IN THE SUPREME COURT OF IOWA
NO. 22-0328

IN THE MATTER OF THE CONSERVATORSHIP OF JOAN Y. BITTNER,

JEFFREY S. BITTNER,
Appellant,

vs.

U.S. BANK NATIONAL ASSOCIATION,
Intervenor-Appellee.

Appeal from the Iowa District Court for Scott County
The Honorable Tom Reidel, No. GCPR078775

INTERVENOR-APPELLEE U.S. BANK'S FINAL BRIEF

Lynn W. Hartman, AT0003365
Nicholas Petersen, AT0012570
SIMMONS PERRINE MOYER BERGMAN PLC
115 Third Street SE, Suite 1200
Cedar Rapids, IA 52401
Tel: 319-366-7641; Fax: 319-366-1917
lhartman@spmblaw.com
npetersen@spmblaw.com

ATTORNEYS FOR INTERVENOR-APPELLEE
U.S. BANK NATIONAL ASSOCIATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Whether the District Court Judgment should be affirmed authorizing contractual attorneys' fees for litigation that the Ward's son (Appellant Jeffrey Bittner) perpetuated despite his admission that the outcome of that litigation made no financial difference, and where indemnification of attorneys' fees is specifically authorized by an IRA Trust Agreement and all parties agreed to indemnification of fees but the Appellant.

GreatAmerica Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration, Inc., 691 N.W.2d 730 (Iowa 2005).

Gabelmann v. NFO, Inc., 606 N.W.2d 339 (Iowa 2000).

Lee v. State, 906 N.W.2d 186 (Iowa 2018)

Hensley v. Eckerhart, 461 U.S. 424 (1983)

Schultz v. Schultz, 591 N.W.2d 212 (Iowa 1999)

Iowa Code § 633.357(2)

Spahn & Rose Lumber Co. v. Iowa Steel & Const. Co., 131 N.W.2d 791 (Iowa 1964)

Iowa R. Civ. P. 1.1101

Iowa R. Civ. P. 1.1102

DuTrac Cmty. Credit Union v. Radiology Grp. Real Estate, L.C., 891 N.W.2d 210, 216 (Iowa 2017).

Arnevik v. Univ. of Minnesota Bd. of Regents, 642 N.W.2d 315 (Iowa 2002).

Pavone v. Kirke, 807 N.W.2d 828 (Iowa 2011).

Iowa Coal Min. Co. v. Monroe Cty., 555 N.W.2d 418 (Iowa 1996).

Fischer v. City of Sioux City, 654 N.W.2d 544 (Iowa 2002).

Soults Farms, Inc. v. Schafer, 797 N.W.2d 92 (Iowa 2011).

Hunter v. City of Des Moines, 300 N.W.2d 121 (Iowa 1981).

Lohman v. Duryea Borough, 574 F.3d 163 (3d Cir. 2009).

Landals v. George A. Rolfes Co., 454 N.W.2d 891 (Iowa 1990).

Lynch v. City of Des Moines, 464 N.W.2d 236 (Iowa 1990).

Smith v. Iowa State Univ. of Sci. & Tech., 885 N.W.2d 620 (Iowa 2016).

Evans v. Jeff D., 475 U.S. 717, 735-36 (1986)

In re Est. of Bockwoldt, 814 N.W.2d 215, 232 (Iowa 2012).

Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 762 N.W.2d 463 (Iowa 2009).

Isakson v. Coll. Square Mall Partners, L.L.C., 791 N.W.2d 428 (Iowa Ct. App. 2010).

McNally & Nimergood v. Neumann–Kiewit Constructors, Inc., 648 N.W.2d 564 (Iowa 2002).

Farmers Bank of N. Missouri, Unionville, Missouri v. Erpelding, 555 N.W.2d 222, 226 (Iowa 1996).

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because it involves application of well-established principles regarding a District Court's authorization of attorneys' fees. See Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

The Ward's son, Jeffrey Bittner ("Jeffrey"), appeals the District Court's ruling that the Conservator could authorize release of money from an IRA to indemnify attorneys' fees, as provided in the applicable IRA Trust Agreement. *See* February 17, 2022 Ruling Authorizing Payment of Attorney Fees to Simmons Law Firm (the "Ruling"). R. Richard Bittner ("Richard") and U.S. Bank National Association ("U.S. Bank") agreed in writing that U.S. Bank will be indemnified and reimbursed by his IRA Trust Account for attorneys' fees incurred. Appendix ("App.") 9, ¶ 6; App. 63, 65, Article VIII (5) and (11) (original emphasis omitted and emphasis added). This ensures that atypical costs of a single trust's administration do not unduly burden the beneficiaries of other IRA trusts with overhead expenses unique to just one. In turn, individuals who enter IRA trust agreements may apportion the burden of fomenting litigation over their IRA assets themselves in their personal financial planning and estate planning. The Conservator confirmed that the IRA Trust Agreement allows U.S. Bank attorneys' fees to be indemnified by

the IRA account. The issue came before the District Court for review due to the Conservatorship. Nobody but the Ward's son, Appellant Jeffrey, objected to payment of these fees, which arose from litigation he perpetuated despite his admission that the outcome of that litigation made no financial difference to him or anybody else. App. 145, Trial Tr. 393:15-395:5. The District Court "reviewed each and every entry" on the fee schedule and the Affidavit further detailing the attorneys' fees incurred, concluded that the fees were reasonable, and authorized them. *See* App. 151-156. The District Court should be affirmed.

U.S. Bank incurred fees under the IRA Trust Agreement in a Declaratory Judgment Action[1] resisted solely by the Appellant here, Jeffrey. The Declaratory Judgment Action concerned whether Richard's IRA assets should be directed to his wife, Joan Bittner ("Joan"), who was named as the 100% share primary beneficiary, or whether the IRA assets should have been directed to a Family Trust controlled by Richard and Joan's son, Jeffrey, though the Family Trust is not named whatsoever on the IRA beneficiary designation.[2] *See* App. 148; App. 92, Affidavit of Attorneys' Fees ¶¶ 2-3. U.S.

[1] *U.S. Bank v. Bittner*, Scott County No. CVCV300445, referred to herein as the "Declaratory Judgment Action."

[2] It is unclear why Appellant observes that a U.S. Bank Trust Officer initially believed that a Marital Trust was an IRA beneficiary in this matter. *See*

Bank retained Simmons Perrine Moyer Bergman P.L.C. ("SPMB" or "Simmons") for advice on how to proceed:

> The Simmons firm thoroughly explored different options to resolve this issue, including interpleader, a potential family settlement agreement, and a declaratory judgment action. Ultimately, it was decided to pursue a declaratory judgment action. Jeffrey was the sole resisting party. In the declaratory judgment action, U.S. Bank requested the Court to declare the rights and obligations of the parties in relation to the individual retirement account trust agreement to include confirming that U.S. Bank must transfer Richard's individual retirement account to Joan Y. Bittner. On March 17, 2021, following two days of trial, the Court entered a ruling finding that Joan Y. Bittner is the 100 percent beneficiary of Richard's IRA account held by U.S. Bank as trustee of the IRA trust.

App. 149.

"Following the conclusion of the declaratory judgment action, U.S. Bank, out of an abundance of caution, sought permission from MidWestOne, as Joan Bittner's conservator, to pay the attorney fees owed to the Simmons law firm from the IRA assets." App. 150. In its October 27, 2021 filing, Conservator "MidWestOne made application to the Court for authorization to

---

Appellant's Final Brief at 11-12. The legal effect of an unambiguous agreement is a conclusion of law that U.S. Bank submitted to the District Court. Moreover, the trial record demonstrated that the same U.S. Bank Trust Officer plainly understood that Joan would be the beneficiary if a Marital Trust were not funded. After the Trust Officer made those comments U.S. Bank determined Richard's Estate was below the federal estate tax threshold, so the Marital Trust was not funded. Moreover, Appellant argued that a separate testamentary trust, the Family Trust, should take the assets. It was not listed on the beneficiary designation whatsoever.

do so." App. 150. Jeffrey, alone, resisted the application:

> Jeffrey, in his brief to the Court, sets forth multiple reasons why the request to pay the Simmons firm from the IRA assets should be denied. Joan's son, Todd Bittner, did not set forth a position or participate in the hearing. Joan's daughters, Kimberly Montgomery and Lynn Von Schneidau, both agree to payment of fees in the amount requested.

App. 150.

U.S. Bank submitted a detailed affidavit explaining the 47-page Statement of Services attached to the Conservator's application and filed a brief comprehensively addressing Jeffrey's multitude of resistance arguments. *See* App. 92, December 9, 2021 Affidavit of Attorneys' Fees ("Aff."); App. 11, Exhibit A to Conservator's October 27, 2021 Application for Order re: Request for Payment of Attorney Fees and Request for Hearing, Statement for Services; App. 105, Intervenor U.S. Bank's December 27, 2021 Reply to Jeff Bittner's Resistance.

