

CAUSE NO. 2018-CI-05727

WILLIAM W. OCHSE IV and CHLOE OCHSE SEILER	§	IN THE DISTRICT COURT
	§	
V.	§	37TH JUDICIAL DISTRICT
	§	
WILLIAM W. OCHSE III, INDIVIDUALLY AND AS TRUSTEE OF THE WILLIAM W. OCHSE III FAMILY 2008 TRUST	§	
	§	
	§	BEXAR COUNTY, TEXAS

**FIRST AMENDED ORIGINAL PETITION
FOR INJUNCTIVE RELIEF AND REMOVAL OF TRUSTEE**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiffs, WILLIAM W. OCHSE IV and CHLOE OCHSE SEILER (“Petitioners”) and file this Original Petition against Respondent, WILLIAM W. OCHSE III, INDIVIDUALLY AND AS TRUSTEE OF THE WILLIAM W. OCHSE III FAMILY 2008 TRUST (the “Respondent”) and respectfully shows the Court as follows.

I.

Discovery Control Plan

1. Any discovery is intended to be conducted under Level 3 of Texas Rule of Civil Procedure 190. Pursuant to Tex. R. Civ. P. 47(c), Petitioners state that they seek monetary relief of \$100,000 or less and non-monetary relief.

II.

Parties

2. Petitioner WILLIAM W. OCHSE IV is an individual who is a current beneficiary of the trust that is the subject of this action. He resides in Bexar County at 16903 Kentucky Trail San Antonio, Texas 78247.

3. Petitioner CHLOE OCHSE SEILER. is an individual who is a current beneficiary of the trust that is the subject of this action. She resides in Bexar County at 635 Rockhill Drive San Antonio, Texas 78209.

4. Respondent WILLIAM W. OCHSE III, INDIVIDUALLY AND AS TRUSTEE OF THE WILLIAM W. OCHSE III FAMILY 2008 TRUST is a current beneficiary as well as the current sole trustee of the trust that is the subject of this action. He has appeared and answered through counsel.

5. CYNTHIA CADWALLADER OCHSE (“CYNTHIA”) is the Respondent’s former spouse, the mother of the Petitioners, and a current beneficiary of the trust that is the subject of this action. Accordingly, she is an interested person who must be served with notice of this petition. She has appeared and answered through counsel.

III.

Jurisdiction and Venue

6. This District Court has jurisdiction to construe a trust instrument, remove a trustee, determine the powers, responsibilities, duties and liability of a trustee, as well as make final determinations of fact affecting the administration, distribution, or duration of a trust pursuant to Texas Trust Code § 115.001(a).

7. Venue in Bexar County is proper pursuant to Texas Property Code § 115.002(b).

IV.

Facts

A. *The Trust*

8. On January 1, 2008, Amanda Hurst Ochse, as grantor, established THE WILLIAM W. OCHSE III FAMILY 2008 TRUST (the “**Trust**”), an irrevocable trust for the benefit of her son, Respondent WILLIAM W. OCHSE III, and for the benefit of his spouse and his descendants. She funded the Trust in 2008 by gifting to the Trust 850 shares of C.H. Guenther & Co. d/b/a Pioneer Flour Mills (“**Pioneer Flour**”). The Trust later acquired additional shares of Pioneer Flour from the grantor.

9. The Trust names Respondent as the sole trustee and directs him to make distributions from trust income and, if necessary, from principal, for the health, education, maintenance and support (“HEMS”) of the beneficiaries, including Will and Chloe. Section 3.1(A) of the Trust Agreement states in pertinent part:

A. Distributions of Income and Principal. The Trustee is authorized *and directed* to distribute to or for the benefit of the primary beneficiary, *the primary beneficiary’s descendants* and the primary beneficiary’s spouse, out of the income, and if income is insufficient, out of the principal of such trust from time to time such sums as are reasonably needed for their health, . . . education, maintenance and support in their accustomed manner of living.... [Emphasis added.]

