

NO. 2018-CI-05727

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

**SECOND AMENDED ANSWER, AFFIRMATIVE DEFENSES, SECOND AMENDED  
CROSS-CLAIMS OF CYNTHIA CADWALLADER OCHSE AND  
FIRST AMENDED REQUEST FOR DECLARATORY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

Respondent/Cross-Claimant Cynthia Cadwallader Ochse files this her Second Amended Answer to Plaintiffs' *First Amended Original Petition for Injunctive Relief and Removal of Trustee* (the "First Amended Petition"), Affirmative Defenses, Second Amended Cross-Claims against William W. Ochse III, Individually and as Trustee of the William W. Ochse III Family 2008 Trust, and First Amended Request for Declaratory Judgment and would show this Court as follows:

**I.**  
**ANSWER**

1. Cynthia Cadwallader Ochse files this Second Amended Answer to Plaintiffs' First Amended Petition, and, in support of same, pursuant to Tex. R. Civ. P. 58, adopts and joins in the claims asserted by Plaintiffs in the First Amended Petition, which is incorporated by reference as if fully set forth herein.

2. Cynthia Cadwallader Ochse files this Answer to Respondent William W. Ochse III's First Amended Original Answer to Cynthia Cadwallader Ochse's Cross-Claim ("First Original Answer") and generally denies the allegations in the First Original Answer and demands strict proof thereof by a preponderance of the credible evidence.

**II.**  
**AFFIRMATIVE DEFENSES**

3. Respondent is barred from asserting any claim that Cynthia is not a beneficiary of the Trust under the affirmative defenses of res judicata, collateral estoppel, and quasi-estoppel.

**A. Res Judicata**

4. In the Divorce Proceeding, Respondent and Cynthia requested for the Court to determine and confirm their separate property interests. Respondent and Cynthia entered into the *Mediated Settlement Agreement* and Agreement. The Agreement was incorporated to the Decree, which was a final judgment that disposed of all the parties and issues in the Divorce Proceeding. The Court had jurisdiction to divide and award each party his or her separate property, including his or her interests in the Trust, and the Court awarded Cynthia her interests in the Trust as her sole and separate property accordingly.

5. In this matter, Respondent, as trustee, alleges that Cynthia does not have any interests in the Trust. At the time of the Divorce Proceeding, Respondent was the trustee of the Trust and was in privity with the parties in the Divorce Proceeding to be bound by the Decree. The claims by Respondent and Cynthia in this matter as to their respective interests in the Trust arise from the same transactions as their claims to their respective interests in the Divorce Proceeding.

6. Since the first action involved the same parties and the same transaction and resulted in a final judgment on the merits, Respondent's cause of action for any determination that Cynthia is not a beneficiary of the Trust is barred under the doctrine of res judicata because that determination was already made in the Decree in the Divorce Proceeding.

**B. Collateral Estoppel**

7. Since the Decree was a final judgment disposing of all the parties and issues in the Divorce Proceeding, the issue of Cynthia's interests in the Trust was litigated. Therefore, Respondent should be precluded from litigating the same issue in this proceeding under the doctrine of collateral estoppel.

**C. Quasi-estoppel**

8. In the Divorce Proceeding, Cynthia and Respondent received benefits by entering into the *Mediated Settlement Agreement* and Agreement, which was incorporated into the Court's Decree. Respondent's current position that Cynthia has no interest in the Trust is inconsistent with his position in the Divorce Proceeding. Respondent should be estopped from maintaining his current position that Cynthia is not a beneficiary of the Trust since it would disadvantage Cynthia and her rights as a beneficiary of the Trust under the doctrine of quasi-estoppel.

**III.**  
**CROSS-CLAIMS**

**A. Parties**

9. Plaintiffs, William W. Ochse IV ("Will") and Chloe Ochse Seiler ("Chloe"), are individuals who reside in Bexar County, Texas, are beneficiaries of the William W. Ochse III Family 2008 Trust that is the subject of this action, and have previously made an appearance herein.

