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-Appellant

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

Defendant-Appellant's Application For Further Review

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GROUNDS FOR FURTHER REVIEW

In a hectic modern world moving court dockets along must be a point of emphasis. With this acknowledgment, if the pace becomes so frantic that matters of public importance are avoided by lower courts and time-honored precedent is discarded in abundance for the sake of expedience, confidence in the judicial system is eroded.

This appeal involves a matter of significant public importance that the court of appeals improperly avoided. Iowa R. App. Proc. 6.1103(1)(b)(4). Providing further grounds for additional review, vast amounts of this court's precedent establishing time- honored rules of construction were ignored in abundance by the courts below. Iowa Rule App. Proc. Iowa R. App. Proc. 6.1103(1)(b)(1).

Providing a conjunctive ground for additional review is another issue of broad public importance: the ever-increasing importance Individual Retirement Accounts (IRA's) play in estate plans. Iowa R. App. Proc. 6.1103(1)(b)(4).

Yet another issue of broad public importance is whether lower courts may consider extrinsic evidence that supports their ultimate conclusion but exclude all extrinsic evidence which suggests that conclusion is mistaken.

Id.

U.S. Bank's conflict of interest was the elephant in the room to the court of appeals. U.S. Bank filed this suit against decedent's son, Jeff, in his capacity as trustee of the Joan Y. Bittner Marital Trust. To use U.S. Bank's own language in paragraph 1 of its petition, "where [U.S. Bank] serves [present tense] as co-trustee." (App. 9). The court's eyes are not deceiving it. U.S. Bank, IRA trustee, sued the Joan Y. Marital Trust *at the time it was serving as trustee of that trust, as well*.

Then in violation of its fiduciary duty to the Joan Y. Bittner Marital Trust and in further violation of its duty of impartiality, U.S. Bank chose sides as chief advocate for one of the claimants to a disputed trust fund.

The issue of whether a conflicted fiduciary may choose sides and serve as chief advocate for one side seems to fall squarely within the definition of "an issue of broad public importance that the supreme court should ultimately determine.". Iowa R. App. Proc. 6.1103(1)(b)(4).

The ultimate issue before the court is quite simple: whether an estate planning lawyer who practiced law for 65 years wanted his $3,500,000 IRA to go to his homemaker-wife outright or continue to be held in trust for her lifetime benefit. 7 wills and 2 prior beneficiary designations show

decedent's unwavering preference for a trust arrangement. Decedent's partner of over 40 years testified that throughout his life decedent gave his wife a monthly financial allowance. (Lambert Tr. 285:25-286:24). Decedent's legal assistant of over 30 years testified that he never would have left his wife this amount outright, it would run contrary to his lifelong view that his role was to provide for her care. (Oseland Tr. 254-279). Decedent's son and law partner for 35 years echoed these same sentiments. (Jeff App. 477:4-478:5). The district court excluded all of this evidence.

Instead of trying to ascertain decedent's intent, the courts below engaged in tortured legal construction which required them to engage in all of the following in order to reach the result decision ultimately announced:

1) Judicially deleting/ignoring the most important clauses in decedent's handcrafted addendum to his IRA beneficiary designation as though they had no legal significance in conflict with this court's decisions in *Colwell v. MCNA Ins. Co.*, 960 N.W.2d 675, 679 (Iowa 2021); *Estate of Pearson v. Interstate Power*, 700 N.W. 2d 333, 343 (Iowa 2005).

2) Inserting (adding) a definition of a contractual term that was never in the IRA contract contrary to the definition clearly intended by decedent conflict with this court's decisions in *Kennedy v. State*, 688

N.W.2d 473, 480 (Iowa 2004); *Kinnney v. Capitol-Strauss, Inc*. 207 N.W.2d 574, 576-77 (Iowa 1973).

3) Ruling that the "boilerplate" in U.S. Bank's form agreement "trumps" language in the decedent's handcrafted addendum (when the law commands the opposite) in conflict with this court's decisions in *Baron v. Crossroads Center of Iowa, Inc.*, 165 N.W. 2d 745, 752 (Iowa 1969); *Stebbens v. Wilkinson*, 87 N.W. 2d 16,20 (Iowa 1957).

