

# Probate by Order to Show Cause

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## Introduction

Although jurisdiction over the necessary parties in a probate proceeding is obtained in the typical case by service of a citation, when the decedent's estate is faced with an imminent risk of irreparable harm, practitioners should consider filing the probate petition by order to show cause. In these rare situations, orders to show cause offer two advantages over citations. First, orders to show cause can be made returnable sooner than citations, thereby reducing the time period in which harm could be inflicted on the decedent's estate. Second, orders to show cause can include temporary restraining orders enjoining potentially harmful actions, thereby maintaining the status quo through the return date. These are advantages that cannot always be achieved if the Surrogate grants preliminary letters testamentary to the will's named executor. And clients face no greater risks or significantly larger costs by filing probate petitions by order to show cause.



This article explains the benefits of filing probate petitions by order to show cause when the decedent's estate is faced with an imminent risk of irreparable harm. Section One compares orders to show cause with citations; Section Two explains the statutory procedural basis for filing probate petitions by order to show cause and compares filing by order to show cause with the will's executor's ability to expedite probate by applying for preliminary letters testamentary; and Section Three discusses emergency situations when practitioners should consider filing probate petitions by order to show cause.

## Section One: Comparing Citations and Orders to Show Cause

Although citations and orders to show cause share several similarities, as indicated above, orders to show cause provide two advantages over citations when the decedent's estate faces an imminent risk of irreparable harm: (i) a quicker return date and (ii) the possibility of obtaining a temporary restraining order.

The functional purposes of both documents is the same: to obtain jurisdiction over all necessary parties who have not waived issuance and service of process, and secondarily, to notify them that a special proceed-

ing to probate the decedent's will has been initiated.<sup>1</sup> As a result, the respective documents must name all parties who are required to receive process under SCPA 1403. There are a number of other basic similarities. Both documents are submitted to the Surrogate *ex parte*. The Surrogate then signs the document and the court issues a return date before the documents are returned to the filing party to effectuate service of process. At the return date, all interested parties have the opportunity to appear and object to the admission of the will to probate and the issuance of letters testamentary to the nominated executor.

Under the SCPA, a citation must be made returnable no earlier than ten days from the date of service if the necessary parties all reside in New York and twenty days if a necessary party resides in a state other than New York. If a necessary party resides outside the United States, that party is entitled to thirty days notice.<sup>2</sup> In cases where even one party is not a domiciliary of New York, the citation cannot be made returnable until the longest applicable period has lapsed. For example, if three parties live in New York and one party resides in Delaware, the citation cannot be made returnable for at least twenty days from the date of service. If an additional party in that circumstance lived in France, the earliest return date would be thirty days after service is completed. Given the requirements of SCPA 308, coupled with scheduling issues in Surrogate's Court, in many cases, the Surrogate's Court may schedule a citation's return date for more than one month after it is filed.

On the other hand, no statutory timetable governs the return date of orders to show cause. Indeed, CPLR 2214(d) provides that orders to show cause are returnable at "a time and in a manner specified therein." As a result, orders to show cause can be made returnable at any time that pleases the court, even as early as the following day.

In addition to the significantly shorter return time, orders to show cause also differ from citations because they can include temporary restraining orders. Temporary restraining orders enjoin specified parties from taking potentially harmful actions through the return date, at which point the court will hear argument on "converting" the temporary restraining order into a preliminary injunction; if granted, the preliminary injunction would remain in effect through the final disposition of the probate proceeding.<sup>3</sup>

Citations cannot include temporary restraining orders because the court would not be able to hold a

preliminary injunction hearing prior to the return date of the citation as determined by SCPA 308. The time periods for return dates in SCPA 308 conflict with the requirement in CPLR 6313(a) that a court set a preliminary injunction hearing “at the earliest possible time” after issuing a temporary restraining order. As a result, citations cannot include temporary restraining orders.

