

Rules and Instructions for an Infant/Incapacitated Person Compromise

Westchester County Supreme Court
Settlement Conference Part
Hon. Joan B. Lefkowitz., J.S.C.
Patricia Goethals, Esq., Court Attorney-Referee
Amanda Hall, Part Clerk
SettlementConferenceWestchester@nycourts.gov

In Westchester County Supreme Court, all infant and incapacitated person's compromises shall be assigned to the Settlement Conference Part for disposition. Upon the filing of all required supporting documents, the Settlement Conference Part will schedule and hold a compromise hearing and issue a compromise order. All inquiries regarding compromise applications should be sent by email to the Settlement Conference Part. Inquires should not be sent to the IAS Parts.

Sample forms and orders may be found on the Ninth Judicial District's website at <http://ww2.nycourts.gov/courts/9jd/diffCaseMgmt.shtml> under "Forms."

COMPLIANCE WITH RULES AND STATUTES

These rules are adopted in recognition of the equitable duty of this Court to consider infants and persons judicially declared incompetent (hereinafter "incapacitated persons") to be wards of the court and to protect them as such. In order to safeguard the rights of infants and incapacitated persons, this Court will require strict adherence to its rules and all other applicable laws and rules. Failure to strictly comply may result in delay and/or denial. Please make certain before you file the required documents that, all of the affirmations and affidavits are consistent, that your application fully complies with and provides all information required by these rules as well as CPLR Article 12 (CPLR 1208), 22 NYCRR 202.67 and Judiciary Law § 474. If a structured settlement is proposed, the application must also comply with General Obligations Law Article 17, § 5-1701, *et. seq.* as well as Internal Revenue Code §§ 104 and 130.

NOTE that 22 NYCRR 202.5(e) requires the **redaction of all confidential personal information** in filed documents, including an infant's full name and birth date. Infant's initials and birth year should be used in filed documents.

THE FOLLOWING DOCUMENTS ARE REQUIRED FOR SUBMISSION TO THIS COURT IN A COMPROMISE PROCEEDING:

1. An Order to Show Cause and Stipulation of Settlement subject to the compromise order (stipulation needed if an action commenced); * Sample stipulation of settlement located on Ninth Judicial Districts' website

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| <p>2. Counsel’s affirmation (see CPLR 1208[b], [e]-[f], 22 NYCRR 267.67 [a] as to disbursements*, and 22 NYCRR 267.67[d] as to OCA retainer number);</p> | <p>* Disbursements for office overhead, including postage, overnight delivery, in-house copying, legal research, telephone calls, parking and local travel expenses and per diem appearance fees are not allowed.</p> |
| <p>3. Parent’s/Guardian’s affidavit or, if no action is commenced, petition verified by parent/guardian (see CPLR 1208 [a]; 22 NYCRR 202.67[b]);</p> | |
| <p>4. Infant’s affidavit including consent (only if the infant is fourteen years of age or older);</p> | |
| <p>5. Recent affidavit, affirmation or report from the infant’s physician (within one year from the date of the petition/application) which must include the diagnosis, treatment and prognosis (if not fully healed);</p> | |
| <p>6. Supporting medical proof/records with respect to the treatment of the injury (see CPLR 1208[c]);</p> | |
| <p>7. Other necessary and/or helpful exhibits such as lien letters;</p> | |
| <p>8. Proposed Order;</p> | <p>* Sample orders located on Ninth Judicial District’s website</p> |
| <p>9. For structured settlements (with an annuity):</p> | <p>Structure settlement broker’s affidavit (sample on website);
Proposed settlement agreement;
Proposed assignment agreement;
Proposed annuity contract;
Proposed guaranty agreement;
Accepted and Rejected structure proposals (at least 2 rejected proposals for the same cost and payout terms as the accepted proposal)</p> |

THE PROPOSED ORDER

Sample orders are on the Ninth Judicial District’s website: <http://ww2.nycourts.gov/courts/9jd/diffCaseMgmt.shtml> under Forms. Each proposed order can be adapted to fit the circumstances presented.