U.S. Bank's fees were reasonable in light of its repeated efforts to avoid them through settlement (prior to filing its Petition in the Declaratory Judgment Action, again prior to trial, and again prior to briefing on Jeffrey's appeal).[3] *See* App. 92-94, Aff. ¶3. Litigation proceeded because those efforts

[3] *See, e.g., Lohman v. Duryea Borough*, 574 F.3d 163, 167 (3d Cir. 2009) (relying on evidence of settlement negotiations bearing on reasonableness of fees, a purpose other than proving validity of a disputed claim under Rule 408).

were rebuffed and defaulting on U.S. Bank's contractual duty to transfer IRA assets to the proper beneficiary was not a realistic option. App. 92-94, Aff. ¶3.

Jeffrey pressed a multifaceted resistance to the dispositive allegations of U.S. Bank's Petition in the Declaratory Judgment Action. App. 94, Aff. ¶ 4. He resisted efforts to answer the Petition, resisted a ruling on the preliminary (and dispositive) question whether the IRA beneficiary designation was unambiguous on its face, and vigorously litigated issues in the case as is readily apparent from a review of the docket. *Id*. This required U.S. Bank's attorneys, in turn, to expend time. *Id*. Significantly, Jeffrey pressed forward with litigation even though he testified at the Declaratory Judgment Action trial that the competing outcomes of the Declaratory Judgment Action would be "trivial" to him and that, with respect to concerns regarding changes to his inchoate interest in IRA assets, the "probability that the Court would find that my mother has testamentary capacity is zero." App. 145, Trial Tr. 393:15-395:5. With the parties pressing for judicial resolution over U.S. Bank's attempts to reach an agreement, U.S. Bank responsibly prepared and participated to efficiently bring the matter to a conclusion.

The Conservator had authority to approve fee indemnification based on the unambiguous terms of the IRA Trust Agreement providing reimbursement. *See* App. 9, ¶ 6; App. 63, 65, Article VIII (5) and (11); *Isakson*

v. Coll. Square Mall Partners, L.L.C., 791 N.W.2d 428 (Iowa Ct. App. 2010) (quoting *McNally & Nimergood v. Neumann–Kiewit Constructors, Inc.*, 648 N.W.2d 564, 571 (Iowa 2002)) (recognizing that "[a] contract for indemnification is generally subject to the same rules of formation, validity and construction as other contracts" and affirming contractual indemnification of attorneys' fees); *see also Farmers Bank of N. Missouri, Unionville, Missouri v. Erpelding*, 555 N.W.2d 222, 226 (Iowa 1996) (finding attorneys' fees were proper based on express provisions within a contract with bank).

As detailed herein, the District Court properly rejected more than a dozen arguments Jeffrey put forth in resistance to fee authorization, App. 151-156, and approved the fees sought:

> The Court finds that MidWestOne's Application to authorize payment of fees by U.S. Bank to the Simmons law firm from the Richard's IRA assets is approved and fees are hereby awarded in the amount of $204,969.42.

App. 156.

Jeffrey's appeal reasserts nearly every one of the issues the District Court examined and rejected below. "A request for attorney's fees should not result in a second major litigation." *Lee v. State*, 906 N.W.2d 186, 194 (Iowa 2018) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). To bring litigation regarding Richard's IRA to a close, U.S. Bank respectfully requests that this Court affirm the District Court's judgment authorizing the

Conservator to agree to what is clearly set forth in the IRA Trust Agreement: indemnification of U.S. Bank's attorneys' fees.

STATEMENT OF FACTS

I. Proceedings in a Declaratory Judgment Action Gave Rise to Attorneys' Fees under an IRA Trust Agreement.

U.S. Bank filed a Declaratory Judgment Action to confirm its contractual obligation to transfer IRA assets pursuant to an IRA Trust Agreement. App. 92-94, Aff. ¶ 3. U.S. Bank entered into the IRA Trust Agreement with Richard Bittner ("Richard"). *Id*. With its contractual obligation to Richard and the third-party beneficiary, his wife Joan Bittner ("Joan"), U.S. Bank sought to bring the questions presented in the Declaratory Judgment Action to an early, low cost, and mutually satisfactory conclusion as between Joan, her son Jeffrey Bittner ("Jeffrey"), and others with any asserted or inchoate interest in Richard Bittner's IRA assets. *Id*. These efforts include, but are not limited to:

- Inviting a family settlement agreement at the outset, if Joan, Jeffrey, and others assessed that the practical result would be the same irrespective what Richard's IRA Beneficiary Designation requires.
- Filing the Declaratory Judgment Action on the legal effect of the IRA Beneficiary Designation and resisting Jeffrey's request for joinder of

those with no possible interest (the Estate and grandchildren) to avoid unnecessarily expanding the action.

- Limiting U.S. Bank's participation to addressing only the face of the document and its contractual obligations (and leaving Richard Bittner's subjective desires for Jeffrey and Joan to litigate).
- Endeavoring to confer by phone and email to avoid unnecessary motion practice. Notwithstanding those efforts, U.S. Bank was forced to respond to motions filed without any effort to confer.
- Moving for judgment as a matter law in order to resolve the legal question concerning the unambiguous contractual language without costly trial preparation and participation. Significantly, the motion's substantive arguments served the basis for the District Court's ruling at the outset of trial and its declaratory judgment findings.
- Moving to bifurcate trial concerning a contested issue in Richard's Estate from the Declaratory Judgment Actions to reduce the cost of preparation and participation. Instead, U.S. Bank's declaratory judgment attorneys had to prepare for trial on the basis of all of Jeffrey's disclosed witnesses and exhibits.
- Proposing a pre-trial family settlement to achieve a mutually acceptable family settlement agreement in recognition of other individuals'

comments with respect to Joan's capacity to alter her estate plan.

- Proposing a post-trial mediation to bring the matter to a close and avoid costs of an appeal.

Id.

Among the various settlement efforts listed immediately above, prior to incurring any fees for which recovery is sought, U.S. Bank proposed that the parties explore a Family Settlement Agreement on July 8, 2020. *U.S. Bank v. Bittner*, Scott County No. CVCV300445, August 1, 2020 Exhibit 17; *see also* App. 378-79 (June 12, 2020 memorandum proposing consideration of family settlement agreement). Jeffrey has conceded that the financial result of any outcome of the Declaratory Judgment Action would, for practical purposes, generate a primary interest in IRA assets for Joan and equal division of assets in succession to him and his siblings:

> Q. And I believe earlier in your testimony you mentioned something about your motivation being essentially pure here because if you take under the will or the family trust, you end up with 24 percent, but if you take under the IRA, you take 25 percent. So it's just trivial, the difference. Isn't that what you said?
>
> A. ***It's -- to me it's trivial, yes***.
>
> . . .
>
> Q. Well, if you look at paragraph 10 [of the settlement entered in this Conservatorship], it doesn't prevent your mother from

> making a new will or the conservator taking some position with notice to all parties, does it?
>
> A. Correct, and if there's notice, there's going to be a hearing, and then the Court is going to have to determine testamentary capacity, and ***I think the probability that the Court would find that my mother has testamentary capacity is zero*.**

App. 145, Trial Tr. 393:15-395:5 (emphasis added). Nonetheless, Jeffrey believed a set of circumstances existed where he could end up with zero, however implausible that may be:

> Q. But, in fact, if this Court declares that the IRA belongs to your mother, you could end up with zero, couldn't you?
>
> A. Under a set of circumstances that I don't think is plausible because of the family settlement agreement and the fact that any changes to the will have to be approved by the Court. If the Court has to review my mother's testamentary capacity, I'm sure it will come to a very quick conclusion that she does not have the requisite capacity.

See App. 145, Trial Tr. 393:22:394:3. Jeffrey is co-trustee of Richard's testamentary trusts, so his theory rejecting Joan's ownership would keep him in control of the IRA (as opposed to control by the Conservator and District Court).

Jeffrey pressed his resistance to the dispositive allegations of U.S. Bank's Petition in the Declaratory Judgment Action. App. 94, Aff. ¶ 4. He resisted efforts to answer the Petition, resisted a ruling on the preliminary (and dispositive) question whether the IRA beneficiary designation was unambiguous on its face, and vigorously litigated issues in the case as is

readily apparent from a review of the docket. *Id*. This required U.S. Bank's attorneys, in turn, to expend significant time. *Id*.