10. Petitioners WILLIAM W. OCHSE IV (“**Will**”) and CHLOE OCHSE SEILER (“**Chloe**”) are Respondent’s only children. As Respondent’s descendants, Will and Chloe are vested, current beneficiaries of the Trust under Section 3.1(A).

11. In 2008 Respondent’s spouse was CYNTHIA CADWALLADER OCHSE (“**Cynthia**”). Pursuant to Section 3.1(A), therefore, Cynthia became a vested, current beneficiary

of the Trust in 2008 when the Trust was established. Any reference in the Trust Agreement to “the primary beneficiary’s spouse” was intended by the settlor as a reference to Cynthia, whose full name appears multiple times in the Trust Agreement. In 2013 Cynthia and Respondent were divorced. They executed an Agreement Incident to Divorce reaffirming that after the divorce, Cynthia shall continue to own, possess, and enjoy, *inter alia*, the following property:

W-9. Any and all interest of any kind whatsoever, if any, that CYNTHIA CADWALLADER OCHSE may have, whether it be as trustee, beneficiary, or otherwise, in the William W. Ochse, III Family 2008 Trust and the Ochse Insurance Trust.

On January 9, 2013, a Final Decree of Divorce was signed in Cause No. 2012-CI-02566, in the 150th Judicial District Court of Bexar County, by which the Court approved the Agreement Incident to Divorce, incorporated it by reference as part of the decree, and ordered the parties to do all things necessary to effectuate the agreement. Accordingly, the divorce did not divest Cynthia of her beneficial interest in the Trust, and thus she remains a vested, current beneficiary of the Trust. Cynthia is the mother of Will and Chloe.

12. Respondent subsequently married Carol Dicker. Because any reference in the Trust Agreement to the *spouse* of the Respondent is necessarily deemed a reference to Cynthia, it cannot be deemed a reference to Carol Dicker, who is not a beneficiary of the Trust. She is entitled to no benefit from the Trust, and it would be a breach of the Respondent’s fiduciary duties as trustee to distribute Trust property for her benefit.

B. Trustee’s Past Wrongful Acts and Omissions

13. When he became trustee in 2008, Respondent had a duty to inform his adult descendants, Will and Chloe, that the Trust had been established, naming them as current beneficiaries. Until March of 2018, however, neither Will nor Chloe knew of the existence of the

Trust or that they were beneficiaries of the Trust, because Respondent did not inform them. They first obtained a copy of the Trust instrument in March of 2018 from their mother, Cynthia, who found a copy of the trust instrument in a box of papers from her divorce. At or around the time that the Trust was established in 2008, Respondent informed Cynthia that a trust was being established, and discussed limited aspects about the Trust with her. Respondent did not, however, inform Cynthia that she, Will and Chloe were current or permissible beneficiaries, or provide her a copy of the Trust Agreement. It was not until Cynthia and Respondent's divorce that Cynthia obtained a copy of the Trust Agreement.

14. Respondent has never provided Will or Chloe with a copy of the Trust Agreement, despite Chloe asking Respondent more than once between 2008 and 2018 whether she has any interest in Pioneer Flour. When Chloe asked Respondent about Pioneer Flour he denied that she owned any shares, rather than disclosing to Chloe that she in fact held a beneficial interest in Pioneer Flour as a beneficiary of the Trust, or disclosing to her that he held shares of Pioneer Flour in trust for the benefit of the family, including her.

15. Respondent rarely mentioned the family's ownership interest in Pioneer Flour to Will or Chloe, but when the subject came up, Respondent spoke of it as if Will and Chloe had no current interest in Pioneer Flour, but only an interest in whatever may be left after he passes away.

16. As trustee, Respondent has never fulfilled his fiduciary obligation to make reasonable inquiry of Will or Chloe about whether either of them reasonably needs any funds from the Trust for health, education, maintenance or support. As trustee, Respondent has made no trust distributions to Will or Chloe, or any of the children of Will or Chloe, even though the Trust has generated substantial income consistently since inception.

17. Section 6.7 of the Trust Agreement states:

The Trustee shall keep the records and books of account of each trust open to the inspection of the then current income beneficiary thereof at all reasonable times; and *shall render annual unaudited statements* of the administration of each trust to the then current income beneficiary thereof....

In breach of Section 6.7 of the Trust Agreement, Respondent has failed to ever render to Will or Chloe any such annual accounting.

C. Threat of Imminent Harm to the Trust; Breach of Fiduciary Duty; Breach of Trust

18. On March 7, 2018, Respondent revealed to Will and Chloe that Pioneer Flour was being sold. Respondent further stated that he intends to use the cash proceeds to pay his personal debts. At that time, Respondent owed substantial sums to his personal creditors, and had a history of ill-advised, imprudent business ventures. Section 4.6 of the Trust Agreement expressly prohibits the trustee from making a distribution or participating in making the decision to make a distribution that would discharge his personal obligations. It would be a breach of trust for Respondent to distribute Trust funds to himself, his spouse or his creditors for the purpose of paying such debts. Nevertheless, in blatant disregard of Section 4.6, throughout his years as sole trustee of the Trust, Respondent has made trust distributions to pay his personal obligations, including promissory notes. If not enjoined, suspended and removed as trustee, Respondent will continue to waste trust assets.

19. As trust beneficiaries, Will and Chloe are entitled to the correct and proper performance by Respondent of the fiduciary duties of a trustee, and they are legally entitled to enjoin serious breaches of the trustee's fiduciary obligations he owes them. During his years as sole trustee, Respondent has persisted in disregarding his duties to Will and Chloe by:

- Failure to inform Will and Chloe of the existence of the Trust in derogation of the fiduciary duty of disclosure.

- Failure to inform Will and Chloe that they are beneficiaries of the Trust in derogation of the fiduciary duty of disclosure.
- Failure to inform Will and Chloe that they are permitted to receive distributions of trust income or principal for their HEMS needs, in derogation of the fiduciary duty of disclosure.
- Failure to provide an annual accounting to Will and Chloe, in breach of the Trust Agreement and in derogation of the fiduciary duty of disclosure.
- Making trust distributions to himself arbitrarily, without properly evaluating his genuine HEMS needs, or considering needs of other beneficiaries, in derogation of the fiduciary duty of impartiality.
- Failing to understand his duties as trustee, in violation of his fiduciary duty of competence.
- Self-dealing, including making trust distributions to discharge legal or contractual obligations he owed personally, in violation of section 4.6 of the Trust instrument.
- Failure to periodically inquire whether Will and Chloe have any need for a trust distribution to help pay for reasonable expenses of health, education, maintenance or support. Same for the other beneficiaries, including Will and Chloe's minor children, who are trust beneficiaries.
- Failure to maintain complete and orderly records of all activity of trust administration, such as records documenting his determination of the appropriateness of each trust distribution he has made to himself.
- Denying that Will and Chloe are permissible income and principal beneficiaries, and instead falsely asserting in his Motion to Dissolve TRO that Will and Chloe are mere "contingent remainder beneficiaries" in derogation of the fiduciary duties of competence and loyalty.

The acts and omissions described above constitute breaches by the Respondent of his fiduciary duties and obligations as trustee of the Trust. If not enjoined, Respondent will continue to disregard the duties Respondent owes Will and Chloe as their trustee.

20. The refusal of Respondent to communicate with Will and Chloe as beneficiaries, concerning matters material to their beneficial interest in the Trust constitutes breach of fiduciary duty and breach of trust.

E. Hostility Materially Affects Performance as Fiduciary

21. Respondent has displayed a hostility toward Petitioners with regard to the Trust that has materially affected Respondent's performance as Trustee, and will continue to materially affect his performance as Trustee in contravention of his fiduciary duties and of the settlor's intentions. Moreover, as a consequence of his own conduct, Respondent's relationship with Will and Chloe is fractured by hostility to such an extent that it now impairs Respondent's ability to perform the fiduciary obligations he owes them as trust beneficiaries.

V.

Removal of Trustee

22. Based on the facts set forth in the preceding paragraphs it is necessary for this Court to remove Respondent from serving as Trustee.

23. Accordingly, pursuant to Texas Property Code § 113.082, Petitioners request that this Court remove Respondent as Trustee.

VI.

Application for Temporary Injunction

24. Petitioners apply for a Temporary Injunction pursuant to Texas Rule of Civil Procedure 680 and Texas Property Code § 114.008(a)(2) temporarily enjoining Respondent, his agents, attorneys and persons acting in concert with him, from engaging in, committing, performing, directly or indirectly, pending final trial, any of the following acts:

a. Distributing, transferring, assigning, or appointing, to himself, his spouse, his creditors, or to any other person or entity, any of the income, principal or assets of the Trust or the proceeds thereof;

b. Taking any action that causes, or has the effect of causing, the dissipation of assets or diminution of value of the assets of the Trust, or of any beneficiary's interest in the Trust;

c. Removing, transferring, or withdrawing funds or assets of the Trust from any bank account, whether such bank account is currently titled in the name of the Trust or otherwise;

d. Removing, destroying, altering, or in any way compromising books and records reflecting or relating to assets and liabilities of the Trust;

e. Refusing to respond to a reasonable request by a beneficiary of the Trust for disclosure of material information known to the Respondent, as trustee, that might affect the beneficiary's rights concerning the trust; and

f. Utilizing any funds or assets of the Trust to pay the Respondent's costs of defense in this action absent advance approval from this Court.

25. This application for Temporary Injunction is presented on the basis that the Respondent has failed, or has threatened to fail, to fulfill his duties arising under the Trust as well as his duties under the Texas Trust Code, by failing to preserve trust assets, and on the further grounds that irreparable injury will result to Petitioners' beneficial interest in the trust if Respondent is not temporarily restrained and enjoined pending final trial. If the Respondent and all persons acting in concert with him are not temporarily restrained and enjoined, it is probable that the further acts and breaches described above will occur, for which there may be no adequate remedy at law.

VII.

Suspension of Trustee

26. Based on the foregoing facts, Petitioners request that pending final trial the Court enter an order suspending Respondent as trustee of the Trust in accordance with Texas Property Code §114.008(a)(6).

VIII.

Temporary Receiver

27. Based on the facts alleged in the foregoing paragraphs, Petitioner requests that pending final trial the Court appoint a temporary receiver pursuant to Texas Property Code § 114.008(a)(5) and that such receiver, through final trial, be empowered by the Court to fulfill all necessary duties, including the duty to make appropriate distributions to the beneficiaries, acting under supervision of this Court, for the purpose of conserving and managing the assets of the Trust pending final trial.

IX.

Demand For Accountings

28. Based on the facts alleged in the foregoing paragraphs, Petitioners hereby demand from the Respondent an accounting of the Trust pursuant to Texas Property Code § 113.151. Petitioners further request that the Court order an accounting of the Trust pursuant to Texas Property Code § 114.008(a)(4), of all transactions of the Trust since creation of the trust. Petitioner demands of the Respondent, and requests an order from the Court directing that such accounting be comprised of a written statement showing the contents prescribed by Texas Property Code § 113.152, including:

(a) all trust property that has come to the trustee's knowledge or into the trustee's possession and that has not been previously listed or inventoried as property of the trust;

(b) a complete account of receipts, disbursements, and other transactions regarding the trust property for the period covered by the account, including their source and nature, with receipts of principal and income shown separately;

(c) a listing of all property being administered, with an adequate description of each asset;

(d) the cash balance on hand and the name and location of the depository where the balance is kept; and

(e) all known liabilities of the trust.

X.

Attorneys Fees

29. As a result of the foregoing, it has been necessary for Petitioners to retain legal counsel to represent them in this action. Pursuant to Texas Property Code § 114.064 and Texas Civil Practice & Remedies Code § 113.152, Petitioners are entitled to recover their attorney's fees and costs of court of and from Respondent in his individual capacity or, alternatively, from the Trust.

XI.

Conditions Precedent

30. Pursuant to Texas Rule of Civil Procedure 54, Petitioners allege generally that all conditions precedent to her recovery have occurred or have been performed.

XII.

Request for Relief

WHEREFORE, Petitioners WILLIAM W. OCHSE IV and CHLOE OCHSE SEILER respectfully requests the following:

1. After notice and hearing, entry of a Temporary Injunction pursuant to Texas Rule of Civil Procedure 680, temporarily enjoining WILLIAM W. OCHSE III, INDIVIDUALLY AND AS TRUSTEE OF THE 2008 WILLIAM W. OCHSE III FAMILY TRUST, his agents, attorneys and persons acting in concert with him, from engaging in, committing, performing, directly or indirectly, pending final trial, any of the following acts:

a. Distributing, transferring, assigning, or appointing, to himself, his spouse, his creditors, or to any other person or entity, any of the income, principal or assets of the Trust or the proceeds thereof;

b. Taking any action that causes, or has the effect of causing, the dissipation of assets or diminution of value of the assets of the Trust, or of any beneficiary's interest in the Trust;

c. Removing, transferring, or withdrawing funds or assets of the Trust from any bank account, whether such bank account is currently titled in the name of the Trust or otherwise;

d. Removing, destroying, altering, or in any way compromising books and records reflecting or relating to assets and liabilities of the Trust;

e. Refusing to respond to a reasonable request by a beneficiary of the Trust for disclosure of material information known to the Respondent, as trustee, that might affect the beneficiary's rights concerning the trust; and

f. Utilizing any funds or assets of the Trust to pay the Respondent's costs of defense in this action absent advance approval from this Court.

2. On final trial, entry of a Final Judgment that the temporary injunction be extended to a permanent injunction.

3. Pending final trial, entry of an order suspending Respondent as trustee of the Trust, and appointing, pursuant to Texas Property Code § 114.008(a)(5) a temporary receiver over the Trust to conserve and manage the Trust assets under supervision of the Court.

4. Entry of an order directing the current Respondent as Trustee to present a written accounting pursuant to Texas Property Code §§ 113.151 & 114.008(a)(4).

5. On final trial, entry of Final Judgment removing WILLIAM W. OCHSE III, as Trustee of the Trust, and awarding Petitioners WILLIAM W. OCHSE IV and CHLOE OCHSE SEILER recovery of their attorneys fees and court costs necessarily incurred herein, together with such pre-judgment interest or post-judgment interest as may be allowed by law, together with such further relief to which Petitioners may show themselves justly entitled.

Respectfully Submitted,

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ATTORNEYS FOR PETITIONERS
WILL OCHSE AND CHLOE OCHSE SEILER

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on all counsel of record by electronic service through an electronic filing manager pursuant to Tex. R. Civ. P. 21a on the 3rd day of December, 2018.

/s/ Bennett L. Stahl

BENNETT L. STAHL

VERIFICATION

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, personally appeared WILLIAM W. OCHSE IV, who, having been duly sworn upon his oath deposed and said that he has read the above and foregoing petition and that the facts stated therein are true and correct and within his personal knowledge.

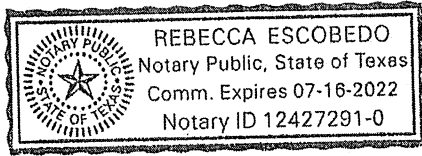


WILLIAM W. OCHSE IV

SWORN TO AND SUBSCRIBED before me this 3rd day of December, 2018, by WILLIAM W. OCHSE IV.




NOTARY PUBLIC, STATE OF TEXAS



VERIFICATION

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, personally appeared CHLOE OCHSE SEILER, who, having been duly sworn upon her oath deposed and said that she has read the above and foregoing petition and that the facts stated therein are true and correct and within her personal knowledge.



CHLOE OCHSE SEILER

SWORN TO AND SUBSCRIBED before me this 3rd day of December, 2018, by CHLOE OCHSE SEILER.



NOTARY PUBLIC, STATE OF TEXAS