COUNSEL’S AFFIRMATION

Counsel must provide an affirmation which demonstrates full compliance with and provide all information required by CPLR 1208 and 22 NYCRR 202.67 and contain sufficient details concerning the following:

Plaintiff/Petitioner’s standing. Counsel’s affirmation must state that parent has standing, as parent and natural guardian, or guardian, and demonstrate that plaintiff/petitioner is a person who is qualified and has standing to bring the application as authorized by CPLR 1207 (hereinafter “plaintiff/petitioner”);

Recent and/or current complaints and condition of the infant;

Medical expenses. Counsel and plaintiff/petitioner must obtain written proof of the total amount of the charges incurred for each doctor, medical provider and hospital in the treatment care of the infant and the amount remaining unpaid for such treatment and care (NYCRR 202.67);

All possible liens and claims. Counsel and plaintiff/petitioner must provide sufficient documentary proof of either the absence or existence of liens against the infant’s settlement proceeds; obtain an itemized statement for any payments made by a lienor; provide sufficient details of the efforts made to resolve such liens, if any, claims for equitable or contractual subrogation or reimbursement by a private medical insurer or employee benefit plan such as ERISA must be identified and the reason for paying or not paying or compromising such claim must be set forth in detail.

NOTE: If lien information is not filed with the proposed Order to Show Cause for a compromise, the Court will include a directive to serve a request for the lien information within a week of the Order to Show Cause, and the return date will be for the filing of the lien letters/information. Sample lien request forms are located on the Ninth Judicial District’s website;

Note: 22 NYCRR 202.67(b) requires the court to make provisions for payment of all medical expenses and liens. The court is concerned that if this issue is not properly addressed, the plaintiff may be surprised and held accountable post settlement. It must be noted that a lien may arise by operation of law if public funds were used to pay for the medicals; and that the lien may have to be satisfied from the proceeds of the settlement regardless of the awareness of counsel or plaintiff/petitioner; **(Counsel is responsible for submitting lien search requests to HMS/New York State Medicaid Inspector General and the County Attorney and/or DSS in the County where the infant resides and where the infant resided at the time of the accident/incident and to any ERISA health insurer);**

Counsel fees and disbursements. Counsel must set forth all services rendered in support of its application for counsel fees. All disbursements claimed by counsel and for which counsel is seeking reimbursement must be itemized with copies of invoices. Office overhead expenses should not be included in disbursements, as they will not be reimbursed from the settlement proceeds, including postage, overnight delivery, in-house copying, legal research, telephone calls, parking and local travel expenses and per diem appearance fees;

Retainer Statement Compliance. State that a retainer was filed and list OCA retainer number (NYCRR Section 202.67[d]);

Reasons for Recommending the Settlement. CPLR 1208 (b) (1) requires counsel to provide the "*reasons for recommending the settlement.*" These "*reasons*" must be set forth in the supporting affirmations and affidavits. Moreover, this Court requires that counsel provide a detailed explanation as to why the proposed settlement is fair and reasonable. In that regard, counsel must address the issues of liability and damages and the infant's current complaints and residuals, if any. Note: Conclusory assertions (such as "*full recovery*" or "*best interest of the child*") without specification and supporting facts, will not be sufficient;

Other Related Claims and Possible Conflicts. A full identification of all claims made by any person, including a parent or other family member, arising out of the same accident/incident must be provided in the parent's affidavit. The plaintiff/petitioner's affidavit must list all injuries sustained by that person and list all procedures/surgeries necessitated by the injury, and the amount of any settlement of the claim, so that with full disclosure, the court can determine if the proposed apportionment of the settlement proceeds is "*fair and reasonable.*" [see CPLR 1208 (a) (8)] Language set forth in CPLR 1208 (b) (2) must also be set forth in counsel's affirmation with respect to the lack of conflicts. Policy limits should also be provided.

PLAINTIFF'S/PETITIONER'S AFFIDAVIT/VERIFIED PETITION

Must demonstrate that plaintiff/petitioner is one of the persons authorized by CPLR 1207 to make said application, and in addition to the information required by CPLR 1208 (a) and NYCRR 202.67, must include details regarding the following:

Qualification and standing of plaintiff/petitioner to bring the application. CPLR 1207 provides that the application may be made by one of the following persons: a guardian of the property or guardian ad litem of an infant or a parent having legal custody or another person having legal custody, or if infant is married, by an adult spouse residing with infant. Note: At times a parent may not qualify, for example, when custody has been removed by the Family Court. Also note, that even where a parent has lawful custody a problem can arise, for example, when the lawsuit is commenced by one parent on behalf of the ward and the compromise application is brought not by that parent, but by the other parent, who was not named as the natural guardian in the underlying claim or action. In such a situation, counsel must also provide, among other things, proof of the authority of the non-party parent to settle or discontinue the loss of services claim. For an incapacitated person, the person's court-appointed guardian has standing.

Plaintiff/petitioner's understanding and approval of the proposed settlement. In addition to all of the above, a plaintiff/petitioner must acknowledge an awareness and understanding of all of the reasons given by counsel for recommending the settlement and approval of the settlement; as well as approval and full understanding of the proposed terms and apportionment/distribution of the settlement proceeds.

Recent and/or current complaints, if any of the infant. All injuries, conditions and complaints, if any, made by the infant especially recent and/or current complaints, so that they can be fully addressed at the compromise hearing. At the hearing the following questions will be asked of the petitioner and the infant: Does the infant have any recent or current pain or limitations? When is the last time any pain or limitations were experienced? How often? Has the infant's physical or

mental ability or range of motion, or ability to engage in any activities been affected?; and if so, what is the prognosis or plan for the future? If the Court finds that the infant's recent and/or recurrent complaints have not been adequately addressed, the application may be denied.

Medical Services, Expenses, Payments and Liens. CPLR 1208 (a) (4) requires that a plaintiff/petitioner provide an itemization of such expenses; and subdivision (a) (7) provides that the affidavit/verified petition of the plaintiff/petitioner must state whether reimbursement for medical expenses has been received from any source. 22 NYCRR 202.67(b) compels the court to make provision for payment thereof. Thus, parent/petitioner and counsel are cautioned not to be vague. The court must not be left with only mere speculation as to whether there are any unpaid bills or liens. For example, an unsupported statement that "*all medical expenses have been paid*", or that they have been "*paid by Medicaid*" will not suffice without documentary proof of payment. In addition, vague statements such as, "I have not been aware of any unpaid liens or bills," also will not suffice.

MEDICAL RECORDS and CURRENT AFFIRMATION/REPORT

Medical records of the treatment of the injury must be filed. Additionally, while a current affirmation is not required, the court does mandate that a recent [within one year of the date of the petition] medical record or report be filed in support of the application. Such affirmation, record, or report should provide a diagnosis and the current condition (fully healed/recovered or listing residuals from the injury). In addition, if there are any recent or current complaints and/or limitations, the current affirmation/report/record should provide a prognosis and whether further medical treatment is required/recommended so that the Court and the plaintiff/petitioner can make a meaningful determination as to whether the proposed settlement is fair and reasonable. Sparse and conclusory medical reports or affirmations will not be acceptable.

OTHER NECESSARY AND/OR HELPFUL EXHIBITS

When necessary, the application should have as exhibits a copy of all documents (relating to liability and damages), which would assist the court in arriving at a determination, including affidavit of no excess insurance when the matter is settled for the policy limit. When such documents are included they should be appropriately identified in the supporting affidavits and affirmations, as well as filed as separate exhibits. Note: Additional documents will be necessary when a structured settlement is proposed (See below).

STRUCTURED SETTLEMENTS

Compliance with rules and statutes. These rules for a proposed structured settlement are supplemental to the above rules for the conventional settlement of claims for infant or incapacitated person. Compliance with all applicable statutes and rules, including §§ 104 and 130 of the Internal Revenue Code and the New York State Structured Settlement Protection Act (General Obligations Law, Article 17, § 5-1701, *et. seq.*) are required.

Compliance with the Internal Revenue Code. One of the benefits of a structured settlement is that the full amount of the periodic payments received as physical injury damages is excludable from the claimant's income by law. By comparison, a claimant receiving damages in the form of a lump sum must pay tax on the subsequent earnings from investing that lump sum. The Internal Revenue Code, in essence, allows settlement funds to be "*invested*" in an annuity and grow tax free (U.S. Internal Revenue Code §§ 104 and 130) (hereinafter the "Code".) However, it must be noted that the

Code does not (without adverse tax consequences) permit a plaintiff to receive (or even constructively receive) settlement funds and then invest same in an annuity. Such a transaction would result in taxable income. By comparison, in the case of a structured settlement, the plaintiff and the defense agree to settle the physical injury claim in exchange for the defendant's promise to make a stream of periodic payments to the plaintiff. Under § 130 of the Code, the defendant or its liability insurance carrier then assigns its periodic payment obligation to an affiliate of a financially strong life insurance company. The assignment company agrees to receive an assignment of defendant's obligation to pay and then acquires an annuity from the life insurer to fund the periodic payments to the plaintiff. Under the Code, the full amount of these periodic payments (including the appreciation in value between the cost of the annuity and the total benefits paid) is tax-free to the plaintiff. In other words, the Code allows a defendant or its liability insurance carrier to use the same settlement proceeds to purchase an annuity and, then assign all payments including the growth thereon, to the plaintiff tax free. Therefore, both the settlement proceeds which are used to purchase the annuity, and the interest earned and paid via that annuity, are tax excludable.

For structured settlements - other required exhibits.

When a structured settlement is proposed the following additional exhibits are required to be submitted with the application:

- (a) the affidavit of the Structured Settlement Broker;
- (b) the proposed settlement agreement;
- (c) the proposed assignment agreement;
- (d) the proposed annuity contract;
- (e) the proposed guaranty; and
- (f) accepted structure (annuity) proposal and at least two rejected/alternative structure (annuity) proposals for the same cost and payout terms as the accepted proposal.

The proposed order for a structured settlement. Counsel must use one of the court's sample orders for a structured settlement, which can be adapted to fit the circumstances presented, comport with Internal Revenue Code requirements.

Supporting documents and additional requirements. In addition to the requirements and documents described above for a traditional compromise application, the application for a structured settlement must also include and be supported by:

Counsel's affirmation (additional requirements). In addition to compliance with all other requirements for an ordinary compromise application, counsel for the plaintiff/petitioner, in support of a structured settlement must demonstrate "due diligence" in the selection of an annuity and a structured settlement broker and demonstrate that the plaintiff has been provided with the disclosure required by General Obligations Law § 5-1702 and § 5-1701 and copies of all of the above described proposed implementing structured settlement documents, as well as copies of the alternative/rejected and/or other competitive structure proposals from other annuity providers or from other structured settlement brokers, which were considered and rejected.

Plaintiff/Petitioner's affidavit/verified petition (additional requirements). In addition to the information required by CPLR 1208 and the rules, the affidavit/verified petition must acknowledge (1) receipt of a copy of all of the above documents as well as a copy of counsel's affirmation in support of the proposed structured settlement; (2) that all of the above was fully explained by

counsel, and (3) receipt of all of the "initial disclosure" required by General Obligations Law § 5-1702, including the advice "to obtain independent professional advice relating to the legal, tax and financial implications of the settlement, including any adverse consequences." It should be noted that: "'Independent professional advice' means advice of an attorney, certified public accountant, actuary or other licensed professional adviser: who is engaged by a claimant or payee to render advice concerning the legal, tax and financial implications of a structured settlement or a transfer of structured settlement payment rights who is not in any manner affiliated with or compensated by the defendant in such settlement or the transferee of such transfer, and whose compensation for rendering such advice is not affected by whether a settlement or transfer occurs or does not occur." It must be further noted that for the purchase of an annuity (as distinguished from a sale or transfer thereof) a structure broker (whether selected by a plaintiff or a defendant) cannot qualify as an "independent professional adviser" under the above definition. Unless plaintiff receives a prior waiver upon good cause shown, plaintiff is required by this court's rules to obtain a competing proposal from a structure broker who is selected by the plaintiff and who is independent of the defendant and defendant's liability insurance carrier.

Affidavit of the Structured Settlement Broker. This court's rules require that an application for approval of a proposed structured settlement must be supported by an affidavit provided by a structure broker. In addition, that affidavit must conform to, and contain all representations and warranties that are set forth in the form affidavit which is on the Ninth Judicial District's website under Differentiated Case Mgmt and Forms. In the annuity field the bargaining agents are structured settlement specialists, and are usually referred to as structure brokers. Most defendants and/or their liability insurance companies have their own list of preferred structure brokers and preferred annuity issuers (life insurance companies). In addition, an annuity issuer will generally sell an annuity only through a structure broker that is appointed as an agent for such issuer. The vast majority of structure brokers, however, operate independently, and are not affiliated with any liability insurance company or annuity issuer. Furthermore, most structure brokers have agency relationships with multiple annuity issuers. The structured settlement application must be supported by an affidavit provided by the broker who places the annuity. The affidavit must, among other things, include: (a) a representation that the cost to purchase the proposed annuity was arrived at after a survey of the market of annuity providers in order to confirm and obtain the best value (price/quality) for same; (b) a full description of all the other annuity plans considered in addition to the one being recommended; and (c) all other warranties, assurances and affirmations which are set forth in the form sample broker's affidavit. (A sample structure broker affidavit is on the court's website under "Forms").

The following proposed documents, which will implement the recommended structured settlement, must be annexed as exhibits to the application and referred to in the structure broker's affidavit:

- (a) Proposed Settlement Agreement;**
- (b) Proposed Assignment Agreement;**
- (c) Proposed Annuity Contract;**
- (d) Proposed Guaranty Agreement; and**
- (e) Accepted proposal and Rejected Proposals (with total guaranteed and anticipated payouts).**

Due diligence and shopping for the best deal.

This court's rules require counsel for plaintiff, in his supporting affirmation to set forth and explain the efforts made to provide the infant/incapacitated person-plaintiff with the best and least costly annuity. When conducting such "due diligence", counsel for infant/incapacitated-plaintiff should consider the following observations: (a) The Cost of the Annuity. While a fixed annuity is a contractual obligation rather than a traditional investment product, its future payout, and thus its rate of return, is affected mostly by the interest rates prevailing at the time of purchase. Despite the fact that annuity issuers periodically publish a schedule of rates, which set forth the cost to buy various future periodic payments, other variables affect the ultimate quote. First, rates between carriers may differ and, in any event, the published rates for each carrier are periodically adjusted relative to prevailing interest rates. Second, the cost to purchase an annuity may be affected by the sex and life expectancy of the infant-plaintiff. Third, market place competition, rivalry and circumstances, which affect each annuity issuer, may also play a part in the annuity's return. When lifetime benefits are part of the proposed annuity, one unknown variable is infant/incapacitated-plaintiff's real life expectancy. For example, when payments which terminate at death are included in the proposed structure, and the infant-plaintiff, due to some injury or condition, has a shorter life expectancy than normal (and is thus given a "rated age"), the cost of the annuity may be less because the annuity issuer may anticipate making fewer payments. In such cases, although the offered annuity may have larger projected payout (if infant/incapacitated-plaintiff lives to a normal life expectancy), the annuity issuer's actuary "calculates" that the actual payout will be truncated by those "payments" which terminate upon death. In any event, as with mortgage rates, market forces and competition between issuers plays a role in the proposed cost of the annuity.

Independence of the structure broker. As noted above, the Internal Revenue Code, in essence, prohibits the direct purchase of an annuity by the plaintiff from the settlement funds. The Code mandates (in order to achieve tax excludability) that the claim be settled in exchange for the defendant or its carrier, with a preference in the selection of a structure broker. It should be noted that, although such a defendant selected broker has no fiduciary relationship with or obligation to the plaintiff, this lack of fiduciary obligation does not mean that such a broker cannot provide the best possible annuity advice and plan. In any event, nothing in the Tax Code precludes a plaintiff, from selecting and receiving advice from a structure broker who can act as a fiduciary for plaintiff and who is independent of the settling defendant and its liability insurance carrier. Indeed the recent experience in structured settlements has been that in serious physical injury cases, most often both parties are receiving advice from their own structured settlement brokers. As stated above, in many states the involvement of a broker selected by plaintiff is the accepted norm.

