IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-0328

IN THE MATTER OF THE CONSERVATORSHIP OF
JOAN Y. BITTNER

Appeal from the Iowa District Court in and for Scott County
The Honorable Tom Reidel Case No. GCPR078775 of Ruling Authorizing Payment of Attorneys Fees to Simmons Law Firm

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REPLY BRIEF OF APPELLANT JEFF BITTNER

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PROOF OF SERVICE

The undersigned attorney hereby certifies that on April 19th, 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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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 19th day of April 2022.

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2. Whether a contractual indemnity provision may override a fiduciary's duty of impartiality.

3. Whether interpleader is available to a fiduciary which genuinely believes that one of the competing claimants is the rightful owner of a disputed fund.

4. Whether Jeff's defense to U.S. Bank's interpleader petition was much ado over nothing.

5. Whether the decisions of U.S. Bank or Jeff were responsible for the magnitude of attorneys' fees U.S. Bank incurred.

6. Whether Jeff has satisfied all elements of issue preclusion.

7. Whether or not the dispute of over the ownership of Richard's IRA was genuine.

ROUTING STATEMENT

U.S. Bank's brief asserts the indemnity provision in its Trust Agreement allows it to be compensated for violating its duty of impartiality. U.S. Bank also argues it is entitled to be indemnified attorneys fees incurred beyond the scope of the IRA contract. Both arguments makes this a case of first impression in Iowa. These arguments provide and additional reasons for the application of Iowa R. App. Proc. 6.1101(2)(c). Retention by the Supreme Court is appropriate.

STANDARD OF REVIEW

U.S. Bank erroneously asserts that the standard of review is for "abuse of discretion". (Brief p. 29). As stated in Jeff's original brief because these fees are requested as a probate proceeding, they are reviewable de novo. *In re Estate of Serovy*, 711 N.W.2d 290, 294-95 (Iowa 2006).

BRIEF AND ARGUMENT

This appeal is not about whether the Simmons firm should be paid for its services. The issue is who should pay:

a) a multibillion dollar fiduciary which seeks to be contractually indemnified for breaching its fiduciary duties or,

b) an 89-year-old widow under a conservatorship and 24-hour care who had no input into the retention or the Simmons firm or the work it performed.

Contrary to U.S. Bank's insistence, Jeff's resistance in the underlying declaratory judgment action that generated this substantial attorney bill was not much ado over nothing. It was about one fiduciary, Jeff, following his fiduciary duty to obey the directives in Richard's Will while the other fiduciary, U.S. Bank, pretended those duties did not exist.

It was about one co-fiduciary, Jeff, defending the intent his late father expressed in his Will while the other fiduciary, U.S. Bank:

- initiated and pursued a legal action adversarial to the trusts established under Richard's Will.
- during a time when it was co-administering Richard's estate.

(Order Denying U.S. Bank Attorneys Fees App. 281[1])

It is natural for this Court to question why this fiduciary would so

[1] " U.S. Bank was aware that it had a conflict involving its duties as Trustee of Richard's IRA and its duties as Co-Executor. This should have been plainly clear when U.S. Bank sued a trust named in the will it was administering".

vigorously pursue a defense so adversarial to his own financial interests[2]. The answer is simple. This is what fiduciary duty required. The details of this answer are provided in this Reply Brief.

I. THE DUTY OF IMPARTIALITY APPLIES WHEN THERE ARE COMPETING CLAIMANTS TO FUNDS HELD IN A TRUST OR ESTATE. IT IS NOT TO BE APPLIED WITH 20/20 HINDSIGHT. THERE IS NO CLARITY EXCEPTION.

Both the district court and U.S. Bank assert because the district court ultimately determined there was only one beneficiary to the IRA, the duty of impartiality does not apply. The duty of impartiality applies whenever there are competing *claimants* to a trust or estate fund. As noted by the Court in *Bierman v. Marcus*, 246 F.2d 200, 202 (3d Cir. 1957) "Of course, only one claim will ultimately be sustained..."

In re Estate of Law, 253 Iowa 599, 113 N.W.2d 233 (1962) squares on all fours with the instant case. The facts and holding in *Law's Estate* also square on all fours with the facts and holding in *Northern Trust Co v. Heuer*, 560 N.E.2d 961 (Ill.App.3d 1990).

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[2] Under Joan's will Jeff is entitled to 25% (Order Richard's Estate March 17, 2021 App. 214). Under Richard's will, Jeff would be entitled to 24%. (Exhibit JB-1 App. 310). The IRA is valued in Richard's probate inventory filed June 28, 2019 at $3,149,995.00 (Richard's Estate-Scott Co. ESPR 078709, June 28, 2019 Sch. I). Accordingly, at the time Jeff resisted U.S. Bank's declaratory judgment action, Jeff stood to *lose*, $31,499.50 if his legal arguments were successful.

The issue in *Law's Estate* was whether the will of Ede Law should be set aside. *Law's Estate*, 134 N.W. at 234. Two of her children, O.B. Law and Burt Law, challenged probate of the will that disproportionately benefitted Ede's two other children, Andrew Law and Elizabeth Bailey *Id*. The will was handwritten by one Mason G. Outerkirk who was appointed executor. *Law's Estate*, 134 N.W. at 233.