On the other hand, orders to show cause can include temporary restraining orders because they can be made returnable at the court’s discretion.<sup>4</sup> As a result, the court would be able to comply with the requirement in CPLR 6313(a) to set a hearing for a preliminary injunction shortly after issuing the temporary restraining order. The requirement to set a hearing date “at the earliest possible time” is required because the temporary restraining order is an *ex parte* restraint, and it is unfair to restrain another party’s activity for longer than necessary without giving him or her an opportunity to oppose the injunction.<sup>5</sup>

## Section Two: Procedure for Filing a Probate Petition by Order to Show Cause

Although probate petitions are typically filed with a citation, New York law does not prohibit filing probate petitions by orders to show cause. Sections 307, 1402 and 1403 of the SCPA regulate the filing and serving of probate petitions. These sections do not mention citations, and all of the jurisdiction requirements in these sections can be met with orders to show cause.

The procedure to file a probate petition by order to show is not markedly different than with a citation. The order to show cause would replace the citation and should be placed in front of the probate petition. The order to show cause and probate petition should share a blueback that reads, for example, “Order to Show Cause and Petition for Probate.” If the order to show cause includes a temporary restraining order (discussed below), the blueback could be titled, “Order to Show Cause with Temporary Restraining Order and Petition for Probate.”

Probate petitions filed by order to show cause can be filed by any party with an interest specified in SCPA 1402—just like a citation. Finally, pursuant to CPLR 2217, orders to show cause must be accompanied by an affidavit stating whether an application has ever been made for similar relief, and if applicable, the result of any prior application and any new facts not raised therein.

If the order to show cause includes a temporary restraining order, the requested restraints should be listed. The order to show cause should include a paragraph that begins, for example, “Until the further order of this court,” followed by a list of the requested tem-

porary restraints. The Surrogate may strike or modify the list of temporary restraints (as well as any other language) before signing the order to show cause. Finally, when an order to show cause includes a temporary restraining order, the accompanying affidavit should state why “immediate and irreparable injury” will result if the requested restraints are not immediately imposed.<sup>6</sup>

The use of an order to show cause cannot circumvent the requirements of Sections 307, 1402 and 1403 of the SCPA. As required by SCPA 307, service on domiciliaries must be by personal delivery, subject to an exception from the court.<sup>7</sup> Likewise, a person without an interest specified in SCPA 1402 cannot file a probate petition by order to show cause. And filing by order to show cause does not eliminate the requirement to name and serve all of the interested parties specified in SCPA 1403 who have not waived issuance and service of process.

Although not required, an attorney may want to appear to file the probate petition by order to show cause. Because filing probate petitions by order to show cause is unusual, clerks are likely to question the procedural basis for doing so. Furthermore, an attorney can persuasively ask the clerk for a quick return date. And if a temporary restraining order is requested, it is even possible that the Surrogate or the Court’s Law Department may have questions about the requested restraints. The preference for an attorney to file increases when the order to show cause includes a temporary restraining order or if there is a need for an early return date.

Finally, before filing a probate petition by order to show cause, practitioners should consider whether their clients’ goals can be accomplished by applying for preliminary letters testamentary when the probate petition is filed. The petitioner in the probate proceeding can apply for preliminary letters testamentary to enable the nominated executor to begin administering the estate and to take such actions as may be required to preserve and collect estate assets. Under SCPA 1412(1), the Surrogate has discretion to grant preliminary letters prior to the completion of process “upon such proof as the court shall deem necessary.” As a result, preliminary letters testamentary may enable the executor to begin carrying out most fiduciary duties well in advance of the return date of a citation.<sup>8</sup> Receipt of preliminary letters also enables the fiduciary to initiate any legal action on behalf of the estate.<sup>9</sup>

Nonetheless, filing a probate petition by order to show cause may still be the preferred method in certain emergency situations. First, the Surrogate may grant preliminary letters testamentary only to the will’s named executor. Therefore, parties with other inter-

ests specified in SCPA 1402, who desire to petition for probate, should still consider filing by order to show cause.<sup>10</sup> As explained in the next section, using an order to show cause by someone not named as fiduciary will be especially attractive when that party believes the named executor may breach his fiduciary duties and harm the decedent's estate. With respect to executors, although the nominated executor could apply for preliminary letters and also bring an independent action requesting a temporary restraining order, such a strategy would likely take more time and cost more money than filing a probate petition by order to show cause.

### **Section Three: Reasons to File a Probate Petition by Order to Show Cause**

Notwithstanding all of the structural and procedural similarities between citations and orders to show cause, the advantages of orders to show cause—a quicker return date and the ability to obtain a temporary restraining order enjoining harmful action—are enormous when the decedent's estate is faced with an imminent risk of irreparable harm. Although there are no reported decisions addressing filing probate petitions by order to show cause, orders to show cause may be particularly useful when it is necessary to (i) stay a related proceeding or (ii) prevent a party from taking actions that could cause harm or loss to the decedent's estate. Examples for these situations are explained below.

#### **A. Staying a Proceeding Involving Property in the Decedent's Estate**

When property in the decedent's estate is at issue in another proceeding, either in Surrogate's Court or in a different court, the outcome of that case may impact the Surrogate's Court's ability to ensure that the decedent's property is distributed according to his or her wishes. In such cases, it may be useful to request that the Surrogate stay the other proceeding pending the final disposition of the probate proceeding.<sup>11</sup> However, when a stay is urgently needed, it may be too late to request a stay on the citation's return date.

For example, in *In re Estate of Pignataro*,<sup>12</sup> the court granted an order to show cause together with a temporary restraining order staying an eviction proceeding in Housing Court.<sup>13</sup> The case provides an instructive example of filing a probate petition by order to show cause with a temporary restraining order staying a proceeding in a different court.

In that case, petitioner filed a petition to probate her mother's will. In the will, the decedent devised a life estate in her residence to the petitioner. The residence was the sole asset of the decedent's estate and the home of petitioner for nearly her entire life. The petitioner was also the respondent in an eviction proceed-

ing in Housing Court involving the aforementioned property. The eviction proceeding was brought by the sister of petitioner, who had obtained legal title to the property prior to the decedent's death. Shortly after the mother's death, petitioner's sister initiated an eviction proceeding in Housing Court.

Petitioner commenced the action by the filing of a probate petition by order to show cause with a temporary restraining order staying the eviction proceeding in Housing Court. Petitioner contended that a stay of the eviction proceeding was needed to allow the Surrogate's Court to take discovery under SCPA 2103 and 2104 to determine if the home should be considered an asset of the decedent's estate. Had the petitioner waited for the citation's return date, the Housing Court probably would have granted the application to evict petitioner from the home and, in effect, determined that title to the property belonged to the petitioner's sister. If that occurred, it may have been too late for the Surrogate's Court to determine whether the house was an asset of the decedent's estate and petitioner would have been homeless.

The benefit to using an order to show cause to stay a proceeding involving property in the decedent's estate is not limited to the facts in the above case or to cases involving real property. Practitioners should consider filing probate petitions by order to show cause any time property (real or personal) allegedly belonging to a decedent's estate is at issue in another proceeding and the result of that proceeding may render moot a Surrogate's determination concerning the estate's ownership of property.

#### **B. Risk of Loss to Property in the Decedent's Estate**

Using orders to show cause should also be considered when there is an imminent risk of harm to property in the decedent's estate. For example, when the decedent's estate includes personal property with a unique or sentimental value and a risk of loss to such property exists, it may be too late to wait until a citation is made returnable. Instead, consider obtaining a quicker return date and even enjoining the harmful actions from occurring through the return date by filing an order to show cause with a temporary restraining order.

Imagine a distributee possesses a valuable and unique painting, which is an asset of the decedent's estate. And imagine further that the distributee, who is angry about being disinherited, has listed the painting for sale with an art dealer. In such a case, it may be too late to wait ten or more days for a citation's return date. However, an order to show could force the distributee to appear before the Surrogate sooner than a citation's return date and could also include a temporary restraining order enjoining the sale of the painting.

In this example, once the order to show cause is signed, it should be served immediately on the distributee (and the art dealer). If the distributee or dealer proceeded with the sale, they would be in contempt of court and potentially subject to penalties for such willful disobedience of a court order.<sup>14</sup>

Finally, practitioners should remember that any person with an interest specified in SCPA 1402 may file a probate petition by order to show cause. Probate petitions filed by order to show cause do not need to be filed by a named fiduciary. In fact, for example, if a legatee or creditor (or anyone interested) is concerned about a named executor's prospective conduct, the order to show cause could request the appointment of an administrator c.t.a. or limited administrator. In such cases, practitioners should name the proposed additional or replacement fiduciary (consider the public administrator) in the order to show cause.

## Conclusion

When the decedent's estate is faced with an imminent risk of irreparable harm, practitioners should consider filing probate petitions by order to show cause. In such emergency situations, orders to show cause can have enormous advantages over citations. Orders to show cause can force parties to appear before the Surrogate well in advance of the return date of a citation, thereby reducing the time period in which damage may be done to the decedent's estate. Orders to show cause can also include temporary restraining orders, which maintain the status quo by enjoining potentially harmful actions from occurring through the return date.

## Endnotes

1. Citations are the form of process addressed in Section 306 of the N.Y. Surrogate's Court Procedure Act (SCPA). Orders to show cause are addressed in Section 2214(d) of the N.Y. Civil Practice Law and Rules (CPLR).
2. SCPA 308(1)(a).
3. CPLR 6301, 6311, 6313(a).
4. CPLR 2214(d).
5. See David D. Siegel, *New York Practice* § 330 (Thomson West, 4th edition, 2005).
6. CPLR 6313(a).
7. An order to show cause could request that service on a domiciliary be completed other than by personal delivery. For such a request to be granted, the movant would need to show "with due diligence" that service by personal delivery cannot be "effected" or would be "impracticable." SCPA 307(3). The Surrogate may be wary of such a request because service had not yet been attempted by personal delivery. In any event, the reason for such a request in an order to show cause should be provided in the accompanying affidavit. If such reasons exist, avoiding the personal-service requirement in SCPA 307(1) may be an additional benefit of filing probate petitions by order to show cause.
8. Although the Surrogate must generally grant preliminary letters testamentary to the will's named executor, under the SCPA, Surrogate has broad power to impose limitations and restrictions on the letters. The Surrogate can also require the executor to file a bond prior to receiving preliminary letters testamentary. SCPA 1412(5).
9. In certain cases, the fiduciary may bring an action on behalf of the estate prior to the issuance of preliminary letters testamentary. For a discussion on the topic, see 5 Warren's Heaton Surr. Ct. Practice 61.01[2] (7th ed., 2010).
10. In such cases, practitioners should also consider an application for limited and restrictive letters under SCPA 702.
11. There are few decisions addressing the Surrogate's Court's power to stay proceedings in other courts. In *In re Estate of Pignataro*, N.Y.L.J., Feb. 5, 2010, p. 33, col. 1 (Sur. Ct. Bronx Co.), which is discussed in this section, the Bronx County Surrogate's Court stayed a proceeding in Housing Court involving assets of the decedent's estate. For further information on stays, see CPLR 2201 and 3211(a)(4) and David D. Siegel, *New York Practice* §§ 255, 262 (Thomson West, 4th edition, 2005).
12. N.Y.L.J., Feb. 5, 2010, p. 33, col. 1 (Sur. Ct., Bronx Co.).
13. The decision does not address filing probate petitions by order to show cause.
14. N.Y. Judiciary Law, Article 19; SCPA 606, 607.