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		Reilly	Cooper
2)	Civil Justice & Courts Policy Committee			
3)	General Government Policy Council			
4)				
5)				

SUMMARY ANALYSIS

A parent's fundamental right to make decisions in raising their children is protected by both the United States Constitution and to a greater extent by the express right of privacy in the Florida Constitution. While it is presumed that fit parents are acting in the best interests of their children, the parents' fundamental right is not absolute. In limited circumstances, the state may act and usurp parental control in order to protect children.

In 2008, the Florida Supreme Court held that pre-injury releases signed by parents to allow their children to participate in commercial activities are unenforceable as a matter of public policy. Thus, a release signed by the father of a 14-year-old minor, which allowed the minor entry to a motor sports park to ride an all-terrain vehicle (ATV), was unenforceable. The waiver purported to release the defendants from liability for negligence. Thus, the pre-injury waiver did not bar a wrongful death action by the minor's estate against the motor sports park for fatal injuries the minor suffered driving the ATV. Although the decision precludes enforcement of pre-injury waivers executed by parents with respect to commercial activities, the Court noted that its reasoning should not be read as being limited solely to commercial activities.

This bill will not have a fiscal impact on state and local governments.

The bill is effective July 1, 2009.

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:

The Right of Parents to Make Child-Rearing Decisions

A. The United States Constitution

The Fourteenth Amendment to the United States Constitution guarantees that no State shall "deprive any person of life, liberty, or property, without due process of law." The Due Process Clause of the Fourteenth Amendment has been interpreted as guaranteeing "more than fair process," [1] and of having a substantive component that "provides heightened protection against governmental interference with certain fundamental rights and liberty interests."[2]

Among the oldest of recognized liberty interests is the right of parents to make decisions in raising their children. In 1923, in Meyer *v. Nebraska,* [3] the United States Supreme Court held that the liberty interest guaranteed by the Fourteenth Amendment includes "not merely the freedom from bodily restraint, but also the right of the individual to…establish a home and bring up children." [4]

In a long line of cases since *Meyer*,[5] the Supreme Court has consistently reaffirmed this fundamental liberty interest. In *Pierce v. Society of Sisters,*[6] the Supreme Court stated:

> [t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[7]

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[1] *Washington v. Glucksberg,* 521 U.S. 702 (1997).

[2] *Id.* at 720.

[3] 262 U.S. 390 (1923).

[4] *Id.* at 399.

[5] See, e.g., Prince *v. Massachusetts,* 321 U.S. 158 (1944); *Stanley v. Illinois, 405* U.S. 645, (1972); *Wisconsin v. Yoder, 406* U.S. 205 (1972); Washington *v. Glucksberg*, 521 U.S. 702 (1997).

[6] 268 U.S. 510 (1925).

[7] *Id.* at 535.

In *Troxel v. Grainville,*[8] the fundamental liberty interest was further expounded upon:

> There is a presumption that 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.[9]

In *Troxel,* paternal grandparents sought visitation with their granddaughters under a Washington State statute that allowed any person to petition for visitation and authorized the court to order visitation when found to be in the best interests of the child. Prior to filing of the petition, the childrens' mother had agreed to grandparent visitation, but not to the extent sought by the grandparents. The trial court granted the petition, which was subsequently reversed on appeal.

The Supreme Court granted certiorari, and held that the visitation statute, as applied in this case, unconstitutionally infringed on the fundamental right of parents "to make decisions concerning the care, custody, and control of their children." The statute allowed any person to petition for visitation and did not accord any weight to a parent's decision concerning the best interests of their children. Further, the trial court granted the petition without making any findings that the mother was an unfit parent, and had seemingly required the mother to disprove that grandparent visitation was in the best interests of her children. The Court concluded:

> The 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.[10]

B. The Florida Constitution

In addition to the protections afforded under the United States Constitution, a parent's right to raise their children is provided further protection under the Florida Constitution, which provides citizens with an express right of privacy.

Article 1, section 23 of the Florida Constitution provides in part:

> 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….

In *Beagle v. Beagle,*[11] a case involving a grandparent visitation statute, the Florida Supreme Court held that the Florida Constitution provides more protection of a parent's right to make decisions concerning their children than does the Federal Constitution:

> The citizens of Florida opted for more protection from governmental intrusion when they approved article 1, section 23 of the Florida Constitution. This amendment is a 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

[8] 530 U.S. 57 (2000).

[9] *Id.* at 68.

