

# New York's Article 77: A Useful Tool for Expediting Trust Litigation

November 14, 2018

Charles R. Jacob III

---

When considering fiduciary litigation in New York, practitioners often think first of Surrogate's Court (New York's probate court) or full-out litigation in New York State Supreme Court (as New York's basic trial court is named). There is, however, a more efficient vehicle for litigation involving trusts than either of those routes. Recently, Goulston & Storrs represented the beneficiary of a relatively small trust and was able to use Article 77 to bring about a complete and economical resolution of a dispute with the trustee.

Article 77 of New York's Civil Practice Law and Rules ("CPLR") gives the Supreme Court concurrent jurisdiction with Surrogate's Court over cases involving most trusts, and allows the case to proceed as a "special proceeding" under CPLR Article 4. A special proceeding is a very streamlined procedural format more akin to a motion than a full litigation. This permits the practitioner to have the case heard by a judge far more quickly and efficiently.

Generally speaking, there will be jurisdiction in New York if either the trustee or trust assets are located in the state, and sometimes if other significant matters involving the trust occurred in New York. The Article 77 special proceeding may be commenced with as little paperwork as a notice of petition and a petition that states the relief sought and the grounds for that relief. A supporting affidavit is desirable for evidentiary support but not required. The notice of petition must be served in the same manner as a summons; or, by proceeding with an order to show cause in the first instance, the petitioner can request the court to direct how service is to be made.

If the matter in dispute exceeds the county's minimum for the Commercial Division (which is \$500,000 in New York County (Manhattan) but \$50,000 to \$200,000 in the other counties of the state), the Commercial Division generally provides even more efficiency in the processing of a case, and has judges with more expertise in financial matters.

Under CPLR Article 4, the notice of petition or order to show cause specifies the time and place of the hearing on the petition. As little as eight days' notice is permitted, although as a practical matter longer notice periods are usually used. The respondent serves an answer; and the petitioner gets a reply if the notice period is long enough. Any motions must be made returnable at the same time and place as the petition, and there is no discovery except with leave of the court, with one exception described below. At the hearing, the court is to "make a summary determination" on the papers "to the extent that no triable issues of fact are raised." If triable issues of fact are raised, "they shall be tried forthwith." That could be at the hearing if counsel have prepared accordingly;

otherwise, it should be relatively soon after the initial hearing. Once the court has decided the matter by whatever means, judgment is entered “determining the rights of the parties.”

Article 77, which is specific to trusts (Article 4 can be used for other types of disputes as well), gives “any party ... the right to examine the trustees, under oath, either before or after filing an answer.” This obviously can be useful if a beneficiary has questions about a trustee’s activities. Conversely, Article 77 allows the trustee to be the petitioner and seek judicial guidance if beneficiaries’ interests are competing, or have an accounting be judicially settled.

Article 77 was relatively seldom-used by New York practitioners for many years, but has gained favor since the financial crisis for resolution of disputes involving mortgage-backed securities, most of which are organized in the form of trusts. These disputes can involve billions of dollars and have been heard and resolved in the Commercial Division of Supreme Court, New York County. But the efficiency of Article 77 allows smaller cases to be litigated economically as well.

If you have a question about Article 77, or any other business concern, we invite you to reach out directly to any member of our Probate and Fiduciary Litigation group.