Executor Outerkirk employed legal counsel to defend the will. *Law's Estate*. 134 N.W. at 234. The issue was whether attorneys hired by Outerkirk, the executor, could be compensated from the assets of the estate for involving the estate in what amounted to a dispute between Ede's children over the estate's property *Id*. As occurred in *Northern Trust*[3], the *Law* trial court granted the executor's request for attorneys fees. *Id*.

This Court reversed.

> "[W]here all the [real] parties in interest were... before the court and had joined issue as between themselves, we have held there was no substantial estate interest left and thus no just cause for the nominated executor to incur expenses or attorneys fees in the contest. *In re Estate of Berry*, 154 Iowa 301, 134 N.W.867; *Kirsher v. Kirsher*, 120 Iowa 337, 94 N.W. 846; *In re Estate of Smith*, 165 Iowa 614, 146 N.W. 836; *In re Estate of Austin*, 194 Iowa 1217, 191 N.W.73; *In re Estate of Burgin*, 191 Iowa 898, 899, 183 N.W. 803. In the latter case it was pointed out that

[3] *Northern Trust Co v. Heuer* 560 N.E.2d 961, 964 (Ill. App. 3d 1990).

each heir or legatee is deemed to be litigating his own interest at his own expense, and where no special interest of the estate appears, expense to the estate is not justified.
...

Thus, where the contest is narrowed down to one of personal interest only between proponents and contestants, attorney fees incurred by the nominated executor in the contest have not been allowed, indicating, at least while those conditions exist, there was no just cause for incurring attorney fees at the expense of the estate. (Citations omitted).

In re Law's Estate, 253 Iowa 599, 113 N.W.2d 233, 235(1962).

This Court summarily concluded:

"There is nothing in this record to support the contention that the welfare of the estate required the active assistance of the nominated executor....It is hard for us to see under what theory the estate as such would have any present interest in the outcome of that litigation. The vital issue(s)...will be fully presented by those who have the only real interest therein".

In re Law's Estate, 113 N.W.2d at 136.

Matter of Estate of Roggentien, 445 N.W.2d 388, 390 (Iowa App. 1989) relied extensively upon the holding in *Law's Estate*.

For an attorney to be paid fees by a fiduciary it is generally necessary to show a benefit to the estate and just cause for pursuing the matter. See generally *In re Estate of Cory*, 184 N.W.2d 693, 698-99 (Iowa 1971)
...

[W]hen it became apparent the issue was who would take the balance of the estate the claimants or the heirs, there was no equity in accruing attorney fees to defend the heirs' position to

the detriment of the claimant should she be successful.

Here, Joan was represented by her conservator MidWestOne Bank and its counsel the Meardon law firm. The trusts under Richard's Will were represented by Jeff and his co-counsel, Hector Lareau. There was no reason for U.S. Bank to enter this dispute in order to tip the scales in favor of one of the contestants.

The rule of law urged by U.S. Bank and adopted by the district court with the benefit of 20/20 hindsight would fundamentally and dramatically alter the rule of impartiality. Specifically, the current rule of impartiality forbids all fiduciaries from being indemnified for embroiling themselves in any dispute over ownership of trust or estate funds, win or lose. *In re Law's Estate*, 253 Iowa 599, 113 N.W.2d 233, 235(1962); *In re Spilka's Will*, 97 N.W.2d 625, 627-28 250 Iowa 1021 (Iowa 1959); *Matter of Estate of Roggentien*, 445 N.W.2d 388, 390 (Iowa App. 1989); *Matter of Estate of Petersen*, 570 N.W.2d 463, 466 (Iowa App. 1997); *Northern Trust Co v. Heuer*, 560 N.E.2d 961, 964 (Ill.App.3d 1990); *Matter Estate of Wise*, 890 P.2d 744, 746 (Kan. App. 1995); *In re Estate of Benso*, 165 Kan. 709, 710, 199 P.2d 523 (1948); *In re Estate of Morine*, 363 A.2d 700, 704 (Me.1976); *In re Greenblatt*, 86 A.3d 1215, 1219 (Me. 2014); *Cairns v. Donahey*, 59

Wash. 130, 109 P. 334 (Wash. 1910); *Matter of Estate of Rohrich*, 496 N.W.2d 566, 571 (N.D. 1993); *In re Estate of Darrow*, 467 N.Y.S.2d 114, 117 (N.Y. Surr. Ct. 1983); *Awakuni v. Awana*, 165 P.3d 1027, 1036 (Haw. 2007).

Obviously, in all of these cases it was ultimately determined that only one of the competing sides was the "real beneficiary". This fact did not alter the fiduciary's duty of neutrality.

Under the rule of law adopted by the district court, the prohibition would be transformed into an invitation encouraging fiduciaries to voluntarily enter the fray on behalf of the side it believes will prevail on the merits. If, for any reason, a fiduciary disliked the party it believes should lose, the fiduciary would have an incentive to enter the fray and "run up the score". This is the opposite of the behavior discouraged by the current rule.

