

Sempre Avanti!

Always forward...

Welcome to the Winter 2011 issue of *Sempre Avanti!*

Happy New Year! All of us here at **Creighton Law Offices** wish all of you a happy and prosperous new year. **By the way, please visit our website (www.creightonlaw.com), which is regularly updated. Sign up to receive our regular blog posts, Estate Planning Defined, as soon as they are published!**

In our last issue, we explained the role of a fiduciary and offered our “**Ten Commandments for Fiduciaries**” as guidelines to help fiduciaries avoid some of the more common mistakes we have witnessed over the years. We received quite a bit of positive feedback regarding the **Fall 2010** issue, so we decided to carry the topic one step further by profiling a case in which a fiduciary overlooked many of the Commandments and showing you what some of the consequences of her behavior were for her and could be for anyone serving as Trustee.



THE TEN COMMANDMENTS FOR FIDUCIARIES

Before we begin, and for ease of reference, it might be helpful for us to review the **Ten Commandments for Fiduciaries**. They are as follows:

First Commandment: Thou shalt be **faithful to the interests** of the Trust and its beneficiaries. Always!

Second Commandment: Thou shalt **not** use the office of Trustee to take out thy **aggressions on thy siblings**. Never!

Third Commandment: Thou shalt not use Trust assets for thy own benefit. Ever!

Fourth Commandment: Thou shalt not commingle Trust assets with the assets of others. Never!

Fifth Commandment: Thou shalt not hire thy kids. Never, ever, ever!

Sixth Commandment: Thou shalt keep all Trust beneficiaries informed. Always, always, always, even if there is no news!

Seventh Commandment: Thou shalt keep proper and complete records. Always, always, always!

Eighth Commandment: Thou shalt not take exorbitant Trustee fees. No, no, no, never!

Ninth Commandment: Thou shalt make Trust property productive. Always!

Tenth Commandment: Thou shalt keep thy attorney informed. Always, always, always. Otherwise how can we help you?

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IN RE: THE CHATARD FAMILY 1989 TRUST, A CASE IN THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

The Chatard Family 1989 Trust was created by **Frederic** and **Vera Chatard**, a married couple. The terms of the trust provided that upon the death of the first spouse, the trust estate would be “broken up” into two separate sub-trusts, **Trust A** and **Trust B**. (This is a common scheme in estate planning. You may have heard such sub-trusts referred to as “Bypass” or “Residual” trusts and “Survivor’s” or “Surviving Spouse’s” trusts.) In other words, some portion of the total assets in the trust estate at the time of the death of the first spouse would be attributed to each of **Trust A** and **Trust B**. The assets in both trusts would be available to the surviving spouse as needed during his or her lifetime.

Frederic died in 1995 and **Vera** died in September 2002. The trust estate had

been divided into **Trust A** and **Trust B** after **Frederic**’s death, as called for in the trust document. One of the **Chatards’** adult children, **Joyce**, began serving as Trustee in early 2003. The beneficiaries of **Trust A** were the **Chatards’** adult son **David**, their adult daughter **Jeanee**, and the four children of their deceased son **Douglas**, some of whom were still under 30 years of age. The beneficiaries of **Trust B** were the same as the beneficiaries of **Trust A**, except that **Joyce**, the Trustee, was also a beneficiary of **Trust B**. Upon **Vera**’s death, **David’s**, **Jeanee’s**, and **Joyce’s** respective shares in the trusts were to be paid to them directly within a “reasonable” amount of time following **Vera**’s death; the share for **Douglas’** children was to be held in **Trust A** (and could be used for the benefit of

those children) until the youngest of them reached 30 years of age, at which time, that share, or what remained of it, was to be paid directly to **Douglas’** children in equal amounts.



Legal action may be taken against those who have violated their duties as trustee.

VIOLATING THE TEN COMMANDMENTS



A Free Ride

When **Vera** died in 2002, **Trust A** and **Trust B** held various assets between them, including cash, securities, and two parcels of real property, one of which was a commercial building and the other a residence referred to as the “**San Pablo property**.” Shortly after **Vera**’s death, **Joyce**, the successor Trustee, moved into the **San Pablo property**, where she lived **rent-free** for about four years. You would be correct if you guessed that, by this action, **Joyce** violated the **First Commandment** (“*Thou shalt be faithful to the interests of the Trust and its beneficiaries*”), the **Third Commandment** (“*Thou shalt not use Trust assets for thy own benefit*”), and the **Ninth Commandment** (“*Thou shalt make Trust property productive*”).

As time went by, relations between **Joyce** and the other trust beneficiaries (her siblings) became strained. Siblings **David** and **Jeanee** eventually filed a number of petitions with the court, at least one of which requested that **Joyce** furnish them with an accounting of her actions as Trustee and the financial state of the trusts, including a listing of income received by the trusts, expenditures made with trust funds, and the like. Apparently, **Joyce** had been violating **The Sixth Commandment** (“*Thou shalt keep all Trust beneficiaries informed*”), as well.

