HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 285 Parental Authority
SPONSOR(S): Horner and others
TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee		De La Paz	De La Paz
2)	Criminal & Civil Justice Policy Council			
3)				
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.

In Kirton v. Fields, decided December 11, 2008, the Florida Supreme Court held 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."

HB 285 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. The bill expressly precludes such waivers and releases from relieving a party for liability for any acts of sexual misconduct committed against the child.

The bill also amends s. 549.09, F.S., to make conforming changes to the current statute specifically addressing motorsport nonspectator liability releases. The bill provides that a release signed by a minor is valid if it is also signed by the minor's parent or guardian.

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 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."[1] 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.[2]

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. [3] It is "perhaps the oldest fundamental liberty interest recognized by [the United States Supreme Court]."[4] 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.[5] 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. [6] "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 into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children."[7]

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."[8] Nevertheless, the later Court declared ". . .*we find* that public policy

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1 Kirton v. Fields, 997 So.2d 349 (Fla. 2008) The Kirton decision was a 4 to 1 decision. Justices Quince, Anstead, Lewis and Pariente were in the majority. Justice Wells dissented. Justices Polston and Canady did not participate in the opinion.

2 Id. at 352.

3 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).

4 Troxel, supra at 65, citing Meyer v. Nebraska, 262 U.S. 390 (1923).

5 Washington v. Glucksberg, 521 U.S. 702 (1997)

6 Troxel, supra at 69. See also, Parham v. J.R., 442 U.S. 584, 602 (1979).

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

8 Kirton, supra at 354.

concerns cannot allow parents to execute pre-injury releases on behalf of minor children." (emphasis added).[9]
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).

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 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. [10]

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.[11] The effect of the Kirton decision is much broader in its application than the statute the U.S. Supreme Court had before it in Troxel. Under the Kirton decision, rather than having the validity of waivers evaluated on a case by case basis on their own facts and circumstances, the Florida Supreme Court preemptively invalidated all parental liability waivers for all commercial activities as a matter of statewide public policy.

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

[9] Kirton, supra at 354.
[10] Troxel v. Granville, 530 U.S. 57 (2000).
[11] Troxel, supra at 76.

> 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. [12]

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:

> 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.
>
> 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.[13] (emphasis added).

HB 285 amends s. 744.301, F.S. to expressly authorize 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. The bill expressly precludes such waivers and releases from relieving a party for liability for any acts of sexual misconduct committed against the child.

The bill also amends s. 549.09, F.S., to make conforming changes to the current statute specifically addressing motorsport nonspectator liability releases. The bill provides that a release signed by a minor is valid if it is also signed by the minor's parent or guardian.

With respect to the extent to which an adult may waive liability on his or her own behalf, courts generally disfavor exculpatory clauses and strictly construe such clauses against the party claiming to be relieved of liability. [14] "Such clauses are enforceable only where and to the extent that the intention to be relieved was made clear and unequivocal in the contract, and the wording must be so clear and understandable that an ordinary and knowledgeable party will know what they are contracting away."[15]

With regard to simple negligence specifically, a waiver may release a party from liability for negligence, but to do so the waiver must be written in such a manner that it "clearly state[s] that it releases the party from liability for [its] own negligence."[16]

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12 Kirton, supra at n2.

13 Wells dissenting, Kirton, supra at 363.

14 See, Murphy v. Young Men's Christian Association of Lake Wales, 974 So.2d 565, 567 (Fla. 2nd DCA, 2008) ; Theis v. J&J Racing Promotions, 571 So.2d 92, 94 (Fla. 2nd DCA, 1990); Southworth & McGil, P.A. v. S. Bell Tel. & Tel. Co., 580 So.2d 628, 634 (Fla. 1st DCA, 1991).

15 Southworth, *supra* note 19 at 634.

16 Goyings v. Jack & Ruth Eckerd Foundation, 403 So.2d 1144, 1146 (Fla. 2nd DCA, 1981).

Absent statutory language to the contrary expressing a different legislative policy with respect to child waivers, it is a foregone conclusion that child waivers will be subject to the same disfavor, the same scrutiny, and the same application to simple negligence that courts apply to adult waivers. They will not, however, be totally prohibited as required under the Florida Supreme Court decision in Kirton.

B. SECTION DIRECTORY:

Section1. Amends s. 549.09, F.S., relating to motorsport nonspectator releases.

Section 2. Amends s. 744.301, F.S., to authorize parents to waive liability on behalf of their children.

Section 3. Providing an effective date.

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:

See Fiscal Comments.

D. FISCAL COMMENTS:

This bill will have a positive fiscal impact if it operates to reduce or avoid 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 285 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. Liability insurance rates for commercial activity providers may also be adversely impacted by the statewide invalidation of all parental liability waivers resulting from the Kirton opinion.

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