The apparently unanimous rule of impartiality casts fiduciaries in the roles of referees in disputes over fund ownership. Their role is to maintain neutrality while the real parties in interest compete for the fund. The role of the fiduciary is substantially undermined in the eyes of the law and the public when the referee tries to tilt the competition in favor of one of the competitors. Yet, this is precisely what U.S. Bank did here.

The District Court adopted a modification to this rule which permits a fiduciary to morph from a role of neutrality to claimant's advocate so long as: a) the fiduciary sides with the prevailing claimant and b) the prevailing claimant's entitlement to the fund is "clear".

The primary obstacle to this position is outside of the district court, there appears to be no authority that endorses this interpretation. The entire body of authority appears to the contrary. *Id*.

A fiduciary deviates from that public policy when it steps out of the neutrality role and becomes an advocate for one of the real parties in interest.

U.S. Bank's advocacy for Joan in this case extended beyond a simple violation of its duty of impartiality. U.S. Bank chose to advocate for Joan's ownership when its fiduciary duties required it to advocate for the trusts under Richard's Will.

Under the terms of the IRA trust agreement U.S. Bank had no duty to volunteer as Joan's advocate. In drafting paragraph 14 of the Trust Agreement, U.S. Bank deliberately limited its duties and responsibilities (App. 296). U.S. Bank serving as an advocate for any claimant to the trust fund was not its duty or responsibility under that agreement.

By contrast as co-executor, it had the absolute duty to follow the directives of Richard's Will. (U.S. Bank trust officer Phil Hershner Tr.[4] 231:7-8) That Will directed that the IRA be held in trust for the benefit of Joan for her life with the remainder to Richard's children in the designated shares. (Ex. JB-1, App. 307).

As co-executor U.S. Bank served as "trustee by implication" with the duty to collect assets for the benefit of the beneficiaries designated under the will. *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.

Richard's Will also mandated that his grandchildren could not be disinherited if their parent predeceased Joan, a result not mandated if Joan is the sole owner of the IRA. (App. 310). U.S. Bank's adversarial role in the Declaratory Judgment Action was in direct contravention to Richard's Will's directives. These matters are addressed more fully in Brief Point IV.

The judgment of the district court should be reversed. U.S. Bank

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[4] All citations are to the transcript in the underlying case, Scott County Case CVCV300445. The transcript was filed by Court Reporter Karla Lester on June 25, 2021.

should not be indemnified any costs or attorneys fees.

II. U.S. BANK MAY NOT BE INDEMNIFIED FOR BREACHING ITS FIDUCIARY DUTY OF IMPARTIALITY

U.S. Bank argues its contract of indemnity controls notwithstanding the law on fiduciary impartiality. It contends the contractual indemnity provisions must be honored regardless of whether the fees were incurred as a consequence of its breach fiduciary duty. The law takes a different view.

"A bargain for exemption from liability for a wilful breach of duty is illegal..." *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 351 F.2d 253, 256 (9th Cir. 1965) quoting Restatement of Contracts (First) Volume 2, Section 575(1).

"To the extent [indemnity] provisions purport to exculpate Edwin from liability for ... breaches of fiduciary duty...such provisions are void as against public policy." *Frizzell v. Deyoung*, 415 P.3d 341,346 (Idaho 2018).

Indemnification agreements repugnant to public policy are invalid, *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1197 (10th Cir. 2002); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1537 (6th Cir. 1992).

"Public policy prohibits, 'indemnifying a party for damages resulting from intentional or wilful wrongful acts.'" *Equitex v. Ungar*, 60 P.2d 746, 750 (Colo. App. 2002).

A contract to indemnify for wilful misconduct is contrary to public policy and unenforceable, *Cox v. Lumbermens Mutual Cas. Co. Inc.*, 439 N.E.2d 126, 129 (Ill. App.3d 1982); *Davis v. Commonwealth Edison Co*, 336 N.E.2d 881,885 (Ill. 1975); *Streit v. Metro. Cas. Ins. Co.*, 863 F.3d 770, 774 (7th Cir. 2017); *Myers v. Lutsen Mountains Corp*., 587 F.3d 891, 894 (8th Cir. 2009); *United States v. Carrara*, 49 F.3d 105, 109 (3d Cir. 1995) *In re Green* 207 B.R. 762, 763 (S.D.N.Y. 1997); *AIU North America, Inc. v. Caisse Franco Neerlandaise De Cautionnemenets*, 72 F.Supp. 350, 353 (S.D.N.Y. 1999); 42 C.J.S. Indemnity §8; Restatement (Second) of Contracts §§195, 197; Restatement (First) Contracts §575.

This Court's precedent establishes breach of fiduciary duty is a wilful act and intentional tort, *Wilson v. IBP*, Inc. 558 N.W.2d 132, 137 (Iowa 1997); *Cochran v. Land O' Lakes, Inc*. 39 F.Supp. 1139, 1148 (N.D. Iowa 1999). Other jurisdictions are supportive. *Zastrow v. Journal Communications*, 718 N.W.2d 51, 62 (Wis 2006); *McMahan v. Deutsche Bank AG*, 938 F.Supp.2d 795, 808 (N.D. Ill. 2013); *Arrington v. Hausman*, 11th Cir. No. 18-11478 January 9, 2019 p. 3 (11th Cir 2019).