Individual Retirement Accounts (IRA's) are becoming an increasingly important component of decedents' estate plans. In this case the IRA in question is worth in excess of $3,500,000 and is the largest asset of the decedent's estate. (Opin. 6-7). This case underscores and highlights the tension between how banks and long-time estate planning lawyers interpret contractual terms differently. In this case the court of appeals injected into decedent's IRA a definition of "primary beneficiary" from Black's Law Dictionary that deviated from other definitions of that term including the meaning ascribed by decedent, an accomplished estate planning attorney. Decedent's clearly intended meaning was contained in the abundant evidence the trial court deliberately excluded.

QUESTIONS PRESENTED FOR FURTHER REVIEW

1. Whether a conflicted fiduciary may chose sides in a dispute over ownership of a trust fund and serve as that side's lead advocate?

2. Whether a court may judicially delete the decedent's handcrafted language referencing his marital trust?

3. Whether court rulings may ignore the very purpose of a marital trust?

4. Whether a court may add a judicial definition of "primary beneficiary" that was never in decedent's IRA contact which decedent never intended.

5. Whether a court may judicially add the words, "if I survive my wife..." when those words were never part of his IRA beneficiary designation.

6. Whether an IRA beneficiary designation which cross- references a will executed on that same day must be read together with that will?

7. Whether a court may consider extrinsic evidence which supports its conclusion but deny admission of all contradictory extrinsic evidence?

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STATEMENT SUPPORTING FURTHER REVIEW

On July 15, 2021, the Iowa Court of Appeals affirmed a ruling of the Iowa District Court over ownership of decedent's $3,500,000 IRA. In order to appreciate the magnitude of the error of the courts below, this court need answer but one question: How could Richard Bittner's deliberately chosen, handcrafted words "marital trust", "[payments] based upon [my wife's] life expectancy" and benefits to his children "upon the death of my wife" have any meaning whatsoever if he intended his wife to be the 100% beneficiary in all events as the lower courts have ruled?

In affirming the decision of the district court, the court of appeals erred as follows:

1) It deleted decedent's handcrafted references to his "marital trust" under the guise of judicial construction in violation of this court's precedent, *Colwell v. MCNA Ins. Co.*, 960 N.W.2d 675, 679 (Iowa 2021).

2) It ignored the *only* purpose a marital trust serves is to avoid leaving

property to a decedent's spouse, outright, 26 U.S.C. Sec. 2010(c); U.S.C. Sec. 2056(a); 26 U.S.C. Sec. 2056(b).

3) It added (chose) a dictionary definition of "primary beneficiary" to decedent's IRA contract rather than using an alternate definition consistent with what *decedent meant* when he used the term "primary beneficiary" in his IRA beneficiary designation in violation of this court's precedent, *Kennedy v. State*, 688 N.W.2d 473, 480 (Iowa 2004). In this regard the court of appeals confused contract interpretation with contract construction. This confusion caused it to exceed the proper role of the court.

4) It added words to decedent's IRA beneficiary designation which say, "if I survive my wife..." when the language the decedent actually used states, "upon the death of my wife...." in violation of this Court's precedent, *Kinnney v. Capitol-Strauss, Inc*. 207 N.W.2d 574, 576-77 (Iowa 1973); *Kunz v. Bock*, 163 N.W.2d 442, 445 (Iowa 1968).

5) It gratuitously found that a subsequently executed will could somehow alter a decedent's intent on the day he executed an IRA beneficiary designation some four years earlier, in violation of this Court's precedent, *Hofmeyer v. Iowa Dist. Court*, 640 N.W.2d 225,

228-229 (Iowa 2001); *Taylor Enterprise, Inc. v. Clarinda Production Credit Ass'n* 447 N.W.2d 113, 115 (Iowa 1989).

BRIEF

STATEMENT OF THE CASE

This case involves a dispute over ownership of an IRA worth over $3,500,000. (Opin. p. 6). This case involves a conflicted fiduciary, U.S. Bank, serving as lead advocate for one of the parties.

