HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 363 Parental Authority
SPONSOR(S): Horner
TIED BILLS: **IDEN./SIM. BILLS:** SB 886

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Insurance, Business & Financial Affairs Policy Committee	16 Y, 4 N	Reilly	Cooper
2)	Civil Justice & Courts Policy Committee		De La Paz	De La Paz
3)	General Government Policy Council			
4)				
5)				

SUMMARY ANALYSIS

The United States Supreme Court and the Florida Supreme Court have both recognized that the right of parents to make decisions concerning care, custody and control of their children is a fundamental liberty interest protected by the constitution.

The Florida Supreme Court recently held in Kirton v. Fields , that "a parent does not have the authority to execute a pre-injury release [of liability] on behalf of a minor child when the release involves participation in a commercial activity." In Kirton, the Florida Supreme Court acknowledged that "[t]he absence of a statute governing parental pre-injury releases demonstrates that the Legislature has not precluded enforcement of such releases on behalf of a minor child." Nevertheless, the later Court declared ". . .we find that public policy concerns cannot allow parents to execute pre-injury releases on behalf of minor children."

When the Florida Supreme Court proclaims new law solely on the basis of its own subjective assessment of "good" public policy, with no constitutional or statutory source of authority, it does so in violation of the separation of powers provision of the Florida Constitution.

HB 363 expressly authorizes natural guardians, on behalf of any of their minor children, to waive and release, in advance, any claim cause of action that would accrue to any of their minor children to the same extent that any adult may do so on his or her own behalf.

This bill appears to have a positive fiscal impact by avoiding an increase in the judicial workload and litigation costs that are a foreseeable result of continued application of the Kirton decision.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

In Kirton v. Fields, decided December 11, 2008, the Florida Supreme Court relied on the state's parens patriae authority to "usurp" the fundamental right of parents to make decisions concerning the rearing of their children and to establish its own public policy for Florida with respect to the enforceability of pre-injury release waivers executed by parents on behalf of their children. [1] Specifically, the Court held that "a parent does not have the authority to execute a pre-injury release on behalf of a minor child when the release involves participation in a commercial activity.[2] In its opinion the Court identified two compelling concerns regarding the enforceability of pre-injury liability releases: the right of parents in raising their children and the interest of the state in protecting children.[3]

The United States Supreme Court and the Florida Supreme Court have both recognized that the right of parents to make decisions concerning care, custody and control of their children is a fundamental liberty interest protected by the constitution. [4] It is "perhaps the oldest fundamental liberty interest recognized by [the United States Supreme Court]."[5] Under the federal constitution, the Fourteenth Amendment's Due Process Clause provides heightened protection against government interference with certain fundamental rights and liberty interests, including parents' fundamental right to make decisions concerning the care, custody, and control of their children.[6] In fact, in Troxel v. Granville, a decision cited by the Florida Supreme Court in Kirton, the United States Supreme Court reiterated its recognition that there is a presumption that fit parents act in their children's best interests. [7] "Accordingly, so long as a parent adequately cares for his or her children (i.e. is fit), there is normally no reason for the State to inject itself

[1] Kirton v. Fields, SC07-1739 (Fla. 2008) at 7.
[2] Id. at 2.
[3] Id. at 6.
[4] See, Troxel v. Granville, 530 U.S. 57, 60 (2000); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Beagle v. Beagle, 678 So.2d 1271, 1275 (Fla. 1996).
[5] Troxel, supra at 65, citing Meyer v. Nebraska, 262 U.S. 390 (1923).
[6] Washington v. Glucksberg, 521 U.S. 702 (1997)
[7] Troxel, supra at 69. See also, Parham v. J.R., 442 U.S. 584, 602 (1979).

into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children."[8]

"Parens patriae" is primarily a standing concept by which agents of the state, typically executive branch agencies, bring actions to represent the interests of private parties or a segment of the state's population on their behalf, in order to protect quasi-sovereign interests of the state in the health and well-being – both physical and economic, of its residents. Traditionally, it also refers to the role of the state as sovereign and guardian of persons under legal disability.[9] The Florida Supreme Court explains parens patriae as follows :

> "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." (citation omitted). The doctrine derives from the common-law concept of royal prerogative, recognized by American courts in the form of *legislative prerogative.* (citation omitted). The United States Supreme Court, upholding a state child labor law in Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), recognized the parens patriae power when it stated that although the "custody, care, and nurture of the child reside first in the parents, . . . the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." Id. at 166, 64 S.Ct. 438 (footnotes omitted; emphasis added).[10]

The context of this recognition by the U.S. Supreme Court, however, was in speaking of a legislative act, and not the implementation of public policy by court ruling. The Florida Supreme Court continued:

> In decisions over the past three decades, this Court has expressly relied on the state's parens patriae authority to protect children in two areas: (1) juvenile delinquency and dependency, (citations omitted). *Pervasive statutory schemes cover each of these areas.* (Citations omitted; emphasis added) .