In *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639, 650 (Iowa 1979) this Court eloquently articulated the reason for refusing to

enforce contracts violative of public policy:

> If a contract is opposed to the interests of the public even though the intent of the parties is good and no particular injury to the public would result in the particular case, a court will hold that it contravenes public policy. The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance.
>
> [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 to contracts which violate that duty or which induce others to do so. (Citations omitted).

The judgment of the district court should be reversed. U.S. Bank should not be indemnified any costs or attorneys fees.

III. INTERPLEADER WAS U.S. BANK'S PROPER COURSE OF ACTION

Glossed over in a footnote on page 20 of U.S. Bank's brief is the case of *Spahn & Rose Lumber Co. v. Iowa Steel & Const. Co.*, 257 Iowa 168, 131 N.W.2d 791, 793 (1964). This one case constitutes the entire body of authority upon which U.S. Bank bases its false claim that the interpleader option was not available to it. The facts of *Spahn* are readily distinguishable from the facts of this case.

Spahn involved multiple mechanics liens filed against the same parcel of real property. *Spahn*, 131 N.W.2d at 790. The *Spahn* plaintiff was a

senior lienholder who started a foreclosure action. He named the junior lienholders as defendants. *Spahn,* 131 N.W.2d at 791. The defendants attempted to interplead other suppliers who had also filed liens. *Id.*

The Court noted that under then applicable Rule of Civil Procedure 35 in order to avail itself of the interpleader option the interpleader plaintiff must be "A person...exposed to multiple liability...because of several claims against him *for the same thing*, *Spahn*, 131 N.W.2d at 793 (Emphasis added).

The Court denied interpleader on the basis that the claims of the interpleader parties *were not for the same thing*. Specifically, the Court noted, "The action here is not on the general contract but for a lien for the material supplied to the general contractor by the individual plaintiff. *There is no contention that any of the liens are for the same materials. In other words they are not for the same thing. Defendants here may be liable to* <u>*all*</u> *the lienholders"*, *Spahn,* 131 N.W.2d at 793-794. (Emphasis added).

In this case there is but one Richard Bittner IRA trust fund. The competing claimants to the fund were Joan and the trusts created under Richard's Will. The trust fund belonged to one claimant or the other. U.S. Bank never had any claim of ownership to the trust fund. By definition, it

was a "mere stakeholder".

U.S. Bank's argues that interpleader was not an option because it had the duty to deliver the trust funds to the rightful beneficiary and it had a sincere belief that Joan was that person. Once again, an apparent unanimity of case law supports the contrary position.

In *Bierman v. Marcus*, 246 F.2d 200, 202 (3d Cir. 1957) the Court held:

> "[J]urisdiction in an interpleader action is not dependent upon the merits of the claims of the parties interpleaded, and a plaintiff can maintain the action even though he believes that only one of the claims is valid and the other, or others, without merit."

In *Hunter v. Federal Life Ins. Co.*, 111 F.2d 551, 556 (8th Cir. 1940) the court stated:

> "In our opinion, a stakeholder, acting in good faith, may maintain a suit in interpleader for the purpose of ridding himself of the vexation and expense of resisting adverse claims, even though he believes only one of them is meritorious."

The D.C. Circuit adopted the quoted language from *Hunter* as its own opinion in *New York Life Ins. Co. v. Welch*, 297 F.2d 787, 790 (D.C. Cir. 1961).

In *Noey v. Bledsoe*, 978 P.2d 1264, 1270 (Alaska 1999) the court

stated:

> "In plainer terms, the stakeholder 'sues [in intepleader] all those who might have a claim to the money, deposits the money with the ...court, and lets the claimants litigate who is entitled to the money.' By forcing competing claims to resolve among themselves what is basically their own dispute, interpleader spares the stakeholders the need to decide which is the best claim."

Every decision this author found holds the same. *Lockridge v. Brockman*, 137 F. Supp 383, 385 (N.D. Ind. 1956)[An interpleader plaintiff may avail itself of interpleader even though it believes only one of the competing claims is meritorious].

Macek v. Swift and Company Employees Benefit Association, 455 P.2d 521, 527 (Kan. 1969)[When faced with conflicting claims a stakeholder may avail itself of interpleader regardless of its opinion as to the merits of the conflicting claims].

Metropolitan Life Ins. Co. v. Segaritus, 20 F.Supp. 739, 790 (E.D. Pa. 1937). [A stakeholder may maintain an interpleader action even though he believes only one of the adverse claims is meritorious].

Madison Stock Transfer v. Exlites Holding International, Inc., 368 F.Supp.3d 460,472 (E.D.N.Y. 2019). [The interpleader plaintiff is relieved from the liability of deciding which litigant has a superior claim].

Bank of New York Mellon Trust Co., N.A. v. Telos CLO 1006-1, Ltd., 274 F.Supp.3d 191, 212 (S.D.N.Y. 2017).[The interpleading plaintiff has no obligation to weigh competing claims].

Atlas Corp. v. Marine Fire Ins. Co., 155 F.R.D. 454, 462 (S.D.N.Y. 1994).[Merits of competing interpleader claims are generally not relevant as to whether interpleader relief is appropriate].