STATEMENT OF FACTS

Richard Bittner ("Richard") was a well known Iowa lawyer who died February 23, 2019. Richard's will nominated his son, Jeff and U.S. Bank as co-executors of his will and co-trustees of the trusts designated under that will. (App. 122-23). U.S. Bank also served as Richard's IRA trustee. While simultaneously serving as a conflicted IRA Trustee and testamentary trustee, U.S. Bank filed suit on behalf of one trust against the other. (App. 9)

Richard owned an IRA worth over $3,500,000. (Opin. p. 6). The IRA was comprised of the IRA Trust Agreement (Exhibit USB-2, App. 93-102) and Richard's IRA beneficiary designation (Exhibit USB-1, App. 89-92).

Richard did not like U.S. Bank's form beneficiary designation so he

handcrafted his own which he attached to U.S. Bank's form (Luci Oseland, Tr. 260:2-7, App. 91-92). Richard's beneficiary designation (App. 91) cross-references a will he executed on that same date, January 11, 2010 (Ex. JB-25, App. 140-159).

On March 7, 2019 U.S. Bank and Richard's son, Jeff Bittner ("Jeff") were appointed co-executors of his estate. Richard's final will dated January 7, 2014 left instructions that his IRA was to remain in trust[1].

Richard's other previous wills and prior IRA beneficiary designations also directed the IRA to remain in trust, to pay Joan required annual distributions for her life and to pass the remainder to Richard's children.

Early on in the administration of Richard's estate, U.S. Bank's in-house counsel concluded that the Joan Y. Bittner Marital Trust was Richard's proper beneficiary, a position which U.S. Bank ultimately disavowed. (Opin. p. 4). On May 30, 2019 six employees of U.S. Bank convened a conference call. It was during this call that U.S. Bank retreated from their vice president's previous conclusion that the Marital Trust was

[1] Perhaps a point that has been glossed over is Richard's IRA was held in an IRA *trust* with U.S. Bank serving as trustee. Therefore, Richard's handcrafted addendum should be viewed in the context that in Richard's (accurate) view, he was already working with an existing trust.

the IRA beneficiary and concluded that Richard intended Joan to be the sole owner (beneficiary) of the IRA in all events regardless of contingencies. (Ex. JB-90 App. 364¶ 6).

U.S. Bank communicated its interpretation to Jeff. At the time Jeff was an Iowa attorney with over 35 years experience who worked with his father for all but 4 of those years. Jeff was taken aback. An outright bequest of a liquid asset of this magnitude is something his father would have never considered. As a man raised during the Great Depression, Richard considered his proper role as a husband to be that of his wife's caretaker. Robert Lambert App. 466:8-17; Jeff App. 477:4-478:5. For the duration of their 65 year marriage, Richard had put Joan on a monthly allowance. (Robert Lambert Tr. 285:25-286:24).

A falling out between the two co-executors ensued. On July 8, 2020, U.S. Bank promised to resign as co-executor. (Ex. JB-18, App. 138). On July 27, 2020, U.S. Bank reneged on its promise. (Answer U.S. Bank Richard's Estate, App. 58).

On July 29, 2020, while still serving as co-executor for Richard's estate and, by its own admission, co-trustee of the Joan Y. Bittner Marital Trust, filed a declaratory judgment petition against the Joan Y. Bittner

Marital Trust. In its Petition U.S. Bank served as advocate for Joan's ownership of the IRA. (App. 9 ¶1, 16 ¶ 37).

An expedited joint trial on U.S. Bank's petition for declaratory judgment and Jeff's petition to remove U.S. Bank as co-executor of Richard's estate took place January 26-27, 2021.

U.S. Bank moved to exclude all the evidence Jeff proposed to offer establishing his father's intent to leave the IRA in trust for his mother. The district court granted the motion. (Tr. 27:21-28:5).

