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Infant Compromise Orders in New York

Gerald Lebovits

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Welcome to the April 2016 Edition of Electronically In Touch

We are pleased to submit the April 2016 edition of Electronically In Touch. This issue consists of informative articles useful to attorneys of all skill levels, including an article regarding how to obtain Infant Compromises, a synopsis of New York’s Limited Liability Company Law, and an interesting article on sex-based life insurance rates, as well as a recap of the Young Lawyers Section’s 2016 Trial Academy and recommended upcoming events.

Electronically In Touch is a member driven publication. We welcome submissions from members on any relevant topic, including practice tips, substantive legal articles, case updates, work/life balance, and information regarding upcoming meetings and events. Please submit articles to Sasha R. Grandison, Esq. at srgrandison@gmail.com by the 25th of each month.

The Officers of YLS and the Editor of Electronically In Touch wish to make clear that the thoughts and opinions expressed in the articles that follow are those of the respective authors and do not represent the thoughts and opinions of the New York State Bar Association, Young Lawyers Section, or its Officers or Executive Committee.

A Message from the Chair of the Young Lawyers Section

Welcome to the April edition of Electronically In Touch. The Section has just wrapped-up our seventh annual Trial Academy, which was held at Cornell Law School in Ithaca, New York from March 30 - April 3, 2016. Trial Academy is a five-day intensive trial techniques program developed to advance and improve courtroom skills with a focus on attendees’ direct participation and learning with critique faculty. Co-Chairs Immediate Past-Chair Sarah Gold and Chair-Elect Erin Flynn put on an amazing program. We could not have done it without the incredibly highly esteemed faculty, or NYSBA staff Megan O’Toole and Adriana Favreau, who play an integral role in planning, organizing, and executing on Trial Academy year-to-year. Thanks so much the presenters/faculty, and to Megan and Adriana! We would also like to extend our thanks to YLS past chairs Sherry Levin Walach and Tucker Stanclift, the founders of Trial Academy. In addition to conceiving of Trial Academy, Sherry and Tucker continue to be involved in the Program every year, and we are so grateful to both of them. We’re also thankful to the substantive sections that sponsored Trial Academy - thanks so much for supporting YLS!

Our Spring Executive Committee Meeting was held in Ithaca on March 31st during the Trial Academy, and was well-attended. It was great to have some Trial Academy participants attend. If you did not attend this year, mark your calendars for Trial Academy 2017 - see you there!

Erica M. Hines
Infant Compromise Orders in New York

By: Rohit K. Mallick, Esq. and Hon. Gerald Lebovits

INTRODUCTION

Infant Compromise Orders present unique challenges in personal-injury lawsuits. Infant cases fall under the ambit of rules involving “disabled” litigants under CPLR Article 12. Infants — those under 18 years old — are “disabled” in that they may not initiate lawsuits on their own. They require a guardian or assigned proxy to represent their interests in court.

In New York, most personal-injury lawsuits never reach trial. They settle. To settle infant claims, both plaintiff and defendant attorneys should note the peculiarities of Infant Compromise Orders, which are integral to a personal-injury practice. Misunderstanding the basics of Infant Compromise Orders will result in frustrated clients, increased costs, and unnecessary delays.

This article covers the requirements of New York Infant Compromise Orders and offers some practical tips — and pitfalls to avoid — when litigating infant cases.

THE COURT’S DUTY TO PROTECT INFANTS

Typical personal-injury settlements are embodied in general releases and stipulations of discontinuance. These documents release the alleged tortfeasors from liability for an alleged harm to the plaintiff, almost always in exchange for money. Once it is filed with the court, the stipulation of discontinuance, which is signed by all parties to an action and which states that the action is being discontinued with prejudice, the case is finished and can be sent to storage and to the client for final billing.

The courts are bound to protect infants, who are considered wards of the court. (Greenburg v. New York Cent. & H.R.R. Co., 210 N.Y. 505, 509, 104 N.E. 931 (1914)). Due to the special status accorded to infants, the process to settle a case involving infant plaintiffs is more complex than a simple stipulation of discontinuance accompanied by a general release.

This common-law responsibility evolved from the medieval courts of England and Wales, where the courts supervised matters pertaining to infants. (Benson v. Siemons, 92 Misc. 509, 513-14, 156 N.Y.S. 1, 4, (Sup. Ct. Special Term 1915)). By the 16th century, the royal prerogative and duty of the Crown in England and Wales were known as parens patriae, a Latin term meaning “parent of his country. (Black’s Law Dictionary (10th ed. 2014). The doctrine compelled the Chancery Courts in England to develop protections for infants and other wards of the courts. (Benson, 92 Misc. at 513-14, 156 N.Y.S. at 4).