For the past thirty years the Court has not strayed beyond those areas where, by legislative act, courts served a well defined judicial function to effectuate the parens patriae policy of the Legislature while acting within the confines of a statutory scheme or serving within a judicial role determining the bests interests of a child in individual family law cases of child welfare, custody and support. Parens patriae has not, until now, been used by the Court as a means for the judicial branch to exercise the "legislative prerogative" of assuming the state's parens patriae role in a particular set of circumstances as a matter of statewide public policy.

The Court acknowledged that "[t]he absence of a statute governing parental pre-injury releases demonstrates that the Legislature has not precluded enforcement of such

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[8] Troxel, supra at 69 & 70. See also e.g., Reno v. Flores, 507 U.S. 292 (1993).

[9] See, Black's Law Dictionary 1144 (8th Ed. 2004); See also Alfred L. Snapp Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982).

[10] Kirton, supra at 8. It should be noted that in the context of using parens patriae authority to restrict parental control over their children, not too much should be read into the phrase excerpted from Prince v. Massahusetts "and in many other ways." That particular excerpt in Prince, was footnoted with a citation to a single case upholding a New York statute making it a crime for a parent or caregiver of a female child under age sixteen to authorize the employment or exhibition of the child as a dancer in a theatrical production or in any exhibition dangerous to life, limb or morals of the child. The New York statute was upheld as being "within the police powers of the legislature." People v. Ewer, 141 N.Y. 129 (NY, Court of Appeals, 1864).

releases on behalf of a minor child."[11] Nevertheless, the later Court declared ". . .*we find* that public policy concerns cannot allow parents to execute pre-injury releases on behalf of minor children." (emphasis added). [12]

The Court explained further:

> Although parents undoubtedly have a fundamental right to make decisions concerning the care, custody, upbringing, and control of their children, Troxel [v. Granville], 530 U.S. 57, 67 (2000), the question of whether a parent should be allowed to waive a minor child's future tort claims implicates wider *public policy* concerns. See Hojnowski [v. Vans Skate Park], 901 A.2d 381, 390. 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. *It cannot be presumed that a parent who has decided to voluntarily risk a minor child's physical wellbeing is acting in the child's best interest.* Furthermore, we find that there is injustice when a parent agrees to waive the tort claims of a minor child and deprive the child of the right to legal relief when the child is injured as a result of another party's negligence. When a parent executes such a release and a child is injured, the provider of the activity escapes liability while the parent is left to deal with the financial burden of an injured child. If the parent cannot afford to bear that burden, the parties who suffer are the child, other family members, and the people of the State who will be called on to bear that financial burden. Therefore, when 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. Moreover, a "parent's decision in signing a pre-injury release impacts the minor's estate and the property rights personal to the minor." Fields, 961 So. 2d at 1129-30. *For this reason, the state must assert its role under parens patriae to protect the interests of the minor children.* (emphasis added).

The Florida Supreme Court's rationale focuses exclusively on risks associated with engaging in such activities, and does not acknowledge any parental or legislative role in weighing the risks of engaging in an activity against the possible greater benefits to the child for engaging in such activities notwithstanding the estimated level of risk. In addition, the ruling in Kirton subordinates the liberty interest of minors to engage in activities approved by their parents to the Court's policy objective of preserving a child's litigation rights in the event of an injury.

In Troxel v. Granville, when the United States Supreme Court had before it a Washington state statute allowing any person to petition for forced visitation of a child at any time with the only requirement being that visitation serve the best interests of the child, they said of the statute :

> [The statute] contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the

[11] Kirton, supra at 9.
[12] Kirton, supra at 9.