Unless a waiver is obtained upon good cause shown, the court's rules require, among other things, that the plaintiff obtain annuity advice from a structure broker that is independent of the defendant and its liability insurance carrier. This court's chief goal is to make certain that a settling infant is being provided with an annuity which is not only personally designed to meet the infant's needs, but also the best value available from a quality and cost evaluation. Although, it is not the purpose of these rules to imply that these goals cannot be achieved by a broker selected by a defendant, plaintiff is required by these rules to obtain advice from an independent plaintiff-selected broker if for no other reason but to introduce competition and market forces to the process. Thus, both brokers are required by these rules to survey the annuity market, and the application must provide an explanation why the proposed annuity represents the best value and is most suitable for this claimant. Due diligence in the selection of an independent structure broker is required in order to minimize the

exposure of the plaintiff to abuses. Since the sale of a structured settlement may undermine the goal of the court to provide long term financial security to an injured settling party, counsel is advised that when doing due diligence in the selection of a broker, counsel should refrain from engaging the services of any structured settlement broker or company which has an affiliation with factoring companies. This is not meant to imply that, when an annuitant seeks to sell and transfer an annuity, a broker cannot qualify as a "licensed professional adviser," in accordance with § 5-1701(e) of the General Obligations Law nor is it meant to imply that such broker cannot provide good advice on how the annuitant can maximize the purchase price and not fall victim to a predatory factoring company. However, these services, should be provided at the request of the annuitant. In contrast, it would not seem appropriate for a structured settlement broker to provide the names of its client annuitants to such factoring companies for solicitation purposes; and it would certainly seem unethical for a structured settlement broker to receive a referral fee or any form of compensation from such a company. It must be noted that the "structure broker's affidavit" which is required by this court's rules must contain a representation that said broker does not have any such relationship with a factoring company. In any event, as stated above, it is not uncommon for costs of an annuity quoted by different annuity issuers, for the identical proposed annuity, to differ by more than 10%. When considerable sums are involved, 10% can be a very considerable savings to a plaintiff; and hopefully the competition between said brokers will result in a benefit for the plaintiff.

Compensation for the Broker. A structure broker is paid a one time commission of 4% for services rendered in connection with the selection and purchase of an annuity. This commission is paid by the annuity issuer. In theory this commission is not deducted from the settlement proceeds, but this cost is taken into consideration by the annuity issuer when it makes an annuity proposal. But, unlike many other types of investment vehicles there are no ongoing management, advisory, or administrative fees under a structured settlement. This can represent a significant cost savings over the decades of pay-out to a permanently disabled or minor plaintiff.

In any event, the issue of compensation and/or commissions for structure brokers must be addressed by counsel in the affirmation supporting the application. When more than one broker is involved, a dispute may arise as to which broker is entitled to the commission. Usually these disputes are resolved amicably with a commission sharing agreement. There are times when an amicable agreement cannot be achieved. In such instances the issue should be brought to the court's attention.

Guaranteed Payments. Counsel must be aware of, and not confuse the various forms of guarantees which are available and should be provided to a settling plaintiff/annuitant. There are three distinct guarantees. The "guaranteed" payments mentioned in the annuity contract and in the form orders which have been provided by this court, refer to that portion of periodic payments which will not terminate upon the death of infant/impaired person. Upon death, these "guaranteed" payments will be made to the estate of the infant/impaired person, or to the designated beneficiary of said person. These "guaranteed payments" are not to be confused with the guaranty of the annuity. This guarantor company will guarantee the obligation of the assignee company to fulfill its obligation to make the future periodic payments in accordance with the annuity contract. Neither of these guarantees should be confused with the additional guaranty provided by the Life Insurance Company Guaranty Corporation under New York Insurance Law, Article 77. Under NY Insurance Law, Article 77, the Life Insurance Company Guaranty Corporation of New York provides \$500,000 of protection with respect to an annuity in the event an annuity issuer becomes insolvent if the annuity issuer is licensed in New York and the plaintiff is a New York resident. In view of this, where the

amount structured is more than \$500,000, it may be prudent, but not required by law, to purchase annuities from more than one annuity issuer in order to keep the cost of each annuity below \$500,000. The court is informed, however, that purchasing more than one annuity generally results in lower payments to the plaintiff. In any event, if the proposed annuity is to cost more than the above \$500,000 maximum guaranteed by Article 77, both counsel and the structure broker must justify any proposed investment in an annuity which does not take full advantage of that added protection.

Lock-In Quotes/Pre-Funding and Notices. Plaintiff's counsel should avoid placing the court in a "catch 22" by pre-funding an annuity or locking in an annuity quote before submitting a structured settlement application for approval. **Unless the "lock in quote" acknowledges that it is subject to court approval, counsel must seek court approval before agreeing to a lock-in quote or notice.** In any event, the said proposal should be brought to the court's attention expeditiously and before there is any change in prevailing interest rates. The court might consider imposing a penalty or sanction on those who, by violation of this rule, cause an infant to be unable to timely survey the market and obtain the annuity that represents the best value available for the particular plaintiff.

Proposed Order in a structured settlement.

The proposed order in a structured settlement (simple) is designed for settlements where there is only one defendant (and its insurer) participating in the settlement and in the funding of the purchase of the annuity. If there are more than one defendant, or more than one annuity is being purchased, the form must be modified accordingly; or the alternate form order (for complex settlements), should be used.

Before completion and submission of the application to settle a claim or action of an infant/incapacitated person, counsel is cautioned to read the court's rules and to use the court's forms.

You will be required to serve a copy of the proposed structured settlement order on all defendants, insurance carriers and the appropriate Department of Social Services/Office of the Medicaid Inspector General/HMS with a notice of settlement so that they will have an opportunity to be heard and object before being bound by its terms.

1. Preamble (Whereas) Clause

The terms of the settlement and other relevant information and requirements are outlined in the "Whereas" clauses. Note: This form complies with the requirements of the Internal Revenue Code and explains in its opening "Whereas" clauses, the significant difference between the "Total Settlement Payout" and the "Total Settlement Cost." Decretal Paragraph 1 has been specifically designed to comply with Internal Revenue Code requirements and should not be modified, (except however, to conform it to the specific periodic payments proposed in this application). Note, that when all future periodic payments are guaranteed, the amount set forth in the Whereas Clauses for "future periodic payments" and for "guaranteed periodic payments" will obviously be identical. However, if any of the future periodic payments will terminate upon death, the above amounts will be different. In any event, the whereas clauses may be modified accordingly.

2. All information set forth in the proposed order must be supported by underlying affidavits and affirmations as well as in the required exhibits. The proposed implementing structured

settlement documents must be appended as exhibits to the application. These exhibits must identify all the necessary parties thereto as well as the annuity payout being proposed.

3. A structured settlement plan will be approved by the court after a hearing has been conducted. In most instances defendants insist that a structure plan be provided by a structure broker that is selected by defendant and/or its insurer. The Court requires that plaintiff's counsel retain a structure broker before discussing a structured settlement with the defendants, Both brokers can be compensated by a splitting of the annuity commission so there is no cost to the plaintiff or the attorney. If there is a dispute regarding commissions, request a hearing and request all necessary persons to be present.

4. The application to settle the claim must be supported by an affidavit by the structure broker whose structure plan is recommended to the court by plaintiff's counsel to be best for the infant/incapacitated person. This affidavit must conform to the form affidavit on the court's website.

5. Modify the form to comport with the proposed periodic payments which are described in the underlying documents, but do not otherwise modify the format since this paragraph was designed to comply with Internal Revenue Code requirements.

6. The "guaranteed" payments mentioned in this paragraph (as well as in the preamble "Whereas" clauses) refer to that part of periodic payments that will not terminate upon the death of the infant. Upon death, these "guaranteed" payments will be made to the fiduciary of the estate of the infant/incapacitated person or to the designated beneficiary of said person. The "guarantee" mentioned in this paragraph is not to be confused with the guaranty which is provided by a "guarantor" company which will guarantee the obligation of the assignee company to make all of the future periodic payments. Nor should the guarantee mentioned in decretal paragraph 1 be confused with the additional guaranty provided under New York Insurance Law, Article 77.

Under New York Insurance Law Article 77, the Life Insurance Company Guaranty Corporation of New York provides \$500,000 of protection with respect to an annuity in the event an annuity issuer becomes insolvent if the annuity issuer is licensed in New York and the plaintiff is a New York resident. See NYS Ins. Dept. O.G.C. Opinion 95-65 (9/24/95); See also N.Y.S. Ins. Dept. O.G.C. Opinion 5-1-96 (May 1, 1996), General Counsel Opinion 2-20-2003 (February 20, 2003). In view of this, where the amount structured is more than \$500,000, it is prudent, but not required by law, to purchase annuities from more than one issuer to keep the cost of each annuity below \$500,000. The court is aware, however, that purchasing more than one annuity generally results in lower payments to the plaintiff.

7. At the end of decretal paragraph No. 1, insert the name of the "payee." Here you should insert the name the infant plaintiff individually if payments commence on or after infant's 18th birthday. If payments commence before the 18th birthday or if payments are to an incapacitated person, provisions must be made for payments to the parent and natural guardian or guardian together with a Bank Officer; or to a guardian appointed pursuant to Article 81 of the Mental Health Law. In cases where an infant/incapacitated person is receiving or may in the future receive, needs based governmental benefits, such as Medicaid or Supplemental Security income, Counsel should consider making provision for, and the order should provide for, the creation of a supplemental needs trust to preserve eligibility for such benefits, in which event the trust should be named as the payee in this

paragraph.

8. There is a paragraph that sets forth the up-front money to be paid by defendants to cover the costs for plaintiff's counsel fees, disbursements, liens, claims and up front money to the plaintiff, if any. If other up-front money must be added, the form should be modified accordingly. There is also a paragraph which provides for the payment by defendant to fund the purchase of an annuity which will provide the future periodic payments. If this defendant is purchasing more than one annuity, then an additional subparagraph should be added for each payment toward an annuity.

9. The defendant (or its insurer), the "assignor", usually assigns the obligation to make the periodic payments to an "assignee" company, which is usually a "shell affiliate" of the annuity issuer. That "assignee" company will then purchase the annuity contract from the annuity issuer.

10. The "annuity issuer" must be licensed to do business in the State of New York, in order for the annuity to be protected by the Life Insurance Company Guaranty Corporation of New York discussed above, and it should have an A.M. Best Company rating of no less than A++ or A+, which are the two highest ratings. The ratings of the proposed annuity issuer must be described in the broker's affidavit and must be supported by an appropriate exhibit attached thereto.

11. The "Settlement Agreement" and the "Assignment Agreement" will provide among other things, that the defendant (or its insurer) will assign the obligation to make the future periodic payments to an assignment company which is usually an affiliate of the annuity insurer. The assignment company (the "assignee") and the life insurance company (the "annuity issuer") must be identified, and its A.M. Best Company rating must be set forth.

12. The Court's Rules for a structured settlement require a copy of each of the proposed agreements to be submitted as exhibits to the structured settlement broker's affidavit, which is submitted in support of the application to settle the claim or action. There is no standard form of "settlement agreement." However, there are several forms of assignment agreements generally used in structured settlements. The plaintiff should request that the form known as the Uniform Qualified Assignment, Release and Pledge Agreement be used, since it grants the plaintiff a security interest in the annuity. Most annuity issuers will use such a form, if requested. If the annuity issuer does not offer a security interest, then the "Uniform Qualified Assignment and Release Agreement" must be used, and the plaintiff will be a general, unsecured creditor of the Assignee. **Where the annuity is for a sum greater than \$500,000, the Court requires a provision granting infant a security interest in the annuity.** Please note, that the order requires, among other things that, after all of the documents have been signed, a copy of each must be provided to plaintiff by plaintiff's counsel and proof of service of same must be filed with the Clerk of the Court or via NYSCEF, as the case may be.

13. The name of the "guarantor" company must be inserted. The obligations of the "assignee" company to make the periodic payments are guaranteed by the annuity issuer or a substantial affiliated company unless the assignee is a substantial company.

14. **Prior to the hearing, you will be required to serve a copy of the proposed structured settlement order on all defendants and insurance carriers and the appropriate Department of Social Services with the order to show cause and, if substantive revisions have been made,**

witha notice of settlement, so that they will have an opportunity to object before being bound by its terms.

15. The order will be signed on the "settlement" date which may be the hearing date, if no issue or objection has been raised by the defendant or the insurance carriers or the appropriate Department of Social Services involved in the transaction.

16. Counsel should carefully read and implement the remainder of the decretal paragraphs after the order has been signed.

Rev. 9-12-19