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

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U.S. BANK NATIONAL ASSOCIATION
Plaintiff-Appellee

vs.

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

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Appeal from the Iowa District Court in and for Scott County
The Honorable Tom Reidel Case No. CVCV300445
Reply Brief of Appellant Jeff Bittner

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## PROOF OF SERVICE

The undersigned attorney hereby certifies that on September 8, 2021, I electronically filed the foregoing Defendant-Appellant, Jeffrey Bittner's Final (and only) Reply 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.

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## CERTIFICATE OF FILING

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

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## BRIEF AND ARGUMENT

## A. SUMMARY OF ARGUMENT

Contracts Professor David Vernon of the University of Iowa College of Law was known for two things: the bright red socks he wore to class each day and, more importantly, the rule he taught his students the first day of class and repeated often throughout the semester, **"If you're going to read at all, read it all."** Professor Vernon's teaching has found its way into five primary rules of contract construction:

"Rule 1" Under Iowa law it is well settled that instruments relating to the same transaction which are contemporaneously executed should be construed together.

*Eide v. Hass (In re H & W Motor Express)*, 358 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); *AmerUs Bank v. Pinnacle Bank*, 51 F. Supp. 2d 994,999 (S.D. Iowa 1999)

"Rule 2" No language of a written agreement shall be deemed superfluous unless no other construction is possible.

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

"Rule 3" Every word in an agreement is taken to have been used for a purpose and must be given some meaning.

*Woods Masonry, Inc. v. Monumental General Cas*., 198 F.Supp.2d 1016, 1028-29 (N.D. Iowa 2002); *Harvey Const. Co. v. Parmele*, 113 N.W.2d 760, 765, 253 Iowa 731 (Iowa 1962); *Hubbard v. Marsh*, 241 Iowa 163, 40 N.W.2d 488, 491 (Iowa 1950).

"Rule 4" When "boilerplate" language of a "form agreement" conflicts with language in a handcrafted addendum, the language of the handcrafted addendum controls.

*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); *Low v. Young, Mullarky & Long*, 158 Iowa 15,15 138 N.W. 828, 829 (Iowa 1912); 17A C.J.S. Contracts § 325.[1]

"Rule 5" When general language and specific language collide, the specific language controls.

*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); *Schlosser v. Van Dusseldorp*, 251 Iowa 521, 526, 101 N.W.2d 715, 718 (1960).

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[1] "The reason greater effect is given to the written or typed portion of an agreement than to the printed part of it, if they are inconsistent, is that the written or typed words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed form is intended for general use without reference to particular objects and aims". 17A Am Jur 2d Contracts §395.

The District Court's erroneous conclusions and U.S. Bank's and MWO's long-winded, byzantine arguments[2] all ignore at least one of these five basic rules.

Yet another ground for reversal is U.S. Bank's violation of the universally recognized duty which provides a fiduciary may not initiate nor take sides in a lawsuit regarding distribution of an estate (or trust estate). U.S. Bank violated its fiduciary duty of impartiality by instituting this action and serving as Joan's advocate.

## B. THE IRA BENEFICIARY DESIGNATION AND WILL RICHARD BITTNER EXECUTED ON JANUARY 11, 2010 (EX. JB-25) ARE INSTRUMENTS RELATING TO THE SAME TRANSACTION AND MUST BE READ TOGETHER

Where the District Court, U.S. Bank and MidWestOne Bank fall short in their analysis is their failure to include Richard Bittner's Will of January 11, 2010 (Exhibit JB-25, App. 140-159) as part of the same transaction with his IRA beneficiary designation executed that same day (Exhibit USB-1/JB-2, App. 89-92). The consequence of this failure is their erroneous quantum leap that if the Marital Trust is not funded, Joan would become the sole 100% beneficiary (which would also make her the sole owner). There is

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[2] See *Dix v. Casey's General Stores*, Inc. Case No. 18-1464, June 25, 2021 Iowa at p. 9 of 23

nothing in the IRA beneficiary designation which contains this direction. In fact, this conclusion ignores Richard's handcrafted language, "She shall be entitled to *all annual distributions* from my IRA *based upon her life expectancy*" (Ex. JB-2/USB-1 p. 3, App. 91).

Had Richard wanted Joan to be the 100% owner of both income and principal interests (i.e. sole and complete owner/beneficiary) in the event the Marital Trust was not funded, he would have used different words. He would have written, "If and to the extent that it is not necessary to fund the Marital Trust, I leave the remainder of my IRA to my wife, Joan in fee simple absolute"

So, where did Richard leave directions as to what would happen if the Marital Trust was not funded? He left them in the January 11, 2020 Will (Exhibit JB-25; App. 140-159) which is specifically referenced in his IRA beneficiary designation (Ex. JB-2/USB-1, App. 91).

