


3:17 Interests Without Financial Consequences

Even where nonfinancial interests are concerned, those of the cestui have to be set first. 

The duty not to take any advantage can also be phrased as the duty to set the interests of the cestui first, or ahead of those of the fiduciary. To the extent that the interests in question are purely financial, it seems clear that the trustee violates this duty when he manages the trust in such a way as to give himself more money than the beneficiary. For then, instead of setting the beneficiary's interest ahead of his own, he does the opposite and sets his interests ahead of those of the beneficiary; and this is so because he takes some advantage.

But even where nonfinancial interests are concerned, those of the cestui have to be set first. An interesting example may be found in the writings of the Roman lawyer and statesman Marcus Tullius Cicero, in his book on Moral Duties (De Officiis, 3.26.99). In that book, Cicero praises the loyalty and "fidelitas" of M. A. Regulus, a Roman senator who was taken prisoner of war by the Carthaginians. They sent him back to Rome to plead before the senate for an exchange of prisoners, but they required him first to give his word that if the exchange of prisoners were not approved, he would return voluntarily to his captors. When Regulus arrived at the Roman senate, instead of arguing *for* the exchange, he argued eloquently *against* it since, in his view, such an exchange would have been very bad for Rome. The senate applauded his patriotism and voted against the exchange; whereupon Regulus returned to his captors and suffered a horrible death(1) at their hands. This was, for Cicero, a compelling example of virtue, that Regulus had placed his duty to Rome above his self-interest.

While no modern California cases have yet dealt with duties of preference with regard to nonfinancial issues, the basic principles can be illustrated by an extreme hypothetical case: Suppose a trustee receives two gold coins, it being understood that one of them is for the cestui, and the other he may keep. If the gold coins are identical, one would think that the trustee might choose either one for himself and give the other to the beneficiary. It is after all his duty to receive the coins and pass one on to the cestui. How could the beneficiary have been harmed by this choice? — But suppose one of the coins is pink gold and the other is yellow gold, and the trustee decides to give the pink one to the beneficiary and the beneficiary complains that he was entitled to the yellow one: if he brings his claim to court, will it be sustained? The trustee will defend on the ground that the coins are equal in value, but the cestui will deny it, and will in fact say to the trustee, "If you really believe that, then give me the yellow one!" It is clear that the beneficiary has no right to make *the selection of coins*: that is the prerogative, and duty, of the trustee. But in making the selection, the trustee must set the interests of the beneficiary ahead of his own, and by insisting on a particular coin against the wishes of the cestui, the trustee breaches this duty.

A similar issue arises in estate practice: One sister, her mother's favorite, is appointed executrix of the mother's estate, and the will provides that she must give her older sister a combination of cash and property (in her discretion) worth \$1 million. The residue of the mother's estate she may keep for herself. The estate has cash in excess of \$2 million after payment of all debts, taxes, and expenses. The executrix offers her older sister \$100,000 in cash and a parcel of property she contends is worth

\$900,000. The older sister says, "The parcel of property you have offered me is not really worth \$900,000, and you have failed to satisfy the bequest." The executrix calls in an appraiser who testifies that in fact the property is worth \$900,000; but the older sister says, "If you believe your appraiser, then keep the property for yourself. I want \$1 million in cash." — The law of fiduciary duty, particularly the duty of preference, would support the older sister, but the general law of estates, particularly the provisions giving the executrix discretion to carry out the provisions of the will, supports the executrix. The result will vary according to whether there are other considerations affecting the estate—such as any negative tax consequences of selling the property to realize cash, or other reasons that it would disadvantage the sister to sell the property: if it would be as easy for the estate to sell the property as for the older sister, the older sister will win; otherwise, she might not.

Endnotes

1 (Popup - Popup)

Cicero tells us that he died of sleep deprivation—a form of torture known even in Roman times, apparently.