Exposed

Joyce’s accounting showed that, in addition to living rent-free in the **San Pablo property**, she had used trust assets to pay for some of her living expenses—\$6,957.73 for a housekeeper, \$2,620.28 for cable TV, \$9,913.39 for utilities, and \$1,879.77 for a telephone—as well as other per-

sonal expenses—\$541.00 in Western Union charges, a \$50.00 payment to American Airlines, \$43.00 to a restaurant, \$108.00 for towing charges, \$287.00 for indoor plants for herself, and \$108.00 for a vacuum cleaner. Again, these expenditures were made in violation of the **First** and **Third Commandments**. **Joyce** even tried to justify the expenditures, such as the \$2,620.28 spent on cable TV, by stating that as Trustee, she needed the cable TV so that she might know when the real estate market reached its peak, presumably so she would know when to list the two parcels of real property for sale (which, by the way, she never did!).

A Fair Price

With regard to Trustee fees for services provided to **Trust B** (which owned both parcels of real property), the court found that **Joyce** was entitled to “reasonable” compensation

and took into consideration the fact that she had taken on the duties of property manager for both of the parcels of real property, duties which, by their nature, entailed certain skills for which **Joyce** should be compensated beyond what was normally considered "reasonable" for a non-professional fiduciary. For these duties, she would be compensated in an amount equaling 10% of the rents received as to the commercial building plus 10% of what would have been received had she collected (or paid) rent on the **San Pablo property**, for combined total fees of **\$28,461.00**. However, **Joyce** had paid herself Trustee fees of **\$130,500.00** from **Trust B**.

With regard to Trustee fees for services provided to **Trust A**, the court



PAYING THE PIPER

As we mentioned in the last issue of **Sempre Avanti!**, California law requires that anyone serving as a fiduciary demonstrate the **highest level** of good faith, loyalty, and diligence in the discharge of his or her duties. Courts do not look favorably upon fiduciaries who breach these duties.

For failing to rent the **San Pablo property** or to pay rent in exchange for occupying the property, the court surcharged **Joyce** in the amount of **\$142,450.00** (meaning that she was required to repay **Trust B**, the owner of the property, this amount), which is the amount of rent the court determined could have been collected. For using trust property to pay for her living expenses (housekeeping, cable TV, utilities, and telephone), the court surcharged **Joyce** in the amount of **\$21,371.17**. For using trust property to pay for her personal expenses (Western Union, American Airlines, the restaurant, etc.), the court surcharged **Joyce** in the amount of **\$1,137.00**. For paying herself excessive Trustee fees, the court surcharged **Joyce** in the amount of **\$102,039.00** as

found that "reasonable" compensation totaled **\$9,750.00**, since the value of the property in **Trust A** was relatively small and not difficult to manage. However, **Joyce** had paid herself Trustee fees of **\$48,500.00** from **Trust A**! It seems **Joyce** had also violated the **Eighth Commandment** ("*Thou shalt not take exorbitant Trustee fees*").

Holding Back Any Distributions

Moreover, as of June 2007 (nearly 5 years after **Vera's** death), **Joyce** had made no distribution to **David** and **Jeanee** from either of the trusts. From the court's record, it is difficult to know whether this had more to do with (1) **Joyce's** desire to continue using the trust assets for her own benefit or (2) the strained relations between



Joyce and her siblings and the various court petitions they had filed against her. If it was the latter, that would be a violation of the **Second Commandment** ("*Thou shalt not use the office of Trustee to take out thy aggressions on thy siblings*").

Joyce Acted In Bad Faith

Finally, the court found that **Joyce's** objections to **David's** and **Jeanee's** petitions were made in **bad faith**, and such objections had cost her siblings and the trusts a significant amount of money in legal fees in **Joyce's** effort to protect her own interests. The court pointed out that, in this regard, she had **not** been "*acting for the benefit of the trust*," in violation of the **First Commandment**.



to **Trust B** and **\$38,750.00** as to **Trust A**, for a total of **\$140,789.00**. For expending trust funds to oppose, in bad faith, her siblings' petitions, **Joyce** was surcharged in the amount of **\$29,160.00**. Additionally, for driving up her siblings' legal fees and costs by opposing their petitions in bad faith, the court ordered her to pay **David's** and **Jeanee's** legal fees and costs in the amount of **\$100,368.11**. Finally, **Joyce** was removed as Trustee and a new Trustee was appointed.

Eventually, **Joyce** was evicted from the **San Pablo property** by her successor and that property was sold. All of the

surcharged amounts, plus the legal fees and costs **Joyce** was ordered to pay on behalf of her siblings, were ordered to come out of her nearly **\$500,000.00** share of **Trust B**, leaving her distributive share of her parents' estate at less than **\$44,000.00**.

We hope this case demonstrates the importance of acting in accordance with the law when serving as Trustee of a trust for the benefit of other persons. If you have any questions regarding your duties as Trustee, we would be honored to speak with you and help you to avoid **Joyce's** fate.



Violating the Ten Commandments for Fiduciaries can be a costly mistake.



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Did You Know?

In Arcadia, California, peacocks have the right of way to cross any street, including driveways.



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Creighton Law Offices is located in San Mateo, California. The firm specializes in providing exemplary estate planning, trust administration, probate, and long-term care planning services to its clients.

Visit our new website!
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If you would like additional copies of this or previous newsletters, please contact **Peter** at (650) 344-0700.