No Interest Too Small For
Beneficiary Standing And Revocable Trusts

By Gary E. Bashian*

"Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in sometime later on. 'It is possible,' says the gatekeeper, 'but not now.'"

- Franz Kafka

As with any litigated matter, the question of Standing is ubiquitous in Surrogate's practice. However, more so than in most civil litigation, questions surrounding an Estate or Trust beneficiary's right to bring suit is one that takes on many nuanced forms, and is seldom answerable independent of the particular facts and circumstances which frame the matter at bar.

Indeed, a beneficiary's Standing before the Surrogate is, unlike most Supreme Court actions, not simply based on the black letter law of a statute, but very often determined by the interplay between the specific terms and powers of the Trust or Will at issue, the status the beneficiary is conferred by those terms and powers, in many cases the actions of a third-party fiduciary, *and* the statute governing a party's Standing itself.

Given these factors, a beneficiary's Standing to bring suit as an interested party takes on somewhat of a fluid nature, often contingent on one or more conditions precedent. Although counsel for a fiduciary is certainly well advised to consider moving to Dismiss Objections, or other types of initiating Petitions, pursuant to CPLR § 3211 (a)(3) for lack of Standing, it is not in every situation one would expect that a contingent beneficiary's claim may have been brought before the Court improperly, and thus ripe for immediate dismissal.

Much like Kafka's gatekeeper, the requirement of Standing can impede many litigants who, unaware of it, pursue access to the Courts but are rebuffed. As summarized by the New York County Surrogate's Court in the *Matter of Morse*, the Courts use a litigant's Standing as:

> "…a protection against vexations litigation and suits by irresponsible parties who do not have a tangible stake in the matter. Limitations on standing are thus designed to assure that only persons having a practical concern in the outcome of an issue—as opposed to one 'resting on

sentiment or sympathy'—be allowed to have their day in court with respect to it."[1]

The critical point where issues of Standing arise before a Surrogate is of course, "what differentiates the 'interest' that affords standing from the interest that does not is the former's pecuniary or financial nature."[2] It is for this precise reason, as many beneficiary interests are based on a host of contingencies directly determining if they have a pecuniary interest or not, that the question of Standing is exercised before the Surrogate's Courts with such frequency; i.e.: is the beneficiary's pecuniary interest, within the context of the instrument in question, so intangible and immaterial that they cannot be heard, or of enough substance that the Court will entertain their entreaty.

Given the enumerable variations of interests that beneficiaries can be conveyed by Will, Trust, or as is often the case, both, determining if the tangibility of an interest is enough to convey Standing can be quite difficult. However, be forewarned that even in circumstances where one might assume a beneficiary would be denied Standing as they have no identifiable or tangible pecuniary interest, this is not always the case.

Judge Holzman, of the Bronx County Surrogate's Court, recently addressed the this issue when considering the Standing afforded a contingent beneficiary of a Revocable Trust's right to object to an accounting of a surviving Co-Trustee. In the *Matter of Shay*[3], Grantor (who also happened to be a Co-Trustee and income beneficiary) established a Revocable Trust with powers to invade the corpus for the Health, Support, Maintenance and Welfare of Grantor. Upon Grantor's death, the corpus was to be divided into equal parts amongst six total family members, and held in in further Trust. During life, Grantor retained the right to amend the Trust freely; amendments being made in 1997 which authorized the Grantor, and her attorney-in-fact, to freely withdraw from the corpus for unspecified purposes, including, but not limited to, gifts. Additionally, after the Grantor's death, the Co-Trustee made a series of significant distributions for her commission payments that had not been yet taken. Unsurprisingly, a contingent beneficiary objected to the two accountings filed with the Court by the Trustee, one of which was reflective of the time period prior to Grantor's death, the second thereafter. The remaining Co-Trustee moved to dismiss the Objections pertaining to the accounting period prior to Grantor's death, arguing that Objectant, having only a contingent interest in a Revocable Trust which was, and could not have been realized during the Grantor's life, did not have the necessary pecuniary interest, and therefore Standing, to object.[4]

Objectant countered with a rule of law determined in the matter of *Siegel v Novak*[5], a Decision of the Florida District Court of Appeals Fourth District, interpreting New York Law, wherein it was held that beneficiaries with a "remainder interest in the

trust, had standing to object to the withdrawals from the trust prior to the death of the settlor…"