[10] *Id.* at 72-73.

[11] 678 So.2d 1271 (Fla. 1996).

can only be concluded that the right is much broader in scope than that of the Federal Constitution.[12]

Holding that the grandparent visitation statute violated the Florida Constitution, the Court concluded that the state cannot intrude upon the parents' fundamental right to raise their children except when the child is threatened with harm.

Consistent with a parent's right to raise their children without government interference, Florida courts have consistently upheld as supported by public policy pre-injury waivers executed by parents on behalf of their children for the purpose of obtaining medical care, car insurance, or to participate in community-sponsored events.[13]

Does the Constitutional Right of Parents to Raise their Children include the Right to Sign Pre-injury Waivers on behalf of their Children?

In *Fields v. Kirton,* the personal representative of a 14-year-old child 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 and others. The trial court entered summary judgment for the defendants, finding that a waiver and release executed by the minor's father, which allowed the minor access to the motor sports park, barred the lawsuit. The release signed by the father released all claims against the defendants, including negligence.

The release provided that the undersigned:

> HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoters, participants, racing associations, sanctioning organizations or any subdivision thereof, track operators, track owners, officials, car owners, drivers, pit crews, rescue personnel, any persons in any RESTRICTED AREA, promoters, sponsors, advertisers, owners and lessees of premises used to conduct the EVENT(S), premises and event inspectors, surveyors, underwriters, consultants and others who give recommendations, directors, or instructions or engage in risk evaluation or loss control activities regarding the premises or EVENT(S) and each of them, their directors, officers, agents and employees, 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 AGREES TO INDEMNIFY AND SAVE AND HOLD HARMLESS the Releasees and each of them FROM ANY LOSS LIABILITY, DAMAGE, OR COST they may incur arising out of or related to the EVENT(S) WHETHER CAUSED 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 RELEASEES 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

[12] *Id.* at 1275.

[13] See *Gonzalez v. City of Coral Gables,* 871 So.2d 1052 (Fla. 3d DCA 1980); Variety *Children's Hospital, Inc. v. Vigliotti,* 385 So.2d 1052 (Fla. 3d DCA 1980).

> COMPOUNDED OR INCREASED BY NEGLIGENT RESCUE OPERATIONS OR PROCEDURES OF THE RELEASEES.
>
> HEREBY agrees that this Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement 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 and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full force and effect.[14]

At the time of the accident, the minor's parents were divorced and living apart, and the mother was unaware of the release or that her son was driving an ATV.

The Fourth District Court of Appeal (4th DCA) subsequently reversed,[15] finding the pre-injury waiver and release unenforceable. The decision distinguished between a parent's fundamental right to raise their children without government interference and the decision to waive in advance a minor's future property rights due to a party's negligence.

> The issue [here] does not involve restricting or precluding parents from deciding what activities may be appropriate for their minor children's participation. Instead, this court's analysis is predicated upon the effect of a release insulating the provider of the activity from liability for negligence inflicted upon the minor. The release causes a forfeiture of the minor's property right to seek legal redress either through his parent or the appointment of a guardian ad litem.[16]

Thus, the 4th DCA held that a child's property rights cannot be waived in advance absent a basis in common law or statute, and that neither basis exists. While the Florida Legislature has provided a statutory scheme[17] authorizing guardians to settle minors' claims under limited circumstances, it did not authorize parents to execute pre-injury releases, when it could easily have done so if it had intended this authority.

Noting that its decision was in conflict with the 5th DCA's decision in Lantz *v. Iron Horse Saloon, Inc.*,[18] the following question was certified to the Florida Supreme Court: Whether a parent may bind a minor's estate by the pre-injury execution of a release.[19]

Although Florida's district courts of appeal had addressed the issue of the enforceability of pre-injury waivers executed by parents and reached inconsistent holdings,[20] the question presented an issue of first impression for the Florida Supreme Court.

In its decision,[21] the Court recognized the fundamental liberty interest of parents is well established and protected by the Fourteenth Amendment and to a greater extent by the Florida Constitution, but that the

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[14] The release signed by the father is reproduced at footnote 2 of the Respondents Brief on the Merits filed with the Supreme Court of Florida. A copy of the Respondent's Brief is on file with the Insurance, Business & Financial Affairs Policy Committee.

[15] *Fields v. Kirton*, 961 So.2d 1127 (Fla. 4th DCA 2007).

[16] *Id.* at 1129.

[17] Section 744.301, F.S.