Lee v. W. Coast Life Ins. Co., 688 F.3d 1004, 1009 (9th Cir. 2012) [Availability of interpleader remedy is not dependent on the merits of the adverse claims, only their existence].

U.S. Bank's claim that it could not avail itself of the interpleader option because it sincerely believed Joan was the rightful owner of the IRA is a specious argument.

U.S. Bank fails to articulate any coherent argument as to how it could have been liable for delivery of the IRA fund to the person who an interpleader court concluded was the rightful owner. The reason U.S. Bank fails to so argue is because it could not have been held liable. The very purpose of an interpleader is to allow a mere stakeholder in the position of U.S. Bank to eliminate its exposure by allowing the court to resolve the dispute over ownership.

Similarly, U.S. Bank fails to cite any case holding a fiduciary liable on a theory of "wrongful interpleader". The reason is apparent. No court would adopt this point of view given that the very purpose behind an interpleader action is to absolve a mere stakeholder from potential liability. The court determines the winning claimant. The interpleader plaintiff obeys the court's order. The interpleader's exposure is thus erased. All of the authority supports this view of the law.

As found by the *Northern Trust* court, the facts of this case provide a textbook example of a situation for which an interpleader option was created. An interpleader is the *required* option for fiduciaries such as Northern Trust and U.S. Bank in order to avoid violating their duty of impartiality, *Northern Trust Co v. Heuer*, 560 N.E.2d 961, 964 (Ill.App.3d 1990).

The judgment of the district court should be reversed. U.S. Bank should not be indemnified any costs or attorneys fees.

IV. CONTRARY TO U.S. BANKS' CLAIMS, JEFF'S RESISTANCE TO THE DECLARATORY JUDGMENT ACTION WAS NOT MUCH ADO OVER NOTHING. IT WAS ABOUT JEFF'S ADHERENCE TO FIDUCIARY RESPONSIBILITY

U.S. Bank's citation to Jeff's testimony coupled with its failure to provide the context in which that testimony was given is misleading and disingenuous. Jeff testified outcome of the declaratory judgment would have a relatively de minimus[5] impact on *his own personal financial situation.*

By contrast, the declaratory judgment action had a substantial impact on Richard's expressed testamentary directive to place the IRA *in trust* for benefit of Joan, an interest Richard expressed not only in the IRA beneficiary designation in dispute but also his 6 previous wills over a span lasting two decades. (App. 306-307, 335-336, 408-409, 433-434, 455-456, 467-477, 498-499) U.S. Bank never asked to see any of these documents[6]

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[5]The term "relatively de minimus" requires further quantification. As stated in footnote 2, Jeff stood to *lose* $31,449.50 *if the legal arguments he advanced in the declaratory judgment action succeeded*. This provides but one example of Jeff's and U.S. Bank's very different approaches to fiduciary responsibility exhibited throughout this litigation.

[6] Other than the last IRA beneficiary designation upon which it relied upon exclusively while simultaneously ignoring Richard's Will executed on that same date which contains the terms of the Joan Y. Bittner Marital Trust the IRA

(Sharon Chin Tr. 33:1-10; 62:23-64:2 Phil Hershner Tr. 242:19-22).

Of equal if not greater importance is the prospect of a substantial adverse impact on all beneficiaries designated under Richard's Will if the IRA passes under Joan's beneficiary designation. This is especially true when considering the interests conveyed to Richard's and Joan's grandchildren.

Specifically, the concern is as follows. Under Richard's Will the beneficiaries are known. Joan's IRA beneficiary designation has never been placed into evidence and are, therefore, unknown as a matter of record in this case.[7]

Assume for the sake of argument that Joan's children are designated as equal beneficiaries of her IRA. If this hypothetical is in fact Joan's designation, it creates a substantial concern for Richard's grandchildren[8].

Specifically, all grandchildren are indefeasibly vested under

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beneficiary designation cross- references.

[7] Jeff knows what Joan's beneficiary designation. However, in order to avoid going outside of the record, a practice frowned upon by this Court, Jeff will address this argument through hypothetical situations.

[8] This concern is equally applicable to *any* potential IRA beneficiary designation of Joan other than one that is a mirror image of the dispositive provisions in Richard's Family Trust.

Richard's Will if that child's parent predeceases Joan (Ex. JB-1 Art. XII(B) App. 310). By contrast, if any of Richard's and Joan's children inherit their IRA through Joan's beneficiary designation, that child may completely disinherit his or her own children by designating persons other than their own children as beneficiaries in their wills.

In a typical will a person's spouse, not their children, will be designated as the primary beneficiary. The scenario that one or more of Richard's and Joan's children might predecease Joan is not one that is far-fetched. All of Richard's and Joan's children are in their 60's. It is not uncommon for people in their 60's to die. Most every extended family tree has someone who has died in their 60's or younger. Many family trees have incidents of children predeceasing their parents.

The dollar amounts involved are very significant to the grandchildren. The date of death value of the IRA was $3,149,995.00. (Richard's Estate Scott. County ESPR 078709 06-28-19 Sch. I). Assume for the sake of argument that three years later the IRA has grown to exceed $4,000,000.

By receiving their share via Joan's IRA beneficiary designation, Kim and Jeff could each disinherit their own children in excess of $1,000,000 by leaving their entire estates to their surviving spouses. If the IRA is the

property of Richard's Family Trust, the children of Kim and Jeff may not be disinherited by their own parent.

By the same token, if Lynn takes under Joan's IRA beneficiary designation, Lynn can completely disinherit her children by designating persons other than her children as beneficiaries under her will. Again, this scenario is not possible if the IRA is the property of the Richard Bittner Family Trust established under his Will.

Jeff has presented this hypothetical underscoring his and U.S. Bank's important fiduciary duties to all of the beneficiaries of Richard's testamentary trusts (including and especially Richard's grandchildren) in multiple legal filings. (Motion to Intervene, etc. (DJA) Oct. 2, 2020 ¶3; Brief in Support of Oct. 2, 2020 motion (DJA) pp. 15-17; Jeff's Reply to U.S. Bank Brief re: Simmons fees December 31, 2021 pp. 10-13 (Joan's Conservatorship). In each instance U.S. Bank has turned a blind eye by pretending these obligations and exposures do not exist.

U.S. Bank insists that Jeff's concern is much ado about nothing. Jeff asserts having fiduciary exposure in excess of $1,000,000 is not much ado about nothing.

The judgment of the district court should be reversed. U.S. Bank

should not be indemnified any costs or attorneys fees.

V. U.S. BANK'S ATTEMPT TO BLAME JEFF THE MAGNITUDE OF ITS ATTORNEYS' FEES IS DISINGENUOUS

This Court is likely familiar with the adage that while all parties are entitled to argue the law, no party is entitled to its own set of facts. This expression has application to U.S. Bank's presentation of the record to this Court.

U.S. Bank's representation that it tried to "bring the dispute to a close at each phase" (Brief p. 24) is simply not true.

In denying U.S. Bank's request for attorneys fees in Richard's Estate the district court noted, "U.S. Bank's efforts to transfer blame for its decision...to Jeffrey is a disingenuous attempt to avoid ownership of the decisions U.S. Bank made." (Ruling Richard's Estate Oct. 18, 2021 App. 282). This finding has equal application to the fees U.S. Bank incurred in the Declaratory Judgment Action.

Following are the facts of record:

- U.S. Bank had a conflict. It admitted this conflict in three separate internal documents. (Exhibits JB-39, 89, 110, App. 397, 515, 521).
- U.S. Bank used this conflict initially as its reason for feeling

compelled to resign as co-executor. Its officers discussed this conflict in a meeting its trust officers had with Estate Attorney Oppel and Jeff on December 17, 2019. (Oppel Tr. 307:8-17, J. Bittner Tr. 354:3-10).

- Jeff relied on U.S. Bank's admitted conflict for his alternate proposal made in that meeting where he suggested:
  a) He would advocate for the estate's ownership of the IRA;
  b) Joan's conservator would advocate for her ownership, and;
  c) U.S. Bank would maintain the neutrality it was required to maintain because of its conflict. (J. Bittner Tr. 354:3-20).
- U.S. Bank then maintained a six month period of silence while Jeff retained legal counsel to commence the declaratory judgment action asserting Richard's testamentary trusts' claim to the IRA. (J. Bittner Tr. 354:21-355:23).
- After Jeff and his counsel had commenced drafting the declaratory judgment Petition, U.S. Bank ambushed its co-executor, Jeff, and estate's legal counsel, Attorney Oppel, with a legal opinion it had unilaterally sought (and paid for) from the Simmons firm which supported U.S. Bank's internal legal interpretation that Joan, individually, was the sole owner of the IRA. (Oppel Tr. 312:10-

313:2; App. 373-379)

- Jeff responded by requesting all of U.S. Bank's internal communications on this IRA issue. ((Oppel Tr. 312:10-313:2; App. 373-379 App. 325 ¶2).
- When U.S. Bank refused to produce its internal communications, Jeff asked U.S. Bank to resign as co-executor of Richard's estate. (Ex. JB-17 App. 326 ¶5, JB-18 App. 328).
- U.S. Bank agreed and promised to resign. (Ex. JB-19 App. 329).
- Three weeks later U.S. Bank reneged on this promise. (Answer Richard's Estate App. 191).
- Two days after reneging, U.S. Bank filed the declaratory judgment action in the role of Joan's advocate to the detriment of the trusts under Richard's Will. (Petition DJA para. 1, 37 App. 160, 167).
- Within three weeks of that filing, Jeff's legal counsel asked U.S. Bank to recast its petition as an interpleader petition thereby maintaining neutrality in the dispute over the IRA's ownership. (Ex. JB-26 App. 351 ¶4).
- In that same email of August 13, 2020, Jeff's legal counsel forewarned:

(P)lease advise your client that the estate and Jeff Bittner personally will take every action available to hold U.S. Bank accountable for the unnecessary litigation engendered by its reckless pursuit of a resolution that necessarily involves choosing one set of fiduciary duties over another. Those actions include challenging claims for attorneys fees and expenses in connection with any aspect of this extended dispute, as well as recovering the estate's and Jeff's personal attorneys fees because of U.S. Bank's failure to acknowledge and address its conflicts.

Please convey this to your client so that it may exercise the choice of pursuing lawful courses of action and avoid the consequences of failing to do so.

(Ex. JB-26 App. 351 ¶6,7).

- U.S. Bank refused opting instead to pursue what it described as a "hard line position" of continuing to serve as Joan's advocate which it maintains to this very day. (See Last Billing Entry by attorney JSB 07/23/2020, App. 12.).
- U.S. Bank failed to point to any record documenting any effort to settle the declaratory judgment action after this date because there were no such efforts.
- Instead, U.S. Bank proceeded "full speed ahead" as Joan's self-appointed advocate incurring the great bulk of attorneys fees for which it now seek indemnification.

- The only proposal of a possible universal family settlement was raised three weeks *before* U.S. Bank filed the declaratory judgment action for which it now seeks indemnification. (Ex. JB-17, App. 326 ¶4).
- Yet, in the very next paragraph of that email, U.S. Bank refused to share its internal communications related to the IRA with Jeff. (App. 326 ¶5)
- Jeff had made it clear to U.S. Bank that satisfaction of this condition of transparency would be required as a showing of good faith, a prerequisite to negotiations (Ex. JB-16 ¶ 1)[9].

U.S. Bank's entire course of conduct in this case is typified by the expression "It's our way or the highway". The court in Richard's Estate commented on the manner in which U.S. Bank chose to proceed:

> "...U.S. Bank made a decision that greatly impacted the beneficiaries of [Richard's] Estate in a negative manner. U.S. Bank served as trustee of Richard Bittner's IRA and also served as CoExecutor of Richard's Estate. U.S. Bank filed a declaratory judgment action against a trust established within Richard's Estate. This created a recognized conflict of interest for U.S. Bank."

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[9] This is not included in the Appendix but is available in the underlying case Scott County CVCV 300445 filed 12-30-2020

(Ruling Richard's Estate Oct.18, 2021 App. 277 first full ¶).

U.S. Bank's own business decisions are the sole cause of its fiduciary violations. U.S. Bank's own decisions are responsible for generating a legal bill of $205,000 in its role as Joan's advocate when that bill should have been under $5,000 had it abided by established Iowa law which required it to maintain neutrality by filing an interpleader. See *Principal Life Ins. Co. v. Hunter,* 2020 U.S. Dist. LEXIS 248442, Case No. 4:20-cv-00093 (S.D. Iowa 2020); *State Farm Life Ins. Co. v. Avila*, 2018 U.S. Dist. LEXIS, Case No. 4:17-cv-00366 (S.D. Iowa 2018); *Northern Trust Co v. Heuer*, 560 N.E.2d 961, 964 (Ill.App.3d 1990).

The judgment of the district court should be reversed. U.S. Bank should not be indemnified any costs or attorneys fees.

VI. JEFF HAS SATISFIED ALL ELEMENTS OF ISSUE PRECLUSION

As noted in Jeff's initial brief, the district court denied U.S. Bank's requested attorneys' fees for the Shuttleworth firm because U.S. Bank had violated its duty of impartiality by choosing sides in a dispute between beneficiaries. (Ruling Richard's Estate Oct. 18, 2021, App. 277 bottom of page).

In this case the district court denied application of issue preclusion based upon its contention that the facts and the law in the two cases were different. (Ruling February 17, 2022 App. 153). U.S. Bank argues that its roles as IRA Trustee were different than its role as Executor in an effort to negate the "identity of party" element to issue preclusion. Neither position has merit.

Jeff concedes the factual and legal issues in the Declaratory Judgment Action are different than the issues involved in his Petition to remove U.S. Bank as co-executor. Those differences do not resolve this matter. One issue is identical to both cases. That issue is the issue currently before this court: whether U.S. Bank can be compensated for violating its duty of impartiality.

The district court was correct in denying U.S. Bank's attorneys' fees in Richard's Estate for violating its duty of impartiality. That ruling is final. No appeal was filed.

When an *issue* has been resolved against a party in a prior proceeding, that party may not re-litigate the resolved issue despite the fact that the current preceding may involve other legal and factual issues. This rule of law is clearly spelled out in this Court's landmark decision of *Hunter*

v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1983).

> In general, the doctrine of issue preclusion prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action. "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, 1977). As we have noted in prior cases, the doctrine may be utilized in either a defensive or an offensive manner.
> ...
> In other words, defensively a judgment is used as a "shield" and offensively as a "sword."

This rule of law has been applied in many subsequent cases. These include *Haberer v. Amick*, 188 F.3d 957, 961-62 (8th Cir. 1999)*; Iowa Supreme Court Bd. of Professional Ethics and Conduct* v. D.J.I., 545 N.W.2d 866, 873-84 (Iowa 1996); *Israel v. Farmers Mut. Ins. Ass'n of Iowa*, 339 N.W.2d 143, 146-47 (Iowa 1983).

U.S. Bank's assertion that its different roles make it a different "person" for purposes of issue preclusion is equally devoid of merit.