10. Respondent, Cynthia Cadwallader Ochse ("Cynthia") is a beneficiary of the William W. Ochse III Family 2008 Trust that is the subject of this action, is the mother of Plaintiffs, and has previously made an appearance herein.

11. Respondent, William W. Ochse III, Individually and as the sole Trustee of the William W. Ochse III Family 2008 Trust (“Respondent”), is a beneficiary of the William W. Ochse III Family 2008 Trust, and may be served through his counsel of record.

12. Other than the Plaintiffs and Respondents named herein, there are no other persons or entities that would be affected by the cross-claims and declarations sought herein. All other potential beneficiaries of the William W. Ochse III Family 2008 Trust who would be affected by the declarations sought herein are unborn or unascertained beneficiaries whose interests are adequately represented by the Plaintiffs and Respondents whose interests are substantially identical in this proceeding. Tex. Prop. Code §§ 115.013-115.014. Therefore, there is no need to appoint a Guardian or Attorney Ad Litem for the potential unborn and unascertained beneficiaries of the beneficiary of the William W. Ochse III Family 2008 Trust pursuant to Tex. Prop. Code §§ 115.013-115.014.

**B. Factual Background**

13. Effective January 1, 2008, Amanda Hurst Ochse, as grantor, entered into an irrevocable trust agreement with Respondent William W. Ochse III, as trustee, that created the William W. Ochse III Family 2008 Trust (the “Trust”). Pursuant to the terms of the Trust agreement, the Trust was an irrevocable trust created for the benefit of Amanda Hurst Ochse’s son, Respondent William W. Ochse III, his spouse, Cynthia, and Respondent’s descendants, Will and Chloe and their descendants.

14. At the time the Trust was created, Cynthia was Respondent’s spouse of approximately thirty (30) years, and all references in the Trust agreement to “the primary beneficiary’s spouse” and “her son’s spouse” were intended by Amanda Hurst Ochse to mean Cynthia.

15. Contemporaneous with the creation of the Trust agreement, Amanda Hurst Ochse made a gift for the benefit of the Respondent, Cynthia, and Respondent's descendants of 850 shares of C.H. Guenther & Son, Inc. ("Guenther") common stock to the Respondent, as trustee of the Trust. Immediately after the gift of the 850 shares of Guenther common stock, Amanda Hurst Ochse and Respondent, as trustee, entered into an *Agreement to Purchase Common Stock*, which was made effective January 1, 2008, wherein the Trust purchased 500 additional shares of Guenther common stock from Amanda Hurst Ochse for \$195,000. Amanda Hurst Ochse received a promissory note for \$195,000 and security agreement on the 500 shares of Guenther common stock from the Trust. After these transactions in May, 2008, the Trust owned 1,350 shares of Guenther common stock.

16. The Trust agreement provides that Respondent, as trustee, is to make distributions from Trust income and, if necessary, from principal, for the health, education, maintenance and support of the beneficiaries. 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...

Since Cynthia was entitled to receive distributions from the Trust pursuant to Section 3.1(A) of the Trust agreement, Cynthia was a vested, current beneficiary of the Trust. Furthermore, the Trust agreement provided that Cynthia's other interests in the Trust included (1) a right to withdrawal property contributed to the Trust pursuant to Article II of the Trust agreement, (2) an interest as an appointee to receive Trust corpus under Respondent's non-general inter vivos power of appointment under Section 3.1(B) of the Trust agreement, (3) an interest as an appointee to receive Trust corpus under Respondent's testamentary power of appointment under

Section 3.1(C) of the Trust agreement, and (4) appointment as a successor co-trustee of the Trust under Section 5.1 of the Trust agreement.

17. On or about February 16, 2012, Respondent filed for divorce from Cynthia under Cause No. 2012-CI-02566, in the 150th Judicial District Court of Bexar County (“Divorce Proceeding”).

18. On May 15, 2012, Cynthia and Respondent entered into a *Mediated Settlement Agreement* wherein it was agreed in pertinent part that both Cynthia and Respondent shall retain their respective interests in the Trust. Pursuant to the terms of the *Mediated Settlement Agreement*, Respondent could secure a divorce and have the agreement rendered as an order of the court. Cynthia and Respondent obtained their divorce on May 18, 2012.

19. On January 9, 2013, Respondent and Cynthia executed an *Agreement Incident to Divorce* (the “Agreement”) which merged the terms of the *Mediated Settlement Agreement* and set forth the final division of property of Respondent and Cynthia. Pursuant to the Agreement, after the divorce, Cynthia received as her sole and separate property and shall 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* (“Decree”) was signed by the Court approving the Agreement and incorporating it by reference as part of the Decree.

#### IV. CROSS-CLAIMS

20. Because Cross-Claimant’s pleading is unclear as to whether he is seeking any affirmative relief, Cynthia offensively pleads res judicata, collateral estoppel, and quasi-estoppel as a bar to Respondent’s claims that Cynthia is not a beneficiary of the Trust.

**A. Res Judicata**

21. Cynthia incorporates by reference the facts and allegations stated above.

22. Since the first action involved the same parties and the same transaction and resulted in a final judgment on the merits, Respondent's cause of action for any determination that Cynthia is not a beneficiary of the Trust is estopped by res judicata because that determination was already made in the Decree in the Divorce Proceeding.

**B. Collateral Estoppel**

23. Cynthia incorporates by reference the facts and allegations stated above.

24. Since the Decree was a final judgment disposing of all the parties and issues in the Divorce Proceeding, the issue of Cynthia's interests in the Trust was litigated. Therefore, Respondent should be precluded from litigating the same issue in this proceeding under the doctrine of collateral estoppel.

**C. Quasi-estoppel**

25. Cynthia incorporates by reference the facts and allegations stated above.

26. In the Divorce Proceeding, Cynthia and Respondent received benefits by entering into the *Mediated Settlement Agreement* and Agreement, which was incorporated into the Court's Decree. Respondent's current position that Cynthia has no interest in the Trust is inconsistent with his position in the Divorce Proceeding. Respondent should be estopped from maintaining his current position that Cynthia is not a beneficiary of the Trust since it would disadvantage Cynthia and her rights as a beneficiary of the Trust under the doctrine of quasi-estoppel.

**D. Breach of Contract**

27. Cynthia incorporates by reference the allegations stated above.

28. The Agreement also reaffirmed outstanding federal income tax liabilities for the certain tax years during which the parties were married. Pursuant to the Agreement, Respondent was to pay and be responsible for and hold Cynthia harmless from the federal income tax liabilities for those years, on the condition that Cynthia would cooperate with the CPA in preparing the necessary forms and furnishing requested information by the IRS concerning income and associated federal income tax arrears. Despite the parties' agreement in the Agreement and Cynthia's continued cooperation with the CPA in preparing tax forms and furnishing the requested information, Respondent wholly failed and refused to pay the referenced outstanding federal income tax liabilities until April 25, 2018, thus causing significant expense on behalf of Cynthia. Damages include, but are not limited to, (1) tax overpayments by Cynthia that the IRS used to offset 2005 liabilities and (2) fees for the accountants and attorneys Cynthia was forced to retain to protect her interests and defend her against the tax liens, all of which Cynthia is entitled to under the terms of the Agreement and Decree.

29. Cynthia asserts that the Agreement is a valid and enforceable contract. Cynthia is the proper party to sue for breach of this contract. Respondent breached the contract and caused injury to Cynthia by failing to pay amounts due and owing pursuant to the terms of the contract.

30. Cynthia's damages include all amounts due and payable under the Agreement, the personal funds she has expended and property she has sold to pay tax liens, as well as accountant's and attorney's fees, and pre- and post-judgment interest as permitted by law.

31. By the terms of the Agreement and pursuant to Section 38.001(8) of the Texas Civil Practice and Remedies Code, Cynthia is entitled to an award of reasonable and necessary attorney's fees.

**E. Breach of Fiduciary Duty**

32. Respondent is in a fiduciary relationship with Will, Chloe, and Cynthia as trustee of the Trust and owes fiduciary duties to them.

33. In 2008, Respondent had a duty to inform Will, Chloe, and Cynthia that the Trust had been created and that they were current beneficiaries of the Trust. Respondent failed to provide any beneficiary a copy of the Trust agreement. Cynthia only received a copy of the Trust from her attorney in the Divorce Proceeding, and Cynthia provided a copy of the Trust to Will and Chloe in March, 2018. Respondent has never informed Will, Chloe, and Cynthia that they are current beneficiaries of the Trust entitled to distribution. Respondent has asserted that he is the only beneficiary entitled to distributions from the Trust during his lifetime contrary to the terms of the Trust agreement. Respondent's refusal to communicate with the beneficiaries of the Trust regarding any matters material to their beneficial interest in the Trust constitutes breach of trust and breach of his duty of disclosure to Will, Chloe, and Cynthia.

34. Respondent has never inquired about any beneficiary's health, education, maintenance or support, and Respondent has made distributions only to himself or his personal creditors for his personal debts unrelated to his health, education, maintenance, or support. Respondent has breached his duty of good faith and fair dealing and his duty of loyalty to Will, Chloe, and Cynthia, and has engaged in acts of self-dealing.

35. Respondent failed to render to Will, Chloe, and Cynthia any annual accounting in breach of Section 6.7 of the Trust agreement, which provides:

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....

Furthermore, Respondent has failed to maintain any records of the Trust.

36. Respondent has displayed hostility toward Will, Chloe, and Cynthia 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.

**F. Removal of Trustee.**

37. Based on foregoing, it is necessary for this Court to remove Respondent from serving as Trustee.

38. Accordingly, pursuant to Texas Property Code § 113.082, Cynthia requests that this Court remove Respondent as trustee.

**G. Suspension of Trustee.**

39. Based on the foregoing, Cynthia requests 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).

**H. Temporary Receiver.**

40. Based on the foregoing, Cynthia 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, acting under supervision of this Court, for the purpose of conserving and managing the assets of the Trust pending final trial.

**I. Demand for Accounting.**

41. Based on the foregoing, Cynthia demands from the Respondent an accounting of the Trust pursuant to Texas Property Code § 113.151. Cynthia further requests 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 its creation. Cynthia 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.

#### V.

#### FIRST AMENDED REQUEST FOR DECLARATORY JUDGMENT

##### A. Declaratory Judgment that Cynthia is the "Spouse" as Referenced in the Trust

42. Cynthia incorporates by reference the allegations stated above.

43. Under Texas Civil Practice and Remedies Code Section 37.005, the Court has the power "to determine any question arising out of the administration of the [Trust]...,including questions of construction" of a trust instrument. In the alternative that the Court determines that Respondent is not barred under res judicata, collateral estoppel, or quasi-estoppel from seeking a determination of Cynthia's interest in the Trust, Cynthia seeks the Court's construction of the meaning of the term "spouse" to mean Cynthia as used and intended by Amanda Hurst Ochse in the Trust agreement.

44. The Trust was an irrevocable Trust created by Amanda Hurst Ochse "for the benefit of her son, her son's descendants, and *her son's spouse*," which at the time of the creation of the Trust was Cynthia. The Trust agreement omits a definition of or other references

to the term “spouse” that would cause the Trust to benefit anyone other than Cynthia, which was the intent of Amanda Hurst Ochse.

45. Respondent interpreted the term “spouse” to mean Cynthia for purposes of the *Mediated Settlement Agreement, Agreement and Decree* in the Divorce Proceeding. As the son of Amanda Hurst Ochse and sole trustee of the Trust since its inception, Respondent was in a position to understand her intent in the creation of the Trust and its terms.

46. Based on the foregoing facts and circumstances, Cynthia seeks a declaration from the Court that the term “spouse” referenced in the Trust is unambiguous under the four corners of the instrument creating the Trust and only means Cynthia as intended by Amanda Hurst Ochse.

47. In the alternative that Court finds that the terms “spouse” referenced in the Trust is ambiguous under the four corners of the instrument creating the Trust, Cynthia seeks a declaration from the Court that the term “spouse” referenced in the Trust means Cynthia based upon extrinsic evidence presented regarding the facts and circumstances at the time the Trust agreement was executed by Amanda Hurst Ochse and based upon evidence that would clarify Amanda Hurst Ochse’s intent regarding who she intended to benefit when she created the Trust agreement.

## **VI. ATTORNEY’S FEES**

48. As a result of the foregoing, it has been necessary for Cynthia to retain legal counsel to represent her in this action. Furthermore, Cynthia pursued the First Amended Request for Declaratory Judgment in good faith and for just cause. Pursuant to Texas Property Code §113.152 and §114.064 and Texas Civil Practice & Remedies Code §113.152 and §37.009,

Cynthia is entitled to recover her attorney's fees and costs of court of and from Respondent in his individual capacity or, alternatively, from the Trust.

**VII.  
CONDITIONS PRECEDENT**

49. Pursuant to Texas Rule of Civil Procedure 54, Cynthia alleges generally that all conditions precedent to her recovery have occurred or have been performed.

**VIII.  
REQUEST FOR RELIEF**

WHEREFORE, Respondent/Cross-Claimant Cynthia Cadwallader Ochse respectfully requests the following relief:

- (a) Respondent takes nothing by this lawsuit and that all relief sought by Respondent be denied;
- (b) To the extent Respondent is making affirmative claims, Cynthia requests entry of an order granting Cynthia's affirmative defenses that Respondent is barred from claiming that Cynthia is not a beneficiary of the Trust under the doctrines of res judicata, collateral estoppel, and quasi-estoppel.
- (c) To the extent Respondent is making affirmative claims, entry of an order that Respondent is barred from claiming that Cynthia is not a beneficiary of the Trust under the offensive use of the doctrines of res judicata, collateral estoppel, and quasi-estoppel.
- (d) 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.
- (e) Entry of an order directing Respondent as trustee of the Trust to present a written accounting to Cynthia and the other Trust beneficiaries pursuant to Texas Property Code §§113.151 and 114.008(a)(4).
- (f) Findings that Respondent as trustee of the Trust breached fiduciary duties to the beneficiaries of the Trust;
- (g) Award Cynthia a judgment against Respondent for actual damages and exemplary damages;

- (h) Entry of a declaratory judgment pursuant to Texas Civil Practice and Remedies Code Section 37.005 declaring that the term “spouse” referenced in the Trust is unambiguous under the four corners of the instrument creating the Trust and specifically means Cynthia as intended by Amanda Hurst Ochse;
- (i) In the alternative that the Court finds that the term “spouse” is ambiguous under the four corners of the instrument creating the Trust, based upon evidence presented regarding the facts and circumstances at the time the Trust was executed by Amanda Hurst Ochse and to determine the intent of Amanda Hurst Ochse as Grantor, the Court enter a declaratory judgment pursuant to Texas Civil Practice and Remedies Code Section 37.005 declaring that the term “spouse” specifically means Cynthia as intended by Amanda Hurst Ochse; and
- (j) On final trial, entry of final judgment removing Respondent as Trustee of the Trust, and awarding Cynthia recovery of her attorney’s 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 Cynthia may show herself justly entitled.

Respectfully submitted,

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**ATTORNEYS FOR CYNTHIA  
CADWALLADER OCHSE**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 13th day of February, 2019, a true and correct copy of the above and foregoing has been transmitted in accordance with TEXAS RULES OF CIVIL PROCEDURE to the following counsel of record:

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