Jeffrey's time expended may well have equaled if not surpassed the hours expended by U.S. bank's attorneys in the Declaratory Judgment Action based on his filings. App. 94, Aff. ¶ 5. While he was represented by counsel Hector Lareau on some issues, Jeffrey, who is a skilled trial lawyer, also represented himself and noted that he was the primary draftsman on pleadings filed. App. 94, Aff. ¶ 5; *see also, e.g., U.S. Bank v. Bittner*, Scott County No. CVCV300445, October 16, 2020 Motion for Extension of Time ¶ 5 ("Jeff Bittner has been and will continue to be the primary draftsman of documents submitted on his and the estate's behalf in the several pending matters arising from the estate and its administration."). Jeffrey's submissions and litigation posture directed at obtaining trial in the Declaratory Judgment Action resulted in expenditure of significant time on actions in the case (perhaps *because* his time expended was not constrained by payment of outside fees). App. 94, Aff. ¶ 5. This necessitated responsive action, as the District Court and appellate dockets in the Declaratory Judgment Action show. *Id*.

Joan, through her Conservator, has never proposed that U.S. Bank end its participation in the Declaratory Judgment Action (by, e.g., releasing U.S. Bank from its obligation to confirm a contractual duty to transfer IRA assets

pursuant to the unambiguous IRA Trustee Agreement and IRA Beneficiary Designation and assuming a lead role). App. 95, Aff. ¶ 6. U.S. Bank therefore had a continuing obligation to perform as agreed under the IRA Trust Agreement with Richard. *Id*. Due to U.S. Bank's duties as sole trustee of Richard's IRA Trust, significant doubt existed whether U.S. Bank could take a neutral role in the manner of an interpleader (i.e., as a disinterested entity holding funds) given the clear language of the IRA Beneficiary Designation benefitting Joan (and only Joan).[4]

Despite U.S. Bank's efforts to resolve the matter without litigation, then without trial, and, finally, without appeal, other parties pressed for costly and time consuming judicial resolution. App. 95, Aff. ¶ 7.

II. The Conservator Confirmed Its Agreement that Fees Were Indemnified.

The IRA Trust Agreement provides that U.S. Bank will be indemnified and reimbursed by his IRA Trust Account for attorneys' fees incurred:

> The Trustee will be compensated for the services in accordance with its fee schedule for an IRA Rollover trust as amended from time to time. Trustee will be reimbursed from the assets and

[4] *See, e.g., Spahn & Rose Lumber Co. v. Iowa Steel & Const. Co.*, 131 N.W.2d 791, 793 (Iowa 1964) (recognizing that interpleader has traditionally required that the plaintiff "must have incurred no independent liability to either of the claimants, that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder," though relieving interpleader plaintiffs of two other distinct common law elements under Rule 35).

> otherwise indemnified and held harmless by me for all of its otherwise unreimbursed expenses (including, without limitation, Trustee's legal fees) under this Agreement.
>
> . . .
>
> The Trustee may employ agents and delegate duties to them as the Trustee sees fit and employ or consult with experts, advisors and legal counsel (who may be employed also by me or by my beneficiary(ies)) and to rely on information and advice received. Trustee will be reimbursed by the IRA Trust Account, me or the beneficiary(ies) for Trustee's costs incurred in employing such parties.

App. 9, ¶ 6; App. 63, 65, Article VIII (5) and (11) (original emphasis omitted and emphasis added).

In March 2021, following Judgment in the Declaratory Judgment Action, Conservator MidWestOne confirmed, upon U.S. Bank's request, that the contract allows U.S. Bank attorneys' fees associated with prosecution of the Declaratory Judgment Action to be indemnified by the IRA account. App. 95, Aff. ¶ 8. U.S. Bank did so for the stated purpose of avoiding multiplying proceedings and fees following judgment. *Id*.

III. Proceedings in the Conservatorship Were Contested Solely by the Ward's Son, Appellant Jeffrey Bittner.

U.S. Bank provided the Conservator notice of its fees under the contractual indemnification provisions set forth in IRA Trust Agreement. App. 95, Aff. ¶ 9; *see also* App. 9, ¶ 6; App. 63, 65, Article VIII (5) and (11).

The Conservator applied to the Court for authorization to approve the

fees. App. 8-67. The Conservator attached the Statement of Services and the IRA Trust Agreement to its Application. App. 11-67.

Jeffrey filed a resistance to the Application. App. 68-89. Thereafter, U.S. Bank intervened. U.S. Bank's November 10, 2021 Motion to Intervene; November 23, 2021 Order. The District Court ordered U.S. Bank to submit an affidavit regarding the Statement of Services submitted with the Conservator's Application and ordered additional briefing. *See* App. 90.

U.S. Bank timely submitted its Affidavit of Attorneys' Fees on December 9, 2021 and its Reply to Jeff's Resistance on December 27, 2021. App. 92-103; 105-146.

IV. The Statement for Services Reflects U.S. Bank's Efforts to Resolve the Declaratory Judgment Action Efficiently.

U.S. Bank's 47-page Statement of Services (attached as Exhibit A to the Conservator's October 27, 2021 Application) sets forth detailed time entries incurred under Article VIII (5) and (11) of the IRA Trust Agreement in the Declaratory Judgment Action through September 30, 2021. App. 95-96, Aff. ¶ 10.

The Statement for Services covers time entries of attorneys' fees that, generally, correlate with four phases in the Declaratory Judgment Action proceedings:

1) 7/10/2020-7/29/2020: $14,425.20 (54.85 hours). Pre-filing analysis and preparation of Petition for Declaratory Judgment.

2) 7/30/2020-12/31/2020: $67,032.10 (270.05 hours). Preparation of legal briefing seeking declaratory judgment as a matter of law based on the unambiguous terms of the IRA Trust Agreement and IRA Beneficiary Designation and preparation of briefing on multiple procedural and substantive issues pressed by Jeffrey in resistance to the request for declaratory relief. U.S. Bank's dispositive arguments served the basis for the Court's Declaratory Judgment Action ruling at the outset of trial and in its declaratory judgment findings.

3) 1/1/2021-1/31/2021: $89,238.80 (368.15 hours). Pre-trial preparation including further briefing, analysis of dozens of adverse exhibits (see JB-1 through JB-119, Scott County No. CVCV300445), preparation of witness examination outlines, witness preparation, participation in trial, and post-trial matters.

4) 2/1/2021-9/30/2021: $33,824.60 (137.40 hours). Post-trial analysis, briefing responsive to Jeffrey's appellate motion, and preparation of appellee's response brief to Jeffrey's appeal.

App. 96, Aff. ¶ 11.

As is readily apparent from narrative descriptions in the Statement of Services, the foregoing phases capture the brunt of work that best correlates with each category, though some time entries do not fit the given cut-off dates (e.g., some pre-filing legal research was used in legal briefing, some dispositive briefing continued in 2021, some pre-trial preparation occurred in 2020, etc.). App. 96-97, Aff. ¶ 12. What is significant, however, is that U.S. Bank attempted to efficiently bring the dispute to a close at each phase but was instead forced to navigate procedural objections and substantive denials that ultimately led to incurring significant expenses in legal briefing, at trial, and on appeal. *Id*.

The remainder of cost on the Statement of Services is attributable to expenses of $999.22, including the Petition filing fee, service of process (including but not limited to process service on Jeffrey after his refusal to accept service), appellate transcript fees, and court costs. App. 97, Aff. ¶ 13.

Given the exhaustive resistance asserted in the Declaratory Judgment Action, the case was appropriately and efficiently staffed by SPMB as needed at various stages of the litigation, with each member, associate, or paralegal performing work on the case appropriate for his or her level of skill and experience. App. 97-102, Aff. ¶¶ 15-29 (detailing attorneys' backgrounds, hours expended, and market rates that have received approval by other Iowa

courts).

V. The District Court Ruling Analyzed and Overruled Appellant Jeffrey Bittner's Multitude of Arguments.

The District Court methodically addressed each resistance argument offered by Jeffrey concerning the Conservator's application to authorize payment of fees. *See* App. 150-156. The District Court held:

1) U.S. Bank was acting within the duties expressly enumerated within the IRA Trust Agreement by confirming the proper beneficiary as made necessary by Jeffrey's misinterpretation of the IRA beneficiary designation. App. 151.

2) The IRA Trust Agreement was not a contract of adhesion because Richard was an astute attorney capable of negotiating its terms. App. 152.

3) "Jeffrey's claim of U.S. Bank taking sides between beneficiaries is inaccurate." App. 152. In seeking declaratory relief to transfer IRA assets to Joan as the sole primary beneficiary, "U.S. Bank has sought permission to invoke its contractual obligation free from outlying claims." *Id.*

4) U.S. Bank did not have a conflict of interest or unclean hands. App. 153. U.S. Bank was "simply asking the Court for direction on how to follow the contractual mandate." App. 153.