Jeff preserved error by making offers of proof of his father wills and prior IRA beneficiary designations (Exhibits JB-1, 25, 56 , 57, 59-63, App. 103-126; 140-159, 231-233, 234-235, 236-261, 262-282, 283-302, 303-323, 324-346). Jeff also preserved error by offering the testimony of Robert Lambert, his father's law partner for 40 years (Tr. 280-287) Lucille Oseland, Richard's administrative assistant for over 30 years (Tr. 254-279), in addition to Jeff's own testimony. (Tr. 331-399). The district court refused to consider any of the offered evidence. (Tr. 27:21-28:5).

On March 17, 2021, the district court issued two orders. The first awarded the IRA to Joan. The second removed U.S. Bank as Richard's co-executor. Jeff filed his Notice of Appeal on the declaratory judgment action

on April 5, 2021. U.S. Bank did not appeal the ruling removing it as co-executor. On June 15, 2021, the Iowa Court of Appeals affirmed the District Court's ruling on the declaratory judgment action. This application seeks further review of the court of appeals' errant decision.

ARGUMENT

I. U.S. BANK'S CONFLICT OF INTEREST SHOULD BE ADDRESSED BY THIS COURT

"No man can serve two masters." - Matthew 6:24. Under Iowa law a corporation is treated the same as a man or woman. It is a legal "person". Iowa Code §4.1(20).

The court of appeals avoided the issue of U.S. Bank's conflict by incorrectly noting, "But U.S. Bank and MidWestOne are correct that [Jeff] agreed to defer trial on that issue." (Opin. 12). This finding is clearly in error and refuted by the record.

On December 16, 2020, Jeff filed a motion to defer trial *on his counterclaim*. (Jeff Bittner Motion Dec. 16, 2020 Scott County Case No. CVCV 300445(hereinafter "DJA")). The following day the trial court granted this motion. " The *Counterclaim* shall not be heard at the time set for trial on the declaratory judgment action." (emphasis added)(Order

December 17, 2020 DJA).

Trial was not deferred on Jeff's *affirmative defenses*. Affirmative defense number 5 reads as follows: "U.S. Bank is conflicted"[2]. (Jeff's Answer, Aff. Def. and Counterclaim Dec. 16, 2020- DJA). Jeff briefed the issue at trial. "U.S. Bank was advised repeatedly that it was required to maintain a position of neutrality because of its self-admitted conflict. Jeff, through counsel, virtually pleaded with U.S. Bank to recast its Petition as one for Interpleader to avoid its conflict. (Exhibit 26 p.2)". (Bittner brief January 12, 2021 bottom of p. 11 -DJA).

U.S. Bank was irrefutably conflicted in this case because it sued another trust where it was co-trustee. The other trust claimed entitlement to the $3,500,000 IRA.

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."

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[2] Relatedly Affirmative Defense No. 1 challenges U.S. Bank's lack of standing to sue (as a conflicted fiduciary obligated to maintain neutrality).

> [W]e have never wavered from our insistence that those holding fiduciary positions must act with a high degree of fidelity; nor have we been reluctant to deny enforcement...which violate(s) that duty or which induce(s) others to do so (citations omitted).

Rowen v. LeMars Mutual Ins. Co. of Iowa, 282 N.W.2d 639, 650 (Iowa 1979).

> 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.

Am Jur 2d Trusts §440. See also 90 C.J.S. Trusts § 270; *Matter of Estate of Wiese*, 257 N.W. 2d 1, 3-4 (Iowa 1977); *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), 31 Am Jur. 2d Executors and Administrators §414 -416.

Here U.S. Bank, a Goliath, decided the rules that apply to other fiduciaries do not apply to it. It decided that it could act as plaintiff on behalf of one trust it served and sue another trust where is also served as trustee.

U.S. Bank's conduct was inherently prejudicial in that it created the impression that if a conflicted fiduciary prefers one set of fiduciary responsibilities over another it must surely be endorsing the side which is

entitled to prevail. Regrettably, to this point it has escaped all consequences of its bold conduct. Only this court can hold it accountable. U.S. Bank can be held accountable either by an outright reversal of the court of appeals or acknowledgment of error that requires remand coupled with this court's directive that U.S. Bank is disqualified from further participation as an advocate.