Both U.S. Bank and MWO argue because the Family Trust is not specifically mentioned in the beneficiary designation it cannot possibly be the designated beneficiary. It is true that the Family Trust is not mentioned in the beneficiary designation, by name. It is also true is that both the Marital Trust and the Will executed contemporaneously (Exhibit 25, App.

140-159) *are* specifically mentioned in the IRA beneficiary designation. (Ex. JB-2/USB-1, App. 91).

> 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). **Under Iowa law it is well settled that instruments relating to the same transaction which are contemporaneously executed should be construed together**. (Emphasis added).

*Eide v. Hass (In re H & W Motor Express)*, 358 B.R. at 383 (N.D. Iowa 2006) citing *Taylor Enterprise, Inc. v. Clarinda Production Credit Ass'n* 447 N.W.2d at 115 (Iowa 1989)[Summary of Argument Rule 1].

The IRA beneficiary designation (Ex. USB-1/JB-2, App. 89-92) and Will (Exhibit JB-25, App. 140-159) were both executed on January 11, 2010. Both are indisputably relate to the same transaction. Indeed, the terms of the Marital Trust referenced in the IRA beneficiary designation are not set forth in the beneficiary designation, itself (Exhibit USB-1/JB-2, App. 89-92). Instead, the terms of the Marital Trust are contained in the Will (Exhibit JB-25 pp. 6-7 of 20, App. 145-146).

Richard's Will of January 11, 2010 leaves no doubt how the IRA was to be distributed if the Marital Trust was not funded.

> 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)

This is absolutely consistent with (and almost identical to) the language in his IRA beneficiary designation (Exhibit JB-2/USB-1, App. 91-92). Moreover, Richard's Will makes it clear that on January 11, 2010, Richard thought it *likely* the Marital Trust would *not* be funded. Hence, the bulk of the IRA would pass to the Family Trust.

"A substantial part of the income for the benefit of my daughter [Lynn Von Schneidau] will be income from my IRA..." [Exhibit JB- 25 para. (G)(3) p. 11 of 20, App. 150].

By definition, no portion, let alone "a substantial portion", of Lynn's sub-trust would be funded by the IRA if Joan is the 100% as the District Court held.

Article IV of Richard's January 11, 2010 Will provides further irrefutable support regarding his intent on the day he executed his IRA beneficiary designation:

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

> While I have, during my lifetime, attempted to equalize the value of assets owned by me and those owned by my wife, I have not succeeded. The assets standing in my name substantially exceed those in the name of JOAN Y. BITTNER. I have therefore concluded to establish a *family trust* which will make full use of all tax credits and deductions (other than the marital deduction) allowed to my estate for federal estate tax purposes. Therefore, and except to the extent of the JOAN Y. BITTNER MARITAL TRUST and the specific bequests to my children as hereinafter provided, all the rest, residue and remainder of my estate, I do hereby give, devise and bequeath to the RICHARD BITTNER FAMILY TRUST for the use and benefit of my wife and my descendants as therein provided. (Capitalized emphasis original, italics added)
>
> (Exhibit JB 25 pp. 2-3 of 20, App. 141-142).

Richard's contemporaneous Will (Exhibit JB-25, App. 140-159) explains why U.S. Bank and MidWestOne Bank have gone to great lengths to exclude *all* of Richard's prior, contemporaneous and subsequent Wills and IRA beneficiary designations: they leave zero doubt as to Richard's intent on January 11, 2010 (and at all times previous and subsequent). The excluded wills and beneficiary designations prove the Banks' urged interpretation of Richard's IRA beneficiary designation is incorrect.

The efforts exclude the many documents which show Richard's actual intent on January 11, 2010 are contrary to the principal goal of contract construction. "It is a cardinal principle of contract law the parties' intention at the time they executed the contract controls..." *Hofmeyer v. Ia Dist. Ct.*

*For Fayette Cty*., 640 N.W.2d at 228 (Iowa 2001). See also *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794,797 (Iowa 1999).

In Professor Vernon's words, **"If you're going to read at all, read it all."** In this case "all" refers to both instruments Richard executed on January 11, 2010 (Ex. JB-2/USB-1 App. 89-92; JB-25, App. 140-159). Ignoring a crucial component to the same transaction is the primary cause of the District Court's, U.S. Bank's and MidWestOne's erroneous interpretation of Richard Bittner's IRA beneficiary designation.

## C. U.S. BANK BREACHED ITS DUTY OF IMPARTIALITY BY SERVING AS JOAN BITTNER'S ADVOCATE IN THIS SUIT

On page 39 of its brief U.S. Bank characterizes Jeff's argument as, "U.S. Bank somehow picked a side and shaped its interpretation to suit that individual's effort". This is precisely what U.S. Bank did.

Even the most cursory review of its pleadings and briefs erases any doubt in this regard. U.S. Bank assumed the role of lead advocate for Joan Bittner's ownership. A fiduciary is forbidden from serving as an advocate in a suit filed to determine the distribution of an estate.

U.S. Bank had no interest in the IRA. The competing real parties in interest were the trustees of the trusts under Richard's will and

MidWestOne, Joan's conservator.

The case of *Northern Trust Co v. Heuer*, 560 N.E.2d 961 (Ill.App.3d 1990) squares on all fours. In that case Northern Trust filed a complaint for construction of a trust. *Northern Trust Co v. Heuer* 560 N.E.2d at 963. Following commencement of the action, Northern Trust filed a motion for partial summary judgment advocating for distribution of the trust estate to one beneficiary (Winterbauer) over the competing claims of another beneficiary (Heuer). *Id*. The trial court granted Northern Trust's summary judgment motion. *Id.* Northern Trust then applied for attorneys' fees which the trial court granted. *Northen Trust Co v. Heuer* 560 N.E.2d at 964.

Heuer appealed the attorney fee award claiming Northern Trust violated its duty of impartiality by choosing sides and advocating for Winterbauer's ownership. *Id*. The Court of Appeals reversed and held:

> A trustee has a duty to deal impartially with all beneficiaries and to protect their interests....*When there are conflicting claims to trust funds, a trustee is not required to make a determination as to the rights of the prospective claimants but should file an interpleader*[4] *[202 Ill.App.3d 1071] action to avoid acting at its own peril*. *Chicago Title & Trust Co. v.*

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[4] As noted on pp. 50-51 of Jeff's original brief, following commencement of this action, Jeff, through his counsel pleaded with U.S. Bank to recast its Petition as one for interpleader. (Exhibit JB-26 p. 2; App. 161). This request fell on deaf ears.

*Czubak* (1976), 42 Ill.App.3d 349, 1 Ill.Dec. 118, 356 N.E.2d 118. (Emphasis added)

*Northern Trust Co. v. Heuer*, 560 N.E.2d at 964

The Court concluded:

In this case, Northern Trust acted properly in seeking the circuit court's construction of the trust agreement concerning the appropriate distribution of the trust. *However, when it argued that the trust should be interpreted in a manner beneficial to Winterbauer and detrimental to Heuer, it exceeded its role as trustee and breached its duty of impartiality*. (Emphasis added)

*Northern Trust Co. v. Heuer*, 560 N.E.2d at 965.

The case of *Matter Estate of Wise*, 890 P.2d 744 (Kan. App. 1995) is also virtually indistinguishable.

The Kansas Court noted:

Standing is a question of whether a party has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Harrison v. Long*, 241 Kan. 174, 176, 734 P.2d 1155 (1987). "Standing to sue" means that a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. (Citations omitted).

*Matter of Estate of Wise*, 890 P.2d at 746

The Court then addressed the executor's standing argument which was virtually identical to U.S. Bank's, here:

> Kenneth Dill ...reasons that, as executor, he is a personal representative of all the heirs, devisees, legatees, and creditors, and he therefore has a duty to protect Viola Dill's interests. *Id.*

The Kansas Appellate Court categorically rejected Kenneth's argument:

> This argument is not persuasive.
>
> One problem with Kenneth Dill's argument is that his premise is incorrect. Kansas appellate decisions have emphasized that an executor's duty is not to represent any individual who may be interested in the estate, but to act in the best interests of the estate. See *In re Estate of Lohse v. Rubow*, 207 Kan. 36, 40, 483 P.2d 1048 (1971). An executor's duty is to the estate, not to the heirs or legatees of the estate. (Citations omitted)
>
> The Kansas Supreme Court has previously ruled that an executor may not take sides in a dispute regarding distribution of an estate...*In re Estate of Benso*, 165 Kan. 709, 710, 199 P.2d 523 (1948)..."
>
> *Matter of Estate of Wise*, 890 P.2d at 746.
>
> The Court concluded on the following page:
>
> Under the rule adopted in *Benso*, an executor cannot become an advocate for one side in a controversy over distribution of an estate. *If that is true, then an executor cannot assume the role of an advocate to initiate such a controversy*. (Emphasis added).
>
> *Matter of Estate of Wise,* 890 P.2d at 747.

A fiduciary's duty of impartiality appears universal.

A trustee has a duty to administer the trust in a manner that is

> impartial with respect to the various beneficiaries of the trust, *Awakuni v. Awana*, 165 P.3d 1027, 1036 (Haw. 2007) quoting The Restatement (Third) of Trusts § 79.
>
> Further, the duty of impartiality includes a restriction that "the *executor may not take sides in the adjudication of the individual claims of beneficiaries one against another*." *In re Estate of Morine*, 363 A.2d 700, 704 (Me.1976). (Emphasis added).
>
> *In re Greenblatt*, 86 A.3d 1215, 1219 (Me. 2014)
>
> [An] administrator or executor may not take sides [in a dispute over distribution of an estate], for if so he might resist the rightful claimant at the expense of the estate to which he might ultimately be found entitled. Such claims do not impair the estate, but relate only as to who is entitled to the same.
>
> *Cairns v. Donahey*, 59 Wash. 130, 109 P. 334 (Wash. 1910).
>
> A personal representative...should not enter controversies among rival contestants. *Matter of Estate of Rohrich*, 496 N.W.2d 566, 571 (N.D. 1993).
>
> An executor owes a duty to all beneficiaries to be fair and impartial in all transactions that affect them; not preferring one to the detriment of others or conferring a benefit upon one at the expense of another. *In re Estate of Darrow*, 467 N.Y.S.2d 114, 117 (N.Y. Surr. Ct. 1983).
>
> Iowa has adopted the same view of the duty of impartiality. Indeed,

the holding in *Petersen*, quoted below, is the same as the court's in *Northern Trust*.

> We will not grant attorney's fees and expenses at the estate's expense where the litigation narrows down to a contest of personal interests between will proponents and contestants,

> because just cause for incurring these expenses does not exist under such circumstances. *In re Estate of Law*, 253 Iowa 599, 113 N.W.2d 233, 235 (1962).

*Matter of Estate of Petersen*, 570 N.W.2d 463, 466 (Iowa App. 1997).

The above-cited cases involving estates are equally applicable here as the duties of a personal representative arise in trust law, *In re Estate of Davis*, 217 P.3d 133, 136 (Ok. App. 2008). Moreover, a personal representative is held to the same standards as a trustee. *In re Estate of Whitlock*, 615 A.2d 1173, 1178 (Me. 1992).

In this case, U.S. Bank's internal staff went beyond the scope of its IRA contractual obligations (and abilities); chose the victor of the IRA dispute in the course of one teleconference on May 30, 2010 (Exhibit 91, App. 365); then used all of its resources to champion the cause of its preordained victor (Joan).

However, the facts of this case are more egregious than those in any of the cases previously cited. In choosing to violate its duty of impartiality, U.S. Bank ignored its duty to follow the clear directions of the Will under which it served as co-executor.

U.S. Bank Vice-President Phil Hershner testified, "It is our absolute professional responsibility to follow the will and execute on the will..." (Tr.

231:7-8). Yet, in filing this suit and repeatedly advocating for Joan's ownership, U.S. Bank defied the Will's directives regarding disposition of the IRA. (Exhibit 1 p. 9, 14-15 of 24, App. 111, 116-117).

U.S. Bank ignored the fact that as Co-executor it 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.

On p. 41 U.S. Bank argues Jeff suffered no prejudice as a consequence of its assuming the lead role of Joan's advocate. Jeff submits the authority cited above holds it is inherently prejudicial when a fiduciary violates its duty of impartiality by siding with one beneficiary at the expense of others in a dispute over distribution of funds.

## D. IF RICHARD WANTED JOAN TO BE THE SOLE IRA BENEFICIARY, THERE WAS NO NEED FOR ANY MARITAL TRUST

If Richard intended Joan to be the 100% beneficiary of his IRA as the Banks have argued, was simply no need to form a marital trust, at all. The very purpose of a marital trust is to a) avoid federal estate taxes while b)

leaving spouse's interest in trust (as opposed to leaving the property to the spouse outright). The imposition of a federal estate tax *only* occurs when the decedent's gross estate exceeds his or her lifetime unified estate and gift tax credit. In the event the gross estate exceeds the unified credit, there are two ways to insure that there will be no tax on the excess: a) to leave the excess to the spouse outright (26 U.S.C. §2056(a)) or b) to leave the excess in a martial trust that qualifies for the spousal exemption under 26 U.S.C. §2056(b). Accordingly, the *only* purpose of Richard's Marital Trust was to insure that if the value of Richard's gross estate exceeded the value of his unified credit, Joan's interest would be left in trust, not given to her outright.

## E. RICHARD'S SPECIFICALLY DIRECTED HIS CHILDREN WOULD BECOME PRIMARY BENEFICIARIES, NOT CONTINGENT BENEFICIARIES UPON THE DEATH OF HIS WIFE.

In an effort to negate Richard's language which directs that his children become primary beneficiaries "*upon the death of my wife*", the Banks rely on the verbiage in U.S. Bank's form which states, "The following shall be beneficiary(ies) only if **none of** the **Primary Beneficiaries** are living at the time of my death:" (Some emphasis added,

some original). Richard addressed this by *defining* his children as "*Primary* beneficiaries" (Richard's verbiage) "upon the death of my wife". (App. 92). Richard's handcrafted addendum which defines his children as "Primary beneficiaries" "trumps" any U.S. Bank's boilerplate which might be inconsistent suggesting that his children might only be contingent beneficiaries. Accordingly, the Banks' argument violates Rule 4 [When "boilerplate" language of a "form agreement" conflicts with language in a handcrafted addendum, the language of the handcrafted addendum controls. *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); *Low v. Young, Mullarky & Long*, 158 Iowa 15,15 138 N.W. 828, 829].

If every word in the form and every word in Richard's handwritten paragraph are given meaning, there are no Contingent beneficiaries. (Summary of Argument Rules 2 and 3). There are no Contingent beneficiaries because *Richard* defined both his wife and his children as "Primary Beneficiaries". Joan is the "primary beneficiary" "based upon her life expectancy". "Upon the death of [Joan][Richard's and Joan's]children [become] primary beneficiaries [of the remainder interest]". (Exhibit JB-2/USB-1 p. 4, App. 92).

Additionally, the form language (pp. 1-2 of USB-1/JB-2 App. 89-90) is of no effect at all. At the very top of the form is the following language, "If the space below is not adequate for *any* of your beneficiary designations, check this box and attach a separate addendum specifying your beneficiary designations." (Emphasis added)(App. 89). This is exactly what Richard did. He checked the box. In so doing "opted out" of U.S. Bank's form and attached his own addendum in lieu of U.S. Bank's form. (App. 89).

Richard's intent to "overrule" U.S. Bank's form was confirmed by Lucille Oseland, Richard's legal assistant for almost 30 years testified:

> 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)

Finally, the Banks' argument that the last paragraph of Richard's IRA beneficiary designation is not superfluous because it would *only* apply in the event Richard survived Joan is not logical. The Banks' urged interpretation is not logical because under their hypothetical, Richard's

children would only become "primary beneficiaries" upon the death of *Richard*. Why? Because Joan has already predeceased Richard in their assumed scenario. Accordingly, the interpretation urged by the Banks requires deletion of Richard's words, "*upon the death of my wife*". (App. 92). This is a violation for Rule 2 [No language of a written agreement shall be deemed superfluous unless no other construction is possible. *Kerndt v. Rolling Hills Nat. Bank*, 558 N.W. 2d 410, 416 (Iowa 1997)]. It is also a violation of Rule 3. [Every word in an agreement is taken to have been used for a purpose and must be given some meaning. *Harvey Const. Co. v. Parmele*, 113 N.W.2d 760, 765, 253 Iowa 731 (Iowa 1962)].

## F. U.S. BANK'S DEFINITION OF "PRIMARY BENEFICIARY" AS 100% BENEFICIARY IN ALL EVENTS IS CONTRARY TO RICHARD'S CLEARLY EXPRESSED INTENT

On page 24 of its brief, U.S. Bank argues, "Richard's reference to his wife, Joan as 100% primary beneficiary, leaves no room for an interpretation naming a legal entity, such as the Family Trust".

The argument falls apart if but one word is substituted in U.S. Bank's sentence. "Richard's reference to his wife, Joan as the 100% primary beneficiary, leaves no interpretation for naming a legal entity, such as the *Marital* Trust." The argument falls apart because Richard *did* specifically

designate the Marital Trust as a beneficiary in his designation. (Exhibit USB-1/JB-2 p. 3, App. 91).

The only way that Joan can be 100% exclusive beneficiary no matter what is if Richard's reference to the Marital Trust in his beneficiary designation is completely ignored. U.S. Bank's urged interpretation is an obvious violation not only of Rule 2 [No language of a written agreement shall be deemed superfluous unless no other construction is possible. *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991)] but also Rule 3 [Every word in an agreement is taken to have been used for a purpose and must be given some meaning. *Woods Masonry, Inc. v. Monumental General Cas*., 198 F.Supp.2d 1016, 1028-29 (N.D. Iowa 2002)].

Despite its position that Joan is the 100% beneficiary no matter what, U.S. Bank concedes in its brief Joan would not have been 100% owner if a federal estate tax had been owed. On p. 26 of U.S. Bank's brief it writes, "The remaining sentences of Richard's designation...*creates a contingency* which would place part of the value of the IRA in the Marital Trust, but that contingency did not occur."

Both MidWestOne and the District Court concede this point, as well.

On p. 12 of its brief, MidWestOne writes, "The subsequent paragraphs under Section (A) of the addendum identify the only other potential primary beneficiary- the Joan Y. Bittner Marital Trust." On p. 13, MWO added, "*Since no part of the IRA needed to be included in the Trust*, Joan therefore became the sole beneficiary." (Emphasis added). In its opinion the District Court noted, "This *contingency* [a taxable estate] did not occur and, accordingly, any reference to the Marital Trust is no longer relevant." (App. 84).

The point made is that unless Richard's reference to the Marital Trust is completely ignored (which it cannot under Rules 2 and 3) that Richard did not intend the definition of "Primary Beneficary" to be 100% sole, exclusive beneficiary in all events as U.S. Bank has urged.

## G. BY DEFINITION, A LIFETIME BENEFICIARY HAS NO INTEREST TO DESIGNATE UPON HER DEATH

On page 19 of its brief, MidWestOne focuses on language in U.S. Bank's form which allows a spouse to designate beneficiaries "of my spouse's interest" upon her death. By definition, a lifetime beneficiary has no interest to designate upon her death.

The Free Dictionary by Farlex defines "Life Beneficiary" as: "A person designated in will to receive a certain asset or instrument *for the*

*remainder of his/her life*. For example, in a will, a farmer may grant ownership of his farm to his children, but they may not take possession of it while their mother is alive. In this situation, the mother is the life beneficiary and has the right to live in the farm house for the rest of her life."

https://financial-dictionary.thefreedictionary.com/Life+Beneficiary.

Black's Law Dictionary (Sixth Edition) defines "life beneficiary" as , "One who receives payments or other rights from a trust *for his or her lifetime*." (Emphasis added).

Investopedia defines, "life estate" as.

A life estate is property...that an individual *owns and may use for the duration of their lifetime*[5]. This person, called the life tenant, shares ownership of the property with another person or persons, *who will automatically receive the title to the property upon the death of the life tenant*. (Emphasis added).

https://www.investopedia.com/terms/l/life-estate.asp

By definition, a person designated as a "life beneficiary" or "lifetime

---

[5] This is precisely what Richard meant when he used "100%" then coupled it with his handcrafted words, "and she shall be entitled to all annual distributions from my IRA *based upon her life expectancy*."

beneficiary" has nothing to designate upon her death because others will "automatically receive the title to the property upon the death of the life tenant".

MWO's argument is much ado about nothing. It violates Rule 3 in that it ignores the words, "*my spouse's interest upon my spouse's death*. " In this case Joan has no interest to designate upon her own death. Richard directed that the title to the IRA be "automatically directed" to his children upon Joan's death.

## H. THE DISTRICT COURT CONSIDERED EXTRINSIC EVIDENCE THEN ERRONEOUSLY PREFERRED GENERAL LANGUAGE WHILE GIVING NO WEIGHT TO LANGUAGE IN THE WILL WHICH SPECIFICALLY ADDRESSED DISTRIBUTION OF THE IRA

On page 27 of its brief, U.S. Bank cites the portion of the District Court's Ruling where it recited Richard Bittner's Will language, "While I have, during my lifetime, attempted to equalize the value of assets owned by me and those by my wife, I have not succeeded." First, this shows the District Court did consider "extrinsic evidence" (the Final Will, Ex. JB-1, App. 103-126) while at the same time excluding other very relevant extraneous evidence. (Exhibits JB-25, App. 140-159; JB56-JB63 App. 231-346).

Further, U.S. Bank's argument and the District Court's ruling ignore Rule 5 [When general language and specific language collide, the specific language controls]. *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991)].

The specific language related to the IRA in Richard Bittner's Final Will is:

> 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 JB-1- p. 9 of 24, App. 111).

This Will (Exhibit JB-1, App. 103-126) also repeats the same language related to Lynn Von Schneidau's interest that is set forth in the Will of January 11, 2010 (Exhibit JB-25, App. 140-159), "A substantial portion of the income for the benefit of my daughter will be income from my IRA..". (Exhibit 1 pp. 14-15 of 24, App. 116-117).

The specific language Richard used directing his IRA to his Family Trust takes preference over his general language which makes reference to taxes.

Further, the District Court and Banks ignored the plural tense used by Richard in his will. Following the language referenced by the District Court in its opinion, Richard wrote in his Final Will, "I have therefore concluded to establish trusts (plural) which will make full use and benefit of all tax credits and deductions." (App. 84, 104-105).

Finally, both the District Court and the Banks are referring to the wrong Will. It's the Will executed contemporaneously that is "part of the same transaction" as the IRA beneficiary designation that is at the center of this case. That Will is Exhibit JB-25 executed January 11, 2010 (App. 140-159). As noted previously, the language on pp. 2-3 of Exhibit 25 (the January 11, 2010 Will), specifically provides that the Family Trust is an integral part of Richard's plan to minimize federal estate taxes. (App. 141-142).

## I. THE FACTS OF THE INSTANT CASE DO NOT ALIGN WITH THE FACTS OF *WHALEN I*. THE DISTRICT COURT WRONGLY APPLIED THE PAROL EVIDENCE RULE AND EXCLUDED ADMISSIBLE, PROBATIVE EVIDENCE

Both Banks have quoted *Whalen v. Connelly*, 545 N.W.2d 284 (Iowa 1996) in support of their interpretation of the Parol Evidence Rule. Richard knew something about the *Whalen* case. He presented the winning oral argument to this Court. *Whalen I* 545 N.W.2d at 287. He served as "Editor

in Chief" of the principal brief that this Court adopted as its opinion, in some cases verbatim. The facts of this case and *Whalen I* are different. In *Whalen I*, the agreements had a full integration clause. *Whalen I*, 545 N.W.2d at 291. These agreements do not. (See Exhibits USB-1 and USB-2, App. 89-102). In *Whalen I*, the parties went to great lengths to define critical terms in the written agreements. *Id.* In these agreements, the term "primary beneficiary" is defined nowhere in either U.S. Bank's form IRA beneficiary designation or form Trust Agreement. (Exhibits USB-1, USB-2, App. 89-102). In *Whalen I*, the District Court considered all of the multiple documents executed as part of the same transaction. *Whalen I*, 545 N.W.2d at 291. In this case, the District Court considered only one of the documents executed as part of the same transaction: the IRA beneficiary designation.

As noted in the previous sections, the Court ignored the terms of the Will specifically referenced in the IRA beneficiary designation which contained the terms of the Marital Trust and provided specific directions disposing the IRA in the event the Marital Trust did not need to be funded to avoid federal estate tax consequences [Exhibit 25, App. 145-146].

Jeff has asserted if all the language of the IRA beneficiary

designation is considered, the only conclusion that can be reached from that document alone is that Richard intended Joan to be a lifetime beneficiary. If any person is a lifetime beneficiary of personal property, his/her interest *must* be held in trust. The Will, executed contemporaneously, provides the details of the trust(s) which were to hold and dispose of the IRA.

Rule 1 articulated in *Eide v. Hass (In re H & W Motor Express)*, 358 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); *AmerUs Bank v. Pinnacle Bank*, 51 F. Supp. 2d 994, 999 (S.D. Iowa 1999) suggests documents executed contemporaneously are not "parol evidence", by definition. Rather, they are part of the contract itself to be read in conjunction with the other documents contemporaneously executed as part of the same transaction.

U.S. Bank goes so far as to argue that all of Richard's wills and beneficiary designations were offered into evidence for an "improper purpose." Such evidence is only for an "improper purpose" if the definition of "improper" is "offered to prove U.S. Bank's contract interpretation is erroneous."

The cardinal principal of contract construction is to ascertain the

parties' intent. *Hofmeyer v. Iowa Dist. Court*, 640 N.W.2d 225, 228-229 (Iowa 2001); *Whalen v. Connelly*, 545 N.W.2d at 291. Iowa R. Evid. 5.401 provides, "Evidence is relevant if: a. It has any tendency to make a fact more or less probable than it would be without the evidence." Iowa R. Evid. 5.406 provides, "Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice." Richard's wills and other IRA beneficiary designations were offered into evidence to show an unbroken pattern (habit) spanning almost two decades where in each and every instance, he left Joan's interest in the IRA, in trust not in fee simple.

## J. JEFF PRESERVED ERROR AND PRESENTED SUBSTANTIAL EVIDENCE OF U.S. BANK'S UNCLEAN HANDS

On page 36 of its argument U.S. Bank asserts Jeff did not present any argument of U.S. Bank's unclean hands in his brief or present any corroborative evidence at trial. Neither representation is accurate.

At the bottom of p.11 in Jeff's pretrial brief filed January 12, 2021, he asserted, "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, App. 161)".

Exhibit 26, offered at trial was an e-mail authored by Hector Lareau, Jeff's attorney to Lynn Hartman, U.S. Bank's attorney. In this e-mail Mr. Lareau noted:

> Rather than maintaining a position of neutrality where U.S. Bank had competing and conflicting duties, it has assumed the role of advocate on behalf of Joan Y. Bittner's conservatorship. This position fully justifies US Bank's removal as co-executor under §§633.65 and 633.10 of the Probate Code. Those points are developed in the brief attached as Exhibit 6.
>
> U.S. Bank simply cannot satisfy its fiduciary duty to Mr. Bittner's estate by continuing to advocate the largest asset of the estate belongs to someone else.
>
> 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 liability by placing the question in the court's hands. See, e.g. *Lincoln National Life Ins. Co. v Onsanger*, 2015 U.S Dist. Lexis 83267, 2015 WL 3932716).
>
> Additionally, US Bank can make good on its undertaking to resign as co-executor of the estate..." (App. 161).

As noted on p. 50 of Jeff's original brief, on three occasions, U.S. Bank acknowledged its roles as IRA trustee and as co-executor (and nominated testamentary trustee) were in conflict. (Exhibits JB-39, 89, 110;

App. 218, 358-363; 391). On June 18, 2020, U.S. Bank Vice President, Phil Hershner wrote, "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*." (Emphasis added)(Exhibit JB-110; App. 391).

Nonetheless, five weeks afterward, while still occupying the conflicting roles of IRA Trustee and Co-Executor of the Richard Bittner Estate, U.S. Bank not only proceeded with this suit serving as Joan Bittner's personal advocate, but also vigorously resisted its removal as co-executor. "Under the 'unclean hands' doctrine a court in equity may deny relief based on a party's inequitable, unfair, dishonest, fraudulent, or deceitful conduct. *Ellwood v. Mid States Commodities, Inc*., 404 N.W.2d 174, 184..." *In re Marriage of Phillips*, 493 N.W.2d 872, 878 (Iowa App. 1992). It is "inequitable and unfair" for any fiduciary to violate its duty of impartiality in a dispute regarding distribution of a trust estate, *Matter of Estate of Wise*, 890 P.2d at 746; *In re Estate of Benso*, 199 P.2d 523 (Kan. 1948); *In re Greenblatt*, 2014 ME 32, 86 A.3d 1215, 1219 (Me. 2014). It is grossly "inequitable and unfair" to allow a fiduciary with inherent conflicting duties to chose one set of duties over the other.

## CONCLUSION

When Richard's IRA beneficiary designation and Will executed on January 11, 2010 are read together as they must be, his intent to make his Family Trust the beneficiary of his IRA in the event the Marital Trust was not funded is undeniable. The District Court improperly excluded the January 11, 2010 Will (Exhibit JB-25, App. 140-159) when Iowa law commands that the two documents executed contemporaneously as part of the same transaction be read together. *Eide v. Hass (In re H & W Motor Express)*, 358 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); *AmerUs Bank v. Pinnacle Bank*, 51 F. Supp. 2d 994, 999 (S.D. Iowa 1999).

U.S. Bank had a significant conflict, which it acknowledged on at least three separate occasions. (Exhibits JB-39, 89, 110; App. 218, 358-363; 391). Rather than eliminating its conflict by resigning as co-executor or maintaining neutrality through an interpleader action, U.S. Bank chose sides. It chose to serve as an advocate in a dispute regarding distribution of the trust proceeds. In so doing, U.S. Bank embarked on a forbidden path of violating its duty of impartiality, *Northern Trust Co v. Heuer*, 560 N.E.2d 961 (Ill.App.3d 1990); *Matter of Estate of Petersen*, 570 N.W.2d 463, 466

(Iowa App. 1997); *Matter of Estate of Wise*, 890 P.2d at 746 ; *In re Greenblatt*, 2014 ME 32, 86 A.3d 1215, 1219 (Me. 2014); *Cairns v. Donahey*, 59 Wash. 130, 109 P. 334, 339 (Wash. 1910).

The IRA beneficiary designation and Will executed together on January 11, 2010, make Richard Bittner's intentions irrefutable: his Family Trust was to receive the IRA to the extent it was not needed to fund the Marital Trust. Jeff asserts that the District Court can be reversed as a matter of law on this issue alone. Alternatively and at the very least, this case should be remanded and the excluded parol evidence be ordered admitted as it is dispositive of Richard's intent. In the event a remand is necessary, U.S. Bank should be ordered to recast its petition as one for interpleader and maintain neutrality in this dispute.

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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 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 6,867 according to Word Perfect which is under the 7,000 words allowed under Iowa R. App. Proc. 6.903(1)(g)(1).