5) A prior U.S. Bank application and award of fees in Richard's Estate proceeding related to separate issues concerning Jeffrey's authority to remove U.S. Bank as co-executor of Richard's Estate, and it did not bar separate fees here for work performed related to distribution of IRA assets in its role as sole Trustee of the IRA. App. 153.

6) Research concerning attorney-client privilege as it related to U.S. Bank's role as trustee of the IRA was recoverable. App. 153-154.

7) The Trust Agreement gave U.S. Bank authority to hire counsel. App. 154.

8) The fees were reasonable based on the 47-page billing statement and supporting Affidavit submitted such that a partial subset of time entries block billed would not bar indemnification. App. 154.

9) Time expended on research and preparation of dispositive pleadings was used in "a productive manner that assisted and aided the Court in reaching a decision." App. 155. Additionally, the District Court was "unable to conclude that the meetings and conference time were excessive." App. 155.

10) Time expended to determine which forum to use to resolve the dispute was consistent with the "ethical duty to explore all potential options for litigating this matter" in "an attempt to determine what forum would provide the quickest and most cost effective resolution of the action." App. 155.

11) It was reasonable to have a second attorney present to assist at the hearings on U.S. Bank's request for declaratory relief. App. 155.

12) A timeline of events created for case preparation was relevant and therefore compensable. App. 156.

13) The fees charged were at rates reasonable for the community. App. 156.

14) The fee application was not premature. App. 156. The IRA Trust Agreement "provides for reimbursement regardless of the outcome of the declaratory judgment appeal." *Id*.

The District Court approved MidWestOne's Application to authorize payment of fees by U.S. Bank to SPMB. App. 156. It deducted $151 that U.S. Bank acknowledged had been misfiled and exclusively related to a breach of fiduciary duty claim Jeffrey brought against U.S. Bank. In its Ruling, the District Court authorized fees in the amount of $204,969.42. App. 156.

The following day Jeffrey timely submitted his notice of appeal. He disputes nearly every adverse finding listed above.

ARGUMENT

The District Court's Judgment Should Be Affirmed Granting Conservator MidWestOne's Application to Authorize Fees over the Objection of the Ward's Son.

I. Standard of Review and Preservation of Error.

This action regarding U.S. Bank's payment of attorneys' fees from a U.S. Bank IRA Trust account to U.S. Bank arises in a conservatorship proceeding because U.S. Bank sought authorization from the Conservator to indemnify its attorneys' fees under a contractual provision permitting reimbursement out of an abundance of caution to minimize the risk of future disputes. The Conservator applied to the Court to provide approval.

This Court reviews "the district court's award of attorney fees for an abuse of discretion." *GreatAmerica Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration, Inc.*, 691 N.W.2d 730, 732 (Iowa 2005). "Reversal is warranted only when the court rests its discretionary ruling on grounds that are clearly unreasonable or untenable." *Id.* (quoting *Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 342 (Iowa 2000)).

U.S. Bank does not dispute Jeffrey's preservation of his right to appeal.

II. The District Court Did Not Abuse Its Discretion Authorizing Contractual Fee Indemnification.

Far from identifying any "clearly unreasonable or untenable" grounds in the District Court's Ruling, *GreatAmerica Leasing*, 691 N.W.2d at 732 (quoting *Gabelmann*, 606 N.W.2d at 342), this appeal reasserts nearly every one of the multitude of issues the District Court examined and soundly rejected below. The arguments rely on presumptions running contrary to the District Court's findings, thereby obscuring its central ruling.

Namely, the IRA Trust Agreement provides that U.S. Bank will be indemnified and reimbursed by the IRA Trust Account:

> The Trustee will be compensated for the services in accordance with its fee schedule for an IRA Rollover trust as amended from time to time. Trustee will be reimbursed from the assets and otherwise indemnified and held harmless by me for all of its otherwise unreimbursed expenses (<u>including, without limitation, Trustee's legal fees</u>) under this Agreement.
>
> . . .
>
> The Trustee may employ agents and delegate duties to them as the Trustee sees fit and employ or consult with experts, advisors and <u>legal counsel</u> (who may be employed also by me or by my beneficiary(ies)) and to rely on information and advice received. <u>Trustee will be reimbursed by the IRA Trust Account, me or the beneficiary(ies) for Trustee's costs incurred in employing such parties</u>.

App. 9, ¶ 6; App. 63, 65, Article VIII (5) and (11) (original emphasis omitted and emphasis added). Further, the District Court—which presided over the underlying action—"reviewed each and every entry on the fee schedule" and

the Affidavit of Attorneys' Fees, concluded that the fees were reasonable, and authorized them. *See* App. 151-156.

While the analysis should end there in recognition that "[a] request for attorney's fees should not result in a second major litigation," *Lee*, 906 N.W.2d at 194 (quoting *Hensley*, 461 U.S. at 437 (1983)), Intervenor-Appellee U.S. Bank addresses the multitude of issues and sub-issues raised on appeal and excerpts pertinent portions of the District Court Ruling for ease of reference.

A. A Contractual Duty to Transfer IRA Assets to the Agreed Beneficiary Existed, Fees Were Incurred to Do So, and Jeffrey's Neutrality, Public Policy, and Impartiality Objections Rest on a Mischaracterization of the Record (Issues 1, 3, and 4).[5]

With a contractual obligation to Richard and the 100% primary beneficiary, Richard's wife Joan, U.S. Bank sought to abide by the terms of Richard's IRA Beneficiary Designation in seeking declaratory judgment. An IRA beneficiary designation is a "written contract" with the administrator of the IRA specifying where assets must be paid following the owner's death. *See Schultz v. Schultz*, 591 N.W.2d 212, 213 (Iowa 1999) ("The decedent had

[5] For ease of reference, section headings identify the groups of related arguments ("Issues Presented for Review" numbered 1 through 8 within the Appellant's Proof Brief) to which Intervenor-Appellee U.S. Bank's response applies.

a written contract with the administrator of his retirement account that, in the event of his death, his account would be paid to Paula S. Schultz."); Iowa Code § 633.357(2) ("The assets of a custodial independent retirement account shall pass on or after the death of the designator of the custodial independent retirement account to the beneficiary or beneficiaries specified in the custodial independent retirement account agreement . . .").

In appealing authorization of fees on the basis of neutrality, public policy, and impartiality, Jeffrey misplaces his reliance on cases that prohibit state law trustees from violating their duty to act impartially toward multiple known beneficiaries of state law trusts for several independent reasons. First, Jeffrey's arguments rely on his mischaracterization of proceedings as advocacy for Joan instead of the reality that U.S. Bank, as the sole Trustee of the IRA, cannot advance an interpretation at odds with the face of the IRA Beneficiary Designation. The IRA Beneficiary Designation clearly and unambiguously identified Joan as 100% primary beneficiary, which gave her a right to enforce U.S. Bank's contractual obligation to transfer IRA assets to her. *See* App. 148.

Second, despite clear language naming Joan as the 100% beneficiary, U.S. Bank put the question to this Court in the Declaratory Judgment Action.[6] Faulting U.S. Bank for seeking confirmation that it was lawfully abiding by the IRA Trust Agreement's terms in view of a dispute undermines the purpose of rules authorizing contracts to be construed by courts. *See e.g.,* Iowa R. Civ. P. 1.1102 (declaratory judgments construing contracts).

Third, Jeffrey relies on authorities addressing impartiality among *multiple* beneficiaries. *See* Appellant's Proof Brief at 18-21 (string citing cases). Here, even if, *arguendo*, trust law in Iowa or elsewhere applied (it does not to the contractual IRA fees), there was only one primary beneficiary and Jeffrey disputed the identity of that single beneficiary. There are not two beneficiaries who could have been treated impartially—there is only the plain reading confirming a single beneficiary, as the Court found in the Declaratory

[6] Due to U.S. Bank's duties as sole trustee of Richard's IRA Trust, significant doubt existed whether U.S. Bank could take a neutral role in the manner of an interpleader (i.e., as a disinterested entity holding funds) given the clear language of the IRA Beneficiary Designation benefitting Joan. U.S. Bank had a contractual obligation to Richard's third-party beneficiary, Joan, to ensure what is clearly specified in the beneficiary designation is actually done. *See, e.g., Spahn & Rose Lumber Co. v. Iowa Steel & Const. Co.*, 131 N.W.2d 791, 793 (Iowa 1964) (recognizing that interpleader has traditionally required that the plaintiff "must have incurred no independent liability to either of the claimants, that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder," though relieving interpleader plaintiffs of two other distinct common law elements under Rule 35).

Judgment Action. *See* App. 187 ("The IRA beneficiary designation form clearly designates Joan Y. Bittner, Richard's wife, as the primary beneficiary.").

