*. *Upon her death*, he wanted the *remainder interest* to pass to his children.

The District Court bolstered its erroneous interpretation by finding that the only way Joan could be entitled to the required annual distributions from the IRA for her life is if she was the outright owner. (P. 6 of the ruling). This conclusion is not supported by the law. 26 CFR 1.409(a)(9)-4 Q & A-5 provides four qualifications for what is known as a "See Through Trust". These are:

(1) The trust must be valid under state law;

(2) The trust must be irrevocable or by its terms become irrevocable upon the death of the original owner;

(3) The trust's underlying beneficiaries must [all] be eligible to be designated beneficiaries themselves, and;

(4) A copy of the trust documentation must be provided by October 31st

of the year following the IRA owner's death.

These four provisions are expressly contained in U.S. Bank's form IRA Trust Agreement (Exhibit USB-2 para. 8 p. 7; App. 99). The obvious purpose of including these provisions is to insure that any trust designated as a beneficiary will qualify as "See Through Trust".

The District Court also concluded that because all parties agree that the Joan Y. Bittner Marital Trust was not funded, that Richard intended his IRA to go to Joan, individually. Given the fact that "primary beneficiary" is not a defined term, there is nothing in the record which supports this conclusion.

To the contrary, all of Richard's Wills and IRA beneficiary designations (most of which were excluded from evidence) support the interpretation that if the Joan Y. Bittner Marital Trust was not to be funded, the IRA required distributions were to be paid to Joan for her life. Any part of the IRA left over following the required distributions was to pass to the couple's children. (Exhibit JB 59- R. Bittner Will February 6, 1995 pp. 3-4 of 26, APP 238-39; Exhibit JB 56 p. 3, App. 233; R. Bittner IRA Ben. Design. February 8, 1998; Exhibit JB-60 p. 6 of 21, App. 267, October 26, 1999 R. Bittner Will; Exhibit JB-57 p. 1, App. 234, October 26, 1999 R.

Bittner IRA Ben. Desig.; Exhibit JB-61 p. 11 of 20, App. 293; September 29, 2006 R. Bittner Will; (Exhibit JB-62 p. 12 of 21, App. 314; October 18, 2008 Will; Exhibit JB-25 pp. 6-7 of 20, App. 145-46, January 11, 2010 Will; Exhibit JB-2 January 11, 2010 IRA Ben. Design. pp. 2-4, App. 90-92; Exhibit JB 63 p. 8 of 23, January 2010 (draft) R. Bittner Will; Exhibit 1- p. 9 of 24, App. 322-23; Exhibit JB-1 January 7, 2014 R. Bittner Final Will, App. 111).

Further, the District Court found, "Jeffrey relies on Richard's subjective desires and firm belief that Richard did not wish to have a sizeable distribution directly to her." (App. 84). This statement mischaracterizes Jeff's argument and the record. First and foremost, Jeff relies primarily in the language set forth in *all* of Richard's IRA beneficiary designation (Exhibit JB-2/USB-1) and this Court's time-honored rules of contract construction. Included among these rules is the rule which provides, "[W]here parties use a form contract and add a clause to a form contract, the additional clause controls." *Stream v. Grow*, No. 0-094/09-1011 (Iowa App. 4/21/2010) (Iowa App. 2010), 2010 Iowa App. LEXIS 310 *15 *Low v. Young, Mullarky & Long*, 158 Iowa 15,15 138 N.W. 828, 829 (Iowa 1912); see also 17A C.J.S. Contracts § 325. In this case,

Richard Bittner's handcrafted addendum (Exhibit JB-2/USB-1 pp. 3-4) controls over U.S. Bank's form agreement (Exhibit JB-2/USB-1 pp. 1-2).

Second, in support of his primary conclusion, Jeff relies on the language contained in all the Wills and IRA beneficiary designations executed by Richard Bittner over the last 19 years of his life. The will admitted to probate ("Final Will") provides:

> If and I the event there is no federal estate tax in force at the date of my death [which is the contingency which would cause the marital trust *not* to be funded] and in the event JOAN Y. BITTNER survives me, she shall be entitled to all of the required distributions from such IRA during her lifetime and upon her death... then the balance of my IRA shall pass to and be distributed as set forth in the beneficiary designation on file with U.S. Bank....
>
> (Exhibit JB-1 p. 9 of 24, App. 111)

The Final Will (and other Wills) further provide:

> "A substantial part of the income for the benefit of my daughter [Lynn Von Schneidau] will be income from my IRA..."
>
> (Exhibit JB-1 p. 14 of 24-bottom of page, App. 115).

This clause begs the question: How will a substantial part of the income from the IRA inure the benefit of Richard's daughter, Lynn, if all of the IRA passes to Richard's widow, Joan, outright?

The District Court omitted from its opinion these provisions of

Richard's Will which specifically address his desires regarding disposition of the IRA. Instead, the Court cited to a general provision from the Will which does not specifically address the IRA in an effort to glean Richard's intent. (See p. 7 opinion; App. 84).

Again, the District Court's approach is at odds with this Court's time-honored preference favoring specific over general contractual language. *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991); *Mopper v. Circle Key Life Ins. Co.*, 172 N.W.2d 118, 126 (Iowa 1969); *Small v. Ogden*, 259 Iowa 1126, 1131, 147 N.W.2d 18, 21 (Iowa 1966).

There was no deviation from Richard Bittner's prior or subsequent plan for disposing of his IRA on the day he executed his last IRA beneficiary designation (Ex. JB-2/USB-1, App. 89-91) ll executed the same day that Richard Bittner executed the IRA beneficiary designation (Exhibit JB-25) provides:

> If and in the event there is no federal estate tax in force at the date of my demise and in the event JOAN Y. BITTNER survives me, she shall be entitled to all of the required distributions from such IRA during her lifetime and upon her death, or...then the balance of my IRA shall pass to and be distributed under the R. RICHARD BITTNER FAMILY

TRUST under Article X[6].

(Exhibit JB-25 pp. 6-7 of 20, App. 145-46).

That same Will also contains identical language regarding income from the IRA producing trust income for daughter Lynn Von Schneidau upon Joan's passing, (Exhibit JB-25 p.11 of 20; App. 150)

Finally, none of the language in Richard's addendum discussing trusts and taxation is necessary if it was his intent to make Joan the sole owner of the IRA. Any estate planning lawyer is aware that the law exempts all direct bequests to spouse from federal estate taxation, 26 U.S.C. §2056(a).

For the reasons set forth above, Jeff prays that this Supreme Court reverse and declare as a matter of law that the Richard Bittner Family Trust under the Last Will and Testament of the decedent is the lawful owner of the Richard Bittner IRA.

B. THE DISTRICT COURT ERRONEOUSLY EXCLUDED DOCUMENTARY PAROLE EVIDENCE

This error was preserved through offers of proof through the testimony of Richard's former administrative assistant, Lucille Oseland.

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[6]In this Will the Richard Bittner Family Trust also distributes the proceeds to the estate equally to his children upon the death of Joan.

(Tr. 256:18-276:13). The standard of review is for errors at law. *Colwell v. MCNA Ins. Co.* Case No. 20-0545 Decided June 11, 2021 (Iowa 2021) at p. 3; *Krause v. Krause*, 589 N.W.2d 721, 724 (Iowa 1999); *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011).

In this case one of two things is true:

1) Richard Bittner's IRA beneficiary designation (Exhibit JB-2/USB-1; App. 89-92) clearly and unambiguously directs that asset to be held in trust, or

2) Richard Bittner's IRA beneficiary designation is ambiguous requiring consideration of additional evidence in order to glean his intent.

The cardinal rule of contract construction is that the intent of the contracting parties must control, *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 796 (Iowa 1999); *Whalen v. Connelly*, 545 N.W.2d 284, 291 (Iowa 1996); *Estate of Pearson v. Interstate Power*, 700 N.W.2d 333, 343 (Iowa 2005); *Kerndt v. Rolling Hills Nat. Bank*, 558 N.W. 2d 410, 416 (Iowa 1997); *Iowa Fuel & Minerals v. Bd. of Regents*, 471 N.W. 2d 859, 863 (Iowa 1991).

Similarly,

> (1) [T]estator's intent is the polestar and if expressed shall control; (2) it must be gleaned from a consideration of all language contained in the will, the scheme of distribution, and facts and circumstances surrounding the making of the will; and (3) technical rules of construction should be resorted to only if the will is clearly ambiguous, conflicting, or testator's intent is for any reason uncertain.

Elkader Prod. Credit Ass'n v. Eulberg, 251 N.W. 2d 234, 237 (Iowa 1977). Accord, *Matter of Estate of Anderson*, 359 N.W.2d 479, 480 (Iowa 1984); *In re Estate of Larsen*, 256 Iowa 1392, 1395, 131 N.W.2d 503,504-05 (1964). *Elliott v. Hiddleson*, 303 N.W. 2d 140, 142 (Iowa 1981)[Testator's intent is polestar]. *Matter of Estate of Rogers*, 473 NW 2d 36, 39 (Iowa 1991)[Intent of testator is polestar. Intent is not derived from what testator was meant to say but, from what testator did say].

Parol evidence must be excluded if a written agreement is entirely unambiguous. If, however, there is ambiguity, parol evidence is admissible to demonstrate the intent of the contracting parties. *C-Thru Container v. Midland Mfg*. 533 N.W.2d 542, 544 (Iowa 1995); *Anderson v. Aspelmeier, Fish, Power, Warner & Engberg*, 461 N.W.2d 598, 600 (Iowa 1990); *Montgomery Properties v. Economy Forms*, 305 N.W.2d 470, 475-76 (Iowa 1981).

Only the District Court and those attorneys now litigating for U.S.

Bank have maintained the position that Richard Bittner's IRA beneficiary designation clearly and unambiguously designates Joan as the sole owner.

In order to reach its ultimate conclusion, the District Court was required to exclude all parol evidence[7]. If parol evidence is included, Richard Bittner's dispositive intent which he expressed time and again over the last two decades of his life becomes irrefutable: Joan Bittner was to receive the required annual distributions for her life. Upon her death, what was left of the IRA was to be distributed equally among the Bittner children. (See wills and IRA beneficiary designations previously cited).

Even the attorney who U.S. Bank hired to provide a corroborative legal opinion began his initial draft opinion with the following, "If Mr. [Richard] Bittner had stopped there [after the field labeled 'Primary Beneficiaries"], I'm sure nobody would have asked for my opinion". (Exhibit JB-94 p. 2 last para., App. 370). This declaration suggests ambiguity.

The same author implicitly admitted ambiguity in Richard's IRA beneficiary designation when he asked, "The only other document I could

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[7] It should be noted, however, that the District Court supported its opinion with parol evidence by citing to a provision of the decedent's Will in an effort to bolster its conclusion. (See opinion p. 7, App. 84).

imagine wanting to read on Bittner would be the US Bank document that governs how beneficiary designations are interpreted and what happens if a beneficiary is not properly designated– is there some plan document like that?" (Exhibit JB-96, App. 379).

U.S. Bank responded to this inquiry as follows:

> Paul,
>
> I spoke with our top IRA person, Wendy Kelly and she said US Bank does not [have] a policy document that would describe the process on what to do if confronted with an ambiguous IRA beneficiary designation. (App. 379).

The opinion author's inquiry begs the question, "Why would he be interested in a document that governs how a beneficiary designation would be interpreted if he thought the beneficiary designation was free from ambiguity?"

As noted previously, prior to the May 30, 2019 U.S. Bank conference call, Sarah Maiers, expressed her opinion on three separate occasions that the Joan Y. Bittner Marital Trust was the IRA beneficiary (Exhibits JB 32-34; App. 200-206).

When *all* the language of Richard's IRA beneficiary designation[8] is

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[8] i.e. His entire IRA beneficiary designation is not simply considered an exercise in redundant surplusage.

taken into consideration, Jeff does *not* believe Richard's declaration to be ambiguous. Jeff believes that Richard unambiguously chose to place the IRA in trust and that Richard's IRA beneficiary designation clearly expresses this intent.

If there is any ambiguity, at all, the parol evidence offered but rejected by the District Court erases any doubt as to Richard Bittner's intent.

- FEBRUARY 6, 1995 WILL: "There shall be specifically included in the marital trust herein provided the value of any and all interests received by the trust attributable to a beneficiary designation with respect to my INDIVIDUAL RETIREMENT ACCOUNT (IRA)." (Exhibit JB 59- R. Bittner Will February 6, 1995 pp. 3-4 of 26, App. 238-39).

  "Upon...the death of my wife, the balance of the trust corpus, inclusive of the distributions from my IRA, shall be distributed to...the R. RICHARD BITTNER FAMILY TRUST [which leaves the remainder to Richard's and Joan's children]." (Exhibit JB 59- R. Bittner Will February 6, 1995 p. 7 of 26, App. 242).
- JANUARY 8, 1998 IRA BENFICIARY DESIGNATION: "The balance of this IRA Account on my demise shall be distributed in no

less than annual installments over the life expectancy of my wife, Joan Y. Bittner, to the Trustee of ...The Joan Y. Bittner Marital Trust" under the terms of my Last Will and Testament dated February 6, 1995"[Referencing Exhibit JB-59 cited above (App. 242) (making the R. Richard Bittner Family Trust the beneficiary upon Joan's death)]. (Exhibit JB 56 p. 3, App. 233).

- OCTOBER 26, 1999 WILL: "Upon...the death of my wife, the balance of the trust corpus, inclusive of the distributions from my IRA, shall be distributed in accordance with the Beneficiary designation which I have filed with Firstar Bank..." (Exhibit JB-60 p. 6 of 21, App. 267)
- OCTOBER 26, 1999 IRA BENEFICIARY DESIGNATION: "The balance of my IRA account on the date of my demise shall be distributed in no less than annual installments over the life expectancy of my wife, Joan Y. Bittner, to the Trustee of the qualified terminable interest property trust captioned, "The Joan Y. Bittner Marital Trust", under the terms of my Last Will and Testament dated October 26, 1999.

  Upon the death of my wife...my IRA account...shall be

distributed...[to] my children..."

(Exhibit JB-57 p. 1, App. 234).

- SEPTEMBER 29, 2006 WILL: "Upon...the death of my wife, the balance of the trust corpus, inclusive of the distributions from my IRA, shall be distributed in accordance with the Beneficiary designation which I have filed with U.S. Bank...[9]" (Exhibit JB-61 p. 8 of 20, App. 290).
- OCTOBER 18, 2008 WILL. Upon...the death of my wife, the balance of the trust corpus, inclusive of the distributions from my IRA, shall be distributed in accordance with the Beneficiary designation which I have filed with U.S. Bank..."[10](Exhibit JB-62 p.9 of 21, App. 311).
- JANUARY 11, 2010 WILL: "If and in the event there is no federal estate tax in force at the time of my demise and in the event JOAN Y. BITTNER survives me, she shall be entitled to all of the required distributions from such IRA during her lifetime and upon her

[9] This was the October 26, 1999 IRA beneficiary designation, Exhibit JB-57 which unambiguously places the IRA in trust for Joan for her life and leaves the remainder to the decedent's children.

[10] Again, this refers to the October 26, 1999 IRA beneficiary designation, Exhibit JB-57 which leaves the remainder to Richard's children upon Joan's death.

death...then the balance of my IRA shall pass to and be distributed under the R. RICHARD BITTNER FAMILY TRUST [which leaves the remainder to Richard's and Joan's children]." (Exhibit JB-25 pp. 6-7 of 20, App. 145-46).

- JANUARY 11, 2010 IRA BENEFICIARY DESIGNATION[11]:

  "...Joan Y. Bittner is the primary beneficiary under the Joan Y. Bittner Marital Trust under my Last Will & Testament dated January 11, 2010 and she shall be entitled to annual distributions from my IRA based upon her life expectancy ...

  Upon the death of my wife, my children, Kimberly Montgomery, Jeffrey S. Bittner, Todd R. Bittner and Lynn Von Schneidau, shall become primary beneficiaries and have an equal share. In the event any child of mine shall not survive me and my wife and is survived by descendants, then such descendants shall succeed in the interest of my child (or children) herein". (Exhibit JB-2 pp. 3-4, App. 91-92). (Emphasis added).

- JANUARY 2012 WILL (DRAFT): " If and in the event there is no

[11] This is the beneficiary designation U.S. Bank now claims *clearly* provides that it was Richard Bittner's intent to leave the IRA to Joan Bittner, outright. (Exhibit JB-2).

federal estate tax in force at the time of my demise and in the event JOAN Y. BITTNER survives me, she shall be entitled to all the required distributions from the IRA during her lifetime and upon her death then the balance shall pass to and be distributed as set forth in my IRA beneficiary designation on file with U.S. Bank..."[12] (Exhibit JB 63 p. 8 of 23, App. 311).

- JANUARY 7, 2014 (FINAL WILL): " If and in the event there is no federal estate tax in force at the time of my demise and in the event JOAN Y. BITTNER survives me, she shall be entitled to all the required distributions from the IRA during her lifetime and upon her death then the balance shall pass to and be distributed as set forth in my IRA beneficiary designation on file with U.S. Bank..." (Exhibit 1- p. 9 of 24, App. 111).

For these reasons, Jeff alternatively prays that this Supreme Court reverse, declare the excluded parol evidence admissible and remand this case for retrial.

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[12] In this instance the Final Will refers to the final IRA beneficiary designation, Exhibit JB-2 which is the subject of this suit and which leaves the IRA to Richard's and Joan's children upon Joan's death.

C. THE DISTRICT COURT IMPROPERLY EXCLUDED THE TESTIMONY OF LUCILLE OSELAND, ROBERT LAMBERT, AND JEFF BITTNER

This error was preserved through offers of proof of the testimony of Lucille Oseland (Tr. 253:15-254:9); Robert Lambert (Tr. 280:3-20); Jeff Bittner (Tr. 337:21-338:2). The standard of review is for errors at law. *Colwell v. MCNA Ins. Co.* Case No. 20-0545 Decided June 11, 2021 (Iowa 2021) at p. 3; *Krause v. Krause*, 589 N.W.2d 721, 724 (Iowa 1999); *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011).

Attorney Robert Lambert practiced law with Richard Bittner for over 40 years. (Tr. 281:7-19). Attorney Jeff Bittner practiced law with his father for over 35 years. (Tr. 332:20-333:9). Administrative Assistant Lucille Oseland worked for Richard Bittner for almost 30 years. (Tr. 255:20-23). The District Court excluded all of their testimony. All of their testimony was established through offers of proof. All testified that Richard Bittner would not have bequeathed in excess of $3,000,000 in liquid assets to Joan, outright.

Mr. Lambert testified:

- Richard controlled the Bittner family finances. (Tr. 285:25-286:2).
- Richard viewed himself as Joan's economic provider. (Tr. 287:15-

17).

- It would have been inconsistent for Richard to leave Joan $3,000,000 in liquid assets. (Tr. 286:20-24).
- It would have been consistent with Richard's habits to leave his wife's interest in trust. (Tr. 287:8-14).

Ms. Oseland testified:

- Pursuant to Richard's directions, she typed all of his wills and IRA beneficiary designations that were offered into evidence. (Tr. 265:18-276:13).
- Richard never gave Joan sole ownership of the IRA in any Will or IRA beneficiary designation she prepared. Further, Richard never left Joan substantial bequests in liquid assets or cash. (Tr. 277:21-278:7).
- Richard never told Ms. Oseland in any words at any time that he wanted Joan to be the outright owner of the IRA. (Tr. 260:18-21).
- Richard never put Joan's name on any account that held substantial liquid assets. (Tr. 265: 8-17).
- Richard would give Joan a monthly stipend from which she would pay the family bills. (Tr. 264:1-3).
- Richard viewed it his role to care of Joan. (Tr. 278:13-16).

- Richard added his addendum (Ex. JB-2 pp. 3-4, App. 91-92) to U.S. Bank's form (Ex. JB-2 pp. 1-2, App. 89-90) because U.S. Bank's form did not satisfy him. (Tr. 260:4-7).
- It would have been "very inconsistent" with Richard's habits to have bequeathed Joan a substantial amount in the form of cash or liquid assets. (Tr. 278:9-12).

Jeff Bittner testified:

"Dad was a person who liked to be in control. He had done many spendthrift trusts over the years. He did raise concerns and he wanted Mom protected." (Tr. 365:4-7). Jeff then shared four benefits of a trust arrangement. (Tr. 365:10-21). Included in these benefits are minimization of federal estate taxes and protecting the decedent's children from disinheritance through remarriage of the surviving spouse. *Id*.

When asked if these trust benefits were matters that he had discussed with Richard over the years, Jeff responded, "I learned those from my father." (Tr. 365:22-25).

Jeff further testified:

> Prior to looking at [the IRA beneficiary designation, Ex. JB-2], my entire history with my dad and the way that he was, that he viewed himself as Mom's caretaker and he knew that a trust

> arrangement is the way to do that.
>
> Based upon my entire experience with my father, the way he was, his– not only desire for control but his desire to take care of Mom, I'm absolutely convinced he wanted a trust arrangement for her. (Tr. 381:12-19).

The same legal analysis applicable to the excluded wills and beneficiary designations applies to the excluded testimony. If there is any question remaining regarding Richard Bittner's intent after reading the plain language of the IRA beneficiary designation (Ex. JB-2/USB-1, App. 89-92), it is erased by the excluded testimony of Mr. Lambert, Ms. Oseland and Jeff Bittner.

For these reasons, Jeff alternatively prays that this Supreme Court reverse, declare the excluded parol evidence admissible and remand this case for retrial.

D. U.S. BANK'S UNCLEAN HANDS AND CONFLICT OF INTEREST PROHIBITED IT FROM SERVING AS JOAN BITTNER'S ADVOCATE IN THESE PROCEEDINGS

Error was preserved through Jeff's Answer and Affirmative Defenses. Specifically, Answer para. 1, 38, 39, Prayer for Relief; Affirmative Defenses 3, 5, 7. (App. 28) Also, preservation was through exhibits and testimony introduced at trial Ex. 39 (App. 218) (Tr. 189:20-190:6), Ex. 89 (App. 359)

(Tr. 197:16-198:6), Ex. 110 (App. 391) (Tr. 198:8-16); Jeff Bittner testimony (Tr. 354:3-355:23; 357:1-358:14). The standard of review for equitable affirmative defenses is *de novo*. *In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994); *In re Renes*, 832 N.W.2d 384 (Iowa App. 2013).

On three separate occasions U.S. Bank admitted its roles as Trustee of the Richard Bittner IRA and Co-Executor of the Richard Bittner Estate were conflicting. (Ex. JB-39, App. 218; Ex. JB-89, App. 359. Ex. JB-110, App. 391)[13]. Jeff's counsel reminded U.S. Bank of its admitted conflict:

> All of this background is by way of demonstrating that US Bank has been hopelessly conflicted since the time it first announced its opinion that Joan Bittner is the sole IRA beneficiary. This position-while US Bank may conceive it to be consonant with its duties as IRA administrator-is exactly contrary to its duty as co-executor to collect the asset for the estate....
>
> U.S. Bank simply cannot satisfy its fiduciary duty to Mr. Bittner's estate by continuing to advocate that the largest asset of the estate belongs to somebody else. (Ex. JB-26 p. 2 para. 1, 3).

[13] In the first two exhibits U.S. Bank stated the conflict arose because of a differing opinion with its co-executor. In the final exhibit, Exhibit 110, U.S. Bank acknowledged that its duties were conflicted. In either event, U.S. Bank had an admitted conflict of interest serving dually as Joan Bittner's advocate for the IRA and Co-Executor of the Richard Bittner's estate and nominated Co-Trustee of the testamentary trusts.

Jeff's counsel presented U.S. Bank with an alternative which would have allowed it to maintain its fiduciary neutrality:

> US Bank can take certain courses of action to address these problems. First, it can re-cast the petition as an action for interpleader. (Which it manifestly ought to be; the interpleader plaintiff is absolved from all further liabiliy by placing the question in the court's hands. See, e.g., *Lincoln National Life Ins. Co. V. Onsager*, 2015 U.S. Dist. Lexis 83267, 2015 WL 3932716).
>
> (Ex. JB-26 p. 2 para.4, App. 161).

Rather than resign as U.S. Bank had proposed doing in its first two e-mails, and rather than agreeing to Jeff's counsel's suggestion that U.S. Bank maintain neutrality (through an interpleader action), U.S. Bank chose an impermissible third course of action. While co-executor and while actively challenging its removal of co-executor, U.S. Bank chose to advocate for Joan's 100% ownership of the IRA as IRA Trustee by continuing to prosecute this declaratory judgment action as Joan Bittner's advocate.

As noted, U.S. Bank admitted to its conflict on at least three separate occasions . (Ex. JB-39, App. 218; Ex. JB-89, App. 359. Ex. JB-110, App. 391)[14]. During the course of proceedings below, U.S. Bank offered varying

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In addition, both Curt Oppel and Jeff Bittner testified that U.S. Bank repeated its admission of conflict in the meeting held on December 17, 2019. (Tr. 307:8-20; 354:3-10).

explanations for this conduct.

First, it asserted that as co-executor it had no duty to attempt to collect the IRA for the estate as the estate was not named as beneficiary in the designation. This argument ignores the fact that as co-executor U.S. Bank served as "trustee by implication" of Richard Bittner's testamentary trusts until testamentary trustees were appointed by the Court. The concept behind "trustee by implication" is straight forward: until the Court appoints testamentary trustees, someone must perform the duty to collect the assets that will fund the trust. That duty falls on the executor as "trustee by implication." The authorities on point are abundant.

> (E)ven though one is named executor only and no reference is made in the will to his acting as trustee, if trust functions are vested he will be deemed a trustee with regard to those duties. See Bogert & Bogert, supra ; Restatement (Second) of Trusts, § 6, Comment b (1959).
>
> *Matter of Wiese's Estate*, 257 N.W.2d 1,4 (Iowa 1977)
>
> Where the duties imposed on executors are active and render the possession of the estate convenient and reasonably necessary, they will be deemed trustees for the performance of those duties to the same extent as though declared so to be in the most explicit terms [quoting *Wilson v. Snow*, 228 U.S. 217; 33 S. Ct. 487, 57 L. Ed. 807 (1913)]. *Id.*
>
> Where powers and duties conferred on one named as executor do not pertain to that office but, do pertain to the office of

> trustee and no other trustee is designated, the executor, by virtue of his appointment as executor becomes trustee by implication of law as where a will directs acts to be done which necessarily require the intervention of a trustee to hold property, such as where there is a bequest of income to one for life and then the principal to another. It is immaterial that he is not expressly named as "trustee"...
>
> 90 C.J.S. Trusts §242.
>
> Where the will contains express directions what the executors are to do, an executor who proves the will must do all which he is directed to do as executor, and he cannot say that though executor he is not clothed with any of those trusts. 3 Williams, Executors, 1796.
>
> *McBurney v. Carson*, 99 US 567, 572, 25 L. Ed. 378 (1879)

Here, in addition to serving as co-executor, U.S. Bank had been explicitly nominated as co-trustee of Richard Bittner's testamentary trusts. Until the testamentary trustees were appointed by the court, the co-executors were charged with the trustees' duties. Arguably the most important duty of any fiduciary is to collect and preserve substantial assets to which the fiduciary has a colorable claim.