U.S. Bank, N.A., (Richard Bittner IRA trustee) is the same legal entity as U.S. Bank, N.A., (co-executor of the Richard Bittner Estate). The

separate (and conflicting) roles U.S. Bank assumed do not make it two separate legal persons.

Iowa Code Section 4.1(20) defines "person" as, "(an) individual, corporation, limited liability company, government or government subdivision or agency, business trust, estate, trust, partnership or association or other legal entity". U.S. Bank, N.A. is one "legal entity".

"The same person may act as executor and trustee but he who occupies both positions 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." 31Am Jur 2d Executors and Administrators §415 (1989) .

As the district court noted in denying U.S. Bank's motion to withhold internal communications related to the IRA from Jeff, "The Court finds that U.S. Bank cannot choose which hat it is wearing at a specific time and place." (Ruling December 31, 2020 Richard's Estate[10]).

The issue in the prior case was whether a fiduciary may be reimbursed its attorneys fees for embroiling itself in a dispute between

[10] This is not part of the Appendix but can be found as the 12/31/2020 ruling in Richard's Estate ESPR078709.

beneficiaries. The U.S. Bank which served as co-executor in Richard's Estate is the same U.S. Bank that is the trustee to Richard's IRA. Resolution of the issue of fiduciary impartiality was critical to the district court's denial of U.S. Bank's requested attorneys in Richard's estate. That ruling is final.

All the elements of issue preclusion have been satisfied. U.S. Bank may not relitigate the propriety of choosing sides in a dispute where "it is hard... to see under what theory [it]...would have any present interest in the outcome of that litigation." *In re Law's Estate*, 113 N.W.2d at 236.

The judgment of the district court should be reversed. U.S. Bank should not be indemnified any costs or attorneys fees.

VII. RESOLUTION OF THE DJA WAS FAR FROM CLEAR

In addition to the fact that no other court has endorsed the district court's "clarity exception" to the rule of fiduciary impartiality, the outcome of the Declaratory Judgment Action was and remains far from a foregone conclusion. Jeff strongly encourages this Court to review the briefs and arguments in Supreme Court case no. 21-0455. Jeff continues to assert that his legal position in that case will ultimately carry the day.

CONCLUSION

U.S. Bank asks this Court for a ruling allowing it to be indemnified $205,000 in attorneys' fees which were incurred because it breached its duty of impartiality. Based upon authority reviewed, no court other than the district court has ruled that payment of the fiduciary's attorneys' fees from the funds of a trust or estate is appropriate under these circumstances. *In re Estate of Law*, 113 N.W.2d 233, 235-236 (Iowa 1962); *In re Spilka's Will*, 250 Iowa 1021, 97 N.W.2d 625, 627-28 (1959); *Matter of Estate of Roggentien*, 445 N.W.2d 388, 390 (Iowa App. 1989); *Matter of Estate of Petersen*, 570 N.W.2d 463, 466 (Iowa App. 1997); *Northern Trust Co v. Heuer*, 560 N.E.2d 961, 964 (Ill.App.3d 1990). (See other citations p.11 this brief).

Similarly, U.S. Bank claims that its contract of indemnity overrides its duty of impartiality. In this instance, an apparently unanimous body of authority also takes a contrary view by forbidding indemnification for willful misconduct, *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 351 F.2d 253, 256 (9th Cir 1965); *Frizzell v. Deyoung*, 415 P.3d 341,346 (Idaho 2018); *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1197 (10th Cir. 2002); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1537 (6th Cir. 1992);

Wilson v. IBP, Inc. 558 N.W.2d 132, 137 (Iowa 1997). (See other authority cited on pp. 14-16 this brief).

U.S. Bank next argues that the interpleader option was unavailable because it held a sincere belief Joan was the rightful beneficiary. Following a common theme, an apparently unanimous body of authority takes the opposing view, once again; *Bierman v. Marcus*, 246 F.2d 200, 202 (3d Cir. 1957); *Hunter v. Federal Life Ins. Co.*, 111 F.2d 551, 556 (8th Cir. 1940); *New York Life Ins. Co. v. Welch*, 297 F.2d 787, 790 (D.C. Cir. 1961); *Noey v. Bledsoe*, 978 P.2d 1264, 1270. (See other authority pp. 18-20 this brief)

In desperation, U.S. Bank tries to take the focus off of its breaches of duty by creating a record out of whole cloth in an effort to blame Jeff for its deliberate misconduct. U.S. Bank chose to advocate for one of the real parties in interest despite Jeff's pleas for it to remain neutral (Ex. JB-26; App. 351 ¶4). U.S. Bank vigorously pursued the role of advocate for one claimant despite being informed of the consequences it would face if it violated its legal obligations. *Id*.

The district court previously held U.S. Bank accountable for breaching its duty of impartiality. That ruling has preclusive effect.

WHEREFORE, Jeff prays that the judgment of the district court be reversed and that U.S. Bank be denied indemnity for all fees and costs incurred. In the alternative Jeff prays for reduction of fees and costs for the reasons set forth in his initial brief.

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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.

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 6,977 according to Word Perfect which is under 7,000 allowed under Iowa R. App. Proc. 6.903(1)(g)(1).