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:	SB 2268
INTRODUCER:	Senator Baker
SUBJECT:	Motor Vehicle Racing Events/Liability Release
DATE:	March 24, 2009
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Maclure	JU	**Pre-meeting**
2.			CF	
3.			RC	
4.				
5.				
6.				

I. Summary:

This bill provides that a motorsport liability release signed by a minor is valid if the release is also signed by the minor's parent or guardian. Additionally, the bill expands the definition of "nonspectators" to include a minor, if the minor's parent or guardian signed the motorsport liability release.

This bill substantially amends section 549.09, 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

[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)).

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 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.
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> . . . .
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> [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]

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[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).
[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.

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]

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 Release

"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, unambiguous 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 gross negligence;[17] however, clauses that extinguish liability for intentional torts or reckless harm will generally not be upheld.[18]

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

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[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)).
[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] Steven B. 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.
[18] Steven B. Lesser, *supra* note 12, at 10.

and that of the state to protect children."[19] 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 purpose of obtaining medical care, insurance, or to participate in community-sponsored events.[20] Florida's district courts have addressed whether pre-injury releases executed by parents are enforceable and have reached inconsistent conclusions.[21] In 2008, the issue was presented to the Florida Supreme Court in *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008).

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.
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> 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.
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> . . . .
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> 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

[19] *Kirton v. Fields*, 997 So. 2d 349, 352 (Fla. 2008).
[20] *Fields v. Kirton*, 961 So. 2d 1127, 1129 (Fla. 4th DCA 2007).
[21] *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).

> NEGLIGENT RESCUE OPERATIONS OR PROCEDURES OF THE RELEASEES.
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> 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 . . . .[22]

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.[23] Furthermore, the 4th DCA said that while the Legislature has provided a statutory scheme authorizing guardians to settle minors' claims under limited circumstances,[24] it did not authorize 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."[25] 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.[26]

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"[27] the state may, in certain situations, usurp parental authority to protect children.[28] 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.[29]

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

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[22] 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).
[23] *Fields*, 961 So. 2d at 1130.
[24] See s. 744.301(2), F.S., permitting natural guardians to settle claims on behalf of minors.
[25] *Fields*, 961 So. 2d at 1130.
[26] *Id*.
[27] 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).
[28] *Kirton*, 997 So. 2d at 353.
[29] *Id*. at 357-58.

protect the safety of minor children would be removed."[30] 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.[31] 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."[32]

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.[33] 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 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.'"[34] 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."[35]

Motorsport Nonspectator Liability Releases

Section 549.09, F.S., authorizes the operator of a closed-course motorsport facility[36] to require nonspectators to sign a liability release form as a condition of entry. The statute defines a nonspectator 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."[37] The release may be signed by more than one person as long as the release form appears on each page that is signed.[38]

III. Effect of Proposed Changes:

This bill amends s. 549.09, F.S., to provide that a motorsport liability release signed by a minor is valid if the release is also signed by the minor's parent or guardian. Additionally, the bill

[30] *Id*. at 358.
[31] *Id*. (citing *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 388 (2006)).
[32] *Id*. at 357.
[33] 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).
[34] *Kirton*, 997 So. 2d at 363 (Wells, J., dissenting) (quoting *Shea*, 908 So. 2d at 404).
[35] *Id*.
[36] 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.
[37] Section 549.09(2), F.S.
[38] Section 549.09(3), F.S.

expands the definition of "nonspectators" to include a minor, if the minor's parent or guardian signed the motorsport liability release.

The bill provides an effective date of July 1, 2009.

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.'"[39] 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.

B. Private Sector Impact:

By specifying that a release signed by a minor is valid, as long as it is signed by the minor's parent or guardian, this bill provides intent that the Legislature wishes to allow pre-injury releases in motorsport activities to be executed on behalf of a minor. Therefore, if sued, motorsport facilities may rely on this bill for the notion that their pre-injury releases are valid and not against public policy.

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

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

This bill relates only to pre-injury releases executed on behalf of minors participating in motorsport activities. Senate Bill 886 also pertains to pre-injury releases, but SB 886 is broader and applies to any pre-injury releases executed by natural guardians on behalf of their minor children. If SB 886 is amended, during the 2009 Regular Session or at a future date, to limit certain pre-injury releases, this bill may conflict with SB 886.

Additionally, the bill provides that a motorsport liability release signed by a minor is valid if it is also signed by the minor's parent or guardian. Case law from other states has indicated that "[e]ven though [the plaintiff's] mother had ratified the terms of the contract … it should be noted that the approval by a parent does not necessarily validate an infant child's contract."[40] Accordingly, courts have found that a minor may avoid or disaffirm a pre-injury liability release signed by the minor as well as the parent.[41] Senate professional staff was unable to find case law specific to Florida on this issue; therefore, it is uncertain whether a Florida court would allow a minor to disaffirm a pre-injury liability release also signed by his or her parent.

VIII. Additional Information:

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

None.

B. Amendments:

None.

[40] *Bosco v. U.S. Ski Ass'n*, 839 F.Supp. 1470, 1474 (D. Colo. 1993). *See also Simmons v. Parkette Nat'l Gymnastic Training Ctr.*, 670 F.Supp. 140 (E.D. Penn. 1987); *Schmidgall v. Engelke*, 224 N.E.2d 590 (1967); *Kaufman v. American Youth Hostels, Inc.*, 174 N.Y.S.2d 580 (N.Y.App.Div. 1957); *Fedor v. Mauwehu Council, Boy Scouts, Inc.*, 143 A.2d 466 (1958).
[41] *See Bosco*, 839 F.Supp. at 1474-75; *Simmons*, 670 F.Supp. at 143, 144.