[18] 717 So.2d 590 (Fla. 5th DCA 1998) (pre-injury release executed by a parent enforceable).

[19] The decision recognized the Florida Supreme Court's decision in *Global Travel Marketing, Inc. v. Shea,* 908 So.2d 392 (Fla. 2005), which rejected the distinction between commercial and community activities with respect to enforcement of an arbitration clause, but did not address the issue of a contractual waiver of a tort claim. The Court rejected the distinction, in part, because there was no reliable basis for applying the standard.

[20] See Lantz *v. Iron Horse Saloon, Inc.* supra, holding a pre-injury release executed by a minor's guardian in a commercial setting enforceable; *Applegate v. Cable Water Ski, L.C.,* 974 So.2d 1112 (Fla. 5th DCA 2008), pre-injury release involving a minor injured at a wakeboarding camp (a commercial activity) unenforceable as against public policy; *Gonzalez v. City of Coral Gables,* 871 So.2d 1067 (Fla. 3d DCA 2004), pre-injury release that allowed a child to participate in a community- and school-sponsored activity (a fire rescue explorer program) enforceable .

right is not absolute. Under the doctrine of "parens patriae,"[22] the state may, in limited situations, usurp parental control to protect children, a power the Court stated that it has relied on for over three decades to protect children in the areas of juvenile delinquency and dependency.

In agreement with the 4th DCA, the Court found that the decision to execute a pre-injury waiver on behalf of a child did not impinge on a parent's constitutionally protected right to make decisions on how to raise their children:

> 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.[23]

The Court reviewed the Florida courts of appeal decisions mentioned earlier in this staff analysis at Footnote 20, and case law from other states. In other states, the only published opinions enforcing such releases involved a minor's participation in school-run or community-sponsored activities. Thus, the Court held that such releases are not enforceable when they involve a minor's participation in a commercial activity.

Although the absence of a statutory scheme in Florida authorizing parents to execute pre-injury release for their children does not preclude their enforcement, the Court determined that public policy concerns preclude the enforcement of pre-injury waivers executed by parents for participation in commercial activities.

The Court stated that different public policy concerns are implicated for releases in commercial activities and releases in community-sponsored activities. Businesses owe a duty of care to their customers, which is particularly important for businesses with children as customers. Allowing pre-injury releases to be executed by parents creates a disincentive for business owners to take safety precautions. Further, businesses have the ability to purchase insurance to provide protection in the event a child is injured. As pre-injury waivers benefit third parties, they cannot be presumed to be in the best interests of the child. Additionally, an injustice would result if a parent agrees to waive in advance the tort claims of a minor, whom is subsequently deprived of the right to legal relief when injured by another party's negligence.

By contrast, community-sponsored activities have limited resources, often cannot afford to purchase liability insurance, and invalidating pre-injury releases for such activities could leave volunteers subject to the threat of lawsuits.

In a vigorous dissent, Justice Wells found the decision to be fundamentally unfair, because the Court declared, and applied to the defendants, a new public policy to bar enforcement of a waiver that previously was enforceable under Florida law. The dissent further stated that the decision whether to permit enforcement of pre-injury releases is a decision for the Legislature and not the courts. Additionally, the distinction made between commercial and community-sponsored activities in the present case had previously been rejected by the Court,[24] on the grounds that there was no reliable basis for applying the standard.

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[21] *Kirton v. Fields, 992* So.2d 349 (2008).

[22] Parens patriea is a Latin term for "parent of his or her country," and describes the state in its capacity as provider of protection to those unable to care for themselves.

[23] *Kirton* at 357.

[24] See *Global Travel Marketing, Inc. v. Shea,* 908 So.2d 392(Fla. 2005).

Effect of the Bill

House Bill 363 addresses the holding in *Fields* and provides statutory authority for guardians to execute pre-injury waivers on behalf of their children to the same extent that they may do so on their own behalf.

B. SECTION DIRECTORY:

Section 1. Amends s. 744.301, F.S., to authorize guardians to execute pre-injury waivers on behalf of minors.

Section 2. Provides an effective date of July 1, 2009.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Permitting guardians to execute pre-injury waivers on behalf of their children in commercial settings will likely allow businesses that include children as their customers to avoid significant increases in premiums that they may be unable to afford.

D. FISCAL COMMENTS:

Children who suffer traumatic, life-altering injuries after a pre-injury waiver of their rights has been executed may ultimately need to seek assistance under Medicare and Medicaid.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES