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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FINAL (ORIGINAL) BRIEF OF APPELLANT JEFF BITTNER

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The undersigned attorney hereby certifies that on April 19, 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

STATUTES

None

RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. **Whether the district court committed reversible error in allowing attorneys fees when U.S. Bank breached its duty of impartiality by serving as an advocate for one beneficiary of an IRA trust fund against the interests of another.**

2. **Whether the district court committed reversible error by rewriting the Trust Agreement to add duties and responsibilities that are not in the agreement.**

3. **Whether the district court committed reversible error by ignoring Iowa law which provides that any contractual provision in violation of public policy is unenforceable.**

4. **Whether the district court committed reversible error by creating and unprecedented exception to the duty of impartiality.**

5. **Whether the district court committed reversible error in denying appellant's claim that issues previously resolved against U.S. Bank had preclusive effect.**

6. **Whether the district court committed reversible error in ruling that U.S. Bank's form agreement was not an agreement that should be construed against its draftsman.**

7. **Whether the district court committed reversible error by awarding U.S. Bank attorneys' fees for prosecuting an action where it lacked standing.**

8. **Whether the district court committed reversible error in ruling U.S. Bank carried its burden of proof to show that the fees charged by the Simmons firm were fair and reasonable.**

ROUTING STATEMENT

This case involves the district court's creation of an unprecedented exception to the rule of law which provides a fiduciary which chooses sides in a dispute between beneficiaries must pay its own attorney fees. In this respect, the district court's ruling is a case of first impression relying upon an exception which has never been acknowledged by Iowa appellate courts or any other court. Similarly, while Iowa precedent is the same as other jurisdictions which recognize the duty of a fiduciary to remain neutral, our courts have never referenced the duty of impartiality, by name. Accordingly, this case would appear governed by Iowa R. App. Proc. 6.1101(2)(c). Retention by the Supreme Court is appropriate.

STATEMENT OF THE CASE

The predominant issue is whether U.S. Bank may recover its attorneys fees for choosing to advocate for one beneficiary in a dispute over the ownership of IRA trust funds where it served as trustee. Related is the question of what impact U.S. Bank's admitted conflict of interest plays. Also related is the impact of the district court's prior ruling which denied U.S. Bank attorneys fees for: 1) choosing sides in a dispute between beneficiaries and 2) having the same conflict of interest which is present in

this dispute.

STATEMENT OF RELEVANT FACTS

Richard Bittner ("Richard") was a well-known Iowa estate planning and trial lawyer who passed away February 23, 2019. U.S. Bank was trustee of Richard's IRA. U.S. Bank was also initially co-executor of Richard's estate. Sarah Maiers, U.S. Bank's attorney originally assigned to the estate, initially asserted the IRA belonged to one of the trusts under Richard's will. (Ex. JB- 32 App. 390-391; Ex. JB- 33 App. 393 ¶3; Ex. JB-34 App. 395 ¶ 3).

Jeff Bittner ("Jeff") is Richard's son. Jeff and Richard practiced law together for many years. Jeff was appointed U.S. Bank's co-executor. (Letter of Appointment March 7, 2019)[1].

On May 30, 2019 U.S. Bank officials convened a conference call to

[1] The letter of appointment is from the *Estate of R. Richard Bittner* Scott County Case No. ESPR 078709. On December 29, 2021, Jeff filed a notice of cross- filing in this case so that the record in the *Estate of Richard Bittner* would become part of the record in this case. These proceedings will be hereinafter referred to as "Richard's Estate". Similarly, on December 21, 2021, Jeff filed a notice of cross filing of the record of *U.S. Bank v. Jeffrey S. Bittner*, Scott County Case Co. CVCV 300445 so that record would become part of this case. This case will hereinafter be referred to as "declaratory judgment action"or "DJA". The exhibit numbers from the undersigned's trial to remove U.S. Bank as co-executor in the Richard Bittner Estate and the DJA are the same as both matters were tried to the Court together on January 26-27, 2021.

discuss the interpretation of Richard's IRA beneficiary designation. They did not ask Jeff or estate attorney, Curt Oppel to participate or provide input. The meeting reached a different conclusion than Attorney Maiers had originally expressed. The opinion of the meeting was that Richard intended for his wife, Joan, to become the sole owner of the IRA following his death. (Ex. JB-90, App. 520 ¶ 5).

Attorney Maiers shared the group's conclusion with Attorney Oppel who, in turn, shared it with Jeff. Jeff's reaction was one of disbelief. (Jeff Bittner Tr. 364:10-365:25.) An outright bequest to Richard's spouse and Jeff's mother, Joan, would have been inconsistent with Richard's life-long habits. More importantly, it would have conflicted with his wills and trust agreements dating back decades which always placed Joan's interest in trust. (Jeff Tr[2]. 364:10-367:5; Lucille Oseland Tr. 264:10-265:17, 277:16-278:18, Robert Lambert. Tr. 286:20-287:17; Exhibits JB-56-57, 59-63, App. 306-307, 335-336, 400-403, 408-409, 433-434, 455-456, 471-472, 498-499).

This disagreement would ultimately lead to a parting of the ways

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[2] 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.

between U.S. Bank and Jeff. Jeff believed the differences had been resolved in a December 17, 2019 meeting he had with U.S. Bank (Jeff testimony Tr. 354:2-355:10). In that meeting Jeff proposed he advocate for the testamentary trusts' ownership of the IRA, while his mother's conservatorship, MidWestOne Bank advocate for her ownership. *Id.*

Under Jeff's proposal, U.S. Bank would remain neutral due to its conflicting roles as IRA trustee and co-executor. This was a conflict U.S. Bank had admitted on multiple occasions. (Attorney Oppel testimony Tr. 307:8-20; Jeff's testimony 354:2-355:10; Ex.'s JB-39, App. 397; JB-89 App. 514 ¶1, JB-110, App. 521). In the six months following the meeting, U.S. Bank did not raise any objection to Jeff's proposal. (J. Bittner Tr. 354:21-355:23)

Accordingly, Jeff and Richard's Estate attorney Oppel were taken aback when in June 2020 they were provided an outside legal opinion U.S. Bank had solicited from the Simmons Perrine law firm ("Simmons") without Jeff's knowledge or consent[3] (Attorney Oppel testimony Tr. 312:18-

[3] Naturally, Jeff was not surprised to find U.S. Bank was providing an opinion which supported its internal group interpretation (which differed from Attorney Maiers' original interpretation).

313:2; Jeff testimony Tr. 355:20-357:20).

Jeff believed U.S. Bank had gone back on its word to maintain neutrality. (Jeff testimony Tr. 355:20-357:20). He asked for a meeting with U.S. Bank officers (Ex. JB-4, App. 323 last ¶; JB-5, App. 325). He conditioned that meeting upon U.S. Bank's sharing all of its communications related to his father's IRA. (Ex. JB-5 App. 325 ¶2).

U.S. Bank refused to produce the communications. (Ex. JB-17 App. 326 ¶ 5) In response, Jeff asked U.S. Bank resign as co-executor. (Ex. JB-18 App. 328 ¶ 3). U.S. Bank agreed. (Ex. JB-19 App. 329). Three weeks later U.S. Bank reneged on this agreement. (Answer, Richard's Estate July 27, 2019 App. 191). This refusal forced Jeff to take legal action to remove U.S. Bank. U.S. Bank was represented on the removal issue (Richard's Estate) by the Shuttleworth law firm ("Shuttleworth").

On July 29, 2020, two days after U.S. Bank reneged on its promise to resign as co-executor, it filed a declaratory judgment action in its capacity of Richard's IRA trustee. In that petition U.S. Bank assumed the role of Joan's advocate for ownership of the IRA. (Petition, DJA ¶1, 37 App. 160, 167) U.S. Bank was represented in these proceedings not by Shuttleworth but by Simmons which had provided U.S. Bank the legal opinion it

requested the previous month.

On August 19, 2019, Jeff's attorney, Hector Lareau, urged U.S. Bank to recast its declaratory judgment Petition as an Interpleader and maintain neutrality as it had originally promised. (Ex. JB-26 App. 351 ¶¶ 1-6). U.S. Bank refused. It continued to serve as Joan's advocate throughout the litigation. In so doing, it amassed attorneys' fees in excess of $205,000. (Application for fees Oct. 27, 2021 Joan's Conservatorship, App. 57).

Ultimately, Jeff was successful in removing U.S. Bank as co-executor after a full evidentiary hearing. (Order March 17, 2021-Richard's Estate, App. 208, 216). U.S. Bank did not appeal that ruling. Despite waiving its appeal rights in the underlying (removal) action, U.S. Bank made application for its attorneys fees incurred in resisting its removal as co-executor. The Court denied those fees on two grounds.

The first was:

"U.S. Bank has a duty to all beneficiaries and cannot pick certain beneficiaries to serve." (Ruling on U.S. Bank's Application for Extraordinary Attorneys' fees October 18, 2021-Richard's Estate, App. 277 bottom of page).

The second was:

> "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."
>
> *Id.*
>
> And:
>
> "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."
>
> (Order October 18, 2021- Richard's Estate App. 277, 281).

U.S. Bank also did not appeal this adverse ruling, either. Jeff asserts these findings of fact were essential to the ruling, are *res judicata* and have preclusive effect.

U.S. Bank was successful as Joan's advocate in the Declaratory Judgment Action. (Order DJA, March 17, 2021, App. 188). Jeff appealed that ruling. It was designated Supreme Court No. 21-0455. It was then assigned to the Court of Appeals. The appeal is pending.

Nine days after the district court's denial of U.S. Bank's first application for attorneys' fees, MidWestOne, Joan's conservator, asked to the court to consider payment of U.S. Bank attorney's fees incurred in the DJA. (Application for Fees October 27, 2021-Joan's Conservatorship, App.

8-10). Jeff resisted on multiple grounds. (Resistance November 5, 2021- Joan's Conservatorship, App. 68-89). Foremost among them was that in serving as Joan's advocate, U.S. Bank violated this Court's and the district court's previously recognized duty which requires fiduciaries to maintain neutrality in disputes between beneficiaries. (Jeff's Resistance Joan's Conservatorship, App. 72-77).

Despite its previous ruling denying U.S. Bank (Shuttleworth) attorneys fees for:

a) choosing sides in a dispute between beneficiaries, and;

b) acting as an advocate for one side in a case where it had a conflicting interest (Ruling October 18, 2021- Richard's Estate App. 277, 281) the district court granted U.S. Bank's application for (Simmons) attorneys fees in this case where it also:

a) chose sides in a dispute between beneficiaries, and;

b) had the same conflict of interest noted in the Court's previous ruling.

These two rulings are irreconcilable. Jeff filed his notice of appeal the following day.

BRIEF AND ARGUMENT

In granting U.S. Bank's fees for the Simmons firm prosecution of the DJA, the district court made multiple errors any one of which requires reversal.

STANDARD OF REVIEW (ALL ISSUES)

Probate proceedings concerning costs of estate administration are equitable in nature. *Matter of the Estate of Wulf*, 526 N.W.2d 154, 155-56 (Iowa 1994); *Matter of Estate of Petersen*, 570 N.W.2d 463, 466, (Iowa App. 1997). Costs of administration includes attorney's fees. Iowa Code § 633.3(8)(1995). The Court's review is accordingly de novo. Iowa R.App. P. 4. It reviews the peculiar circumstances of each case to determine whether an executor "may legally obligate the estate for attorney's fees." *Wulf*, 526 N.W.2d at 156, *Petersen*, 570 N.W.2d at 466.

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ALLOWING ATTORNEY FEES FOR U.S. BANK'S VIOLATION OF ITS DUTY OF NEUTRALITY AND IMPARTIALITY

Error was preserved by Jeff's November 5, 2021 Resistance pp. 5-10 and Reply December 31, 2021 Brief Points III A-B pp. 6-16.

> "'A trustee has no authority to employ counsel at the expense of the estate to represent the interest of one beneficiary in hostility

> to that of another. To permit him to do so would be to allow the trustee to pay from the property of one litigant the counsel fees of his opponent.' *Fleming v. Casady*, 202 Iowa 1094 1104, 211 N.W. 488, 493...
>
> In *Young v. Potts*, 6 Cir., 161 F.2d 597, 600, it is said: 'It has been repeatedly held by controlling authority that one who represents conflicting interests and so fails in the exercise of good faith is to be denied compensation or reimbursement for expenses.' Citing many cases."
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> *In re Spilka's Will*, 250 Iowa 1021, 97 N.W.2d 625, 627-28 (1959).

This is the law in Iowa. This is the law everywhere. Cases from other jurisdictions have referred to this doctrine as the duty of impartiality. It applies to estates. It applies to trusts. Without reference to this duty by name, Iowa has adopted this rule of law.

> "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).

Also on point is *Matter of Estate of Roggentien*, 445 N.W.2d 388, 390 (Iowa App. 1989):

> "However, when 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".

The case of *Matter Estate of Wise*, 890 P.2d 744, 746 (Kan. App. 1995) also applies:

> "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).
>
> 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. "[T]he 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).

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).

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.

In this case, U.S. Bank's internal staff chose the victor of the IRA interpretation dispute in the course of one teleconference on May 30, 2019 (Ex. JB-90, App. 520 ¶6). It then used its vast resources to champion the cause of its preordained victor.

U.S. Bank's breach of its fiduciary duty of impartiality is undeniable.

Unless an exception to the general rule applies, U.S. Bank cannot recover attorneys fees incurred in breaching its duty of impartiality.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY MANUFACTURING A NON-EXISTENT CONTRACTUAL PROVISION WHICH ALLOWED U.S. BANK TO RECOVER ATTORNEY FEES FOR BREACHING ITS DUTY OF IMPARTIALITY

Error was preserved by Jeff's November 5, 2021 Resistance Brief Point App. 5-10 and Reply December 31, 2021 Brief Point II pp. 4-6 III(A) pp. 6-10 and III (J) pp. 23-24.

In seeking to recover its attorneys fees, U.S. Bank urged the district court to read paragraph 11 of its form IRA Trust Agreement ("Trust Agreement") in isolation. This paragraph provides, "The Trustee may employ agents and delegate duties to them as the Trustee sees fit and may employ or consult with experts and legal counsel ... and may rely on information and advice received. Trustee will be reimbursed by the IRA Trust, me or the beneficiaries for the Trustee's costs incurred in employing such parties." (Exhibit USB-2 DJA, App. 296).

Iowa law provides Paragraph 11 may not be viewed in isolation. It may not be viewed in isolation from other provisions of the Trust Agreement. Similarly, it may not be interpreted in a legal vacuum which

ignores Iowa common law that prohibits contractual provisions which violate public policy.

Paragraph 11 is not the starting point in analyzing this contract. Paragraph 14 is. U.S. Bank Trust Agreement paragraph 14 provides, "Trustees duties and responsibilities are *only* those expressly enumerated herein. *Trustee has no other duties, responsibilities or liabilities*." (Emphasis added). (Ex. USB-2 DJA, App. 296). Accordingly, in order for U.S. Bank to be entitled to recover any fees under paragraph 11, those fees must be incurred in furtherance of U.S. Bank's "expressly enumerated duties and responsibilities." (Paragraph 14).

U.S. Bank's form Trust Agreement does not confer upon it the "duty or responsibility" to interpret the meaning Richard Bittner's IRA beneficiary designation. That is the duty of the Court. *Northern Trust Co v. Heuer*, 560 N.E.2d 961, 964 (Ill.App.3d 1990); *Perry v. Community Action Servs.*, 82 F.Supp.2d 892, 896 (N.D.Ill. 2000); *Olsen v. Shell Oil Co.*, 595 F.2d 1099, 1104 (5th Cir. 1979); *Robin v. Sun Oil Co.*, 548 F.2d 554, 557 (5th Cir. 1977) 17 C.J.S. Contracts §229(1).

More importantly, there is no contractual duty or right to take the critical step beyond contract interpretation declaring itself and assuming the

position of advocate for any particular beneficiary or group of beneficiaries. That is forbidden by the Courts. (See Brief Point I).

Even if there were a clear, specific contractual provision allowing U.S. Bank to breach its fiduciary Duty of Impartiality, it would be void as a contract against public policy. (See Brief Point III).

III. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO ACKNOWLEDGE THAT EVEN A CLEARLY WORDED CONTRACTUAL PROVISION WHICH ALLOWED U.S. BANK TO BE COMPENSATED FOR SERVING AS AN ADVOCATE IN A DISPUTE BETWEEN BENEFICIARIES WOULD BE CONTRARY TO PUBLIC POLICY, ILLEGAL AND VOID

Error was preserved by Jeff's November 5, 2021 Resistance Brief Point App. 5-10 and Reply December 31, 2021 Brief Point II pp. 4-6 III(A) pp. 6-10 and III (J) pp. 23-24.

Even if U.S. Bank's IRA Trust Agreement had stated clearly:

> "In a dispute over ownership over this IRA following the death of Richard Bittner, U.S. Bank may advocate for any beneficiary or beneficiaries it reasonably believes should prevail and shall be reimbursed all costs and attorneys fees"

that would be a contractual provision in violation of public policy, unenforceable and void.

- A fiduciary breaches its fiduciary duty of impartiality and neutrality

by serving as an advocate in a dispute between beneficiaries, *In re Spilka's Will*, 97 N.W.2d 625, 627-28 250 Iowa 1021 (Iowa 1959); *Matter of Estate of Petersen*, 570 N.W.2d 463, 466 (Iowa App. 1997); *Matter of Estate of Roggentien*, 445 N.W.2d 388, 390 (Ct. App. Iowa 1989); *Northern Trust Co v. Heuer*, 560 N.E.2d 961,963-64 (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) citing to Restatement (Third) of Trusts § 79.

- Contracts which call for a breach a fiduciary duty are against public policy, *Cochran v. Zachery*, 115 N.W.486, 487-88 (Iowa 1908); *Gleason v. Chicago, Minneapolis & St. Paul Rwy Co.* 43 N.W. 517, 518-19 (Iowa 1889); *Thompson v. First National Bank In Grand Forks*, 269 N.W.2d 763, 764 (N.D.1978); *In re Big Rivers Elec.*

Corp., 233 B.R. 726, 736 (Bankr. W.D. Ky. 1998); *In Del Rey Realty Co. v. Fourl* (1941) 44 Cal.App.2d 399, 402--403, 112 P.2d 649.

- Contracts against public policy are illegal, unenforceable and void, *Walker v. Gribble,* 689 N.W.2d 104, 110 (Iowa 2004); *Mincks Agri Center, Inc. v. Bell Farms, Inc*., 611 N.W.2d 270, 275 (Iowa 2000); *Rogers v. Webb*, 558 N.W.2d 155, 156-57 (Iowa 1997)*; Wunschel Law Firm, P.C. v. Clabaugh*, 291 N.W.2d 331, 335 (Iowa 1980); *Rowen v. LeMars Mutual Ins. Co.*, 282 N.W.2d 639, 650 (Iowa 1979); *Bay v. Davidson*, 133 Iowa 688, 111 N.W. 25, 26 (Iowa 1907); Restatement (Second) of Contracts §178; 17A Am Jur 2d Contracts §257 (1989); 17 C.J.S. Contracts §211.

IV. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY CREATING AN UNPRECEDENTED EXCEPTION TO THE RULE OF IMPARTIALITY

Error was preserved by Jeff's November 5, 2021 Resistance Brief Point A pp. 5-10 and Reply December 31, 2021 Brief Point II pp. 4-6 III(A) pp. 6-10 and III (J) pp. 23-24.

The previous brief points establish:

- A fiduciary owes a duty of impartiality and neutrality in a dispute over ownership of a trust or estate corpus. *In re Spilka's Will*, 97

N.W.2d 625, 627-28 250 Iowa 1021 (Iowa 1959); *Matter of Estate of Petersen*, 570 N.W.2d 463, 466 (Iowa App. 1997).

- There is no language in U.S. Bank's IRA trust agreement that purports to allow it to circumvent this fiduciary duty (Ex. USB-2 DJA), and;
- Even if there were such clear language, it would be a violation of the clear public policy of Iowa which requires neutrality in these circumstances. Contracts against public policy are illegal, unenforceable and void, *Walker v. Gribble,* 689 N.W.2d 104, 110 (Iowa 2004); *Mincks Agri Center, Inc. v. Bell Farms, Inc*., 611 N.W.2d 270, 275 (Iowa 2000)

These facts lead to the inescapable conclusion the district court created an unprecedented exception to the duty of impartiality. The district court's opinion asserts that a fiduciary may carve out an exception to the duty of impartiality in cases where it is "clear" who the beneficiary is. (See Ruling February 17, 2022 Joan's Conservatorship, App. 152). In other words, the district court has adopted a rule of law which provides that when it is clear to the trustee who the owner of the trust corpus should be, then it may cross the neutral-fiduciary line and become an advocate for the

beneficiary or beneficiaries it believes are entitled to prevail[4].

There are obstacles to the district court's deviation from the general rule of law.

The first obstacle is the case of *Northern Trust Co v. Heuer*, 560 N.E.2d 961 (Ill.App.3d 1990). *Northern Trust* squares on all fours with the instant case.

In that case Northern Trust filed a suit 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 agreed with Northern Trust and granted summary judgment in favor of Winterbauer. *Id.* Northern Trust then applied for attorneys' fees which the trial court granted. *Northern Trust Co v. Heuer* 560 N.E.2d at 964.

Mr. Heuer only appealed the attorney fee award claiming Northern Trust violated its duty of impartiality by not only choosing sides but also

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[4] In this case the advocate for one beneficiary amassed attorneys' fees in excess of $200,000.

advocating for Winterbauer's ownership. *Id*. The Court of Appeals reversed, denied attorneys fees 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[5] [6] [202 Ill.App.3d 1071] action to avoid acting at its own peril**. *Chicago Title & Trust Co. v. 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.

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[5] Jeff, through his counsel pleaded with U.S. Bank to recast its Petition as one for interpleader. (Exhibit JB-26 Dec. Judg. Action Scott Co. Case No. 300445. Jeff incorporates this filing herein, by reference). This request fell on deaf ears.

[6] This quote from Northern Trust is also germane to U.S. Bank's argument that it had the duty to determine ownership. The Northern Trust court categorically disagreed noting that the bank did *not* have the "duty or responsibility" to "make a determination as to the rights of prospective claimants". Determination of ownership is obviously the duty and responsibility of the court.

Contrary to the emphasized language of the *Northern Trust* court, the district court held that U.S. Bank *could* make a determination as to the rights of the respective claimants and act accordingly. (Ruling Feb. 17, 2022 Joan's Conservatorship, App. 152).

But then, the district court went a step farther than any court has ever gone before. The district court said when it is clear to a fiduciary which party should prevail in a dispute over trust property, the fiduciary may morph from "neutral fiduciary" to "advocate for a beneficiary". *Id.* The district court's holding is the opposite of the holding in *Northern Trust* which denied fees despite the fact that ownership was so clear in the underlying case that it was disposed of on summary judgment.

The second and legally larger obstacle to the district court's judicially created exception is that it is the undermines the reason for the rule of impartiality and neutrality. The reason for this rule is to discourage fiduciaries from spending the corpus of a trust or estate in a dispute where it is not a real party in interest. *In re Spilka's Will*, 97 N.W.2d 625, 627-28, 250 Iowa 1021 (1959); *Matter of Estate of Petersen*, 570 N.W.2d 463, 466 (Iowa App. 1997).

The rule created by the district court would undermine this reason

whether or not the fiduciary ultimately sided with the winning or losing party because the fiduciary which involves itself in the dispute will always be incurring attorneys' fees. The fiduciary will, in turn, seek reimbursement for its advocacy efforts from trust or estate property.

The third obstacle confronting the district court's ruling is the IRA beneficiary designation was not clear to the point its eventual interpretation was a foregone conclusion. Iowa law requires that instruments executed contemporaneously as part of the same transaction be construed together, *Eide v. Hass (In re H & W Motor Express)*, 358 B.R. 380, 383 (N.D. Iowa 2006) citing *Taylor Enterprise, Inc. v. Clarinda Production Credit Ass'n* 447 N.W.2d at 115 (Iowa 1989).

The IRA beneficiary designation (Ex. USB-1/JB-2, App. 285-88) and Will (Ex. JB-25, App. 330-349) were both executed on January 11, 2010. Both indisputably relate to the same transaction. Indeed, the Marital Trust terms referenced in the IRA beneficiary designation are not set forth in the beneficiary designation, itself (Exhibit USB-1/JB-2, DJA, App. 285-88). Instead, the terms of the Marital Trust are contained in the Will (Ex. JB-25 App. 336-337).

Richard's Will executed the same day as his IRA beneficiary

designation 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[7]. (App. 335-336)

This is absolutely consistent with (and almost identical to) the language in his IRA beneficiary designation (Exhibit JB-2/USB-1, DJA, App. 287-288). 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.

The district court's interpretation of the IRA designation also completely ignores the following provision of Richard's will. "A substantial part of the income for the benefit of my daughter [Lynn Von Schneidau] will be income from my IRA..." (Ex. JB- 25 para. (G)(3) p. App. 340).

By definition, no portion, let alone "a substantial portion", of Lynn's

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

sub-trust would be funded by the IRA if Joan is the 100% as the District Court held in the underlying case. This particular provision was contained in all seven of Richard's wills executed since 1995.

Moreover, every time Richard signed an IRA beneficiary designation, he cross-referenced a will usually one executed on the very same day. (Exhibits JB-1 & JB-2 (App. 287, 299); JB-56 & JB-59 (App. 400, 403); JB57 & JB-60 (App. 401, 429). The last seven wills Richard executed in the last two decades of his life state clearly that he wanted his IRA to pass into one or both of his testamentary trusts, not directly to his wife, Joan. (Ex. JB 59- R. Bittner Will February 6, 1995 App. 405-407, 409-413; Ex.- JB 56- R. Bittner IRA Ben. Design. February 8, 1998 App. 400; Ex. JB-60 - October 26, 1999 R. Bittner Will App. 434-437; Ex. JB-61- September 29, 2006 R. Bittner Will, App. 456-457; Ex. JB-62- October 18, 2008 Will, App. 477-478; Ex. JB-25- January 11, 2010 Will, App. 335-336; Exhibit JB-63- January 2012 (draft), App. 498 R. Bittner Will; Ex. JB-1- January 7, 2014 R. Bittner Final Will, App. 307).

There is substantial evidence supporting Jeff's interpretation. When reviewed by the Court of Appeals, his urged construction will carry the day. Even if Jeff's arguments do not carry the day, they provide a strong voice

urging an alternate construction than that reached by the district court.

The fourth obstacle confronting the district court's ruling is that no other court has recognized the "clarity" exception created by it.

The fifth obstacle confronting the district court's ruling is the proverbial "slippery slope" it creates for all courts if the created exception is affirmed. At present, there is a clear-cut rule of law in every jurisdiction that forbids a fiduciary from involving itself as an advocate in a dispute between beneficiaries.

If the "clarity exception" urged by the district court is adopted, an avalanche of litigation will surely follow attempting to define the degree of clarity required before the exception may be applied. Will it apply only in cases when a dispositive motion is granted? Will a unanimous jury verdict satisfy the exception? Will it apply only in cases where the losing party asserts a legally frivolous position?

Regardless of how it applies, the newly created exception will serve the opposite purpose of the current rule. The purpose of the current rule is to discourage fiduciaries which have historically been required to be neutral in beneficiary disputes from serving as advocates.

U.S. Bank's conduct here parallels the conduct of LeMars Mutual

Insurance Company in the case of *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639, 645 (Iowa 1979) wherein the Court noted:

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

In this case, the competing parties for ownership of the Richard's IRA were the trusts created under Richard's Will and Joan's conservator, MidwestOne Bank. MidWestOne was capably represented by the venerated law firm of Meardon, Sueppel & Downer P.L.C.

U.S. Bank had no claim of ownership in the IRA. It had no business involving itself in the dispute over ownership let alone assuming the role of lead advocate for one of the competing beneficiaries. It should not be rewarded for breaching its duty of impartiality.

This is particularly applicable here where U.S. Bank was asked by Jeff in the very beginning of the ligation to recast its petition as an

interpleader thereby maintaining neutrality. Instead, it deliberately chose to be lead advocate for one of the possible beneficiaries. (Ex.- JB 26 App. 351 ¶¶ 1-5).

V. THE DISTRICT COURT ERRED BY REFUSING TO ACCEPT THAT ITS OCTOBER 18, 2021 RULING IN THE ESTATE OF RICHARD BITTNER HAS PRECLUSIVE EFFECT

Error was preserved by Jeff's November 5, 2021 Resistance Brief Points B,C pp. 10-13 and Reply December 31, 2021 Brief Point II pp. 4-6 III(F) pp. 18-19.

On October 18, 2021, the district court denied U.S. Bank's requested attorneys' fees in Richard's estate on the alternate grounds that:

1) U.S. Bank had chosen to serve certain beneficiaries at the expense of others (Ruling on U.S. Bank's Application for Extraordinary Attorneys' fees October 18, 2021 Richard's Estate, App. 277), and;

2) That in filing and pursuing the declaratory judgement action as Joan's advocate had acted in a matter where it had conflicting fiduciary duties. (Ruling on U.S. Bank's Application for Extraordinary Attorneys' fees October 18, 2021 Richard's Estate App. 277, 281).

The two district court rulings on U.S. Bank's fee requests are irreconcilable. They are not only intellectually but also legally inconsistent.

The ruling in the first case precludes the opposite ruling in the second case.

The constituent components of the legal doctrine known as *res judicata* are claim preclusion and issue preclusion. *Israel v. Farmers Mutual Ins. Ass'n of Iowa,* 339 N.W.2d 143, 146 (Iowa 1983); *Harrison v. State Bank of Bussey*, 440 N.W.2d 398, 399-401 (Iowa App. 1989). Claim preclusion prohibits a party from asserting claims that could have been resolved in a prior litigation between the parties. *Id.* Issue preclusion forbids re-litigation of issues that were resolved in prior litigation. Issue preclusion is established through proof of the following elements:

1. The issue concluded must be identical.

2. The issue must have been raised and litigated in the prior action.

3. The issue must have been material and relevant to the disposition of the prior action.

4. The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Hunter v. City of Des Moines, 300 N.W.2d 121, 125-26 (Iowa 1981); *Fischer v. City of Sioux City*, 654 N.W.2d 544, 547 (Iowa 2002); *Harrison v. State Bank of Bussey*, 440 N.W.2d 398, 401 (Iowa App. 1989).

All elements of issue preclusion are satisfied here.

1. The critical issues in Richard's Estate fee dispute were whether U.S. Bank had conflict of interest and whether it could be compensated for violating its duty of impartiality by choosing sides in a dispute between beneficiaries. (October 18, 2021 Ruling pp. 7,11-Richard's Estate).
2. These issues were raised in the prior proceedings. (Jeff June 18, 2021 Resistance App. 72-77; Submission of Supplemental Authority September 23, 2021, App. 269; Jeff oral argument September 29, 2021-All filings Richard's Estate).
3. These issues was relevant to the prior determination. The issue before the Court was whether U.S. Bank could recover attorneys fees when it had an obvious conflict of interest and one of its stated reasons resisting its removal admitted siding with one group of beneficiaries over another. (October 18, 2021 Ruling Richard's Estate, bottom of App. 277).
4. The determination made by the Court was essential to the resulting judgment.

All of the elements of issue preclusion have been satisfied. U.S. Bank may not re-litigate its conflict of interest nor the propriety of choosing

sides when the litigation narrows down to a contest of personal interests between potential beneficiaries, *In re Spilka's Will*, 97 N.W.2d 625, 627-28, 250 Iowa 1021 (Iowa 1959)*; Matter of Estate of Petersen*, 570 N.W.2d 463, 466 (Iowa App. 1997); *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123-26 (Iowa 1981).

VI. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO CONSTRUE THE IRA TRUST AGREEMENT AGAINST U.S. BANK

Error was preserved by Jeff's November 5, 2021 Resistance Brief Point App. 72-77 and Reply December 31, 2021 Brief Points II p. 4-6, III(A) pp. 6-10 (including footnote 1).

The district court erred by refusing to strictly construe the form Trust Agreement, Exhibit USB-2, against U.S. Bank. (Ruling Feb. 5, 2022, App. 152 ¶1). A contract of adhesion is a standardized contract drafted by a powerful commercial unit and put before individuals on the "accept this or nothing basis", *C & J Fertilizer v. Allied Mut. Ins. Co.* 227 N.W.2d 169, 180 (Iowa 1975); *Home Federal Sav. & Loan Ass'n v. Campney*, 357 N.W.2d 613, 619 (Iowa 1984); *Hofmeyer v. Ia Dist. Ct. For Fayette Cty.*, 640 N.W.2d 225, 230 (Iowa 2001).

Despite the district court's ruling to the contrary, U.S. Bank's IRA

Trust Agreement (Exhibit USB-2, App. 289-298) is a classic contract of adhesion. U.S. Bank and Richard's IRA Trust Agreement is comprised of the "form agreement" (USB-2, App. 289-298) and the IRA beneficiary designation (USB-1, App. 285-288).

The "form agreement" (USB-2) defines the contractual terms of the IRA trust. The beneficiary designation (USB-1) only allows the owner to designate his beneficiaries.

The district court erroneously concluded because there was no evidence Richard did not negotiate the form agreement it was not a contract of adhesion. On its face the Trust Agreement a is a classic contract of adhesion. It is a "form agreement" of a "powerful commercial unit." There is no evidence Richard *was* allowed to negotiate any term of Exhibit USB-2. In other words, there is no evidence he was allowed any input into U.S. Bank's "form agreement" (Exhibit USB-2) (which is different form the beneficiary designation (Exhibit USB-1)).

Another rule of construction ignored by the district court compounds its error. This rule requires doubtful language must be interpreted most strongly against the party who selected language, *Dickson v. Hubbell Realty Co.*, 567 N.W.2d 427, 430 (Iowa 1997); *Kerndt v. Rolling Hills Nat. Bank*,

558 N.W.2d 410, 416 (Iowa 1997); *Iowa Fuel & Minerals v. Board of Regents*, 471 N.W.2d 859, 863 (Iowa 1991); 17A Am 2d Contracts §348. In this case, the language of the form Trust Agreement (Exhibit USB-2) was selected entirely by U.S. Bank.

VII. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ACKNOWLEDGE U.S. BANK'S LACK OF STANDING IN THE UNDERLYING CAUSE OF ACTION PRECLUDES FEE SHIFTING

Preservation of Error: On December 21, 2021 Jeff filed a Notice of Cross Filing and Incorporation of Record of Declaratory Judgment Action. That filing reads as follows:

> "[F]or purposes of the Application of the Simmons' law firm fees and for all other purposes [the undersigned] does hereby cross-file and incorporate the entire record in the Declaratory Judgment Action, Scott Count Case No. CVCV300445, including but not limited to all docket entries, exhibits and transcripts of testimony." (App. 104).

U.S. Bank's request for attorneys' fees arises from the services it provided in the underlying case. Error on the issue of standing was preserved by paragraphs 1 and 2 of Jeff's Affirmative Defenses filed December 16, 2020 in the underlying case (App. 175). Moreover, standing can be raised at any time, *Schott v. Schott*, 744 N.W.2d 85, 88 (Iowa 2008) quoting *Northbrook Residents Ass'n Iowa State Dept. of Health Office*, 298

N.W.2d 330, 331 (Iowa 1980).

Intertwined with and encompassing the substantive appeal issues is the issue of U.S. Bank's standing to serve in the capacity of advocate. "Standing to sue" means a party must have a sufficient stake in an otherwise justiciable controversy to obtain resolution of that controversy, *Alons v. Iowa Dist. Court for Woodbury County*, 698 N.W.2d 858, 863 (Iowa 2005); *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475; *Sanchez v. State*, 692 N.W.2d 812, 821 (Iowa 2005)

> "As far as Iowa law is concerned, this means 'that a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected.' Id. Having a legal interest in the litigation and being injuriously affected are separate requirements for standing. *Id.*
>
> Standing is a doctrine courts employ to refuse to determine the merits of a legal controversy irrespective of its correctness, where the party advancing it is not properly situated to prosecute the action. When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded.
>
> 59 Am. Jur. 2d Parties § 36, at 442 (2002) (footnotes omitted); see also *Hawkeye Bancorporation v. Iowa Coll. Aid Comm'n*, 360 N.W.2d 798, 802 (Iowa 1985) ("standing is a self-imposed rule of restraint").
>
> *Alons v. Ia Dist. Court for Woodbury County*, 698 N.W.2d 858, 864

(Iowa 2005). The second element of the test is clearly lacking. U.S. Bank was not going to be "injuriously affected" regardless of the outcome of the Declaratory Judgment Action. Jeff asserted from the beginning that the parties who would potentially be injuriously affected from the outcome are Joan (through her conservator) and the trusts under Richard's will. They are the real parties in interest.

A "real party in interest" is a party who, under governing substantive law, possessed the right to be enforced, *Republic of Indonesia v. Bill's Rentals, Inc.*, 330 F.3d 1041, 1045 (8th Cir. 2003)*; Iowa Public Service Co. v. Medicine Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977).

In this instance, the "right to be enforced" was the right to own Richard's IRA. U.S. Bank never had a claim of ownership. U.S. Bank was not a real party in interest. It had no standing. Its only option was to file an interpleader. It failed and refused to do so. U.S. Bank should not be compensated for its relentless pursuit of an action where it lacked standing.

VIII. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO ACKNOWLEDGE THAT U.S. BANK DID NOT CARRY ITS BURDEN TO PROVE THE ATTORNEYS FEES OF THE SIMMONS FIRM WERE FAIR AND REASONABLE

Error was preserved by Jeff's November 5, 2021 Resistance Brief

Points E-L, App. 81-88.

As the case law establishes, U.S. Bank is not entitled to shift payment of any of its attorneys' fees. The argument set forth below is made in the alternative.

U.S. Bank bears the burden of proving the fees should be awarded. *In re Estate of Bockwoldt*, 814 N.W.2d 215, 232 (Iowa 2012).The burden is on the party seeking to recover fees to not only prove that the services were reasonably necessary but also the charges were reasonable in amount, *Ales v. Anderson Gabelmann Lower & Whitlow*, 728 N.W. 2d 832, 842 (Iowa 2007); *Lynch v. City of Des Moines*, 464 N.W.2d 236, 238 (Iowa 1990). Any uncertainties in a fee application due to nonspecific entries are to be resolved against U.S. Bank, *Am. Gen. Life Ins. Co. v. One Vision*, No. 19-CV-3016-CJW-KEM, 2019 WL 6134483 at *9 (N.D. Iowa Nov., 19, 2019).

A. The Fees Are Excessive

U.S. Bank's attorney bill for this action was $205,000 for a two-day trial, including preparation, and defense of that ruling on appeal. Had U.S. Bank acted properly by filing an interpleader action, virtually all of this bill would have been eliminated.

Two weeks after U.S. Bank filed the DJA, Jeff's attorney, Hector

Lareau, wrote U.S. Bank's (Simmons) counsel asking U.S. Bank to recast its Petition as one for interpleader and maintain neutrality as it had promised.

> "All of this background is by way of demonstrating that US Bank has been hopelessly conflicted since the time it first announced its opinion that Joan Bittner is the sole IRA beneficiary. This position- while US Bank may conceive it to be consonant with its duties as IRA administrator-is exactly contrary to its duty as co-executor of Mr. Bittner's estate to collect the asset for the estate...
>
> U.S. Bank simply cannot satisfy its fiduciary duty to Mr. Bittner's estate by continuing to advocate that the largest asset of the estate belongs to someone else.
>
> U.S. 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 form 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)).
>
> (Ex. JB-26 App. 351 ¶¶ 1, 3, 4)

Little did Jeff and Attorney Lareau know that by this time U.S. Bank had already considered the interpleader option and rejected it in favor of what one of its attorneys called, "a Hard Line Position".

In its billing entry of 07/23/20 by an attorney identified by initials "JSB" the Simmons firm billing entry reads:

> "Follow up on memo re: The path for the Bank to seek Declaratory Judgment in the nature of Interpleader vs. any

Hard Line Position....” (App. 12 last entry).

On July 29, 2020, U.S. Bank deliberately opted for a “Hard Line Position”. U.S. Bank continued to maintain its Hard Line Position through trial and appeal accruing an attorney bill over $205,000 which was erroneously shifted to Joan by the district court’s ruling.

Had U.S. Bank properly maintained the role of neutral fiduciary by filing an interpleader petition, its attorneys fees would have been substantially lower. Iowa’s federal court decisions shed light on this fact.

> “Though no rule or statute provides for recovery of fees and costs associated with bringing an interpleader action, “courts have traditionally relied on the equitable nature of the interpleader remedy to allow a ‘*modest*’ award of attorney fees.” *Hearing*, 33 F. Supp. 3d at 1042. Modest because although “[t]he institution of a suit in interpleader, including the depositing of the fund in the registry of the court and the procuring of the stakeholder from further liability, does not involve any great amount of skill, labor or responsibility, *Hunter*, 111 F.2d at 557. As such, an interpleader plaintiff’s “[r]ecoverable expenses” should generally be “limited to the attorneys fees billed to prepare the complaint, obtain service of process on the claimants to the fund, and secure dismissal from the lawsuit, *Van Dusseldorp v. Ho*, 4 F Supp. 3d 1069, 1071 (S.D. Iowa 2014)”. (Emphasis added).

Principal Life Ins. Co. v. Hunter, 2020 U.S. Dist. LEXIS 248442, Case No. 4:20-cv-00093 (S.D. Iowa 2020).

> “[A court considering an application for interpleader attorney fees] will not award fees, for example, ‘devoted to the initial

> investigation of the underlying facts... prior to the actual filing of the interpleader action,' *Id*. at 1072, Neither may it award fees for researching the standard applicable to awards of attorney fees in Interpleader, *Id*. at 1071. Therefore, many hours claimed in counsel's affidavit are not recoverable".

State Farm Life Ins. Co. v. Avila, 2018 U.S. Dist. LEXIS, Case No. 4:17-cv-00366 (S.D. Iowa 2018).

For purposes of comparison, the other firm representing U.S. Bank in the matter tried simultaneously[8], Shuttleworth, billed $127,000 for the same two- day trial. (App. For Fees Shuttleworth Ex. A May 11, 2021 (Richard's Estate), App. 227-245. Jeff's attorney, Hector Lareau billed $27,700 for the same two-day trial. (Lareau App. For Fees February 3, 2021-Richard's Estate App. 192-207). The amount of fees charged are also noteworthy because no party was allowed formal discovery as the district court scheduled both the DJA and Richard's Estate for an expedited, combined trial.

Between U.S. Bank's two law firms, the matters handled by Shuttleworth were more complex. Specifically, the primary legal issue undertaken by the Shuttleworth was whether U.S. Bank had waived

[8] The matter tried simultaneously was Jeff's motion to remove U.S. Bank as co-executor (i.e. Richard's Estate matter).

attorney-client privilege. This issue resulted in five total briefs (Richard's Estate-Jeff's 09-03-20 17 page brief resisting motion to quash; U.S. Bank's 17 page 09-14-20 reply brief; Jeff's 8 page 10-19-20 supplemental brief; Jeff's 21 page second supplemental brief 12-18-20; U.S. Bank's 10 page response 12-18-20 all Richard's Estate filings) It resulted in further filings after the Court had ruled. (Jeff's 01-06-21 contempt filing; U.S. Bank's motion for extension of time 01-12-21).

By contrast, the most complex legal issue in the DJA was the parole evidence rule. Iowa law on the parole evidence rule is straight-forward. The Shuttleworth bill should have been the larger of the two. Yet, it was almost $80,000 smaller.

The attorney fees on appeal are over seven times larger than Jeff's attorney, Hector Lareau, charged Jeff on both matters tried simultaneously. Admittedly, Jeff did much of his legal work, pro se. Notwithstanding this fact, the fees charged by U.S. Bank for the services of the Simmons firm are very large when compared with fees charged by others on the same and similar issues.

B. Block Billing Warrants Reduction in the Fee Reward

The Supreme Court was confronted with a similar situation in the

Bockwoldt case. In citing to the case of *In re Metcalf's Estate*, 227 Iowa 985, 994, 289 N.W. 739, 743 (1940), the Court commented:

> The beneficiaries objected, noting, among other things, "that services were not itemized" and the fees were unreasonable. *Id.* at 992, 289 N.W. at 742. We stated that "[i]t requires but a glance at the statement of the attorney ... to apprise one that the same was too indefinite to furnish a proper legal basis for [a finding as to the extent of value of the alleged extraordinary services]." *Id.* at 993, 289 N.W. at 743. The application for SLH's fees poses a similar problem.
>
> Willows resisted the application for fees for SLH, pointing out that other than the general statement of the type of duties performed, there was no "documentation or evidence showing the services performed by [SLH] from which the Court can determine whether the advances are reasonable or for the benefit of the estate." Without an itemized statement from SLH, Willows argues that "there is no way for the Court or interested parties to know whether the firm and Wessels double-billed for the work."
>
> We agree. Without a more detailed breakdown, such as the one Wessels provided to justify his own fees, it was impossible for the district court to determine whether the fees provided by SLH were "reasonable." Specifically, it is impossible to determine whether SLH and Wessels duplicated each other's efforts.
>
> *Bockwoldt*, 814 N.W.2d at 232 (Iowa 2012).

The Simmons block billing makes it difficult if not impossible to determine whether amounts spent on various tasks were fair and reasonable. U.S. Bank has not carried its burden. The requested fees should be denied

or reduced, accordingly.

C. The Time Spent on Consideration of Federal Court and the Motion to Move Case to Business Court Should Be Denied

The time devoted to exploring the possibility of federal jurisdiction is excessive. The expenditure of effort devoted to this task should have been minimal. It is clear there was no basis for federal jurisdiction:

- There was no federal question involved hence, there was no "federal question jurisdiction".
- U.S. Bank's mailing list showed that Kim Montgomery (a necessary defendant) was a resident of Minnesota, U.S. Bank's principal place of business.
- Because complete diversity between plaintiff and all necessary defendants was lacking, there was no "diversity jurisdiction", either.

U.S. Bank's attorneys also conducted an investigation into the Honorable Thomas Reidel, the judge specifically assigned to the Joan's Conservatorship and Richard's Estate. (See time entries 07/25/20-07/27/20, App. 13-14). The consequence of this investigation was to file a motion to move this case to Business Court with the Petition on July 29, 2020.

On August 21, 2020, this motion was summarily denied by Chief Judge Greve who noted:

> This court finds this matter is not particularly complex, and it does not require any specialized business or banking knowledge. Further, the other two cases related to these parties and issues have been assigned to the Honorable Thomas Reidel, who is more than capable of handling this case as well.

It is difficult to see how these efforts could have inured to the benefit of Joan's's conservatorship estate in any way. It is even more difficult to justify this legal strategy based upon the language of the Trust Agreement upon which U.S. Bank relies. U.S. Bank should not be recompensed for these efforts.

D. The Fee Statement Should Be Reduced for Duplication of Time

It is difficult to justify the presence of two Simmons' attorneys at trial. Megan Merritt did all the witness examination on behalf of the Shuttleworth firm on the Removal Petition. Hector Lareau and Jeff tried both cases without additional help.

It did not require more than one attorney per case, per side to present properly present evidence and argument. Either Ms. Hartman or Mr. Peterson could have properly presented U.S. Bank's case in the DJA. Trial did not require the presence of both. The district court conceded this fact in its ruling. (Ruling Feb. 17, 2022 App. 155 last ¶) yet allowed the duplication of effort, anyhow. U.S. Bank did not carry its burden that the

presence of both attorneys at trial was necessary.

E. U.S. Bank Failed to Carry its Burden to Show the Relevance of Creating, "A Timeline of Events with Jeff Bittner

Starting around September 8, 2020, a person designated as "MAO" was tasked with the mission of "Creating Timeline of Events with Jeff Bittner." (App. 18). At first blush, these entries appear focused upon matters that are irrelevant; more prejudicial than probative; constitute "prior bad acts" or are, otherwise; inadmissible under the Iowa Rules of Evidence. (See Iowa R. Evid. 5.402, 5.403, 5.404(b)).

It is unclear how these efforts were designed to enhance the Joan's conservatorship U.S. Bank bears the burden of showing that these efforts inured to Joan's benefit*, In re Estate of Bockwoldt*, 814 N.W.2d 215, 232 (Iowa 2012). U.S. Bank did not carry this burden.

F. The Trial Court Should Have Reduced Hourly Rates to Reflect Community Standards

Attorneys fees must be assessed at the community rate. *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982); *Carson v. Billings Police Dept.*, 470 F.3d 889, 892 (9th Cir. 2006); *Taylor v. Dist. of Columbia*, 205 F.Supp.3d 75, 84 (D. D.C. 2016).

Megan Merritt of the Shuttleworth firm is a polished trial attorney and an accomplished legal writer. She is a Cedar Rapids lawyer. She billed at $240.00 an hour. (App. 228). Hector Lareau, Jeff's lawyer, possesses similar attributes. He is a Rock Island lawyer. He billed $250.00 per hour. (App. 197).

Attorney Peterson billed at $265.00 per hour for most of his services. (App. 45-57) Attorney Hartman billed at $302.00 *Id.*. The Simmons partner designated at "RWS" billed at $450.00 per hour (App. 13). The Simmons partner designated as "JSB" billed at $312.00 per hour (App. 12). The Simmons partner designated as "CLC" billed at $275.00 per hour. (App. 17).

The Merritt/Lareau rates are more in line with Quad City Community rates. The bill should be reduced, accordingly.

Moreover, it appears that the paralegal rate charged by Simmons was $140.00 per hour when the going rate in the Quad Cities for a top paralegal with thirty years experience is $75.00 per hour.

G. The Attorney Bill Is Premature

The fee application notes the Declaratory Judgment Action is on appeal. No one will know the ultimate outcome until the Iowa Court of

Appeals and, perhaps, the Supreme Court rules. In the event the ruling is adverse to U.S. Bank, the IRA will not be part of Joan's conservatorship. One of the elements for recovering attorneys fees in Iowa is the extent of success, *Bockwoldt* 814 N.W.2d at 232.

It goes without saying that if Joan does not own the IRA, there are no legal grounds to pay attorneys fees from an asset she does not own. Ultimate success on the Declaratory Judgment Action will not be known until the Supreme Court issues its Procedendo. Accordingly, the fee application is premature.

CONCLUSION

The district court improperly re-wrote the contract to expand U.S. Bank's duties and responsibilities after the bank had deliberately limited its obligations in its form Trust Agreement, *In re Jorgensen*, 959 N.W.2d 670 , 678 (Iowa 2021); *Kennedy v. State*, 688 N.W.2d 473, 480 (Iowa 2004); *Kunz v. Bock*, 163 N.W.2d 442, 445 (Iowa 1968); Paragraph 14 (Ex. USB-2, App. 296). In the process, the district court erroneously conflated U.S. Bank's duty to distribute the IRA proceeds to the proper beneficiary with the court's duty to determine who the proper beneficiary is.

Contrary to the district court's ruling, a trustee has no duty to make a

determination of ownership of a disputed fund. The *Northern Trust* court made this clear, *Northern Trust Co. v. Heuer*, 560 N.E.2d at 964. Contract interpretation is exclusively the Court's job, *Perry v. Community Action Servs.*, 82 F.Supp.2d 892, 896 (N.D.Ill. 2000); *Olsen v. Shell Oil Co.*, 595 F.2d 1099, 1104 (5th Cir. 1979); *Robin v. Sun Oil Co.*, 548 F.2d 554, 557 (5th Cir. 1977) 17 C.J.S. Contracts §229(1).

U.S. Bank can point to no provision of the Trust Agreement authorizing it to make the determination of ownership. More importantly, U.S. Bank can point to no part of its agreement which empowers it to cross the line from neutral fiduciary to principal advocate for one of the parties even if there were language allowing it to determine ownership.

With the erroneous exception created by the district court in this case alone, all other reported cases hold that any fiduciary which breaches this duty by crossing the neutral-fiduciary line and becoming an advocate for one of the parties must pay its own attorneys fee. In this case, the district court created an exception to this general rule which is not supported by any recognized authority.

The exception created by the district court swallows a clear-cut, entrenched and well-considered rule of law. It is fraught with unintended

consequences. It is an invitation for an avalanche of future litigation refining this newly-created "clarity exception".

U.S. Bank should be ordered to pay all of its own attorneys fees. Alternatively, the fees awarded to be reduced for the reasons set forth in Brief Point VIII.

Wherefore, the undersigned prays the ruling of the district court be reversed and U.S. Bank not be allowed to shift the burden of any of its attorneys fees. Alternatively, the undersigned prays that U.S. Bank's attorney fee award be substantially reduced pursuant to the arguments set forth in Brief Point VIII.

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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 9,910 according to Word Perfect which is under 14,000 allowed under Iowa R. App. Proc. 6.903(1)(g)(1).