The judicial concept of parens patriae arrived in New York upon England’s imposition of colonial authority in the 17th and 18th centuries. Following hundred of years of statutory and common-law development, New York courts had adopted parens patriae responsibility with respect to infants. In 1856, the Court of Appeals stated that “the jurisdiction of the Court of Chancery over the persons and property of infants, and to appoint guardians of their persons and estates, whatever may have been its origin, is universally conceded, and is one of the most useful and important functions which it is called upon to exercise . . . . The power formerly possessed in this State by the Chancellor is now vested in the Supreme Court.” (In re Hubbard, 82 N.Y. 90, 91, 37 Sickels 90, 91 (1880) (citing Wilcox v. Wilcox, 14 N.Y. 575, 578 (1856)).

The purpose of this protected status is to protect infants from greedy family members and guardians, friends, lawyers, or other members of society. Given that few people are more vulnerable than infants, the courts must step in to ensure that no party other than the infant benefits from the compromise and to safeguard the infant’s interests while balancing against the legitimate interests of the family, guardians, and legal representatives of both plaintiff and defendants. (Jeffrey M. Donato, The Infant’s Compromise: From Settlement to Hearing, 20 N.Y. St. B. Ass’n Elder L.J., 31, 30-33 (Fall 2010)).

Today’s CPLR Article 12 embodies the historic common-law notion of protecting infants involved in legal proceedings. CPLR 1201 defines the disability of infants. It provides that unless a court appoints a guardian ad litem, the infant shall appear by a guardian of the infant’s property, by a parent with legal custody of the infant, or by another person with legal custody the infant, or by the adult spouse, if the infant is married to an adult. (CPLR 1201).

CPLR 1207 establishes the court’s authority to act on its common-law duty to protect infants by requiring the infant’s guardian to move or petition the court to approve any proposed settlement of an infant claim. (CPLR
1207). The remainder of Article 12 delineates the requirements to resolve cases involving litigants with various disabilities. The rules pertinent to Infant Compromise Orders are described below.

COMPONENTS OF THE STANDARD INFANT COMPROMISE ORDER

Assuming the role derived from the doctrine of *parens patriae*, courts seek full disclosure of all information relevant to an infant compromise. CPLR 1208 sets forth the requirements to file a proper Infant Compromise Order for the court's consideration. These requirements fulfill only the proper filing threshold; they might not satisfy the judge who hears the terms of the proposed Infant Compromise Order.

Under CPLR 1208, any case involving an infant requires the following for proper settlement and adjudication:

**A. Affidavit of the infant's representative, which shall state:**

i. The infant's legal name and relationship to the representative;

ii. The infant's age and residence;

iii. The circumstances giving rise to the action or claim;

iv. The nature and extent of the client's injuries;

v. The names of all physicians who attended to, treated, or were consulted with reference to the injuries arising from the incident underlying the lawsuit;

vi. All medical expenses (enumerated);

vii. The period of disability and lost wages, if any;

viii. The infant's current physical condition;

ix. The terms and proposed distribution of the settlement, along with the infant's knowledge and approval of the settlement;

x. The details of any other motion or petition for settlement of a claim to recover on the same claim in the same action;

xi. All collateral sources for medical or related expenses;

xii. Whether a representative or any other related party has made a damages claim arising from the incident underlying the infant's cause of action;

xiii. The amount to be paid to settle the claim and the institution that will hold the funds until the time of distribution.

**B. Attorney's affidavit, which shall state:**

i. The reasons for recommending the settlement;

ii. Whether the attorney represents any other individual for a claim arising from the same underlying incident causing harm to the infant;

iii. That the attorney is not directly concerned in the settlement;

iv. Whether the attorney is collecting a fee with respect to the settlement and the full amount of that fee (including legal expenses);

v. All services the attorney rendered with respect to representing the infant plaintiff.

**C. Medical Reports**

i. One or more hospital reports, which need not be verified, to substantiate the injuries claimed by plaintiff. (The depth of these records will depend on the severity and complexity of the injury.)

ii. Should be dated less than six months before the proposed order is filed.

**D. Appearance Before Court**

i. At the hearing, the moving party or petitioner, along with the infant, and the infant's attorney shall appear before the court at the designated time, unless the appearance is excused for good cause.

ii. The appearance is typically on the record and requires testimony from both the infant and guardian.

**E. Representation**

i. No attorney having or representing any interest conflicting with that of an infant or incompetent may represent the infant or incompetent.

ii. If the infant (and the infant's guardian) are not represented by counsel, the papers may be drafted and the action initiated by the attorney for an adverse party, and in that case the papers must clearly state that fact.

DOCUMENTARY SUPPORT AND THE HEARING

The proposed Order must include the party information, the settlement amount, and where the settlement funds will be deposited in the infant's favor. Many courts will distribute a list of preferred banks, but generally any insured savings bank in New York with appropriate interest-bearing accounts available for deposit will suffice. The Order must also include language that the funds will be reserved solely for the infant and shall be disbursed in the infant's favor only upon the infant's ascension to age 18, or any other arrangement the court deems appropriate.
The Order is a simple and short document; it is the supporting documents that bear heavily on approval of any proposed Infant Compromise Order.

The representative's affidavit is perhaps the most important document in the Infant Compromise Order package. The guardian, usually a parent or other close family member, is typically the person most knowledgeable about the infant's injury, medical treatment and recovery, negotiations with the adverse parties, how the proposed settlement amount was reached, and how and where the funds will be deposited. This affidavit should also include all special medical expenses incurred by the plaintiff as well as how these expenses were paid (either by the guardian, insurance, the defendants, or otherwise). The affidavit should also include information for any other claims and lawsuits that arose from the same incident that injured the infant so that the court can determine whether collusion or other sort of foul play is involved in resolving the infant's case. (Donato, supra, at 30-33 & n.5).

Even though the guardian must submit an affidavit, many counties and judges also require an affidavit from the injured infant as well, especially if the infant is over the age of 14 at the time of proposed settlement.

This infant's affidavit should include similar information as the guardian's, but from the infant's perspective. Whether the infant is fully healed from the injuries should be stated in the affidavit, as well as that the infant agrees with the settlement terms.

The attorney's affirmation is also crucial, but is more focused on the settlement amount and why the settlement amount is in the infant's best interests. The court will rely on this document to determine how the parties came to terms to assess the settlement amount. The affidavit should also outline the full extent of insurance funds available to the infant for settlement, regardless of the final settlement amount. Similarly, any liens or other expenses/disbursements that may be assessed against the settlement amount must be identified. A complete affirmation will also include an analysis of liability and exposure to inform the judge of the practical concerns that could arise were the case to be tried.

The attorney's affirmation should also outline the legal work done on the case. This is particularly crucial for the plaintiff's attorney, who must justify any legal fee taken from the settlement funds. Although the fees outlined in a retainer agreement (typically 1/3 of the total recovery) will usually be sufficient, the affirmation must explain that the attorney conducted competent legal work to validate the fee. Some judges might, for example, reduce fees to 25% when a case has not reached suit and the amount of legal work is disproportionate to the recovery amount. (Glair v. Peck, 6 N.Y.2d 97, 105, 188 N.Y.S.2d 491, 495, 160 N.E.2d 43, 46 (1959); Mahler v. American Airlines, Inc., 49 Misc.2d 693, 697, 269 N.Y.S.2d 342, 347, (Sup. Ct. Westchester County 1966)).

The third key component of the proposed Order is the medical record. Attorneys should include examination reports of the plaintiff that are no older than six months. These reports should address the injuries suffered and whether they are fully resolved or require future treatment. The records should ideally also describe all treatment the infant underwent, as well as all planned future procedures. Timing of the medical reports and physician affirmation or letter is crucial; the court desires full disclosure of the extent of medical treatment and the infant's current physical condition. As the courts have noted, "only by recent medicals can the Court properly assess the severity of the injuries in relation to the proposed settlement, consistent with the Court's obligation and duty to such infants who sustain personal injuries." (Guerra v. Fernandez, 149 Misc. 2d 25, 26, 562 N.Y.S.2d 1020, 1021 (Sup.Ct. Queens County 1990); Donato, supra, at 30-33).

Some courts will also require an affirmation from the medical provider(s). This affirmation should be dated within at least the six months before the date of the proposed Order and be composed in accordance with the requirements found in CPLR 2106 (affirmation of truth of statement by attorney, physician, osteopath or dentist).

With respect to all supporting documents to an Infant Compromise Order, completeness and full disclosure are absolutely necessary. Failure to meet these standards will result in rejection of a proposed Order. The Appellate Division has observed in one case that "[a]lthough the record indicates that timely medical treatment is needed to assure the proper formation and growth of the plaintiff's [injury], there is no evidence that such treatment has been rendered or scheduled in the [time] the case has been pending, or that there has been any precise inquiry into the type, timing, and cost of medical treatment that will be required." (Edionwe v. Hussain, 7 A.D.3d 751, 754, 777 N.Y.S.2d 520, 522 (2d Dept. 2004)). The supporting documents should leave no stone unturned. It should include as many details as possible to ease the court's assessment of the proposed compromise.

The paperwork should be filed as a petition, an ex parte order to show cause, or in some cases as a special proceeding (where the case is pre-suit, for example). Each county, court, or judge will identify the preferred method of receiving the paperwork; checking individual rules and filing fees is critical.
Upon the court's acceptance of the proposed Order and supporting documentation, the court will schedule a hearing. Even if the initial application is ex parte, all parties should be put on notice of the hearing. Accepting the documents does not ensure approval of the proposed compromise.

All parties may appear in court because the matter is typically heard on the record, but defense counsel will commonly waive the defendant's appearance. The court will often question both the infant and the guardian to insure that the injured parties understand the settlement terms and recognize that settlement waives all rights to trial. Judges might question, challenge, and reject a proposed Order. The settlement amounts might ultimately be changed by the judge's recommendation. Should the case involve complex medicals or future medical treatment, defense counsel should be present to protect their client's interests.

The judge presiding will reiterate to the attorneys and guardian that the funds of the settlement terms are the property of the infant alone and are meant solely for the infant's benefit. The designated interest bearing account is not to be modified or accessed until the infant reaches adulthood at 18 or later, should the court so deem.

Counsel should inform their clients that even though an infant plaintiff has agreed to settlement terms, any compromise is subject to the court's approval at the hearing. If the court is dissatisfied with any aspect of the proposed Order, particularly the settlement amount, the attorneys might need to defend their position based on their injury and liability assessments. Alternatively, defense counsel might need to seek additional settlement authority from their client. Defense counsel can save time, costs, and energy by having their clients available by telephone during the hearing, or conference, should the need for these discussions arise.

Even though Infant Compromise Orders declare that the funds are to be made available only at the end of infants disability, CPLR 1211 allows guardians to petition for early release of funds for infant support. (CPLR 1211). The courts discourage that practice and do not consider these applications routinely. (See, e.g., Conigliaro v. Rosa, 24 Misc.2d 15, 15, 202 N.Y.S.2d 560, 561 (Sup. Ct. Nassau County 1960)). Applications will be denied except in cases demonstrating unusual circumstances or where the guardian cannot otherwise provide for the infant's necessities, treatment, or education.

As stated in In re Stackpole v. Scott, 9 Misc.2d 922, 928,168 N.Y.S.2d 495, 498 (Mun. Ct. Queens County 1957), any petition for early withdrawal of funds should include, among other things, a full explanation for withdrawal reasons, sworn statements by qualified persons about the extent of the alleged expenditures for which the funds are necessary, the family's financial circumstances, recital of available funds, and a clear statement about why the guardians cannot afford the alleged expenditures.

PRACTICE TIPS FOR INFANT PERSONAL-INJURY CASES

A case involving an infant should be handled with extreme care from the onset. Like any other case, plaintiff and defense attorneys should immediately the statute of limitations that affects their case. The typical personal-injury statute of limitation is three years, but the wide variety of potential torts that affect infants might have different time limits. These time limits are codified in CPLR 213, 214, and 215.

Perhaps the most important regulation is CPLR 208, which tolls any statute of limitation that pertains to an infant's cause of action. Specifically, the "disability" of infancy tolls allows any statute of limitation found in CPLR 213, 214, and 215 until the disability ends, which in the case of infancy means until the infant plaintiff reaches the age of 18. For example, if an infant plaintiff suffers a personal injury on his fifth birthday, the typical statute of limitation would expire the day after his eighth birthday. However, due to the toll found in CPLR 208, the three-year statute of limitation does not begin to run until the infant plaintiff's infancy ends, meaning that in the same example, the five year old plaintiff's time to file a personal injury lawsuit would not expire until the day after his twenty-first birthday, three years after the "disability" of infancy ends. An exception under CPLR 208 and 214-a limits medical, dental, and pediatric claims to 10 years, except for continuous treatment.

Although this tolling seems like a great boon to plaintiffs, there are many practical pitfalls to extensions of time. For example, many infant cases will involve a municipal defendant. In New York, any case involving a municipal defendant requires a 90-day Notice of Claim to be filed under General Municipal Law § 50-e. The tolling provisions of CPLR 208 do not apply to the Notice of Claim, which is a condition precedent to the filing of any lawsuit against a New York public entity. Failure to meet the strict 90-day deadline can result in a plaintiff's losing the case before it begins, even though the applicable statute of limitation might not begin to run for many years.

Another practical pitfall of the extended statute of limitations comes from an investigatory standpoint. Problems arise if the same infant from the previous example were injured on his fifth birthday, but the lawsuit did not commence until his eleventh birthday. For example, a defendant might not be able to contact individuals with knowledge of the alleged harm or preserve surveillance data that might have recorded the incident. Similarly, plaintiffs might lose track of a key eyewitness who supports their case or, if the hypothetical injury concerns a trip
and fall, who might be unable to photograph the condition that caused the injury before it is repaired. These factors bear heavily on the ability to prove or defend a case and will ultimately reflect in the value of the settlement agreed upon by the parties and which the court will review in any Infant Compromise Order.

When negotiating a resolution to an infant case, future medical expenses can be a point of contention. Children who suffer significant injury might not be able to undergo surgery until later in life, when they stop growing. Defense attorneys typically downplay the need for future treatment as unnecessary. Defense attorneys also (legitimately) are concerned that any future disbursement of funds for treatment might not be used for medical purposes. The ideal Infant Compromise Order will address how such future treatment is funded. If the future treatment is to be conducted by a doctor other than the one providing the affirmation of medical condition, an additional affidavit by that medical professional describing the future procedures in detail, as well as the projected or agreed-upon costs, is recommended. To protect their clients, defense attorneys should take care to ensure that any future funds may be distributed only after the guardian can generate proof that the plaintiff underwent the medical procedure, with any additional funds disbursed directly to the medical professional after the proof is filed with the court. Failure to properly inform the Court of future medical expenses often unnecessarily delays the resolution of Infant Compromise Orders.

Even when the parties reach an amicable agreement on the consideration needed to resolve the matter, the court, in its “parental” role, must approve any settlement amount. While this article covers the basic requirements of Infant Compromise Orders, many judges have additional requirements to settle an infant case. Beyond that, each individual county court may have its own requirements, too.

In the Bronx, for example, the court requires all information outlined in CPLR 1207 and 1208. But it also requires an affirmation from a doctor who has examined the infant in the preceding six months. The affirmation must discuss the infant’s current medical condition. If the infant is over 14, an affirmation from the infant is also required. The infant’s presence is also mandatory at the ensuing hearing before the assigned judge. As an additional requirement, any case assigned to the City Part requires an additional worksheet downloadable on the Supreme Court’s website. Some other judges require additional items.

In New York County, the county rules require that any Infant Compromise be resolved at a hearing, or conference, on the record, before the assigned judge. An attorney seeking approval of that compromise must serve on all opposing parties a Notice of Conference on Proposed Infant’s Compromise at least five days before the scheduled appearance, with a copy of the proposed Order annexed. This requirement stands in addition to the specific rules outlined in the CPLR and in each individual judge’s rules.

In contrast to New York and the Bronx, Kings, Richmond, and Queens counties have no specific countywide rules. Judges in these counties maintain their own rules, checklists, and procedures for infant cases assigned to their parts. The lesson for the new or seasoned litigator is to become familiar with both the county rules, if applicable, and the assigned judge’s rules. If the case is pre-suit, a special proceeding must be initiated. In that case, a litigant must be prepared to supplement the petition with additional information depending on the assigned judge’s individual requirements.

CONCLUSION

Infant Compromise Orders present a unique niche of case resolution in New York. The critical themes of settling infant cases are full disclosure to the courts, thorough and complete affidavits and affirmations, and a concise presentation of all relevant medical information concerning the infant’s injury. Attorneys should strive to create an open dialogue with opposing counsel, their clients (plaintiffs or defendants), medical providers, the court, and all other interested parties to the litigation. Every county and judge has a different take on conducting infant-compromise settlements. Thus, individual rules must be studied before the paperwork is filed. Infant Compromise Orders require collaboration above and beyond the typical personal injury settlement and should be handled with prodigious care to protect our most valuable and vulnerable resource: our children.

Rohit K. Mallick is an associate at Kaufman Dolowich & Voluck, LLP, where he focuses on the defense of premises liability, personal injury, professional liability, and maritime cases. He earned his B.A. from New York University in 2007 and his J.D. from the Fordham University School of Law in 2010.

Gerald Lebovits is an acting Supreme Court justice in Manhattan and an adjunct professor of law at Columbia, Fordham, NYU, and New York Law School. This article was originally published in the Richmond County Bar Association 17 (Spring 2015).