II. THE COURT OF APPEALS' CONSTRUCTION OF RICHARD'S IRA BENEFICIARY DESIGNATION RENDERS RICHARD'S MARITAL TRUST DIRECTIONS MEANINGLESS

The appellate opinion is Joan was and is Richard's 100% beneficiary (and sole owner) in all events and regardless of any contingencies including federal tax consequences. (Opin. p. 1). That conclusion required the appellate court to ignore the critical language deliberately chosen by Richard in his handcrafted IRA addendum. That language provides:

> "...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* ... (Emphasis added). (App. 91).

That same conclusion required the appellate court to ignore the following language contained in the will Richard executed the very same day as his IRA beneficiary designation:

> 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, ...the balance of my IRA shall pass to and be distributed under the R. RICHARD BITTNER FAMILY TRUST under Article X[3].
> (App. 145-146)

Under the appellate opinion, Joan is not just entitled to annual distributions based upon her life expectancy, she is entitled to:

- 100% of the IRA principal,
- 100% of the IRA income,
- 100% of the principal and income immediately upon Richard's death regardless of whether his estate fell above or below the federal estate taxable amount.

By ruling that "primary beneficiary" means "100% beneficiary in all events" the court of appeals erased Richard's language which he deliberately added in his IRA addendum which entitled Joan to the income from the IRA for her life and substituted an entirely different meaning Richard never intended: Joan should receive the entire IRA outright in all events regardless of federal estate tax consequences.

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[3]The Richard Bittner Family Trust distributes the remainder equally to his children upon the death of Joan.

The approach implemented by the court of appeals is forbidden by this Court.

The appellate opinion conflicts with this court's precedent which forbids a court from rewriting contracts under the guise of judicial construction. *Kennedy v. State*, 688 N.W.2d 473, 480 (Iowa 2004).

The appellate opinion conflicts with numerous supreme court opinions which require a court to give meaning to every word in a contract if possible. These opinions include *Colwell v. MCNA Ins. Co.*, 960 N.W.2d 675, 679 (Iowa 2021); *Estate of Pearson v. Interstate Power*, 700 N.W. 2d 333, 343 (Iowa 2005).

The appellate opinion uses language in U.S. Bank's form to "trump" Richard's handcrafted language referencing his marital trust, lifetime payments to his wife and directing the corpus to go to Richard's children "upon the death of my wife" when this court's precedent commands the opposite result. *Baron v. Crossroads Center of Iowa, Inc.*, 165 N.W. 2d 745, 752 (Iowa 1969); *Stebbens v. Wilkinson*, 87 N.W. 2d 16 , 19 (Iowa 1957);

III. THE APPELLATE OPINION IGNORES THE FACT THAT THE *ONLY* REASON FOR A MARITAL TRUST IS BECAUSE THE PERSON DOES *NOT* WANT TO LEAVE THE PROPERTY TO HIS SPOUSE, OUTRIGHT

Under federal estate taxation, each individual is allowed to give away an unlimited amount to his/her spouse outright or in a qualified marital trust (both during their lifetime and upon their death). Each individual is further allowed to give away a specified amount during his/her lifetime and upon his/her death to other persons or non-marital trusts without incurring a federal estate tax, 26 U.S.C. §2010(c). In 2019 when Richard died that amount was $11.4 million. (Opin. 7). In the event Richard's taxable estate exceeded $11.4 million, there were two ways he could have avoided tax on the excess. First, he could have left it to Joan, outright. The excess given to Joan outright would have been exempt under 26 U.S.C. §2056 (a). Second, Richard could have left the property for Joan's benefit in a Marital Trust which is exempt under 26 U.S.C. § 2056(b).

The appellate opinion completely ignores the fact that the *only* purpose a marital trust serves is if the decedent does *not* want his surviving spouse to receive the excess outright. If Richard had intended for Joan to receive the IRA outright, there would have been no reason for him to mention a marital trust at all because an outright gift to Joan accomplishes the same tax-savings objective.

Another flaw in the appellate opinion is that it also commands the

conclusion that Richard directed Joan's excess interest to be held in a marital trust if his taxable estate exceeded $11.4 million but wanted the entire $3,500,000 IRA to pass directly to Joan outright and free from trust if he had no taxable estate. Richard's estate plan judicially crafted by lower courts is one that escapes logic. The type of estate plan created for Richard by these courts is unheard of in the arena of estate planning. It is an estate plan no competent lawyer would contemplate.

IV. THE COURT OF APPEALS SUBSTITUTED ITS DEFINITION OF "PRIMARY BENEFICIARY" FOR RICHARD'S

The task before the court of appeals was to determine what *Richard meant* by his use of the term "primary beneficiary". This is an issue of contract *interpretation*. It is a cardinal principal of contract law the *parties'* intention at the time they executed the contract controls. *Hofmeyer v. Iowa Dist. Court*, 640 N.W.2d 225, 228-229 (Iowa 2001). In this instance because U.S. Bank was not a party to designating beneficiaries, the critical question upon which the outcome of this case rests is who *Richard* intended as his beneficiaries on January 11, 2010.

Where the court of appeals ran afoul is its incorrect conclusion that this is a case involving contract *construction*. "Interpretation" is the search

for meaning of contractual terms; "construction" is ascertaining their legal effect. *Pathology Consultants v. Gratton*, 343 N.W.2d 428, 433 (Iowa 1984); *Fashion Fabrics of Iowa v. Retail Investors*, 266 N.W.2d 22, 25 (Iowa 1978). This case clearly involves an issue of contract *interpretation* because the very purpose of this litigation is to determine who *Richard* wanted to be his beneficiaries.

Because "primary beneficiary" is: a) not a defined term under the IRA agreement and b) not a defined term under Iowa law, the deciding issue is what *Richard meant* by that term. The court of appeals chose to substitute its intent for Richard's by taking the definition of "primary beneficiary" from Black's Law Dictionary. (Opin. p. 9). In so doing the appellate court both exceeded its judicial role and ignored an alternate definition which expressed Richard's intent.

Investopedia defines "primary beneficiary" as "an individual who is *first in line to receive benefits* under a will, trust, retirement account, life insurance policy or annuity upon the account holder's death." (emphasis added).

https://www.investopedia.com/terms/p/primary-beneficiary.asp#:~:text=What%20Is%20a%20Primary%20Beneficiary,account%20or%20trust%20hold

er's%20death.

All of the excluded parol evidence proves Richard equated the term, "income beneficiary" with "primary beneficiary". By definition, an "income beneficiary" is "the first in line to receive benefits...upon the death of the account holder." The "income beneficiary" is the first to receive payments of income. The "remaindermen" only receive their share after the income beneficiary's interest has expired.

This overwhelming evidence that this is how Richard interpreted "primary beneficiary" was found in his seven prior wills, two prior IRA beneficiary designations and the testimony of those who worked most closely with Richard. (Exhibits JB-1, 25, 56 , 57, 59-63, App. 103-126; 140-159, 231-233, 234-235, 236-261, 262-282, 283-302, 303-323, 324-346; Luci Oseland Tr. 260:18-21; Robert Lambert App. 466 8:17; Jeff App. 477:4-478:5). It was reversible error to exclude this evidence.

In conjunction with this error, the court of appeals mischaracterized Jeff's argument on p. 4 of it's opinion by remarking, "[Jeff] argues that Joan is not the primary beneficiary of the IRA." This is not Jeff's argument, at all. Jeff's position is that Joan *is* Richard's "primary beneficiary" which *Richard* equated with "income beneficiary" of his IRA trust.

V. THE APPELLATE OPINION INAPPROPRIATELY ADDS THE WORDS, "IF I SURVIVE MY WIFE..." TO RICHARD'S IRA BENEFICIARY DESIGNATION

The concluding words of Richard's handcrafted addendum are 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..." (Emphasis added).

The court of appeals ruled that this provision *only* applied if Richard survived Joan. The Court of Appeals ruling thus adds the words, "if I survive my wife...", words which Richard never used or intended. However, once the Court of Appeals ruled that "primary beneficiary" means, "100% beneficiary in all events and regardless of contingencies including federal estate tax consequences" it was required to further alter Richard's IRA beneficiary designation by adding the words, "if I survive my wife" in order to support its ultimate conclusion (i.e. that Joan was the 100% owner in all events).

The alternate interpretation of Richard's IRA handcrafted language urged by Jeff is supported by the language of Richard's excluded wills, prior IRA beneficiary designation and witness testimony. That straight-

forward approach is based upon the language Richard actually used in his IRA beneficiary designation. Richard's clear language specified that Joan was to receive the required annual distributions from his IRA *based upon her life expectancy* (App. 91). Upon *her* death the undistributed portion was to be paid to Richard's children hence the language, "upon the death *of my wife*, my children shall become primary beneficiaries....(emphasis added)(App. 91).

If Richard had wanted Joan to take 100% ownership and only wanted his children to become beneficiaries in the event he survived his wife, he would have used the following language:

"1) If I am survived by my wife, she shall be entitled to my IRA in fee simple absolute and

2) If I am not survived by my wife, my children shall take my IRA in equal shares."

If Richard's actual intent was that ascribed to him by the court of appeals:

A) His reference to his "Marital Trust" (App. 91) is completely unnecessary and contradictory to the court's conclusion that Joan was 100% beneficiary in all events.

B) Any reference to income payments to Joan "based upon her life expectancy" (App. 91) is both redundant and contradictory because as sole beneficiary she would be entitled to all income and principal *immediately* and *not* " based upon her life expectancy".

C) He would have not needed to use the language "upon the death *of my wife*, because under the court of appeals interpretation[4] contingent beneficiaries *only* take if the primary beneficiary is dead. In other words, the language in question is completely redundant which is an interpretation disfavored by our courts. *Colwell v. MCNA Ins. Co.*, 960 N.W.2d 675, 679 (Iowa 2021).

D) Indeed, if Richard had intended the result found by the lower courts, he would not have needed the addendum at all as U.S. Bank's form would have been adequate to accomplish this result.

VI. THE WILL RICHARD EXECUTED FOUR YEARS LATER DOES NOT DEFINE HOW RICHARD WANTED HIS IRA DISTRIBUTED ON THE DAY HE EXECUTED HIS IRA BENEFICIARY DESIGNATION

Under Iowa law it is well settled that instruments relating to the same transaction which are contemporaneously executed should be construed

[4] The court of appeals interpretation uses language from U.S. Bank's form to "trump" Richard's handcrafted addendum. The law requires the opposite result.

together, *Eide v. Hass (In re H & W Motor Express)*, 380 B.R. 380, 383 (N.D. Iowa 2006); *Taylor Enterprise, Inc. v. Clarinda Production Credit Ass'n* 447 N.W.2d 113, 115 (Iowa 1989).

On January 11, 2010, the same day Richard executed his IRA beneficiary designation, he executed a will (Exhibit JB-25). Richard's IRA beneficiary designation cross-references *that* will. *That* will contains the terms of the marital trust referenced in Richard's IRA beneficiary designation. *That* will specifically directs if there is no need to fund the marital trust, the Family Trust is to receive the IRA. (App. 145-150). That Family Trust specifically and unambiguously provides that Joan is to receive the required annual distributions from the IRA for her lifetime and upon her death any undistributed income is to be received by her children in equal shares. *Id.*

The two documents read together as part of the same transaction define Richard's intent on January 11, 2010, the day he executed the IRA beneficiary designation.

Without providing any legal support, the court of appeals found that Richard's subsequently executed will negated his intent on January 11, 2010. (Opin pp. 6-7). In so ruling, the court of appeals inverted its legal

concepts. More specifically:

- The ultimate goal of this case is to determine what Richard Bittner wanted to happen to his IRA on January 11, 2010, the day he executed his IRA beneficiary designation. *Hofmeyer v. Ia Dist. Ct. For Fayette City*., 640 N.W.2d 225, 225 (Iowa 2001).
- The will that Richard executed on the same day which is cross-referenced in his IRA beneficiary designation is critical to determining his intent *on that day*. (App. 91, 145-150).
- The will that Richard executed four years later tells us nothing about what he was thinking on January 11, 2010.

Whether or not the subsequently executed will served or even could serve to amend the January 11, 2010 IRA beneficiary designation was never an issue before the court. But, the relevance of the January 11, 2010 will speaks volumes toward what Richard was thinking the day he executed his final IRA beneficiary designation. It should not have been excluded.

VII. LOWER COURTS CANNOT USE EXTRINSIC EVIDENCE TO SUPPORT THEIR ULTIMATE CONCLUSION BUT REFUSE ADMISSION OF EVIDENCE THAT REFUTES THAT CONCLUSION

While claiming Richard's IRA beneficiary designation was clear and

unambiguous, the lower courts considered extrinsic evidence from Richard's final will to support their decision. Simultaneously, they excluded all extrinsic evidence which suggested their ultimate conclusion was mistaken. If Richard's IRA beneficiary designation were unambiguous as the lower courts have claimed there was no need to resort to language in his will. It was error for the lower courts to consider extrinsic evidence which supported their ultimate conclusion but exclude contradictory evidence.

CONCLUSION

It is difficult to imagine any court would rule that a fiduciary is allowed to serve as lead advocate in a case where it chooses one set of fiduciary responsibilities over another. In order to uphold the decision of the district court, the court of appeals had to avoid addressing this issue. It did so by making a finding of fact that is refuted by the record. (Opin. 12; Jeff's affirmative defense no. 5 Dec. 16, 2020 DJA).

Similarly, the court of appeals deliberately turned a blind eye to language which undermined its result. In order for the court of appeals decision to be justifiable in the eyes of the law, the most crucial language in Richard's handcrafted addendum has to be ignored. Indeed, the addendum

has to be ignored altogether (App. 91-92). If Richard wanted Joan to receive the entire IRA outright, his reference to the Marital Trust (App. 91) is totally unnecessary. If Richard wanted his wife to own the IRA outright, there is no need for his language that specifies Joan should receive the IRA income "based upon her life expectancy" (App. 91). If "primary beneficiary" means 100% beneficiary as the court ruled, Joan owns it. As owner, she would be entitled income, principal, everything.

Similarly, if Richard wanted Joan to own the IRA outright, his wishes stating that his children shall become primary beneficiaries upon *her* death (App. 92) must be deleted from his IRA beneficiary designation.

Moreover, if Joan is the outright owner, she does not have to leave the IRA to her children. She can leave it to anyone. In theory, she could leave it to a hypothetical second husband, something that would, undoubtedly, make Richard turn in his grave.

Similarly, the decisions of the lower courts show a lack of understanding of the very basics of federal estate taxation. The only reason for a marital trust is if the decedent does *not* want to leave the property to his surviving spouse outright.

The court of appeals deliberately avoided resolving the issue of

whether U.S. Bank, a fiduciary, could choose one set of fiduciary responsibilities over another. The court of appeals ignored Richard's clear intent that his IRA continue to be held in trust to insure that his wife would be fully supported for the rest of her life in the manner she had grow accustom to. Justice requires this court to accept further review to resolve the important public issue of whether a conflicted fiduciary may choose advocacy over neutrality. Further review is necessary to uphold Richard's wishes regarding the largest asset of his estate.

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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 original transcript in DJA/Richard's Estate 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.

PROOF OF SERVICE

The undersigned attorney hereby certifies that on July 1, 2022, 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 parties and attorneys of record.

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT RULE 6.1103(4)

I, Jeffrey S. Bittner, hereby certify that the number of words in this application for further review, exclusive of he court of appeals decision, table of contents, table of authorities, relevant materials from the district court record, district court orders, and administrative agency decisions and all certificates is 5,599 words according to Word Perfect which is under the 5,600 words allowed under the Iowa R. App. Proc. 6.1103(4) which is two fifths of the word limitation established by Iowa R. App. Proc. 6.903(1)(g)(1).

CERTIFICATE OF FILING

The undersigned attorney further certifies that the foregoing Defendant-Appellant's Proof Brief was filed with the Supreme Court of Iowa by using the EDMS system on this 1stth day of July 2022.