> State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. [13]

The U. S. Supreme Court in Troxel, while refraining from invalidating the statute on its face, found the application of the statute against the parent's wishes in her case to be an unconstitutional violation of her due process right to make decisions concerning the care, custody and control of her daughters.[14] Given, however, that in Kirton, the Florida Supreme Court, unilaterally decided that such waivers are never in a child's best interest and that no parental decision to the contrary is entitled to any deference on statewide scale in every instance involving commercial activity, it is difficult to see how this policy decision, had it been enacted by the Legislature, would survive a federal due process challenge.[15]

Being simply a concept of standing, parens patriae is not a constitutional source of authority for the Court to "protect" children from decisions of fit parents or from the longstanding legislative policy determination to decline to interfere with such parental decisions. When the Court proclaims new law solely on the basis of its own subjective assessment of "good" public policy, it does so in violation of the separation of powers provision of the Florida Constitution. Article II, Section 3 of the Florida Constitution provides: "The powers of state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

While the decision in Kirton is limited to pre-injury releases for participation in commercial activities, its rationale may not be. The Court said in a footnote:

> We answer the certified question as to pre-injury releases in commercial activities because that is what this case involves. Our decision in this case should not be read as limiting our reasoning only to pre-injury releases involving commercial activity; however, any discussion on pre-injury releases in noncommercial activities would be dicta and it is for that reason we do not discuss the broader question posed by the Fifth District. [16]

Justice Wells in a dissenting opinion pointed out several issues concerning the effect of the Court's new public policy edict. Justice Wells stated in part:

> . . . at the time of this parental agreement which permitted the minor to participate in this activity, there was no law in Florida, either statutory or court-declared, enunciating the public policy that the majority now determines makes this agreement unenforceable. Absent the majority's decision that such an agreement is against public policy, the agreement would without question be enforceable. (citation omitted) I believe that it is fundamentally unfair to now declare a new public policy and then apply it to the defendants in this case.

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[13] Troxel v. Granville, 530 U.S. 57 (2000).

[14] Troxel, supra at 76.

[15] Currently, three states have enacted statutes which invalidate pre-injury release waivers of negligence claims for minors. The states are Hawaii (Haw. Rev. Stat. Ann. S. 663-10.95), Louisiana (La. Civ. Code Art. 2004), and Montana (Mont. Code Ann. S. 28-2-702). However, to date there has been no reported litigation challenging the validity of these statutes.

[16] Kirton, supra at n2.

> Moreover, I conclude that the majority opinion highlights why the decision as to the enforceability of a parent's pre-injury release of a minor's claim is and should be a legislative decision. The majority opinion creates many questions and provides few answers. *The answers will have to be gleaned from further costly case-by-case litigation*, and if the particular circumstances of other releases are found to be against the declared public policy, the result will be additional after-the-fact determinations of liability without sufficient notice to the parties involved. (emphasis added) . [17]
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> . . .
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> 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. The majority's decision seems just as likely to force small-scale activity providers out of business as it is to encourage such providers to obtain insurance coverage.
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> 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. When the Legislature acts, all are given advance notice before a minor's participation in an activity as to what is regulated and as to whether a pre-injury release is enforceable. In contrast, *the majority's present opinion will predictably create extensive and expensive litigation attempting to sort out the bounds of commercial activities on a case-by-case basis.*
>
> The majority opinion also does not explain the reason why after years of not finding pre-injury releases to be against public policy, it today finds a public policy reason to rule pre-injury releases unenforceable when the Legislature has not done so.[18]

HB 363 expressly authorizes natural guardians, on behalf of any of their minor children, to waive and release, in advance, any claim cause of action that would accrue to any of their minor children to the same extent that any adult may do so on his or her own behalf.

B. SECTION DIRECTORY:

Section 1. Amends s. 744.301, F.S., to authorize parents to execute pre-injury release waivers on behalf of their minor children.

Section 2. Providing an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

[17] Wells dissenting, Kirton, supra at 27,

[18] Wells dissenting, Kirton, supra at 29-30.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

This bill will have a positive fiscal impact by reducing or avoiding litigation costs and court operating expenses associated with negligence claims brought on behalf of minors against commercial providers of activities for children due to the enforceability of parental pre-injury liability releases. Increases in litigation costs and the judiciary's workload are foreseeable without passage of HB 363 due to the continued application of the Kirton decision and any possible subsequent extension of Kirton to non-commercial activities as alluded to by the Court in footnote 2 of its decision.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure to funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

See discussion in Effect of Proposed Changes.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES