The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SB 2440
INTRODUCER:	Judiciary Committee and Senator Bennett
SUBJECT:	Liability Releases
DATE:	March 21, 2010 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Maclure	JU	**Fav/CS**
2.			WPSC	
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill provides statutory authority for natural guardians, on behalf of their minor children, to execute pre-injury releases or waivers, waiving any claim or cause of action against a commercial activity provider, or its owners, affiliates, employees, or agents, for the inherent risks involved in an activity. The bill clarifies that it is not limiting the ability of natural guardians, on behalf of their children, to waive any claim against a noncommercial activity provider to the extent authorized by common law. The bill defines the term "inherent risk" to mean the dangers or conditions that are characteristic of, intrinsic to, or an integral part of the activity; the failure of the activity provider to warn of the inherent risks; and the risk that the minor child or another participant may act negligently or intentionally and contribute to the injury of the minor child.

The bill also provides specific language that must be included in a waiver or release, and be at least five points larger than the rest of the text of the waiver or release, in order for it to be enforceable. As long as the waiver or release includes the statutory language and waives no more than allowed by statute, there is a rebuttable presumption that the waiver or release is valid and that the minor child's injury or damage arose from an inherent risk. A claimant can rebut the presumption that the waiver or release is valid by showing by a preponderance of the evidence that the waiver or release does not comply with the statute. In order to rebut the presumption that

the injury or damage to the minor child arose from an inherent risk, the claimant must demonstrate by clear and convincing evidence that the conduct, condition, or other cause resulting in the injury or damage was not an inherent risk of the activity. If a claimant successfully rebuts one of the presumptions, liability and compensatory damages must be established by a preponderance of the evidence at trial.

Additionally, the bill provides that a motorsport liability release signed by a natural guardian on behalf of a minor is valid to the same extent provided for other nonspectators, if the minor is participating in a sanctioned motorsports event. However, if a minor is participating in any other activity at a closed-course motorsport facility, other than a sanctioned motorsports event, then the waiver is valid only if it complies with the general waiver requirements proposed by the bill. The bill also expands the definition of "nonspectators" to include a minor, if the minor's natural guardian signed the motorsport liability release.

This bill substantially amends sections 549.09 and 744.301, Florida Statutes.

II. Present Situation:

Parental Autonomy

Parental autonomy is a liberty interest protected by the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment provides, in part, that no state shall "deprive any person of life, liberty, or property, without due process of law."[1] The United States Supreme Court has recognized that this clause guarantees "more than fair process" and, instead, also "provides heightened protection against government interference with certain fundamental rights and liberty interests."[2] Specifically, the Court has said that the Due Process Clause of the Fourteenth Amendment protects "'a right of personal privacy,'" which includes the right to independently make certain important decisions without governmental interference.[3] Moreover, the Court has found it "clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'"[4]

Parental autonomy, or parents' interest in the care, custody, and control of their children, is one of the oldest recognized liberty interests. The United States Supreme Court has addressed the issue of parental autonomy in a number of cases over the years.[5] In 1923, the Court held that child-rearing was a fundamental right, stating: "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected."[6] Several years later the Court again addressed the issue and confirmed "that the custody, care and nurture of the child

[1] U.S. CONST. amend. XIV, s. 1.
[2] *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).
[3] *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684 (1977) (quoting *Roe v. Wade*, 410 U.S. 113, 152 (1973)).
[4] *Id*. at 684-85 (quoting *Roe*, 410 U.S. at 152-53) (internal citations omitted).
[5] *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Parham v. J.R.*, 442 U.S. 584 (1979); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Troxel v. Granville*, 530 U.S. 57 (2000).
[6] *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[7]

In 2000, the Court addressed the issue of parental autonomy in the context of grandparent visitation. In *Troxel v. Granville*, 530 U.S. 57 (2000), paternal grandparents petitioned to expand their visitation rights with their deceased son's children after the children's biological mother (who had remarried) reduced the visitation from every weekend to once a month. The Court expounded upon the right of parents to make decisions in raising their children:

> [T]here is a presumption that fit parents act in the best interests of their children. . . . Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.
>
> . . . .
>
> [T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made.[8]

While an implicit right of privacy is recognized under the United States Constitution, Floridians enjoy an explicit right of privacy under article I, section 23 of the Florida Constitution. Specifically, Florida's right to privacy provision states: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."[9]

The Florida Supreme Court has held that the Florida Constitution provides more privacy protection than the federal constitution. Specifically:

> "The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. . . . Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution."[10]

---

[7] *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).
[8] *Troxel*, 530 U.S. at 68-69, 72-73.
[9] FLA. CONST. art. I, s. 23.
[10] *Beagle v. Beagle*, 678 So. 2d 1271, 1275-76 (Fla. 1996) (quoting *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985)).

Further, the Florida Supreme Court held that "[b]ased upon the privacy provision in the Florida Constitution, . . . the State may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm."[11]

Pre-Injury Liability Releases

Generally

"Exculpatory clauses extinguish or limit liability of a potentially culpable party through the use of disclaimer, assumption of risk, and indemnification clauses as well as releases of liability."[12] The most common exculpatory clauses, or "releases" as they are commonly called, are the waiver of liability[13] and assumption of risk clauses.[14] Exculpatory clauses are generally disfavored; however, because of the countervailing policy that favors the freedom to contract, exculpatory clauses are enforceable in Florida as long as the language is clear and unequivocal.[15] "'The wording of such an agreement must be so clear and understandable that an ordinary and knowledgeable party to it will know what he is contracting away.'"[16] Florida case law has also found that an exculpatory clause can properly waive liability for simple and gross negligence;[17] however, clauses that extinguish liability for intentional torts or reckless harm will generally not be upheld.[18]

Parental Waivers

There is no general rule regarding parental waivers, except that the enforceability of waivers signed by a parent on behalf of a minor child appears to depend on the common law and statutory law in the particular state in which the case is heard. "Parental waivers seem likely to be enforced in at least 11 states under some circumstances. On the other hand, the likelihood of enforcement seems remote, at best, in 14 states. . . . [I]n about half of the 50 states, there is no case law or statute providing an answer to the question of enforceability of these types of contractual agreements."[19] The table on the next page shows the estimated likelihood that a court will enforce a parental waiver in that state as of 2007.[20]

---

[11] *Beagle*, 678 So. 2d at 1276.
[12] Steven B. Lesser, *How to Draft Exculpatory Clauses that Limit or Extinguish Liability*, 75 FLA. B.J. 10, 10 (Nov. 2001).
[13] A waiver of liability is a "written instrument in which the participant agrees not to hold the provider liable for any injuries or damages resulting from the provider's negligence." Mario R. Arango and William R. Trueba, Jr., *The Sports Chamber: Exculpatory Agreements Under Pressure*, 14 U. MIAMI ENT. & SPORTS L. REV. 1, 7-8 (1997).
[14] *Id*.
[15] *See Middleton v. Lomaskin*, 266 So. 2d 678, 680 (Fla. 3d DCA 1972); *Tout v. Hartford Acc. & Indem. Co*., 390 So. 2d 155, 156 (Fla. 3d DCA 1980); *Theis v. J & J Racing Promotions*, 571 So. 2d 92, 94 (Fla. 2d DCA 1990); *Banfield v. Louis*, 589 So. 2d 441, 444 (Fla. 4th DCA 1991); *Cain v. Banka*, 932 So. 2d 575, 578 (Fla. 5th DCA 2006); *Krathen v. School Bd. of Monroe County*, 972 So. 2d 887, 888 (Fla. 3d DCA 2007); *Applegate v. Cable Water Ski, L.C.*, 974 So. 2d 1112, 1114 (Fla. 5th DCA 2008).
[16] Lesser, *supra* note 12, at 12 (quoting *Fuentes v. Owen*, 310 So. 2d 458, 459-60 (Fla. 3d DCA 1975)).
[17] *See Theis*, 571 So. 2d at 94; *Borden v. Phillips*, 752 So. 2d 69, 73 (Fla. 1st DCA 2000); *Cain*, 932 So. 2d at 578-79.
[18] Lesser, *supra* note 12, at 10.
[19] Doyice J. Cotten and Sarah J. Young, *Effectiveness of Parental Waivers, Parental Indemnification Agreements, and Parental Arbitration Agreements as Risk Management Tools*, 17 J. LEGAL ASPECTS SPORT 53, 75-76 (2007).
[20] *Id*. at 62. The original table did not include reference to which category Alabama belongs.