Exhibit 1 p. 9 of 24 Article IX, App. 111 specifically directs the IRA to be held in trust for Joan if the Marital Trust is funded. If the Marital Trust was not funded, the IRA was to pass as designated in the IRA beneficiary designation (i.e. to Joan for life, remainder to her children upon her death).

The fact that Richard Bittner intended his IRA to find its way to the R. Richard Bittner Family Trust (under his Will) upon Joan's death is reflected in the part of his Will which provided that a substantial portion of the income that Lynn Von Schneidau will receive will be funded by the IRA (Ex. 1- p. 14 of 24, App. 116).

> By accepting the trust, a trustee becomes bound to administer it or execute it in accordance with the provisions of the trust instrument and intent of the settlor...
>
> 90 C.J.S. Trusts §247.

Either U.S. Bank is trustee by implication of law (as executor) or it was an actual testamentary trustee (or both). Twice in its Petition U.S. Bank states that it was co-trustee of the Joan Y. Bittner Marital Trust at the time it filed this action. "This action... addresses whether U.S. Bank... should transfer R. Richard Bittner's account to his widow, Joan Y. Bittner, or to a Marital Trust specified in his will over which his son, Jeffrey S. Bittner, *serves as co-Trustee with U.S. Bank*..." (Petition para. 1)(Emphasis added).

"Jeffrey disputes U.S. Bank's interpretation and has stated that his father intended to designate the Marital Trust under his Will as the beneficiary of the IRA, over which he serves as co-Trustee [with U.S. Bank]." (Petition Para. 38, App. 16-17).

> It is the right and the duty of the trustee, and of him alone, to proceed promptly, or within a reasonable time by suit, or other legal proceeding, if necessary, to collect or reduce to possession the property and assets belonging to the trust estate and to collect all claims due the estate. A failure to perform these duties with due diligence, renders the trustee personally liable for the resulting loss. A testamentary trustee's duty and responsibility in this respect is not affected by the fact that the executor of the estate is a reputable attorney....

90 C.J.S. Trusts §263 (Emphasis added).

Iowa Code §633.160 provides, Every fiduciary shall be liable...for neglect or unreasonable delay in collecting the....assets of the estate..." (Emphasis added). Iowa Code § 633A.4202 provides, " A trustee shall administer the trust solely in the interest of the beneficiaries, and shall act with due regard to their respective interests."

> A trustee who has accepted an active trust has the power and duty to collect, take possession of and keep in his custody the trust property and assets and to hold manage, and apply the same to effect the purposes and objects of the trusts.
>
> 76 Am Jur 2d Trusts §440.
>
> A trustee has a duty, even though not expressly imposed by the trust instrument to protect, conserve and safeguard the assets of the trust for the benefit of all the cestuis que trust, and so that the trust shall attain its purpose. It is his duty at all times to act wholly for the benefit of the trust and the beneficiary...
>
> 90 C.J.S. Trusts § 270

> It is the trustee's paramount duty to preserve and protect the trust estate in compliance with the terms of the trust. The safety of the trust fund is the first care of the law, and on this depends every rule which has been made for the conduct of trustees.
> 90 C.J.S. Trusts §247(b).

The duties of an executor and trustee of a testamentary trust are co-extensive and inseparable until assets are collected and the trust is funded. *McBurney v. Carson*, 99 U.S. 567, 572 (1879)*; Wilson v. Snow,* 228 U.S. 217, 225, 33 S. Ct. 487, 57 L. Ed. 807 (1913), *Matter of Estate of Wiese*, 257 N.W. 2d 1, 3-4 (Iowa 1977), 31 Am Jur. 2d *Executors and Administrators* §414 -416.

Whether U.S. Bank was acting in its capacity as "trustee by implication" (i.e. executor) or as named testamentary trustee, U.S. Bank had a *duty* to follow the written directives of Richard Bittner's Will. At trial, U.S. Bank Vice-President Phil Hershner noted , "It is our absolute professional responsibility to follow the will and execute on the will..." (Tr. 231:7-8).

One enumerated duty was to hold the IRA *in trust* for Joan Bittner; pay her all the required distributions *for her lifetime;* and, ultimately pass the remainder interest to designees upon her death.

The clean hands doctrine stands for the principle that a party may be denied relief in equity based upon inequitable, unfair, dishonest, fraudulent, or deceitful conduct, *Ellwood v. Mid States Commodities, Inc*. 404 N.W.2d 174, 184 (Iowa 1987); *In re Marriage of Phillips*, 493 N.W.2d 872, 878 (Iowa App. 1992). See also, *Iowa Health System v. Trinity Health Corp*. 177 F. Supp. 2d 897, 924 (N.D. Iowa 2001); 27 Am Jur 2d *Equity* § 136 at p. 667.

In this case, U.S. Bank deliberately chose to pursue a path that opposed the wishes decedent expressed in his Will. A party which chooses one set of fiduciary responsibilities in derogation of its conflicting fiduciary duties has unclean hands. U.S. Bank should have filed an interpleader action rather than prosecute this suit assuming the role of Joan Bittner's advocate. In its ruling denying U.S. Bank's motion to quash Jeff's subpoena for U.S. Bank's records related to the IRA, the District Court noted, "The Court finds U.S. Bank cannot choose which hat it is wearing at a specific place and time." (Order 12-31-20 Scott Co. No. ESPR078709, App. 65).

U.S. Bank's second explanation for its conflict was that its only conflict was its with Jeff, its co-executor. Assuming arguendo that this was U.S. Bank's only conflict, it is disqualifying. Iowa Code §633.76 requires

co-fiduciaries to act in concert. In the event of a disagreement between the co-fiduciaries, one may petition the court to resolve their differences. That is not what happened in this case.

While serving as co-executor and trustee by implication of the testamentary trusts, U.S. Bank unilaterally proceeded with a lawsuit advocating Joan Bittner's sole ownership of the IRA. (Petition para. 37, App. 16; Motion for Summary Judgment 12-29-20 Prayer for Relief, App. 37-38; Brief in Support of Motion for Summary Judgment 12-29-20 pp. 7-24; Reply Brief 01-19-21 pp. 4-17).

Had U.S. Bank been truly desirous of maintaining neutrality, it would of availed itself of the interpleader option. Joan's advocate should have been her conservator, MidWestOne Bank.

U.S. Bank's attempt to split its corporate personality in order to favor one set of fiduciary duties over another is not permissible.

> An executor, as such, must administer the estate according to the will, even though the will creates an interest in the nature of a trust or a duty implying a trust...In such a case, the executor may be treated as a trustee or serving in a dual capacity.
>
> 31 Am Jur 2d, Executors and Administrators §416.
>
> The same person may act as executor and trustee, but he who occupies the two position must comply with the duties of both,

and the fact that they are different departments of the same trust company does not change the fact that they are one person.

31 Am Jur 2d, Executors and Administrators §415.

For these reasons Jeff alternately prays that this Supreme Court reverse, remand this case for retrial, order U.S. Bank to recast its Petition as an interpleader action and order it to refrain from taking any position of advocacy.

E. U.S. BANK'S IRA AGREEMENT DID NOT ALLOW IT TO SERVE AS JOAN'S ADVOCATE

Error was preserved through Jeff's Answer and Affirmative Defenses. Specifically Answer para. 1, 39, 41, Prayer for Relief; Affirmative Defenses 1, 2, 4, 7, 8, App. 28; Jeff Bittner's pretrial brief 01/12/21 pp. 10-12. Also, preservation was through exhibits and testimony introduced at trial Ex. USB-2, App. 93-102. (Tr. 89:13-11); Testimony of Sharon Chin testimony (Tr. 89:18-90:16).

The standard of review is for errors at law. *Colwell v. MCNA Ins. Co.* Case No. 20-0545 Decided June 11, 2021 (Iowa 2021) at p. 3; *Krause v. Krause*, 589 N.W.2d 721, 724 (Iowa 1999); *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011).

Instead of following its duties as co-executor and co-trustee of the

testamentary trusts, U.S. Bank chose to champion the cause of what it claims was its duty as IRA Trustee. An examination of its own IRA trust agreement shows this claim lacks merit. U.S. Bank's Trust Agreement is U.S. Bank's form. (See Ex. USB-2; App. 93-102). Accordingly, it must be construed strictly against its draftsman, U.S. Bank. *Rodman v. State Farm Mut. Auto. Ins. Co.*, 208 N.W.2d 903, 905-06 (Iowa 1973); *Dickson v. Hubbell Realty Co.*, 567 N.W.2d 427, 430 (Iowa 1997); *Kerndt v. Rolling Hills Nat. Bank*, 558 N.W.2d 410, 416 (Iowa 1997).

Article VIII para. 14 of the IRA Trust Agreement (Ex. USB-2; App. 100) reveals that U.S. Bank deliberately limited its own duties and responsibilities. It provides, "Trustee's duties and responsibilities are only those *expressly* enumerated herein. Trustee has *no other duties*, responsibilities or liability. (Emphasis added). There is no expressed enumerated duty or responsibility in that trust agreement to serve as advocate for any particular potential beneficiary or group of beneficiaries.

By assuming the role of Joan Bittner's advocate U.S. Bank exceeded its contractual duties and responsibilities which it deliberately limited. Accordingly, U.S. Bank has undertaken an *ultra vires* act in serving as Joan Bittner's litigation advocate.

An *ultra vires act* is one performed without authority to act on the subject, *City of Humboldt v. Knight*, 255 Iowa 22, 120 N.W.2d 457, 458 (Iowa 1963); *Green v. City of Mt. Pleasant*, 256 Iowa 1184, 1206 131 N.W.2d 5, 19 (Iowa 1964); *Outing v. Plum*, 212 Iowa 1169, 235 N.W. 559 (Iowa 1931); Black's Law Dictionary (Sixth Edition).

The conduct of U.S. Bank in this case parallels the conduct of LeMars Mutual Insurance Company in the case of *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639, 645 (Iowa 1979) wherein the Court noted:

> Le Mars Mutual should take no active part in the controversy... but here the company...took [an] active even aggressive part in the trial over the strenuous objections of the other defendants...
>
> ...As nominal defendant in a derivative action, Le Mars Mutual has the duty to maintain strict neutrality in the struggle between policyholders and corporate personnel. Where, as here, the policyholders are represented by able and aggressive counsel, there is no reason to depart from the posture of neutrality. This Court believes that sound principles of judicial administration compel the conclusion that the proper role of independent counsel for Le Mars Mutual is established by the required neutrality of the corporate entity...

In this case, the competing parties for ownership of the Richard's IRA were the trusts created under Richard's Will and Joan's conservator, MidwestOne Bank. MidWestOne was capably represented by the venerated law firm of Meardon, Downer & Suppel, P.L.C. U.S. Bank had no claim of

ownership in the IRA.

Because U.S. Bank acted beyond the scope of its contractual authority in advocating for Joan Bittner's sole ownership of the IRA, it committed an *ultra vires* act. Accordingly, it had no standing to sue or advocate on her behalf[15].

For these reasons, Jeff alternately prays that this Supreme Court reverse, remand this case for retrial, order U.S. Bank to recast its Petition as an interpleader action and order it to refrain from taking any position of advocacy.

CONCLUSION

This case can be easily resolved if the Court focuses on but one question: If Richard Bittner wanted to leave 100% of his IRA to his wife if she survived him, what purpose did his handcrafted addendum serve? The answer is that it served no purpose, at all. If this was his intent, he would have simply filled in Joan Bittner's name on the first line in U.S. Bank's form under "Primary beneficiary". Then, he would have simply filled in the name of his four children on the first four lines under "Contingent

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[15] Jeff's affirmative defenses alternately included breach of contract (Defense #4) and ultra vires conduct (Defense #8).

beneficiay(ies)". As an estate planning lawyer he was aware that all direct spousal bequests are exempt from taxation, 26 U.S.C. §2056.

The essence of the District Court's interpretation and U.S. Bank's conclusion is that Richard Bittner's addendum to his IRA beneficiary designation meant nothing at all. According to them, Richard Bittner's addendum simply kept repeating over and over what he already done with U.S. Bank's form. But, Richard Bittner did not find U.S. Bank's form satisfactory.

> Q. ...Will you provide us the background on how the Addendum came about?
>
> A. Mr. Bittner dictated to me the addendum to the IRA beneficiary designation and he went over it, extensively. I would transcribe the changes, and then once it was completed we provided that with the initial two pages to U.S. Bank.
>
> Q. So would it be safe to summarize your testimony by saying U.S. Bank's form didn't adequately satisfy what Richard Bittner wanted to do, so he added an addendum?
>
> A. That is correct.

(Lucille Oseland, Tr. 259:22-260:7).

In this case, U.S. Bank interprets its IRA beneficiary designation as though the IRA was an insurance policy. To U.S. Bank, "primary

beneficiary" and "sole successor owner" are synonymous terms. Richard Bittner interpreted the IRA beneficiary designation as though it was an estate planning document, his estate planning document. To Richard Bittner, an estate planning lawyer, "primary beneficiary" meant "lifetime beneficiary".

U.S. Bank did not see fit to define "primary beneficiary" in its form agreement. So, in his handcrafted addendum, which "trumps" U.S. Bank's form[16], Richard Bittner defined "primary beneficiary" as the person entitled to received the required annual income payments for her life, his wife, Joan.

The last paragraph of Richard's IRA beneficiary designation either expresses his dispositive intent or means nothing. The District Court found it meant nothing. The District Court's conclusion is at odds with this Court's historical directives. *Estate of Pearson v. Interstate Power*, 700 N.W. 2d 333, 343 (Iowa 2005); *Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75, 78 (Iowa 1997); *Kerndt v. Rolling Hills Nat. Bank*, 558 N.W. 2d 410, 416 (Iowa 1997); *Iowa Fuel & Minerals v. Bd. of Regents*, 471 NW 2d 859,

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[16] See *Stream v. Grow*, No. 0-094/09-1011 (Iowa App. 4/21/2010) (Iowa App. 2010), 2010 Iowa App. LEXIX 310 *15 *Low v. Young, Mullarky & Long*, 158 Iowa 15,15 138 N.W. 828, 829 (Iowa 1912); see also 17A C.J.S. Contracts § 325.

863 (Iowa 1991); *Harvey Construction Co. v. Parmele*, 113 N.W. 2d 760, 765 (Iowa 1962).

The last paragraph is the Elephant in the Room.

Of equal importance is U.S. Bank's disqualifying conflict of interest. Its conflicting fiduciary obligations required it to remain neutral. Instead, it chose the role of Joan Bittner's advocate, a role for which it had no fiduciary duty according to the terms of its own form Trust Agreement (Ex. USB-2 para. 14, App. 100). Sadly, when offered the opportunity to maintain neutrality after its conflicting fiduciary obligations were directed to its attention, U.S. Bank rejected the neutral option of interpleader. (Ex. JB-26 p. 2 para. 1,3,4, App. 161).

As a financial institution, U.S. Bank's fiduciary bar should be high. Its fiduciary conduct fell short of the legal requirement. When a conflicted fiduciary chooses sides, the prejudice to the other side is inherent. See generally *Rowen*, 282 N.W.2d at 645.

For the reasons set forth above, the District Court's judgment must be reversed. Richard Bittner's clearly expressed intent was to place his IRA in trust. The annual distributions required by law belong to Joan Bittner. Upon Joan's death, the remainder interest (if any) passes to Richard's

children in equal shares. Alternatively, this case should be remanded for trial, the excluded parol evidence should be admitted and U.S. Bank should be ordered to recast its Petition as an action for Interpleader.

/s/ Jeffrey S. Bittner
Jeffrey S. Bittner, AT #0000931
201 West 2nd Street Suite 1000
Davenport, Iowa 52801
Ph. (563)-579-7071
Fax(563)-328-3352
E-mail jbittner@jbittnerlaw.com

REQUEST FOR ORAL ARGUMENT

Jeff Bittner respectfully requests thirty (30) minutes of oral argument.

CERTIFICATE OF COSTS

The undersigned hereby states that the cost of the transcript was $1,452.50. The cost of paper copies of final briefs is anticipated to be $0.00 as all contemplated filings will be electronic.

CERTIFICATE OF COMPLIANCE WITH IOWA R. APP. PROC. 6.903(1)(g)(1).

I, Jeffrey S. Bittner, hereby certify that the number of words in this proof brief, exclusive of the table of contents, table of authorities, statement of issues and all certificates is 11,606 according to Word Perfect which is under the 14,0000 words allowed under Iowa R. App. Proc. 6.903(1)(g)(1).