Surrogate Holzman, perhaps persuaded by the reasoning of the *Siegel* Court, found that Objectant did in fact have standing to bring Objections, even though the interest conveyed could not be realized while the Grantor was alive. Though this is by no means ground-breaking Jurisprudence, both the *Siegel* and *Shay* cases quietly re-affirm the New York Court's position that contingency beneficiaries of Revocable Trusts do in fact have Standing to object to accountings regarding transactions undertaken before the death of the Grantor, despite the lack of a concrete, pecuniary interest in the Trust itself prior to it becoming irrevocable. But whereas the *Morse* Court somewhat glibly utilized this doctrine as a blanket rule, both Surrogate Holzman and the Florida District Court examined the facts surrounding their respective controversies in fairly close detail, providing a degree of insight into the reasoning behind their Decisions, and the purpose of affording contingent beneficiaries Standing in the first place.

As the Florida District Court elucidated in *Siegel II*[6]*,* when the matter was brought before them again on appeal in 2011:

> "Under New York Law, after the death of the settlor, the beneficiaries of a revocable trust have standing to challenge pre-death withdrawals from the trust which are outside of the purposes authorized by the trust *and* which were not approved or ratified by the settlor personally or through a method contemplated in the trust instrument."

Notably, the *Siegel II* Court, and Surrogate Holzman in the *Shay* matter, while agreeing with the determination of the *Morse* Court in 1998 that: "…even when a beneficial interest in a trust is subject to a condition precedent, that uncertainty is not enough to deny standing to the party who seeks to protect the trust property to which such interest relates…"[7], they nevertheless seem to legitimize, or at least find sustenance, for the right of a contingent beneficiary to object where there has been some deviation from the governing language of the Trust, and/or the possible breach of fiduciary duty during its administration, by the Trustee.

Although the position is never articulated specifically in either the *Siegel* or *Shay* Decisions, the *Siegel II* Court, Judge Holzman, and the judiciary as a whole, are certainly aware of the implications of denying contingent beneficiaries Standing to object when a Revocable Trust accounting has been filed. If such were the law, fiduciaries acting on behalf of Settlors with waning capacity and liberal Trust powers could potentially act with impunity, and without regard to the duties they owe to the Grantor, the beneficiaries, or the Trust itself, as there would be no party afforded the legal right to hold them to task for, or even question, their acts. In all likelihood, the practical realities

of potentials for fiduciary abuse supplanted the concerns of the Judiciary, and Legislature, of vexatious litigation being brought by beneficiaries without a fully realized interest in a Trust to bring an accounting proceeding This presumably led to the sensible and realistic position to grant contingent beneficiaries Standing to bring Objections in situations such as these.

Whereas the gatekeeper to the law, no matter form it may take on, may be powerful, and by its nature obstructive, rarely is it unyielding to an innocent party who seeks redress and attempts to protect their rights, no matter how attenuated their interests might appear at first glance to be.

*Gary E. Bashian is a partner in the law firm of Bashian & Farber, LLP with offices in White Plains, New York and Greenwich Connecticut. Mr. Bashian is a past President of the Westchester County Bar Association, he is presently on the Executive Committee of the New York State Bar Association's Trust and Estates Law Section as Vice Chair of the Estate Litigation Committee, and is a past Chair of the Westchester County Bar Association's Trusts & Estates Section.

Mr. Bashian gratefully acknowledges the contributions of Andrew Frisenda, an associate at Bashian & Farber, LLP, for his assistance in the composition of this article.

---

[1] Matter of Morse, 177 Misc2d 43,45 [NY Surrogate's Court 1998]; citations omitted.
[2] Matter of Morse,supra.
[3] Matter of Shay, Slip Op 33 Misc3d 1230(A) [Bronx Surrogate's Court 2011]
[4] *see* Matter of Malasky, 290 AD2d 631 [3rd Dept, 2002]
[5] Siegel v Novak, 920 So2d 89 [FLA 4th DCA 2006]
[6] Siegel v Novak, 10/19/11 Decision re: motion for re-hearing [FLA 4th DCA 2011]
[7] Matter of Morse, supra, 46.