Insufficient Information	Do Not Currently Enforce Agreements	Very Likely to Enforce Agreements	Currently Enforce Agreements
Delaware	Arkansas	Georgia	Alaska
Iowa	Hawaii	Idaho	Arizona*
Kansas	Illinois	Mississippi	California
Kentucky	Louisiana		Colorado
Maine	Michigan		Connecticut**
Maryland	Montana		Florida**
Minnesota	New Jersey		Indiana*
Missouri	Pennsylvania		Massachusetts
Nebraska	Tennessee		North Dakota
Nevada	Texas		Ohio
New Hampshire	Utah		Wisconsin
New Mexico	Virginia		
New York	Washington		
North Carolina	West Virginia		
Oklahoma			
Oregon			
Rhode Island			
South Carolina			
South Dakota			
Vermont			
Wyoming			

* Statute limits parental waivers to certain activities (i.e., equine, auto racing).
** Case law has since changed the enforceability of parental waivers from the time the table was created in 2007.

In the context of a pre-injury waiver or release executed by a parent on behalf of a minor, "[t]he enforceability . . . concerns two compelling interests: that of the parents in raising their children and that of the state to protect children."[21] Consistent with a parent's right to raise his or her child without governmental interference, Florida courts have upheld pre-injury releases executed by a parent on behalf of the child for the purposes of obtaining medical care or insurance, or to participate in community-sponsored events.[22] Florida's district courts have addressed whether pre-injury releases executed by parents are enforceable and have reached inconsistent conclusions.[23] In 2008, the issue was presented to the Florida Supreme Court in *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008).

[21] *Kirton v. Fields*, 997 So. 2d 349, 352 (Fla. 2008).
[22] *Fields v. Kirton*, 961 So. 2d 1127, 1129 (Fla. 4th DCA 2007).
[23] *See Lantz v. Iron Horse Saloon, Inc*., 717 So. 2d 590 (Fla. 5th DCA 1998), *rev'd*, 997 So. 2d 349 (Fla. 2008) (release executed by parent was sufficient to release claims based on premises owner's negligence); *Gonzalez v. City of Coral Gables*, 871 So. 2d 1067 (Fla. 3d DCA 2004) (pre-injury release allowing child to participate in a community or school sponsored activity was enforceable); *Krathen v. School Bd. of Monroe County*, 972 So. 2d 887 (Fla. 3d DCA 2007) (pre-injury release for child's participation on the high school cheerleading squad was applicable to negligence claims and enforceable); *Fields v. Kirton*, 961 So. 2d 1127 (Fla. 4th DCA 2007) (pre-injury releases executed by a parent on behalf of a minor not supported by Florida law); *Applegate v. Cable Water Ski, L.C.*, 974 So. 2d 1112 (Fla. 5th DCA 2008) (pre-injury exculpatory clause related to a commercial activity was unenforceable as against public policy).

In *Kirton*, the personal representative of a 14-year-old boy, who was killed while riding an all-terrain vehicle (ATV) at a motor sports park, brought a wrongful death action against the owners of the motor sports park. The trial court entered summary judgment in favor of the defendants, finding that the waiver and release executed by the boy's father, which allowed the boy access to the motor sports park, barred the lawsuit. The release provided, in part, that the undersigned:

> HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the . . . track owners, . . . owners and lessees of premises used to conduct the EVENT(S), . . . all for the purposes herein referred to as "Releasees," FROM ALL LIABILITY TO THE UNDERSIGNED, his personal representatives, assigns, heirs, and next of kin FOR ANY AND ALL LOSS OR DAMAGE, AND ANY CLAIM OR DEMANDS THEREFOR ON ACCOUNT OF INJURY TO THE PERSON OR PROPERTY OR RESULTING IN DEATH OF THE UNDERSIGNED ARISING OUT OF OR RELATED TO THE EVENT(S). WHETHER CUASED (sic) BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE.
>
> . . . .
>
> HEREBY ASSUMES FULL RESPONSIBILITY FOR ANY RISK OR BODILY INJURY, DEATH OR PROPERTY DAMAGE arising out of or related to the EVENT(S) whether caused by the NEGLIGENCE OF RELEASEEES or otherwise.
>
> . . . .
>
> HEREBY acknowledges that THE ACTIVITIES OF THE EVENT(S) ARE VERY DANGEROUS and involve the risk of serious injury and/or death and/or property damage. Each of the UNDERSIGNED, also expressly acknowledges that INJURIES RECEIVED MAY BE COMPOUNDED OR INCREASED BY NEGLIGENT RESCUE OPERATIONS OR PROCEDURES OF THE RELEASEES.
>
> HEREBY agrees that this Release and Waiver of Liability . . . extends to all acts of negligence by the Releasees, INCLUDING NEGLIGENCE RESCUE OPERATIONS and is intended to be as broad and inclusive as permitted by the laws of the Province or State in which the Event(s) is/are conducted . . . .[24]

The Fourth District Court of Appeal (4th DCA) subsequently reversed the trial court's holding, instead finding that the release was unenforceable because a child's property rights cannot be waived in advance absent a basis in common law or statute, neither of which exists.[25] Furthermore, the 4th DCA said that while the Legislature has provided a statutory scheme authorizing guardians to settle minors' claims under limited circumstances,[26] it did not authorize

[24] Brief of Respondent on the Merits at 6 n. 2, *Kirton v. Fields*, No. SC07-1739 (Fla. March 6, 2008) (on file with the Senate Committee on Judiciary).
[25] *Fields*, 961 So. 2d at 1130.
[26] See s. 744.301(2), F.S.

parents to execute pre-injury releases. "If the legislature wished to grant a parent the authority to bind a minor's estate by signing a pre-injury release, they could have said so."[27] Recognizing conflict with another case, the 4th DCA certified the following question to the Florida Supreme Court: Whether a parent may bind a minor's estate by the pre-injury execution of a release.[28]

In *Kirton v. Fields*, the Florida Supreme Court recognized that parents have a fundamental liberty interest in decisions involving their minor children, but that parental rights are not absolute. Under the doctrine of "parens patriae"[29] the state may, in certain situations, usurp parental authority to protect children.[30] In noting this, the Court stated:

> While a parent's decision to allow a minor child to participate in a particular activity is part of the parent's fundamental right to raise a child, this does not equate with a conclusion that a parent has a fundamental right to execute a pre-injury release of a tortfeasor on behalf of a minor child. . . . [W]hen a parent decides to execute a pre-injury release on behalf of a minor child, the parent is not protecting the welfare of the child, but is instead protecting the interests of the activity provider. . . . For this reason, the state must assert its role under parens patriae to protect the interests of the minor children.[31]

After a review of Florida case law, as well as out-of-state precedent, the Court determined that public policy concerns preclude the enforcement of pre-injury releases executed by parents on behalf of their minor children in order to participate in commercial activities. The Court limited its holding to commercial activities, in part, because businesses owe a duty of care to their patrons and by permitting pre-injury releases "the incentive to take reasonable precautions to protect the safety of minor children would be removed."[32] Additionally, a commercial business owner can inspect the premises, train his or her employees, regulate the types of activities permitted, and has the ability to purchase insurance to provide protection in the event a child is injured.[33] In contrast, community- and school-sponsored activities often have limited resources and "the providers cannot afford to carry liability insurance" and if "pre-injury releases were invalidated, . . . volunteers would be faced with the threat of lawsuits and the potential for substantial damage awards, which could lead volunteers to decide that the risk is not worth the effort."[34]

In his dissent, Justice Wells argued that the distinction the majority made between commercial and community-sponsored activities was already argued and quashed by the Florida Supreme Court in a previous case.[35] Justice Wells argued that the dividing line between commercial and community activities is not clear and that there is no reasonable "'basis in law or fact for this

[27] *Fields*, 961 So. 2d at 1130.
[28] *Id*.
[29] Parens patriae, which is Latin for "parent of his or her country," describes "the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY (8th ed. 2004).
[30] *Kirton*, 997 So. 2d at 353.
[31] *Id*. at 357-58.
[32] *Id*. at 358.
[33] *Id*. (citing *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 388 (2006)).
[34] *Id*. at 357.
[35] See *Global Travel Marketing, Inc. v. Shea*, 908 So. 2d 392 (Fla. 2005) (holding that an arbitration agreement executed by a parent on behalf of the child in a commercial travel contract was enforceable).

distinction, nor a reliable standard by which to apply it without making value judgments as to the underlying activity that the parent has deemed appropriate for the child to engage in.'"[36] Because of the many questions involved in this issue, Justice Wells argued that the decision on whether pre-injury releases executed by a parent on behalf of a minor child should be enforceable is a decision that is best left to the Legislature. "If pre-injury releases are to be banned or regulated, it should be done by the Legislature so that a statute can set universally applicable standards and definitions."[37]

Motorsport Nonspectator Liability Releases

Section 549.09, F.S., authorizes the operator of a closed-course motorsport facility[38] to require nonspectators to sign a liability release form as a condition of entry. The statute defines "nonspectators" as "event participants who have signed a motorsport liability release." The liability release form must be printed in at least eight-point type and provides that the "persons or entities owning, leasing, or operating the facility or sponsoring or sanctioning the motorsport event shall not be liable to a nonspectator or his or her heirs, representative, or assigns for *negligence* which proximately causes injury or property damage to the nonspectator."[39] The release may be signed by more than one person as long as the release form appears on each page that is signed.[40]

If a closed-course motorsport facility:

- has at least 70,000 fixed seats for race patrons,
- has at least seven scheduled days of motorsports events each year,
- has at least four motorsports events each year,
- serves food and beverages at the facility through concession outlets, a majority of which are staffed by members of non-profit civic or charitable organizations,
- engages in tourism promotion, and
- has on the property permanent exhibitions of motorsports history, events, or vehicles,

then it is considered a motorsports entertainment complex and can host sanctioned motorsports events.[41]

These events must be sanctioned by a sanctioning body. The following are statutorily authorized sanctioning bodies:

- American Motorcycle Association (AMA);
- Auto Racing Club of America (ARCA);
- Championship Auto Racing Teams (CART);

[36] *Kirton*, 997 So. 2d at 363 (Wells, J., dissenting) (quoting *Shea*, 908 So. 2d at 404).
[37] *Id*.
[38] A "closed-course motorsport facility" is defined as "a closed-course speedway or racetrack designed and intended for motor vehicle competition, exhibitions of speed, or other forms of recreation involving the use of motor vehicles, including motorcycles." Section 549.09(1)(a), F.S.
[39] Section 549.09(2), F.S. (emphasis added).
[40] Section 549.09(3), F.S.
[41] Section 549.10, F.S.

- Grand American Road Racing Association (GRAND AM);
- Indy Racing League (IRL);
- National Association for Stock Car Auto Racing (NASCAR);
- National Hot Rod Association (NHRA);
- Professional Sportscar Racing (PSR);
- Sports Car Club of America (SCCA); and
- United States Auto Club (USAC).

Also, any successor of the above organizations may be a sanctioning body, as well as any other nationally recognized governing body of motorsports that:

- Establishes an annual schedule of motorsports events and grants rights to conduct the events;
- Has established and administers rules and regulations governing all participants involved in the events and all persons conducting the events; and
- Requires certain liability assurances, including insurance.[42]

Florida Guardianship Law

Chapter 744, F.S., generally called the Florida Guardianship Law, governs types of guardianship, appointment of guardians, guardians' powers and duties, termination of a guardianship, as well as veterans' and public guardianships. A guardian is "a person who has been appointed by the court to act on behalf of a ward's person or property, or both."[43] There are several different types of guardianship recognized under Florida law.[44] One of the most common types of guardianship is that of natural guardians. "The mother and father jointly are natural guardians of their own children and of their adopted children, during minority."[45] Section 744.301(2), F.S., provides that natural guardians are authorized, on behalf of their minor children, to:

- Settle any claim or cause of action accruing to any of their minor children;
- Collect, receive, manage, and dispose of the proceeds of any such settlement;
- Collect, receive, manage, and dispose of any real or personal property distributed from an estate or trust;
- Collect, receive, manage, and dispose of the proceeds from a life insurance policy payable to, or accruing to the benefit of, the child; and

Collect, receive, manage, and dispose of the proceeds of any benefit plan as defined in s. 710.102, F.S.,[46] of which the minor is a beneficiary, participant, or owner.

[42] Section 549.10(1)(d), F.S.
[43] Section 744.102(9), F.S.
[44] See ch. 744, part III, F.S.
[45] Section 744.301(1), F.S.
[46] A benefit plan is defined as "a retirement plan and may include, but is not limited to, any pension, profit-sharing, stock-bonus, or stock-ownership plan or individual retirement account." Section 710.102(2), F.S.

III. Effect of Proposed Changes:

This bill addresses the Florida Supreme Court's holding in *Kirton v. Fields*, by amending s. 744.301, F.S., to authorize the natural guardian of a minor child to waive and release, in advance, any claim or cause of action against a commercial activity provider, or its owners, affiliates, employees, or agents, which would accrue to a minor child for personal injury or property damage resulting from an inherent risk in the activity.

The holding in *Kirton v. Fields* was limited to activities provided by commercial establishments and was not directed at noncommercial or school-sponsored activities.[47] Therefore, under the law as it currently stands after *Kirton*, it appears that a pre-injury waiver or release signed on behalf of a minor child may waive negligence in the context of noncommercial or school-sponsored activities. Accordingly, in order to follow the intent of the Florida Supreme Court in *Kirton*, the bill provides that nothing in it is meant to limit the ability of natural guardians, on behalf of any of their minor children, to waive and release, in advance, any claim or cause of action against a noncommercial activity provider, or its owners, affiliates, employees, or agents, to the extent authorized by common law.

The bill does not define the terms "commercial activity provider" or "noncommercial activity provider." Justice Wells acknowledged in *Kirton* the difficulty in drawing a distinction between commercial and noncommercial activities:

> [T]he line dividing commercial activities from community-based and school-related activities is far from clear. For example, is a Boy Scout or Girl Scout, YMCA, or church camp a commercial establishment or a community-based activity? Is a band trip to participate in the Macy's Thanksgiving Day parade a school or commercial activity? What definition of commercial is to be applied?
>
> The importance of this issue cannot be overstated because it affects so many youth activities and involves so much monetary exposure. Bands, cheerleading squads, sports teams, church choirs, and other groups that often charge for their activities and performances will not know whether they are a commercial activity because of the fees and ticket sales. How can these groups carry on their activities that are so needed by youth if the groups face exposure to large damage claims either by paying defense costs or damages? Insuring against such claims is not a realistic answer for many activity providers because insurance costs deplete already very scarce resources.[48]

It appears that the decision on whether an activity provider is commercial or noncommercial will depend on the court hearing the case.

The bill defines the term "inherent risk" to mean "those dangers or conditions, known or unknown, which are characteristic of, intrinsic to, or an integral part of the activity and which are

[47] *See Kirton*, 997 So. 2d at 358.
[48] *Kirton*, 997 So. 2d at 363 (Wells, J., dissenting).

not eliminated even if the activity provider acts with due care in a reasonably prudent manner." Included in the definition of "inherent risk" are:

- The failure by the activity provider to warn the natural guardian or minor child of an inherent risk; and
- The risk that the minor child or another participant may act in a negligent or intentional manner and contribute to the injury or death of the minor child.

A "participant" does not include the activity provider or its owners, affiliates, employees, or agents for purposes of the definition.

The bill provides that, at a minimum, the following language must be included in a waiver or release, and be in uppercase type that is at least five points larger than the rest of the text of the waiver or release, in order for it to be enforceable:

NOTICE TO THE MINOR CHILD'S NATURAL GUARDIAN

READ THIS FORM COMPLETELY AND CAREFULLY. YOU ARE AGREEING TO LET YOUR MINOR CHILD ENGAGE IN A POTENTIALLY DANGEROUS ACTIVITY. YOU ARE AGREEING THAT, EVEN IF (…name of released party or parties…) USES REASONABLE CARE IN PROVIDING THIS ACTIVITY, THERE IS A CHANCE YOUR CHILD MAY BE SERIOUSLY INJURED OR KILLED BY PARTICIPATING IN THIS ACTIVITY BECAUSE THERE ARE CERTAIN DANGERS INHERENT IN THE ACTIVITY WHICH CANNOT BE AVOIDED OR ELIMINATED. BY SIGNING THIS FORM YOU ARE GIVING UP YOUR CHILD'S RIGHT AND YOUR RIGHT TO RECOVER FROM (…name of released party or parties…) IN A LAWSUIT FOR ANY PERSONAL INJURY, INCLUDING DEATH, TO YOUR CHILD OR ANY PROPERTY DAMAGE THAT RESULTS FROM THE RISKS THAT ARE A NATURAL PART OF THE ACTIVITY. YOU HAVE THE RIGHT TO REFUSE TO SIGN THIS FORM, AND (…name of released party or parties…) HAS THE RIGHT TO REFUSE TO LET YOUR CHILD PARTICIPATE IF YOU DO NOT SIGN THIS FORM.

As long as the waiver or release includes the above warning language and waives no more than allowed under s. 744.301(3), F.S., there is a rebuttable presumption that the waiver or release is valid and that the minor child's injury or damage arose from an inherent risk. A claimant can rebut the presumption that the waiver or release is valid by showing by a preponderance of the evidence that the waiver or release does not comply with the statute. In order to rebut the presumption that the injury or damage to the minor child arose from an inherent risk, the claimant must demonstrate by clear and convincing evidence that the conduct, condition, or other cause resulting in the injury or damage was not an inherent risk of the activity.

If a claimant successfully rebuts a presumption under s. 744.301(3)(c), F.S., liability and compensatory damages must be established by a preponderance of the evidence at trial. It appears that a claimant would only need to rebut one of the presumptions in order to go forward to trial.

Additionally, the bill amends s. 549.09, F.S., to provide that a motorsport liability release signed by a natural guardian on behalf of a minor is valid to the same extent provided for other nonspectators, if the minor is participating in a sanctioned motorsports event. In these situations, the motorsport liability release must comply with the requirements of s. 549.09, F.S. However, if a minor is participating in any other activity at a closed-course motorsport facility, other than a sanctioned motorsports event, then the waiver must comply with the requirements in s. 744.301(3) and is valid only to the extent, and subject to the presumptions, provided in that subsection. The bill changes the term "nonspectators" from plural to singular and also expands the definition of a "nonspectator" to include a minor, if the minor's natural guardian signed the motorsport liability release.

The bill shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The fundamental right of parenting is a long-standing liberty interest recognized by both the United States and Florida constitutions. Because child-rearing is considered a fundamental right, parents have the inherent authority to make decisions about their children's welfare without interference from the government. Parental rights, however, are not absolute and, in certain situations, the state may, as parens patriae, intervene on behalf of the minor. Some Florida courts, including the Florida Supreme Court, have held that the "'decision to absolve the provider of an activity from liability for any form of negligence (regardless of the inherent risk or danger in the activity) goes beyond the scope of determining which activity a person feels is appropriate for their child.'"[49] To the extent that this bill is seen as going against public policy and depriving a minor of the right to legal relief when the minor is injured, it could face constitutional scrutiny.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[49] *Kirton*, 997 So. 2d at 357 (quoting *Fields*, 961 So. 2d at 1129).

B. Private Sector Impact:

This bill authorizes natural guardians to execute pre-injury releases on behalf of their minor children for inherent risks involved in a commercial activity; however, the bill does not recognize releases signed by natural guardians that waive negligence, gross negligence, or intentional conduct. It is unknown at this time whether, by authorizing releases for inherent risks only, commercial activities will need to purchase additional insurance due to concerns related to the risk of liability.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 18, 2010:
The committee substitute:

- Authorizes a motorsport liability release signed on behalf of a minor participating in a sanctioned motorsports event to be valid to the same extent as other nonspectators. This means that if the minor is participating in a sanctioned event, a natural guardian is authorized to waive, in advance, any claims for negligence, as well as inherent risks.
- Clarifies that if a minor is participating in an activity at a closed-course motorsport facility, other than a sanctioned motorsports event, then the waiver must comply with, and is valid only to the extent and subject to the presumptions of, the general waiver requirements established by the bill.
- Provides that the general waiver requirements established by the bill, limiting pre-injury releases signed on behalf of minors to inherent risks, only apply to commercial activity providers.
- Authorizes natural guardians, on behalf of their minor children, to waive, in advance, any claim against a noncommercial activity provider, or its owners, affiliates, employees, or agents, to the extent authorized by common law. This provision clarifies that noncommercial activity providers may still use pre-injury releases that waive negligence.
- Changes the effective date from July 1, 2010, to upon becoming a law.
- Makes technical changes.

B. Amendments:

None.