As a result, the District Court properly rejected Jeffrey's arguments concerning neutrality, public policy, and impartiality:

> Jeffrey next argues that if a contractual provision allowed U.S. Bank to choose sides in a dispute between beneficiaries, such a provision would be in violation of public policy and void. The problem here is that Jeffrey starts with the presumption that there is more than one beneficiary to Richard's IRA. However, the clear language of the IRA shows that Joan Bittner is the 100 percent primary beneficiary, as is clearly set forth in the language of the beneficiary designation. Accordingly, this is not a case where U.S. Bank has chosen sides. Rather, U.S. Bank has sought permission to invoke its contractual obligation free from outlying claims. If Jeffrey's interpretation were to be taken literally, then any person could come to U.S. Bank and say I am a beneficiary of Richard's IRA and U.S. Bank would be powerless to take any action other than interpleader, despite the fact that the person's claim is without merit. Similarly, in this case, Jeffrey's claim was determined to be without merit. Accordingly, the Court finds that Jeffrey's claim of U.S. Bank taking sides between beneficiaries is inaccurate.

App. 152.

B. U.S. Bank Had Authority under the Terms of the IRA Trust Agreement (Issues 2 and 7).

Jeffrey ignores U.S. Bank's obligation to transfer IRA assets to the agreed beneficiary in arguing that U.S. Bank had no duty to "interpret" Richard's IRA Beneficiary Designation or somehow lacked standing to bring the underlying Declaratory Judgment Action. *See* Jeffrey's Proof Brief at 23,

42. The IRA Beneficiary Designation imposes a contractual duty to transfer the IRA assets. *See* App. 151 ("The contract requires U.S. Bank to pay out IRA distributions to the proper beneficiary."); *see also* App. 285 ("I, the Grantor, do hereby direct U.S. Bank N.A., as Trustee of the IRA Trust, to disburse, in the event of my death, all monies or other property held for my benefit in the IRA Trust to the beneficiary(ies) enumerated below."). U.S. Bank's Petition for Declaratory Judgment sought confirmation, in its role as sole Trustee of the IRA, of the terms of the IRA Beneficiary Designation and IRA Trust Agreement so that it could fulfill its obligation to direct the IRA assets to the correct individual without contractual liability to another. U.S. Bank had authority to file its Petition for Declaratory Judgment. *See* Iowa R. Civ. P. 1.1101, 1.1102 (authorizing declaratory judgments to construe written instruments).

The subterfuge in Jeffrey's characterization of U.S. Bank's position is to presume it somehow picked a side and shaped an interpretation to suit that individual's interests. On the contrary, U.S. Bank sought independent review from the District Court as to a conclusion of law regarding the correct interpretation of the IRA Beneficiary Designation to ensure that it got it right before transferring any IRA assets. Certainly, U.S. Bank maintained what the District Court ultimately found—that the intent of the 2010 IRA Beneficiary

Designation "is clear and unambiguous" and it should be "enforce[d] . . . as written." *See DuTrac Cmty. Credit Union v. Radiology Grp. Real Estate, L.C.*, 891 N.W.2d 210, 216 (Iowa 2017). This is in recognition that U.S. Bank, as the sole Trustee of the IRA, cannot advance an interpretation clearly at odds with the face of the IRA Beneficiary Designation.

Accordingly, the District Court properly rejected Jeffrey's argument concerning the extent of U.S. Bank's contractual duties and authority to retain counsel to bring a suit:

> Jeffrey alleges that paragraph 14 of the trust agreement limits U.S. Bank's contractual duties and responsibilities. Jeffrey centers his argument on the belief that U.S. Bank did not have a duty or responsibility to pursue the declaratory judgment action. The Court disagrees. U.S. Bank filed the declaratory judgment action to confirm U.S. Bank's contractual obligation to transfer the IRA assets pursuant to its IRA trust agreement and Richard's beneficiary designation. While U.S. Bank could have elected to pursue this matter via interpleader, the Court finds it was not inappropriate for it to do so via a declaratory judgment action. The contract requires U.S. Bank to pay out IRA distributions to the proper beneficiary. U.S. Bank merely took action to confirm that the beneficiary stated in the designation was, indeed, the beneficiary. This was necessary due to Jeffrey's misinterpretation of the IRA beneficiary designation. Accordingly, the Court finds that U.S. Bank was acting within the duties expressly enumerated within the trust agreement.
>
> . . .
>
> Jeffrey next contends that neither Joan nor the conservator hired the Simmons firm. That is true; however, the trust agreement explicitly gives authority to U.S. Bank to hire counsel to represent them in disputes involving the trust agreement. The

> declaratory judgment action qualifies as a legitimate action by U.S. Bank to secure legal representation, in this case the Simmons firm, to pursue a resolution to a dispute.

App. 151, 154.

C. Res Judicata Does Not Apply to Indemnification of Fees Under the IRA Trust Agreement (Issue 5).

Contractual indemnification of U.S. Bank's fees for prosecuting the Declaratory Judgment Action in its capacity as sole trustee of the IRA was not adjudicated in proceedings addressing recovery of discretionary co-Executor fees, contrary to Jeffrey's res judicata arguments. When Iowa courts consider a defense of claim preclusion, they look for the presence of three factors: (1) "the parties in the first and second action were the same"; (2) "the claim in the second suit could have been fully and fairly adjudicated in the prior case"; and (3) "there was a final judgment on the merits in the first action." *Arnevik v. Univ. of Minnesota Bd. of Regents*, 642 N.W.2d 315, 319 (Iowa 2002). "To determine whether the claim in the second suit could have been fully and fairly adjudicated in the prior case, that is, whether both suits involve the same cause of action, this court must examine '(1) the protected right, (2) the alleged wrong, and (3) the relevant evidence.'" *Pavone v. Kirke*, 807 N.W.2d 828, 837 (Iowa 2011) (quoting *Iowa Coal Min. Co. v. Monroe Cty.*, 555 N.W.2d 418, 441 (Iowa 1996)).

The four prerequisites of defensive issue preclusion are that "(1) the issue in the present case 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 case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment." *Fischer v. City of Sioux City*, 654 N.W.2d 544, 547 (Iowa 2002). "[T]he doctrine of issue preclusion prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action." *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 103 (Iowa 2011) (quoting *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981)).

Neither of these res judicata doctrines apply to the question whether the Conservator should authorize U.S. Bank to indemnify itself under the IRA Trust Agreement for the amount set forth in the Statement of Services. Unlike the earlier proceeding in Scott County No. ESPR078709 (the "Estate Matter"), U.S. Bank is seeking fees indemnified by contract as sole trustee of the IRA. This is a materially different issue presented for disposition than U.S. Bank's co-executor fees in the Estate Matter. U.S. Bank's request for the Conservator's authorization of the fee indemnification amount could not have

been "fully and fairly adjudicated" in the Estate matter, nor was the issue "identical" and "raised and litigated" there under *Arnevik* and *Fischer*.

Accordingly, the District Court properly found that res judicata would not bar the fees:

> Jeffrey next argues that the doctrine of res judicata prevents U.S. Bank from relitigating the issue of violating its duty of impartiality. Despite the cases being intertwined, the facts and law in the case to remove U.S. Bank as co-executor are different from the facts and law in the petition for declaratory judgment action brought by U.S. Bank as trustee. While U.S. Bank may have had a conflict by trying to engage in its role as trustee and its role as co-executor, it is not the same as the request here for indemnification of fees pursuant to contract. Furthermore, the petition for declaratory judgment action was separate and distinct from the action to remove U.S. Bank as coexecutor. The fact that U.S. Bank may have had a conflict in trying to serve the roles of trustee and co-executor is not indicative that the issues in these two cases are identical. The conflict was germane to resolving the issue of U.S. Bank's removal as co-executor. The conflict was not an issue in the declaratory judgment action as it sought interpretation of a beneficiary designation. Accordingly, the Court finds that the doctrine of res judicata is not applicable.
>
> Jeffrey next argues that the Court's rulings of December 31, 2020, and October 18, 2020, preclude U.S. Bank from re-litigating the propriety of attorney fees incurred on issues related to waiver of attorney-client privilege. The Court finds it is not unreasonable for the Simmons firm to research the issue of waiver of attorney-client privilege under the joint representation doctrine. The fact that the Simmons firm ultimately did not file court documents resisting Jeffrey's subpoena does not mean it was inappropriate or frivolous for them to research the same on behalf of U.S. Bank in the role that they played in representing U.S. Bank as trustee of the IRA trust.

App. 153-154.

D. Characterization of the IRA Trust Agreement as a Contract of Adhesion Is Incorrect and Irrelevant (Issue 6).

Richard was an astute attorney with specialized knowledge of contract law. *See* App. 152; *see also, e.g., U.S. Bank v. Bittner*, Scott County No. CVCV300445, Jeffrey S. Bittner's Pretrial Brief at 5 n. 2. He had substantial IRA assets and was equipped to negotiate the terms of the IRA Trust Agreement or to take his business elsewhere. Richard did in fact alter the terms by incorporating a tailor-made addendum. *See* App. 287-288. Accordingly, the District Court properly rejected Jeffrey's argument that the IRA Trust Agreement was a contract of adhesion:

> Jeffrey next argues that U.S. Bank's trust agreement is a contract of adhesion that must be construed strictly against U.S. Bank. The Court disagrees and finds that the trust agreement is not a contract of adhesion. In this case, there was no evidence or assertion that the trust agreement was not negotiable or that Richard was not free to take his business elsewhere. To the contrary, the evidence presented in various hearings supports a finding that Richard was an astute attorney. If Richard had wanted the agreement changed or altered, there was no reason to believe he could not have made such a request. Richard also had the ability to simply take his business elsewhere if he was unhappy with the terms of the trust agreement as presented by U.S. Bank.

App. 152.

Moreover, the IRA Trust Agreement unambiguously provides for fee indemnification, so no question of interpretation exists. *See DuTrac*, 891 N.W.2d at 216 (contract that "is clear and unambiguous" and should be

"enforce[d] . . . as written."); *see also* App. 90 ("The Court finds that an evidentiary hearing is not required. Payment of fees is subject to contractual interpretation and evidence will not assist the Court.").

E. The District Court Appropriately Exercised Its Discretion Authorizing Fees (Issue 8).

1. Hours Expended Were Reasonable Overall.

The District Court appropriately exercised its discretion in finding that the fees authorized were reasonable based on the record of this case, detailed in the Statement of Services and Affidavit submitted in support thereof. *See* App. 11-57; App. 92-103; *see also supra* pp. 15-20, 22-24 (summarizing the content of the Affidavit and 47-page Statement of Services detailing U.S. Bank's repeated efforts to bring the questions presented in the Declaratory Judgment Action to an early, low cost, and mutually satisfactory conclusion; the vigorously asserted resistance; and U.S. Bank's continuing contractual obligation to perform under the IRA Trust Agreement with Richard in the absence of release from its contractual duties).

Jeffrey's attack on the reasonableness of fees necessarily incurred from prosecution of the Declaratory Judgment Action rings hollow after U.S. Bank sought settlement prior to filing its Petition in the Declaratory Judgment Action, again prior to trial, and again prior to briefing on Jeffrey's appeal. App. 92-94, Aff. ¶ 3. Despite Jeffrey's sworn trial testimony that the

competing outcomes of the declaratory judgment action would be "trivial" to him and that, with respect to concerns regarding his inchoate interest in IRA assets, the "probability that the Court would find that my mother has testamentary capacity is zero," App. 145, Trial Tr. 393:15-395:5, he stood alone denying the dispositive relief requested in U.S. Bank's Declaratory Judgment Action Petition. *See* App. 149. U.S. Bank's settlement inquiries were rebuffed, and U.S. Bank was forced to proceed through trial and appeal. App. 92-95, Aff. ¶¶ 3-7. "While evidence of settlement negotiations is inadmissible to prove the merit or lack of merit of a claim, the use of such evidence as bearing on the issue of what relief was sought by a plaintiff does not offend the clear terms of Rule 408. Such evidence can be relevant when comparing what a plaintiff 'requested' to what the plaintiff was ultimately 'awarded.'"[7] *Lohman v. Duryea Borough*, 574 F.3d 163, 167 (3d Cir. 2009). U.S. Bank sought to prevent and then halt all litigation so that the parties with claimed interest in the IRA could mutually agree to an outcome that they

[7] Iowa R. Evid. 408(b) specifically authorizes evidence of settlement offers for purposes than proving validity of a disputed claim. Here, the alternative purpose is the reasonableness of proceeding to incur costs necessary to reach disposition of the claims in light of the exhaustive resistance mounted by Jeffrey over U.S. Bank's efforts to settle. Regardless, the prohibited purpose (disclosure for proof of validity of a disputed claim) does not apply and would work against U.S. Bank's interest because its settlement proposals were rejected notwithstanding that its position ultimately prevailed.

believed would produce a "trivial" difference. That failing, U.S. Bank proceeded with prosecution of the claims because defaulting on its contractual duty was not a realistic option.

More broadly as to reasonableness of fees, "the district court is an expert on the issue of reasonable attorney fees." *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990). "The court had the benefit of observing a lengthy trial. Thus, it was in an ideal position to judge the necessity of time and effort spent by counsel and the rationality of the relationship between the services rendered" and the action for which fees were recoverable. *Lynch v. City of Des Moines*, 464 N.W.2d 236, 240 (Iowa 1990); *see also Evans v. Jeff D.*, 475 U.S. 717, 735-36 (1986) (quoting *Hensley*, 461 U.S. at 436) ("There is no precise rule or formula for determining attorney's fees," rather the process entails a "succession of necessarily judgmental decisions."). Attorneys' fees need not be reduced "simply because the district court did not adopt each contention raised." *Smith v. Iowa State Univ. of Sci. & Tech.*, 885 N.W.2d 620, 624 (Iowa 2016) (quoting *Hensley*, 461 U.S. at 440). Thus, "dollar-by-dollar attorney fee reductions" are not required for work believed to be unnecessary. *See Smith*, 885 N.W.2d at 626-27. "Rarely is litigation an unbroken string of successes. Just about every legal proceeding involves setbacks." *Id*. at 626. For the reasons set forth in U.S. Bank's

Affidavit, based on the contents of the Statement of Services, and for the reasons further detailed below, U.S. Bank's fees were reasonable relative to Jeffrey's exhaustive resistance to the Petition.

Accordingly, the District Court properly found that the fees awarded were recoverable:

> Jeffrey next objects and says that time that the Simmons firm's attorneys spent on meetings and conferences is excessive and that the time spent on motions for judgment on the pleadings and summary judgment are not reimbursable. The Court disagrees. As noted above, the Court has reviewed each and every entry on the fee schedule. The Court is unable to conclude that the meetings and conference time were excessive. Furthermore, while judgment on the pleadings was not filed, the work performed provided a basis, in part, for the motion for summary judgment. While the summary judgment motion was not timely filed, the Court accepted and utilized the same as the trial brief for U.S. Bank. Accordingly, the research and time were utilized in a productive manner that assisted and aided the Court in reaching a decision.
>
> . . .
>
> The Court finds that MidWestOne's Application to authorize payment of fees by U.S. Bank to the Simmons law firm from the Richard's IRA assets is approved and fees are hereby awarded in the amount of $204,969.42.

App. 154-156 (emphasis added).

2. Much of the Time Was Not Block Billed, and the 47 Pages of Time Entries and Affidavit Detail the Work Performed on All Entries.

U.S. Bank provided a 47-page Statement of Services issued by its attorneys and an Affidavit summarizing the work performed in furtherance of

the Declaratory Judgment Action through the various phases of the proceeding. *See* App. 92-103; App. 11-57. Together, these provide detailed information regarding the work performed and sought to be reimbursed under the IRA Trust Agreement. As is apparent from those submissions, much of the SPMB time was not block billed. *See id*. As to all entries, block billed or not, the time expended and the nature of work performed is detailed and clear from the Statement of Services. *See id*.

Even as to the subset of time entries that were block billed (by identifying the time expended alongside a list of separate but detailed task descriptions), aggregation of a portion of time entries is irrelevant where the entire fee bill must be contractually reimbursed. Generally, block billing does not bar attorney fee recovery. *Smith*, 885 N.W.2d at 626 n. 6. Concerns regarding block billing may arise in cases like *Smith*, where courts must make appropriate reductions of time devoted on unsuccessful claims or on "unrelated time spent on claims for which fees are not recoverable." *See id.* at 625. That is not a concern here, where all of fees are indemnified under the IRA Trust Agreement and the 47-page Statement of Services provides ample detail on the nature of the work and there is an affidavit providing additional details regarding why the work was necessary. *C.f. In re Est. of Bockwoldt*, 814 N.W.2d 215, 232 (Iowa 2012) (district court could not analyze whether

probate attorneys' fees were "just and reasonable" under section 633.199 without any itemized statement).

Accordingly, the District Court did not abuse its discretion rejecting any fee reduction on this basis:

> Jeffrey next contends that the block billing employed by the Simmons firm compels reduction of its fee request. It is important to note that in this case, the fees are not normal probate fees, but rather are fees of contractual indemnification. U.S. Bank sought the conservator's approval authorizing U.S. Bank to reimburse itself from IRA assets, in accordance with the IRA trust agreement's provisions for fee indemnification. This was done out of an abundance of caution. The Court has reviewed the billing statements of the Simmons law firm, along with a detailed affidavit submitted by Lynn Hartman, and finds that overall the fees are reasonable. The Court declines to nit-pick each individual fee amount, but does deduct from the fees the $151 related to a breach of fiduciary lawsuit filed by Jeffrey against U.S. Bank that would not be related to the declaratory judgment action.

App. 154.

3. A Forum Analysis Was Necessary and Appropriate.

Appellant's brief impugns the analysis by counsel for U.S. Bank regarding the appropriate forum for the Declaratory Judgment action. Appellant's Final Brief at 50. On the contrary, U.S. Bank sought streamlined proceedings on a question of law concerning a somewhat complex though unambiguous IRA contract, in a manner that would not be bogged down by unrelated factual questions concerning Richard's Estate. U.S. Bank made its desire to streamline and minimize the Declaratory Judgment Action

proceedings well known. *See, e.g.* App. 92-94, Aff. ¶ 3 (describing effort to "bifurcate trial of the Estate and Declaratory Judgment Actions to reduce the cost of preparation and participation"); *see* App. 92-95, Aff. ¶¶ 3, 7 (describing efforts to efficiently resolve the matter). Of course, the downside of any standalone proceeding would have been losing the factual and legal expertise of the District Court, which has presided over Richard's Estate proceedings.

Regardless of whether the minimal time U.S. Bank's counsel expended to seek standalone proceedings was unsuccessful, those fees are recoverable. Attorneys' fees need not be reduced "simply because the district court did not adopt each contention raised." *Smith*, 885 N.W.2d at 626 (quoting *Hensley*, 461 U.S. at 440). Thus, "dollar-by-dollar attorney fee reductions" are not required for work believed to be unnecessary. *See Smith*, 885 N.W.2d at 626-27. "Rarely is litigation an unbroken string of successes. Just about every legal proceeding involves setbacks." *Id*. at 626.

The District Court found that this analysis was appropriate to determine the quickest and most cost effective resolution of the action:

> Jeffrey next objects to time spent on consideration of which forum to utilize to resolve this dispute. The Court determines that the Simmons law firm had an ethical duty to explore all potential options for litigating this matter. The Court does not find that the actions of the Simmons firm constituted judge shopping, but rather an attempt to determine what forum would provide the

> quickest and most cost effective resolution of the action. The Court finds that the time spent on the consideration of these issues was warranted.

App. 155.

4. U.S. Bank's Declaratory Judgment Attorneys Attempted to Avoid Attending a Two-Day Trial over Jeffrey's Resistance.

In the lead-up to trial in the Declaratory Judgment Action, U.S. Bank anticipated the concern of spending multiple attorneys' time in a consolidated trial of the Estate Matter and Declaratory Judgment Action after separate law firms had appeared and prepared to address those separate matters. U.S. Bank moved for judgment as a matter of law on the contract claim and to bifurcate trials to eliminate duplication of time. *See* App. 92-94, Aff. ¶ 3 (describing motion "for judgment as a matter law in order to resolve the legal question concerning the unambiguous contractual language without costly trial preparation and participation" and to "bifurcate trial of the Estate and Declaratory Judgment Actions to reduce the cost of preparation and participation"). Jeffrey resisted staging the proceedings in a manner that would have permitted a narrower set of issues to be tried. *U.S. Bank v. Bittner*, Scott County No. CVCV300445, December 30, 2020 Motion to Strike; *see also U.S. Bank v. Bittner*, Scott County No. CVCV300445, January 14, 2021 Ruling at 4 (noting Jeffrey Bittner's oral resistance to sequencing motion).

The Court overruled U.S. Bank's request for separate trials. *Id.* Significantly, Jeffrey then began filing duplicate disclosures in both case files, making it unclear which of the dozens of exhibits filed and numerous witnesses disclosed would be relevant.

In turn, U.S. Bank's Declaratory Judgment attorneys responsibly prepared to address those witnesses and exhibits should the need arise. At trial, Jeffrey conducted examination along with his co-counsel, Hector Lareau. U.S. Bank's lead Declaratory Judgment Action attorney, Lynn Hartman, examined the witness for U.S. Bank who offered evidence of the IRA Trust Agreement and the IRA Beneficiary Designation in support of the request for declaratory relief. She prepared for potential cross examination of witnesses, if that became necessary in relation to Declaratory Judgment Action matters separate from the Estate Matter. U.S. Bank attorney Nicholas Petersen contributed to briefing of legal points, argued the issue of parol evidence at the outset of trial, and prepared to conduct cross examination of witnesses.

Significantly, at the outset of trial, U.S. Bank requested a ruling excluding parol evidence due to the unambiguous contractual language of the IRA Beneficiary Designation. This Court granted the ruling, foreclosing any need to conduct any cross examination. *See* App. 96, Aff. ¶ 11.

U.S. Bank sought to minimize expenses by staging the proceedings in a manner that would not require trial preparation and participation of multiple attorneys, but those efforts were rejected on Jeffrey's objections. Much like U.S. Bank's settlement efforts, it can only request a course that will minimize fees but must responsibly prepare and participate if those requests are overruled.

The District Court, which participated in the underlying proceedings, found the presence of two attorneys reasonable:

> Jeffrey next argues that the Simmons fees should be reduced for duplication of time because two attorneys were present at most hearings. Utilization of two attorneys is not uncommon. While Lynn Hartman was certainly able to handle the hearing on her own, it is reasonable that Nicholas Petersen would also be present to assist. While it is true that it may not have been necessary for two attorneys to be present, the Court cannot find that the same is unreasonable and Jeffrey's objection in this regard is overruled.

App. 155.

5. The Challenged Timeline Was a Chronology for Case Preparation.

Among the parties to the Declaratory Judgment Action, Jeffrey stood alone resisting the dispositive portions of U.S. Bank's Petition for Declaratory Relief. The exhibits attached to pleadings and submitted in advance of trial in the Declaratory Judgment Action docket contain numerous emails, correspondence, and memoranda either involving Jeffrey or addressing his

contentions. *See, e.g., U.S. Bank v. Bittner*, Scott County No. CVCV300445, Trial Exhibits JB-4 through JB-22; JB-26 through JB-55; JB-64 through JB-66; JB-89 through JB-119. Prior to his proposed exhibit filings, U.S. Bank had been involved in numerous of these communications and many had been filed as exhibits to briefs. Time entries within the Statement of Services reflect that a paralegal prepared a chronology of communications regarding Richard's IRA with hyperlinked documents in preparation for discovery (as it may relate to Jeffrey's contentions) and then trial (as it may relate to his theory of the case). Jeffrey insinuates that U.S. Bank's counsel somehow had improper motives with respect to this innocuous and routine chronology due to its description as a "timeline of events with Jeff Bittner." On the contrary, a routine chronology is part of good case preparation.

The District Court accepted that such a timeline was relevant to the case for preparation:

> Jeffrey's next objection is that the Simmons firm should be required to show the relevance of creating a timeline of events with Jeffrey Bittner. The Court accepts the statement set forth in the brief that the timeline was created for case preparation. Communication with Jeffrey was relevant to the case and the Court finds that the time spent preparing the timelines is compensable.

App. 156.

6. Rates Charged Are Commensurate with the Attorneys' Experience and Market Rates.

SPMB's standard hourly rates are comparable to rates charged by other comparable law firms in Iowa (including the Quad Cities) for services by attorneys and paralegals with similar levels of experience on matters of the size and complexity of this case, and reflect the market's operation. App. 98-102, Aff. ¶¶ 17-29. For instance, Ms. Hartman's standard undiscounted[8] hourly rate of $365 was the same rate charged by Shuttleworth & Ingersoll, P.L.C. attorney Gary Streit in the R. Richard Bittner Estate matter. App. 101, Aff. ¶ 26; *see also* App. 219-251.

Ms. Hartman's discounted hourly rate charged to U.S. Bank of $302 per hour is less than the $325 per hour rate charged by Quad City Bank & Trust attorneys at Betty, Neuman & McMahon, P.L.C., and those charged by counsel for the Conservator. App. 101, Aff. ¶ 26; *see also In re R. Richard*

---

[8] As the Statement of Services indicates, Ms. Hartman charged U.S. Bank $302 per hour. App. 100-101, Aff. ¶ 25. The hourly rates in the Statement for Services are those that SPMB customarily charged for services by the listed attorneys and paralegals when these services were rendered in this case for U.S. Bank. *Id*. SPMB charges for the services of its attorneys and paralegals on the basis of hourly rates which reflect, among other things, their years of practice and experience. *Id*. Certain SPMB's attorneys' customary rates for services to U.S. Bank (including those performed under the IRA Trust Agreement) are discounted below the standard hourly rate those attorneys generally charge for comparable services. *Id*.

Bittner, Scott County No. ESPR078709, December 1, 2021 Application for Extraordinary Attorney Fees and Exhibits A and B attached thereto; Conservator's March 18, 2020 Application for Fees, Scott County No. GCPR078775 (identifying 2019 rate of $331.87 per hour for Conservator's counsel at Meardon, Suppel & Downer P.L.C.).

Notably, the December 1, 2021 Application seeking authorization for fees at a $325 per hour rate for Quad City Bank & Trust attorneys at Betty, Neuman & McMahon, P.L.C. is signed and approved by Jeffrey as comprising a "reasonable fee." App. 101-102, Aff. ¶ 27; *see* also *In re R. Richard Bittner*, Scott County No. ESPR078709, December 1, 2021 Application for Extraordinary Attorney Fees and Exhibits A and B attached thereto. A total of 99.8% of the dollars billed on the Statement of Services for attorneys' fees ($203,605.60) were charged at less than this rate that Jeffrey recently approved. *See generally* App. 11-57, Statement of Services; *see also* App. 100, Aff. ¶ 24.

Beyond Jeffrey's disregard for his recent signed approval of a reasonable Quad City area rate of $325 per hour, the Appellant glaringly fails to address the comparable experience of various attorneys relative to the rates charged. For instance, one SPMB associate's rate of $175 per hour rate was comparable to a rate charged by associates elsewhere in Iowa. *See*

Conservator's March 18, 2020 Application for Fees, Scott County No. GCPR078775. Ms. Hartman's rate, with 30 years' worth of quality experience practicing law in this subject area, would be expected to be commensurate with Mr. Streit (to say nothing of the discounted rate). The total of 0.6 hours charged by an SPMB trial attorney at a rate of $450 per hour ($270 total in the entire Statement of Services) covers time entries for limited consultation regarding case strategy with one of the foremost trial attorneys in the state who possesses approximately four decades of experience. *See*, App. 11-57, Statement of Services.

All comparable SPMB rates have been approved by various courts in Iowa in various cases in recent years. App. 102, Aff. ¶ 28 (citing and describing *Busse v. Busse*, No. LACV083022 (Iowa Business Ct., Linn Cty. September 6, 2017) (Telleen, J.); *GreatAmerican Financial Services Corporation vs. Prestwood Funeral Home Inc.*, No. LACV070734 (Iowa Dist. Ct., Linn Cty. August 15, 2017); *Am. Family Mut. Ins. Co. v. Hollander*, No. C 08-1039, 2011 WL 2680715, at *1 (N.D. Iowa July 8, 2011), *aff'd*, 705 F.3d 339 (8th Cir. 2013); *E.E.O.C. v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2013 WL 3984478, at *20 (N.D. Iowa Aug. 1, 2013), *rev'd in part*, 774 F.3d 1169 (8th Cir. 2014), *vacated and remanded*, 136 S. Ct. 1642, 194 L. Ed. 2d 707 (2016)).

Accordingly, the District Court did not abuse its discretion finding the rates charged were reasonable:

> Jeffrey next argues that the Simmons rate should be reduced to reflect community standards. The Court has reviewed the affidavit of Lynn Hartman and finds that while the fees charged by the Simmons firm are at the top end for the community, that they are reasonable for the community. It should also be noted that Lynn Hartman charged a discounted rate. Accordingly, the Court declines Jeffrey's request to reduce the fees to reflect community standards.

App. 156.

7. U.S. Bank Requested Authorization to Reimburse Itself from the IRA Trust for the Amount Stated, so the Request Is Timely.

U.S. Bank's request for the Conservator's authorization to reimburse itself from the IRA Trust Assets is timely because the IRA Trust Agreement provides for reimbursement regardless of the outcome of the Declaratory Judgment Action appeal. App. 9, Aff. ¶ 6; App. 63, 65, Article VIII (5) and (11). Jeffrey's request for delay due to the pending appeal is legally immaterial to indemnification. This Court has issued a final judgment in the Declaratory Judgment Action that is operative, and there is no prevailing party fee shifting which would affect the result. *See* App. 9, ¶ 6; App. 63, 65, Article VIII (5) and (11).

Accordingly, the District Court did not abuse its discretion rejecting Jeffrey's resistance on this basis:

> Jeffrey's final argument is that the Simmons' bill is premature. The Court finds this to be inaccurate. The Simmons' bill is submitted pursuant to an indemnification agreement in the trust agreement. The same was brought to further the interest of the trust. The Court agrees with the Simmons firm's assertion that the IRA trust agreement provides for reimbursement regardless of the outcome of the declaratory judgment appeal.

App. 156.

8. Fee Indemnification Language Provides an Alternative Basis to Affirm the District Court's Appropriate Exercise of Discretion.

As set forth above, the District Court appropriately exercised its discretion to determine that the fees were reasonable after review of the Affidavit of Attorneys' Fees and each and every entry on the 47-page fee schedule. *See* App. 151-156. Additionally and alternatively, U.S. Bank sought the Conservator's approval authorizing U.S. Bank to reimburse itself from IRA assets in accordance with the IRA Trust Agreement's provisions for fee indemnification. The attorney fee reimbursement contract at issue here is assessed under a different standard than discretionary fee awards because it serves a different purpose. "Indemnification is a form of restitution. Indemnity shifts the entire liability or blame from one legally responsible party to another. Indemnity is, in short, a redistribution of risk." *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 762 N.W.2d 463, 469 (Iowa 2009) (citations omitted); *see also Isakson v. Coll. Square Mall Partners, L.L.C.*, 791 N.W.2d 428 (Iowa Ct. App. 2010) (quoting *McNally & Nimergood v. Neumann–*

Kiewit Constructors, Inc., 648 N.W.2d 564, 571 (Iowa 2002)) (recognizing that "[a] contract for indemnification is generally subject to the same rules of formation, validity and construction as other contracts" and affirming contractual indemnification of attorneys' fees). U.S. Bank's IRA Trust Agreement with Richard requires reimbursement of all fees in order to shield other customers' IRA trusts from expenses unique to a single account and, by extension, to facilitate institutional management of IRAs. Unlike in civil rights and other actions employing Lodestar fee calculations (as opposed to indemnification), Richard and, later, his designated IRA beneficiary were free to terminate their relationship with U.S. Bank at any time.

An analogous case is *Farmers Bank of N. Missouri, Unionville, Missouri v. Erpelding*, 555 N.W.2d 222, 226 (Iowa 1996), where a bank sought recovery of attorneys' fees incurred under a contract (a promissory note) in a replevin action and the Iowa Supreme Court found no requirement for court review of reasonableness. The Court stated that the defendants' "contention that an itemization of the charged fee must be submitted in order for the court to assess its reasonableness is without basis in the law." *Id.* The Court affirmed the award of attorneys' fees on enforcement of the defaulted note. *Id.* Much as here, the contracting party agreed to attorneys' fees, and recovery of those fees serves to ensure the costs of defaulted promissory notes

is borne exclusively by the defaulting party rather than increasing the finance costs of all promissory note holders.

CONCLUSION

For the reasons stated herein, Intervenor-Appellee U.S. Bank respectfully requests that the Court affirm the judgment below.

REQUEST FOR SUBMISSION WITHOUT ORAL ARGUMENT

Intervenor-Appellee U.S. Bank requests submission without oral argument.

Dated: May 3, 2022

SIMMONS PERRINE MOYER BERGMAN PLC

By: /s/ Nicholas Petersen
Lynn W. Hartman, AT0003365
Nicholas Petersen, AT0012570
115 Third Street SE, Suite 1200
Cedar Rapids, Iowa 52401-1266
Telephone: (319) 366-7641
Facsimile: (319) 366-1917
Email: lhartman@spmblaw.com
npetersen@spmblaw.com
ATTORNEYS FOR INTERVENOR-APPELLEE U.S. BANK NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2022, I electronically filed the foregoing document with the Clerk of Court using the EDMS system with a copy being sent via electronic notice to all parties and attorneys of record

/s/ Nicholas Petersen

CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the limitation on the volume of type set forth in IOWA R. APP. P. 6.903(1)(g)(1). It contains 11,267 words, excluding parts of the brief exempted by IOWA R. APP. P. 6.903(1)(g)(1).

This brief complies with the type-face requirements of IOWA R. APP. P. 6.903(1)(e) and the type-style requirements of IOWA R. APP. P. 6.903(1)(f). It has been prepared in a proportionally spaced typeface, using Microsoft Word 2013 in 14-point Times New Roman.

/s/ Nicholas Petersen